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First Amendment Sentence Mitigation: Beyond a Public Accountability Defense for Whistleblowers

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Abstract

Public accountability defenses for whistleblowers who reveal national security information to the media or the public have largely failed. Courts have rejected such arguments and Congress has not provided a statutory defense. This Article argues that the appropriate place to consider public accountability factors in whistleblower cases is at sentencing. Courts can take, and have taken, substantive First Amendment rights into consideration at sentencing as mitigating factors. Courts do so rarely and cautiously, usually in moments of perceived breakdown in the political processes that facilitate the more typical role of individual rights as limits on government action. Examining historical sentencing practices in fugitive slave rescue and conscientious objector cases, this Article demonstrates the historical validity of taking substantive constitutional interests into account at sentencing—and that the constitution does not evaporate with a verdict. This Article also argues that a moment of breakdown is occurring with regards to the Espionage Act and use of rights as limitations on government action. Because of this failure, courts should implement sentence mitigation on the basis of First Amendment interests in whistleblower cases, providing an immediate pragmatic solution and potentially prompting a more sustainable long-term approach to government whistleblowers.

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Introduction

In October 2018, the federal district court in Minnesota sentenced former Federal Bureau of Investigation ("FBI") agent Terry James Albury to four years in prison under the Espionage Act for disclosing internal FBI documents to the press.[1] Albury pleaded guilty but contended he was a whistleblower acting in the public interest; he argued he had disclosed systemic racial biases within the FBI and throughout its investigations.[2] At sentencing, Albury's lawyers argued that his motives mattered: "[C]ontrary to the government's claims, Mr. Albury's motivation for his . . . conduct, while not relevant to guilt, is quite relevant at sentencing."[3] The government, in contrast, contended that Albury's motive was irrelevant, even at sentencing.[4] The judge seemed to agree implicitly with the government, although her statement of reasons and other sentencing memos in the Albury and other leak cases remain sealed.[5]

Whistleblowers and the public have arguable First Amendment interests in these kinds of public accountability leaks. In whistleblower cases, these interests include both speaker rights and listener rights.[6] In Espionage Act cases, courts have generally found that these interests are irrelevant with respect to guilt as a matter of law.[7] A lack of statutory authorization for such a defense hampers judicial adoption of this reasoning, and independent judicial creation of a First Amendment defense has little support in existing doctrine or common law traditions. In Albury's case and in others, the government has argued that the same is true at sentencing.[8] Historical examples, however, show that courts can and have taken such constitutional interests into account at sentencing. Courts did so with rescuers who violated the Fugitive Slave Act, and they did so with absolutist conscientious objectors during the Vietnam War. Each example involves individuals who object

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[1] *See* Charlie Savage & Mitch Smith, *Ex-Minneapolis FBI Agent Is Sentenced to 4 Years in Leak Case*, N.Y. TIMES (Oct. 18, 2018), https://www.nytimes.com/2018/10/18/us/politics/terry-albury-fbi-sentencing.html [https://perma.cc/P35S-MY2J].

[2] *See id.* See also Trevor Timm, *Forget Comey and McCabe. Support FBI Whistleblower Terry Albury Instead*, COLUM. JOURNALISM REV. (Apr. 17, 2018), https://www.cjr.org/watchdog/terry-albury.php [https://perma.cc/4GJM-553M], for the following excerpt from a statement from his lawyers to the *Columbia Journalism Review*: "Terry Albury is a good and honorable man. His conduct in this case was an act of conscience. It was driven by his belief that there was no viable alternative to remedy the abuses . . . He recognizes that what he did was unlawful and accepts full responsibility."

[3] Reply Sentencing Brief at 2, United States v. Albury, No. 0:18-cr-00067-WMW (D. Minn. Oct. 8, 2018).

[4] *See infra* note 8.

[5] *See infra* note 76.

[6] *See generally* Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953 (2018).

[7] *See* United States. v. Kiriakou, 898 F. Supp. 2d 291 (E.D. Va. 2012); Daniel Ellsberg, *Snowden Would Not Get a Fair Trial—and Kerry Is Wrong*, GUARDIAN (May 20, 2014), https://www.theguardian.com/commentisfree/2014/may/30/daniel-ellsberg-snowden-fair-trial-kerry-espionage-act [https://perma.cc/SK4W-PMF6].

[8] Government Response to Defense Position with Respect to Sentencing at 2, United States v. Albury, No. 0:18-cr-00067-WMW (D. Minn. Oct. 8, 2018).

to government conduct, have arguable First Amendment interests in the actions they take, and break some aspect of the law to demonstrate their objection.

Considering First Amendment rights during sentencing is incongruous with the typical conception of the role constitutional rights play in the judicial process. Constitutional rights usually serve not to mitigate the exercise of government power but to restrain it altogether. Although much debate (and litigation) occurs about what specific government actions are or are not prohibited by a certain constitutional right, whatever rights one does have against the government are presumptively *decisive*; a constitutional right does not normally weigh against countervailing considerations but *trumps* them.[9] In practice, when a court determines that a government action infringes an individual's constitutional right, it usually circumscribes the government's exercise of power by granting a prosecuted individual a rights-based defense or by declaring the underlying law unconstitutional. In doing so, the court effectively declares that the Constitution *bars* the exercise of the power in question. Even where certain procedural constitutional rights are relevant to sentencing—for instance, due process considerations prohibit courts from enhancing sentences based on gender or race—those rights still usually act to prohibit certain government conduct.[10]

However, the examples in this Article show that courts can and have considered substantive constitutional rights, particularly First Amendment rights, as mitigating factors during sentencing. Here, rights do not function as exclusionary constraints on government action by independently settling the question of what the government can and cannot do. Instead, they mitigate the exercise of a permissible use of government power.[11] Where a typical free-speech defense might, for instance, prevent the government from restraining a defendant, here, the relevant First Amendment rights do not prohibit government action but only serve to lessen the severity with which the government can punish the speaker.

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[9] In this respect, constitutional rights function as what philosophers call "presumptively decisive reasons," "exclusionary reasons," or "normative "requirements" that do not merely weigh against other considerations but, at least typically, settle the question of what should be done. *See* R. JAY WALLACE, THE MORAL NEXUS 26–27 (2019) (on "requirements"); Samuel Scheffler, *Relationships and Responsibilities*, *in* BOUNDARIES & ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT 97–100 (2002) (for concept of "presumptively decisive" reasons for action); JOSEPH RAZ, PRACTICAL REASONS AND NORMS (2nd ed. 1990) (for concept of "exclusionary reasons"); JUDITH THOMSON, REALM OF RIGHTS (1990) (on the way rights function). Thank you to P. Quinn White for these framing concepts and language. The concept of "hard stops" is also related to the concept of negative rights, in the sense that constitutional rights largely prohibit categories of government action. *See, e.g.*, Bowers v. De Vito, 686 F.2d 616, 618 (7th Cir. 1982) ("the Constitution is a charter of negative liberties"); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

[10] *See infra* note 67.

[11] *See* RAZ, *supra* note 9.

Admittedly, this conception of constitutional rights is at odds with their typical function.[12] Used broadly, this conception of rights could lead to an erosion of constitutional protections for individuals. In keeping with this risk, courts have used their discretion to do so rarely and with caution, only in moments of perceived *breakdown* in the political processes that typically facilitate rights as circumscribers of government conduct.[13]

At its broadest, this Article demonstrates the historical validity of considering First Amendment interests at sentencing; the Constitution does not evaporate with a verdict. This Article also argues that courts should implement sentence mitigation on the basis of First Amendment interests in whistleblower Espionage Act cases. Specifically, this Article argues that the political processes that would otherwise facilitate the use of First Amendment rights in their typical sense with regards to whistleblowers are experiencing breakdown. A rights-based defense may still be the ideal way to approach whistleblowers, but using First Amendment factors as mitigating factors at sentencing is permissible, within judicial discretion, and may prompt a more sustainable systematic approach to government whistleblowers.

I. Institutional Approaches to Whistleblowers

A. *The Espionage Act as De Facto Leak Law*

Albury, the only black agent at his field office in Minneapolis and the son of an Ethiopian political refugee, disclosed to the press documents that revealed "FBI investigation directives that profiled and intimidated minority communities" and the broad latitude, controversial to many, that agents have in conducting surveillance and operating undercover to recruit potential informants.[14] The Espionage Act provision under which prosecutors charged Albury carries a statutory penalty of up to ten years.[15] Pursuant to Albury's plea agreement, prosecutors recommended a sentence of thirty-seven to fifty-seven months, depending on the court's decision regarding a sentencing enhancement for abuse of trust. The court agreed to implement this enhancement, with the final range running

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[12] Indeed, philosophers would probably no longer refer to the function of such considerations at sentencing as true rights, but rather reasons for action. Given that law speaks in terms of rights, this paper continues to use the term "rights."

[13] This breakdown reflects judicial perception, but it is usually informed by some measure of similar public sentiment. The cases examined in this Article demonstrate this mixture.

[14] Timm, *supra* note 2; *see also* Trevor Aaronson, *The FBI Gives Itself Lots of Rope to Pull in Informants*, INTERCEPT (Jan. 31, 2017), https://theintercept.com/2017/01/31/the-fbi-gives-itself-lots-of-rope-to-pull-in-informants/ [https://perma.cc/2PGC-M9XZ]. For criticism of similar instances of FBI informant practices, see, e.g., Diala Shamas, *A Nation of Informants: Reining in Post-9/11 Coercion of Intelligence Informants*, 83 BROOK. L. REV. 1175 (2018); Amna Akbar, *Policing "Radicalization"*, 3 U.C. IRVINE L. REV. 809 (2013); David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. REV. L. & SOC. CHANGE 123 (2010).

[15] 18 U.S.C. § 793(e).

from forty-six to fifty-seven months.[16] Albury was sentenced to forty-eight months in prison.[17]

Albury's case joins a recent uptick in prosecutions of leakers under the Espionage Act.[18] This 1917 law was traditionally used to prosecute spies in the United States that passed classified information to agents of foreign powers, but prosecutors increasingly have used the law to prosecute government employees that leak classified information to the media.[19] These individuals include former National Security Agency ("NSA") contractor Reality Winner, Chelsea Manning, Joshua Schulte, and Edward Snowden.[20] This list, to which Albury belongs, is strikingly different from the approaches taken against earlier leakers in the 2000s, let alone approaches taken in the 20th century.[21] Earlier cases included instances where prosecutors initially sought lengthy sentences for Espionage Act violations but later requested sentence reduction (Larry Franklin);[22] decisions not to prosecute (Jesselyn Radack, Thomas Tamm, Russ Tice);[23] initial indictments under the Espionage Act that were later downgraded to lesser charges pursuant to plea agreements (Thomas Drake, Shamai Leibowitz, John Kiriakou);[24] or sentences that

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[16] Government Response to Defense Position with Respect to Sentencing, *supra* note 8.
[17] Savage & Smith, *supra* note 1.
[18] *See Federal Cases Involving Unauthorized Disclosures to the News Media, 1844 to the Present*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Jan. 17, 2019), https://www.rcfp.org/wp-content/uploads/2018/12/1-17-19-Leaks-Chart-Updated-Through-Edwards-1.pdf [https://perma.cc/5YFZ-Q466].
[19] *See* Greg Myre, *Once Reserved for Spies, Espionage Act Now Used Against Suspected Leakers*, NPR (June 28, 2017), https://www.npr.org/sections/parallels/2017/06/28/534682231/once-reserved-for-spies-espionage-act-now-used-against-suspected-leakers [https://perma.cc/E8N3-GRPV].
[20] Reality Winner was sentenced to sixty-three months in 2018. *See* Dave Philipps, *Reality Winner, Former N.S.A. Translator, Gets More than 5 Years in Leak of Russian Hacking Report*, N.Y. TIMES (Aug. 23, 2018), https://www.nytimes.com/2018/08/23/us/reality-winner-nsa-sentence.html [https://perma.cc/UW7W-LSMV]. Chelsea Manning received thirty-five years for a variety of crimes, including six specifications of violating the Espionage Act, in 2013, but a breakdown of specific sentences by charge is not publicly available. Her sentence was commuted by President Obama in 2017 after serving roughly seven years. *See* Charlie Savage, *Chelsea Manning to Be Released Early as Obama Commutes Sentence*, N.Y. TIMES (Jan. 17, 2017), https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html [https://perma.cc/4JDD-GJ7B]. The trial of Joshua Schulte, charged in 2018, is ongoing as of February 2020. *See* Order, United States v. Schulte, No. 1:17-cr-00548-PAC (S.D.N.Y. Dec. 9, 2019). Edward Snowden was charged in 2013 with two counts of violating the Espionage Act, among other crimes, but remains outside U.S. custody. *See* Josh Gerstein, *Snowden Charged with 3 Felonies*, POLITICO (June 21, 2013), https://www.politico.com/story/2013/06/edward-snowden-charged-nsa-093179 [https://perma.cc/X2PM-UYR6].
[21] *See* Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281, 312–13 (2014).
[22] Lawrence Franklin was initially charged in 2003, pleaded guilty and received a roughly thirteen-year sentence later reduced to ten months house arrest. *See id.* at 314.
[23] Relevant events happened for Radack in 2002 and for Tamm & Tice in 2004. *See id*. at 313–14.
[24] Relevant events happened for Drake in 2004–2005, Leibowitz in 2009 & Kiriakou in 2007–2012. *See id.* at 315–16, 318–19.

were low to begin with (Stephen Kim).[25] Critics of how leakers were handled from 2000–10 had already pointed out that the government had effectively transformed the Espionage Act, especially 18 U.S.C. § 793, into "a surrogate for a leaks law."[26] Indictments and prosecutions from 2010–20, including Albury's, have only strengthened calls for reform.[27]

B. *Bases for a Public Accountability Defense*

These leakers have generally argued that they were motivated by a desire to serve the public by fostering greater democratic accountability in the national security realm. First Amendment scholars and civil libertarians have advanced a robust case for a public accountability defense for actors who disclose protected national security information in the public interest. Yochai Benkler has proposed that a public accountability defense "be available to individuals who violate a law on the reasonable belief that by doing so they will expose to public scrutiny substantial violations of law or substantial systemic error, incompetence, or malfeasance."[28] Under Benkler's proposal, defendants would need to show that the defendant had taken steps to mitigate harm from the disclosures and to disclose to an entity "likely to result in actual exposure to the public."[29] Heidi Kitrosser has explored additional factors that could support a public accountability defense, including whether there was a plausible argument that the disclosed information was improperly classified, how widely and by whom the information was already known, the availability of other means of achieving whistleblowing, and the extent to which public debate ensues.[30]

Although these scholars use the language of public accountability to describe the defense, this line of thinking can also be stated in more specific First Amendment terms.[31] In *Garcetti v. Ceballos*,[32] the Supreme Court wrote that "First Amendment interests . . . extend beyond the individual speaker."[33] The public also has an interest "in receiving the well-informed views of government employees."[34]

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[25] Steven Kim pleaded guilty in 2009 and served a thirteen-month prison term. *See id.* at 314.

[26] Benjamin Wittes, *Espionage Act Amendments*, LAWFARE (Dec. 6, 2010), https://www.lawfareblog.com/espionage-act-amendments [https://perma.cc/6BPN-3VDH].

[27] *See* Jameel Jaffer, *The Espionage Act and A Growing Threat to Press Freedom*, NEW YORKER (June 25, 2019), https://www.newyorker.com/news/news-desk/the-espionage-act-and-a-growing-threat-to-press-freedom [https://perma.cc/Z8LR-S8CW]. The Assange case is another example that occurred after this Article's drafting. *See* Gabe Rottman, *The Assange Indictment Seeks to Punish Pure Publication*, LAWFARE (May 24, 2019), https://www.lawfareblog.com/assange-indictment-seeks-punish-pure-publication [https://perma.cc/L78J-9EZL].

[28] Benkler, *supra* note 21, at 286.

[29] Benkler, *supra* note 21, at 286

[30] Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 WM. & MARY L. REV. 1221 (2015).

[31] *See, e.g.*, Stephen Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531 (2008); Mary-Rose Papandrea, *Leaker, Traitor, Whistleblower, Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449 (2014).

[32] 547 U.S. 410 (2006).

[33] *Id.* at 419.

[34] *Id.*

Indeed, as the Court recently emphasized in *Lane v. Franks*,[35] "speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment."[36] This listener-centric view emphasizes the importance of balancing the public's interest in hearing speech with the harm of revealing government secrets in whistleblower cases.[37]

Individual whistleblowers' own First Amendment political speech rights are also at stake in leaks to the media. The *Pickering* balancing test, which is used to decide when First Amendment protections apply to government employee speech, could theoretically apply to whistleblower speech. The *Pickering* test states that when deciding whether protections extend to employee speech, courts should balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[38] A public employee's free speech rights do not disappear at the threshold of his employment—in addition to the listener rights of the public.

The 2006 decision in *Garcetti* complicated the applicability of *Pickering* to whistleblower cases. In *Garcetti*, the Supreme Court held that First Amendment protections do not apply to speech "made pursuant to the [public] employee's official duties."[39] Some academics have suggested that, read broadly, *Garcetti* could mean government whistleblowers have no First Amendment protections for political speech or that courts will adopt a strong presumption in favor of the government when applying the *Pickering* test.[40] The more recent 2014 case *Lane v. Franks*, however, demonstrates that the Court has not entirely abandoned *Pickering* thinking. Taking a step back from the full implications of *Garcetti*, the Court distinguished between speech "ordinarily within the scope of an employee's duties," such as work product, and speech "merely concern[ing] those duties."[41] For the latter category, "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform his speech into employee—rather than citizen—speech."[42] *Lane v. Franks* strengthens the case that individual First Amendment protections could be available for public accountability whistleblowers under the *Pickering* line of cases.[43]

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[35] 573 U.S. 228 (2014).
[36] *Id.* at 240.
[37] *See* Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of the State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT. SEC. & POL'Y 409, 421–26 (2012).
[38] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
[39] 547 U.S. at 413.
[40] *See, e.g.*, Vladeck, *supra* note 31; Geoffrey Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185, 195 (2007).
[41] *Lane*, 573 U.S at 229.
[42] *Id.* at 240.
[43] *See, e.g.*, Heidi Kitrosser, *The Special Value of Employee Speech*, 2015 S. CT. REV. 301 (2015); Stephen Vladeck, *Lane v. Franks and the First Amendment Rights of National Security Leakers*,

C. *Failure of Public Accountability Defenses*

Public accountability defenses for whistleblowers charged with Espionage Act violations have not been successful.[44] Courts have hesitated to adopt this defense without legislative sanction, Congress has hesitated to legislate a defense, and presidents have been wary of using their discretionary power to commute or pardon leakers on this basis. Courts have granted government requests to suppress evidence related to intent at Espionage Act trials for years. From the Pentagon Papers trial to a pretrial motion in the Kiriakou case, judges have ruled evidence related to intent irrelevant and inadmissible at the guilt stage of a trial.[45] Similarly, a military court ruled that evidence relating to Chelsea Manning's intent in passing defense information to WikiLeaks was inadmissible at trial.[46]

Lack of statutory authorization for a public accountability whistleblower defense has been a barrier to judicial adoption of such a defense. Congressional action has not been forthcoming on this topic. Members of Congress have introduced ostensible reforms to the Espionage Act to counteract its vagueness and tailor the offense more closely to leaks to the press. The main relevant bill, however, introduced by Senators Lieberman, Ensign, and Brown in 2010, was criticized as "the worst of both worlds."[47] The proposed bill left a central and problematic portion of the Espionage Act intact—18 U.S.C. § 793(e)[48]—while dramatically expanding the language of a related provision—18 U.S.C. § 798—so that it would "cover[] a lot more than the most reckless media excesses."[49] Besides this 2010 proposal, Congress has not tried to reform the law, despite many calls for revision. Overall, legislative action on this topic has been lackluster, with new proposals containing many of the same problems as the law in need of reform.

JUST SECURITY (June 19, 2014), https://www.justsecurity.org/11949/first-amendment-leakers/ [https://perma.cc/X8RZ-3Y4J].

[44] *See* Section I.A and accompanying notes; *see also* Stephen Mulligan & Jennifer K. Elsea, *Criminal Prohibitions on Leaks and Other Disclosures of Classified Defense Information*, CONG. RES. SERV. 17 (Mar. 7, 2017), https://fas.org/sgp/crs/secrecy/R41404.pdf [https://perma.cc/QYV9-V3UW] ("No individual has ever been acquitted based on a finding that the public interest in the released information was so great that it justified an otherwise unlawful disclosure.").

[45] *See* Ellsberg, *supra* note 7; *see also* United States. v. Kiriakou, 898 F. Supp. 2d 291, 926–27 (E.D. Va. 2012) ("For these reasons, defendant's requests for discovery that would support a good faith defense have been denied because any claim that he acted with a salutary motive, or that he acted without a subversive motive, when he allegedly communicated [national defense information] to journalists is not relevant to this case.").

[46] *See* Trevor Timm, S*en. Schumer is Wrong: Snowden Would Be Barred from Arguing His Case at Trial*, FREEDOM OF THE PRESS FOUND. (Jan. 5, 2014), https://freedom.press/news/sen-schumer-is-wrong-snowden-would-be-barred-from-arguing-his-case-at-trial/ [https://perma.cc/STQ5-WQFT].

[47] *See* Wittes, *supra* note 26; *see also* Benjamin Wittes, *Problems with the Espionage Act*, LAWFARE (Dec. 2, 2010), https://www.lawfareblog.com/problems-espionage-act [https://perma.cc/U8HN-N7BJ].

[48] *See* Wittes, *supra* note 26. This portion of the legislation has been criticized for lacking an intent element and extending to information already made public.

[49] Wittes, *supra* note 26. This provision is currently narrowly scoped to dissemination of cryptographic and communications intelligence.

Prosecutorial discretion and pardons could each offer a way for the executive branch to take public accountability considerations into account if it so chose. Prosecutors could decline to charge whistleblowers (as they have done in the past), and presidents could commute sentences or pardon leakers. Instead, in recent years, prosecutors have shown *more* willingness to use the Espionage Act against accused leakers.[50] Given this trend, prosecutorial discretion is probably an unreliable way to implement public accountability considerations. Pardons have also not been forthcoming. President Obama commuted the remainder of Manning's sentence after she served seven years. But his decision came only after substantial public pressure.[51] In addition, Obama's public explanation for the commutation did not cite public accountability. He reasoned, "the sentence that she received was very disproportional—disproportionate relative to what other leakers had received . . . it made sense to commute, not pardon, her sentence. I feel very comfortable that justice has been served and that a message has still been sent."[52] In other words, Obama's commutation was based on factors that could have easily been accounted for at Manning's sentencing under existing practices, rather than on a factor that required special executive consideration.

D. *First Amendment Interests as a Mitigating Factor at Sentencing*

1. Constitutional Mitigation

Given the difficulties of implementing an affirmative public accountability defense, courts can instead weigh public accountability factors through First Amendment considerations at sentencing. Incorporating First Amendment rights as mitigating factors at sentencing provides a promising, practical, and more defined way to balance the competing interests present in whistleblowing cases. This argument builds on a strong practice of individualized sentencing and a past case history of considering First Amendment interests at sentencing. Specifically, using the historical examples of fugitive slave rescuers and absolutist conscientious objectors during the Vietnam War, this Article argues that sentencing can be an appropriate setting for considering First Amendment interests related to crimes.

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[50] *See* REPORTERS COMM., *supra* note 18.

[51] *See, e.g.*, Rose Kulak, *Good News: Chelsea Manning Finally Walks Free*, AMNESTY (May 17, 2017), https://www.amnesty.org.au/chelsea-manning-free/ [https://perma.cc/3ASZ-XUWP]; *see also* Benjamin Wittes & Susan Hennessey, *Obama is Right on Chelsea Manning*, LAWFARE (Jan. 17, 2017), https://www.lawfareblog.com/obama-right-chelsea-manning [https://perma.cc/EH5F-MR9Z].

[52] The White House, *President Obama Explains Why He Commuted the Sentence of Chelsea Manning*, YOUTUBE (Jan. 18, 2017), https://www.youtube.com/watch?v=tEoC7h5BPJw [https://perma.cc/6DE9-ZJ2F]. For a transcript of Obama's remarks, see *Obama's Last News Conference: Full Transcript and Video*, N.Y. TIMES (Jan. 18, 2017), https://www.nytimes.com/2017/01/18/us/politics/obama-final-press-conference.html [https://perma.cc/7U26-MGSY]. Obama also pardoned Gen. James Cartwright, who had accepted a plea agreement for making false statements to the FBI about conversations with a journalist in connection with a leak investigation. Cartwright was not charged under the Espionage Act, which is why his case is not discussed in detail in this Article.

Indeed, as an area of the criminal justice system famously known for affording courts wide discretion for ethically complicated acts like whistleblowing, sentence mitigation may be better equipped to deal with the normative complexities involved in whistleblower cases.[53] Overall, the case history outlined below provides a more judicially palatable option for taking such interests into account in whistleblower cases, compared with a judge-made defense.

First Amendment mitigation at whistleblower sentencing is not an entirely new idea—Benkler gestured at the possibility of using public accountability factors either at the defense stage or the sentencing stage—but the defense argument has proved more popular in academic literature.[54] A public accountability defense, in many ways, is probably a more just and wholistic approach. But this Article proceeds from the reality that public accountability defenses have largely failed to gain traction in courts, in part because of their breadth. First Amendment factors at sentencing offers an alternative basis for a pragmatic solution that does not require judges to shape new doctrine; First Amendment interests are well-defined, compared to the wide scope of public accountability measures. As mentioned in the Introduction, the sentencing memos in these cases remain sealed, so we do not actually know exactly how judges think about these interests at sentencing.[55] But given the near-maximum plea bargain sentences in many Espionage Act cases, it seems reasonable to assume courts are either minimizing the importance of First Amendment interests at sentencing, or not considering them—and they should be.[56]

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[53] Thank you to David Pozen for the framing of this thought. For discussion of some of the ethical complexities of whistleblowing, see, e.g., William E. Scheuerman, *Whistleblowing as Civil Disobedience: The Case of Edward Snowden*, 40 PHIL. & SOCIAL CRIT. 609 (2014); David Pozen, *Edward Snowden, National Security Whistleblowing and Civil Disobedience*, LAWFARE (Mar. 26, 2019), https://www.lawfareblog.com/edward-snowden-national-security-whistleblowing-and-civil-disobedience [https://perma.cc/E24R-NJK9].

[54] Benkler, *supra* note 21, at 304; *see also* Pamela Takefman, Note, *Curbing Overzealous Prosecution of the Espionage Act: Thomas Andrews Drake and the Case for Judicial Intervention at Sentencing*, 35 CARDOZO L. REV. 897 (2013) (arguing for a balancing test at whistleblower sentencing that weights harm against national security with public interest benefits, but explicitly states that First Amendment arguments are beyond the scope of the Note).

[55] *See* Statement of Reasons (Document Sealed) as to Terry J. Albury, United States v. Albury, No. 0:18-cr-00067, (D. Minn. Oct. 26, 2018).

[56] The near-mechanical maximum sentences suggest that judges are not exercising any discretion in these cases, let alone First Amendment discretion—these issues are not even getting to court. Winner pleaded to and received a sixty-three-month sentence. *See* Plea Agreement at 5, United States v. Winner, No. 1:17-cr-00034-JRH-BKE (S.D. Ga. Aug. 23, 2018); *see also* Philipps, *supra* note 20. John Kiriakou pleaded to and received a thirty-month sentence. *See* Plea Agreement at 2, United States v. Kiriakou, No. 1:12-cr-00127-LMB (E.D. Va. Oct. 23, 2012); *see also* Judgment at 2, United States v. Kiriakou, No. 1:12-cr-00127-LMB (E.D. Va. Jan. 25, 2013). Manning pleaded guilty without a pretrial agreement limiting her sentence. *See* Charlie Savage, *Private Accused of Leaks Offers Partial Guilty Plea*, N.Y. TIMES (Nov. 8, 2012), https://www.nytimes.com/2012/11/09/us/army-private-in-wikileaks-case-offers-partial-guilty-plea.html [https://perma.cc/X5UK-U29T]. Albury is actually the outlier: he pleaded to a forty-six to fifty-seven-month sentence and received forty-eight months, although the bottom of the original contemplated sentencing range was thirty-seven months. *See supra* note 8 and accompanying text.

2. Objections

The societal harm associated with leaks of classified information to the media varies and indeed can be quite high. Arguably, the national security damage from a leak is arguably higher than the harm created by an individual conscientious objector, for instance. But seriousness of harm does not negate the need to consider constitutional rights. Indeed, sentence mitigation provides, in many ways, a better place to do this intricate kind of balancing than an all-or-nothing defense.

Critics may argue that if a criminal statute has been declared constitutional, and the legislative and executive branches agree as to its enforcement, it would be undemocratic for judges to "refuse" to enforce the law. This Article argues that factoring in constitutional rights at sentencing is within judicial discretion. Judges have the discretion to find sentencing variances for a range of other policy reasons, and First Amendment rights have historically been used—and should be used in whistleblower cases—as a similar basis for granting a variance.

The comparisons between cases in this Article could be challenged on a few grounds. First, some may argue First Amendment rights are not monolithic: maybe free speech and free exercise rights should be treated differently at sentencing, and comparing whistleblowers to fugitive slave rescuers and conscientious objectors is therefore invalid. That objection may have credence—this Article is an initial and novel historical analysis of First Amendment constitutional rights at sentencing and can be further refined in future research. However, given the comparative historical importance of free exercise rights to free speech rights, I expect other scholars will also have challenges identifying historical free speech cases to which to compare whistleblower cases.[57]

Some may object that whistleblower cases deal with listener interests, whereas the historical cases focus only on the First Amendment rights of an individual. I could not locate historical examples involving listener interests at sentencing; indeed, the concept of listener interests is fairly contemporary, so this kind of direct comparison may not be possible.[58] Still, the examined cases do not

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[57] *See, e.g.*, HARLAN FISKE STONE, LAW AND ITS ADMINISTRATION 140 (1915). Stone lists freedom of religious worship among the most important rights in the Constitution but not freedom of speech. Its omission is striking, given the length of the list. ("The most important of these [fundamental rights] were freedom of religious worship, the right peaceably to assemble, the right to bear arms, the right to be free from unreasonable searches and seizures, the right to a speedy trial by jury, the right not to be compelled to testify against oneself in a criminal trial, the right not to be deprived of life, liberty, or property without due process of law, and the like.") Thanks to Robert Post for this point. *See also* Stromberg v. California, 283 U.S. 359 (1931) (often considered one of the first instances where the Court defended individual speech rights).

[58] Listener rights are generally traced to the 1960s shift in First Amendment jurisprudence. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stating the First Amendment is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."); Red Lion Broad Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.");

provide reason to discount consideration of listener interests at sentencing. Although I think that listener interests can and should be considered at whistleblower sentencing, a full treatment of that argument is reserved for another article; this analysis focuses more on the individual speech rights of whistleblowers.

Some may object to the comparison of whistleblowing to absolutist conscientious objectors on the basis that the first places others at risk while the second, a form of opting out rather than affirmative misconduct, is a choice that only carries risk for that individual. But this objection lacks historical validity. Many people thought conscientious objectors during the Vietnam War were putting the lives of other Americans who were to be drafted at risk, demonstrated by language used at their sentencings.[59]

As a final note, this Article limits itself to historical cases where defendants are arguing for the relevancy of *constitutional* interests, not just general public-benefit arguments. Grounding the analysis in constitutional rights helps focus the analysis on "high-water mark" cases grounded in constitutional reasoning, escaping some of the squishiness of more general public-benefit arguments. For instance, this Article sticks to the current legal definition of conscientious objector, which rests on religious objections to combat. It does not contemplate other categories of criminal activity for which "conscience" might arguably be invoked as a motivator, such as the sovereign citizen movement's refusal to pay taxes or environmental terrorism. A discussion about such cases and sentence mitigation may be worth having, but this paper's argument is narrower: that public accountability whistleblowing fits within a historical tradition of recognizing First Amendment rights as mitigating factors at sentencing.

E. *Background on Individualized Sentencing & Constitutional Interests*

The argument that First Amendment interests should be considered at sentencing rests on the existing practice of individualized sentencing. The Supreme Court has recognized individualized sentencing as both an authorized and desirable practice.[60] Courts must consider "all the circumstances of a crime" in order to demonstrate "sound discretion."[61] Sentences for the same crime can and should vary: "the punishment should fit the offender and not merely the crime."[62] The U.S.

Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."). For a 1940s example, see Martin v. Struthers, 319 U.S. 141, 143 (1943) ("This freedom [of speech and press] . . . necessarily protects the right to receive [information].").

[59] *See, e.g.*, United States v. Charles, 460 F.2d 1093, 1095 (6th Cir. 1972) (quoting a trial court judge saying "When you consider a man has just willfully neglected to serve and refused to serve his country, it would seem to be a travesty that he would serve less time at confinement, even under a maximum sentence, than a man who went on and served").

[60] *See* Williams v. Oklahoma, 358 U.S. 576, 585 (1959); *see also* Williams v. New York, 337 U.S. 241, 247 (1949) ("The belief no longer prevails that every offense in a like legal category calls for an identical punishment.").

[61] *Williams v. Oklahoma*, 358 U.S. at 585.

[62] *See Williams v. New York*, 337 U.S. at 247.

Sentencing Guidelines articulate a standard set of factors that judges must consult when undertaking the full range of circumstances of the crime.[63] These guidelines state that "the nature and circumstances of the offense and the history and characteristics of the defendant" should be considered at sentencing.[64] In addition, the sentence should reflect: "the seriousness of the offense," "adequate deterrence to criminal conduct," "protect[ion of] the public from further crimes of the defendant," and the need to "provide the defendant with needed" training or treatment.[65] Although these guidelines are not binding on judges, district courts must indicate that they have "consult[ed] those Guidelines and take[n] them into account."[66]

Certain constitutional interests have informed the individualized sentencing process. Courts have recognized due process considerations at sentencing, with race, national origin, and gender barred from use as mitigating or enhancing factors.[67] The Court has also recognized some substantive constitutional interests as factors relevant to sentencing. In *Miller v. Alabama*,[68] the Court found that mandatory life sentences without parole for juvenile homicide offenders were unconstitutional.[69] In its view, then, Eighth Amendment interests were relevant at sentencing but not relevant to a determination of guilt. Even when young offenders "commit terrible crimes," the "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences."[70] The Supreme Court also found that mandatory life sentences failed to serve the basic sentencing objectives of deterrence, offender rehabilitation, and preventing further danger to society—the standard elements of individualized sentencing.[71] In doing so, the Court demonstrated a willingness to consider constitutional interests and individualized sentencing practices together. *Miller* reinforces the idea that sentencing can and should involve factors separate from those considered at conviction, including constitutional interests.

Still, courts have not directly explained why constitutional interests can be mitigating factors while not serving as partial or complete defenses. Their implicit approach seems to be based on the limits of judicial authority: courts are bound to enforce criminal law as legislatively defined but enjoy discretion to select a specific

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[63] 18 U.S.C. § 3553(a)(1).
[64] *Id.*
[65] 18 U.S.C. § 3553(a)(2)(A–D).
[66] United States v. Booker, 543 U.S. 220, 264–65 (2005).
[67] *See* United States v. Kaba, 480 F.3d 152 (2nd Cir. 2007) (racial or national origin); United States v. Smart, 518 F.3d 800, 805 n.1 (10th Cir. 2008) (race); United States v. Borrero-Isaza, 887 F.2d 1349, 1356 (9th Cir. 1989) (national origin); United States v. Gomez, 797 F.2d 417 (7th Cir. 1994) (national origin); Williams v. Currie, 103 F. Supp. 2d 858 (M.D.N.C. 2000) (gender); United States v. Maples, 501 F.2d 985, 987 (4th Cir. 1974) (gender).
[68] 567 U.S 460 (2012).
[69] *Id.* at 471.
[70] *Id.*
[71] *See* 18 U.S.C. § 3553(a)(1)(2).

sentence from a statutory range of penalties.[72] Constitutional interests are legitimate considerations that can factor into this discretion. Even if constitutional considerations do not outweigh the prevailing government interest at conviction, constitutional rights can shift the balance of interests at sentencing. For instance, in *Daniels*, a conscientious objector case examined later in the paper, the appeals court wrote that Congress, with regards to the selective service law, "did not provide that every violation of 50 U.S.C. App. § 462 [Selective Service Act] shall be punishable by a term of imprisonment of no less than five years. Hence, [the law] is an express legislative sanction of sentences substantially less than five years in prison for willful and knowing refusals to obey an order of a local selective service board in situations where there are appropriate mitigating circumstances."[73] Despite not fully explaining why, courts nevertheless *have* considered First Amendment interests in sentencing of multiple fugitive slave rescuers and absolutist conscientious objectors. These cases provide examples of how such a practice might work for whistleblowers.

F. *Public Accountability Arguments in Albury's Case*

Although none of the parties in Albury's case raised explicit constitutional arguments at sentencing, numerous amici raised First Amendment arguments in briefs to the court. A brief from scholars of constitutional, First Amendment, and media law urged the court to consider the public value of Albury's speech, among other benefits.[74] The Reporters Committee for Freedom of the Press pointed to historical patterns that support a distinction between using the Espionage Act to prosecute espionage in the traditional sense and leaks to the media.[75] But none of this language found its way into Judge Wilhelmina Wright's comments at sentencing.

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[72] *See Williams v. New York*, 337 U.S. at 246 ("Both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."). *See also* Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) ("Nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute."). Second, in noncapital criminal cases, the jury has traditionally only played a role at the liability stage, and the judge determines the sentence. Mandatory minimums started to cloud this distinction: what had once been only elements of crimes also became sentencing factors, blurring the distinction between what a judge could consider separately from a jury. *See Apprendi*, 530 U.S. at 466 (holding that when judges seek to enhance sentences beyond the statutory maximum on factual grounds, a jury must decide the relevant facts). Non-fact-based considerations at sentencing largely remain in the judge's hands. *See also* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003).

[73] *See* United States v. Daniels, 446 F.2d 967, 971–72 (6th Cir. 1971).

[74] Brief for Scholars of Constitutional, First Amendment, and Media Law as Amicus Curiae Supporting Defendant, United States v. Albury, No. 0:18-cr-00067-WMW (D. Minn. Oct. 4, 2018).

[75] Brief for Reporters Comm. For Freedom of the Press as Amicus Curiae Supporting Defendant, United States v. Albury, No. 0:18-cr-00067-WMW (D. Minn. Oct. 4, 2018).

Judge Wright implicitly rejected public accountability arguments in Albury's case. Wright acknowledged that Mr. Albury may have concluded his actions were "a just calculation of risk," and acknowledged that he may have been "motivated by sincere moral conflict."[76] Nonetheless, Wright stated that "the moral conflict is not one that you're being judged on today. It's not what the sentence represents a response to."[77] She concluded that "the law stands in judgment of the acts that you committed," which constituted "criminal activity . . . and that cannot be tolerated."[78]

The cases below show that the legal inflexibility Judge Wright found in Albury's case is not the only possible judicial response. Indeed, Judge Willson, the judge in the 1858 Fugitive Slave Act rescuer case, began his sentencing decisions with language that is uncannily similar to Judge Wright's.[79] The two judges reached, however, different conclusions, with Willson mitigating the sentence on the basis of First Amendment rights and Wright disregarding them. The historical cases discussed below show that Judge Wright was not bound to make this decision—First Amendment considerations are an appropriate component of the law to consider at sentencing. The law can be upheld and constitutional rights considered, from fugitive slave rescuers, to conscientious objectors, to public accountability whistleblowers.

II. Mitigation of Fugitive Slave Act Rescuer Sentences

First Amendment rights have been considered, although rarely, at sentencing. My research identified two historical moments where judges considered First Amendment rights affirmatively at sentencing, in Fugitive Slave Act rescuer cases and in Vietnam War absolutist conscientious objector cases. In both cases, multiple judges in separate cases employed this practice, so it was not just an isolated or idiosyncratic practice. Section IV advances a tentative theory about why First Amendment sentence mitigation has been present only rarely and in these cases in particular. But first, Sections II and III walk through the two historical moments in detail, demonstrating that judges have found it within their discretion to mitigate sentences on the basis of First Amendment rights.

A. *Fugitive Slave Act Background*

The Fugitive Slave Act of 1850 generated widespread national debate and resistance. This law was part of the Compromise of 1850, a series of congressional attempts to reconcile differences between Northern and Southern states. The law required the cooperation of citizens and state officials in the return of escaped slaves

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[76] Sentencing Hearing at 37:17–19 & 39:11–17, United States v. Albury, No. 0:18-cr-00067-WMW (D. Minn. Oct. 8, 2018).
[77] *Id.* at 39:11–17.
[78] *Id.* at 37:17–19.
[79] *See id.* at 37:17–19 ("The law stands in judgment of the acts that you committed."); *see also* Willson in Transcript of Langston Trial, *in* JACOB R. SHIPHERD, HISTORY OF THE OBERLIN-WELLINGTON RESCUE 178 (1959) ("[S]till the law must be vindicated.").

to their masters.[80] It also empowered federal courts to prosecute those who aided escapees, igniting a debate about the extent of the powers of the federal government.[81]

Substantial resistance to and support for the law developed, especially in states along the North-South border. One form of resistance involved helping recaptured slaves escape again—sometimes even from within courtrooms. In response, Southern border states passed additional laws punishing rescuers more harshly.[82]

Resistance to the law went beyond the politics of federalism. Many Northerners who helped escaped slaves evade capture saw their actions through the lens of conscience. They considered themselves "traitors if they obey[ed] laws which break the laws of Heaven" and referred to "the laws of Heaven" as a body of "Higher Law," including in court.[83] In their eyes, the Fugitive Slave Act "ma[de] it a crime to feed the hungry, clothe the naked, and help the weary traveler on his journey."[84] This recourse to Higher Law was a central part of the transcendentalist movement that developed in the 1840s. The movement "encouraged . . . a highly individualistic and personal repudiation of evil" rather than "a socio-legal philosophy which would have permitted [only] the state, in the exercise of its police power," to curtail evils such as slavery.[85] Slavery was the main focus of "Higher Law" adherents, but intemperance, immorality, and poverty were also topics of concern for the group.[86]

These resisters, although not necessarily members of traditional peace churches, such as Quakers, were all part of the broader transcendentalist movement. They were not idiosyncratic lawbreakers independently deciding to invoke religion as a ground for helping slaves. The group's view was not widely popular: judges warned juries not to take the group's beliefs seriously, criticizing this school of thought as disruptive to the rule of law. For instance, in a speech to a grand jury in the district court for the Western District of Pennsylvania, a judge told the jury that he regretted this "new discovery in ethics; that there are obligations and duties depending upon the dictates of conscience of a higher nature than the laws of our country," urging the jurors to ignore any arguments regarding the defendant's

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[80] Fugitive Slave Act of 1850, Pub. L. No. 31-60, § 7, 9 Stat. 462-64 (repealed 1864).
[81] OFFICIAL PROC. OF THE NAT'L DEMOCRATIC CONVENTION 25 (1856); Prigg v. Pennsylvania, 41 U.S. 539, 625–26 (1842); Ableman v. Booth, 62 U.S. 506, 526 (1859).
[82] *See infra* notes 117–18.
[83] SHIPHERD, *supra* note 79, at 8, 44. For an opposing view, see generally JOHN NEWELL, THE HIGHER LAW, IN ITS APPLICATION TO THE FUGITIVE SLAVE BILL: REVIEW OF DR. JOHN C. LORD'S SERMON, ON THE DUTIES MEN OWE TO GOD AND TO GOVERNMENTS (1850).
[84] SHIPHERD, *supra* note 79, at 32.
[85] Henry Commager, *Constitutional History and the Higher Law*, 62 PA. MAG. OF HIST. AND BIOGRAPHY 20, 25 (1938).
[86] *Id.*

adherence to a Higher Law.[87] In another case, prosecutors insulted a rescuer, likening his belief in Higher Law to adhering to the "rules of bigotry."[88]

Given its contested nature, the Fugitive Slave Act was overall well-enforced.[89] Judges in both trial and appeals courts rejected arguments that the law was unconstitutional.[90] Recent estimates of enforcement suggest that, during the first year of the law's enforcement alone, two-thirds of 147 captured escapees were returned to slavery.[91] Only seven of the captured escapees not returned to slavery were freed pursuant to a formal judicial hearing.[92] The remainder gained freedom in inventive ways: sometimes someone bought the captured slave's freedom; other times cities adopted policies of nonenforcement, as in Chicago.[93] Notwithstanding high rates of enforcement, the cases examined below show that judges sometimes recognized "Higher Law" motivations as mitigating factors at the sentencing of rescuers. Judges, however, only recognized these conscience-based mitigating factors in the cases of rescuers, most of whom were white, but not in the cases of escaped slaves themselves.

B. *The Oberlin Rescue*

One of the most notable rescues occurred in and around Oberlin, Ohio, in 1858. Oberlin was a strongly abolitionist town; the government at trial would remark that the students of Oberlin "are taught sedition and treason in connection with science and literature."[94] Prosecutors charged thirty-seven Oberlin men under the Fugitive Slave Act for assisting John Price, who had escaped from slavery, break free from his legally sanctioned pursuers.[95] A crowd had swarmed the hotel where Price was being held by captors and secured his release.[96] Independently and contemporaneously, some individuals were in the initial stages of negotiating

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[87] PAUL FINKELMAN, SLAVERY IN THE COURTROOM: AN ANNOTATED BIBLIOGRAPHY OF AMERICAN CASES 95 (1985).
[88] Transcript of Hossack Trial, *in* R.R. HITT, REPORT OF THE TRIAL OF JOHN HOSSACK 143 (1860).
[89] Enforcement varied by year, as did perception of enforcement. See STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE ACT 1850-1860 (2012), for a book-length take on this subject.
[90] *See* R.J.M BLACKETT, THE CAPTIVE'S QUEST FOR FREEDOM 68, 78 (2018); *see also* Ableman v. Booth, 62 U.S. 506, 520 (1859).
[91] BLACKETT, *supra* note 90, at 69–70. Out of 147 captured escapees, forty-five were returned without any type of hearing; fifty-three were returned after a hearing; sixteen escaped; seventeen were rescued; seven were returned but later ransomed; seven were freed after a hearing; and two were purchased prior to their return in the first year. Numbers remained high through 1860, just before the start of the Civil War. *See* STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL 323 (2011).
[92] BLACKETT, *supra* note 90, at 69–70.
[93] BLACKETT, *supra* note 90, at 23; CHARLES MANN, THE CHICAGO COMMON COUNCIL FUGITIVE SLAVE LAW OF 1850 71 (1903).
[94] SHIPHERD, *supra* note 79, at 165.
[95] *See* LUBET, *supra* note 91, at 229–47; *see generally* NAT BRANDT, THE TOWN THAT STARTED THE CIVIL WAR (1990).
[96] *See* LUBET, *supra* note 91, at 246.

Price's release through habeas corpus, rather than through force.[97] Of the thirty-seven men initially indicted, only two went to trial.[98] After those trials, detailed below, the remainder of the indictments were dropped after a different Ohio prosecutor charged the slave catchers for kidnapping in response to the indictments of the rescuers.[99] The two jurisdictions agreed to resolve the battle of charges with *nolle prosequi* declarations for all remaining rescuers and catchers.[100]

Simeon Bushnell, a white bookseller who had driven Price's getaway wagon, and Charles Langston, a free black school principal who had been trying to negotiate Price's habeas release before the crowd rushed the hotel, stood trial.[101] There is little evidence that Langston and the others negotiating Price's release through habeas corpus had contact with the members of the crowd that eventually rescued Price. However, the grand jury cast a wide net and indicted Langston anyway.[102] (Notably, Langston was black.)

Scholars have described the Oberlin trials as the "longest, and most radically politicized fugitive slave trial of the antebellum era."[103] The defense and the prosecution consisted of star lawyers, with the prosecution coming under pressure from the White House to make an example of the town of Oberlin.[104] The maximum penalty per offense under the Act was six months in jail plus a fine of $1,000.[105] The trial transcripts show some evidence that the defendants anticipated receiving the maximum sentence; Langston specifically mentions this maximum penalty as one he is prepared to accept.[106] Indeed the defendants did have some evidence to believe they might receive a maximum sentence, as a court in Ohio had previously required a rescuer to pay the maximum financial penalty: in 1854, an Ohio lawyer had been sentenced to a total of $3,000 in damages plus court costs for helping three slaves escape, but he received no jail time.[107]

Presiding Judge Hiram Willson was openly pro-slavery. In his home state of New York, Willson had tricked a black man into leaving the state so he could be sent back to Louisiana; Willson was subsequently charged with kidnapping and fled to Ohio to make a new start.[108] Willson made a speech in front of the grand jury

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[97] *See* LUBET, *supra* note 91, at 245.
[98] *See* BLACKETT, *supra* note 90, at 271–75.
[99] *See* BLACKETT, *supra* note 90, at 271–75.
[100] *See* SHIPHERD, *supra* note 79, at 263.
[101] *See* BLACKETT, *supra* note 90, at 270–71.
[102] *See* Paul Finkelman, *A Political Show Trial in the Northern District: The Oberlin-Wellington Fugitive Slave Case*, *in* JUSTICE AND LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO 47 (2012).
[103] BLACKETT, *supra* note 90, at 272–73.
[104] *See* Finkelman, *supra* note 102, at 44, 47.
[105] Fugitive Slave Act of 1850, Pub. L. No. 31-60, § 7, 9 Stat. 462, 464.
[106] SHIPHERD, *supra* note 79, at 178.
[107] The court appeared to assess damages rather than the statutory fine in this case. *See* ROBERTA SUE ALEXANDER, A PLACE OF RECOURSE, THE U.S. SOUTHERN DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, 1803-2003 41 (2005).
[108] *See* Finkelman, *supra* note 102, at 45.

that boldly criticized violators of the Act, calling rescuers and their like "prelates of the dark ages" dedicated to "intolerance and bigotry" against any persons who did not share their abolitionist views.[109]

Despite the political pressure and the judge's proslavery predilections, both rescuers received relatively lenient sentences. Bushnell received a sentence of sixty days, a $600 fine, and the costs of the prosecution.[110] Langston received a twenty-day sentence, a $100 fine, and prosecutors' costs, after he made a remarkable speech arguing for a reduced sentence.[111] The following sections trace the role that arguments about "Higher Law" motivations played at their sentencings.

1. Bushnell's "Exemplary" Sentence?

At trial, Bushnell's defense lawyer argued extensively about Higher Law. He argued that Bushnell had "obeyed the laws of God," following moral commands that "rise above the coerced observance of criminal statutes."[112] Even as a lawyer, bound by the "arts and finesse of the bar," he proclaimed himself a "votary of that Higher Law," just like his client.[113] Although he acknowledged the mismatch between Higher Law and a court of law, he stated that he was still "authorized to demand of you as a court, the narrowest construction of this [Fugitive Slave] act . . . for the very purpose of excluding this case from its straitened scope."[114] If the court should nonetheless find Bushnell guilty, the defense attorney argued that the rescuers had willingly made a choice to act on conscience and willingly had "come to suffer its penalties" and that "they are here, unresistingly to endure if they must."[115]

This conscience-based argument was not successful at trial, and the jury found Bushnell guilty. At sentencing, neither Bushnell nor his lawyers elected to speak. Judge Willson did speak, announcing his intention to pronounce an "exemplary" sentence for offenders such as Bushnell, who "are exultant in the wrong" they have done.[116] The sentence Willson handed down—sixty days and $600 plus prosecutors' costs—is only the third-harshest financial penalty, but the longest jail sentence, I have identified for slave-rescuing offenses. The harsher financial penalties, as stated above and as detailed in Table 1, were handed down to fellow Ohioan Rush Sloane ($3,000 total fine and no jail time) and Wisconsinite Sherman Booth ($1,000 fine and thirty days in jail).

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[109] SHIPHERD, *supra* note 79, at 3.
[110] *See* SHIPHERD, *supra* note 79, at 450.
[111] *See* SHIPHERD, *supra* note 79, at 472.
[112] SHIPHERD, *supra* note 79, at 127.
[113] SHIPHERD, *supra* note 79, at 130.
[114] SHIPHERD, *supra* note 79, at 129–30.
[115] SHIPHERD, *supra* note 79, at 129–30.
[116] SHIPHERD, *supra* note 79, at 449–50.

Compared to the federal maximum of six months and even harsher border state laws, it is difficult to view a sixty-day sentence as "exemplary." Border-state laws punishing rescue attempts were appealingly harsh enough to slaveholders that they often tried to finagle ways to try rescuers in Southern state courts rather than in federal court. For instance, slavery sympathizers illegally spirited rescuer David W. Bell and his son from Indiana into Kentucky to be tried for assisting in the escape of slaves.[117] Similarly, a Delaware ship captain, William B. Baylis, was sentenced in Virginia to forty years for rescuing five slaves in Virginia.[118] Bushnell's trial transcript alone does not present enough evidence to say definitively that the conscience arguments played a role in Bushnell's sentencing. Still, the fact that Bushnell received a sentence that was less than half of the maximum possible jail time, and Willson's subsequent openness to these arguments at Langston's sentencing, cast doubt on the sentence being quite as exemplary as Willson described it.

2. Langston's Mitigated Sentence

Willson, who pronounced this "exemplary" sentence in Bushnell's case, was receptive to mitigation arguments in the case heard immediately after Bushnell's, that of Charles Langston, a free black man. The cases were connected to the same incident; so connected, in fact, that the government attempted—unsuccessfully—to empanel the same, cherrypicked, entirely Democratic (pro-slavery) jury for both cases.[119] Langston's attorney also presented a conscience-based defense, but Langston's jury similarly returned a guilty verdict.[120]

At sentencing, Langston himself opted to speak and gave a lengthy speech "in regard to the mitigation of that sentence."[121] His remarks became one of the more famous speeches of the era for its condemnation of the country's response to slavery. Langston displayed little hope that his words would carry weight with the court: he began his speech by acknowledging that, especially given his race, "I cannot . . . expect any thing [sic] which I may say will in any way change your predetermined line of action."[122] Nonetheless, Langston's speech was remarkably bold. He called the jury, judge, prosecutor, and his defense attorneys racially prejudiced and yet still managed to convince the judge that his sentence should be mitigated on the basis of conscience.[123]

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[117] SAMUEL MAY, THE FUGITIVE SLAVE LAW AND ITS VICTIMS 92-93 (1861).
[118] *Id*. at 99.
[119] Finkelman, *supra* note 102, at 45.
[120] Langston's defense attorney argued, "[h]e does not stand before you accused of the commission of any thing [sic] which is in itself a crime, but with an act which is only a crime, because the law declares it is. And if he be found guilty as charged, his character will not be a[s] affected as is his who has been convicted of theft, of arson, or of murder." SHIPHERD, *supra* note 79, at 141.
[121] SHIPHERD, *supra* note 79, at 464.
[122] SHIPHERD, *supra* note 79, at 464.
[123] SHIPHERD, *supra* note 79, at 468.

Langston principally argued that the "law under which I am arraigned is an unjust one, one made to crush the colored man, and one that outrages every feeling of Humanity, as well as every rule of Right."[124] In his speech, he did not use the term "Higher Law," a term that seems to have been associated primarily with white peace churches, but he did use an associated term, the "rule of Right." That term referred to the view that a Judeo-Christian natural law undergirded the Constitution.[125] Langston emphasized this moral and religious perspective as the most important basis for sentence reduction in his case, dismissing arguments about the law's constitutionality: "I have nothing to do with its constitutionality; and about it I care a great deal less."[126] In stating this view, Langston focused on his own individual rights as a basis for mitigation, as opposed to the systemic invalidity of the law.

Judge Willson—the same judge who crafted an "exemplary" sentence for Bushnell—was moved. The judge responded:

> You have done injustice to the Court . . . in thinking that nothing you might say could effect a mitigation of your sentence... I see mitigating circumstances . . .[that] excite[] the cordial sympathies of our better natures, [but] still the law must be vindicated. On reflection, I am constrained to say that the penalty in your case should be comparatively light.[127]

The judge did not specify what he found convincing in Langston's speech. But Langston's sentence, at $100 and twenty days of jail time, was considerably lighter than Bushnell's. His words about the "rule of Right" clearly had some effect.

C. *The Hossack Chicago Trial*

In a separate Illinois rescue trial, rescuer John Hossack gave a similarly rousing speech.[128] Hossack had participated in the rescue of an escaped slave, Jim Gray.[129] Gray had been captured and was at a hearing in a courtroom, about to be handed over to a federal marshal for return to the South.[130] There, Hossack, as part of a team of rescuers, helped him escape from within the courtroom.[131]

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[124] SHIPHERD, *supra* note 79, at 467.
[125] *See* Harry F. Harrington, Moral Influence of the American Government, Address at Young Men's Association in Albany, NY (July 4, 1846).
[126] SHIPHERD, *supra* note 79, at 176.
[127] SHIPHERD, *supra* note 79, at 471–72.
[128] John Hossack, Speech of John Hossack Before Judge Drummond, of the United States District Court, at Chicago, Upon Conviction of Violating the Fugitive Slave Law (1860), https://www.gutenberg.org/files/13987/13987-h/13987-h.htm [https://perma.cc/9HKZ-SYKT].
[129] *See* HITT, *supra* note 88, at 45.
[130] *See* FINKELMAN, *supra* note 87, at 129.
[131] *See* FINKELMAN, *supra* note 87, at 129.

At sentencing, Hossack first argued the Act was unconstitutional on what would now be called equal protection grounds, an argument his attorneys had declined to make at trial.[132] But he concluded with arguments about "Higher Law," in a speech widely reprinted in Illinois papers:

> This law … is so obviously at variance with the law of that God who commands me to love Him with all my soul, mind, might and strength, and my neighbor as myself, and the Redeemer who took upon him my nature and the nature of poor Jim Gray has been so particular in telling me who my neighbor is, that the path of duty is plain to me. This law so plainly tramples upon the divine law, that it cannot be binding upon any human being under any circumstances to obey it.[133]

At trial, the prosecution had tried to strip away Hossack's religious motivations, casting him as possessing instead only a foolhardy disregard for laws, rather than true religious compunction. The prosecuting attorney announced to the court, "for [his] motives I have a perfect contempt."[134] Indeed, "it is conscience [that moved him], and nothing but conscience, not religion . . . [and his conscience is] that extremely independent conscience which makes any man's little head a legislature, his prejudices a constitution, and his opinion a revelation."[135]

Ultimately, the jury found Hossack guilty of aiding a rescue in violation of the Fugitive Slave Act but recommended mercy at sentencing.[136] At sentencing, Judge Thomas Drummond—who would go on to be a Lincoln supporter—took the jury's recommendations for mercy seriously. Hossack received a ten-day sentence and a fine of $100 plus costs of prosecution. Hossack's co-defendant, Dr. Stout, was similarly sentenced to ten days and a fine of $50 plus costs, and co-defendant C.B. King was sentenced to one day imprisonment and $10 plus costs.[137] The mayor, other leading community figures, and the general public all contributed to paying their fines.[138] Table 1 below shows these and other recorded rescuer sentences in federal court, gathered from across multiple sources.

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[132] *See* FINKELMAN, *supra* note 87, at 130.
[133] Hossack, *supra* note 128.
[134] HITT, *supra* note 88, at 155.
[135] HITT, *supra* note 88, at 203–04.
[136] HITT, *supra* note 88, at 314.
[137] *See* MAY, *supra* note 117, at 128.
[138] *See* BLACKETT, *supra* note 90, at 190–91.

Table 1: Rescuer Sentences[139]

Name	*Jail Time*	*Fine*	*Trial Costs*[140]	*Date*	*Jurisdiction*
Rush Sloane[141]	0 days	$3000	$950[142]	1854	Ohio
Benjamin Waterhouse[143]	1 hour	$50	No[144]	1854	Indiana
Sherman Booth[145]	30 days	$1000	--	1855	Wisconsin
John Ryecraft[146]	10 days	$200	--	1855	Wisconsin
Simeon Bushnell[147]	60 days	$600	Yes	1858	Ohio
Charles Langston[148]	20 days	$100	Yes	1858	Ohio
William M. Connolly[149]	20 days	$10	Yes	1858	Ohio
Reuben Johnson[150]	30 days	$5	Yes	1859	Ohio
John Hossack[151]	10 days	$100	$591	1859	Illinois
Joseph Stout[152]	10 days	$50	$802.21	1859	Illinois
Claudius B. King[153]	1 day	$10	--	1859	Illinois

D. *Additional Constitutional Concerns Raised During Rescue Cases*

Concerns about religious convictions certainly were at the forefront of these cases, especially at sentencing, but it was not the only defense raised during these

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[139] The table also does not report cases for which incomplete records are available. The government charged a Mr. Harvey of Pennsylvania in 1852, who was fined an unknown amount, MAY, *supra* note 117, at 22, and a Mr. Brown of Indiana in 1854, *see* Justin Clark, *Fugitive Slaves in Indiana: A Study in Newspapers*, HOOSIER STATE CHRONICLES (2017) https://blog.newspapers.library.in.gov/fugitive-slaves-in-indiana/ [https://perma.cc/43XJ-ZM68]. The government attempted but failed to charge Enoch Reed of New York with a violation of the Fugitive Slave Act and instead charged him with resisting a federal officer; Reed died before his sentencing. *See* Angela Murphy, *"It Outlaws Me, and I Outlaw It!" Resistance to the Fugitive Slave Law in Syracuse, New York*, 28 AFRO-AMERICANS IN N.Y. LIFE AND HISTORY (2004). Also indicted in Ohio in 1860 but with no sentencing records available are George Gordon, Jas. Hammond, Asbury Parker, Calvin Rowland, Joseph T. Baldwin, E.D. Asbury, and Jonathan McLarew. *See Indicted for Obstructing the Fugitive Slave Law*, STAUNTON SPECTATOR, Dec. 18, 1860, at 2. In addition, the table does not include acquittals, dropped charges, hung juries, or cases that were resolved with the purchase of the fugitive slave's freedom.

[140] Where records are available on trial costs, I record them. Where trial costs were indicated as due but not specified, I record as yes; likewise if they were indicated as not due, I record as no. Where nothing is recorded in the column, there was no discussion of costs, positive or negative.

[141] ALEXANDER, *supra* note 107, at 41.

[142] MAY, *supra* note 117, at 24.

[143] MAY, *supra* note 117, at 43.

[144] MAY, *supra* note 117, at 43.

[145] Ableman v. Booth, 62 U.S. 506, 510 (1859).

[146] MAY, *supra* note 117, at 33.

[147] SHIPHERD, *supra* note 79, at 170.

[148] SHIPHERD, *supra* note 79, at 178.

[149] SHIPHERD, *supra* note 79, at 47. Some records and accounts related to the Connolly case also spell his surname "Connelly."

[150] ALEXANDER, *supra* note 107, at 299.

[151] MAY, *supra* note 117, at 128.

[152] MAY, *supra* note 117, at 128.

[153] MAY, *supra* note 117, at 128.

trials. The constitutionality of the law was fiercely debated, primarily on federalism grounds. Northern states contested the federal government's ability to assert this degree of control. One of the above trials generated a habeas corpus motion that went up to the Supreme Court, which upheld the Act's constitutionality.[154] A second constitutional issue also ran through the trials of escaped slaves themselves, asserting that they were not afforded due process. (White rescuers generally did not raise this claim.) Last, black rescuers made what were essentially equal protection arguments. The Constitution did not yet contain the Fourteenth Amendment, so these arguments did not, at the time, formally constitute constitutional interests. Still, these sentiments proved powerful in the courtroom. Particularly, in Langston's speech, the following line drew "great applause" from the crowd, and is rendered in all-capitals in the trial transcript: "BLACK MEN HAVE NO RIGHTS WHICH WHITE MEN ARE BOUND TO RESPECT."[155] Conscience motivations played a major role in the sentencing decisions above, but these other factors were also present.

III. Mitigation of Conscientious Objector Sentences

A. *Background: Conscientious Objection During the Vietnam War*

During the Vietnam War, the Sixth and Eighth Circuits decided a series of cases that overturned maximum sentences that district courts had imposed on conscientious objectors. The appeals courts held that the trial courts had not adequately considered religious motivations as part of individualized sentencing. Each of these cases dealt with Jehovah's Witnesses, a category of conscientious objector that has long been problematic for the government. Three of these cases dealt with Jehovah's Witnesses who were opposed to completing alternative civilian service if ordered to by a Selective Service Board, which they considered part of the military, but were not opposed to such service if it was ordered by a court.[156] This type of refusal by Jehovah's Witnesses is called "absolutist" conscientious objection. The fourth case dealt also concerned a Jehovah's Witness but dealt mainly with a procedural irregularity.

In each case, the appellate judge argued that the lower court failed to exercise proper discretion by not considering the defendant's religious motivations at sentencing.[157] The appellate judges did not, however, invalidate the convictions

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[154] Ableman v. Booth, 62 U.S. 506, 526 (1859).

[155] SHIPHERD, *supra* note 79, at 177.

[156] These types of conscientious objectors have been a perennial problem for the government, which has struggled to deal with them throughout the many iterations of its approach. For instance, during the Civil War, this type of objector was imprisoned until Lincoln decided to parole them all, largely because of resource constraints. *See* Tara J. Carnahan, *The Quakers and Conscientious Objection*, HISTORIA (2011), https://www.eiu.edu/historia/2011Carnahan.pdf [https://perma.cc/H2QH-WMKQ].

[157] The cases considered are Woosley v. United States, 478 F.2d 139 (8th Cir. 1973); United States v. McKinney, 466 F.2d 1403 (6th Cir. 1972); United States v. Charles, 460 F.2d 1093 (6th Cir. 1972); United States v. Daniels, 446 F.2d 967 (6th Cir. 1971).

or contest the constitutionality of the underlying statute. Their decisions focused on the fact that trial judges failed to exercise required discretion by not adequately accounting for First Amendment interests as potentially mitigating factors at sentencing. Although general protections for conscientious objectors had been defined by statute and refined in court, neither the relevant statute or precedent cases specifically prescribed judicial consideration of religious interests when participants failed, somehow, to follow procedure or rejected alternative service.[158] Despite general statutory authorization for consideration of conscientious objector rights, these judges utilized their discretion to require consideration of First Amendment interests at sentencing in these cases, drawing on existing bodies of sentencing and constitutional law.

A different circuit judge wrote each opinion, and no two panels that heard the cases contained the same configuration of judges, resulting in an approach that was not limited to certain outlier or radical judges.[159] Even so, the circuit judges usually converged on similar analyses. The courts pointed to the generally good moral character of the convicted defendants and the special characteristics of conscientious objection, including First Amendment, particularly free exercise, interests. Indeed, although these cases occurred before the enactment of the Federal Sentencing Guidelines, the judges considered factors that mirror the considerations set forth in part of that statute, 18 U.S.C. § 3553(a)(1).[160] In *Woosley v. United States*,[161] for instance, the court found a trial judge's imposition of the statutory maximum sentence on a Jehovah's Witness who refused draft induction "disproportionate to the nature of the crime and the character of the criminal" and that it failed to take into account that the "appellant's crime was a crime of conscience."[162] The judges spoke in the language of individualized sentencing, recognizing constitutional interests as part of existing judicial sentencing discretion.

B. *General Protections for Conscientious Objectors*

During the Vietnam War, the Supreme Court expanded the meaning of the statutory definition of conscientious objectors. Conscientious objectors were defined in statute as those who by "religious training and belief" were opposed to war.[163] This definition, dating to World War II, was broader than previous statutory definitions, which had limited conscientious objector status only to formal

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[158] *See infra* notes 165–70.
[159] In *Charles*, the judges were Weick, Edwards & Celebrezze; the judgment was issued per curiam. 460 F.2d 1093. In the *Daniels* case, Phillips, Edwards & Celebrezze, who authored the opinion on first appeal before it was reheard en banc. 446 F.2d 967. In *McKinney*, the judges were Phillips, Celebrezze, & Weick, who authored the opinion. 446 F.2d 1403.
[160] Namely, "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1).
[161] 478 F.2d 139 (8th Cir. 1973).
[162] *Id.* at 148.
[163] 50 U.S.C. § 3806 (1967).

members of specifically enumerated "peace churches."[164] A series of Supreme Court decisions during the Vietnam era broadened this standard to encompass those "whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[165] Despite this expansion, the Court foreclosed political objectors from attaining conscientious status.[166] A few years later, the Court held that, to qualify for protection, religious beliefs must apply to all wars, not particular wars, excluding from conscientious objector status those who opposed the conduct in or basis of a particular war.[167] Despite the extensions of conscientious objector protections, neither the Court nor the legislature had explicitly addressed the dilemma of absolutist conscientious objection.

Overall, however, the Supreme Court generally spoke favorably of conscientious objectors as a category, stating that Congress recognized "the value of conscientious action to the democratic community at large" and that sometimes "principles of conscience and religious duty may sometimes override the demands of a secular state."[168] Furthermore, "it is not inconsistent with orderly democratic government for individuals to be exempted by law, on account of special characteristics, from general duties of a burdensome nature."[169] The cases described below thus came down in a favorable judicial environment, despite no specific higher court decisions on absolutist objectors.

C. *Sentence Mitigation for Absolutist Conscientious Objectors in* Daniels

In 1971, the Sixth Circuit decided *United States v. Daniels*,[170] which dealt with a Jehovah's Witness afforded conscientious objector status by his Selective Service Board ("SSB").[171] However, Daniels subsequently refused to comply with the terms of the mandated, alternate civilian service the board required of conscientious objectors.[172] Many Jehovah's Witnesses view SSBs as part of the military, with compliance with any board conditions forbidden by their religion as

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[164] *See* Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1134 (2014) (citing S. 1871, 65th Cong. § 3 (1917) (making noncombatant service available to members of "well-organized religious sect" whose "creed forbids its members to participate in war.")).
[165] Welsh v. United States, 398 U.S. 333, 344 (1970); *see also* United States v. Seeger, 380 U.S. 163 (1965).
[166] *See* Selective Draft Law Cases, 245 U.S. 366, 387–90 (1918); *see also* Seeger, 380 U.S. at 165 (illustrating Congress meant "to exclude essentially political, sociological, or philosophical views" from conscientious objector definition.).
[167] Gillette v. United States, 401 U.S. 437 (1971).
[168] *Id.* at 445.
[169] *Id.* at 460.
[170] 446 F.2d 967 (6th Cir. 1971).
[171] *Id.*
[172] *Id.*

equivalent to participation in the military.[173] Most absolutist objectors are not opposed to complying with court-ordered civilian service, however—an important fact in these cases.[174] The conscientious objector in this case was convicted of "willfully and knowingly failing to report" to his board to begin his SSB-ordered civilian service at a Kentucky hospital.[175] The court sentenced him to five years imprisonment, the maximum term prescribed by federal statute for those who violated the Selective Service Act.[176]

On the first appeal, the circuit judge affirmed Daniels's conviction but remanded the case for reconsideration of the sentence.[177] The appellate judge noted concerns about the "severity of the sentence" given the available alternative solution, that "Jehovah's Witnesses are responding to court orders to perform the identical conscientious objector work which they will not perform in response to a Selective Service Board Order" and that this appellant had so certified.[178] On remand, however, the district court refused to alter its sentence, and the appellate court heard the case a second time.[179]

The appeals court remanded a second time, imposing its own sentence of 25 months of concurrent probation and civilian work.[180] This opinion provided more detailed reasoning for the court's decision. The court first investigated its powers to review a sentence within statutorily prescribed limits. Despite a general presumption against review of lower court sentences, it found that it could review the sentence in this case because of "the reliance by the sentencing court on improper factors or the failure of the sentencing court to 'evaluat[e] the available information in light of the facts relevant to sentencing.'"[181]

The appeals court faulted the lower court for failing to consider all relevant factors at sentencing and for over-relying on certain factors in its final decision. The appeals court's critique focused on three particular aspects of the trial court's failure to exercise discretion: it failed to individualize sentences; it failed to assess the purposes of punishment in relation to the crime; and it overemphasized the serious nature of the crime to the detriment of the individual's circumstances. The appellate judge noted Daniels's "sole motivation for refusing to obey an order of his local selective service board was a devout adherence to his religious beliefs"

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[173] *See, e.g.*, *id.* at 968 n.3; *see also* United States v. Daniels, 429 F.2d 1273, 1274 (6th Cir. 1970) ("We take judicial notice that Jehovah's Witnesses are responding to court orders to perform the identical conscientious objector work which they will not perform in response to a Selective Service Board order.").
[174] *Daniels*, 429 F.2d at 1274; *Daniels*, 446 F.2d at 968 n.3.
[175] *Daniels*, 429 F.2d at 1274.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Daniels*, 446 F.2d at 968.
[180] *Id.* at 972–73.
[181] *Id.* at 970.

and that a more lenient solution, court-ordered service, was readily available and had been implemented elsewhere in the Sixth Circuit.[182]

Moreover, in its critique, the circuit court heavily cited the foundational Supreme Court cases on individual sentencing, *Williams v. Oklahoma*[183] and *Williams v. New York*.[184] The appeals court was shocked that the trial judge had emphasized that "since 1938 or 1939, his court has . . . sentenced to five years in the penitentiary every young man who has refused to obey an order of a draft board."[185] The appeals court condemned the practice of regularly "imposing a sentence without particular reference to the circumstances surrounding the commission of the crime or of the background of the criminal defendant."[186]

Second, the circuit court found that the sentence did not comport with the accepted aims of punishment, which it saw as deterrence, rehabilitation, and protection of society from further danger.[187] Imprisoning offenders who, other than their present crime, appear to be of "good character" and "model behavior" offers few rehabilitation or protection benefits.[188] Similarly, the available alternative sentences would not "induce widespread disobedience of the orders of local Selective Service boards," offering adequate deterrence.[189]

Third, the circuit court faulted the trial judge for validating the sentence by emphasizing the "serious" nature of the crime by calling it a crime that "strikes at the very foundations and fundamentals of our whole governmental system."[190] A particular crime's social significance does not obviate the need for individualized sentencing, including consideration of all other relevant factors surrounding the crime. The court pointed to Congress's decision to impose a term of up to five years as "express legislative sanction of the practice of meting out sentences substantially less than five years . . . [even] for willful [sic] and knowing refusals to obey an order of [an SSB] . . . where there are appropriate mitigating circumstances."[191] If Congress had intended otherwise, or intended for maximum sentences to be imposed on absolutist objectors, it could have said so.

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[182] *Id.* at 968.
[183] 358 U.S. 576 (1959).
[184] 337 U.S. 241 (1949).
[185] *Daniels*, 446 F.2d at 971.
[186] *Id.*
[187] Although this case was decided before current sentencing guidelines were put in place, these considerations map to the factors included in 18 U.S.C. § 3553(a)(2).
[188] *See Daniels*, 446 F.2d at 972.
[189] *Id.*
[190] *Id.* at 971.
[191] *Id.* at 971–72.

D. *Additional Cases of Sentence Mitigation for Conscientious Objectors*

The facts and outcome of this case were essentially repeated in subsequent Sixth Circuit litigation, starting with *United States v. McKinney*.[192] *McKinney* involved an even more drawn-out battle of wills between the trial and appeals courts, with not two but three appeals.[193] The final opinion in *McKinney* criticized the trial judge for "resent[ing] our remanding."[194] The circuit court's steadfastness in the face of this lower court intransigence further demonstrates the degree to which it believed its own approach to sentencing, which incorporated consideration of the individual's motivations, was correct.

A final case in the Sixth Circuit, *United States v. Charles*,[195] also involved a Jehovah's Witness who failed to follow the proper civilian procedures for obtaining conscientious objector status before induction.[196] On receiving his induction notice, he reported for induction but failed to take the "symbolic step forward" that indicated acceptance of induction.[197] Technically, this refusal did not violate procedures, but he and the local officials were apparently unaware of this fact and the case proceeded as though it had.[198] In reality, he would have had the option seek pursue conscientious objector status post-induction, but it is unclear whether Charles would have found the post-induction procedure an acceptable option, given that his beliefs prohibited him from participating in military activity in any capacity, even to obtain an exemption.[199]

By the time of the *Charles* case, trial judges had learned from the remand-a-thons in similar litigation. The trial judge in *Charles* added language about the insincerity of the applicant's religious beliefs to his sentencing opinion in hopes of convincing the appeals court to uphold his verdict. Still, the trial judge also wrote that it would be "a travesty" that a man who had "willfully neglected to serve and refused to serve his country" would "serve less time . . . than a man who went on and served."[200] The appeals court, not to be fooled, dismissed the religious insincerity arguments and found that the trial judge, in mechanically imposing a maximum sentence without adequate consideration of the defendant's religious motivations, had "abused the sentencing discretion" given to him.[201] In other words, *Daniels* controlled in this case, too, where improperly followed procedure was at issue.

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[192] 466 F.2d 1403 (6th Cir. 1972).
[193] United States v. McKinney, 427 F.2d 449 (6th Cir. 1970); United States v. McKinney, 466 F.2d 1403 (6th Cir. 1971); United States v. McKinney, 466 F.2d 1403 (6th Cir. 1972).
[194] 466 F.2d at 1404.
[195] 460 F.2d 1093 (6th Cir. 1972).
[196] *Id.*
[197] *Id.*
[198] *Id.* at 1094.
[199] *Id.* ("He has never claimed that had he been given notice he would have consented to induction. In fact, the principles of faith accepted by the Jehovah's Witnesses, upon which Appellant relies for support of his conscientious objector claim, apparently forbid acceptance of induction.").
[200] *Id.* at 1095.
[201] *Id.* at 1094.

The last of this quartet of cases came in 1973 from the Eighth Circuit; it shows that the Sixth Circuit was not alone in this problem or in its conclusions.[202] In *Woosley v. United States*,[203] the Eighth Circuit remanded the maximum sentence of a Jehovah's Witness absolutist conscientious objector for reconsideration. The appeals court spoke in fairly strong language about the defendant's motivation: the "appellant's crime was a crime of conscience" and his "transgression rested upon a technical violation of the law . . . dictat[ing] leniency."[204] The opinion drew on reasoning from the Sixth Circuit, echoing its arguments that "neither society nor the individual stands to gain any benefit" from the sentence, in contravention of the purposes of punishment.[205] This Eight Circuit opinion is most notable in conducting distinctly separate analyses of the trial judge's failure to individualize the sentence and the excessiveness of the sentence, whereas the Sixth Circuit opinions tended to blend these two factors.[206] The Eighth Circuit's approach provides a clearer basis for suggesting that a maximum sentence would be inappropriate for the crime regardless, given the First Amendment interests in the case.

E. *No Evidence of a Slippery Slope Towards Sentencing Leniency*

The cases discussed below in this section demonstrate that granting sentence mitigation in certain, narrowly constrained cases did not lead to widespread leniency for those charged with violating the Selective Service Act. It did not even lead to leniency in all cases for those *with* valid absolutist conscientious objector claims. The courts, then, in these conscientious objector cases, limited First Amendment sentence mitigation to a narrow set of circumstances.

Judges did not extend this kind of mitigation to those who claimed to have non-religious objections to SSB-mandated civilian service, as in broader conscientious objector cases like *Seeger*.[207] For instance, in the Second Circuit, an individual had failed to seek conscientious objector status but claimed that "although he is not a Jehovah's Witness, the mandates of his conscience are similar to those of Jehovah's Witnesses and that, like them, he can obey the order of a court to do civilian service, but that he cannot conscientiously obey a similar directive of his [SSB]."[208] At trial, he received a sentence of two consecutive one-year terms

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[202] A Second Circuit opinion references an affidavit that stated "twenty-one acknowledged Jehovah's Witnesses who had been prosecuted in the Eastern District of New York for Selective Service violations had been sentenced to terms of probation in lieu of prison upon the condition of the probation that they perform some form of alternative civilian work service." This practice seemed to be more widespread, but due to the lack of availability of district court opinions from these years in relevant legal databases, I have been unable to verify this statement. United States v. McCord, 466 F.2d 17, 20 (2nd Cir. 1972).
[203] 478 F.2d 139 (8th Cir. 1973).
[204] *Id.* at 147.
[205] *Id.* at 148.
[206] *Id.* at 143, 146.
[207] United States v. Seeger, 380 U.S. 163 (1965)
[208] United States v. McCord, 466 F.2d 17, 20 (2nd Cir. 1972).

and claimed "he was unconstitutionally singled out."[209] Although the appeals court did find it had authority to review the sentence, it found no grounds for remanding the sentence for reconsideration, in contrast to the above cases.

In a First Circuit case, *United States v. Walker*,[210] a similarly situated Jehovah's Witness received a two-year prison sentence, in comparison with the five-year sentences in the above cases.[211] The appeals court upheld this sentence, finding sufficient evidence that the trial court had considered all appropriate factors and that the sentence had been crafted in an individualized manner.[212] The court did so, however, with "a sense of unease," especially with respect to the lower court's focus on deterrence as the main reason for the sentence and citing *Daniels* language on the improbability of deterrence where religious motivations are concerned.[213] The Eighth Circuit later cited this "sense of unease" in *Woosley* as support for its remanding a Jehovah's Witness maximum sentence for reconsideration.[214]

When James Johns, an applicant in Kentucky, claimed neither religious nor equivalent personal motivations but sought mitigation of his sentence for draft violations, the district court also declined to institute sentence mitigation.[215] The court found that where an applicant's conduct was "voluntary, purposeful, and with the specific intent to disobey and disregard a law of the United States," mitigation was not warranted.[216] Its reasoning shows the court took the defined bounds of First Amendment religious freedom rights seriously in its sentencing mitigation.

These cases did not lead to a slippery slope, but they certainly occurred in the context of broader growing judicial leniency towards draft evaders. Especially in urban areas and across California, district court judges were granting probation plus civilian alternative service even to draftees who disobeyed SSB orders but did not present conscientious objector arguments.[217] By 1971, the *New York Times* reported that 62.7 percent of nationwide draft cases received probation, up from 10.4 percent in 1967.[218] Similarly, a survey conducted by the *New York Times* indicated that judges were cognizant of shifting public attitudes towards the war and were also reticent to have their judicial power curtailed by draft boards, which they often viewed as procedurally lacking or too strict in their judgments.[219]

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[209] *Id.*
[210] 469 F.2d 1377 (1st Cir. 1972).
[211] *Id.* at 1378.
[212] *Id.* at 1380.
[213] *Id.* at 1381.
[214] Woosley v. United States, 478 F.2d 139, 142 (8th Cir. 1973).
[215] United States v. Johns, 366 F. Supp. 1093 (E.D. Ky. 1973).
[216] *Id.* at 1095.
[217] *See* Steven Roberts, *Judges Growing Lenient in Draft Amnesty Cases*, N.Y. TIMES (July 3, 1972), https://www.nytimes.com/1972/07/03/archives/judges-growing-lenient-in-draft-amnesty-cases-us-judges-growing.html [https://perma.cc/74X8-EZTL].
[218] *Id.* Convictions and sentence length also dropped during this time period from 75.1 percent to 34.8 percent.
[219] *Id.*

This nationwide phenomenon shows that the judges in the Sixth and Eighth Circuits were acting in the context of a favorable nationwide judicial and cultural shift. That said, their opinions were measured and grounded in existing canons of sentencing and constitutional law. Indeed, based on the sentencing practices in other parts of the country, they could have gone much further, granting, for instance, probation (as judges did in urban areas), rather than remanding for shorter jail time. Instead, they were measured in their mitigation.

IV. When Do Courts Turn to First Amendment Interests as Mitigating Factors?

The above cases show that judges sometimes consider First Amendment interests as mitigating factors at sentencing. But when do judges shift from using rights as circumscribers of government action, the usual conception, to treating rights as factors that mitigate punishment of individual action? The cases above suggest a counterintuitive pattern, one that contradicts common assumptions about the deference courts give to agreement between the other two branches. Courts seem to use rights-based sentence mitigation as a last resort, when other governmental solutions have been foreclosed. In both the fugitive rescuer and absolutist conscientious objector cases, no branch of government initially acted to relieve the affected group. The Supreme Court upheld both laws' constitutionality, the legislature failed to provide exemptions, and the executive branch refused to exercise its prosecutorial or pardon discretion. This pattern of factors contradicts the school of judicial interpretation arguing that courts tend to endorse institutional agreement between government branches.[220] Here, even in the presence of institutional agreement, courts instead pursued rights-based sentence mitigation. The lower courts were, essentially, using their sentencing discretion to signal and correct a "wrong call" made by the Supreme Court and other branches. This section demonstrates the presence of these factors (judicially affirmed constitutionality, legislative inaction, and executive inaction) in the Fugitive Slave Act and Vietnam conscientious objector cases. It also makes a case that these factors exist in the current Espionage Act whistleblower case.

A. *Constitutionality of the Law Affirmed*

In both rescuer and objector cases, constitutional challenges to the underlying law had previously failed. The Supreme Court upheld the basic premise of the Fugitive Slave Act in the 1842 case *Prigg v. Pennsylvania*,[221] holding that slave owners could pursue escaped slaves in the North.[222] The Court found that Pennsylvania's state law prohibiting the extradition of fugitive slaves violated Article IV, Section 2 of the Constitution (the Fugitive Slave Clause, which

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[220] *See, e.g.*, Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984); Curtis Bradley & Trevor Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).
[221] 41 U.S. 539 (1842).
[222] *Id.*

instituted reciprocal agreements between states to return slaves) and the 1793 Fugitive Slave Law.[223] In the subsequent 1859 case *Ableman v. Booth*,[224] the Court upheld the constitutionality of the 1850 Fugitive Slave Act itself.[225] Furthermore, it found that state officials must cooperate with federal officials in the extradition of escaped slaves.[226]

In the Vietnam War absolutist conscientious objector context, in the series of cases examined above, the Supreme Court upheld the basic premise of the Selective Service Act.[227] Additionally, it made no allowances for absolutist objectors, even as it expanded exceptions for other religious dissenters.[228]

In contemporary Espionage Act whistleblower cases, lower federal and military courts have repeatedly upheld the constitutionality of the Act against vagueness and other constitutional challenges.[229] Although the constitutionality of the Espionage Act has not been adjudicated by the Supreme Court, these shared initial facts suggest a similarity between the three cases.

B. *Legislative Efforts to Account for Relevant Rights Were Absent or Failed*

Identifying legislative inaction or gridlock is notoriously difficult; as such, it cannot be a determinative signal of when courts can or should implement constitutional rights-based sentence mitigation. However, the signs of legislative "failure" that existed in both historical cases are worth recognizing. The Fugitive Slave Act passed as part of the Compromise of 1850, which sought to resolve ferociously contested issues of territorial expansion and slavery and forestall related conflict.[230] In this context, any subsequent changes to the law could have been catastrophic for a country in crisis.[231] Additionally, the Democratic Party ran on support for the Act for around a decade, so the majority party lacked the political will to change the law.[232]

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[223] *Id.* at 620–21, 625–26.
[224] 62 U.S. 506 (1859).
[225] *Id.* at 526.
[226] *Id.* at 524.
[227] *See* Welsh v. United States, 398 U.S. 333 (1970); *see also* United States v. Seeger, 380 U.S. 163 (1965); Gillette v. United States, 401 U.S. 437 (1971).
[228] *Welsh*, 398 U.S. at 333; *Seeger*, 380 U.S. at 163; *Gillette*, 401 U.S. at 437.
[229] *See, e.g.*, United States v. Kiriakou, No. 1:12cr127-LMB, 2012 U.S. Dist. LEXIS 112393 14–20, 25–26 (E.D. Va. Aug. 8, 2012) (rejecting vagueness and overbreadth challenges to 18 U.S.C. §793(d)); *see also* Supp. to Petition for Grant of Review at 20–22, United States. v. Manning, No. ARMY 20130739 (A. Ct. Crim. App. Aug. 20, 2018) (arguing 18 U.SC. § 793(e) is unconstitutionally vague and overbroad); Opinion of Court at 13–15, United States v. Manning, No. ARMY 20130739 (A. Ct. Crim. App. May 31, 2018) (rejecting such arguments).
[230] *See* Paul Finkelman, *Compromise and Constitutionalism: The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845 (2011).
[231] *See id.* at 883 (describing the Fugitive Slave Act as the most divisive and important aspect of the Compromise of 1850).
[232] *See, e.g.*, OFFICIAL PROC. OF THE NAT'L DEMOCRATIC CONVENTION 10 (1852); OFFICIAL PROC. OF THE NAT'L DEMOCRATIC CONVENTION 25 (1856); OFFICIAL PROC. OF THE NAT'L DEMOCRATIC CONVENTION 55, 57-58 (1860).

During the Vietnam War in the 1970s, several efforts to provide legislative amnesty for draft violators, including absolutist objectors, failed to gain traction. In late 1971, Senator Robert Taft introduced legislation to grant amnesty to draft evaders.[233] This bill stalled in committee, as did a similar House bill.[234] Around the same time, Senator Ted Kennedy explored setting up an administrative system for granting amnesty to draft evaders, much like the Wilson system detailed below.[235] This effort, too, floundered.[236]

Regarding the Espionage Act, legislative efforts have also been lacking or lackluster. For example, as discussed in Section I, the only major attempt has been a much-criticized 2010 bill, with no further action despite continued ramped-up prosecutions.

C. *Executive Branch Pardon Powers Were Not Deployed*

Executive branch discretion, including pardon powers, often have served as release valves for controversial laws. As described at earlier, the executive branch has shown little appetite for pardons and a decreasing appetite for exercising prosecutorial discretion in favor of defendants in Espionage Act whistleblower cases.

Tellingly, in both the Fugitive Slave Act and Vietnam conscientious objector cases, the executive branch also opposed pardons for the relevant offenders. Only two Fugitive Slave act violators were pardoned—one as the law came in to force and one as the anti-slavery Republicans were poised to take power.[237] During the 1850s, several Democratic presidents followed the final term of a Whig president.[238] Whig President Fillmore presided over the final passage of the Compromise of 1850; pardons of rescuers would have been incompatible with such a political deal.[239] Presidents Pierce and Buchanan both campaigned on a Democratic Party platform that supported the Fugitive Slave Act.[240] Pierce pardoned only one rescuer, a free black man named Noah Hanson, in 1854. Hanson was arrested a month before the Compromise of 1850 was adopted, for hiding

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[233] *See* Bill Kovach, *Amnesty Bill for Foes of Draft is Introduced in Senate by Taft*, N.Y. TIMES (Dec. 15, 1971), https://www.nytimes.com/1971/12/15/archives/amnesty-bill-for-foes-of-draft-is-introduced-in-senate-by-taft.html [https://perma.cc/6SNZ-ACUZ].
[234] *See Taft Bill Seeks Draft Amnesty*, HARTFORD COURANT, Feb. 14, 1972, at 2.
[235] *See Kennedy Unit Plans Quiz on Draft Amnesty*, L.A. TIMES, Feb. 7, 1972, at A5.
[236] *See id.*
[237] Those violators were Noah Hanson, *see infra* note 241, and Sherman Booth, *see infra* note 243.
[238] Millard Fillmore was the last Whig president (1850–53). He was followed by Democrats Franklin Pierce (1853–57) and James Buchanan (1857–61).
[239] *See* Finkelman, *supra* note 230, at 873–79 (describing Fillmore's presiding role) & 883 ("The most important part of the Compromise of 1850 was the Fugitive Slave Law.").
[240] *See Franklin Pierce's Murky Legacy as President*, CONSTIT. CTR. (Oct. 8, 2018), https://constitutioncenter.org/blog/franklin-pierces-murky-legacy-as-president/ [https://perma.cc/X2V9-LUZQ]. *See also* James Buchanan, *James Buchanan to Isaac G. McKinley Voicing His Support for the Fugitive Slave Law*, GILDER LEHRMAN COLLECTION (July 16, 1851).

escaped slaves in the house of his employer, Congressman William Colcock of South Carolina.[241] Pierce left no record of his reasons for the pardon, and no record exists of what Hanson's sentence would have been. Unique features of this case, namely the fact of Hanson's arrest just before the passage of the law, and the embarrassment that the situation involved a Congressman, might have influenced Pierce's decision to pardon Hanson.[242]

After Hanson, no petitions for rescuer pardons succeeded until the eve of the Republican ascendency. Indeed, President Buchanan had steadfastly resisted pardoning rescuers. Friends of Sherman Booth, a rescuer discussed above, first applied for a pardon or remittance of fines unsuccessfully in early 1860, which was refused.[243] Booth then applied personally for a pardon or remittance from the Buchanan administration after President Lincoln's election but before his inauguration.[244] Buchanan's Attorney General roundly refused: Booth "has been aided, comforted and abetted by a state court . . . [which] makes the vindication of the law in this particular case absolutely necessary by way of example."[245] In his final address to Congress, Buchanan decried the Wisconsin resistance to the Fugitive Slave Act.[246] But, on his final day in office, with the anti-slavery Republicans in ascendancy, Buchanan reversed course and pardoned Booth without explanation.[247]

During the early 1970s, President Nixon was also staunchly against draft amnesty.[248] "We stand for no amnesty for draft-dodgers and deserters," he stated during his 1972 campaign.[249] In contrast, pardons or the equivalent played a role in nearly every major American war, often for absolutist conscientious objectors. During the Civil War, the Lincoln administration started an informal parole system in 1863 that sent absolutist objectors home, in large part because continued

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[241] *July 19, 1854 Pardon of Noah C. Hanson for Harboring Slaves*, CONG. INFO. SERV., INDEX TO PRESIDENTIAL EXECUTIVE ORDS. AND PROCLAMATIONS PART I 128 (1987); Franklin Pierce, *Presidential Pardon of Noah C. Hanson*, RAAB COLLECTION, July 19, 1854, https://www.raabcollection.com/franklin-pierce-autograph/franklin-pierce-signed-sold-only-known-presidential-pardon-black-person [https://perma.cc/V34E-WHCF].

[242] It is worth noting that Hanson was imprisoned between his trial in March 1851 and the pardon in July 1854; perhaps some parallels can be drawn to President Obama's commutation of Manning's sentence.

[243] *See* A.J. Beitzinger, *Federal Law: Enforcement and the Booth Cases*, 41 MARQUETTE L. REV. 7, 27 (1957).

[244] *See id*. at 31.

[245] *Id.*

[246] James Buchanan, State of the Union Address (Dec. 13, 1860), https://teachingamericanhistory.org/library/document/1860-state-of-the-union-address/ [https://perma.cc/364Y-44BT].

[247] *See* Beitzinger, *supra* note 243, at 32.

[248] Nixon was raised by a Quaker mother, interestingly, but chose nonetheless to enlist. *See Contradictions Marked Nixon's Religious Life, Presidency*, L.A. TIMES (Apr. 30, 1994), https://latimes.newspapers.com/image/158973569/?terms=Contradictions%2BMarked%2BNixon%27s%2BReligious%2BLife%2C%2BPresidency%2C%2BL.A.%2BTIMES%2C%2BApr.%2B30%2C [https://perma.cc/3E2T-96ZX].

[249] *Draft Amnesty Still Opposed*, AUSTIN STATESMAN, Jan. 31, 1973, at 24.

detention was too costly for the government to maintain.[250] During World War I, President Wilson established a system of administrative review for conscientious objector petitions.[251] He did so largely to resolve debate over whether conscientious objector status should be granted based on an individual's belief, not membership in a certain religious sect.[252] Both the legislature and the Court had rejected Wilson's individualistic view of conscientious objection.[253]

Wilson's new military review board examined 60 percent of the roughly 4,000 drafted men claiming conscientious objector status.[254] Of those examined, 25 percent would have otherwise been court-martialed as disobedient soldiers.[255] Eventually, the board also was allowed to examine closed courts-martial, subsequently overturning more than 113 convictions.[256] After the war, members of the military and Congress severely criticized this exercise of presidential power.[257]

Presidents Harding and Coolidge selectively pardoned political objectors to World War I, including Eugene Debs. Franklin Delano Roosevelt enacted a general pardon in 1933 for violators of the Espionage Act, the Sedition Act, and the Selective Service Act, provided the violator had served his sentence.[258] After World War II, in 1946, acting with comparative speed, President Truman established the President's Amnesty Board by executive order.[259] Pursuant to its recommendations, in 1947, he pardoned 1,523 individuals who had violated the Selective Training and Service Act, followed by further pardons in 1952.[260]

Given this background expectation, Nixon's stance against pardons during the Vietnam War was considered extreme.[261] During his second term, he tempered

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[250] *See* Carnahan, *Quakers*, *supra* note 156, at 8.
[251] *See* Kessler, *supra* note 164, at 1128–31.
[252] *See* Kessler, *supra* note 164, at 1128–31.
[253] *See* Selective Service Act of 1917, Pub. L. No. 65-12, 40 Stat. 76, ch. 15, § 4; Fraina v. United States, 255 F. 28 (2d Cir. 1918) (upholding prosecution of individuals soliciting individual conscientious objectors to violate the draft in violation of the Selective Service Law); Selective Draft Law Cases, 245 U.S. 366, 376 (1918) (allowing narrow exemptions for religious objectors does not violate Equal Protection).
[254] What happened to the remaining forty percent—and whether they received review at all—is an open question. *See* Kessler, *supra* note 164, at 1134.
[255] Kessler, *supra* note 164, at 1134.
[256] Kessler, *supra* note 164, at 1139, 1141 (citing Letter from Newton D. Baker, Sec'y, U.S. Dep't of War, to Woodrow Wilson, President 3–4 (July 1, 1919)).
[257] Kessler, *supra* note 164, at 1145.
[258] Franklin D. Roosevelt, *Granting Pardons to Persons Convicted of Certain War-Time Offenses*, PRESIDENTIAL PROCLAMATION No. 2068, 1933-PR-2068 (1933).
[259] Harry S. Truman, *Granting Pardon to Certain Persons Convicted of Violating the Selective Training and Service Act of 1940 as Amended*, PRESIDENTIAL PROCLAMATION No. 2762, 1947-PR-2762 (1947).
[260] *Id.*; *see also Amnesty: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, U.S. GOV. PRINTING OFFICE 59–60 (1974).
[261] *See, e.g.*, Julius Duscha, *Should There Be Amnesty for the War Resister?*, N.Y. TIMES (Dec. 24, 1972), https://www.nytimes.com/1972/12/24/archives/should-there-be-amnesty-for-the-war-

his stance, declaring he might consider amnesty at some future time but "not while there are Americans in Vietnam fighting to serve their country and defend their country, and not while P.O.W.'s are held by North Vietnam."[262] Still, Nixon's administration marked a significant decrease in the availability of executive action as a resolution of conscientious objector cases.

D. *When Other Branches Change Course, Courts Retreat*

Courts seem to stop rights-based sentence mitigation practices when any other government branch addresses the original constitutional tension. In the Vietnam era, for instance, courts backed off as soon as the executive branch revised its stance on draft amnesty. After Nixon resigned, President Ford introduced a program of conditional amnesty in 1974. The program required civilian service in exchange for discharge and pardon. President Carter instituted a program for unconditional amnesty—amnesty offered without service requirements—in 1977.[263] Cases dealing with absolutist objector sentence mitigation stopped just as Ford's amnesty programs began.[264]

Regarding the Fugitive Slave Act, sentencing mitigation practices ended when the country descended into Civil War. The intervening war complicates analyzing the loosening and tightening of judicial restraint in this case.

E. *Why Sacramental Drug Use Did Not Follow the Same Path*

A case involving Native American religious use of a proscribed substance raised similar issues to the rescuer, objector, and whistleblower cases. But, despite these similarities, it resolved in a different manner because of Congressional intervention, a resolution that never required judicial consideration of First Amendment interests at sentencing. *Employment Division v. Smith*[265] considered the constitutionality of denying unemployment benefits to Native Americans fired

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resister-mare-than-so000.html [https://perma.cc/4N8U-47PV] (calling Nixon's remarks on the subject "particularly harsh" and "extremely critical" and that his views "would appear to foreclose any Presidential action on the issue as long as he is in office.").

[262] Steven Roberts, *Judges Growing Lenient in Draft Amnesty Cases*, N.Y. TIMES (July 3, 1972), https://www.nytimes.com/1972/07/03/archives/judges-growing-lenient-in-draft-amnesty-cases-us-judges-growing.html [https://perma.cc/UK6G-MNVY].

[263] Jimmy Carter, *Granting Pardon for Violations of the Selective Service Act*, PRESIDENTIAL PROCLAMATION No. 4463, 1977-PR-4483 (1977).

[264] Cases dealing with sentence mitigation for conscientious objectors ran from 1970 to 1973, and the amnesty program began in 1974. Reviewing the four central cases, citations in conscientious objector cases cease after 1974 until the Gulf War. *Daniels* was last cited in conscientious objector cases in 1973. *See* Woosley v. United States, 478 F.2d 139, 144 (8th Cir. 1973); United States v. Thompson, 483 F.2d 527, 531 n. 2 (3rd Cir. 1973). *McKinney* was last cited in *Woosley*. 478 F.2d at 144. *Charles* was last cited in United States v. Polizzi, 493 F.2d 570, 574 (3rd Cir. 1974). The last of the Vietnam-era sentence-mitigation cases, *Woosley*, was not cited in a conscientious objector case after it was heard until 1991. *See* Island v. United States, 946 F.2d 1335, 1337–38 (8th Cir. 1991).

[265] 494 U.S. 872 (1990).

for using peyote during religious rituals.[266] On its face, this case could have followed the road of the rescuer and absolutist objector cases. The Supreme Court upheld the rule's constitutionality; at that point, the legislative and executive branches could have acquiesced to this interpretation. In this alternate version of events, trial courts could then have used their sentencing discretion to reduce sentences of sacramental peyote users based on First Amendment rights. But that did not happen; instead, Congress broke ranks with the executive and wrote religious-rights exceptions into statute.[267] This case suggests that when one of the factors in the rescuer and absolutist objector cases—a determination of the law's constitutionality and legislative plus executive inaction— is missing, courts do not turn to rights-based sentencing mitigation. Here, legislative action changed the course of events.

Employment Division v. Smith, decided in 1990, dealt with two interrelated Oregon laws.[268] The first law denied unemployment compensation to those fired for work-related "misconduct."[269] The second defined drug use, including peyote use, as such misconduct.[270] Reversing the Oregon high court, the Supreme Court held that this set of laws was constitutional on two grounds. First, the drug law did not restrict actions solely on the basis of their religious nature. The Court held that it did not violate the Free Exercise Clause because it did not target or promote specific religious actions.[271] Second, the Court found that a government action that substantially burdens a specific religious practice need not be motivated by a "compelling" government interest.[272] This reversed the longstanding test established by the 1968 Supreme Court *Sherbert v. Verner*[273] decision.

Sherbert v. Verner addressed whether a Jehovah's Witness could be denied unemployment benefits because of her religious beliefs. Specifically, her faith compelled her not to work on a certain day of the week, thus contributing to her unemployment.[274] This case's compelling-interest test (which looked at whether the government burdened free exercise, whether the government had a compelling interest to do so, and whether it had done so in the least restrictive manner) made rights-based sentencing largely irrelevant where religiously motivated conduct intersected with laws.[275] The test expanded judicial protections for various religiously-motivated conduct, meaning courts did not face questions of sentence

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[266] *Id.*
[267] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (1993).
[268] *Smith*, 494 U.S. at 872.
[269] *Id.* at 874.
[270] *Id.* In this case, the Supreme Court initially remanded the case for a determination whether sacramental peyote use was proscribed by the state's drug laws. The State Supreme Court found that it was, but that such proscription was unconstitutional. The Supreme Court reversed.
[271] *Id*. at 881.
[272] *Id.* at 888.
[273] 374 U.S. 398 (1963).
[274] *Id*. at 399.
[275] *Id.* at 409.

mitigation in subsequent related cases. [276] Few individuals faced the question of First Amendment rights at sentencing, given that most religious exercise interests were protected.

The decision in *Smith* opened the door for further charges against individuals who violated criminal law while pursuing religious practices. Courts could have seen an influx of Native peyote users convicted for a variety of drug-related offenses. Furthermore, they could have responded with sentence mitigation in cases of sacramental use. Indeed, one Wisconsin Court of Appeals decision started to lay the groundwork for this kind of approach in 1994. In *State v. Fuerst*,[277] the court "conclude[d] . . . it would be permissible for a court sentencing a defendant convicted of drug offenses to consider the defendant's religious practices as a factor at sentencing if those religious practices involve the use of illegal drugs."[278]

Instead, Congress stepped in to limit the effect of the *Smith* decision.[279] Congress acted largely because mainstream religious groups with political clout viewed the Court's decision as a threat to their practices: mainstream groups argued that, "the courts were to be closed to them as well as to obscure peyote adherents."[280] The debate became one about institutional religion, rather than the kind of minority dissent represented by peyote users, fugitive slave rescuers, or absolutist objectors.[281] The passage of the 1993 Religious Freedom Restoration Act ("RFRA") legislatively reinstated the *Sherbert* test: the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" and must only do so because of a compelling interest and through the least restrictive means.[282]

Surprisingly, the RFRA initially did not provide protections for sacramental peyote users. It took a separate 1994 legislative effort, the American Indian Religious Freedom Act, to obtain protections for sacramental peyote use.[283] The RFRA legislative response was clearly centered around majority participants in religion, not minority needs. Sacramental peyote users are more like fugitive rescuers and absolutist conscientious objectors than they are like everyday churchgoers. Had mainstream religious groups with political power not taken up

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[276] Some cases resolved in favor of religious exercise: Wisconsin v. Yoder, 402 U.S. 994 (1971); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Com., 480 U.S. 136 (1987); Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989). In other cases, the interest balancing test cut against religious interests. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Goldman v. Weinberger, 475 U.S. 503 (1986); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Bowen v. Roy, 476 U.S. 693 (1986).
[277] State v. Fuerst, 512 N.W.2d 243 (Wis. Ct. App. 1994).
[278] *Id.* at 246.
[279] Religious Freedom Restoration Act, *supra* note 267.
[280] Garrett Epps, *The Strange Career of Free Exercise*, ATLANTIC (Apr. 4, 2016), https://www.theatlantic.com/politics/archive/2016/04/the-strange-career-of-free-exercise/476712/ [https://perma.cc/94RJ-5W2D].
[281] *Id.*
[282] Religious Freedom Restoration Act, *supra* note 267.
[283] American Indian Religious Freedom Act Amendments, 42 U.S.C. § 1996a (1994).

the *Smith* decision as a cause, sacramental peyote users probably would have ended up with options for legal recourse more like fugitive rescuers and absolutist objectors. This difference in outcomes perhaps suggests that sentence mitigation is a suboptimal solution for minority groups—carrying with it clear implications for access to justice. Under this view, majorities receive the more standard protections of rights that restrict government action, while minorities only have recourse to rights that limit the penalties the government imposes on individual actions.

Conclusion

We do not know how courts currently view arguments about constitutional interests during sentencing in whistleblower cases involving the Espionage Act, since the sentencing decisions remain sealed. However, this Article demonstrates a historical pattern that refutes the government's arguments in recent cases that constitutional interests are irrelevant at sentencing. As history demonstrates, the court's role as a protector of substantive constitutional rights does not end with a guilty verdict. Courts have exercised this discretion at sentencing in a focused, targeted way that has not led to a cascade of unwarranted amnesty. Courts have exercised this authority with restraint, and they cede their role to the political branches once those branches move towards solutions that address the constitutional interests at stake.

Courts have considered constitutional interests at sentencing in different historical contexts and in relation to very different underlying criminalized conduct. But each set of underlying conduct shares one similarity: it challenged an exercise of government power fundamental to politics at the time. The Fugitive Slave Act addressed the power of the federal government to exert control over the states in connection with slavery. The absolutist conscientious objector cases during the Vietnam War implicated how the federal government could wage an ongoing war. Whistleblower cases under the Espionage Act deal with the power of the federal government to protect classified intelligence for national security purposes.

The same kinds of analysis courts employ in these historical cases could easily transfer to whistleblower cases. Considering motivation in Espionage Act whistleblower cases could alter a court's view of how a sentence fulfills the accepted aims of punishment: deterrence looks different applied to whistleblowers compared to spies. Furthermore, though revealing national security secrets is a serious offense, the court's language throughout the historical cases underscores that gravity alone does not obviate the need for individually tailored sentencing. Motivations that involve constitutional rights are clearly factors that matter to the crafting of an individualized sentence.

The contemporary applicability of constitutional interests at sentencing is not limited to the whistleblower context. In 2019, juries convicted faith-based activists for violating national park laws while aiding undocumented immigrants

crossing the southern border.[284] The actions of these activists challenged the power of the federal government to control the flow of people across its borders in the context of what the executive branch viewed as a national emergency. Some activists made faith-based arguments at trial that echo the arguments made in the historical incidents examined in this Article. For instance, at the trial of Scott Warren, one of the activists convicted of violating the park laws, a friend testified that his actions stemmed from "a deeply felt, gut-level need based on his deep faith."[285] Warren was found not guilty in what has been speculated to be a case of jury nullification, which also happened in some of the historical cases investigated above.[286] Another group of helpers convicted of lesser offenses faced up to six months in prison, but the members were instead sentenced to 15 months unsupervised probation.[287] The leniency of these sentences suggests that the defendants' motivations might have made an impact on judges at sentencing—and the continued potential relevancy of rights-based mitigation at sentencing, beyond Espionage Act cases.

The evidence in this Article supports making public the sentencing decisions in the whistleblower, migrant aid, and similar cases. The discussion of the role of constitutional interests at sentencing in policy and academic literature is sparse. The only way to have this important debate in full, and to ascertain where courts are actually drawing limits in this context, is to see how courts treat the competing arguments made by the defense and the government at sentencing. As these historical incidents show, the Constitution does not die after a guilty verdict. But, only with public sentencing decisions will we know *how* the Constitution lives after a guilty verdict and how to hold the government fully to account.

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[284] *See* Manny Fernandez, *She Stopped to Help Migrants on a Texas Highway. Moments Later, She Was Arrested*, N.Y. TIMES (May 10, 2019), https://www.nytimes.com/2019/05/10/us/texas-border-good-samaritan.html [https://perma.cc/6P48-U3PL].

[285] Ryan Devereaux, *Bodies in the Borderlands*, INTERCEPT (May 4, 2019), https://theintercept.com/2019/05/04/no-more-deaths-scott-warren-migrants-border-arizona/ [https://perma.cc/J995-3YJG].

[286] Isaac Stanley-Becker, *An Activist Faced 20 Years in Prison for Helping Migrants. But Jurors Wouldn't Convict Him*, WASH. POST (June 12, 2019), https://www.washingtonpost.com/nation/2019/06/12/scott-warren-year-sentence-hung-jury-aiding-migrants/ [https://perma.cc/U29T-F56X]; Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 L. & CONTEMP. PROB. 52 (1980). For a Fugitive Slave Act example, see the case of William Jerry in Syracuse in CAMPBELL, *supra* note 89, at 101.

[287] Joel Rose, '*No More Deaths' Volunteers Face Possible Jail Time for Aiding Migrants*, NPR (Feb. 28, 2019), https://www.npr.org/2019/02/28/699010462/no-more-deaths-volunteers-face-possible-prison-time-for-aiding-migrants [https://perma.cc/Q6B5-R975].