Redefining the Third-Party Doctrine: Carpenter's Effect on DNA Privacy

Drew M. Baldwin

University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol108/iss1/5
NOTES

REDEFINING THE THIRD-PARTY DOCTRINE:
CARPENTER’S EFFECT ON DNA PRIVACY

Drew M. Baldwin

TABLE OF CONTENTS

TABLE OF CONTENTS .......................................................... 153
INTRODUCTION ........................................................................ 154
I. CARPENTER IN THE SIXTH CIRCUIT ........................................... 156
   A. History of Fourth Amendment Privacy and the Third-Party Doctrine ... 157
   B. The Sixth Circuit’s Holding .................................................. 158
II. CARPENTER IN THE UNITED STATES SUPREME COURT ................ 159
    A. Carpenter’s Holding ....................................................... 159
    B. Remains of the Third-Party Doctrine ................................. 160
III. CARPENTER’S IMPLICATIONS FOR DNA TESTING KITS .............. 162
     A. The Qualitative Differences in DNA Data ............................ 162
        i. What DNA Contains .................................................... 162
        ii. The Players in Direct-to-Consumer DNA Testing Kits .......... 163
        iii. The “Genetic Panopticon” and DNA for Crime Solving .... 165
     B. The Question of Whether DNA is Voluntarily Given ............. 169
        i. “Anonymized” Genetic Research Data .............................. 170
        ii. Eugenics, Genetic Discrimination, and the Genetic
            Nondiscrimination Act .................................................. 171
        iii. Public Opinion Reflects Lack of Appreciation of the Risks ...... 175
CONCLUSION ............................................................................. 176

1 Online Content Manager, Kentucky Law Journal, Volume 108; J.D. Candidate, The University of
   Kentucky College of Law (2020); B.A., Covenant College (2015). The author would like to thank her
   husband for his support and enthusiasm during the writing process, as well as her mother, who has served
   as a lifelong sounding board and advocate for her thoughts and ideas. The author would also like to thank
   the members of KLJ—Staff Editors, Notes Editor, Production Editor, Managing Editor, and Editor-in-
   Chief—for their constructive feedback and excellent editing.
INTRODUCTION

In a quirky recent holiday commercial, Dr. Seuss's the Grinch receives his Ancestry and Health reports from 23andMe.2 "Genetically likely to move more than average during sleep," the Grinch says, as he tumbles from his bed and rolls down a set of stairs.3 "[It] says here that loving salty snacks is in my DNA," he next says, as he pours an entire shaker of salt onto a Christmas cookie.4 The ad concludes: "This holiday season, give the gift of a DNA kit."5 As the number of people who had their DNA analyzed with "direct-to-consumer" testing more than doubled in 2017 and "now exceeds 12 million,"6 it is clear that people are genuinely curious about their genetics. DNA kits from companies like 23andMe offer customers information on both ancestry and health, including information about whether a user is a carrier for a specific trait.7 As the Grinch advertisement demonstrates, the results also give information on genetic predispositions, such as movement during sleep and affinity for salty or sweet snacks.8 Based on the number of DNA kits sold,9 the draw of learning this information is apparent. Some people, however, are skeptical about the privacy of the genetic material sent to 23andMe labs.10 A concerned—and sarcastic—Twitter user summed up the other side of the argument, stating: "If someone gives you a free genetic testing kit for Christmas[,] just keep in mind you’re still mad at Facebook for allegedly sharing a picture of your Aunt Peggy on vacation with advertisers as you eagerly shove your literal DNA into an envelope and mail it to a stranger."11 Americans' interest in DNA kits is significant, but so are the potential risks involved in handing DNA to third parties.

We are living in the digital age, a time of innovation and technology that the drafters of the Constitution could never have imagined. The drafters of the Fourth Amendment could not have anticipated the vast number of ways we can store data with the Internet. Most importantly, the drafters could not have imagined the ways this allows the government to interfere with the lives and privacy of Americans. The Internet has revolutionized data collection and storage, GPS and location information, and access to private information in ways that the Fourth Amendment's prohibition against unreasonable search and seizure does not explicitly protect.

---

2 23andMe, Discover the Grinch's DNA Story!, YOUTUBE (Nov. 1, 2018), https://www.youtube.com/watch?v=q61SdyE88Qk [https://perma.cc/QV7K-BGMR].
3 Id.
4 Id.
5 Id.
6 Antonio Regalado, 2017 Was the Year Consumer DNA Testing Blew up, MIT TECH. REV. (Feb. 12, 2018), https://www.technologyreview.com/s/610233/2017-was-the-year-consumer-dna-testing-blew-up/ [https://perma.cc/5SMN-DMQD].
7 Reports, 23ANDMe, https://www.23andme.com/dna-reports-list/ [https://perma.cc/S3P9-FZRH].
8 Id.
9 Regalado, supra note 6.
10 See Erika D. Smith, You Should Be Worried About Your DNA privacy, THE SEATTLE TIMES (May 1, 2018), https://www.seattletimes.com/opinion/you-should-be-worried-about-your-dna-privacy/.
This past June, the United States Supreme Court decided *Carpenter v. United States* and updated Fourth Amendment protections for the modern era. Though the court was split, the majority concluded that the government's search of Carpenter's phone was a violation of the Fourth Amendment and declined to give the state unrestricted access to cell carriers' physical location data. Chief Justice John Roberts stated, "In light of the deeply revealing nature of [cell-site location information], its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection." The court distinguished between cell phone data and other types of data, but the reach of this differentiation is unclear.

What is clear is that the third-party doctrine, a doctrine formerly allowing information revealed to third parties to be public and allowing police to seize it without a warrant, has almost been completely destroyed. What was once a strict, bright-line standard of criminal procedure is now a blurry question mark. The *Carpenter* Court, instead of ruling that data given to a third party is automatically accessible by the government, declined to give the state unrestricted access to an individual's physical location data. Though the third-party doctrine lives on, the parameters will need to be redefined, and lower courts will have to re-determine the new scope of the third-party doctrine. Hopefully, this reworking of the third-party doctrine will be more flexible than before and more protective of Americans' privacy rights.

Though *Carpenter* has ruled that cell phone location information is now private, how does this apply to other personal information turned over to a third party? Justice Gorsuch's dissent brings up an interesting question: How will this new ruling affect DNA information? With websites like 23andMe and AncestryDNA, there has been a boom in the DNA testing industry. With just a vial of saliva, a person can determine who they are, where they came from, and even what illnesses they are predisposed to. Should the government be able to access this information simply because a person provided their DNA to a third-party company for testing? Though the government may argue that DNA information should be treated as twentieth century information, like a business record or pen register, this DNA data is turned
over to a third party just as cell phone location information is and should be afforded similar protection.

This Note will examine the topic of third-party DNA privacy. Part I begins with a brief history of Carpenter’s beginnings in the Sixth Circuit and its interpretation of the third-party doctrine. Part II gives an overview of the Supreme Court’s narrow holding in favor of digital privacy, its reasoning, and the resulting status of the third-party doctrine. Finally, Part III explores what the implications for DNA data are. This includes an analysis of the two key components of why the Court determined that cell-site location information (“CSLI”) deserves Fourth Amendment protection. First, DNA, like CSLI, is “qualitatively different” than twentieth century data. This can be seen in the nature of DNA itself, the technology involved in genotyping it, and the recent arrests of criminals using genealogy websites. Second, DNA is not truly given voluntarily because users do not appreciate the risks involved, and the current federal law has large gaps in protections for genetic discrimination. Therefore, DNA should be protected under the precedent of Carpenter.

I. CARPENTER IN THE SIXTH CIRCUIT

Carpenter began in the Sixth Circuit. The case arose from a sequence of robberies in metro Detroit, Michigan, and northern Ohio between December 2010 and March 2011. “Ironically, the perpetrators were after cell phones”—robbing Radio Shack and T-Mobile stores at gunpoint and filling plaid laundry bags full of smartphones. In April 2011, the police arrested four men, including Timothy Carpenter.

Carpenter was charged with violating the Hobbs Act. He was later charged with six additional counts of “aiding and abetting robbery that affected interstate commerce, in violation of the Hobbs Act, and aiding and abetting the use or carriage of a firearm during a federal crime of violence.” Carpenter moved to suppress the CSLI evidence under the Fourth Amendment’s requirement that these records could only be seized “with a warrant supported by probable cause,” but the district court denied his motion to suppress.

At trial, seven accomplices testified that Carpenter had organized most of the robberies, supplied the guns, and served as the lookout in a stolen car across the street

---

21 See generally United States v. Carpenter, 819 F.3d 880 (6th Cir. 2016).
22 Id. at 884.
24 Carpenter, 819 F.3d at 884.
25 Id.; see also 18 U.S.C.S. § 1951(a) (2018) (“Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.”).
26 Carpenter, 819 F.3d at 884; see also 18 U.S.C.S. § 1951(a).
27 Carpenter, 819 F.3d at 884.
from the robbery locations. An FBI agent offered expert testimony on CSLI, essentially explaining that cell phones work by connecting with cell towers (or "sites"). Phones constantly search for the strongest signal, sometimes connecting with multiple individual cell towers. These towers cover up to twenty miles in rural areas, but "cover[] typically anywhere from a half-mile to two miles" in urban places like Detroit. Cell phone companies normally store this type of information and can track the cell sites where phone calls began and ended.

Law enforcement officers were able to establish that Carpenter had been at the crime scenes by obtaining over one hundred days of his smartphone data records from Sprint and Metro PCS without a warrant pursuant to the Stored Communications Act of 1986. This Act "allows phone companies to disclose records when the government provides [them with] 'specific and articulable facts showing that there are reasonable grounds to believe' that [the] records at issue 'are relevant and material to an ongoing criminal investigation.'" The Act allows third parties to disclose relevant information to the police without a warrant. Using cell-site data, the FBI agent made maps connecting Carpenter's phone to within a half-mile or two miles of the location of each robbery around the time each robbery occurred. Calls made by Carpenter were connected with specific towers over a range of dates. Based on these cell phone records and maps, Carpenter was convicted by a jury and "sentenced [] to 1,395 months' imprisonment." Carpenter then appealed his conviction and sentence on Fourth Amendment grounds, arguing that his CSLI should remain private.

A. History of Fourth Amendment Privacy and the Third-Party Doctrine

The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Accordingly, government trespasses on these areas have traditionally been considered searches. The third-party doctrine was first established in 1976 and is a legal principle allowing personal information that
customers provided to a third party, such as a bank, to be disclosed to the police.\(^{42}\) Prior to the establishment of the third-party doctrine, the Supreme Court extended Fourth Amendment protections to privacy interests as well as property interests in the 1967 decision, \textit{Katz v. United States}.\(^{43}\) To come within the protection of \textit{Katz}, a two-part test must be satisfied: “[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”\(^{44}\) When both of the requirements under \textit{Katz} are met, “government action that ‘invad[es]’ the expectation normally counts as a search.”\(^{45}\)

In 1979, the Supreme Court, in \textit{Smith v. Maryland}, applied the \textit{Katz} standard and denied a reasonable expectation of privacy in telephone numbers gathered from pen registers, which are systems of tracking phone numbers dialed from a person’s home phone.\(^{46}\) Specifically, the Court recognized that law enforcement officials may obtain telephone numbers from pen registers without a warrant.\(^{47}\) The Court held in \textit{Katz} that the “[g]overnment’s activities in electronically listening to and recording the petitioner’s words” was a search for Fourth Amendment purposes.\(^{48}\) The \textit{Smith} court nailed down the parameters of this doctrine, holding that police officers’ installation of a pen register was not a search because the caller would not have expected the numbers dialed to stay private.\(^{49}\) After \textit{Smith} in 1979, the Supreme Court traditionally held that information that an individual voluntarily handed over to third parties was not protected by the Fourth Amendment.\(^{50}\)

\textbf{B. The Sixth Circuit’s Holding}

The Sixth Circuit examined the CSLI data at issue in \textit{Carpenter} by likening it to internet communications.\(^{51}\) The Fourth Amendment protects the content of e-mails,\(^{52}\) but courts have not extended this “protection[] to the internet analogue to envelope markings, namely the metadata used to route internet communications, like sender and recipient addresses on an email, or IP addresses.”\(^{53}\) The Sixth Circuit determined that the business records at issue in \textit{Carpenter} fell on the unprotected side of this distinction because “the records include routing information, which the wireless providers gathered in the ordinary course of business.”\(^{54}\) The court ruled that because

\begin{itemize}
  \item \textit{Id.} at 361 (Harlan, J., concurring).
  \item \textit{Carpenter}, 819 F.3d at 886 (quoting \textit{Smith v. Maryland}, 442 U.S. 735, 740 (1979)).
  \item \textit{Smith}, 442 U.S. at 736 n.1, 741–45 (citing \textit{Katz}, 389 U.S. at 361).
  \item \textit{Id.} at 745–46.
  \item \textit{Katz}, 389 U.S. at 353 (emphasis added).
  \item \textit{Smith}, 442 U.S. at 745–46.
  \item \textit{United States v. Warshak}, 631 F.3d 266, 288 (6th Cir. 2010) (citing Warshak v. United States, 490 F.3d 455, 473 (6th Cir. 2007)).
  \item \textit{Carpenter}, 819 F.3d at 887.
  \item \textit{Id.}
\end{itemize}
the carriers necessarily have access to this information, CSLI is like a mailing address, a phone number, or an IP address. It is "information that facilitate[s] personal communication[, rather than . . . the content of th[e] communication[]."

In applying Smith, the Sixth Circuit found that the defendants had no expectation of privacy in their location information, just as Smith had no reasonable expectation of privacy in the numbers he dialed. Because of this, the collection of Carpenter’s data was not found to be a search.

Ultimately, Carpenter was convicted and sentenced to 116 years in prison. With this holding that an individual has no reasonable expectation of privacy in his or her CSLI, the Sixth Circuit dealt a blow to individual privacy rights. On September 26, 2016, Carpenter filed a petition for a writ of certiorari, offering the Supreme Court a chance to modernize the Fourth Amendment after sidestepping several opportunities to reshape it previously.

II. CARPENTER IN THE UNITED STATES SUPREME COURT

A. Carpenter’s Holding

On June 22, 2018, in a 5-4 opinion authored by Chief Justice John Roberts, the Supreme Court decided Carpenter v. United States. Though the Court was split, the majority reversed the Sixth Circuit’s holding, concluded that the government’s search of Carpenter’s phone was a violation of the Fourth Amendment, and declined to give the state unrestricted access to a cell carrier’s physical location data. The Court acknowledged that Fourth Amendment protections needed an update for the digital age. “[A] central aim of the Framers was ‘to place obstacles in the way of a too permeating police surveillance,’” wrote Chief Justice Roberts. “We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools,” Roberts continued.

The Court first addressed whether an individual has an expectation of privacy in his or her physical location and movements. It distinguished between basic types of tracking and more invasive methods, noting that an individual has no expectation

---

55 Id.
56 Id.
57 Id. at 888 (citing Smith v. Maryland, 442 U.S. 735, 741–45 (1979)).
58 Id. at 890.
59 Matsakis, supra note 23.
60 See Carpenter, 819 F.3d at 886–87 (finding that the content of personal communications is private, while the means of communication are not and holding that CSLI, like an envelope, is merely a means of communication and therefore is not protected).
63 Id. at 2223.
64 See id. at 2217, 2219.
65 Id. at 2214 (quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).
66 Id.
67 See id. at 2217.
of privacy when traveling in public. The Court did say, however, that there is a difference between limited tracking and GPS monitoring of a vehicle: GPS tracks every movement, and this type of long-term monitoring does impinge on one’s reasonable expectation of privacy.

Chief Justice Roberts stated, “[i]n light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection.” He differentiated between cell phone data and other types of third party data, explaining that “Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible.” This was a win for digital privacy, though it is unclear what this ruling might mean for other forms of government surveillance. Roberts kept his decision narrow in scope, not “call[ing] into question conventional surveillance techniques and tools,” “other business records that might incidentally reveal location information,” or “other collection techniques involving . . . national security.”

B. Remains of the Third-Party Doctrine

After the Carpenter Court declined to extend the third-party doctrine to the collection of CSLI, not much remains of the third-party doctrine: “[A] moment of silence, please, for the nearly departed[]. . . . With Carpenter, the third-party doctrine is almost dead.” What is left will have to be redefined by the lower courts. It seems that the third-party doctrine will likely still apply to “20th Century business records, such as telephone [ ] records, financial records, and . . . security-camera

68 See id. at 2215 (citing United States v. Knotts, 460 U.S. 276, 281 (1983)).
70 Carpenter, 138 S. Ct. at 2223.
71 Id. at 2219.
73 Carpenter, 138 S. Ct. at 2220.
74 Id.
75 Id.
77 See Howe, supra note 72.
footage."  

Warrants will be required, however, for law enforcement to have access to certain 21st century records owned by third parties, like long-term CSLI data.  

The Court reasoned that the fact that the individual continuously has to reveal his or her location to the cell phone company and does not voluntarily choose to do so was important.  

This certainly implicated the third-party doctrine, but the Court acknowledged that some third-party data should be protected by the Fourth Amendment:

[W]hile the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when Smith was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person’s movements.

The Court declined to extend the third-party doctrine here because of the nature of the CSLI data, explaining that in this circumstance, the fact that the data was given to a third party does not outweigh the user’s Fourth Amendment protection. 

Because Carpenter did have a reasonable expectation of privacy in his physical movements, the government was required to get a search warrant to obtain his CSLI data.

Though the Carpenter Court held that the third-party doctrine was still applicable, it opened the door for other types of third-party data to be protected by the Fourth Amendment if the data is “qualitatively different” than traditional forms of records. 

Essentially, the third-party doctrine has now been narrowed to limited information such as pen registers and bank records. “Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.”

The government may still use subpoenas to gain access to records in most investigations, but the Court held that “a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party.”

---

78 David Kris, Carpenter’s Implications for Foreign Intelligence Surveillance, LAWFARE (June 24, 2018, 4:51 PM), https://www.lawfareblog.com/carpenters-implications-foreign-intelligence-surveillance [https://perma.cc/3BYN-IPLS].
79 Id.
80 See Carpenter, 138 S. Ct. at 2220 (first citing Riley v. California, 573 U.S. 373, 385 (2014); then citing Smith v. Maryland, 442 U.S. 735, 745 (1979)).
81 Id. at 2216–17.
82 Id. at 2217.
83 Id. at 2221–22.
84 See id. at 1216–17, 2220.
85 Id. at 2216.
86 Id. at 2222.
III. CARPENTER’S IMPLICATIONS FOR DNA TESTING KITS

Carpenter’s decision and its impact on the third-party doctrine leaves many open questions. Carpenter addresses specific types of location information, such as GPS and CSLI. Interestingly, in his dissent, Justice Gorsuch briefly mentions what the Carpenter decision might mean for genetic information given to third parties by way of direct-to-consumer DNA testing: “Can [the government] secure your DNA from 23andMe without a warrant or probable cause?” DNA, of course, is not location information, but is private information given to a third party. It seems that it would fall squarely into Carpenter territory. The government may disagree, however, and argue that DNA information should be treated as a 20th century record not subject to Carpenter.88

DNA information stored in third-party databases such as 23andMe and AncestryDNA should fall under the precedent of Carpenter for two main reasons. First, DNA data, like CSLI, is arguably “qualitatively different” than other types of third-party data. Second, DNA data is not truly given to third parties voluntarily because users do not understand the far-reaching consequences and risks of turning it over. These two criteria were the important conceptual touchstones in Carpenter that prompted the Court to protect CSLI stored in third-party systems under the Fourth Amendment.90 Therefore, DNA data stored in third-party databases should be given the same protection under the Fourth Amendment and should remain private.

A. The Qualitative Differences in DNA Data

If the Supreme Court considers cell phone location data to be a form of data that is “qualitatively different” from business records, then DNA data must be considered qualitatively different, too. DNA genotyping is a novel and unique technique, and the DNA itself is even more personal than location data. Widely known as the building blocks of human life, DNA is filled with private information and should be afforded the same protection as, if not more protection than, CSLI. To analogize CSLI and genetic data, it will be helpful to give a brief background and summary of the nature of what information DNA contains, the current market for DNA kits, and crime solving using genealogy databases.

i. What DNA Contains

DNA information stored in third-party databases should fall under the precedent of Carpenter because it, like CSLI, is “qualitatively different” from other types of third-party data. The court in Carpenter explained that seven days of “CSLI is an

87 See id. at 2262 (Gorsuch, J., dissenting).
88 Kris, supra note 78.
89 Compare Carpenter, 138 S. Ct. at 2262 (Gorsuch, J., dissenting) (arguing that most judges feel the Fourth Amendment is implicated when DNA is requested from 23andMe), with id. at 2216–17 (majority opinion) (implying that CSLI may be “qualitatively different” from telephone numbers and bank records).
90 See id. at 2216–17, 2220.
entirely different species of business record.”

The Court also explained that long-term CSLI is a “new phenomenon” and a “qualitatively different category,” calling it “novel” and “unique.” CSLI is a product of “seismic shifts in digital technology.” The reason the Carpenter Court extended Fourth Amendment protection to CSLI—and should do so to DNA as well—is because of how personal and private it is: “an intimate window into a person’s life, revealing not only his particular movements, but through them his ‘familial, political, professional, religious, and sexual associations.”

DNA data is a much more extensive and personal record than an ordinary business record, and though it does not track a person’s current movements, it contains information on who a person is and where they came from. According to 23andMe, a human’s 23 chromosomes have enough information to determine the person’s health risks and carrier status for conditions like celiac disease, late-onset Alzheimer’s disease, Parkinson’s disease, and the BRCA1/BRCA2 gene that causes breast cancer. DNA contains ancestry information on the origins of a person’s maternal and paternal ancestors and how they migrated around the world over the course of thousands of years. DNA data contains wellness information such as propensity for caffeine consumption, lactose intolerance, muscle type, and deep sleep tendencies. Finally, DNA influences facial features like cheek dimples, taste features such as affinity for sweet or salty snacks, hair features like color, curliness, and propensity for baldness, and many more physical characteristics.

ii. The Players in Direct-to-Consumer DNA Testing Kits

The two major players in the genetic testing field today are Ancestry.com, through AncestryDNA, and 23andMe, a California biotech company named aptly for the 23 chromosome pairs that make up human DNA. Both companies have experienced tremendous increases in business in recent years, with numbers of users well into the millions. Valued at 2.6 billion dollars in 2016, AncestryDNA announced in March of 2018 “that it had tested nearly 10 million people,” while 23andMe, valued at 1.5 billion dollars at the end of 2017, reported in 2018 that it had tested over 5 million people.
In 2016, Ancestry.com spent $109 million on advertising in the United States and “was on track to spend even more in 2017.”\(^{105}\) 23andMe had the “next-largest amount of ad spending” with $21 million.\(^{106}\) These companies have enormous advertising and marketing budgets, focusing specifically on the holiday season.\(^{107}\) Though there are sales during the Christmas season,\(^{108}\) the regular cost of a 23andMe Ancestry and Traits package is $99 and the cost of the Health and Ancestry Service package is $199.\(^{109}\) Today, both AncestryDNA and 23andMe offer health packages.\(^{110}\) For example, 23andMe gives users data relating to health issues—specifically, predisposition for certain health problems or the presence of carrier genes for disease or cancer.\(^{111}\) In the past, however, AncestryDNA gave consumers information based only on heritage and did not provide data about health.\(^{112}\)

DNA kit companies normally acquire DNA by requesting that participants mail in a saliva sample or cheek swab.\(^{113}\) The immune system cells acquired from this sample are then chemically lysed, and the genetic material in the sample is separated from the rest of the cellular material.\(^{114}\) Next, this DNA is amplified through a process called polymerase chain reaction, which produces enough DNA to perform a microarray analysis.\(^{115}\)

AncestryDNA and 23andMe products use a technology called “DNA microarray ‘chip’ technology.”\(^{116}\) Using this new technology, “thousands of short, single-stranded DNA molecules attach[] to a glass slide (or ‘chip’) in ‘spots’ in a grid pattern.”\(^{117}\) These spots on the grid have strands of DNA from a part of a single known gene variant.\(^{118}\) “[E]ach slide contains thousands of spots, which [] represent a [] large portion of the human genome.”\(^{119}\) The participant’s DNA is then “denatured,” which “separate[s] the DNA duplex into single strands, and the strands are cut into smaller, more manageable fragments.”\(^{120}\) These single strands are marked with “fluorescent dye and applied to the microarray slide,” where DNA

---

\(^{105}\) Regalado, supra note 6.

\(^{106}\) Id.

\(^{107}\) See, e.g., 23andMe, Discover the Grinch’s DNA Story!, supra note 2.

\(^{108}\) Amir Ismael, Some of the Most Popular DNA Kits are on Sale Right Now for Black Friday at their Lowest Prices Ever—Here’s a Quick Break Down of Each One, BUSINESS INSIDER (Nov. 23, 2018, 6:30 PM), https://www.businessinsider.com/dna-kits-on-sale-black-friday-cyber-monday-2018-11 [https://perma.cc/92VW-8E78].

\(^{109}\) Compare Our Services, 23ANDME, https://www.23andme.com/compare-dna-tests/?slideout=true&vip=true [https://perma.cc/P6UZ-URAS].

\(^{110}\) 23andMe, Discover the Grinch’s DNA Story!, supra note 2; Learn More About What’s Included with AncestryHealth Core, ANCESTRY, https://www.ancestry.com/health/core.

\(^{111}\) Rodriguez, supra note 100.; see Reports, supra note 7.

\(^{112}\) Rodriguez, supra note 102.


\(^{114}\) Id.

\(^{115}\) Id.

\(^{116}\) Id.

\(^{117}\) Id.

\(^{118}\) Id.

\(^{119}\) Id.

\(^{120}\) Id.
sequences that match the single strand will bind to that strand. The fluorescent signal that results from this binding "indicates the presence of a specific gene variant in the [participant's] DNA." If the Court considered long-term CSLI tracking and storage to be a new phenomenon, then the complex and technical DNA genotyping process must similarly be considered unique and novel. DNA data collection and genotyping, like CSLI, is too "deeply revealing" in its "depth, breadth, and comprehensive reach."

iii. The "Genetic Panopticon" and DNA for Crime Solving

In 2013, the Supreme Court decided a landmark DNA case in which the defendant, Alonzo Jay King, Jr., was convicted in a rape case that had gone unresolved for years. Police matched his DNA to a statewide database. In Maryland v. King, the Supreme Court determined that taking DNA samples from arrestees was no different than fingerprinting: "a minimally intrusive means to determine identity." DNA holds infinitely more information than a mere fingerprint, making its use in this context significantly more intrusive. The judges ruled against the defendant's Fourth Amendment privacy claim, with a sharp dissent from Justice Scalia. Jessica Cussins wrote, "Scalia accused the majority side of 'sleight of hand' for using the fingerprint analogy." Justice Scalia noted that DNA tests "can take months to process and [the tests are] rarely used strictly for identification purposes." He stressed the negative impact of the majority's decision, saying, "Make no mistake about it: As an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason."

This decision was poorly received by many. Critics of the decision called it "a serious blow to genetic privacy" and "a serious blow to human rights," and asked, "How long before you'll be asked to give a DNA swab before you can board a plane, work as a lawn contractor, join the football team at your high school, or drive?"

---

121 Id. 122 Id. 123 Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018). 124 See Maryland v. King, 569 U.S. 435, 439–440 (2013). 125 Id. at 441. 126 Jessica Cussins, Welcome to the "Genetic Panopticon," PSYCHOLOGICAL THERAPY TODAY (June 5, 2013), https://www.psychologytoday.com/us/blog/genetic-crossroads/201306/welcome-the-genetic-panopticon [https://perma.cc/H9KG-WP32]. 127 See id. ("And DNA holds much more information than a fingerprint; the intrusiveness it represents occurs when database searches are conducted, not when an arrestee's mouth is swabbed."). 128 King, 569 U.S. at 466 ("DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."). 129 See id. at 466–82 (Scalia, J., dissenting). 130 Cussins, supra note 126. 131 Id. 132 King, 569 U.S. at 481 (Scalia, J., dissenting). 133 Cussins, supra note 126. 134 Id.
How long, indeed? Though this decision occurred in 2013, these issues are becoming more and more realistic.

Scalia’s most compelling illustration, the “genetic panopticon,” was taken from eighteenth century philosopher and jurist Jeremy Bentham.135 Highly critical of allowing invasive searches of potentially innocent people, Scalia said in his dissent, “Perhaps the construction of such a genetic panopticon is wise.”136 “But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”137

The “panopticon” was Jeremy Bentham’s concept of a prison that could keep inmates under control at little cost to the government.138 This prison would be a circular building with watchmen in the center called the “hub,” so that “they could see all the inmates at once.”139 Equally important, however, “the inmates would not be able to see them.”140 Bentham wrote in the 1790s: “The essence of it consists, then, in the centrality of the inspector’s situation, combined with the well-known and most effectual contrivances for seeing without being seen.”141 “Panopticon inmates would always have to act” like they “were being watched” since they never knew for certain whether they were or not.142 Bentham thought this concept was efficient because it would cause inmates to regulate themselves.143 Of course, this concept was never put into action,144 but it certainly makes for an evocative point about DNA privacy. In his analogy, Scalia referred to the all-seeing aspect of the panopticon.145 The fear of being watched by a keeper would undoubtedly affect behavior.146 “Replace the keeper with a faceless bureaucrat or secretive national-security agency and it doesn’t take any speculation to see the same chilling effect at work.”147

The decision in King was a landmark ruling that altered criminal procedure. “Six years later, it turns out the American people may have built that genetic panopticon themselves, one self-swab at a time.”148 Today, the biggest issue in using DNA in the criminal context arguably comes from matching the DNA found at crime scenes to DNA stored in online databases to make arrests. This crime-solving technique using genetic information from online databases has sparked a controversy

136 King, 569 U.S. at 482 (Scalia, J., dissenting).
137 Id. at 482.
139 Id.
140 Id.
141 Id.
142 Id.
143 Id.
144 Id.
145 Id.
146 See id.
147 Id.
regarding the privacy of genetic information. The novelty of this crime-solving technique and its success in recent years further illustrates how DNA data, like CSLI data, is qualitatively different from a business record. To demonstrate the novelty of DNA data aggregation and crime-solving technology, consider how many cold cases, many of which were high-profile, have been solved within just the last several years. Two infamous serial killers, the Golden State Killer and the Grim Sleeper Killer, were among the many criminals caught recently using DNA databases.

The California “Golden State Killer” was arrested when he was identified by law enforcement by finding “matching DNA from his relatives on a genetic database.” His DNA was identified through GEDMatch, “an open-source website that enables users to voluntarily upload their genetic information in the hopes of reuniting with long-lost relatives.” Also referred to as the “East Area Rapist,” he was among the most well-known serial killers in American history, especially in the 1960s, 1970s, and 1980s. California law enforcement agents had “been stumped about the identity of a man who committed at least a dozen murders and [over] 50 rapes in a spree of terror across the state in the 1970s and 1980s.” He is now known by his real name: Joseph DeAngelo. Investigators were able to obtain access to “abandoned” DNA samples—those left in the public domain—from DeAngelo. They compared this DNA to “a never-touched DNA sample from a 37-year-old murder in Ventura County that was sitting in a freezer.” The freezer DNA was a match for more than ten murders in California.

Investigators of these murders were ecstatic about this breakthrough. This DNA data gathered from the crime scenes was then matched to a genetic profile online. GEDMatch said in a statement in April of 2018 “that law enforcement officials had used its database to crack the case.” Police found distant relatives of the Golden State Killer on GEDMatch and ultimately traced the information to his front door. After performing a familial DNA search, law enforcement officers arrested 72-year-old former police officer Joseph DeAngelo.

---

149 See infra text accompanying notes 174–183.
150 See infra text accompanying notes 151–177.
151 Rodriguez, supra note 102.
152 Id.
154 Ford, supra note 148.
155 Fuller, supra note 153.
157 Fuller, supra note 153.
158 Id.
159 Id.
160 Id.
161 Id.
162 Ford, supra note 148.
Consider also the “Grim Sleeper” serial killer, Lonnie Franklin, Jr., who was similarly arrested using familial DNA testing. He “was charged with 10 counts of murder and one count of attempted murder” after being connected with his son’s DNA. Beginning around 1985, the Grim Sleeper murdered a total of ten young women and one man. Then, in 1988, the killings stopped, hence the murderer’s nickname “Grim Sleeper.” But in 2007, another young woman was murdered. Detectives worked on the case for years and had connected all of the killings to the same handgun and matched saliva found on the victim’s bodies. “It wasn’t until 2010 that police arrested a suspect in this case—and it came down . . . to a bite of pizza.” The suspect, Franklin, Jr., was followed to a restaurant where he ate a piece of pizza. After the meal, detectives took his thrown away pizza crust, a fork, napkins, and his cup. When these items were tested, Franklin’s DNA profile matched the Grim Sleeper killer’s DNA. In 2014, a judge ruled that the evidence of the pizza crust was legally obtained.

In 2018, detectives were able to locate suspects in twenty-eight cold cases by matching the DNA at crime scenes to the DNA information posted by relatives on GEDMatch. Public genealogy websites like GEDMatch are not the only players in this game, however. AncestryDNA was involved in at least one past crime as well. In 2014, a New Orleans filmmaker was tagged as being a murderer from Idaho because of a DNA sample that his father had turned over as part of a genealogy project. His father’s DNA was then sold to Ancestry.com, where police found it with a court order. Later, the suspect was cleared after it was determined that his DNA was not a match.

Legal experts have stated that catching criminals in cold cases like these shows the value in genetic searches, but it also highlights the limits of Americans’ legal

---

164 Id.
165 Id.
166 Id.
167 Id.
168 Id.
170 Id.
171 Id.
172 Id.
173 Id.
176 Id.
177 Id.
protections for genetic information.78 Sonia Suter, a George Washington University law professor specializing in bioethics, has said, “There is a tendency in such cases to minimize the privacy costs because the gains are so great.”79 She further says, “The values of privacy are always more amorphous and easily discounted against concrete benefits of catching killers and rapists.”80 Elizabeth Joh, “a UC Davis law professor who studies the Fourth Amendment and technology,” said that this issue is “a story about data.”81 She emphasized the risks involved, saying, “Do you realize, for example, that when you upload your DNA, you’re potentially becoming a genetic informant on the rest of your family?”82 Ultimately, the question on qualitative differences is summed up as follows: “Time (and the inevitable court challenges) will tell whether an individual’s reasonable expectation of privacy in their personal genetic data . . . is deemed ‘qualitatively different’ information that deserves zealous protection under the Fourth Amendment.”83 Indeed, only time will tell if DNA data will be considered qualitatively different from twentieth century records. In light of the technology involved in genotyping the information, the amount and nature of personal information stored in an individual’s DNA, and the extreme privacy risk involved due to the ability of law enforcement to catch criminals using DNA databases, the Supreme Court in the future certainly should determine that DNA data is qualitatively different than twentieth century records and deserving of protection.

B. The Question of Whether DNA is Voluntarily Given

DNA information stored in third-party databases should also fall under the precedent of Carpenter because it is not truly given voluntarily. This is because most users do not understand the far-reaching consequences involved. One AncestryDNA user was so concerned about maintaining her anonymity that she fabricated a name out of fear that her DNA would be traced back to her.84 She said, “It makes me a little nervous . . . Will it just be used to catch murderers? Or will it be used to catch protestors one day, too?”85 The word “voluntary” is defined as “proceeding from the will or from one’s own choice or consent.”86 Merriam Webster lists “deliberate” as a possible synonym for voluntary, defining it as “characterized by awareness of the consequences.”87 “Deliberate,” according to Merriam Webster, “implies full consciousness of the nature of one’s act and its consequences.”88 Here, though many DNA kit users do “voluntarily” hand over genetic information, the deliberate aspect of the decision is

78 Ford, supra note 148.
79 Id.
80 Id.
81 Id.
82 Id.
83 Bernans, supra note 69.
84 Rodriguez, supra note 102.
85 Id.
88 Voluntary, supra note 186.
lacking. A decision made with no appreciation for the risks is not truly a voluntary choice.

i. "Anonymized" Genetic Research Data

Though Anne Wojcicki, CEO of 23andMe, believes the 23andMe “business model will both revolutionize healthcare and positively impact consumers,” it seems that its long-term goal is building its database and selling access to DNA data. Stephanie M. Lee, a writer for the San Francisco Chronicle, has said that “23andMe wants to do for health what Google has done for search: make massive quantities of information digital, accessible and personal.”

23andMe just made a 300 million dollar deal with the British pharmaceutical giant GlaxoSmithKline (“GSK”), which allows it to use DNA information for drug research purposes. Wojcicki said in a blog post that the collaboration with GSK is a way “to accelerate [the] ability to make [ ] novel treatments and cures a reality.”

Again, privacy concerns are implicated. Dr. Arthur Caplan, head of the division of medical ethics at New York University School of Medicine, said that any genetic privacy concerns extend to blood relatives who did not consent to having their DNA tested, which echoes the concerns of using familial DNA testing to catch the Golden State Killer. Caplan points out that the larger question involved here is whether customers realize what they are getting into “when they spit into those tubes.”

The information of GEDMatch is, of course, public because it is posted online by people in search of relatives. This information is intentionally public, and it is reasonable that this information could be used publicly. DNA kits, however, are marketed differently, and most users have an expectation that their DNA information will stay private. To participate in a DNA-based genealogy service, users must agree to a privacy contract. But, “[t]ucked discreetly in the legalese of these policies, you will find a line indicating your consent to sharing de-identified genetic data with unnamed ‘third-parties.”

---

193 Id.
194 Id.
195 Rodriguez, supra note 102.
196 See id.
197 Id.
198 Id.
Consider what might happen if this genetic information could be shared with employers or with medical insurers. The privacy policy from 23andMe’s website promises that genetic information will not be shared without the user’s consent, but 23andMe does share genetic information with third parties after it has been anonymized. Its website states that the company might “share aggregate non-genetic data to perform business development, initiate research, send [users] marketing emails and improve [its] services.”

Experts believe that the information given to third parties may not remain anonymous, however. Hank Greely, the director of Stanford’s Center for Law and Biosciences, believes that this de-identified genetic information might be personally identifiable, saying, “They will strip the data of identifiers, but if this is going to be useful for medical research, there will necessarily be information about your age, your height, your weight, where you live, maybe where you were born, and any diseases you may have.” Despite this belief, Greely chose to send his DNA to AncestryDNA because he does not know how realistic this threat really is.

ii. Eugenics, Genetic Discrimination, and the Genetic Nondiscrimination Act

At least one other expert, Joel Reynolds, however, believes that identifying genetic information turned over to third parties is a real threat. Reynolds is a post-doctoral fellow of bioethics at the Hastings Center and is concerned that genetic testing users will not understand the complexity or nature of the threat that their public genetic information might pose in the future. 23andMe states that almost eighty percent of consumers opt in to donating data for research purposes. Greely says that most people are willing to contribute to furthering medical research, yet states, “But what if somebody wants to do research on race and intelligence?” A major privacy concern is that DNA information might be used in the future for non-research purposes, though Ancestry’s spokesperson has said, “We do not and will not sell DNA data to insurers, employers, health providers or third-party marketers and will only share DNA data with researchers if the customer has consented.” Though this seems comforting to users, the privacy policy of AncestryDNA may be legally modified at any time: “We may modify this Privacy Statement at any time.” 23andMe’s privacy statement similarly informs users that

---

199 Id.
200 Id.
201 Id.
202 Id.
203 Id.
204 Id.
205 Id.
206 See id.
207 Id.
208 Id.
209 Id.
210 Id.
211 Id.
if the privacy agreement changes in a material way, they will be notified. This implies that the privacy statement can be changed. In light of this, Joel Reynolds stated, "Today, there are open doors to certain types of genetic discrimination that we simply do not have legal protections for. . . . This is very high stakes." The history of the United States is filled with discrimination of all shapes, sizes, and colors. One such type of discrimination that stains the history of the United States is the eugenics movement of the early 1900s. Proponents of genetic tailoring to perfect the genetic composition of the population believed that individuals with undesirable characteristics should be sterilized. The first sterilization law in the U.S. was enacted . . . in 1907, and by 1931, thirty states had enacted [similar] eugenic sterilization laws.

One of the most notorious decisions by the United States Supreme Court was the 1927 decision of *Buck v. Bell*, a case in which a Virginia statute allowing for the sterilization of inmates to promote "the health of the patient and the welfare of society" was upheld. Carrie Buck, described as being "feeble-minded," was committed to a Virginia mental institution. The Court found that her forced sterilization did not deprive her of due process nor of equal protection of the laws protected by the Fourteenth Amendment. The Court affirmed the value of the sterilization law, stating that the reason for it was to prevent the nation from "being swamped with incompetence. . . . Three generations of imbeciles are enough."

By 1980, however, "many [US] states had repealed their sterilization laws," but it is estimated that over 60,000 individuals deemed "feeble-minded" were sterilized and denied the ability to have children. The targets of the eugenics movement were those with physical or mental abnormalities and those with "social inadequacies" like addiction to drugs and criminal tendencies.

During the time of the early eugenics era, the structure of human genes was unknown and largely undiscovered, though it was known that genetics were the basis for heredity based on the research of Gregor Mendel in the nineteenth century and Thomas Hunt Morgan in the twentieth century. Because of this limited knowledge of heredity, the discrimination of the eugenics movement was based

---

212 *Privacy Statement*, 23ANDMe, https://www.23andme.com/about/privacy/ [https://perma.cc/M6CW-NK8D].
215 *Id.* at 109–10.
216 *Id.* at 110.
218 *Id.*
219 See *id.* at 208.
220 *Id.* at 207.
222 Dohn, *supra* note 113, at 100.
223 Incidentally, Thomas Hunt Morgan was born in Lexington, Kentucky, and received his Bachelor of Science from the University of Kentucky (formerly the State College of Kentucky). Garland Edward Allen, *Thomas Hunt Morgan*, *Encyclopædia Britannica*, https://www.britannica.com/biography/Thomas-Hunt-Morgan [https://perma.cc/W7TS-454Q].
almost entirely on genetics. In the mid-1950s, scientists began making leaps in the field of hereditary discovery. Scientists learned that human cells contain 46 chromosomes. Scientists also learned that chromosomal abnormalities caused developmental problems, such as Down syndrome.

Time and technology advances led to more genetic discrimination. By the 1970s, a handful of states “passed laws mandating genetic testing for sickle cell anemia in African Americans.” Black people at this time were denied employment and faced high insurance costs because of the possibility that they were carrying the sickle cell trait. Congress attempted to prohibit this type of genetic discrimination by passing the National Sickle Cell Anemia Control Act of 1972, but it did not halt this type of discrimination.

In 1995, Congress attempted again to prevent genetic discrimination in employment and in insurance coverage and premiums. This attempt was unsuccessful, however. Every year after 1995, a different bill was introduced in each chamber—until 2008, when Congress finally passed the Genetic Information Nondiscrimination Act (“GINA”). GINA’s goal is two-pronged: “to prohibit discrimination on the basis of genetic information with respect to health insurance and employment.”

Though this federal law has made it illegal to discriminate in the workplace and in health insurance fields, GINA does not regulate the use of genetic information in life, disability, or long-term care insurance. It also does not cover “discrimination in the public education system or in housing.” There are certainly gaps in the current protections against genetic discrimination that are worrisome in regard to the current landscape of DNA testing technology.

One such gap is life insurance, where companies can and do legally deny applicants who have discovered a genetic predisposition for medical issues after genetic testing. For example, in 2015, a 36-year-old employed woman with no medical issues was denied life insurance. Her letter from the life insurance

---

225 Id.
226 Id.
227 Id.
228 Id.
229 See id.
230 Id.
231 Id. at 110-11.
232 Id. at 110.
233 Id. at 111.
234 Id.
236 Genetic Information Nondiscrimination Act, 122 Stat. at 881.
237 Dohn, supra note 110, at 126.
238 Id.
company read, “Unfortunately after carefully reviewing your application, we regret that we are unable to provide you with coverage because of your positive BRCA 1 gene.” The BRCA 1 or 2 gene, which increases the risk of breast and/or ovarian cancer, is found in roughly one in 400 U.S. women. Though “55% to 65% of women who inherit a [1] BRCA 1 mutation will develop breast cancer by the age of 70,” the presence of the gene is certainly not always fatal. There is even a trend now in women with the gene to have preventative mastectomies, which significantly reduces the likelihood of developing breast cancer. Celebrity “Angelina Jolie, who underwent a preventive double mastectomy in 2013” for this very reason, has become a spokesperson for BRCA testing. Jolie claimed that her preventative measures caused her chances of developing breast cancer to “drop[] from 87% to 5%.”

The insurance industry, of course, has fought against including life insurance in the list of fields that are prohibited from genetic discrimination. According to Christina Farr, the insurance industry argues that its “business model would crumble if companies are forced to accept those with a high risk of cancer and various genetic diseases into the pool.” This is true, to some extent. People who believe they are predisposed to illness will be more likely to apply for life insurance than those who do not. Though insurance must engage in some degree of discrimination between claims, there should be limits. Genetic markers like BRCA 1 or 2, which do not always result in cancer, should not be an allowed form of discrimination.

In addition to life insurance, discrimination in education contexts is also not prohibited by GINA. In 2012, a boy from Palo Alto, California—coincidentally the same location where 23andMe CEO Wojcicki grew up and “not far from 23andMe’s Mountain View headquarters” —was transferred out of his neighborhood school to a different school by the school district. When his parents filled out his school forms, they indicated that he was a carrier for cystic fibrosis, though he did not exhibit any symptoms. When school officials shared this with the parents of two other students at the school with cystic fibrosis, the other parents

---

241 Id.
242 Id.
243 Id.
245 Farr, supra note 240.
246 Id.
247 Id.
248 Id.
249 Id.
250 Id.
251 Id.
252 Id.
253 Zhang, supra note 239.
254 Lee, supra note 190.
requested that the boy be transferred to another school.\textsuperscript{257} His parents then sued the school system.\textsuperscript{258} Even though genetic testing led to this lawsuit, GINA did not apply because this situation did not involve health insurance or employment.\textsuperscript{259} The parents could only sue under the Americans with Disabilities Act (ADA), but their son was afforded no protection because asymptomatic carriers of cystic fibrosis do not have a disability per se.\textsuperscript{260}

With the benefits of genetic testing come dangers. Though GINA protects against some genetic discrimination in the medical insurance and employment fields, large gaps remain. More protections are needed to fill the loopholes in other areas of insurance and in education. Therefore, as Michael Dohn stated, "[t]he ever-increasing access to [DNA] information should thus be accompanied with ever-expanding protections."\textsuperscript{261}

iii. Public Opinion Reflects Lack of Appreciation of the Risks

In light of the new forensic technique of using genealogy databases to catch the Golden State Killer and the media’s negative reaction, data has been gathered on whether public concern about genetic privacy has been overstated.\textsuperscript{262} In a survey of 1,587 respondents, researchers asked participants if law enforcement should be allowed to use certain types of data to solve crimes.\textsuperscript{263} Violent crimes, such as rape, murder, arson, or kidnapping, were distinguished from non-violent crimes, such as theft or drug possession.\textsuperscript{264} The survey showed that 85\% of respondents believed that law enforcement should be allowed to search cell phone records for violent crimes.\textsuperscript{265} Similarly, 91\% of participants said that police should be able to search genealogical websites that match DNA to relatives for violent crimes.\textsuperscript{266} It is important to note that this survey is responding to police searching public genealogy databases like GEDMatch, and not private ones like 23andMe.\textsuperscript{267} Even so, the public opinion for public genealogy sites was very similar to public opinion for cell phone records, which further likens this type of forensic crime-solving with the tracking of CSLI in Carpenter.

In addition to illustrating the similarities in public opinion regarding both CSLI and DNA data, this survey suggests that people are not aware of the consequences of giving DNA data to third parties, especially as those consequences relate to law

\textsuperscript{257} Id. at *2–4.
\textsuperscript{258} Zhang, supra note 239.
\textsuperscript{259} Id.
\textsuperscript{260} Dohn, supra note 113, at 129.
\textsuperscript{261} Id. at 131.

\textsuperscript{263} Id. at 3.
\textsuperscript{264} Id. at 3–4.
\textsuperscript{265} Id. at 4.
\textsuperscript{266} Id.
\textsuperscript{267} See id.
enforcement: "These data provide preliminary evidence that individuals may not be particularly concerned about police searches of personal genetic data that populate genetic genealogy databases when the purpose is considered justified." 268 The fact that 91% of survey respondents answered that the government should have access to genealogy websites to solve violent crimes indicates that a large number of people consider this invasion of privacy "justified," but perhaps this is because they are not aware of the privacy risks. To many, the value in catching evil murderers outweighs the risks involved in allowing the government to access third-party DNA data. But let us not forget the main reasons for keeping DNA private: Prohibiting the potential for eugenic practices and preventing genetic discrimination.269 The pattern in these surveys of public support for allowing the government access to third-party DNA data only emphasizes that Americans do not appreciate the risks of allowing such access.

The appropriate limits to place on government access to third-party DNA data needs to be carefully considered, and soon:

As more people become familiar with the vulnerabilities of personal genetic services, opinions may shift regarding the acceptability of police access to data that are generated by and shared with these services.

Far from being a forensic anomaly, the public genetic search that led to the arrest of the Golden State Killer suspect is quickly on its way to becoming routine procedure. What limits, if any, to place on police access to genetic genealogy databases must be thoughtfully considered and soon, with robust input from the public.270

The Guerrini study also posits that "[s]ome scholars have predicted that individual access to raw genetic data will soon 'become expected or required as genomics becomes more clinically oriented and the public begins to insist on participatory data governance.'"271 There will likely be a time in the near future when sharing genetic information with doctors and hospitals will be common practice in the medical field. As Monica Rodriguez stated in Fortune, the current state of the privacy of genetic information regulation lies "somewhere between the realm of lightly regulated consumer goods and highly regulated medical services,"272 and for now, "[i]n this era of dwindling privacy, human DNA is perhaps the last frontier."273

CONCLUSION

Allowing the government to access DNA data from third-party genetic databases infringes on Fourth Amendment protections. Further, allowing this access could have

268 Id. at 4–5.
269 See supra Sections III.B.i–ii.
270 Guerrini et al., supra note 263, at 7.
271 Id. at 6 (quoting Adrian Thorogood et al., APPLaUD: Access for Patients and Participants to Individual Level Uninterpreted Genomic Data, 12 HUM. GENOMICS, no. 7, 2018, at 1, 2).
272 See Rodriguez, supra note 104.
273 Id.
serious and far-reaching consequences on participants using DNA kits. In light of
the precedent from Carpenter v. United States, this DNA information should be
protected. Users have a reasonable expectation of privacy in their genetic
information and it should be afforded the same protection as CSLI. The Carpenter
Court reasoned that because CSLI is "qualitatively different" than other types of data
and because it is given involuntarily and as a part of daily life, it is worthy of
protection. DNA data is also worthy of protection. It too has significant qualitative
differences from 20th century data, and it too is not given voluntarily, as it is largely
handed over with no appreciation for or understanding of the consequences. For
many, mailing DNA information to testing labs is done solely as a means to an
end—discovering ancestry and health risks. For these reasons, DNA data stored in
third-party databases should fall under the precedent of Carpenter and deserves to
be protected by the Fourth Amendment.

BACHA BAZI AND HUMAN RIGHTS VIOLATIONS IN AFGHANISTAN: SHOULD THE U.S. MILITARY HAVE DONE MORE TO PROTECT UNDERAGE BOYS?

Annie Barry Bruton

TABLE OF CONTENTS

TABLE OF CONTENTS ........................................................... 179
I. INTRODUCTION ................................................................. 180
II. CULTURAL PERSPECTIVE .............................................. 181
   A. Cultural Dilemma ......................................................... 181
   B. Sexual Consent in the U.S. ........................................... 183
III. LEGAL IMPLICATIONS: BACHA BAZI AND THE ALLIED COALITION
    IN AFGHANISTAN ............................................................ 184
    A. U.S. Law ................................................................. 184
    B. International Law ....................................................... 187
IV. CURRENT ACTIONS .......................................................... 190
    A. U.S. Lawmakers ......................................................... 190
    B. Afghanistan: Government Action & Directives .................. 191
    C. Case Study: Major Jason Brezler, USMC ......................... 193
V. THE WAY FORWARD .......................................................... 194
CONCLUSION ............................................................................. 197

1 J.D. expected 2020, University of Kentucky College of Law; B.S. in Chemistry, 2013, United States Naval Academy. I would like to thank Dan Quinn, and all others who have had the courage to stand up for what is right, even if it meant sacrificing everything.
I. INTRODUCTION

In January of 2018, a report on the “investigation into child sexual abuse by Afghan security forces” and U.S. military inaction was “released ... by the Special Inspector General for Afghan Reconstruction, known as Sigar.”

The “heavily redacted” report, which was commissioned under the Obama administration, did little to address the prevalence of child sexual abuse in the Afghan military and police and how often the U.S. military “looked the other way at the widespread practice.”

The practice, known as bacha bazi or “boy play,” has existed in Afghanistan since antiquity and includes a wide array of sexual activities between older men and young boys. The practice has been known to consist of sexual slavery and child prostitution, where force and coercion are common.

Afghan security officials often claim they are unable to end such practices because many of the men involved in bacha bazi are powerful and often prominent members of the government, police, and military forces.

Under current legislation, “United States military aid funds must be cut off to any foreign military unit implicated in gross human rights violations, which [presumably] includes ... bacha bazi.” In 2014, however, Congress authorized a special waiver for the Afghan Security Forces Fund called the “notwithstanding clause,” which allows U.S. military aid “notwithstanding any other provision of law.” This clause has since “been used repeatedly to evade cutting off military aid to Afghan units” despite widespread knowledge of the practice of bacha bazi.

Following national outrage in early 2018, Congress quietly removed the “notwithstanding” language. Congress continues to authorize funding, however, “that would otherwise be prohibited” if “a denial of such assistance would present significant risk to U.S. or coalition forces or significantly undermine United States national security objectives in Afghanistan.”

There have been several high-profile cases of U.S. military members objecting to the practice, which members claim has since ended their career paths, including the incident in which then-Capt. Dan Quinn “beat up an Afghan commander for...”

---

3 Id.
5 See Martin & Shaheen, supra note 4, at 193–94.
6 See id. at 193.
7 Nordland, supra note 2.
9 Nordland, supra note 2.
10 See id.
12 Id.
keeping a boy chained to his bed as a sex slave.” He was promptly relieved of his command. Quinn maintains that “[w]e were putting people into power who would do things that were worse than the Taliban did.”

This Note will analyze the dilemma that U.S. military members face in ignoring the cultural practice of bacha bazi or taking action against sexual predators, as well as the U.S. government’s actions—or, their inaction. Part I will provide a background analysis of the cultural phenomenon, as well as a background of sexual consent norms in the U.S. Part II will analyze the legal implications of the practice. Part III will explain current actions taken by the U.S. government. Finally, Part IV will provide a solution to force the end of the practice of bacha bazi or, at the very least, the end of U.S. funding of the government of Afghanistan.

II. CULTURAL PERSPECTIVE

A. Cultural Dilemma

Bacha bazi is not a new phenomenon. Its roots in Afghanistan can be tied to the late nineteenth century, although similar practices have been prevalent in Central Asia since at least the rule of the Ottoman Empire. The practice notably declined during the extremist rule of the Taliban, a group formed in the early 1990s by an Afghan faction of mujahideen, Islamic fighters who resisted the Soviet occupation of Afghanistan (1979–89) with the backing of the U.S., Pakistan, China, Iran, and Saudi Arabia. In the mid-1990s, the Taliban extremist group gained control of Kabul and, subsequently, the country, by forcibly hanging the former president. In 2001, a U.S.-led invasion toppled the Taliban regime, and bacha bazi returned. In particular, growing poverty in Afghanistan since the beginning of U.S. military involvement became “a driving force in the rise of bacha bazi.” Widespread conflict and an economy significantly impacted by war has allowed predators to easily prowl the streets of large cities targeting young boys. These men may promise the boys’
families work or education, or they may kidnap the boys outright. The practice has quickly gained popularity and widespread acceptance, most notably among powerful warlords, businessmen, and police. Societal acceptance, or perhaps tolerance, is evident in the popular Afghan saying, “women are for children, boys are for pleasure.”

American policy with respect to bacha bazi has largely been a sensitive issue for lawmakers due to viewing the sexual abuse as a “cultural issue.” In actuality, however, “[i]t is unacceptable morally and culturally to the majority of people in Afghanistan.” Morally, bacha bazi is objectively reprehensible. Only the perpetrator of such crimes could find a way to justify it morally in their own, subjective way. In contrast, a practice being culturally unacceptable implies that society as a whole disapproves of the practice in question. “Cultural values . . . deal with ‘knowledge, art, belief and any other capabilities and habits acquired by man as a member of society.’” The society as a whole, or at least the majority, condemns the practice. Those practicing bacha bazi are able to do so largely because of social status. They are members of government, police, or Afghan security forces, and oftentimes enjoy the protection of the U.S. government. Therefore, bacha bazi seems to be less of a “cultural issue” and more of an issue of systemic enablement by both the U.S. and Afghan government.

Because bacha bazi is a widespread cultural phenomenon, does the U.S. military have the right to interfere? “Only the U.N. Security Council has the legal power to enforce international law;” and if the U.S. exercises its right of veto, the Security Council has no power against it. The “right to interfere” question, however, lies more in the realm of whether intervention is “the right thing to do” than the legal realm. Whether or not we can interfere. Humanitarian intervention is nothing new as “The University of Pittsburg’s Taylor Seybolt’s 2008 review of 17 U.S.-led interventions found that nine had succeeded in saving lives.” For example, in April of 1991, “the United States began airdropping food, water, and blankets on the large refugee camps along the Turkish-Iraqi border that were sheltering Kurds displaced by

---

23 Id.
24 Id.
25 Id.
28 See id., for a more in-depth discussion about the mischaracterization of bacha bazi as a “cultural issue.”
30 Id.
31 See Nordland, supra note 2.
33 Id.
by [the] Iraqi Republican Guard.” These people were offered live-saving aid from the U.S. contrary to the government of Iraq, which had displaced them after putting down an uprising in the northern portion of the country in a particularly brutal manner. This serves as an example of the U.S. government “doing the right thing.” Therefore, according to historical example, the U.S. appears willing to disregard international law and the decision making of individual countries in order to stand up for those most vulnerable.

### B. Sexual Consent in the U.S.

In the U.S., the practice of bacha bazi is viewed as reprehensible due to the differences in how our society views sexual intercourse and consent, especially in the context of minors. According to one scholar, “[o]ne clear way that [U.S.] law addresses sexual consent is through age of consent laws.” Every state prohibits by statute some kind of ‘consensual’ sexual activity between children and adults. “Most [American] states distinguish among sex crimes against children by the severity of the offense and the age of the child.” That is, the younger the child the more serious the offense. These differences highlight the effort by U.S. lawmakers to “account[] for power and maturity differences between the ‘consenting’ parties.” These laws are largely created in order to deter criminal conduct and the exploitation of young children. Especially in the case of statutory rape, American society demonstrates a distinct concern with not only holding the perpetrator accountable, but more importantly preventing “harm to our children.” In this way, Afghanistan and the U.S. are distinctly different and therefore the aversion to the practice of bacha bazi amongst U.S. service members is logical. Service members are familiar with societal norms of sexual consent in America from a young age and it is no surprise that they have trouble balancing their understanding and acceptance of consent law with bacha bazi. In a similar situation in 2011, a twenty-two-year-old Eritrean immigrant in St. Louis was charged with first-degree statutory rape after it was discovered that he had impregnated a 12-year old girl. Regardless of the law in

---

35 Id.
36 Id.
37 This conclusion is inferred from the codification of statutory rape laws in the U.S. See generally Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape, 48 BUFF. L. REV. 703 (2000) (discussing the state of statutory rape laws in the United States).
40 Id.
41 Id.
42 Id.
43 See id. at 515, 522 n.58.
44 Id. at 515.
45 Id.
Eritrea, having sexual intercourse with a minor is a major crime in the state of Missouri.\textsuperscript{46} The St. Louis Circuit Attorney remarked that “a serious crime against a child has occurred,”\textsuperscript{47} reflecting a viewpoint which American society largely holds.

While the actual age of the underage boys subject to bacha bazi may not always be known, most are young teenagers and some even younger.\textsuperscript{48} In a particularly disturbing account, 29-year-old Muhammed Duad described his calculated pursuance of a young boy of twelve, “‘[i]f you want a haliq’—a boy for sex—‘you have to follow the boy for a long time before he will agree.’”\textsuperscript{49} He went on to describe that, through providing candy and money to the young boy, he was able to eventually convince the boy to become his lover.\textsuperscript{50}

III. LEGAL IMPLICATIONS: BACHA BAZI AND THE ALLIED COALITION IN AFGHANISTAN

A. U.S. Law

Sigar opened the investigation into child sexual abuse by Afghan security force “at the request of Congress and in response to a 2015 New York Times article.”\textsuperscript{51} The article alleged that U.S. soldiers were actively told to ignore the systematic sexual abuses of young boys and “described the practice as ‘rampant.’”\textsuperscript{52} A former Marine “recalled feeling sickened the day he entered a room on base and saw three or four men lying on the floor with children between them.”\textsuperscript{53} The Marine communicated to his father that “[a]t night we can hear them [young boys screaming, but we’re not allowed to do anything about it.”\textsuperscript{54} When the Marine complained to his superiors, he was told “to look the other way because it’s their culture.”\textsuperscript{55}

The Pentagon immediately denied any official policy instructing U.S. servicemembers serving in Afghanistan to look the other way when confronted with Afghan abuse of young boys.\textsuperscript{56} Pentagon spokesman Navy Capt. Jeff Davis informed reporters that “[w]e’ve never had a policy in place that directs any military or an government personnel overseas to ignore human rights abuses.”\textsuperscript{57} Capt. Davis als

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Nordland, supra note 2.
\item Id.; see also Goldstein, supra note 26.
\item Goldstein, supra note 26.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
stated that "there is nothing that would preclude any military member from making
reports about human rights violations to their chain of command," but did not outline
whether there were any policies to handle reporting of human rights abuses." 58 The
Pentagon, however, suggested that the issue of bacha bazi was "fundamentally" a
local Afghan law enforcement matter." 59 The White House echoed a similar stance
by stating that "[t]his form of sexual exploitation violates . . . Afghanistan’s
international obligations." 60 Effectively, both the Pentagon and the White House
declined to take responsibility for inaction on the part of the U.S. government and
instead shifted the blame to the Afghan government.

The Sigar report was completed in June 2017. 61 Originally, the contents were
considered to be "so explosive" that it was recommended to be withheld from the
American public until June 9, 2042. 62 The report evidences the failure of the U.S.
government to meet the standard of the Leahy Law, the domestic law prohibiting the
enabling of gross human rights violations by the U.S. government. 63 The term
"Leahy Law" refers to statutory provisions prohibiting the U.S. government from
using funds to assist units of foreign security forces where there is credible
information implicating that unit in the commission of gross human rights
violations. 64 Provision (c) of the Act governs the U.S. State Department while
provision while (d)(3) of the Act governs the U.S. Department of Defense. 65 The
U.S. government has found that torture, extrajudicial killing, enforced
disappearance, and rape are all considered gross human rights violations. 66 As the
practice of bacha bazi is nothing more than systematic rape and sexual abuse of
young boys, Afghan actors caught in the practice, or at least reasonably suspected to
have committed the practice, fall squarely within the intent of the provision. It is a
clear violation of U.S. law to continue to allow funding for Afghan security forces
and police. A particularly alarming fact is that before an individual security force is
nominated for U.S. government assistance, the State Department is required to
investigate the unit fully. 67 The U.S. Embassy is tasked with conducting "consular,
political, and other security and human rights checks." 68 In fact, in most cases, a
further investigation is then conducted in Washington, D.C. by the Department of
State itself in order to ensure a full examination of the unit in question. 69 With all
this required preparation, it is absurd to assume that the U.S. government was
unaware of bacha bazi when the funds for Afghan security forces were originally
approved.

58 Id.
59 Id.
60 Id.
61 Nordland, supra note 2.
62 Id.
63 See id.
64 Leahy Fact Sheet, U.S. DEP’T STATE: BUREAU DEMOCRACY, HUMAN RIGHTS, AND LABOR,
65 22 U.S.C. § 2378d.
66 Leahy Fact Sheet, supra note 64.
67 Id.
68 Id.
69 Id.
One manner in which the U.S. government recently circumvented the Leahy Law, as revealed by the Sigar report, was the reliance on the “notwithstanding clause,” which stated that Afghan military aid should be available “notwithstanding any other provision of law.” This clause existed until 2018, when Congress quietly altered the language to authorize funding “that would otherwise be prohibited” if “a denial of such assistance would present significant risk to U.S. or coalition forces or significantly undermine United States national security objectives in Afghanistan.”

The 2018 version of the Defense Appropriations Act does impose stricter requirements for waiving the Leahy Law, which includes a guarantee that the Secretary of Defense has “sought a commitment by the Government of Afghanistan to take all necessary corrective steps.” The fact remains, however, that Congress is expressly authorizing U.S. funding which “would otherwise be prohibited by 10 U.S.C. 362 to a unit of the security forces of Afghanistan.” These loopholes counter the application of the Leahy Law that cuts off valuable security partners, suggesting that the U.S. government prioritizes security above human rights in Afghanistan. A career Afghan policy scholar noted that “[w]hen there was a conflict between the counterterrorist agenda and anything else, the counterterrorist agenda won out.” The overarching problem, therefore, is that the “notwithstanding clause” was only enacted by Congress in 2014, when the Afghanistan Security Forces Fund was first created in 2005. This indicates that for approximately eleven years, the U.S. government knew, or should have known, due to the supposed extensive background investigation prior to the awarding of funds by the U.S. State Department, of the widespread practice of bacha bazi.

Although the Department of Defense and the State Department have taken steps to identify and investigate instances of bacha bazi in the wake of the Sigar report, it is clear that the U.S. government has failed to hold Afghan forces accountable for their crimes in order to fulfill national security interests. According to the Sigar report, the Department of Defense’s “continuing to provide assistance to units for which the department has credible information of a gross violation of human rights undermines efforts by U.S. government officials to engage with the Afghan government on the importance of respect for human rights and rule of law.” This presents the ultimate question to the U.S. as it moves forward in Afghanistan: which

---

70 Nordland, supra note 2.
73 Id.
74 Id.
77 See Nordland, supra note 2.
78 Id.
is of greater importance, protecting the young boys or protecting our interests in the region?

B. International Law

Following the atrocities of World War II, the international community committed itself to the development of the concept of universal human rights. The effort culminated in a document known as the Universal Declaration of Human Rights (UDHR). The UDHR was “[d]rafted by representatives with different legal and cultural backgrounds from all regions of the world” and stands “as a common standard of achievements for all peoples and all nations.” The document established a universal, international standard for human rights for the first time in history and “has been translated into over 500 languages.” In the 1980s, human rights activities by non-governmental organizations accelerated and policies concerning basic human rights began to be incorporated into states’ foreign policies. The fall of the Soviet Union and “the end of the Cold War ushered in the [widespread] practice of humanitarian intervention, arising from a new geopolitical environment.” In 1988, the UN General Assembly “adopted a resolution recognizing for the first time that private humanitarian organizations have a role to play” in emergency situations. Next, in 1991, the UN General Assembly “passed a resolution creating a humanitarian aid coordinator” and “suggested that while the United Nations should try to win the consent of affected governments before sending aid, it is not necessarily prohibited from intervening if it fails.” In this context, states expressed an increased willingness to deploy their armed forces in case of humanitarian emergencies or events of large-scale human rights violations. Further, the UN Security Council affirmed its right in January of 1991 to intervene in international situations in the future “by acknowledging for the first time the existence of ‘nonmilitary’ threats to peace and security ‘in the economic, social, humanitarian and ecological fields.’”

With respect to the U.S., a commitment to universal human rights has been a part of our national foreign policy since our adoption of the Geneva Convention treaties

---

82 Id.
84 Id.
86 Id.
87 Id.
following World War II; a speech delivered by President Jimmy Carter in 1977 at the Notre Dame commencement ceremony notably highlighted this viewpoint:

First, we have reaffirmed America’s commitment to human rights as a fundamental tenet of our foreign policy. In ancestry, religion, color, place of origin, and cultural background, we Americans are as diverse a nation as the world has even seen. No common mystique of blood or soil unites us. What draws us together, perhaps more than anything else, is a belief in human freedom. We want the world to know that our Nation stands for more than financial prosperity.

Nonetheless, we can already see dramatic, worldwide advances in the protection of the individual from the arbitrary power of the state. For us to ignore this trend would be to lose influence and moral authority in the world. To lead it will be to regain the moral stature that we once had.

Throughout the world today, in free nations and in totalitarian countries as well, there is a preoccupation with the subject of human freedom, human rights. And I believe it is incumbent on us in this country to keep that discussion, that debate, that contention alive. No other country is as well-qualified as we to set an example.

President Carter “effectively usher[ed] in human rights as a central part of U.S foreign policy.” Although his statements took place in 1977, it is clear that gross human rights violations remain an issue on the global stage, most importantly in the form of bacha bazi. The U.S. government has demonstrated a commitment to human rights in the past and therefore must continue to do so today.

U.S.-led coalition forces in Afghanistan are bound by applicable customary and conventional international humanitarian and human rights laws. UN Security Council Resolution 1746 called for “full respect for human rights and international humanitarian law throughout Afghanistan” and required “all parties to uphold international humanitarian and human rights law and to ensure the protection of civilian life.” Although Security Council resolutions are merely recommendations

---

89 Id.
and not laws, the weight which they hold is of symbolic and political importance.\footnote{Céline Van den Rul, \textit{Why Have Resolutions of the UN General Assembly if They are Not Legally Binding?}, E-\textsc{Int’l} \textsc{Rel.} (June 16, 2016), https://www.e-ir.info/2016/06/16/why-have-resolutions-of-the-un-general-assembly-if-they-are-not-legally-binding/ [https://perma.cc/7ZKN-G4D7].} The General Assembly represents a “town meeting of the world” in which many countries are able to voice their opinions, discuss global issues, and articulate formal representations of their collective decisions through resolutions.\footnote{Id.} The “world opinion” expressed in the resolutions can be symbolic in two main ways: it can have an invaluable influence on the behaviour [sic] of states and stigmatize or isolate the practice of states that do not conform to it.\footnote{Id.} Fifteen countries served on the Security Council, which produced Resolution 1746, including the U.S., China, and Russia.\footnote{See \textit{Current Members: Permanent and Non-Permanent Members}, \textsc{United Nations Security Council}, https://www.un.org/securitycouncil/content/current-members [https://perma.cc/YF8U-CKB2].} As three of the most powerful nations on earth and nations that do not always agree politically, a collective resolution representing their opinion holds enormous weight on the world stage. Clearly, bacha bazi was recognized as a significant problem in 2007, which required discourse on a global stage. Since 2007, however, the practice of bacha bazi has not been actively combatted, nor has it shown any signs of slowing.\footnote{See Nordland, \textit{supra} note 2.}

Alternatively, the International Law of War may be applicable to bacha bazi. The “Law of War” is defined as “[t]hat part of international law that regulates the conduct of armed hostilities.”\footnote{U.S. \textsc{Joint Chiefs of Staff}, \textit{Joint Pub. No. 1-04, Legal Support to Military Operations GL-3} (2016), https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/p1_04.pdf [https://perma.cc/FNQ9-G2VT].} The purpose of the Law of War is to prevent unnecessary suffering, safeguard certain fundamental human rights of those involved in a conflict, and to ultimately restore peace.\footnote{Id. at 11-2.} The Law of War, also known as the Law of Armed Conflict, is an international body of law supported by both the Hague and Geneva Conventions.\footnote{Legal Obligation of U.S. Armed Forces to Intervene in Acts of Bacha Bazi in Afghanistan, \textsc{Cong. Res. Serv.} (Oct. 22, 2015, 12:31 PM), https://fas.org/sgp/crs/natsec/bacha.pdf [https://perma.cc/8YBQ-CCXC].} The Hague Conventions relate to the “methods of war,” and the Geneva Conventions “concern respecting and protecting [the] victims of conflict.”\footnote{Id.} The Geneva Convention Treaty IV is directed to civilians specifically and is applicable in Afghanistan because it takes effect during international armed conflict of any kind “which may arise between two or more parties to the treaty.”\footnote{Id.} Both Afghanistan and the U.S. were original parties to the Geneva Conventions in 1956 and 1955 respectively.\footnote{Id.} Assuming this applicability, U.S. service members would be legally required to intervene with respect to instances of bacha bazi if the young boys qualify as a protected class under Treaty IV.\footnote{See \textit{Treaties, States Parties and Commentaries}, \textsc{Int’l Committee Red Cross}, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf?State.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treaty Selected=380 [https://perma.cc/PE99-XKCF].} Addressing civilians, Treaty IV...
is a "complex document, which provides different protections for the 'whole of the population' and ‘protected persons." An important stipulation built into the document, however, "is that the concept of protected persons . . . respects a State's relations with its own nationals." That is, if bacha bazi is culturally accepted, the boys would not qualify as protected persons and domestic practices in Afghanistan govern the conduct of U.S. service members.

IV. CURRENT ACTIONS

A. U.S. Lawmakers

"The Sigar report recommended restricting the use of that 'notwithstanding clause' to evade the provisions of the Leahy Law." In September of 2018, U.S. Senator Rand Paul offered an amendment in committee that would withhold all American funding of Afghan forces until a 'U.S.[.] government watchdog in Afghanistan could verify those forces were not using children as child soldiers or sex slaves." Unfortunately, "he was opposed by Senate Foreign Relations Committee leaders," despite the fact that the U.S. has allocated nearly five billion dollars in aid to Afghan security forces in 2019. Senator Paul’s plan would have called for Sigar to verify that no child soldiers or sex slaves were utilized by any individual or unit within the Afghan National Security Forces before receiving funds from the U.S. In response, the Chairman of the Senate Foreign Relations Committee, Senator Bob Corker, backed a counter-amendment to allow the funding because "such a withdrawal of U.S. support would be problematic from a 'broad U.S. national security standpoint.'"

The manner in which Congress finally addressed the issue of funding these Afghan units was the removal of the "notwithstanding" language, and the substitute

\[106\] Id.
\[107\] Id.
\[108\] Nordland, supra note 2.
\[111\] Hunter, supra note 110.
\[112\] Wong, supra note 110. The counter-amendment backed by Senator Corker instead "require[d] the Departments of Defense and State to report [broadly] on implementation of recommendations" from the Sigar report, vice the "unachieveable standard" that Sigar verify each unit or individual had zero instances of sexual slavery before receiving funds. Id.
of language which continued to allow funding to units otherwise prohibited under the provisions of the Leahy Law provided that: "(1) a denial of such assistance would present significant risk to U.S. or coalition forces or significantly undermine United States national security objectives in Afghanistan; and (2) the Secretary has sought a commitment by the Government of Afghanistan to take all necessary corrective steps." Additional requirements were also imposed, which include that the Secretary of Defense must report every 120 days on the status of corrective steps taken by the Government of Afghanistan, and that if necessary corrective steps were not completed within one year, the authority to violate the Leahy Law and provide assistance to a unit shall no longer apply. While it is certainly a step in the right direction that Congress has expressly limited the violation of the Leahy Law to one year if corrective steps are not taken, Congress is in the same breath expressly authorizing a full year of known child sexual abuse. In other words, U.S. service members and Department of Defense officials may be fully aware of these atrocities for some time before action can officially be taken to remove funding. There is no power for Congress to remove funding before the one-year mark.

This blatant disregard for the safety of underage boys in Afghanistan seemingly answers the previously posed question: protecting its interests in the Middle East is more important to the U.S. government than protecting the young boys who are victimized by bacha bazi. Again, this is in direct conflict with the provisions of the Leahy Law requiring U.S. aid to be cut off to Afghan "unit[s] implicated in gross human rights violations." Americans point with pride to girls who have been enrolled in school since the Taliban was defeated, but what of the mass, institutionalized pedophilia practice? U.S. conduct moving forward matters immensely as "we are a practicing democracy with both philosophical and geopolitical reasons to encourage the democratic aspirations of all peoples." Democracy cannot exist in a world in which major superpowers, such as the U.S., do not follow international laws. It is counterproductive, as democracy cannot flourish in a "lawless climate."

B. Afghanistan: Government Action & Directives

Following the fall of the Taliban in 2001, bacha bazi returned openly in Afghan society. The problem immediately became "so widespread that the government [] issued a directive barring 'beardless boys'—a euphemism for under-age sex

---

114 Id.
115 Nordland, supra note 2.
117 Cutler, supra note 32, at 96.
118 See id. at 96-97.
119 Id. at 96.
120 Drury, supra note 17.
partners—from police stations, military bases and commanders’ compounds.”

Yet, “archaic social traditions and deep-seated gender norms” in the Afghan culture have caused the government much trouble in preventing the practice. In fact, since 2001, coalition forces have observed that many Afghan families are “keen to provide a son to a warlord or government official . . . in order to gain familial prestige.” These families have “full knowledge of the sexual ramifications,” as well as the government officials who accept the boys as bribes or in exchange for money. Following criticism from the United Nations in 2011, “Afghan officials formally agreed to outlaw” bacha bazi. The government promised to create a plan for sweeping changes into the “investigation and prosecution of perpetrators of under-age recruitment” of child soldiers and “sexual violence.” In 2014, the Afghan Independent Human Rights Commission (AIHRC) conducted a national inquiry into bacha bazi, which consisted of “interviews with perpetrators as well as with victims” and data collection across seventy-one focus group sessions and fourteen public hearing sessions. As a result of their research and data collection, the AIHRC created over ten specific recommendations to the Afghan government, including the criminalization of bacha bazi practices by modifying the Penal Code.

Even in the wake of the formal inquiry by the AIHRC—a government entity created by the Afghan Constitution—the government’s ability and willingness to internally enforce laws protecting children” had been largely “non-existent.” The government finally revised the federal penal code in 2017, criminalizing bacha bazi for the first time in the history of Afghanistan. In an entire chapter dedicated to banning the practice, “the perpetrators . . . could face up to seven years in jail while those [who] keep multiple boys below age 12 could face life imprisonment.”

Notwithstanding the fact that bacha bazi is now technically criminalized in Afghanistan, the judiciary and law enforcement have not made major strides in putting an end to the practice fully. In fact, experts claim the practice is still on the rise. Unfortunately, the perception of the Afghan people is that ending bacha bazi

---

121 Smith, supra note 49.
123 Id.
124 Id.
125 Id.
129 Mondloch, supra note 122.
130 Shajjan, supra note 27.
131 Id.
is simply "not a priority for the Afghan government."134 34 "There is no court dedicated to hearing human trafficking cases, and little public education about trafficking and where people should go to report it."135 135

C. Case Study: Major Jason Brezler, USMC

While deployed to a remote base in Helmand province, Afghanistan in 2010, Marine Major Jason Brezler identified a local police chief as a threat to not only the local civilians he was assigned to protect, but also to his own Marines.136 136 The police chief, Sarwar Jan, was allegedly linked to the Taliban and was also a "pedophile who preyed on local boys."137 137 Major Brezler "was able to kick Sarwar Jan off the base," but was informed nearly two years later via email that the dangerous pedophile had returned.138 138 From his public budgeting class at the University of Oklahoma, where a now reservist Major Brezler was pursuing a master's degree, he received an email stating "SARWAR JAN IS BACK."139 139 It was a forwarded email from a Marine acquaintance in Helmand.140 140 Major Brezler quickly located the dossier on Sarwar Jan on his computer and attached it to the email, hitting reply all.141 141 Just seventeen days after Major Brezler's email warning, one of Sarwar Jan's underage "sex slaves" killed three unarmed Marines at the base gym in Helmand.142 142

The dossier was legally classified military information, however, and it was not to be transmitted via personal email.143 143 Major Brezler was subsequently investigated by the Naval Criminal Investigative Service (NCIS) and charged with mishandling of classified documents.144 144 He was referred to a military Board of Inquiry regarding his violations of the Uniform Code of Military Justice (UCMJ) and was ordered to

---

134 Id. (quoting Wali Mohammad Kandiwal, the author of a recent study on the new Afghan law relating to bacha bazi).
135 Id. (citing Kandiwal).
137 Id.
138 Id.
139 Id.
140 Id.
141 Id.
142 Id.
143 Id.
be honorably separated. Major Brezler maintained since the events that his punishment was retaliatory, perhaps part of an elaborate cover-up to conceal that military officials knew both how dangerous Sarwar Jan was and that he was a known perpetrator of bacha bazi who the government failed to bring to justice. In 2016, a federal judge overturned the discharge on the grounds that “the government had not granted [Major] Brezler full access to records related to his claim,” but declined to rule on whether the board of inquiry’s recommendation was an act of retaliation. Did the U.S. Navy attempt to silence Major Brezler as a cover-up for their failure to put an end to a known sexual predator’s actions? The American public may never know, but it certainly appears suspicious given the fact that because government officials failed to heed his warning, three service members were killed by one of the bacha bazi boys. The family of one of the slain Marines, Lance Corporal Gregory Buckley, Jr., filed a lawsuit against the Marine Corps and the Department of Defense seeking classified information about the details surrounding their son’s death. The family also alleged that they believed the military had unduly punished the whistleblower, Major Brezler, who tried to warn the Marines in Helmand of the danger of Sanwar Jan prior to their son’s death.

V. THE WAY FORWARD

Figure 1: The New Pentagon Papers

The U.S.-led coalition in Afghanistan has largely “built a government around a ‘lesser evil,’” in that they have empowered current leadership—consisting of many known pedophiles—“in lieu of the extremist . . . Taliban.” This will likely decrease international support for Afghanistan’s continual development. The solution for erasing bacha bazi from

---

145 Id.
147 Schogol, supra note 146.
149 Id.
151 Mondloch, supra note 122.
152 Id.
Afghanistan is twofold. First, and most importantly, the Afghan government must continue to modernize. The legal system must enforce the new laws criminalizing the practice, from the police to the judiciary. The current administration must focus inward and expel those in positions of power who are known to abuse young boys and create a united front of zero tolerance. “If the central government can ensure its representatives at the local level will cease their engagement in *bacha bazi*, the social norms are bound to change as well.” Further, the government can “attack the issue from an ethno-cultural standpoint.” Outreach to rural Pashtun communities is critical because the “legitimacy of the government is often eclipsed” in these areas “by the power of warlords and tribal leaders.” The Pashtun are the largest ethnic group in Afghanistan saddling the rural border with Pakistan—in fact, many live within Pakistan. Pashtun society is sheltered by a pastoral setting in which many do not speak Arabic and “allow social customs to trump religious values.” Tribal leaders have remained relatively secular and have widely practiced *bacha bazi*. Therefore, it is not simply a problem in the Islamic culture within Afghanistan, which represents a U.S.-backed central government, but also the rural ethnic groups. Eliminating *bacha bazi* “will finally occur when a pedophile-free Afghan government is able to more closely connect the country’s urban centers to its rural [Pashtun] countryside.” Only then will social norms begin to change and incorporate social justice. Yet, this is largely out of the control of the U.S. government. This is a solution that must come from within. The U.S., however, may be able to “force the hand” of Afghan officials to stimulate societal change by completing the second necessary step in reaching a solution: sticking to our word and removing monetary aid in accordance with the Leahy Law. In 2004, after the U.S. intervened in Iraq, President Bush remarked that “[e]very woman in Iraq is better off because the rape rooms and torture chambers of Saddam Hussein are forever closed.” Ending Saddam Hussein’s many human rights abuses was a major selling point of the Iraq War and the Bush administration recognized the importance of the justice served. How, fifteen years later, are we unwilling to prevent continued human rights violations of a similar severity in neighboring Afghanistan? How are we able to justify active monetary funding to known violators in which American tax dollars are used to enable pedophilia?

133 Id.
134 Id.
135 Id.
138 Id.
139 Mondloch, *supra* note 122122.
140 Id.
The current administration has “articulated a vision of foreign policy” that places an emphasis on “America First.” Foreign dignitaries invited to the White House in the past two years “included those with poor reputations on human rights, including Egyptian President Abdel Fattah al-Sisi . . . and Turkish President Recep Erdoğan.” The current administration has also updated its policy in Afghanistan to expand U.S. troops and airstrikes and loosen the rules of engagement on the battlefield. The administration has remained silent on the issue of bacha bazi and the application of the Leahy Law, however, despite demands from congressional members to explain our continued presence in Afghanistan in the face of these atrocities. Alarmingly, the U.S. chose to depart early from the United Nations Human Rights Council, effective June 19, 2018. All of these facts point to the U.S. moving in the wrong direction with respect to bacha bazi and failing to recognize our duty as decent human beings to protect underage boys. Through the advancement of a foreign policy that avoids an emphasis on human values, which may “create[ ] obstacles to [] our national interests,” the U.S. is sending a message to oppressed people across the world that they should not “look to the United States for hope.” Increasingly, the current administration is moving toward “forging relationships with [] oppressors” in order to “serve [] security and economic interests.”

If the current administration will not alter its stance on human rights violations in Afghanistan in order to maintain power in the region, then Congress must pressure the White House for change. Congress created the “notwithstanding clause” providing a loophole to the Leahy Law, and Congress holds the power to change it. First, Congress should pen a letter to the President demanding change, similar to that which was written to Secretary of State Henry Kissinger regarding “strong opposition to providing military assistance to repressive governments.” The letter reads, in part, as follows:

In the absence of extraordinary circumstances, we do not believe that long-term U.S. foreign policy interests are served by maintaining supportive relationships with oppressive governments, especially in the military field, since military power is directly associated with the exercise of governmental control over the civilian population.

163 Id.
164 Id.
168 Id.
169 See Nordland, supra note 2.
Unless U.S. foreign policies—especially military assistance policies—more accurately reflect the traditional commitment of the American people to promote human rights, we will find it increasingly difficult to justify support for foreign aid legislation to our constituents.\(^{171}\)

This letter should be published to the American people in an effort to show that Congress is mindful that by providing support to Afghan security forces, the U.S. military and the American people could be viewed as complicit in the human rights abuses. The outspoken Senator Rand Paul should work closely with his Kentucky Senatorial counterpart, Senate Majority Leader Mitch McConnell, to raise awareness of bacha bazi among their peers and in the White House. Only with increased knowledge of these violations can change be made. The U.S. should not continue to pursue a foreign policy inconsistent with the values of the American people. The executive branch has historically fluctuated on its stance with regards to human rights and foreign policy, “depending on who occupied the White House.”\(^{172}\) Persistence and congressional attention to issues is essential to success in stopping the continued support of the oppressive Afghan regime and its violations. Concern for international human rights runs deep in the members of Congress, and they have the ability to create a movement to put an end to bacha bazi. U.S. government funding of Afghan security forces must be stopped until bacha bazi has ended.

Finally, in accordance with the Siger report, the Secretary of Defense should “[e]stablish and implement a records management policy for all alleged gross violations of human rights in Afghanistan.”\(^{173}\) The Secretary of Defense should then be held responsible for maintaining that documentation and ensuring its credibility.\(^{174}\) The Ambassador to the United Nations should have access to this information at all times in order to ensure we are sharing information with our NATO counterparts who are also serving in Afghanistan.

VI. CONCLUSION

In conclusion, “[i]t is evident that despite the efforts of international organizations such as the United Nations” to advance “their capacity to monitor and report” human rights violations in international conflicts, the fact remains that the offenders are rarely held liable for their crimes.\(^{175}\) Abuses in Afghanistan are widespread and virtually unchecked, leading to the exploitation of thousands of young boys. Both the international community as well as the U.S. government have failed to protect them, and the reprehensible practice of bacha bazi will continue unless swift action is taken. The current U.S. administration seems unwilling to take a stance in which it prioritizes the protection of human rights over that of national

\(^{171}\) \textit{Id.} at 388 (quoting Letter from Donald M. Fraser et. al., U.S. Cong., to Henry A. Kissinger, U.S. Sec'y of State (Sept. 18, 1974)).

\(^{172}\) Snyder, \textit{supra} note 170, at 397.


\(^{174}\) \textit{Id.}

\(^{175}\) Martin & Shaheen, \textit{supra} note 4, at 195.
interests and foreign policy. The stance that the American people and our national interests should take precedence over the interests of non-Americans, or "America First," is compelling. Our wealth and power as a nation, however, is not encumbered "by the demands of international justice, societal morality, and a conscience." By denying justice to the underage boys of Afghanistan and failing to hold their oppressors accountable for their criminal actions, we deny their aspirations for hope. And worse, we "invite their enduring resentment." Congress has both the ability and desire for change. They must honor the provisions of the Leahy Law by reversing their decision under the "notwithstanding clause" and its 2018 progeny to remove an exception granting continued monetary support for Afghan security forces with credible instances of gross human rights violations. "With the looming withdrawal of NATO troops and a persistent insurgent threat, Afghanistan is in a precarious position." Notwithstanding the other issues surrounding the country, U.S. foreign policy must prioritize human rights. This is the start of the recovery of Afghanistan and its development into a functional nation.

176 McCain, supra note 167.
177 See id.
178 Id.
179 Mondloch, supra note 122.