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CRIMINAL LAW

PUBLIC RECORDS AREN'T PUBLIC: SYSTEMIC BARRIERS TO MEASURING COURT FUNCTIONING & EQUITY

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In a new era of computational legal scholarship, computational tools exist with the capacity to quickly and efficiently reveal hidden inequalities in the criminal legal system. Technically, laws exist that legally entitle the public to the requisite court records. However, the opaque bureaucracy of courts prevents us from connecting the public to documents they have a right to access. We exemplify this legal ethical problem by investigating areas of law where codified protections against inequalities exist and where computational tools could help us understand if those protections are being enforced. In general, the computational requirements of such projects needn't be complex, making them even more attractive as solutions for auditing legal system processes. Using the backdrop of a national audit of public records policies to retrieve criminal jury trial transcripts, we establish the impossibility of securing the public records needed to quantify the illegal use of racially motivated peremptory strikes. We argue that the lack of opacity or availability of these policies serve as a bottleneck to the relatively simple computational process of quantifying previously unknown language and events in criminal jury trials. This Article considers the ethical implications of the lack of access to records that are legally public and

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considers how this lack of access to records becomes an access to justice problem.

INTRODUCTION

The nascent field of computational law has grown dramatically in recent decades, with an interdisciplinary universe of scholars tackling a variety of theoretical and empirical projects that consider both law-as-code and law-as-data. Law professors Frankenreiter and Livermore name and distinguish these two trends in computational legal analysis as the project of modeling law as a set of rules (law-as-code) versus the project of extracting information from legal text to apply to other research problems (law-as-data).[1] Here, we focus more specifically on applications of law-as-data, but more generally argue that there is a system-level problem constraining both types of legal analysis that has yet to be dealt with.

[1] Jens Frankenreiter & Michael A. Livermore, *Computational Methods in Legal Analysis*, 16 ANN. REV. L. & SOC. SCI. 39, 41 (2020).

Previously, large-scale computational legal analytics faced significant limitations in computational efficiency, cost of computing resources, and data availability. However, today, the current climate of technological, scientific, and methodological innovations have made it uniquely viable to study law computationally.[2] Importantly, this digital era has brought with it massive increases in digital data storage and the increased attentions of social and legal scholars who endeavor to specifically harness that data using innovative computational techniques.[3] Consequently, a substantial amount of computational legal analysis has been undertaken in a short time. This work includes projects to obtain mass-scale legal source data, create new crosswalks of large institutional legal data, and analyze the substance of that legal data.[4]

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[2] *See generally* RYAN WHALEN, COMPUTATIONAL LEGAL STUDIES: THE PROMISE AND CHALLENGE OF DATA DRIVEN RESEARCH 1–8 (2020) (presenting a volume exploring and introducing computational legal studies in part due to the specific contemporaneous inflection point between law and computation today).

[3] *See* Martin Hilbert & Priscila López, *The World's Technological Capacity to Store, Communicate, and Compute Information*, 332 SCIENCE 60, 64 (2011); MATTHEW J. SALGANIK, BIT BY BIT: SOCIAL RESEARCH IN THE DIGITAL AGE 3 (2019).

[4] *See, e.g.*, Adam R. Pah, David L. Schwartz, Sarah Sanga, Zachary D. Clopton, Peter DiCola, Rachel Davis Mersey, Charlotte S. Alexander, Kristian J. Hammond & Luís A. Nunes Amaral, *How to Build a More Open Justice System*, 369 SCIENCE 134, 136 (2020) (using open-source data from the Systematic Court and Litigation Events data to demonstrate inconsistency in fee waiver decisions and argue for increased court data transparency); Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from* Booker, 89 N.Y.U. L. REV. 1268, 1303–04 (2014) (creating a cross walked dataset covering nearly 400,000 criminal defendants to study sentencing disparity); Maria-Veronica Ciocanel, Chad M. Topaz, Rebecca Santorella, Shilad Sen, Christian Michael Smith & Adam Hufstetler, *JUSTFAIR: Judicial System Transparency Through Federal Archive Inferred Records*, 15 PLOS ONE 1, 6 (2020) (introducing JUSTFAIR or the Judicial System Transparency through Federal Archive Inferred Records, a large scale, cross walked, free public database of 600,000 records); Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 630 (2008) (using R, an open-source software system for statistical computations and graphics, to analyze the length of majority opinions from 1791 to 2005); Wolfgang Alschner, *The Computational Analysis of International Law*, *in* RESEARCH METHODS IN INTERNATIONAL LAW 203 (2021) (reviewing computational techniques optimal for the study of international law and calling for adding computer science methodology to legal scholarship); Benjamin E. Lauderdale & Tom S. Clark, *The Supreme Court's Many Median Justices*, 106 AM. POL. SCI. REV. 847, 850–52 (2012) (using kernel-weight optimal classification to weight justices' votes by both chronological closeness and substantive similarity); Daniel Martin Katz & Michael James Bommarito II, *Measuring the Complexity of the Law: The United States Code*, 22 A.I. & L. 337, 344–45 (2014) (offering a new framework for measuring legal complexity); Michael

At the same time as this rise of computational legal studies, various courts have publicly announced their intention to make their data more public and transparent, particularly concerning criminal courts and felony case processing. In 2018, Florida announced a new public data portal that would track criminal defendants through the system with the intention of identifying inequities.[5] In 2021, the Ohio Criminal Sentencing Commission unveiled the Ohio Sentencing Data Platform in order to collect and share data about sentencing for felony cases.[6] In Cook County, Illinois, home to Chicago and one of the largest felony criminal courts in the country, the State's Attorney's Office has recently announced a commitment to data transparency and released a substantial amount of criminal data via the Cook County State's Attorney Open Data Portal (CCODP).[7] Through this portal, any member of the public can download and access datasets on felony case initiation, intake, diversion, disposition, and sentencing for all cases processed in Cook County Courts. Such initiatives paint a rosy picture—a picture where public data access seems to have opened up at the same time as technology has coalesced to make meaning of that data on a larger scale.

However, we argue that these initiatives have not been sufficient principally because they do not attempt to reimagine the contours of what public data actually is. These data portals have limited types of data available

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Evans, Wayne McIntosh, Jimmy Lin & Cynthia Cates, *Recounting the Courts? Applying Automated Content Analysis to Enhance Empirical Legal Research*, 4 J. EMPIRICAL LEGAL STUD. 1007, 1024–27 (2007) (testing various text classification models for determining content in Supreme Court advocacy briefs); David S. Law, *The Global Language of Human Rights: A Computational Linguistic Analysis*, 12 L. & ETHICS HUM. RTS. 111, 121–23 (2018) (using topic modelling and natural language processing to study language similarity in national constitutions and human rights instruments); Thomas Margoni, *Text and Data Mining in Intellectual Property Law: Towards an Autonomous Classification of Computational Legal Methods* 18 (CREATe, Working Paper No. 1, 2020) (discussing the classification of new computational legal methods and advocating for their teaching in law school curricula).

[5] Josh Salman, '*A Treasure Trove of Information': Data Collection Bill Will Make Florida the Most Transparent State in the Nation*, HERALD-TRIBUNE (Mar. 12, 2018, 5:06 PM), https://www.heraldtribune.com/story/news/local/sarasota/2018/03/12/bill-will-make-florida-most-transparent-state-in-nation/13004841007/ [https://perma.cc/L9LW-WSXJ].

[6] *See* Laura A. Bischoff, *Ohio Court Data Project Promises to Bring Transparency, Improve Justice in Felony Cases*, COLUMBUS DISPATCH (Oct. 4, 2021, 2:51 PM), https://www.dispatch.com/story/news/2021/10/04/ohio-sentencing-data-platform-tested-improve-court-transparency/5992267001 [https://perma.cc/AY2Q-53N9]; *see also Ohio Sentencing Data Platform*, OHIO CRIM. SENT'G COMM'N, https://www.ohiosentencingdata.info [https://perma.cc/7Q44-SGNW].

[7] *Cook County State's Attorney Open Data Portal*, COOK CNTY. STATE'S ATT'Y, https://www.cookcountystatesattorney.org/about/open-data [https://perma.cc/6MDG-Y7QZ].

and leave significant gaps. Critical sources of dynamic data that are already legally public continue to be de facto inaccessible to the public. Consequently, we argue that a critical bottleneck in both public access to data and computational legal analysis continues to be a practical barrier to access that the courts have not alleviated. This is particularly acute surrounding particular types of public data.

In this Article, we look at one particularly rich and promising source of already legally public criminal data—criminal jury trial transcripts. We begin ewith a review of the legal limitations to public data access and with a discussion of what data is, practically speaking, public. We consider the current system of data access under a managerialized rights framework, where laypeople are required to take unjustifiably onerous steps to enact their rights. We then turn specifically to court transcripts as a rich data source demonstrating how courts generate and reify inequality, though these capacities of transcript data remain obscured by their inaccessibility. We then conduct an exploratory audit of court transcript data procurement policies across over 3,000 U.S. counties and draw thematic conclusions about de facto barriers to public access. We conclude with a discussion of how courts' approaches to public data need to change in the future, particularly in ways that lessen the burden on the public to access records they are legally entitled to.

I. DATA RIGHTS VS. DATA ACCESS

A. LEGAL RIGHTS TO PUBLIC DATA

In the United States, the public has a right to access court proceedings and court records.[8] In *Nixon v. Warner Communications*, the Supreme Court affirmed this right, stating, "[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."[9] These rights have been reified consistently in

[8] *See* Ronald D. May, *Public Access to Civil Court Records: A Common Law Approach*, 39 VAND. L. REV. 1465, 1466–92 (1986); JAMES M. CHADWICK, ACCESS TO ELECTRONIC COURT RECORDS: AN OUTLINE OF ISSUES AND LEGAL ANALYSIS, BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., OFFICE OF JUST. PROGRAMS 2 (June 2001), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/legal-issues.pdf [https://perma.cc/9R9N-GXXR] (detailing case history that enshrines these public rights and extends them to electronic versions of records).

[9] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).

courts across the country in the intervening decades. In the landmark case on the issue, *Richmond Newspapers v. Virginia*, the Supreme Court asserted that the First Amendment gives the public a constitutional right of access to criminal trials.[10] This was affirmed in *Globe Newspaper Company v. Superior Court*.[11] Both cases focused specifically on trial attendance rather than records, but despite this focus, cases citing these decisions quickly expanded their focus to right to access and examine court records. Notably, *Associated Press v. District Court* held that the First Amendment required the court to provide pretrial records.[12] This is not to say that courts did not present any curtailing of these rights to access. Indeed, courts specified that lower courts had considerable discretion and advisory power over their own files and records.[13] This string of decisions, and debates surrounding the First Amendment continue to be brought before courts in the present day, as legal questions surrounding access to electronic court records in particular have become more pressing.[14]

B. REALITIES OF PUBLIC DATA ACCESS

These legal protections for public access to criminal court data are staunchly juxtaposed with the realities of public data access. We must differentiate two types of public data to fully understand this dichotomy—de jure public data and de facto public data. Here, we define de jure public data as data that is legally public. In keeping with the precedential cases described above, vast swaths of criminal court data are de jure public data. The Administrative Office of the United States Courts has clarified that there are some limitations to this overall legality; for instance, there are some situations in which data that would normally be public can legally be kept from the public. They described the contours of these situations, saying,

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[10] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 556–57 (1980).

[11] Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 601 (1982).

[12] Associated Press v. U.S. District Court, 705 F.2d 1143, 1148 (9th Cir. 1983).

[13] See May, *supra* note 8, at 1469, who provides some examples of this advisory power, writing, "For example, the Court would not allow the use of judicial records either to satisfy 'private spite or [to] promote public scandal 'or as a 'source of business information that might harm a litigant's competitive standing.' Finally, the Court indicated that the decision whether to allow access to judicial records generally is best left to the sound discretion of the trial judge because of his ability to weigh all the relevant factors in light of the facts of a particular case."

[14] CHADWICK, *supra* note 8, at 7–9.

> In certain circumstances, judges have the authority to seal additional documents or to close hearings that ordinarily would be public. Reasons can include protecting victims and cooperating informants and avoiding the release of information that might compromise an ongoing criminal investigation or a defendant's due process rights.[15]

This description further indicates that most criminal court data is not occasionally public, but rather ordinarily or presumptively public. In this Article, we are not substantially concerned with the limited pool of data that is defensibly and legally considered not public.[16] This is a very small pool with exceptional constraints, and to be overly focused on it at this analytic juncture would dismiss the larger systemic problem.[17] Instead, we are intentionally interested in data that is ordinarily public. Even though this data is de jure public, and its status is not technically fraught in any way, that does not mean it is practically possible for laypeople or researchers to obtain. It is worth noting that the case law begins to establish the contours of the right to access public records insofar as what documents and events are public and theoretically accessible but does not specify the mechanism through which that right can be enacted. Indeed, we argue that much of the data legally defined as public data is de facto nonpublic data because of substantial barriers to access. In this way, we differentiate between public data and publicly accessible data by considering what these barriers to access are and how those barriers themselves contribute to enduring cycles of inequality in U.S. courtrooms.

We are not the first scholars to question the veracity and practicality of the term 'public record.' Particularly in the context of the tension between data privacy and data transparency, scholars have asked how public these public records really are for over two decades.[18] We extend this body of work

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[15] *Accessing Court Documents—Journalist's Guide*, U.S. CTS., https://www.uscourts.gov/statistics-reports/accessing-court-documents-journalists-guide [https://perma.cc/N6YW-7ZZB].

[16] As per the Administrative Office of the United States Courts whom we cite above, this pool includes protecting cooperating informants or steps necessary to protect victims. This restricted data may also include some vulnerable groups like minors. This data is also important but is not the focus of the Article to follow.

[17] That is to say, we do not want to become so focused on these edge cases, some that are not public for legitimate protective reasons, that we ignore the larger problem that pertains to the majority of records that are public.

[18] *See* Victoria S. Salzmann, *Are Public Records Really Public?: The Collision Between the Right to Privacy and the Release of Public Court Records Over the Internet*, 52 BAYLOR

by contemplating public data access using a framework of managerialized rights. Popular in studies of employment and, more recently, Title IX policy, the managerialization of rights requires individuals to act on their own accord to secure protection of their rights from a larger institution.[19] This is because the rights exist but are not formally mechanized or handled by the grantor of the rights. As a result, the grantee must manage them. In this way, protection or enactment of individual rights becomes a significant burden for the claimant rather than for the institution that is legally required to protect the rights of the claimant.

Scholars in this area clarify a number of stable features of managerialized rights processes, two of which are especially salient here. First, managerialized rights are often characterized by a group of people whose rights have been violated but who are not vindicating those violated rights due to institutional barriers.[20] Second, these rights are not self-

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L. REV. 355 (2000) (providing an overview of how FOIA, the right to privacy, and court decisions interact with electronic record rights and problems derivative of their disclosure).

[19] *See generally* Jeb Barnes & Thomas Burke, HOW POLICY SHAPES POLITICS: RIGHTS, COURTS, LITIGATION, AND THE STRUGGLE OVER INJURY COMPENSATION (2014) (arguing that adversarial legal processes individualize politics, which further reifies the importance and impact of managerialized rights); ELLEN BERREY, THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE (2015) (demonstrating how invocation of diversity can function to resist fundamental change in culture and practices); ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY (2017) (explaining how contemporary approaches to workplace discrimination law actually function to reinforce discrimination via managerialized rights); THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS (2004) (reconceptualizing 'litigousness' as a byproduct of creating policies requiring litigation while simultaneously struggling to limit litigation); Frank Dobbin & Alexandra Kalev, *Training Programs and Reporting Systems Won't End Sexual Harassment. Promoting More Women Will*, 70 HARV. BUS. REV. 687, 691–92 (2017); Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, 94 HARV. BUS. REV. 14, 20 (2016); LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS (2016) (unpacking reasons for the limited success of antidiscrimination policies and tying the origins of this failure to ambiguous laws that allow managers to shape their meaning in daily practices); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOCIO. 1531 (1992) (describing how ambiguity in laws regulating employment give organizations the ability to design "compliance" in a way that preserves managerial interests).

[20] *See generally* BERREY ET AL., *supra* note 19 (explaining how contemporary approaches to workplace discrimination law actually function to reinforce discrimination via managerialized rights); KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (rev. ed. 1992) (focusing on how the social identity of victims

enforcing and are enforced differently depending on how the parties are related.[21]

When applying the key features of managerialized rights to the data access issues we discuss here, we first recognize the public as legally entitled to public court records. However, the public is largely not vindicating their right to obtain these documents. This can be explained by several factors, including a lack of knowledge of their right, a lack of understanding of opaque legal processes, a lack of detailed information necessary to initiate requests, or financial barriers to sustaining requests. This right to public records is also enforced differently across jurisdictions with different policies and is also differently accessible to different people. For instance, a law student might know more about contacting a county clerk than other people. Perhaps a private lawyer with a lucrative practice may be more able to financially afford records requests than other people, even more than other legal actors. In both hypotheticals, someone with fewer resources or less knowledge who has an equal right to see the data—data that may be the surest way to reveal patterns of harmful behavior—faces significant and unequal obstacles in vindicating their rights. Managerialized rights are therefore an access-to-justice problem because they shift the burden for protection to the exploited party who is often powerless in the face of the larger institution.

This conceptualization is a useful one for considering the relationship between the public and supposedly public data because it helps interpret barriers to public access. Despite court records being de jure public, the current structure places the onus almost entirely on the requestor. We argue that the process by which court records are requested requires that individuals

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limits individual choices and how the structure of antidiscrimination law perpetuates victimization); DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003) (explaining how civil rights play a role in the lives of individuals who have experienced discrimination despite not filing a claim under the Americans with Disabilities Act); William L. F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631, 631 (1980); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 663–64 (2005).

[21] *See generally* CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE (2010) (showing how institutional and social practices transform Family and Medical Leave Act rights to recreate inequality); David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 L. & SOC'Y REV. 551, 551 (1984).

who seek court records have specialized knowledge of where to obtain the records, have specialized knowledge about the individual cases that they seek records of, have sufficient financial resources to procure the records, and follow whatever local procedure the court deems necessary to obtain those records. Individuals have theoretical legal access to these records, but substantial practical barriers prevent actual access.

Take for example, the "Public Access to Court Electronic Records," or PACER system, maintained by the federal judiciary. This system touts itself as a public records service that provides the public with "instantaneous access to more than 1 billion documents filed at all federal courts."[22] However, we argue that this access comes at a price. There are two major roadblocks in this system: first, the logistical and procedural difficulty of PACER and, second, the cost of accessing records.[23] First, an interested user has to be aware of PACER and must know if the types of documents they seek are available through PACER at all. They must also request an account on the PACER website and wait several business days for their log-in information to be mailed to a physical address.[24] Furthermore, an interested user has to have enough information about a given case to motivate a search through the PACER portal which may include information outside of the experience of the lay user, such as docket numbers.

Second, and relatedly, the interested user has to be financially able to see their request through. PACER charges a minimum ten cents per page, including calculating bill-able pages out of HTML-formatted information.[25] This may not sound like a lot, but PACER builds in charges that functionally penalize users who are less knowledgeable. If, for example, a user was to enter a party name that yielded multiple matches, they would be charged for

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[22] PACER, https://pacer.uscourts.gov/ [https://perma.cc/V922-QK6E] (under "Frequently Asked Questions," select "What is PACER?").

[23] For some specific examples of how PACER use can be confusing or frustrating to the layperson, see Seamus Hughes, *The Federal Courts are Running an Online Scam*, POLITICO (Mar. 20, 2019), https://www.politico.com/magazine/story/2019/03/20/pacer-court-records-225821/ [https://perma.cc/PS4P-CFA8].

[24] PACER, *PACER – Case Search Only*, https://pacer.uscourts.gov/register-account/pacer-case-search-only [https://perma.cc/N6W6-88W3] (noting that if a user does not pay with a credit card, they will have to wait for log-in information to be mailed to them).

[25] *PACER Pricing: How Fees Work*, PACER, https://pacer.uscourts.gov/pacer-pricing-how-fees-work [https://perma.cc/VU7G-RQYP].

every resultant match, not just for the data that they actually wanted.[26] In this way, courts have continued to endorse a fee structure that makes public court records practically inaccessible to most of the public under the guise of increased accessibility. Notably, this does not necessarily serve to protect individuals' personal information, as personal information has been monetized by companies who are willing to share data the court obscures—for a fee.[27] As we will discuss, this problem extends beyond PACER and permeates the United States criminal legal system more broadly.

The courts seem to provide additional access options to this data for free, perhaps suggesting a commitment to public access. The website for the Administrative Office of the U.S. Courts says, "Electronic records can be viewed in the clerk of court's office for free, as can any paper records that have not been destroyed or transferred to the National Archives. But per-page fees are charged for printing or copying court documents in the clerk's office."[28] In this version of public access, a member of the public must secure both time and transport to the clerk of the court's office, and they must hope that the documents they want have not been destroyed. If those documents do exist, they must still pay per page for copies of them, which not only fails to alleviate the burdens to the public that already exist through the online system, but also exacerbates those burdens.

Therefore, much like other examples of managerialized rights, a member of the general public who wishes to exercise their rights to see court records is responsible for taking on the onus of the request, for procuring specialized knowledge about the request, and for financially sponsoring their request, even in error. Notably, while these per-page fees might seem small if executed correctly, court records are notoriously lengthy with court transcripts alone easily stretching into over a hundred pages in a single case. This fee structure then makes it nearly impossible to collect court records at the scale necessary to audit various elements of the justice system even if the expert knowledge to complete a mass-scale request is known. The Systematic Content Analysis of Litigation Events Open Knowledge Network (SCALES OKN), a group who aims to procure and disseminate public records,

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[26] PACER, https://pacer.uscourts.gov [https://perma.cc/V922-QK6E] (under "Frequently Asked Questions," select "How much does it cost to access documents using PACER?").

[27] Arminda Bradford Bepko, *Public Availability or Practical Obscurity: The Debate Over Public Access to Court Records on the Internet*, 49 N.Y.L. SCH. L. REV. 967, 982 (2004).

[28] *Accessing Court Documents – Journalist's Guide*, U.S. CTS., https://www.uscourts.gov/statistics-reports/accessing-court-documents-journalists-guide [perma.cc/N6YW-7ZZB].

estimates that procuring the documents for a single year of partial data costs over $100,000.[29] This further demonstrates the reality that de jure public records are actually de facto nonpublic records.

II. COURT TRANSCRIPTS AS PUBLIC DATA

We turn now to an analysis of one particular type of public data, criminal jury trial transcripts, that is particularly disadvantaged by the current system of managerialized record retrieval. Court transcripts are unlike other types of court data in that they capture rich rhetorical data about court proceedings and contain records of various process actions that are not recorded in other types of court documents.[30] They also contain and can be mined for basic procedural and substantive data that is not necessarily otherwise collected or distributed. The outcome of this data processing is datasets of information, some of it very basic, that are otherwise not aggregated. Court transcripts also vary substantially from other types of court record by being indeterminately lengthy and virtually excluded from even the paid public records services currently offered by many courts. We are not the first to encounter this problem. Notably, other scholars who study the universe of criminal record and criminal court data specifically point to transcripts as some of the most logistically and financially difficult court records to obtain.[31]

A. CASE STUDY: COOK COUNTY, ILLINOIS

Explaining the trouble of procuring criminal jury transcripts is most easily done via example, so here we consider Cook County, Illinois, to exemplify the range of access-to-justice problems with court transcripts. As we move through this example, it should be noted that Cook County varies from many of its contemporaries by actually having a policy through which one can clearly request court transcripts. The difficulty in obtaining

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[29] Pah et al., *supra* note 4, at 136.

[30] *See* David DeMatteo, John F. Edens, Meghann Galloway, Jennifer Cox, Shannon Toney Smith, Julie Present Koller & Benjamin Bersoff, *Investigating the Role of the Psychopathy Checklist–Revised in United States Case Law*, 20 PSYCH., PUB. POL'Y & L. 96, 105 (2014) (arguing that trial transcripts would allow researchers access to study cases that do not result in written opinions).

[31] David Bright, Russell Brewer & Carlo Morselli, *Using Social Network Analysis to Study Crime: Navigating the Challenges of Criminal Justice Records*, 66 SOC. NETWORKS 50, 54 (2021).

transcripts starts with the reality that even basic facts about the workings of the criminal legal system are opaque. This problem is so egregious that even the number of criminal trials in Cook County is not readily communicated to the public. The Administrative Office of Illinois Courts Annual Report states that of the small percentage of cases that went to trial, only 10% went to a jury trial, while the other 90% went to a bench trial.[32] It is much more difficult to find out what the raw number of such cases generally is, much less which cases they are specifically. This becomes crucial because of the burden placed on the public when requesting court transcripts that we argue are uniquely necessary to reveal the frequency of certain events in the legal system, like racially motivated peremptory strikes.

Taking on the role of a member of the public who wishes to procure a court transcript, one might begin by googling something like "cook county court transcript." At the time of this writing, the first result conveniently led to the Clerk of the Circuit Courts page which contained an empty webpage containing two clickable buttons, labeled "Contact Information" and "Transcript Orders & Rates," both of which are revealed to do absolutely nothing (see Figure 1).[33]

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[32] Press Release, Circuit Ct. of Cook Cnty., Trials and Other Criminal Proceedings in Cook County Have Continued Through Pandemic (Apr. 20, 2021), https://www.cookcountycourt.org/MEDIA/View-Press-Release/ArticleId/2836/Trials-and-other-criminal-proceedings-in-Cook-County-have-continued-through-pandemic [https://perma.cc/85EW-G933]. Here we cite a 2019 statistic, before COVID-19 related functioning disruptions given by the Circuit Court of Cook County. In the same release, they state that nationally 92% of felony cases are resolved via dismissal or guilty pleas and imply Cook County is similar, but do not state so explicitly.

[33] *See About the Court*, STATE OF ILLINOIS CIR. CT. OF COOK CNTY., https://www.cookcountycourt.org/ABOUT-THE-COURT/Office-of-the-Chief-Judge/Court-Related-Services/Official-Court-Reporters/Contact-Information (last visited Feb. 11, 2022). This error seems to have been corrected during the editorial process of this Article. Nevertheless, this problem persisted for a significant amount of time and exemplifies technical access issues in navigating court websites, making it a useful example to include here.

Figure 1: Cook County Clerk Transcript Orders and Rates

Returning to Google to add terms and click on seemingly less-related webpages revealed another link marked "Court Reporters" that proved to be the correct path. Unlike its predecessor, this page has transcript information at the bottom.[34] These tabs reveal what types of information you must have to successfully request a single trial transcript. This information includes the date of the hearing, the name of the case, the case number, the branch or courtroom number where the case was heard, and the name of the judge.

Assuming you have all this information, the financial considerations begin. If you opt for copies of the transcript rather than originals, you will be required to pay two dollars per page for transcripts that can easily exceed 100 pages.[35] There is also a tab that touts itself as a guide to instruct you where to go to order the transcript. This guide requires you to know where each individual case was heard, understand the legal terminology, and scroll to the relevant court.[36] The sum of this exercise, then, is to make it clear that even requesting one single transcript is confusing, expensive, and obfuscated by

[34] *Official Court Reporters*, STATE OF ILLINOIS CIR. CT. OF COOK CTY., https://www.cookcountycourt.org/ABOUT-THE-COURT/Office-of-the-Chief-Judge/Court-Related-Services/Official-Court-Reporters [https://perma.cc/A4G7-WBVL].

[35] The page indicates that exceptions are made for indigent defendants, specifying that "[c]opies for indigent defendants are provided free of charge (included in the $4.00 page rate). The same transcript required to be filed later for subsequent appeal(s) may be charged at the copy rate." *Id.*

[36] *Id.*

access issues on the part of the court. This labyrinthian process for obtaining a single transcript is not scalable. It becomes even more implausible to consider that a sufficient number of transcripts for computational analysis could be obtained through this process with any sort of efficiency. This means that a relatively simple computational project, perhaps requiring only basic natural language processing, is stymied by court processes that turn accessing legally public records into an insurmountable barrier.

Perhaps the most sobering part of this reality is that Cook County stands above many of its peers by having a specific and public-facing transcript policy at all. As we will discuss, the difficulty is substantially higher in other counties across the United States. Much like the managerialized rights framework with which we considered public data access above, the burden on a member of the general public to exercise their right to inspect public criminal trial transcripts is high, even in a location like Cook County which offers some process and some public information about that process. As we reveal in this Article, public information about transcript retrieval processes is rare, further compounding the access problems to the records and our ability to study justice problems uniquely discernable from criminal jury transcripts.

Consequently, there is limited research using court transcripts, and what research has been done is often limited to particular cases or small sample sizes. Among the larger transcript sample sizes in the United States found by these authors was work by Boothroyd et al., who analyzed 104 transcripts; Belli et al., who analyzed 15 transcripts; and Hoppe, who analyzed 43 transcripts.[37] While these studies make good use of the transcript data, it is clear that the stopgap preventing further analysis of court transcripts is not manual efficiency, much less computational efficiency, but is rather access to supposedly public documents. With increased ability to request and obtain court transcripts, we can exponentially increase the universe of potential analysis and make use of new computational legal techniques to study the contents of those transcripts, analyzing thousands, or tens of thousands,

[37] Roger A. Boothroyd, Norman G. Poythress, Annette McGaha & John Petrila, *The Broward Mental Health Court: Process, Outcomes, and Service Utilization*, 26 INT'L J. L. & PSYCHIATRY 55, 57 (2003); Roberta Belli, Joshua D. Freilich, Steven M. Chermak & Katharine A. Boyd, *Exploring the Crime-Terror Nexus in the United States: A Social Network Analysis of a Hezbollah Network Involved in Trade Diversion*, 8 DYNAMICS OF ASYMMETRIC CONFLICT 263, 266 (2015); Trevor Hoppe, *From Sickness to Badness: The Criminalization of HIV in Michigan*, 101 SOC. SCI. & MED. 139, 143 (2014).

rather than dozens at a time. This would allow researchers to analyze the entire data universe, rather than sectioning out small portions of it.

B. CURRENT LIMITATIONS TO KNOWLEDGE DUE TO TRANSCRIPT INACCESSIBILITY

Access to criminal court transcripts would substantially alter what is known about criminal courts, both for interested researchers and the general public who seek to understand the functioning and context of courts. Specifically, transcripts for criminal jury trials would grant access to two different types of information: information on the basic functioning of the court and information on access to justice and equity issues within the court. Although this Article is keenly concerned with the latter, focusing attention to issues of equity with respect to jury selection, it is worth discussing potential insights into the basic functioning of the court and how that, in itself, can be a question of access and equity. We spend significant time here considering how transcripts could be particularly advantageous not to privilege transcripts above other types of currently inaccessible records, but rather to demonstrate how inaccessible records becoming available might alter the terrain of justice. The following is a non-exhaustive account of some of the ways in which access to court transcripts could improve knowledge about the courts.

1. Court Functioning

First, we look to the insights that transcripts could provide on how the court functions. As we discuss in this section, broad insight into patterns and practices of the courts as a system is difficult to obtain. Researchers and policymakers are often limited by time-consuming methodology that is prohibitive to scale for even single major metropolitan areas; ppractitioner interviews and court watching make up most of our current knowledge landscape about the day-to-day functioning of the courts.[38] We offer several

[38] Harvey A. Moore & Jennifer Friedman, *Courtroom Observation and Applied Litigation Research: A Case History of Jury Decision Making*, 11 CLINICAL SOCIO. REV.123, 129 (1993); Nicholas H. Woolf & Jennifer M. J. Yim, *The Courtroom-Observation Program of the Utah Judicial Performance Evaluation Commission*, 47 CT. REV. 84, 87 (2011); Amy Kirby, *Conceptualising Participation: Practitioner Accounts*, *in* PARTICIPATION IN COURTS AND TRIBUNALS: CONCEPTS, REALITIES AND ASPIRATIONS 65, 66–69 (2020); Maria Hawilo, Kat Albrecht, Meredith Martin Rountree & Thomas Geraghty, *How Culture Impacts Courtrooms: An Empirical Study of Alienation and Detachment in the Cook County Court System*, 112 J.

ways in which access to criminal court transcripts could enhance understanding.

The first area is the use and presentation of evidence. Transcripts would offer full insight into when and how evidence is presented, as well as how objections are sustained or overruled. The presentation of evidence obviously has substantial relevance for judicial appeal. The improper presentation of evidence in a criminal case can itself be grounds for appeal.[39] The use of evidence, in other words, is integral to understanding the routine function of the court and the potential stability of convictions and acquittals.

In the jury context, this information would give insight into the rhetorical presentation of technically inadmissible evidence and the frequency with which juries are asked to dismiss the presentation of evidence following a sustained objection. This has substantial implications for understanding courtroom norms on a broad level.

Methodologically, we can currently gain some understanding of the use and presentation of evidence through practitioner interviews and court watching, but transcripts would offer a more robust account. Interviews allow for the collection of practitioner perspectives about evidence, and court watching provides a snapshot of individual cases, but neither offers a robust systemic analysis. Furthermore, a great deal of available contemporary scholarship on the presentation of evidence to juries centers around a relatively narrow area—forensic evidence.[40]

CRIM. L. & CRIMINOLOGY 171, 188–89 (2022) [hereinafter *How Culture Impacts Courtrooms*]; Kat Albrecht, Maria Hawilo, Thomas Geraghty & Meredith Martin Rountree, *Justice Delayed: The Complex System of Delays in Criminal Court*, 53 LOY. UNIV. CHI. L.J. 747, 767–69 (2022) [hereinafter *Justice Delayed*].

[39] This can involve counsel's failure to present evidence, the prosecution's failure to share potentially exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), or the improper consideration of inadmissible evidence.

[40] Here we refer in particular to the well-established literature about the CSI Effect, or the highly debated theory that jurors are unduly influenced by fictional crime television media such that it has meaningfully changed expectations of forensic evidence. *See, e.g.*, Steven M. Smith, Veronica Stinson & Marc W. Patry, *Fact or Fiction? The Myth and Reality of the CSI Effect*, 47 CT. REV. 4 (2011) (reviewing contemporary research about the CSI Effect specifically to differentiate myths from realities about it and conclude that some form of the CSI Effect does exist); Kimberlianne Podlas, *The "CSI Effect" and Other Forensic Fictions*, 27 LOY. LA. ENT. L. REV. 87 (2006) (finding that the CSI Effect does not warrant criminal justice reforms, rather describing it as a rationalization technique used by law enforcement and prosecutorial to explain losses); Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 NEW ENG. L. REV. 435 (2007)

Transcripts would also aid in understanding the general rhetorical presentation of the case to a jury. Currently, we lack a complete account of, for example, the modes of argumentation being made to jurors in opening or closing arguments, which are most reliably gathered from criminal jury trial transcripts. Insight into rhetorical techniques can be gleaned in part through practitioner interviews and court observations. However, practitioner interviews can truly only give insight into how practitioners conceptualize their own rhetorical techniques, not how they are presented to an audience or interpreted in context. Court observations are limited in their overall scope: We are unable to truly see the court as a system through this limited mode of data collection. Further, researchers should not need to expend additional resources when this information is theoretically available via public documents.

A rhetorical analysis of opening and closing arguments would allow for an understanding of what types of arguments practitioners present as effective for juries or what universe of arguments they present as available for presenting to juries. This tells us not what juries do or do not respond to, but what lawyers actually use in practice, presumably under the assumption that it would be persuasive. This is not to say that scholars have not

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(arguing that there is nuance to the CSI Effect and that it represents the moral/mathematical certainty dichotomy undergirding reasonable doubt standards); Simon A. Cole, *A Surfeit of Science: The "CSI Effect" and the Media Appropriation of the Public Understanding of Science*, 24 PUB. UNDERSTANDING SCI. 130 (2015) (suggesting that the CSI Effect discourse itself is important in understanding how claims about the validity of the CSI Effect (in both directions) are grounded in the same type of privileged access to science); Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 YALE L. J. POCKET PART 70 (2006), https://www.yalelawjournal.org/forum/the-csi-effect-fact-or-fiction [https://perma.cc/2PUR-743R] (surveying attorneys in Maricopa County and finding that prosecutors expressed belief in the CSI Effect and its impact on their cases); Donald E. Shelton, *The 'CSI Effect': Does It Really Exist?*, 259 NAT'L INST. JUST. J. 1 (2008) (evaluating whether or not the CSI Effect has tangible effects on justice outcomes and finding that while CSI viewers had higher expectations of scientific evidence, these expectations were not significantly related with odds of conviction); Young S. Kim, Gregg Barak & Donald E. Shelton, *Examining the "CSI-Effect" in the Cases of Circumstantial Evidence and Eyewitness Testimony: Multivariate and Path Analyses*, 37 J. CRIM. JUST. 452 (2009) (empirically testing whether the CSI Effect can be demonstrated and concluding that there is not sufficient evidence to require a change in criminal litigation or procedural practices); State v. Cooke, 914 A.2d 1078, 1083–88 (Del. Super. Ct. 2007); N. J. Schweitzer & Michael J. Saks, *The CSI Effect: Popular Fiction About Forensic Science Affects the Public's Expectations About Real Forensic Science*, 47 JURIMETRICS 357 (2007) (finding that viewers of CSI were more likely to be skeptical of forensic evidence at trial).

undertaken this task, but to our knowledge, it has not been undertaken at the scale that computational text analysis of a large corpus of transcripts would permit.[41]

This would also allow for an understanding of how practitioners present technical or specific legal jargon. How do they unpack what has happened, or what is about to happen, in layman's terms for a jury that is unlikely to be made up of fellow practitioners? What type of work is being done to allow these factfinders to make accurate legal decisions—and how might that interplay with certain strategic considerations? The answers to both of these questions involve the rhetorical presentation to the jury and can have substantial implications for the efficacy of the criminal legal system. The presentation of technical information speaks to the jury's fundamental understanding of their task and whether they are able to do it effectively.

Finally, a complete set of transcripts would allow for a more complete understanding of delays by specifically analyzing when and how continuances are issued. Currently, we can understand some continuances through practitioner and stakeholder interviews, as well as court observations.[42] Again, what we lack is a systemic analysis of when and where continuances occur. Being able to analyze a complete universe of data to point to patterns in moments—if they always happen because one party is not present or because paperwork has not been properly transferred between divisions or departments—allows for a better understanding of systemic failures.

Although the use of continuances is a regular court function, delays are a matter of equity and access to courts.[43] Continuances or delays mean more court appearances, which has the snowballing effect of increased logistical issues for litigants, witnesses, or defendants, including taking (more) time off from work, finding (more) childcare, and obtaining (more) transportation to

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[41] *See* Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55, 55 (1992); Philip N. Meyer, *"Desperate for Love II": Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case*, 30 UNIV. S.F. L. REV. 931, 931(1996) (undertaking the in-depth study of a single case); *see also* Candice D. Tobin, *Misconduct During Closing Arguments in Civil and Criminal Cases: Florida Case Law*, 24 NOVA L. REV. 35 (1999) (offering a number of instructive and useful examples but not undertaking a specifically empirical analysis).

[42] *See How Culture Impacts Courtrooms*, *supra* note 38, at 188–89; *Justice Delayed*, *supra* note 38, at 767–69.

[43] *Justice Delayed*, *supra* note 38, at 789–90.

and from the courthouse. Furthermore, delays can extend time before trial for criminal defendants, keeping them incarcerated longer.

2. Access and Equity Issues

Additionally, a lack of transparent court data has direct implications for access and equity by substantially limiting work that can be done in several key areas. Although, as we mentioned, some jurisdictions are becoming more public with some data, a good deal of knowledge is currently lacking even in jurisdictions with more robust public data. Key examples of this are the difficulty of studying judicial temperament and demeanor, the difficulty in robustly studying jury instructions (and whether they are understood by the jury), and, in the key case study in this Article, understanding racial discrimination in jury selection.

First, information on judicial temperament and demeanor is difficult to ascertain without complete access to transcripts. Currently, our best understanding of how courtrooms are managed comes from court observations and interviews with practitioners. Although most scholarship does not evaluate judges for competency, understanding how judges manage their courtrooms speaks generally to how litigants, defendants, victims, and witnesses are treated, and can provide substantial insight into where and why systemic issues arise. In other words, a robust evaluation of systemic failures in the courts must necessarily include an evaluation of how judges manage those spaces and treat the people before them.

Second, transcripts could plausibly provide a universe of data on jury instructions and their comprehensibility for the juries. Although questions from jurors pertaining to clarifying the instructions or role do not necessarily go back on the record, this is an area that could conceivably appear on transcripts. Without, first, a full collection of public transcripts, it is difficult to ascertain the rate at which such questions go on record. Some questions are unlikely to be fully answered given the overall judicial reticence to do so.[44] Having potential access to the universe of questions that are asked repetitively can provide insight into areas where those particular instructions fail to actually *instruct* juries.

Finally, having a comprehensive set of data on the voir dire portion of criminal jury trials would allow for a comprehensive understanding of jury

[44] Nancy S. Marder, *Jury Reform: The Impossible Dream*?, 5 TENN. J. L. & POL. 1, 20 (2014) (finding that are "reluctant to intrude on the province of the jury," particularly when it comes to questions about how juries ought to deliberate).

selection—specifically the use of racially motivated peremptory strikes—post-*Batson*. A peremptory strike, or peremptory challenge, is a special challenge parties can exercise before trial that allows for the exclusion of potential jurors unless the opposition makes a prima facie case of discrimination on the basis of a protected category (race, ethnicity or sex).[45] We discuss this example in some depth because it is the only such example whereby the public—through journalists—had unique access to a large volume of criminal trial transcripts.

In 1986, the United States Supreme Court held in *Batson v. Kentucky* that the prosecutor could not strike Black jurors on the basis of race without providing a neutral reason for the strike.[46] The Court held that to do so would undermine the public perception of fairness in the criminal legal system and would deprive defendants of basic rights.[47] Since *Batson*, the Court has provided some clarification on how to determine if the prosecution has given an adequately and honestly neutral alternative explanation ("legitimate nondiscriminatory reason") for striking Black jurors. The following cases illustrate how the Supreme Court has weighed in on how a trial judge might discern between a legitimate nondiscriminatory reason for striking a juror and a reason given as a proxy for discrimination against non-white jurors—and what a judge could legally consider in evaluating that distinction.

Prior to 2019, the ability to argue that certain types of prosecutorial behavior were, in fact, a proxy for discrimination was exceptionally thin. The Court ruled in 2005 in *Miller-El v. Dretke* that a defendant could rely on "all relevant circumstances" in considering whether a peremptory strike was purposeful discrimination.[48] There, the relevant circumstances were a compilation of jury shuffling, disparate patterns of jury questioning by race, prosecutor notes, and the statistical fact that the State issued a peremptory challenge to only 12% of non-Black potential jurors, while eliminating 91% of potential Black jurors.[49] In 2008, the Court extended this conceptualization of 'all relevant circumstances' in *Snyder v. Louisiana* by ruling that it is "enough to recognize that a peremptory strike shown to have been motivated

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[45] *See Peremptory Challenge*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/peremptory_challenge [https://perma.cc/2DUC-V3TE].

[46] Batson v. Kentucky, 476 U.S. 79, 94 (1986).

[47] *Id.* at 87.

[48] 545 U.S. 231, 240 (2005).

[49] *Id.* at 266.

in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution."[50] Similarly, the Court held in 2015 in *Foster v. Chatman* that the prosecutor's notes, which disqualified Black jurors prior to questioning, were sufficient to establish intentionality.[51] Further, the Court pointed to the presence of similarly situated white jurors who were not struck.[52]

In 2019, in *Flowers v. Mississippi*, the Court consolidated and affirmed these markers of proxy and reinforced them. The Court held that the State's apparent relentlessness in pursuing an all-white jury, the State's additional time spent questioning Black prospective jurors (compared to accepted white jurors), and the difference between the Black struck jurors and white jurors established that the State's stated reasons for striking Black jurors were a proxy for racial discrimination.[53] Finally, and most importantly, the Court considered that the State's use of peremptory strikes in the trial in question (Flowers's sixth trial) followed the same pattern as in the first four trials (two of which had resulted in a conviction being overturned for prosecutorial misconduct in wrongfully striking Black jurors).[54] In other words, the Supreme Court has plausibly opened the door for the consideration of patterns of racial discrimination in the use of peremptory strikes, as long as that can be established through data. Establishing these patterns becomes more plausible when additional types of data, like criminal jury trial transcripts and their universe of unstructured text, are considered.

Flowers v. Mississippi was an incredibly unique case in the *Batson* lineage for two major reasons: First, the facts of *Flowers* were extraordinary and, second, the Court had unique, unprecedented access to the prosecutor's entire history of peremptory strikes due to independent data collection and analysis done by reporters for American Public Media (APM).[55] *Flowers*

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[50] 552 U.S. 472, 485 (2008).

[51] 578 U.S. 488, 501 (2016).

[52] *Id.* at 511.

[53] 139 S. Ct. 2228, 2248 (2019).

[54] *Id.* at 2245.

[55] APM Reports produced a podcast entitled *In the Dark*. The second season investigated the Curtis Flowers case and, in doing so, the reporters physically combed through the available transcripts of all of prosecutor Doug Evans's criminal jury trials in his 26-year career. This is currently the most robust investigation into criminal legal transcripts, and it was acquired via trips to the courthouse and analyzed manually. The transcript collection is here: *APM Reports Jury Analysis*, In the Dark Source Notes Episode 8, APM REPORTS, https://features.apmreports.org/in-the-dark/season-two/source-notes.html#trials [https://perma.cc/J3EN-J597].

affirmed that the trial judge can consider statistical evidence of the State's use of peremptory strikes against Black jurors versus white jurors in a case, as well as considering that prosecutor's relevant history in past cases.[56] To this point, the Supreme Court has also affirmed that this evidence is not necessary—that the defense need not establish a pattern of discriminatory behavior—however, in this case, that pattern of behavior in the history of the Flowers trial was available.[57]

As mentioned, the *Flowers* case was unique in that Curtis Flowers was tried six times for the same murders.[58] Although the Supreme Court limited its analysis of a historical pattern to the prosecutor's behavior only in Flowers's prior cases, it decidedly held that the trial judge can consider context outside of the unique trial at issue.[59] Conceivably the Court could limit pattern analysis to cases with multiple trials against the same criminal defendant on that same issue. However, the Court does not make that limitation explicit within its opinion. Regardless, it is worth noting that such information is extraordinarily difficult to come by, and the door opened by the Court's allowance of the consideration of context is potentially impossible to get through for reasons explained elsewhere in this Article. Therefore, *Flowers* serves as an exemplary case study of how systemic discrimination within the legal system can be better understood—and better argued before the courts—due to increased access to transcripts where this type of information is extractable.

III. AUDIT OF U.S. TRANSCRIPT AVAILABILITY

Our goal in this Article is not just to indict the lack of available data and call for more, but we also aim to analyze how the data that is available continues to shift the onus for procuring theoretically public documents to a public that cannot meaningfully access them. Therefore, we supplement our analysis of this data universe with an exploratory audit of transcript availability and record procurement policies across the United States. Broadly speaking, we seek to analyze exactly how inaccessible court

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[56] *Flowers*, 139 S. Ct. at 2243.

[57] *See* Swain v. Alabama, 380 U.S. 202, 222–24 (1965) (establishing that requiring a pattern is too strict and placing some restrictions on State's ability to use preemptory challenges). *Batson* allows for the consideration of a pattern. 476 U.S. at 96–97.

[58] *Flowers*, 139 S. Ct. at 2234.

[59] *Id.* at 2243.

transcripts are by emulating the process that laypersons are expected to follow in order to obtain transcripts from their local courthouses.

Notably, we follow this process in the way that laypersons would rather than follow it as researchers would, since researchers may have specific connections to courts or financial resources unavailable to the general public. We do so intentionally because using well-resourced academics as a benchmark for public access violates the spirit of the law surrounding public access. Academic researchers are not sole representatives of the "public" that is legally entitled to access public records. That said, the research team that codified these policies is still likely more knowledgeable about legal systems and information location than the average layperson. We address this reality in the discussion of our results at length but emphasize this point here to contextualize the methodological processes followed by our audit of transcript availability.

Our goal in conducting this audit is to understand inaccessibility as a multi-dimensional concept. Something can be inaccessible for a number of reasons. For example, it may be inaccessible by simply not existing, a relatively straightforward definition of inaccessibility. However, something might also be inaccessible because barriers to access may be practically insurmountable for the target audience. Here we consider not just the existence of information on procuring criminal court transcripts, but also the type of information about a legal case needed to request the transcript, how much the transcripts will actually cost, and the actual process for literally obtaining the transcript after making your request.

A. METHODOLOGY

We conducted the transcript audit at the county level, using census areas, districts, and boroughs where appropriate.[60] We opted to do so for several methodological reasons: (1) laypersons generally encounter legal processes on a closer-to-local level rather than at the state level; (2) if there is consistency in process at a higher unit of analysis, that will become apparent at a finer-grained unit of analysis rather than artificially reducing variation out of the sample; and (3) to capture a full range of variation within legally cognizable jurisdictions. Our developed list of areas that meet our

[60] We include boroughs, census areas, and districts in the fifty United States, unincorporated territories of the United States, and territories of the United States because the U.S. exercises sovereign powers over all such areas.

inclusion criteria included 3,244 valid areas, a vast majority being counties in the contiguous forty-eight states of the United States.

We searched for and coded each county manually. Because of our position as legal academics and practitioners, the coding team is aware that court record policies (that would include transcripts) are generally under the purview of the county clerk. However, in order to replicate the process that a layperson would follow, we instead initiated standard searches in a search engine to find the information using terms like "[county name] transcript court records" and "[county name] records request."

Following our theory of managerialized rights and the specific burdens placed on the general public to obtain transcripts, we code for a variety of de facto barriers to public access.[61] First, we include a blanket code for whether or not information on transcripts was available at all. Second, we record information about the price of transcripts if available. Third, we record any information about what specialized information a requestor needs to request a transcript. Fourth, we record practical logistical details about how an individual would actually obtain the transcript (both in process and in mode of request/delivery). We do this for each of the identified 3,244 valid areas.

B. RESULTS

The results of this audit reveal numerous barriers to public access for legally declared public data. We find these access barriers at virtually every coded nexus of possible variation. We then discuss several salient themes that emerged across the data distribution. Here, we focus not on the fine-grained analytics of the audit sample, instead opting to present exploratory findings about how these thematic categories relate to the legal issues dealt with in this Article.

1. Missingness

The first and most pervasive theme of this analysis was missingness. It was common throughout the data for counties to simply have no locatable public-facing policy on how to obtain court records.[62] In these cases, we

[61] This coding procedure entails a close manual search and systematic categorization of information.

[62] In some states, we were unable to find relevant policies on obtaining records at all. For example, we were not able to locate policies in a number of counties in New Hampshire, like

searched exhaustively for record request policies of any kind but were often unable to locate any at all. What we encountered instead were a number of websites that claimed to have county level records, despite being privately held.[63] This poses a problem to the general public who may be relying on these sites when official sources are not present. Even in cases where these websites are well-intentioned, they do not constitute a sufficient solution to protecting public data access when that burden is rightly ascribed to the courts.

It was also common that counties would have pages instructing how to obtain court records but would specify and limit those types of records in ways that did not seem to include transcripts. In fact, court transcripts were very rarely mentioned at all, despite having substantially different logistical requirements than other types of public records. Qualitatively, this was especially common in smaller counties, whose data policies almost exclusively referred to property data.[64] Larger and more traditionally urban counties were more reliable in including reference to transcripts specifically in their data policies, though explicit reference to transcripts remained abnormal across the data.[65]

Belknap County and Carroll County, nor were we able to locate them in a number of counties in Georgia like Bacon County and Brooks County.

[63] A typical example of this is https://countyclerkrecords.com, which notes in its disclaimer at the bottom of the page that "CountyClerkRecords.com is a privately owned informational website that is not owned or operated by any state government agency." [https://perma.cc/PQC9-CXMT]. These sites generally are repositories of information relating to numerous geographies and appear in search readily when official websites do not exist.

[64] For example, we were able to find policies about requesting records generally, with no specific relevance to transcripts in some smaller counties like Clay County, Illinois, and Merrimack County, New Hampshire. *See e.g.*, *Request for Access to Public Records Pursuant to NH RSA 91-A "Right-to-Know" Law*, TOWN OF MERRIMACK, N.H., https://www.merrimacknh.gov/sites/g/files/vyhlif3456/f/file/file/request_for_access_to_public_records_with_copy.pdf [https://perma.cc/V6K7-PBVF]; *Clay County, Illinois*, ILL. ASS'N CNTY. OFFS., http://claycountyillinois.org/circuit-clerk/#records [https://perma.cc/5PDP-2MRD].

[65] For example, we were able to find transcript specific policies from Cook County, Illinois; Philadelphia County, Pennsylvania; and Los Angeles County, California. *See* discussion of Cook County *supra* Section II.A; *see also Request for Transcript or Copy*, PHILA. CNTY., https://www.courts.phila.gov/pdf/forms/court-reporters/courtreporters-transcript-order-form.pdf [https://perma.cc/7YAG-N68W]; *Court Reporter Transcript Request Form*, SUP. CT. CAL. CNTY. L.A., https://www.lacourt.org/generalinfo/courtreporter/gi_re002.aspx [https://perma.cc/ZQ8B-MRM5].

The simple presence of information was not the only type of missingness. Also frequent in the data were obfuscations about general process or a lack of detail that functionally equivocated to missingness. For example, in Benton County, Arkansas, there is some information about court records, but the website instructs that the requestor must call a phone number for more information.[66] We conceptualize this as a barrier to access because it requires the requestor to expend additional agency rather than communicating that information as transparently as possible to a potential requestor. There could be a number of defensible reasons that a policy is not elucidated—perhaps the policy is being revised or perhaps policies are complex and difficult to explain via static text. However, even if the process is complex for some reason, the solution to that complexity is not to erect additional barriers to access that give no information about the reason additional agency is required.

2. Procedural Variation in a Legally Identical Process

The second theme that we identified throughout the data was highly varied contact procedures for what should be a legally identical process. That is, it is the job of county clerks to act as stewards and disseminators of public records. However, this is not consistently the process by which counties are instructing individuals to obtain records. Instead, processes varied substantially in how likely it would be for a layperson to identify the proper recipient.

In some cases, jurisdictions had portal-like systems allowing a requestor to fill in a contact sheet to make a data request. One example of this is Barrow County, Georgia, which points requestors to such a portal, but again, does not specifically describe transcript procurement.[67] Other jurisdictions require significantly more specificity in identifying the proper contact person to obtain a transcript. For example, in Arenac County, Michigan, requestors must contact the specific court reporter who was assigned to the relevant judge who heard the case.[68] This is another example of increasing burdens to

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[66] *Public Records*, BENTON CNTY. CIR. CLERK, https://bentoncountyar.gov/circuit-clerk/public-records [https://perma.cc/Y5N4-DP6L].

[67] *Open Records Request*, BARROW CNTY. COMM'RS, https://www.barrowga.org/departments/frm-record-request.aspx [https://perma.cc/EVZ7-77LF].

[68] *23rd Circuit Court*, ARENAC CNTY., https://www.arenaccountymi.gov/Courts-Law/23rd-Circuit-Court [https://perma.cc/3AJD-JSZS].

public access. In general, we note three ways of dealing with court record requests: (1) a county clerk handles the request; (2) the requestor must contact a court reporter directly;[69] and (3) a third party entirely handles the request.[70]

We found this variation significant not just in its range of substantive difficulty, but in how it speaks to system-wide dysfunction. Public right to public data is not a local-level protection that some counties can opt into and others can opt out of at will. Rather, what we identified are procedural variations in what should be a legally identical process across jurisdictions.[71] Having such widely varying processes makes accessing records in certain jurisdictions virtually impossible, while the same record can be much more easily obtained in a different location.

3. Financial Burdens and Outdated Processes

The third salient theme of this analysis concerns financial burdens and outdated processes that prevent public access to public data. Information about prices specific to transcript requests was rare. Across counties and states, per page pricing of transcripts ranged from twenty-five cents per page to three dollars per page, when information was given.[72] Much more common

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[69] In some counties, requestors must contact a specific court reporter directly. *See, e.g.*, *Records & Information*, SUP, CT. CAL. CNTY. SANTA CRUZ, https://www.santacruz.courts.ca.gov/divisions/records-information [https://perma.cc/ZD86-W3WL].

[70] An example of latter case, where a third party entirely handles transcript requests, is Jackson County, Michigan. Jackson County refers transcript requests to Theresa's Transcript Service, again emphasizing that despite the consistency in legal entitlements to public data, the process of getting it is highly variable and often under the purview of unexpected actors. *Transcripts*, JACKSON CNTY., MI, https://www.co.jackson.mi.us/443/Transcripts [https://perma.cc/6QT7-6E6V].

[71] For example, even two counties within the same state can have substantially different procedures. In Los Angeles County, California, requestors must provide a case name, case number, courthouse, department, court reporter's name, dates of proceeding, and are then asked to provide details of what they would like transcribed in an online form. *See Court Reporter Transcript Request Form*, SUP. CT. CAL. CNTY. L.A., https://www.lacourt.org/generalinfo/courtreporter/gi_re002.aspx [https://perma.cc/ZQ8B-MRM5]. In Mariposa County, also in California, requestors must only provide a description of records being sought and an indication of the relevant department. *Public Record Request*, MARIPOSA CNTY. CAL., https://www.mariposacounty.org/forms.aspx?fid=86 [https://perma.cc/T7UC-T9BD].

[72] These numbers can be highly variable, but we give some examples here. In Kenai Peninsula Borough, Alaska, records (generally) are $0.25 per page. *Kenai Peninsula Borough*, KENAI PENINSULA BOROUGH, https://kpb.govqa.us/WEBAPP/_rs/(S(hlobviwrqivn2gmaq

was a lack of information about what to expect to pay for a criminal jury trial transcript, since such documents were not mentioned at all.[73]

However, there were also other additional fees attached to record retrieval, including research fees, shipping and handling fees, and service fees that were more commonly quoted in county policies. Most commonly assessed were research fees, which ranged from twenty to thirty dollars. In some counties, like Pima County, Arizona, a requestor would be assessed a thirty-dollar fee for every name that had to searched by the clerk, meaning that research fees could become quite substantial for one request.[74] The policies also stated that requestors should expect to often pay shipping and handling fees for physical copies of documents to be sent to their location.[75] The price of these fees, often around seven dollars,[76] clearly indicates that clerks are not anticipating sending bulky criminal jury trial transcripts.

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uxbc0bo))/SupportHome.aspx?sSessionID= [https://perma.cc/7JWZ-YDHX]. In Escabmia County, Alabama, records cost $5.00 for the first page and $0.50 per subsequent page. *Escambia County Arrest, Court, and Public Records*, STATE RECS. ALA. ESCAMBIA CNTY., https://alabama.staterecords.org/escambia [https://perma.cc/F9NY-6E2T]. In many counties in Colorado, including the city and county of Denver, transcripts specifically are $3.00 per page. *Court Reporter Transcript Request Form*, COLO. JUD. BRANCH, https://www.courts.state.co.us/userfiles/file/Court_Probation/02nd_Judicial_District/Denver_District_Court/COURT%20REPORTER%20TRANSCRIPT%20REQUEST%20FORM(1).pdf [https://perma.cc/7GVS-FJ5S]. In our reading of the data, it seems as though some of the lower prices per page commonly refer to records generally rather than transcripts specifically.

[73] Even when documents or records were mentioned, prices remained vague. For example, in Barry County, Michigan, the policy states that the "court recorder will notify the requester of estimated transcript costs" and "[t]he transcript will be provided upon receipt of the balance owed." *Request Court Transcripts From Judge Doherty's Courtroom*, BARRY CNTY. MICH., https://www.barrycounty.org/courts_and_law_enforcement/request_a_transcript_from_judge_doherty_s_courtroom.php [https://perma.cc/N6RW-UYE6]. Bibb County, Georgia, states, "If the County determines that a special service charge will be applied for extensive use of technology resources, clerical and/or supervisory assistance, a written estimate of charges will be provided to the requester," and that a "[r]eceipt of a deposit will also be required prior to compiling such requests." *Public Records Request*, MACON-BIBB CNTY., GA., https://maconbibbcountyga.justfoia.com/Forms/Launch/d57722a8-2ffa-4ee8-afab-394303f0fae9 [https://perma.cc/2T4Q-E2NB].

[74] PIMA CNTY. CONSOL. JUST. CT., RECORDS UNIT CUSTOMER SERVICE FEE SCHEDULE (2017), https://www.jp.pima.gov/Forms/JP90C%20-%20Records%20Fee%20Schedule%20%208-9-17.pdf [https://perma.cc/3K92-QXPT].

[75] *Id.*

[76] For example, Mohave County, Arizona, specifically notes that the shipping and handling (postage) costs are $7.00. *Records Request Form*, JUD. BRANCH ARIZ. CNTY. MOHAVE,

Some counties, like La Paz County, Arizona, require requestors to send the court a self-addressed and stamped envelope in order to receive the requested documents.[77] Not only is this a slow method of delivery that requires additional effort on the part of the requestor for no discernable reason, but it also delineates the expectations of the courts that record requests should be able to fit in an envelope. Easily exceeding hundreds of pages in length, a single criminal jury trial transcript could not plausibly fit in any envelope.

Some counties did have online options for document procurement and request, while others still principally recommended mail, fax, or even in-person pick-up.[78] There are a number of potential reasons for the lack of digital systems, among them a lack of staff trained in digital systems or a lack of funding to build and support digital record requests. Either of these possibilities do not negate the need to provide accessible options to individuals for procuring documents, rather, such an explanation would further reinforce the need for larger governmental and judicial systems to take these burdens from individual small jurisdictions writ large to protect a public data right.

4. Expert Knowledge Requirements

The fourth and final theme we identify and analyze here concerns the amount of information required to motivate a search for records. Counties generally had high standards for the amount of information required to motivate a search, should the requestor not want to incur additional research fees payable to the clerk.[79] At minimum these generally included case

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https://www.mohavecourts.com/sites/default/files/Mohave%20Courts/Court%20Departments/Clerk%20of%20Court/Docs/MIRequestforCourtDocs.pdf [https://perma.cc/2FS2-N6EE].

[77] LA PAZ CNTY. RECORDER'S OFF., FEE SCHEDULE, http://www.co.la-paz.az.us/DocumentCenter/View/4200/Fee-Schedule-PDF [https://perma.cc/9Q7C-3N8B].

[78] For example, in Dale County, Alabama, most trial court information can be obtained online. *See Delores Woodham – Dale County Circuit Clerk*, THIRTY-THIRD JUD. CIR. CT. ALA., https://dale.alacourt.gov/circuit-clerk-delores-woodham/ [https://perma.cc/JXB8-U6SK]. The website for Apache County, Arizona, gives instructions about documents being sent in by fax, mail, or drop-off. *Clerk of the Court*, APACHE CNTY. STATE ARIZ., https://www.apachecountyaz.gov/Clerk-of-the-Court [https://perma.cc/LW76-TQFQ].

[79] For example, in Maricopa County, Arizona, the policy states that requestors may be assessed an additional $30.00 fee for each year or additional name to be researched. *Obtaining Records*, CLERK SUP. CT. MARICOPA CNTY,, ARIZ., https://www.clerkofcourt.maricopa.gov/records/obtaining-records [https://perma.cc/Z2PC-N5HX]. Several counties in Georgia,

number and party name, but requests for information also might include the specific case date, the name of the judge, and the number of pages in the document. Requiring this level of information about each request functionally means that a member of the public must be a party to that case, know a party to that case, or possess expert-level knowledge to find the relevant information for a given case. This again constitutes a barrier to true public access. Generally, these criteria were not consistent across states or counties, which further amplifies the difficulty in making individual or mass requests.[80]

Some counties required substantially less information to process a search, indicating that it is possible to configure searches with much more limited information, at least in some cases. This is an encouraging sign that some of these expert-level knowledge requirements could be changed, even under the existing framework. Cochise County, Arizona, requires, at minimum, only the defendant's name and the approximate date, while Autauga County, Alabama, asks only for a "reference" or "description" of the case.[81]

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among them Barrow County, indicate that there will be an assessed labor rate for search, retrieval, redaction, and production at the hourly rate of the lowest-paid qualified employee with no charge for the first fifteen minutes. *Open Records Request Form*, BARROW CNTY., GA., https://barrowcountyga.justfoia.com/Forms/Launch/d705cbd6-1396-49b7-939e-8d86c5a87deb [https://perma.cc/BM48-4DGF].

[80] As described above, some counties, like Los Angeles County, require a substantial amount of information. *See Court Reporter Transcript Request Form*, SUP. CT. CALI. CNTY. L.A., https://www.lacourt.org/generalinfo/courtreporter/gi_re002.aspx [https://perma.cc/H4Q6-ARR9]. However, other counties, like Cleburne County, Arkansas, require only "sufficient information to reasonably identify the record requested." *Public Access to Records*, CLEBURNE CNTY. DIST. CT., https://www.cleburnecountydistrictcourt.com/public-access-to-records [https://perma.cc/FCY8-VAZ8]. This a substantial contrast to somewhere like Alameda County, California, which requires the court reporter's name, date of hearing, time, judge, department, case name, and case number. *Request for Court Reporter's Transcript*, SUP. CT. CAL., CNTY. ALAMEDA, https://www.alameda.courts.ca.gov/system/files/request-court-reporters-transcripts.pdf [https://perma.cc/6J7N-JBW3].

[81] *Requesting Copies of Court Documents*, COCHISE CNTY. CT. SERVS., https://www.cochise.az.gov/191/Requesting-Copies-of-Court-Documents [https://perma.cc/FEK4-Y44Z]; AUTAUGA CNTY., PUBLIC RECORDS REQUEST, http://www.autaugaco.org/Sites/Autauga_County/Documents/Main/SKMBT-C36017071908210.pdf [https://perma.cc/8ZXN-TF98].

C. DISCUSSION

The exploratory results of our transcript process audit are consistent with a systemic process of distancing governmental responsibility and managerializing public access to public records. Across all four themes we describe here—missing information, varied contact procedure, financial burdens and process inefficiency, and expert knowledge requirements on the part of requestors—we see significantly elevated burdens placed upon individuals who are attempting to engage their constitutionally protected right to inspect public court records in the form of criminal jury trial transcripts. In our review of the current literature, our exemplification of present procedure, and our audit of the universe of policies, we find significant barriers to access to public records that functionally transform de jure public records into de facto nonpublic records. The consequences of these barriers function similarly to other forms of managerialized rights, where the process of vindicating and engaging those rights often serves to leave those rights functionally unprotected. This affects not only researchers looking to add knowledge in understudied disciplines and policymakers seeking to evaluate current processes, but it is also an affront to the very notion of public access to public documents as protected both by common law decisions and the Constitution.

We have largely left aside the field of computational legal analysis and how the problem with retrieving criminal jury trial transcripts has anything to do with this rising field of scholarship, so we return to it here as a call for action. Computational legal analysis has a unique opportunity to make positive gains in the study of inequality and bias across court systems by using its unique methodological toolsets to make use of unconventional or unstructured data at scale. We argue that court transcripts are such a data frontier. In fact, we argue that criminal jury trial transcripts are currently the only formal records of many types of interacting discrimination that plague the criminal legal system. However, to contribute to these spaces, computational legal analysis cannot be satisfied to use what data is easily available. Instead, computational legal scholars must continue to interrogate the systematic barriers to data access and examine how those barriers may obfuscate inequity and sustain systems of inequality.

The current solution to the problem of public access to public court transcripts, both individually and at scale, is not an acceptable one. Presently, in order to obtain court transcripts at scale for research or as a member of the public, the most viable solution is winning tens of thousands to millions of dollars from research foundations to pay the government for the transcripts

or to produce a networked connection to some sort of legal stakeholder to procure them for you. Instead, the government must assume the financial costs of making records public and the process costs of making records not just de jure public, but also de facto public. This will require an overhaul of the current system, but a system that obfuscates legal processes and denies the public their legally protected right to inspect court data is not a system that deserves to remain.

This work is presently limited by looking at available policy information without testing the veracity of the policy statements. That is, here we presume that the policy as stated on various clerk of court websites is how the policy would be enacted in practice. We hope to lessen this limitation in our future work by actually requesting transcripts from a diverse sample of jurisdictions and recording how the process in reality matches or deviates from the policy we located. We hope that in addition to the substantive conclusions and data access gains from the transcripts themselves, we can make significant gains in the evaluative research needed to fully analyze public data policies as they concern criminal jury trial transcripts.

Finally, this work is also necessarily interpreted through the lens of two legally trained coders. Both coders of this data have completed law school. This presents advantages in ensuring that all possibly relevant information was obtained for the audit but almost certainly outpaces the ability of the average person to retrieve the information cited here. In an effort to lessen the impact of our own expertise, we plan to conduct a coding test on a digital survey platform where laypeople will be tasked to retrieve information about the availability of court transcripts in different counties. Their results will then be compared to the results of the data audit described above.

CONCLUSION

Court data is generally inaccessible to the public. Although records are legally public, the difficulty in obtaining those records makes them functionally not public at all. The managerialized rights framework elucidates how that works: The right to public records operates not as a guarantee from those who hold the records (the clerks, the courts) to make those records freely available but instead is held behind procedural barriers that functionally obstruct that right entirely. This is, of course, assuming that the records continue to exist for any meaningful length of time.

As discussed in this Article, this means that some areas of research are necessarily hindered, with important implications for the full understanding of how the criminal legal system works. Limited access to data means limited

access to understanding precisely how bias operates in the criminal legal system because we lack empirical proof of patterns within the court system and tangible connection between those patterns and socio-demographic information.

Clerks, as the office in charge of the non-judicial aspects of a court, ought to take a more proactive public archival role in collecting and maintaining court records and data in order to take the responsibility for managing rights outside the hands of the people who have less perfect knowledge of the system. There are whispers of this type of movement happening already, with various counties publicly taking steps to produce more transparent data or implementing more accessible portal-type tools to allow members of the public to easily request records. However, we urge that these public-facing tools be created with a more expansive understanding of what counts as public records and with consistency across jurisdictions. An ideal data portal would be responsive to the four themes identified in this audit: missing information, varied contact procedure, financial burdens and process inefficiency, and expert knowledge requirements on the part of requestors. Adequately addressing these themes is a substantial undertaking that requires courts to produce and maintain better data tools, take responsibility for the cost of data production, and develop systems for efficient data dissemination. We argue that these changes are necessary to fulfill the duty of the courts under their own rules to make public data truly accessible to the public and available for the types of system-level analysis necessary to measure currently unmeasurable legal events and sources of legal system inequity.