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Open Records, Shuttered Labs: Ending Political Harassment of Public University Researchers

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ABSTRACT

This Article confronts a dangerous contemporary trend: the political harassment of public university professors by activists on the right and left, through the mechanism of open records requests. It is timed to a moment when universities and state legislatures are grappling with the consequences of escalating public records intrusion into scholars' work that threatens enterprises as diverse as climate change research and biomedical experiments.

Every U.S. state has an open records law—a statute that permits any person, for any reason, to access the records of public agencies. Unknown to many, these state laws typically sweep public universities within their definition of “agencies,” making professors’ draft manuscripts, emails, and even exam questions potentially fair game for records requesters. In the past decade, scholars in states with broad open records laws have increasingly received harassing records requests from requesters politically or economically threatened by the intellectual work they seek to reveal. Such requests undermine the peer-review process and the communications through which scholars explore and contest ideas, impairing the core intellectual functions of the university. Equally worrisome, harassing record requests chill research on critical contemporary issues—a knowledge-generation role of universities that is essential to a democracy, which depends on an informed citizenry.

This Article argues that professors should never have been subject to public records laws in the first instance, both because they are not engaged in public governance, and because open records laws are fundamentally incompatible with academic freedom. It further argues that the best way to stanch the present records request intrusion into scholars’ work is to create a broad scholar-records exemption from existing state laws.

While some commentators have described the problem of public records harassment of university faculty, none have presented an in-depth theoretical justification for reform, nor an examination of the full range of harms stemming from public demands for scholar records. This is also the first article to propose a specific legislative fix, informed by real-world legal battles over scholar records disclosure. By presenting a comprehensive and prescriptive issue treatment, this Article aims to help open records reform cross the political finish line.



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My engagement with this topic stems from sequential roles as nonprofit litigator/state attorney/professor, in which capacities I have represented public record requesters, advised state agencies on records law compliance, and been targeted by politically motivated records requests. Consistent with the transparency recommendations in Part IV herein, I declare that no funding was received in connection with this article. Interviews were conducted pursuant to UC Berkeley human subjects research protocol 2017-06-10065.

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INTRODUCTION

[Climate change is] a very complex subject. I'm not sure anybody is ever going to really know. I know we have, they say they have science on one side but then they also have those horrible emails that were sent between the scientists. . . . Terrible.

–Donald Trump (2016)¹

Every U.S. state has an open records law; like the federal Freedom of Information Act (FOIA), each one permits any person, for any reason, to access email and other records of public agencies. A key difference between state records laws and federal FOIA is that state laws must contemplate the possibility that state public universities are “agencies” for record-request purposes. Lacking a federal model, state legislatures have diverged greatly in their treatment of public university records generally, and faculty records in particular. Some states, such as Montana and North Carolina, make university records wholly reachable through public record requests; other states, such as Maine and Pennsylvania, exclude them entirely from records law coverage; and still others, such as Illinois and Virginia, provide limited exemptions for professors’ records.

Increasingly, professors in states with minimal or ambiguous statutory protections for scholar records are subject to intrusive public records requests from those economically threatened by or ideologically opposed to the intellectual work that requesters seek to reveal. In this Article, I argue that the use of document requests to disrupt politically disfavored university research is an unforeseen abuse of public records laws, that it is deeply destructive to the academy, and that it disserves society at large. I also probe the values animating public records statutes and those animating the public university, respectively, to demonstrate their essential incompatibility. I then explore the range of harms that demands for scholar records inflict on professors, universities, and society. Last, I propose a precise legislative fix: an expansive scholar-records exemption from state open records laws, presented here as a model statutory amendment.

My goals in this Article are analytic, prescriptive, and synthetic. Although others have described the open-records harassment of faculty, this Article is, on one hand, the first to analyze in depth the friction between public records laws and the preservation of academic freedom (the theoretical source of the

1. *Donald Trump’s New York Times Interview: Full Transcript*, N.Y. TIMES (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/us/politics/trump-new-york-times-interview-transcript.html>.

problem), and, on the other hand, the first to offer a specific policy prescription (the practical solution to the problem). As such, whereas many have told the middle of the story—by recounting the varied forms of records harassment visited upon scholars—this is the only piece whose narrative arc runs from problem origin to resolution.

In the past decade, conservative advocacy groups have made forced disclosure a key strategy for disrupting inquiry into topics inconvenient to industry, specifically by requesting researchers' preliminary research and private scholarly correspondence through the use of open records laws. Most publicized and consequential have been cases of fossil fuel-funded think tanks issuing expansive document requests to eminent climate science researchers, and then distorting their dislodged correspondence to "mobilize doubt" about the reality of global warming.² Such tactics underlay the 2009 faux-scandal termed "Climategate," in which emails from renowned climatologist Michael Mann at the University of Virginia (UVA) were successfully used to amplify President Trump's, and many other Americans', skepticism of human-induced climate change.³

Climate change denialists have since targeted additional scientists with records requests and embroiled them in multiyear litigation battles over records releases. Dr. Jonathan Overpeck, one of the authors of the 2007 report of the Intergovernmental Panel on Climate Change that shared the Nobel Peace Prize with Al Gore, faced such an attack.⁴ Indeed, abusive use of open records laws to distort peer-reviewed, platinum-standard climate science by any means available has become so frequent and disruptive that in 2011 a new nonprofit organization, the Climate Science Legal Defense Fund, was formed in significant

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2. See Aaron J. Ley, *Mobilizing Doubt: The Legal Mobilization of Climate Denialist Groups*, 40 LAW & POL'Y 221, 238 (2016) (discussing the centrality of public records requests to climate change denialists' advocacy campaigns).
 3. The Climategate episode involved researchers' email from the Climatic Research Unit's server at the University of East Anglia in the United Kingdom, which climate change denialists selectively quoted and distorted to suggest that scientists were engaged in research fraud to manufacture a case for global warming. This email was initially unlawfully hacked, but was later sought through public records requests. See generally Kate Sheppard, *Climategate: What Really Happened?*, MOTHER JONES (Apr. 21, 2011, 10:00 AM), <http://www.motherjones.com/environment/2011/04/history-of-climategate> [<https://perma.cc/TXY5-PFDH>]. Attitudinal researchers found a significant decline in public belief in global warming in 2010 compared to 2008, and a loss of trust in scientists generally, in part as a result of misinformation propagated by Climategate. See Anthony A. Leiserowitz et al., *Climategate, Public Opinion, and the Loss of Trust*, 57 AM. BEHAV. SCIENTIST 818, 824–26 (2013).
 4. Harassment of Dr. Jonathan Overpeck is described at *infra* Subpart I.2.

part to provide advice and litigation support to climatologists receiving public record requests.⁵

The political left has also entered this war-by-another-means, in which document requesters' goal is not idea contestation, but rather, reputational damage to political enemies. Thus, for example, religious liberty scholar Douglas Laycock in 2014 faced expansive and intrusive records requests from student LGBT rights activists, who were concerned that his academic writings were being used in the political process to justify discriminatory legislation. Using Virginia's public records law, these students sought, among other items, more than two years of Professor Laycock's cell phone records—a tactic highly likely to induce communicative chill. As one commentator summarized: “[T]he students’ FOIA request is intended to impose a cost on a professor for producing scholarship the students don’t like. Here we go again.”⁶

In extreme cases, records requests to researchers working in high-controversy areas have been a prelude to harassment and “doxxing,”⁷ sometimes culminating in vandalism and threats of violence. At least one court has found persuasive evidence of “a causal nexus between . . . disclosure of animal research records and subsequent attacks on the researchers identified in such records after they are disseminated to the public via the internet” These attacks included “explicit death threats to researchers [and] firebombing of cars owned (or thought to be owned) by researchers”⁸ Public records harassment of

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5. See John Schwartz, *Under Fire, Climate Scientists Unite With Lawyers to Fight Back*, N.Y. TIMES (May 15, 2017), <http://www.nytimes.com/2017/05/15/science/under-fire-climate-scientists-unite-with-lawyers-to-fight-back.html>; see also CLIMATE SCI. LEGAL DEF. FUND, <https://www.csldf.org/about/mission/> [<http://perma.cc/TN2H-JVPM>] (describing the organization's goal to let scientists conduct research without the threat of politically motivated attacks).
 6. Will Creeley, *FOIA Request for UVA Law Profs Records Threatens Academic Freedom*, FOUND. FOR INDIV. RTS. IN EDUC. (May 28, 2014), <http://www.thefire.org/foia-request-for-uva-law-prof-records-threatens-academic-freedom> [<https://perma.cc/5JAX-VM72>].
 7. “Doxxing” is the practice of publicizing private information about someone, generally on the internet, in particular as a form of punishment or revenge. *Dox*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/dox> [<https://perma.cc/HS4R-33GA>]. For several examples of harassment in high-controversy animal research areas, see MICHAEL HALPERN, CTR. FOR SCI. & DEMOCRACY, FREEDOM TO BULLY: HOW LAWS INTENDED TO FREE INFORMATION ARE USED TO HARASS RESEARCHERS 12–14 (2015), <http://www.ucsusa.org/sites/default/files/attach/2015/09/freedom-to-bully-ucs-2015-final.pdf> [<https://perma.cc/K5WQ-Z3UF>].
 8. Order Denying Public Records Act Claims for Injunctive and Declaratory Relief at 3, *Stop Animal Exploitation Now! v. Univ. of Cal. Regents*, No. BC402237 (Cal. Super. Ct. July 16, 2010), described in Phil Hampton, *Judge Affirms Campus Position on Animal Records Disclosure*, UCLA NEWSROOM (June 6, 2011), <http://newsroom.ucla.edu/releases/judge-affirms-campus-position-207666> [<https://perma.cc/6HX7-XYV8>]. See also NAT'L ASS'N FOR BIOMED. RES., A REVIEW OF ANIMAL RIGHTS FOIA REQUESTS—FY 2013, at 2 (2014),

animal researchers has in fact become sufficiently pervasive and frightening that several states have amended their open records laws to address the problem,⁹ or have adopted statutes to protect animal researchers from the consequences that may flow from public release of information about their work.¹⁰

Public records requests to university scholars are affecting an ever-expanding range of academic disciplines. In the University of California (UC) system alone, recent years have seen open records requests to researchers examining the risks and benefits of genetically modified organisms,¹¹ health effects of toxic chemicals,¹² the safety of abortions performed by clinicians rather than doctors,¹³ the infrastructure necessary to scale green energy production,¹⁴

<http://www.nabr.org/wp-content/uploads/2014/09/FOIAREPORT.pdf> (stating that information obtained through public record requests “has been used to . . . target individuals at their homes, and is often posted on animal rights websites to encourage harassment”).

9. See, e.g., OR. REV. STAT. § 192.345(30) (2018) (protecting the personal information of any researcher at the Oregon Health and Science University who is conducting research “using animals other than rodents”); UTAH CODE ANN. § 63G-2-305(52) (West 2017) (protecting the personal information of all animal researchers in the state higher educational system).
10. See, e.g., WASH. REV. CODE ANN. §§ 4.24.570–580 (West 2018) (defining certain acts or planned acts against animal facilities and their researchers as an intentional tort); CAL. PENAL CODE § 422.4 (West 2018); (making it a misdemeanor to publish information about an academic researcher “with the intent that another person imminently use the information to commit a crime involving violence or a threat of violence” against the researcher); CAL. PENAL CODE § 602.12 (West 2018) (making it a misdemeanor to trespass on the home property of an academic researcher “for the purpose of chilling, preventing the exercise of, or interfering with the researcher’s academic freedom”).
11. See, e.g., Complaint at 10–12, *Ruskin v. Regents of the Univ. of Cal.*, No. PT16-1304 (Cal. Super. Ct. Yolo Cty. Aug. 17, 2016) (seeking extensive email and other records from ten UC Davis faculty and staff engaged in research, writing, or speaking about genetically modified organisms); Email From Stephan Neidenbach, to Univ. of Cal. Berkeley Pub. Records Office (Sept. 6, 2015) (California Public Records Act (CPRA) request seeking “[a]ll e-mails to and from Professor Michael Pollan [of the U.C. Berkeley Graduate School of Journalism] containing any of the following: ‘GMO’, ‘genetically’, ‘Monsanto’, ‘transgenic’, ‘biotech’, ‘biotechnology’, and/or ‘glyphosate’”) (on file with author).
12. As one example, an attorney with an undisclosed client (but likely one from the chemical industry) requested records in 2011 from Dr. Arlene Blum, visiting scholar in the U.C. Berkeley Department of Chemistry and Executive Director of the nonprofit Green Science Policy Institute, essentially seeking all documents she has ever produced at U.C. Berkeley relating to “the [health] effects of chemical substances including flame retardants.” Letter From George G. Benetatos, Law Office of George G. Benetatos, to Alan T. Kolling, Univ. of Cal. Berkeley Pub. Records Coordinator (July 25, 2011) (on file with author).
13. Order Denying Petition for Writ of Mandate, *Life Legal Def. Found. v. Regents of the Univ. of Cal.*, No. RG12625716 (Cal. Super. Ct. Alameda Cty. May 10, 2012) (rejecting pro-life group’s demand for records disclosing the identity of UC researchers involved in abortion safety study) (copy on file with author).
14. Email From Michael J. Aguirre, to Ethan Elkind, Dir. of the Climate Change Program, Ctr. for Law, Energy & the Env’t, Univ. of Cal. Berkeley Sch. of Law (Nov. 15, 2016) (CPRA request for “any and all records” related to law professors’ assessment of constitutional and

and a variety of contemporary science, technology, and social science topics around which it is critical to maintain freedom of inquiry, thought, and discussion.

An additional species of contemporary records request seeks to strip communicative privacy from faculty who opine about controversial political issues in their capacity as public intellectuals—essentially, scholars as citizens. Thus, public university faculty who signed an open letter opposing the nomination of Jeff Sessions to U.S. Attorney General have received records requests from a conservative political publication for all of their emails containing the words “Sessions,” “Jeff Sessions,” or “Attorney General,”¹⁵ and a MacArthur Award-winning historian who wrote critically of Wisconsin Governor Scott Walker’s antilabor stance was asked to disclose publicly all of his emails containing, *inter alia*, the word “union.”¹⁶

The use of state open records laws to inflict reputational damage on university faculty, undermine public confidence in the academy’s scholarly work products, and deter scholars from entering public debates is assuredly far from the good governance ideals that framers of open records laws had in mind. Instead, consistent with these laws’ basis in democratic citizen oversight of government operations, their architects aimed to make conventional state agencies politically transparent to increase accountability to the electorate. Where state legislatures expressly contemplated that public universities might be construed as public agencies for open records purposes, lawmakers generally took pains to place scholarly intellectual activities beyond these laws’ reach, presumably recognizing that professors wield neither policymaking nor coercive power that requires this form of citizen check on abuse.

In many states, however, the critical distinctions between universities and conventional agencies appear to have been overlooked in the initial crafting of public records law, or their importance substantially underestimated. In the current polarized political climate, we are paying an intellectual price: Dozens of the nation’s most accomplished scholars are unfairly pulled off-task, smeared, demotivated, and accruing vast legal bills for themselves and their institutions in

jurisdictional issues with respect to California Independent System Operator’s expansion to include additional investor-owned utility assets) (on file with author).

15. Kathryn Rubino, *Law Professors That Spoke Out Against Jeff Sessions’s Nomination Subjected to Records Requests*, ABOVE THE LAW (Jan. 18, 2017, 12:19 PM), <http://abovethelaw.com/2017/01/law-professors-that-spoke-out-against-jeff-sessionss-nomination-subjected-to-records-request> [https://perma.cc/4H6R-DZ8M].
16. William Cronon, *Abusing Open Records to Attack Academic Freedom*, WILLIAM CRONON: SCHOLAR AS CITIZEN (Mar. 24, 2011), <http://scholarcitizen.williamcronon.net/2011/03/24/open-records-attack-on-academic-freedom> [https://perma.cc/RM3W-ZP8U].

defending against overtly harassing or highly intrusive records requests. This hyper-aggressive and often ill-intentioned deployment of public records laws, aptly described as their “weaponization,”¹⁷ is hardly the public-spirited operation their architects envisioned.

In this Article, I use the term “harassment” expansively to connote records requests that burden recipient scholars and limit academic freedom, even though the term “intrusion” would in some instances be more exact. Although the line between the two is blurry, “harassing” requests are those made with subjective ill intent, such as to distract a recipient from useful tasks by creating records-response busywork, or to dislodge information with the intention of quoting it selectively, acontextually, and tendentiously to inflict unfair reputational damage. Record requests that are merely “intrusive,” in contrast, may emanate from a requester’s subjectively pure (and in some cases, warranted) concern about research ethics, be it over the treatment of laboratory animals, or whether corporate money is influencing scholars’ research agendas and issue frames. The requests’ intrusiveness stems from the type of materials that requesters seek (such as prepublication research or scholarly communications), which compromise academic freedom¹⁸ and the opportunity cost of the time that faculty must devote to complying with or resisting records demands.¹⁹

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17. See, e.g., Emily Willingham, *Is the Freedom of Information Act Stifling Intellectual Freedom?*, FORBES (Nov. 21, 2015, 5:49 PM), <http://www.forbes.com/sites/emilywillingham/2015/11/21/is-the-freedom-of-information-act-stifling-intellectual-freedom> [https://perma.cc/X39X-CHWL] (describing the use of “weaponized” records requests against university scientific researchers).
 18. Although “academic freedom” is variously defined and defended, as discussed *infra* Subparts II.B and II.E, its essential core is “the free search for truth and its free exposition.” AM. ASS’N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (WITH 1970 INTERPRETIVE COMMENTS), in AAUP POLICY DOCUMENTS AND REPORTS 13, 14 (11th ed. 2014), <http://www.aaup.org/file/1940%20Statement.pdf> [https://perma.cc/A7NL-LYV9].
 19. Whether a request is “harassing” (ill-intended) or merely “intrusive” (burdensome and problematic to fulfill) is often in the eye of the beholder, and the categories of harassment and intrusion frequently overlap in practice: A records requester staunch in the conviction that a scholar’s ethical integrity has been compromised by a funding source may spin any records received to confirm this view, thereby inflicting potentially unwarranted reputational damage. Likewise, a requester who publishes information about animal researchers online as part of an ethical critique also facilitates physical harassment of those researchers. Further, and of considerable practical significance, harassing and intrusive requests are typically framed in extremely broad, fishing-expedition terms, asking researchers for all documents they have produced related to a certain topic or using certain key words or over a lengthy period of time—or all three. Thus, scholars’ burdens of retrieval, review, possible redaction, and potential resistance are often enormous. For this reason alone, harassing requests are almost invariably intrusive, and vice versa, such that the terms can fairly be used synonymously.

This Article argues that regardless of partisan cast or the subjective motivations of requesters, records requests to professors profoundly threaten the core intellectual functions of public universities—teaching, research, and scholarly expression—and dangerously undermine the production of new knowledge beneficial to society. It accordingly recommends that state public records laws (PRLs) be broadly amended to exempt scholar records and proposes model statutory language to achieve this.

Part I of this Article describes the theory, operation, and utility of public records laws. It identifies the policies underlying open records laws as applied to conventional government agencies, these laws' central operational features, and their many successes in promoting government transparency and accountability. Part I also describes an emerging academic literature expressing doubts that government transparency is an unqualified good, or that the laws promoting it, including but not limited to open records laws, are presently used primarily to enhance democratic values rather than to hamper and delegitimize public institutions.

Part II explores universities as an institutional type, organized for specific purposes unlike those for which conventional government agencies are constituted. It argues that public universities' academic functions are identical to those of (records-law-unreachable) private universities; that these functions raise few of the concerns animating open records laws; and that there is accordingly an ill fit between public records laws' justificatory rationales and public university scholars as objects of record requests.

Part II then describes the general inefficacy of First Amendment protections for academic freedom in shielding scholars from harassing records requests. This state of affairs arises in part from courts' tendency to view the public interest in document disclosure as a compelling government interest justifying some interference with speech. More fundamentally, however, it stems from the different concerns at play when private-citizen rather than government policing of scholars' expression is at issue, and specifically, the fact that public records laws do not directly regulate speech, even where they may substantially and negatively affect it. This inability to resolve the tension between public records access and academic freedom on constitutional grounds, I argue, necessitates the protection of scholar records through other means.

Part III then explores the variability in state public records laws' treatment of scholar records, relying in part on the helpful typology in a recent fifty-state survey by the Climate Science Legal Defense Fund. This Part uses case studies of three litigated scholar-records disputes to demonstrate the problems with all existing state open records laws that encompass scholar records. Part III

supplements these case studies with descriptions of additional harms that accrue from public records requests to faculty, to define more fully the problem to be solved. Although other scholarship has identified subsets of these harms, no article to date has explored public records harms as comprehensively, and proposed remedies have accordingly been only partial. Harms caused by records requests are, I urge, sufficient to warrant immediate policy intervention, and in its absence will—for reasons political, doctrinal, and technological—continue to increase.

Part IV briefly examines open records reform proposals in the existing literature and concludes that among them, only legislative amendment is likely to be effective in addressing the range of actual and potential scholar-harassment scenarios. This Part further argues that any statutory reform must be broader than other scholars have proposed or state legislatures have to date enacted. Part IV then proposes a detailed model statutory provision to exempt scholar records from state PRLs, and provides a provision-by-provision justification. This project—the first of its kind—is designed to facilitate the transition from critique of the status quo to actual reform.

Part IV also identifies public accountability concerns regarding university research funding, in particular, that certain records requests presently aim to surface. I suggest that although concerns about the potential for research funding to compromise scholar objectivity are legitimate and indeed deeply important, ethical transgressions by scholars—which may also extend to nonfunding matters, such as treatment of laboratory animals or falsification of data—are most appropriately policed through mechanisms other than open records law.

This Article concludes optimistically. Although any proposal to restrict public access to records is a heavy political lift, increasing awareness of the problem of open records abuse generally and a shift in advocacy politics around open records laws have created reform conditions unimaginable two decades ago. In the specific context of scholar records, civil society groups' appreciation of the crucial role of university researchers as truthseekers with respect to urgent issues like climate change, as well as the recent success of legislation in two states to better protect scholar records, suggest that the moment is ripe for further reform.

I. THE THEORY OF PUBLIC RECORDS LAWS

America's public records laws are simultaneously well known and obscure. Although the political accountability purposes of these laws are perhaps self-

evident, the highly consequential mechanics of such laws are not widely known. Further, the application of most PRLs to public university scholars is a little-understood feature. Indeed, many public university faculty members are unaware that their written work product, including their email, is in most states broadly accessible to the public . . . until they find themselves on the receiving end of an intrusive and unnerving records request.

Additionally, the lofty transparency-promotes-democracy rhetoric pervading judicial opinions in litigated PRL cases—which overwhelmingly arise in the context of conventional government records rather than public university scholar records—obscures the fundamentally different competing values at stake where faculty records are involved. Thus, any discussion and endorsement of restricting access to public university scholars’ records requires at least a brief explication and justification with respect to first principles, as well as some historical context for the existence of public records laws.

A. The Rationale for PRLs

Federal and state PRLs in the United States, like the European Enlightenment open records laws from which they descend,²⁰ are premised on the need for a democratic government to be transparent and accountable to its citizen-subjects. The federal FOIA,²¹ enacted in 1966 and significantly strengthened in 1974, reflects the suspicion of U.S. government secrecy born of the Cold War and Vietnam era, and magnified by the Watergate scandal. It also stems from a broader convergence of liberal political forces committed to the increased democratic political engagement that information access is presumed to facilitate.²² As the U.S. Supreme Court described the animating philosophy of FOIA: “The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle

20. Sweden’s Freedom of the Press Act of 1766 is considered the first modern freedom of information act. The Swedish government describes the law’s purpose as “to guarantee an open society with access to information about the work of the Riksdag (Swedish parliament), Government and government agencies.” *The Principle of Public Access to Official Documents*, GOV’T OFFS. SWED. (Mar. 2, 2015), <http://www.government.se/how-sweden-is-governed/the-principle-of-public-access-to-official-documents> [https://perma.cc/B2MF-YZFN] (last updated Apr. 11, 2016).

21. 5 U.S.C. § 552 (2018).

22. For a concise overview of the interest groups and cultural forces that culminated in federal FOIA’s enactment, see David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 112–20 (2018).

that a democracy cannot function unless the people are permitted to know *what their government is up to*.²³

This democracy-promotion rationale is mirrored in the text or legislative history of nearly all state public records laws, including the California Public Records Act (CPRA) of 1968,²⁴ whose broad prodisclosure policies will here be used as an exemplar of state PRL features. The CPRA contains a legislative declaration that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”²⁵ As the California Supreme Court has articulated this public right: “Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.”²⁶

These twin precepts—that government must be nonsecretive (transparent in its operations) and nonarbitrary (accountable in its exercise of power)—underlie the strong prodisclosure policies of federal and state PRLs. The transparent-process sentiment is the dominant one, manifest in a long line of CPRA cases emphasizing the government’s heavy burden in justifying document withholding, and stating that the Act’s primary purposes are to “prevent secrecy in government and to contribute significantly to the public understanding of government activities.”²⁷ These mirror a long line of FOIA

23. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772–73 (1989) (Douglas, J., dissenting) (quoting EPA v. Mink, 410 U.S. 73, 105 (1973)). See also W. VA. CODE § 29B-1-1 (2015) (“[I]t is the public policy of the State of West Virginia that all persons are . . . entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. . . . The people insist on remaining informed so that they may retain control over the instruments of government they have created.”); Dep’t of the Air Force v. Rose, 425 U.S. 352, 372 (1976) (“[T]he basic purpose of the Freedom of Information Act [is] to ‘open agency action to the light of public scrutiny.’” (citation and internal quotation marks omitted)).

24. CAL. GOV’T CODE §§ 6250–6276.48 (West 2018).

25. *Id.* § 6250.

26. CBS, Inc. v. Block, 725 P.2d 470, 473 (Cal. 1986). See also Times Mirror Co. v. Super. Ct., 813 P.2d 240, 241 (Cal. 1991) (“An informed and enlightened electorate is essential to a representative democracy.”); Register Div. of Freedom Newspapers, Inc. v. County of Orange, 205 Cal. Rptr. 3d 92, 96 (Cal. Ct. App. 1984) (stating that the CPRA is “intended to safeguard the accountability of government to the public”).

27. Fredericks v. Super. Ct., 182 Cal. Rptr. 3d 526, 535 (Cal. Ct. App. 2015); see also Filarsky v. Super. Ct., 49 P.3d 194, 196 (Cal. 2002) (the CPRA’s purpose is to “increas[e] freedom of information by giving members of the public access to information in the possession of public agencies”); Caldecott v. Super. Ct., 196 Cal. Rptr. 3d 223, 233 (Cal. Ct. App. 2015) (“The basic goal [of the CPRA] is to open agency action to the light of public review, with its core purpose designed to contribut[e] significantly to public understanding of the

cases holding that the federal Act's main purpose is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."²⁸

The lawful-exercise-of-power rationale appears in public records cases such as *CBS, Inc. v. Block*, holding that a sheriff vested with authority to issue concealed weapons permits must, in some circumstances, disclose records revealing the names of the concealed weapons' licensees and the reasons claimed in support of their discretionary license.²⁹ Otherwise, the court reasoned, the public could not determine whether the sheriff "has properly exercised his discretion in issuing the licenses," or "whether the law is being . . . carried out in an evenhanded manner."³⁰

On a related point, California courts have held that the more coercive the state action, the greater the need for records access. Thus, for example, a California court of appeal held that a death row inmate convicted of murder was entitled to charging documents in other homicide cases, even though they were claimed to be records-law-exempt investigatory files, where the documents would shed light on whether the District Attorney's Office selectively sought the death penalty based on the race of the perpetrator, the victim, or both.³¹ The court explained that "the public's interest in the fair administration of the death penalty is a long-standing concern in California, and it is inconceivable to us that any countervailing interest that the District Attorney could assert outweighs the magnitude of the public's interest."³²

A somewhat different transparency and accountability notion undergirding open records laws—or at least, a pronounced and salutary feature of those laws in operation—is that they can protect the public fisc by enabling citizens to monitor the expenditure of tax monies. This oversight function can discourage, or at least expose, both financial waste (bad governance) and private inurement (corrupt governance). Thus, in the wake of Hurricanes Katrina and Rita in 2005, for example, the *Washington Post* used FOIA requests to reveal that only a fraction of the millions of dollars intended as aid for storm victims had been put to its intended use; an ethics-oriented public interest group used documents obtained through FOIA to reveal that the federal government wastefully paid a private cruise ship operator to use its ships as hotels and

operations or activities of the government." (quoting *L.A. Unified Sch. Dist. v. Super Ct.*, 175 Cal. Rptr. 3d 90, 92 (Cal. Ct. App. 2014))).

28. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citing *Rose*, 425 U.S. at 361).

29. *CBS, Inc.*, 725 P.2d at 477.

30. *Id.*

31. *Weaver v. Super. Ct.*, 168 Cal. Rptr. 3d 864, 866–69 (Cal. Ct. App. 2014).

32. *Id.* at 868–69.

hospitals after declining an offer of free ship capacity from Greece; and Cable News Network (CNN) used FOIA requests to discover that truckloads of donated or government-purchased basic household goods were being resold to government agencies rather than distributed to disaster-affected individuals.³³

B. The Operation of PRLs

The architecture of the CPRA, like most other state PRLs, reflects the strong prodisclosure philosophy these underlying rationales suggest, and indeed a view that government transparency is such a foundational democratic value that it should in most cases be elevated over competing values. The default rule under PRLs is that the government should release documents when asked. As the California's Department of Justice's official CPRA manual states: "The fundamental precept of the CPRA is that governmental records shall be disclosed to the public, upon request, unless there is a specific reason not to do so."³⁴

As a threshold matter, the CPRA permits "any person"—whether a natural person or association or business organization³⁵—to request a record for any reason. The statute's very broad definition of what constitutes a "public record" encompasses almost every conceivable writing or recording in any medium or on any device.³⁶ The CPRA also requires rapid government response to a record request.³⁷ Records requesters need not show that any public benefit will flow from records release, nor do they need to share them, and they may use documents obtained in any manner. In this sense, open records rights are

33. REPORTERS COMM. FOR FREEDOM OF THE PRESS, *FEDERAL OPEN GOVERNMENT GUIDE* 2–3 (10th ed. 2009).

34. CAL. ATTORNEY GEN.'S OFFICE, *SUMMARY OF THE CALIFORNIA PUBLIC RECORDS ACT 2* (2004), http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/summary_public_records_act.pdf [<https://perma.cc/42EC-27DF>]. Other states' public records laws (PRLs) generally contain similar language. Typical is the declaration of policy prefacing West Virginia's freedom of information law, *supra* note 23.

35. CAL. GOV'T CODE § 6252(b)–(c) (West 2018). Here, the state law almost uniformly mirrors FOIA, as "the identity of the requesting party has no bearing on the merits of his or her FOIA request." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989).

36. CAL. GOV'T CODE § 6252(e)–(f) (West 2018).

37. The CPRA requires government agencies to respond to a request within 10 days, with the potential for an extension of up to 14 days in "unusual circumstances." CAL. GOV'T CODE § 6253(c). Although agencies need not produce responsive documents within this short window, they must explain and justify their intended timeframe for production with reference to the scope and complexity of the request. *See id.*

(although there may be philosophically defensible reasons for this) rights without responsibilities.

Importantly, under both state and federal PRLs, a requester's motives or end uses of disclosed records need not be identified, and cannot be a basis for denying a request.³⁸ Although this feature makes PRLs subject to abuse, it is a likely necessary feature, consistent with the notion that the right to know about government operations inheres in the public at large, rather than in a particular requester.³⁹ It also comports with the oversight rationale underlying PRLs, which by their nature often create an oppositional relationship between records requester and government recipient: The purpose of PRLs could be readily undermined if recipients were allowed to deny a request based on subjective disapproval of a requester's motive. As the U.S. Supreme Court has described in the context of FOIA, the purpose of PRLs is "to permit access to official information long shielded unnecessarily from public view and attempt[] to create a judicially enforceable public right to secure such information from possibly unwilling official hands."⁴⁰

Further, although the CPRA (like other state PRLs) contains many disclosure exemptions, these are narrowly construed, and the government bears the burden of establishing that an exemption applies.⁴¹ Most exemptions are also permissive rather than mandatory, allowing agency disclosure of information whose release is not barred by other laws.⁴²

The Act's catch-all balancing test, permitting an agency to withhold otherwise reachable records if disclosure would harm important competing interests, not only requires those other interests to be public rather than agency

38. See *Forsham v. Califano*, 587 F.2d 1128, 1134 (D.C. Cir. 1978) ("The Freedom of Information Act does not depend on a showing of need or interest by the particular applicant for the records. Any showing of need or interest is irrelevant.").

39. See *Reporters Comm.*, 489 U.S. at 772 (because FOIA establishes "a broad right of access" to government information, FOIA cases do not turn on "the particular purpose for which [a] document is being requested"); *City of San Jose v. Super. Ct.*, 88 Cal. Rptr. 2d 552, 560 (Cal. Ct. App. 1999) ("[O]nce a public record is disclosed to the requesting party, it must be made available for inspection by the public in general.").

40. *EPA v. Mink*, 410 U.S. 73, 80 (1973).

41. CAL. GOV'T CODE §§ 6254, 6255(a) (West 2018), amended by S.B. 1494, ch. 423, 2018 Legis. Serv., Reg. Sess. (Cal. 2018); *San Gabriel Tribune v. Super. Ct.*, 192 Cal. Rptr. 415, 420–21 (Cal. Ct. App. 1983).

42. See CAL. GOV'T CODE § 6254 (West 2018) (identifying multiple categories of records that may be but are not required to be withheld); see also, e.g., *id.* § 6267 (displaying example of a limited exception, namely, cabining the conditions under which public library records may be released, such as those indicating which patrons borrowed which books); Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (2018) (requiring confidentiality of certain student records).

interests, but requires that “on the facts of the particular case the public interest served by not disclosing the record *clearly outweighs* the public interest served by disclosure of the record.”⁴³ Where CPRA-exempt and nonexempt material coexist in a document, the law generally requires the government to segregate and release the nonexempt portion,⁴⁴ even if it is burdensome to redact the exempt material.⁴⁵

The law also requires the government to absorb or heavily subsidize the costs of record-request activity in at least three ways. First, by statute, record requesters may generally only be charged for direct costs of duplication, and need not reimburse the (often considerably more expensive) government employee time necessary to research, retrieve, redact, and mail records.⁴⁶ Second, although individual records sought must be defined with reasonable specificity to mitigate the burden of search and identification, there is no limit to the number of sequential requests a person may make. Third, the CPRA provides for fee-shifting in favor of a records-requester plaintiff who demonstrates that one or more records were unlawfully withheld, even if plaintiff’s victory was limited.⁴⁷ In contrast, a public entity victorious in public records litigation may only recover fees if the plaintiff’s case was “clearly frivolous.”⁴⁸

The ongoing vitality of the prodisclosure sentiment animating public records laws nationwide is apparent in the recent constitutionalization of the right of public records access in California. In response to a controversial, ultimately defeated state legislative proposal to loosen certain CPRA response

43. CAL. GOV’T CODE § 6255(a) (West 2018) (emphasis added).

44. *Id.* § 6253(a).

45. State Bd. of Equalization v. Super. Ct., 13 Cal. Rptr. 2d 342, 349 & n.14 (Cal. Ct. App. 1992).

46. See CAL. GOV’T CODE § 6253(b) (West 2018). Record payment arrangements differ across FOIA and various state public records laws, and PRLs may also permit greater recoupment of record-retrieval costs where electronic records are involved. Further, different categories of requesters (for instance, media versus commercial requesters) may be charged different amounts. It is fair to say, however, that the government substantially subsidizes record response in terms of both staff time and hard cost. Indeed, recent studies suggest that at the federal level, “the government recoups less than one percent of compliance costs [under FOIA], conservatively estimated.” David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1116 (2017).

47. CAL. GOV’T CODE § 6259(d), amended by S.B. No. 1244, ch. 463, 2018 Legis. Serv., Reg. Sess. (Cal. 2018) (providing that “[t]he court shall award court costs and reasonable attorney’s fees to the requester should the requester prevail in litigation filed pursuant to [the CPRA]”). As interpreted by a California Court of Appeal, status as a prevailing party requires only that the plaintiff “succeed[] on a significant issue . . . and achieve[] some of the benefit sought” in litigation. *Garcia v. Governing Bd. of Bellflower Unified Sch. Dist.*, 163 Cal. Rptr. 3d 689, 695 (Cal. Ct. App. 2013).

48. CAL. GOV’T CODE § 6259(d) (West 2018).

obligations at the local government level, voters in 2014 approved an amendment to the state constitution to render protections for public records access more robust. Now the California Constitution not only echoes the CPRA's text in proclaiming that "the people have the right of access to information concerning the conduct of the people's business, and, therefore, . . . the writings of public officials and agencies shall be open to public scrutiny," but it also requires that any future amendments to the CPRA must generally enhance disclosure, rather than, for example, aim to minimize implementation costs to government.⁴⁹

C. The Merits of PRLs

Open records laws have been used for decades by journalists, scholars, nonprofit advocacy groups, and ordinary citizens for myriad purposes well aligned with the laws' democracy- and accountability-promoting purposes. FOIA has long been used for purposes as noble and varied as ensuring that government provides food stamp recipients with legally required notice of changes in eligibility procedures,⁵⁰ monitoring whether U.S. arms exports reach their intended destinations,⁵¹ and providing public access to data about the U.S. Navy's storage of explosive munitions that could pose a threat to communities

49. CAL. CONST. art. I, § 3(b) (amended 2014) (requiring, inter alia, that any future amendment to the CPRA contain express findings demonstrating that the enactment either promotes public access to records, or contains a necessary limitation on records access to protect other interests). *Id.* § 3(b)(2), (7). The § 3(b)(7) amendment, enacted in 2014, was responsive to 2013 budget riders that aimed to reduce local agencies' CPRA compliance costs (such as by removing the 10-day response deadline), which the State reimburses. See Anthony York, *Budget Could Limit Public's Access to Government Documents*, L.A. TIMES (June 18, 2013), <http://articles.latimes.com/2013/jun/18/local/la-me-budget-open-records-20130619> [<https://perma.cc/45QH-AHQE>] (describing records law restrictions); *Contra Costa Times Endorsement: California Voters Should Approve Proposition 42 in June*, EAST BAY TIMES (Mar. 18, 2014), <http://www.eastbaytimes.com/2014/03/18/contra-costa-times-endorsement-california-voters-should-approve-proposition-42-in-june/> [<https://perma.cc/9R2L-2HTD>] (describing ballot box counter-reaction).

50. See *Anderson v. Butz*, 550 F.2d 459, 462–63 (9th Cir. 1977) (invalidating Secretary of Agriculture's instruction that certain federal rent subsidies be included as "income" for food stamp purposes, due to lack of adequate public notice via the Federal Register as required by FOIA).

51. See *Council for a Livable World v. U.S. Dep't of State*, No. 96-1807 (HHK), 1998 U.S. Dist. LEXIS 23642, at *18 (D.D.C. Nov. 23, 1998) (holding that Department of State must release numerous records from its "Blue Lantern" program, which tracks whether arms exports reach their specified destinations).

near naval bases.⁵² Recently, FOIA has been used to surface records about such compelling contemporary concerns as the legality of government antiterrorism actions,⁵³ the determination whether endangered species are being protected in the design of construction projects,⁵⁴ the high levels of fraud against students by for-profit colleges,⁵⁵ and the sexual abuse of young athletes by sports coaches.⁵⁶

State PRLs have similarly been used to shine light in state and local government corners warranting illumination, such as how California is addressing collection agencies that victimize low-income residents,⁵⁷ whether algorithms used in setting parole terms are racially biased,⁵⁸ and how costs are being allocated among public and private parties for a \$15 billion project to address freshwater supply needs.⁵⁹ Importantly for present purposes—and as cases of the virtuous use of PRLs manifest—the intended object of PRLs is what

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52. See *Milner v. Dep't of the Navy*, 562 U.S. 562, 581 (2011) (holding that agency explosives maps and data did not qualify for withholding under claimed FOIA exemption and must be released to requesters).
 53. See *First Amendment Coal. v. U.S. Dep't of Justice*, 878 F.3d. 1119, 1121, 1130 (9th Cir. 2017) (holding that records requestor “substantially prevailed,” and was thus entitled to attorney’s fees in suit seeking release of legal memoranda prepared by U.S. DOJ’s Office of Legal Counsel addressing the legality of targeted killing of U.S. citizen terrorists).
 54. See *Our Children’s Earth Found. v. Nat’l Marine Fisheries Serv.*, 85 F. Supp. 3d 1074, 1084 (N.D. Cal. 2015) (holding, inter alia, that agency failed to conduct adequate search for documents related to potential impact of planned Stanford University water diversion facility upgrades on endangered Steelhead trout).
 55. See Yan Cao & Tariq Habash, *College Complaints Unmasked*, CENTURY FOUND. (Nov. 8, 2017), <http://tcf.org/content/report/college-complaints-unmasked> [<https://perma.cc/8BV7-TVV9>] (describing FOIA requests to the U.S. Department of Education that revealed that “99 percent of student fraud claims concern for-profit colleges”).
 56. See *Muchnick v. Dep’t of Homeland Sec.*, 225 F. Supp. 3d 1069, 1078 (N.D. Cal. 2016) (holding that DHS must release to records requester substantive information in its files about former Irish Olympic swim team coach who had allegedly sexually abused young female swimmers before his immigration to the United States).
 57. See *Black Panther Party v. Kehoe*, 117 Cal. Rptr. 106, 113 (Cal. Ct. App. 1974) (holding that when state agencies provide collection agencies with copies of consumer complaints against them, those complaints become public records, and must be provided to requesters).
 58. See Jeff Larson et al., *How We Analyzed the COMPAS Recidivism Algorithm*, PROPUBLICA (May 23, 2016), <http://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm> [<https://perma.cc/5UPL-XEPF>] (describing use of county data obtained through Florida’s PRL to establish bias in the estimation of recidivism risk among a population of criminal defendants).
 59. See Letter From Doug Obegi, Senior Attorney, Nat. Res. Def. Council, to Pub. Records Coordinator, Cal. Dep’t of Water Res. (Apr. 10, 2017), http://www.nrdc.org/sites/default/files/media-uploads/prs_request_for_waterfix_cost_allocation_4-10-17.pdf; *Fixing California’s Water System: Securing State Water Supplies*, CALIFORNIA WATERFIX, <http://www.californiawaterfix.com/#problem> (estimating “[t]he cost to fix California’s primary water delivery system [to be] \$14.9 billion”).

one historian has aptly described as “the democratic oversight of formal government processes.”⁶⁰

Assessment of PRLs has grown more nuanced and critical in recent years, however, as they have been increasingly used in antidemocratic ways, and as their transparency-is-always-better premise has been revealed as overly simple. Although even ardent PRL critics express due humility that we can eliminate these laws’ flaws while preserving their virtues,⁶¹ brief engagement with the problematic features of PRLs helps to situate the present scholar-records project within a larger conversation about unintended consequences of open government laws.

D. The Problems with PRLs

Proponents of government transparency inevitably invoke Justice Brandeis’s rhetorically powerful description: “Sunlight is said to be the best of disinfectants.”⁶² In the past decade, however, a growing body of commentary has identified the limits of metaphor as public policy—or extended the analogy. Critiquing the demand for wholly transparent government operations while mining Brandeis’s semantic vein, scholars and science policy advocates are increasingly asking whether over-application of sunlight through open government laws, including but not limited to intrusive or overtly harassing use of public records laws, is creating “glare,”⁶³ unduly “turning up the heat on

60. Cronon, *supra* note 16.

61. See, e.g., Pozen, *supra* note 22, at 164 (“Figuring out how exactly to translate . . . high-level [reform] principles into granular policy prescriptions will no doubt prove an enormous challenge.”).

62. Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WKLY., Dec. 20, 1913, at 10, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf [<https://perma.cc/4M7Z-TGLC>]. Although the object of Brandeis’s concern was business rather than government opacity, courts and commentators typically recite his prescription as a justification for PRLs. See, e.g., *N.H. Right to Life v. U.S. Dep’t of Health and Human Servs.*, 778 F.3d 43, 48–49 (1st Cir. 2015) (describing the federal FOIA as “the legislative embodiment of Justice Brandeis’ famous adage”); *Com v. Chestnut*, 250 S.W.3d 655, 667 (Ky. 2008) (stating, in upholding a prisoner’s right of access to records in his inmate file, that “[t]he General Assembly fully embraced Justice Brandeis’s observation when it expressed a clear desire for public availability of public agency documents through the Kentucky Open Records Act”).

63. Steven J. Mulroy, *Sunlight’s Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 TENN. L. REV. 309 (2011) (focusing on open meetings laws).

science,”⁶⁴ or inducing “sunburn”⁶⁵ in a variety of contexts, and dis-serving the public interest.

Thus, scholars have written about the abuse of public records laws to mount the equivalent of denial of service attacks on local government agencies, through which requesters hostile to government make repeated vexatious demands with no obvious purpose other than to waste the time of public employees and pull them off legitimate work. Egregious examples include requests that have been filed in the Town of Gulf Stream, Florida for “all Public Records situate[d] atop the Chief of Police’s desk on 7/15/2014 at 11:20 a.m.,” and for the “[number of] most recent emails created by the Town Manager and containing the word [_____]” (a request repeated with variations).⁶⁶ In an upscaling of this bombardment tactic with a more overtly partisan cast, a conservative interest group named Reclaim has deployed New York’s PRL to demand voluminous financial and administrative documents from more than two hundred local governments and school districts, its apparent goal to “overwhelm governments and achieve the deconstruction of the administrative state.”⁶⁷

Some commentators additionally note that records requests have come to be used for many purposes unrelated to enhancing democratic participation. Accordingly, the most frequent users of PRLs are not investigative journalists seeking to uncover and disseminate publicly important information, as is commonly assumed, but rather, “corporate lawyers, information resellers, and other private rent-seekers.”⁶⁸ As Professor David Pozen summarizes:

Public-oriented inquiries by concerned citizens and their advocates . . . make up only a small fraction of the 700,000-plus FOIA requests submitted each year. Studies have consistently shown that

64. David Fox, *Turning Up the Heat on Science: A New Threat to Academic Freedom*, 43 U. TOL. L. REV. 173 (2011).

65. Keith W. Rizzardi, *Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government*, 44 STETSON L. REV. 425 (2015).

66. *Id.* at 450, 452.

67. Joyce St George, *The Billionaires’ President*, NEW YORKER: THE MAIL, Apr. 10, 2017, at 3, <http://www.newyorker.com/magazine/2017/04/10/letters-from-the-april-10-2017-issue> [<https://perma.cc/5MA9-BL7H>]. The website for Reclaim New York urges users to send freedom of information requests via an easy click-through menu using Reclaim templates, as part of its “plan to fight corruption with transparency in every school district, village, town, city, and county across the state.” See *The New York Transparency Project*, RECLAIM N.Y., <http://www.reclaimnewyork.org/transparency> [<https://perma.cc/9367-TH5B>].

68. Pozen, *supra* note 46, at 1099; see also Margaret B. Kwoka, *Inside FOIA, Inc.*, 126 YALE L.J. FORUM 265, 266–67 (2016) (describing the extensive use of FOIA to service for-profit information resellers and other “information needs unrelated to government transparency and accountability”).

the bulk of requests come from businesses seeking to further their own commercial interests by learning about competitors, litigation opponents, or the regulatory environment.⁶⁹

Further—and disturbing in relation to the rationale for PRLs—the complexion of FOIA and state PRL use has experienced a marked “ideological drift,” such that good-government advocates and the conventional media are increasingly bit players, and antigovernment forces are ever more conspicuous actors.⁷⁰ A recent critique of open meeting laws likewise questions the premise that transparency laws generally improve government, describing how these laws’ undervaluation of deliberative privacy and their bureaucratization of intragovernmental communication can compromise decisionmaking quality.⁷¹

A final, underexamined-but-profound concern with respect to PRLs is the unfair collective damage to public institutions that comes from subjecting them, and only them, to open records laws, because private entities are generally exempt from PRLs irrespective of their power or the extent of their government contract work.⁷² This asymmetric scrutiny, which surfaces public entity foibles while neglecting parallel or larger ones in private entities, can create or exacerbate generalized antipathy to government that is profoundly antidemocratic in effect.

69. Pozen, *supra* note 46, at 1103. While there is nothing illegitimate about a regulated community’s use of PRLs to understand government’s exercise of its authority (and business may indeed function better when it has more tools with which to probe often-opaque government rules), parties with strictly pecuniary motivations for making document requests are not the archetypal information-seekers envisioned by PRL drafters. Nor are they the entities subconsciously evoked by the lofty democracy-promotion rhetoric of judicial opinions in public records cases.

70. Pozen, *supra* note 22, at 127 (observing that open records requests often serve primarily to “hamstring[] comparatively accountable agencies entrusted with regulating health, safety, the economy, the environment, and civil rights”).

71. Mulroy, *supra* note 63, at 314. Mulroy writes:
[A] broad open meetings law can cause greater damage to democracy than the harm it is designed to prevent. . . . The broadest of open meetings laws chill needed deliberation and collegiality, prevent compromise, and make unrealistic demands on busy part-time local legislators. . . . While we have enjoyed five decades of increasing sunshine, it might be time for some shade.

Id. at 314.

72. Pozen, *supra* note 46, at 1114; *see also* Sarah Shik Lamdan, *Sunshine for Sale: Environmental Contractors and the Freedom of Information Act*, 15 VT. J. ENVTL. L. 1 (2014) (describing the federal government’s increasing practice of outsourcing environmental management tasks, such that the public cannot obtain information about particular projects’ environmental impacts through FOIA).

A global assessment of the merits and demerits of PRLs is beyond the scope of this Article.⁷³ It is clear, however, that an ever-larger chorus of voices within and outside academia are proving amenable to the notion of PRL reform to address the worst distortions and abuses of these laws' democracy-promoting intent. In this context, there is a particularly striking scholarly consensus, increasingly shared by professional organizations and many civil society groups,⁷⁴ around a well-defined, surgical reform project that is practically urgent, philosophically defensible, and even—recent events suggest—politically possible. This project is the amendment of individual state open records laws to remove the records of public university scholars from the reach of state PRLs—records that, for the reasons below, should never have been swept within these laws' ambit in the first instance.

II. THE THEORY OF UNIVERSITIES

Universities are organized for specific purposes unlike those for which conventional government agencies are constituted. These purposes raise few of the concerns animating open records laws, and indeed make application of PRLs to university scholars deeply problematic. It may seem facially evident that a public university like the University of California is significantly more similar to a private institution like Stanford University than it is to, say, a state Department of Motor Vehicles. However, the frequency with which state open records laws treat public universities like conventional state agencies rather than their private university analogs; the normative power of this longstanding treatment; and the limited degree to which court PRL decisions in the scholar-records context acknowledge differences between conventional government agencies and public universities all warrant a return to first principles.

73. Such an assessment would require engagement with, *inter alia*, scholars' many meritorious suggestions of ways to improve and strengthen FOIA's operation with respect to conventional agencies. See generally David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1788, 1792–94 (2008) (describing government-information statutes as often providing “the illusion of a right of access where none exists,” and recommending reforms to address recurrent problems in right-to-know legal administration that impede information access).

74. As described by Nicholas Robinson, Legal Advisor to the International Center for Not-for-Profit Law, civil society groups are increasingly concerned about the vulnerability of their communications and collaborations with public university centers, clinics, and professors in light of PRLs. The Center is working to develop guidance for nonprofits involved in such work, while recognizing that it may be impossible to protect their information fully under current law. Telephone Interview With Nicholas Robinson, Legal Advisor, Int'l Ctr. for Not-for-Profit Law (Jan. 12, 2018) (on file with author).

A. Universities as Nonrepresentative, Noncoercive Aggregations of Individual Scholars

Public universities are not representative government agencies. Most obviously, whereas high-ranking government actors' core functions typically include formulating and articulating official policy, faculty members—whether at public or private institutions—have no comparable role as decisionmakers or spokespeople for a democratic collective. As Senior Counsel for the American Association of University Professors has explained, “faculty members’ substantive communications are not expressed on the public’s behalf,” even though “they certainly have public value.”⁷⁵ As a logical corollary, “[w]hile [faculty members’] appointment and the subject of their work may well be of interest to the public, the content of that work is not properly a subject of public oversight.”⁷⁶

Further, university professors are not in any meaningful sense a collective that is readily analogized to an agency that behaves as superorganism. The professoriate is, instead, simply an aggregation of individual organisms sharing certain professional norms and conditions of work. Scholars, in stark contrast to agency professionals, operate as intellectually autonomous actors, choosing their own research projects and methods; they do not fulfill the mandates of particular statutes, regulations, or administrative agency leaders. Indeed, the hyperindividuation of the academician is key to her value as scholar.

Protecting a scholar’s intellectual autonomy, and the generative creativity presumed to flow therefrom—which in turn depends upon protecting the privacy of intellectual activity and communications that a scholar intends to be nonpublic—has no direct analog in most agency settings, where research agendas are largely externally dictated, and public-facing products are generally presented as collective works. Indeed, even where government agency professionals engage in primary research and receive public records requests, they are apt to be better shielded by public records laws, which uniformly contemplate the group rather than the individual as the level of analysis. Specifically, the “deliberative process” protections common to state public records laws, and tied to the commonsensical notion that uninhibited deliberation will improve agency decisions, protect much agency intellectual

75. RACHEL LEVINSON-WALDMAN, *Academic Freedom and the Public’s Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship*, AM. CONST. SOC’Y L. & POL’Y: ISSUE BRIEF 20 (2011), http://www.acslaw.org/wp-content/uploads/2018/04/Levinson_-_ACS_FOIA_First_Amdmt_Issue_Brief_1.pdf [<https://perma.cc/9XQ4-3HXX>].

76. *Id.* at 19.

activity and communication,⁷⁷ yet lack obvious application to faculty scholarship (which yields no official decisions).

Many other exemptions common in state public records make plain that they were not drafted with scholars in mind. One example: While state PRLs contain numerous exemptions designed to protect private information about third parties that lands in government hands (such as Social Security numbers), they do not contain specific exemptions addressing, for example, the confidentiality of student exam materials. It would appear, however, equally easy for a legislature to make a categorical call that the public interest in nondisclosure of a professor's test questions exceeds the public interest in their disclosure, had the legislature ever squarely contemplated the question.

The poor fit between self-determined faculty intellectual tasks and conventional agency policymaking tasks has induced advocates and courts to make strained analogies in an endeavor to protect the privacy of scholar research under overbroad PRLs. Thus, a West Virginia court sympathetic to a professor harassed by records requests for his unpublished research on the environmental effects of a surface coal mine determined to stretch to its elastic limits the state PRL's protection for agencies' "internal memoranda" that reveal the deliberative process preceding a decision.⁷⁸ The court held that the targeted professor could lawfully withhold the requested records because, although West Virginia University (WVU) was "not a state agency engaged in policy making," and the professor "did not formulate policy on behalf of WVU" when publishing articles, "the relevant agency decision for purposes of applying the 'deliberative process' exemption is the development and ultimate publication of the article."⁷⁹ Although analytically creative, the dialogue of a scholar's mind with itself hardly

77. See, e.g., *Formaldehyde Inst. v. Dep't of Health & Human Servs.*, 889 F.2d 1118, 1120 (D.C. Cir. 1989) (holding that a letter aggregating peer-review comments on a proposed journal article by a Center for Disease Control employee could be withheld from a requester under the FOIA disclosure exemption for certain "inter-agency or intra-agency memorandums or letters" that are "predecisional" and "deliberative"); see also 5 U.S.C. § 552(b)(5) (commonly known as "Exemption 5"). Although the *Formaldehyde* opinion has been criticized for reading the "inter-agency or intra-agency" precondition out of the Exemption 5 test, see, e.g., *Nat'l Inst. of Military Justice v. Dep't of Defense*, No. 06-5242, 2008 WL 1990366, at *1 (D.C. Cir. 2008) (Tatel, J., concurring) (stating that *Formaldehyde* and its progeny improperly "embrace any agency document that is part of the deliberative process," even if it originated outside of an agency (quoting *Formaldehyde*, 889 F.2d at 1123)), in practice, the analytic approach in *Formaldehyde* has endured, and courts have protected under Exemption 5 many unpublished, research-related records in agencies' custody regardless of their source.

78. *Highland Mining Co. v. W. Va. Univ. Sch. of Med.*, 774 S.E.2d 36, 47–54 (W. Va. 2015).

79. *Id.* at 50–51.

seems the type of “deliberation” leading to an “agency decision” that legislative drafters had in mind.⁸⁰

Universities also differ from conventional agencies in their lack of coercive power vis-à-vis non-campus populations. Although academic research and its public dissemination may and often do inform public policy, there is no mechanism by which scholars can directly affect the general citizenry. Rather, a politically accountable intermediary (such as an agency receiving a report from a university research team, or a legislative committee hearing testimony from a professor) always stands between the university and potentially regulable third parties. As one government official turned academic explained:

I welcomed FOIA when I was in government [at the Federal Trade Commission] and fought hard for the FTC to make our decision-making more transparent. But I and my colleagues were making consequential decisions that affected, often deeply, companies and individuals. Academics don’t do that, and to subject them to the transparency requirements of [public records laws] is just absurd.⁸¹

Simply put, such influence as academics have derives from persuasion, not power relation. For this reason alone—the absence of democratic governance rationales for applying open records laws to the core scholarly work of the university—it appears unnecessary and unfair to subject their work product to PRLs, with the significant time, privacy, and monetary costs they impose on scholars and universities required to produce records for inspection. In Professor William Cronon’s framing, university scholars are not part of “formal government processes,” rendering their subjection to “democratic oversight” at best superfluous, and at worst intrusive and wasteful.⁸²

80. This was indeed exactly the point the records requesters pressed (albeit unsuccessfully) in endeavoring to defeat the deliberative-process exemption. Petitioner Highland Mining Company argued that “there is no basis for any finding that the research articles prepared by Professor Hendryx had anything to do with making policy for WVU [West Virginia University].... WVU does not make policy. It is not an agency, it is a university. ... Therefore, any research paper published by a member of its faculty could not constitute ‘policy’ within the meaning of the deliberative process exemption....” Petitioner’s Reply Brief at 1, *Highland Mining Co. v. W. Va. Univ. Sch. of Med.*, 774 S.E.2d 36 (2015) (No. 12-C-275), 2014 WL 7740204. For obvious ends-oriented reasons, however, record requesters did not take this persuasive argument to its logical conclusion: that public university scholars’ documents should never have been swept within the reach of laws that exist to monitor conventional agency decisionmaking.

81. Email From David Vladeck, A.B. Chettle, Jr. Professor of Law, Georgetown Univ. Law Ctr., Former Director of the Bureau of Consumer Protection of the Federal Trade Commission, to author (May 31, 2018) (on file with author).

82. Cronon, *supra* note 16.

B. Universities as Generators and Transmitters of Knowledge

Still more important than what universities are not is what they are. Universities are constituted for specific affirmative purposes wholly different from the purposes of government: the promotion of teaching and research, and the generation of useful knowledge for society. The centrality of the knowledge-generation function of the university, whether public or private—typically expressed in Latin mottos (*Fiat Lux* (University of California), *Veritas* (Harvard), and the composite *Lux et Veritas* (Yale))—is compelling even in translation. As described by a leading scholar of academic freedom: “[T]here is a unique nexus between the professor’s calling and the search for truth,” and also an “ultimate dependence of society upon [professors’] creativity and their willingness to take risks in exercising that creativity.”⁸³

The American Association of University Professors distilled the preconditions for the healthy, uninhibited functioning of the professoriate in a widely cited 1940 statement of the “Principles on Academic Freedom.”⁸⁴ These Principles are that a university professor is entitled to: (1) full freedom in research and publication of results (subject to qualification only where research is done “for pecuniary return”); (2) freedom in classroom discussion; and (3) freedom from institutional censorship or discipline when speaking as a private citizen.⁸⁵ This requires universities to refrain from preventing or punishing controversial independent faculty research or controversial classroom speech relevant to the subject at hand, because “[c]ontroversy is at the heart of the free academic inquiry which the entire statement is designed to foster.”⁸⁶ Otherwise

83. ROBERT O’NEIL, *ACADEMIC FREEDOM IN THE WIRED WORLD: POLITICAL EXTREMISM, CORPORATE POWER, AND THE UNIVERSITY* 11 (2008). See also ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 80–81 (2017) (describing the First Amendment values of protecting countermajoritarian or otherwise unpopular views as having “an even more vital role to play in those institutions that are dedicated to nurturing new ideas, challenging prevailing orthodoxies, and providing society with the best possible example of how to encourage independent thinking and engage in rigorous assessment”).

84. 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (WITH 1970 INTERPRETIVE COMMENTS), *supra* note 18.

85. *Id.* at 14.

86. *Id.* Whether the concept of academic freedom rightly extends beyond teaching and traditional academic publication to protect professors in overt advocacy roles, such as lobbying, litigating cases, or expressing personal opinion in op-eds or blog posts, is a matter of active scholarly debate. See, e.g., O’NEIL, *supra* note 83, at 9 (discussing the view of Professor William Van Alstyne and others that it is problematic to extend the concept of academic freedom beyond the vocational-utterance-protection rationale that undergirds it); see also STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* (2014) (outlining five schools of academic freedom and associated contours, ranging from modest (the “it’s just a job” school) to all-encompassing (the “academic

stated, a broad condition of noninterference with the development of professors' thought products and expression is considered essential for encouraging wide-ranging inquiry, and thus for promoting the university's central task of knowledge generation.⁸⁷

Indeed, in the context of the federal FOIA, the D.C. Circuit early acknowledged both the importance of preserving universities as "autonomous" entities that should not be conflated with government agencies for public records purposes simply because they receive government funds, and that this need for a zone of researcher privacy obtains irrespective of universities' public or private status. In *Forsham v. Califano*, that Court rejected private FOIA requesters' bid to access the raw data generated by a consortium of public and private universities conducting diabetes research under a federal grant, where the government did not have direct possession of relevant records.⁸⁸ The court reasoned that not only was there no evidence of Congressional intent to stretch the concept of government agency to encompass all federal grantees, but that strong policy rationales militated against such an interpretation:

[A] grant is assistance to an autonomous grantee. The grantee is not an arm, agent or instrumentality of the grantor. . . . Through its grants to university groups, the government obtains the efforts of creative persons who flourish in an academic atmosphere. Such arrangements provide a measure of detachment and independence from the mission of the government agency. The researchers may feel the tug of government purse strings, but they also feel answerable to the standards of their academic colleagues.⁸⁹

The court summarized its intuition about the need to preserve a sphere of researcher privacy thus: "[A]n undertaking to be audited by responsible personnel [from a grantor agency] is not the same as an agreement to accept

exceptionalism" school)). University counsel have emphasized to me in interviews, however, that as a practical matter, it is virtually impossible to disentangle the "scholar" and "non-scholar" identities of a professor that inform the contents of any particular "record," even where that record is highly editorial. For this reason, professors' advocacy-related records are here treated as scholarly records that should be PRL-exempt.

87. Professor Robert Post explains that whereas First Amendment protection of individual self-expression serves the egalitarian value of "democratic legitimation," the concept of academic freedom instead promotes the value of "democratic competence": By creating new knowledge, the academy improves the public's ability to self-govern. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* xii–xiii, 85 (2012).

88. 587 F.2d 1128 (D.C. Cir. 1978), *aff'd sub nom*, *Forsham v. Harris*, 445 U.S. 169 (1980).

89. *Id.* at 1138 (quoting M.S. Mason, *Current Trends in Fed. Grant Law—Fiscal Year 1976*, 35 FED. BAR 163, 167–68 (1976)).

rummaging by the world at large.”⁹⁰ The court thereby recognized that universities, whether public or private, must be kept institutionally distinct from government agencies if they are to maintain the desired intellectual independence.

Against this backdrop, public records requests issued to public university scholars are far more than mere annoyances. By essentially deputizing an unbounded number of third parties to do what the university as employer is itself barred from doing—interrupting, exposing, and through publicity *de facto* policing what scholars say, what they research, and how they communicate—public records laws create inhibitory conditions for public university faculty directly at odds with the noninterference principles upon which innovation depends.

C. Universities as Recipients of Taxpayer Funds

One obvious way in which public and private universities differ is with respect to core funding: Only public universities receive direct, ongoing state financial support, albeit in unpredictable and, in recent history, dramatically declining amounts. It is therefore appropriate—and not in overt tension with core university functions—to demand that public universities be transparent in their finances in a way that private universities need not be, whether by making financial operations subject to public records laws, or through other disclosure and oversight mechanisms.

State PRLs have long been used to monitor whether public university administration is fiscally sound and financially uncorrupted. For example, media and other requesters rely on state PRLs to investigate such items as university employee pay, the performance of university investments, and the items of value that textbook publishers confer on bookstores.⁹¹ A nonpartisan think tank has recently used open records requests to reveal how public universities’ deals with for-profit companies may undermine educational quality and value.⁹² These uses of open records laws, in which requests are

90. *Id.* at 1137. A 1999 amendment to FOIA (the so-called “Shelby Amendment”) imposed new disclosure requirements for data produced through federally funded research, including research conducted at state universities, that is in some tension with the reasoning in *Califano*. See O’NEIL, *supra* note 83, at 117 (describing effect of Amendment). The power of the D.C. Circuit’s reasoning, however, remains unchanged.

91. CPRA Request Log, U.C. Office of the President (2017) (on file with author) (logging requests from June 2007 to July 2017).

92. See Margaret Mattes, *The Private Side of Public Higher Education*, CENTURY FOUND. (Aug. 7, 2017), <http://tcf.org/content/report/private-side-public-higher-education> [<https://perma.cc/B3S8-VUB4>] (using data gleaned through PRL requests to describe how private companies

directed at university administrators rather than at scholars and do not implicate intellectual activity of the academy, appear wholly consistent with the purposes of PRLs as applied to public universities: ensuring that public funds are responsibly expended to promote a public educational mission. Accordingly, this Article does not propose to restrict them.

A more expansive and frequently pressed transparency claim, with admitted facial appeal, is that public universities and their faculties are paid with taxpayer dollars, and therefore, the entirety of their work product belongs to the general public and should be reachable through records requests. Even putting aside the empirical objection that public dollars now account for only a fraction of public university budgets, however,⁹³ the “taxpayer funding” argument fundamentally misses the mark.

Specifically, records-access claims founded in taxpayer rights misapprehend what the public is buying when it funds universities. Properly conceived, the public goods that taxpayers purchase are final products, in the form of published papers, public presentations, expressions of professionally informed opinion, and educated students. To obtain final products of quality, the public must respect the processes through which knowledge is generated and students are educated. That, in turn, requires shielding certain intermediate products (in the form of, for instance, inchoate scholarship, professional communications, and student evaluation tools) from public view. For this reason, only matters directly related to fiscal management of the university should be reachable through public records request, while those related to intellectual activity should be protected in the interests of safeguarding the public’s investment in the university’s ultimate research and education outcomes.

that manage online courses for public universities may prioritize profit over student educational benefit).

93. Legislative funding of higher education has been decreasing dramatically for decades nationwide. In the early 2000s, as the taxpayer-funded portion of the University of California’s overall budget shrank from 50 percent to 34 percent, a UC Berkeley Chancellor took to describing his campus as “state-assisted” rather than “public.” JENNIFER WASHBURN, UNIVERSITY, INC.: THE CORPORATE CORRUPTION OF HIGHER EDUCATION 8 (2005). Although a case could fairly be made that a 34 percent taxpayer-funded university is within its rights to be 66 percent unaccountable, I do not here press that line of argument. One can, however, easily understand institutional resentment at the dramatic ascent in records demands to public universities in an era when public financial support is falling sharply. See HALPERN, *supra* note 7, at 2 (noting that “public funding for public universities has declined markedly,” yet “[t]he public or private status of the employer matters—not the funding stream”).

D. Universities as Ethically Corruptible

A final issue in considering the propriety of applying open records laws to university scholarship involves research ethics and, in particular, whether private funding sources may unduly influence scholars' research agendas, conclusions, decisions about publication, advocacy activities, and more. Thus, for example, scholars may focus on questions of interest to private funders, resulting in an overall tilt in the disciplinary literature; they may be granted access to proprietary data sets on condition that they restrict their inquiry to certain topics; they may become intellectually biased, to the extent they feel pressured to interpret ambiguous results in ways most likely to please their sponsors; they may become willing or unwitting spokespeople for corporate pecuniary interests; and at the extreme, they may be required to preclear material with funders before publication in a way that amounts to censorship-by-sponsor.

The claim for records access based on fear of what one might term "scholar capture" is essentially the obverse of the taxpayer funding claim: Sharp declines in state funding have left public universities ever more reliant on private donations, with corresponding risks for scholars' intellectual independence and integrity. This argument is powerful, empirically well founded, and without easy rejoinder.

Media and advocacy-group records requests to public university faculty have been key, for example, in revealing—and unraveling—Coca-Cola's efforts to use professors to prop up the market for its sodas in the face of public health critiques. As these critiques gained political traction in the form of taxes and other policies that decreased soda sales, Coca-Cola proposed to establish and fund a nonprofit organization, "Global Energy Balance Network" (GEBN), that would redirect the public conversation about causes of obesity. GEBN's messaging would focus on the need for exercise to "balance" calorie consumption, notwithstanding overwhelming scientific evidence that reducing caloric intake—not increasing exercise—is the key to losing weight.⁹⁴

To garner credibility for its profit-motivated message, Coca-Cola recruited no less than the Dean of the West Virginia University School of Public Health to found and promote GEBN, giving him nearly \$1.5 million to sell the empirically

94. Anahad O'Connor, *Coca-Cola Funds Scientists Who Shift Blame for Obesity Away From Bad Diets*, N.Y. TIMES: WELL (Aug. 9, 2015, 5:25 PM), <http://well.blogs.nytimes.com/2015/08/09/coca-cola-funds-scientists-who-shift-blame-for-obesity-away-from-bad-diets> [https://perma.cc/T9ZV-ZSP2]. It takes three miles of walking to burn off one 12-ounce, 140-calorie can of Coke. *Id.*

unsupported idea that “weight-conscious Americans are overly fixated on how much they eat and drink while not paying enough attention to exercise.”⁹⁵ Subsequent public revelations about GEBN’s origin and theme prompted outrage by the Dean’s public health colleagues, led directly to his decanal resignation, and forced disclosure of Coca-Cola as GEBN’s fund source on the organization’s website. These salutary outcomes are all directly or indirectly attributable to information daylighted by a consumer watchdog group’s open records request to public university faculty.⁹⁶

In other cases, records requests to scholars may be used to expose the practice of “ghostwriting,” through which corporations put not only funds, but manuscripts in professors’ hands. Ghostwriting is particularly pervasive in medicine, where pharmaceutical and medical device companies hire communications firms to draft review articles, editorials, letters to the editor and the like that are then company-approved for compatibility with business objectives and relayed to prominent academics for signature.⁹⁷ Ghostwritten articles typically “promote the sponsor company’s products or discredit competing ones, with eventual authorship credited to academic researchers who provide little or no input, thereby concealing industry involvement and contributing to distorted drug profiles.”⁹⁸

Ghostwritten articles pushed by Wyeth were at the center of public controversy over the benefits and risks of hormone replacement therapy (HRT), wherein it was revealed that the company provided physicians with dozens of signature-ready articles for medical journals that would promote its HRT drugs by highlighting benefits and downplaying risks.⁹⁹ Prior to the scandal, in most cases neither Wyeth, nor the nominal article author, nor the relevant journal revealed the link between the drug manufacturer and the manuscript. Although ghostwriting has to date been surfaced primarily through litigation discovery (in

95. *Id.*

96. See Pepita Barlow et al., *Science Organisations and Coca-Cola’s ‘War’ With the Public Health Community: Insights From an Internal Industry Document*, J. EPIDEMIOLOGY & COMMUNITY HEALTH 1 (2018) (describing the nonprofit U.S. Right to Know’s use of a state PRL to obtain email from Coca-Cola sent to select academics concerning the formation of GEBN).

97. *Frequently Asked Questions About Medical Ghostwriting*, PROJECT ON GOV’T OVERSIGHT (June 28, 2011), <http://www.pogo.org/our-work/articles/2011/ph-iis-20110620.html> [<https://perma.cc/8FHJ-RZVA>].

98. Xavier Bosch et al., *Challenging Medical Ghostwriting in US Courts*, 9 PLOS MED. 1, 1 (2012).

99. Natasha Singer, *Medical Papers by Ghostwriters Pushed Therapy*, N.Y. TIMES (Aug. 4, 2009), <http://www.nytimes.com/2009/08/05/health/research/05ghost.html>.

the Wyeth case) and non-PRL means,¹⁰⁰ it is easy to see how PRLs to public university medical schools could shine additional light on the practice.

The slippery ethical terrain involved when academic research meets private money with strings attached is not easily navigated, and there is a strong argument that all investigative tools are fair game in endeavoring to keep scholars uncorrupted by sponsorship. Maintaining the accessibility of funding-related transactions through records requests will do much of the necessary police work, however (even while revealing fewer than all of the ways that corporate funders may influence scholars' actions), and as argued in Part IV, the remainder is better done through non-records mechanisms of accountability. This is in part because concerns about research ethics logically extend equally to public and private university scholarship, but of course, open records laws apply only to public institutions. It is also because ethics inquiries are best pursued in a regularized manner than assures due process to researchers, which public record requests emphatically do not.

There is, in sum, a fatally poor fit between state public records laws and public university scholars. PRLs are problematically under-inclusive of research ethics concerns, because they do not reach issues of research funding at private universities, and suspected ethical transgressions can be better pursued through non-PRL mechanisms. Of greatest concern, however, is that PRLs are inappropriately inclusive of the scholarly functions of research, teaching, and expression, because they thereby compromise the core university value of academic freedom. Unfortunately, as discussed below, academic freedom is presently difficult to vindicate on constitutional grounds in PRL cases involving scholar records, suggesting that law reform is necessary to protect this value statutorily.

100. Medical ghostwriting has also surfaced in the popular press, as when a North Carolina neurologist's editorial in *Stat*, a health and science website affiliated with the Boston Globe, praised drug company representatives as sources of useful clinical information, while failing to reveal more than \$300,000 in payments accepted from the drug industry. See Kevin Lomangino, 'A Blow to [STAT's] Credibility': MD Listed as Author of Op-ed Praising Drug Reps Didn't Write It, HEALTHNEWSREVIEW.ORG (Sept. 7, 2017), <http://www.healthnewsreview.org/2017/09/a-blow-to-stats-credibility-public-relations-firm-may-have-ghostwritten-op-ed-praising-drug-reps> [<https://perma.cc/WH5T-GK4T>]; Charles Seife, *Big Pharma's Attempt to Ghostwrite for Stat Ended Badly—But Not Badly Enough*, SLATE (Sept. 11, 2017, 4:34 PM), http://www.slate.com/articles/health_and_science/medical_examiner/2017/09/big_pharma_s_ghostwriting_problem.html [<https://perma.cc/R34H-MHJN>]. The article, which journalists and editors ultimately learned was ghostwritten by the public relations firm Keybridge Communications, was retracted after it was determined that a heartwarming anecdote about how a drug-rep presentation tangibly benefited a specific patient was fabricated. See Lomangino, *supra*.

E. The Unreliability of “Academic Freedom” as a Defense to PRL Claims

Although the Supreme Court has recognized that academic freedom is a “special concern of the First Amendment,”¹⁰¹ scholar-defendants in PRL cases have found that constitutional claims are often ineffective to shield their records from public disclosure. This state of affairs stems in part from courts’ tendency to view the public interest in document disclosure as a compelling government interest justifying some interference with speech—a view encouraged by the lofty democracy-promotion rhetoric in open records laws, which was clearly crafted with conventional government agency operations in mind. The limited utility of a First Amendment defense in scholar-record litigation also stems from the different concerns at play when private-citizen rather than government policing of scholar expression is at play, insofar as public records laws do not directly regulate speech, even where in practical effect they may greatly distort or inhibit it.

Judicial recognition of academic freedom in the United States first emerged in the context of direct government regulation of speech during the McCarthy era, when the U.S. Supreme Court ruled in favor of professors who were subjected by statute or government action to various ideological litmus tests in their roles as university educators. In 1957, in *Sweezy v. New Hampshire*, the U.S. Supreme Court overturned the contempt conviction of a college professor who refused to respond to questions that the state attorney general had posed to determine whether he was a subversive.¹⁰² These included questions about his knowledge of certain individuals’ Communist party affiliations and questions about his own lecture content. Although the Court ultimately rested its holding on the Due Process clause, its disquisition on “[t]he essentiality of freedom in the community of American universities,”¹⁰³ and its connection of this freedom to

101. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

102. 354 U.S. 234 (1957).

103. *Id.* at 250. The *Sweezy* Court’s passionate pronouncement on the purpose and necessity of academic freedom has since been quoted in nearly every academic writing and filed brief on the subject:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to

the expressive and associative freedoms guaranteed by the First Amendment, marked the Court's first express pronouncement on the concept of academic freedom, and its simultaneous elevation to constitutional status.

A decade later, in *Keyishian v. Board of Regents*, the Court struck down on First Amendment grounds a New York statute that, inter alia, made certain "treasonable or seditious" utterances, or the teaching of doctrines that advocated forcible overthrow of government, grounds for removal of an instructor from public school employment.¹⁰⁴ The Court emphasized that the preservation of academic freedom was "a special concern of the First Amendment" and a paramount societal value transcending the expressive interests of individual teachers resisting loyalty-oath demands, making intolerable any "laws that cast a pall of orthodoxy over the classroom."¹⁰⁵

Taken together, *Sweezy* and *Keyishian* stand for the proposition that courts will view any law that threatens to impose public employment consequences for disfavored speech or association with deep constitutional suspicion. These scenarios, however, present easier cases than determining the constitutionality of state-mandated disclosure of faculty records where there is no implied employment sanction based on those records' contents. Although *Sweezy* and *Keyishian* have informed lower courts' analysis in PRL cases pitting the public's desire for information against scholars' need for room to explore ideas without inhibitory oversight, academic freedom cases arising in non-PRL contexts have generally proven insufficient to sway courts that broad application of state PRLs to public university scholars violates the First Amendment.¹⁰⁶ The inability to resolve the tension between public records access and academic freedom on constitutional grounds accordingly requires protection of scholar records through other means.

evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id.

104. *Keyishian*, 385 U.S. at 589.

105. *Id.* at 603.

106. See LEVINSON-WALDMAN, *supra* note 75, at 10 ("[D]espite . . . powerful statements by our nation's highest court and appellate courts recognizing the value of academic freedom and its grounding in the First Amendment, courts charged with reviewing scholarly claims of confidentiality in the face of requests for disclosure pursuant to state FOIA statutes have rendered uneven decisions."); see also Ellen Auriti et al., *Who Can Obtain Access to Research Data? Protecting Research Data Against Compelled Disclosure*, 11 NAT'L ASS'N C. & U. ATT'YS NOTES 5 2013 ("Even where courts have favorably considered elements of the academic freedom and First Amendment arguments in rejecting efforts to compel disclosure of research data, they typically have done so not by basing their rulings on a formal researcher's privilege, but rather by weighing those interests as part of a balancing test approach.").

F. University Responses to Public Records Intrusion

Where courts have failed to protect academic freedom in the face of PRL requests, university personnel have endeavored to fill the void. In response to escalating public records harassment of professors nationwide, public university faculty senates, committees, and associations have increasingly filed letters and briefs supporting scholars in individual PRL cases implicating academic freedom.¹⁰⁷ They have also issued broader policy statements about the need to protect scholars' intellectual privacy more robustly, in the hope that their institutions to take a more categorical view of which types of records must be protected from the reach of PRLs to preserve academic freedom. In the wake of the harassing PRL requests to historian William Cronon at the University of Wisconsin, for example, UCLA in 2012 took a leadership role on the issue of PRLs' application to professors. In its "Statement on the Principles of Scholarly Research and Public Records Requests," UCLA explained, and sought in future to avert, many of the harms that open records laws may cause for public university scholars.

The Statement identifies the core principles of scholarly research as (1) the need for "[f]rank exchange among scholars," including the ability to "play 'devil's advocate,'" and to communicate in "edgy, casual language not intended for public circulation or publication"; (2) the need to protect the system of academic peer review; (3) the need to ensure that faculty can "choose research topics that are highly relevant to society and therefore may generate strong reactions. . . . without fear of retribution, threats, or interference"; (4) the need to protect public university faculty from the types of public records intrusions that private university faculty are spared, and to enable free communication between collaborators at different types of institutions; and (5) the need to treat academic disciplines as the frontline definers and enforcers of professional and ethical standards.¹⁰⁸

107. For example, the American Association of University Professors wrote a letter to the President of the University of Virginia regarding the controversy over Dr. Mann's climate-related email. See ROBERT O'NEIL, AM. ASS'N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND FREEDOM OF INFORMATION REQUESTS 1, 1 (2011). The University Faculty Senate at UVA issued a "Position Statement on FOIA Request for Dr. Michael Mann's Research Records" that became a litigation exhibit. See Memorandum in Opposition to Verified Petition for Mandamus and Injunctive Relief at 5, *Am. Trade Inst. v. Rector and Visitors of Univ. of Va.*, No. CL-11-3236 (Va. Cir. Ct. May 24, 2011).

108. Joint Senate-Admin. Task Force on Acad. Freedom, *Statement on the Principles of Scholarly Research and Public Records Requests*, UCLA ACAD. PERSONNEL OFF. (Sept. 2012), <http://apo.ucla.edu/policies-forms/academic-freedom> [<https://perma.cc/Y778-AD3L>].

The Statement identifies three types of harms that public requests for scholarly records may pose: reduction in candid communication among faculty, waste of time in “monitor[ing] all that is written or said in case of potential public disclosure,” and a broader “chilling effect” of deterring faculty from investigating controversial issues.¹⁰⁹ The Statement then calls upon its intended audience—the university itself—to “do its utmost” to protect scholars’ communications by clarifying that certain record types are not “subject to public records oversight.”¹¹⁰ Specifically, the Statement urges the university to protect categorically from disclosure all communications (including all private, draft, or prepublication materials) that are part of the peer-review process, which depends for its proper operation on participants’ candor.¹¹¹

The Statement also calls on the university to affirm that it will continue to respect the disciplinary norms established by “longstanding traditions of ethical and professional codes of conduct,” and will protect research on controversial topics from subjection to “political, social, religious or other non-academic criteria of evaluation” as a result of the external pressures generated by records release.¹¹² Additionally, the Statement calls on the university to afford “the same protections to UCLA faculty that colleagues in private universities or corporations enjoy.”¹¹³

The Statement is a thoughtful, eloquent, and succinct exposition of deep problems that PRLs pose for public university faculties, and its grievance list is, if anything, overly modest. Indeed, as described in this Part, there are additional problems that scholar-records requests pose for public universities outside the context of scholars’ original research, such as the inability to protect teaching materials and intramural expression of views on politics or policy from public view. Unfortunately, the audience to which the Statement is addressed—the university’s administration, including its legal counsel—is powerless to grant the drafters’ key wishes.

Most fundamentally, public universities cannot ensure that their scholars will be protected from open records intrusions that private university scholars are spared when numerous state laws treat these two types of institution differently. As important, the university cannot will the courts to provide categorical protections for scholar records in the face of state statutes that provide broad latitude for courts to balance competing interests, and do not

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

reflect the significant philosophical tension between the government accountability principles underlying PRLs and autonomy-promotion principles underlying universities. Indeed, as described *infra*,¹¹⁴ the key California appellate case involving scholar records decided since the Statement was issued reflects a strong judicial disinclination to make categorical rules in this area. This result obtained notwithstanding an extremely capable and vigorous university defense of the scholar-privacy interests at issue—a defense the university has also mounted in other recent PRL cases, with equally limited success.

For this reason, the UCLA Statement would ideally be repurposed and deployed as part of a persuasive case to a different audience: state legislatures.¹¹⁵ The potential legislative project ahead is best illustrated through case studies of courts' treatment of public university scholars under existing state PRL regimes, which yield discouraging lessons about the status quo, and lessons for statutory reform.

III. SCHOLAR HARASSMENT UNDER OVERBROAD STATE RECORDS LAWS

A. Treatment of Scholar Records Under Varied State PRLs

Case law makes plain that scholars are vulnerable to political harassment under all but the most restrictive state records laws. Open records statutes vary dramatically in their treatment of public university records: Some state legislatures have implicitly recognized that universities are a unique institutional type and have accordingly confined the reach of PRLs to universities' financial and administrative matters, while others have through legislative silence made all university records, including scholar records, PRL-reachable. This variability likely arises because state open records laws typically mimic federal FOIA, with minor-to-moderate variations, and the absence of a federal university left states without a model FOIA provision.¹¹⁶

A 2017 fifty-state survey of the research protections available under state open records laws grades states from "A" through "F" based on a combination of

114. See Subpart I.3.

115. Counsel for the American Association of University Professors (AAUP) indeed recommends this course, advocating that the Association not only continue to file supportive briefs in contested public-scholar PRL cases, but assist statehouses in crafting sufficiently broad exemptions to state public records laws to protect academic freedom. See O'NEIL, *supra* note 107, at 6.

116. Although federal agency researchers are also vulnerable to political harassment through FOIA requests, that problem implicates different policy issues than those arising in the university scholar records context and requires its own nuanced treatment that is beyond the scope of this Article.

statutory text, judicial decisions, and lesser persuasive authorities such as attorney general opinions.¹¹⁷ This typology indicates that less than one-third of state PRL laws have complete (“A”) or strong (“B”) protections for scholarly work. In the substantial majority of states (those with “C” through “F” grades), scholars face a stiff challenge in keeping their research materials, communications, and other records private, and are correspondingly susceptible to politically motivated harassment.

In the three states graded “A” for protection of public university researchers—Maine, Delaware, and Pennsylvania—scholarly activities are wholly excluded from the reach of public records laws. The Maine statutory exclusion is the broadest; it generally bars disclosure of records from all public universities, community colleges, and Maine’s maritime academy.¹¹⁸ Delaware’s statutory exclusion likewise excludes the entire public university system from the reach of its PRL, except for university boards of trustees.¹¹⁹ Pennsylvania takes a similar approach, excluding the state’s four large public higher education institutions from the general operation of open records laws.¹²⁰ Although the state’s other public educational institutions (such as community colleges) are not PRL-exempt, a generous exemption for “[u]npublished lecture notes, unpublished manuscripts, unpublished articles, creative works in progress, research-related material and scholarly correspondence” appears to put most scholar-products generally beyond the law’s reach.¹²¹

In the four states graded “F”—Arkansas, Montana, New Mexico, and North Carolina—state law draws no distinction between conventional state

117. CLIMATE SCI. LEGAL DEF. FUND, RESEARCH PROTECTIONS IN STATE OPEN RECORDS LAWS: AN ANALYSIS AND RANKING 8 (2017), <http://www.csldf.org/wp-content/uploads/2017/12/CSLDF-Research-Protections-in-State-Open-Records-Laws.pdf> [<https://perma.cc/QJ3C-8VB6>].

118. ME. REV. STAT. ANN. tit. 1, § 402(3)(E) (2017). The only university records reachable under Maine’s PRL are those of boards of trustees and their sub-units. *Id.*

119. Delaware’s Freedom of Information Act excludes from its definition of “public bodies” subject to public record requests nearly all of the “activities of the University of Delaware and Delaware State University” (the state’s two higher educational institutions), except where record requests “relate to the expenditure of public funds.” DEL. CODE ANN. tit. 29, § 10002(i) (West 2016).

120. Pennsylvania’s Right to Know Law differentiates among various state institutions based on function, and it makes only a subset of these institutions reachable through public records requests. “State-related [educational] institutions” (defined in 65 PA. CONS. STAT. §§ 67.102, 67.1501 (2018)) are exempt from the PRL. *See* *Mooney v. Temple Univ. Bd. of Trustees*, 285 A.2d 909 (Pa. Commw. Ct. 1972); *Roy v. Pa. State Univ.*, 568 A.2d 751 (Pa. Commw. Ct. 1990). These institutions are instead made partially politically accountable via mandatory annual public reporting that focuses on salary transparency. *See* 65 PA. CONS. STAT. § 67.1503.

121. 65 PA. CONS. STAT. § 67.708(b)(14).

agencies and public universities, and protection for scholars' records appear to be slim to nonexistent pursuant to statutory exceptions crafted with conventional agency activities in mind. Arkansas open records law, for example, exempts from public disclosure only "[f]iles that if disclosed would give advantage to competitors or bidders."¹²² Montana's law generally exempts only information that is "constitutionally protected from disclosure because an individual privacy interest clearly exceeds the merits of public disclosure."¹²³ The only scholar records protected by New Mexico and North Carolina's laws are those revealing "trade secrets."¹²⁴

Between these extremes are twelve states graded "B" (strong statutory exemptions for academic research that have also been generously interpreted by courts), seventeen states graded "C" (limited or ambiguous researcher protections), and fifteen states graded "D" (narrow research protections). Although public universities in "A" states have been spared scholar-records intrusions and litigation under their PRLs, university scholars in the remainder have either had to surrender records reluctantly or litigate vigorously to oppose their release under narrow or ambiguous exemptions.

B. Case Studies

Illustrative case studies of scholar harassment in states graded "B" through "D" demonstrate both courts' struggles to reach equitable results under overbroad public records laws, and the desirability of a legislative fix.

1. Records Harassment in a State With Considerable Scholar Protections: Virginia

The harassment case of climatologist Michael Mann, which arose in a state now graded "B" for its comparatively strong researcher protections, demonstrates the extraordinary efforts required to vindicate research privacy interests in jurisdictions with less than absolute protections for scholar records. In 2011, the climate denier group American Tradition Institute (ATI)¹²⁵ filed suit

122. ARK. CODE ANN. § 25-19-105(b)(9)(A) (2018).

123. MONT. CODE ANN. § 2-6-1002(1)(a) (West 2017).

124. N.M. STAT. ANN. § 14-2-1(A)(6) (West 2017); N.C. GEN. STAT. § 132-1.2(1)(a) (2017).

125. As described in Mann's court papers, "ATI is a vocal opponent of climate change science and has attacked Dr. Mann and others in the scientific community as part of its fundraising efforts." Memorandum in Support of Intervenor-Respondent Michael Mann's Motion for Leave to Intervene at 2, *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, No. CL-11-3236, 2011 WL 11545824 (Va. Cir. Ct. Sept. 2, 2011).

in Virginia state court against Dr. Mann, seeking all of the documents he had produced or received during his six-year employment at the University of Virginia—a request implicating tens of thousands of records, including voluminous correspondence between Dr. Mann and his collaborators on climate-related projects.¹²⁶ As characterized in university defense counsel’s court filings, ATI’s wide-ranging request encompassed “the raw materials of scholarship, the undistilled, unedited, back and forth between scientists that leads to published, peer-reviewed scholarship.”¹²⁷

ATI’s request was unsupportable as a matter of policy, defense counsel wrote, because “[t]he University firmly believes that mandatory disclosure of this type of information would stifle and irrevocably damage intellectual inquiry.”¹²⁸ The records request at issue was, as described in a later joint filing by the university and Dr. Mann, “part of a sustained, coordinated attack against scientists who study climate change and the academic institutions that support their studies,” and but one part of a larger political campaign “to stir controversy, chill scientific debate, and embarrass and harass Dr. Mann and the University.”¹²⁹

Dr. Mann’s case presented an issue of first impression under Virginia’s open records law, and turned on interpretation of a statutory provision exempting from disclosure:

Information of a *proprietary* nature produced or collected by or for faculty or staff of public institutions of higher education . . . in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such information has not been publicly released, published, copyrighted or patented.¹³⁰

The Virginia Supreme Court ultimately ruled broadly in favor of Mann, unpersuaded by ATI’s argument that the term “proprietary” should be read to encompass only scholar records that confer pecuniary advantage. In an opinion

126. *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, 756 S.E.2d 435, 437 (Va. 2014).

127. Memorandum in Opposition to Verified Petition for Mandamus and Injunctive Relief at 4–5, *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, No. CL-11-3236, 2011 WL 11521448 (Va. Cir. Ct. May 24, 2011).

128. *Id.* at 5.

129. Memorandum in Support of Motion to Quash Process and Deny Petitioners’ Requests for Discovery at 4, *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, No. CL-11-3236, 2012 WL 9938198 (Va. Cir. Ct. Jan. 20, 2012).

130. VA. CODE ANN. § 2.2-3705.4(4) (2018) (emphasis added).

reflecting both an understanding of academic freedom and the ways that public record requests inhibit it, the court wrote:

We reject ATI's narrow construction of financial competitive advantage as a definition of "proprietary" because it is not consistent with the General Assembly's intent to protect public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges. In the context of the higher education research exclusion, competitive disadvantage implicates not only financial injury, but also harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression. This broader notion of competitive disadvantage is the overarching principle guiding application of the exemption.¹³¹

In so holding, the Court found persuasive affidavits from scholars and academic administrators stating that the inability to protect scholarly communications would impair public universities in faculty recruitment and retention, and discourage private university scholars from collaborating with public university colleagues out of fear that this could "render their communications involuntarily public."¹³²

Although the ruling and reasoning from the state's highest court will likely protect Virginia public university scholars from future records harassment—and why, post-litigation, Virginia law has been ranked comparatively protective of scholar records privacy—it is sobering to tally the time, cost, and personal toll required to achieve this result, even under a statutory exemption that on its face appears to reflect legislative sympathy for scholar privacy needs.

At the institutional level, university counsel were required to expend more than three years defending Dr. Mann in litigation. This undertaking included spending weeks to: identify responsive records, and meet and confer over terms of their production; categorize Dr. Mann's emails, and produce exemplar documents for the Court to review in making exemption determinations; litigate the issue whether the university could charge for the time expended in reviewing records, or merely for direct copying costs (also an issue of first impression under Virginia law); and litigate ATI's desire to conduct discovery on the university's

131. *Am. Tradition Inst.*, 756 S.E.2d at 441–42.

132. *Id.* at 442 (quoting affiant John Simon, Executive Vice President and Provost of UVA and former Vice-Provost of Duke University).

document withholding.¹³³ The university also had to counter vigorous arguments from amicus Reporters Committee for Freedom of the Press, which urged that “[p]ublic universities are necessarily included in [Virginia] FOIA,” and that “the media has a strong interest in being able to monitor university spending and operations”¹³⁴—an argument that generally failed to acknowledge that universities present a unique institutional type, and that over-disclosure of university records unrelated to spending and administrative operations threatens to impair the core university functions of uninhibited intellectual exploration and production of new knowledge.¹³⁵

At the personal level, Dr. Mann was required to expend hundreds of hours participating in his litigation defense and responding to media coverage over his records-disclosure battle, representing a major distraction from climate change research. As he details in a book written during the *ATT* litigation, among climate change denialists’ strategies is “to subject climate scientists to intrusive demands for materials, making it difficult or impossible, and at the very least less enjoyable, for them to carry out their work....”¹³⁶ Although time and opportunity costs for defendants and their counsel inhere in all public records litigation, for the reasons described in Part I, the policy rationales for subjecting scholars and universities to such costs are significantly weaker than for conventional government agencies, and the societal losses potentially greater.

Dr. Mann’s defense was also expensive—so much so that to mount it adequately, he was required to help fund it. As frequently arises in scholar-records disclosure cases, individual and institutional interests in the case early diverged, because individual scholars understandably have a strong stake in

133. See Westlaw Trial Court Electronic Docket, *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, No. CL-11-3236 (Va. Cir. Ct.).

134. Brief of *Amici Curiae* Reporters Comm. for Freedom of the Press et al., in Support of Appellants at *4, *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, 756 S.E.2d 435 (Va. 2014) (No. 130934), 2013 WL 9554548.

135. The media’s desire to maximize its own access to information sources is understandable. There is some irony, however, in the Reporters Committee’s vigorous opposition to a broad PRL exemption for scholar records. Not only are reporters invulnerable to PRL requests for their own sources, methods, and work products, but they have fought hard—and unlike professors, successfully—to be spared the forced disclosure of their information in state civil and criminal proceedings. Compare Christina Koningisor, *The De Facto Reporter’s Privilege*, 127 YALE L.J. 1176, 1202 (2018) (noting that a majority of states have enacted a statutory shield for journalists, and in other states, judges have constructed common law shields, privileges, or other means to protect them from compelled testimony), with NED POLSKY, *HUSTLERS, BEATS, AND OTHERS* 141–42 (Lyons Press 1985) (1967) (decrying the absence of a testimonial privilege for academic researchers, which makes it impossible for criminologists to protect their criminal research subjects).

136. MICHAEL E. MANN, *THE HOCKEY STICK AND THE CLIMATE WARS: DISPATCHES FROM THE FRONT LINES* 200 (2d ed. 2014).

protecting the privacy of their own records and those of their collaborators, whereas universities, even if receptive to scholars' concerns, are well aware of the cost of vigorous resistance to disclosure and institutional resource constraints, and are consequently inclined to be generous to records requestors. In Mann's case, this potential conflict arose almost immediately, when contrary to his wishes, the university entered into a protective order to share requested emails with opposing counsel prior to resolving issues of potential exemption. As described in Dr. Mann's intervention papers, these emails contained his "thoughts, ideas, and statements on various scientific issues," exchanged "with professional colleagues throughout the world," and he could not abide direct disclosure "to the very activist petitioners that are on a mission to scapegoat him."¹³⁷ Dr. Mann therefore obtained private counsel and intervened in the case to protect his own scholarly interests, requiring him to locate more than \$140,000 for litigation expenses.¹³⁸

Thus, although *ATI* represents a state-specific victory with respect to scholar records privacy, it does not resolve the issue on a nationwide basis, given variability among state laws. It also fails to establish clear lines for differentiating between public university documents that should be presumptively subject to disclosure under PRLs, and those that should be categorically protected. Finally, and importantly, Dr. Mann's case demonstrates the vigor with which requesters may contest scholar-records access under any state law presenting even minimal ambiguity as to what records may lawfully be withheld in a public university context.

2. Records Harassment in a State With Minimal Scholar Protections: Arizona

The ordeal to which Dr. Mann was subjected was arguably magnified, not diminished, when he prevailed in the Virginia Supreme Court: Stymied under a restrictive open records law, petitioner *ATI* simply moved its fight to Arizona, whose permissive public records statute has been graded a "D" for scholar protection. There, *ATI*—rebranded, mid-litigation, as the Energy & Environmental Legal Institute (E&E)—sought through Arizona's broad PRL to

137. Memorandum in Support of Intervenor-Respondent Michael Mann's Motion for Leave to Intervene at 1–2, *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, No. CL-11-3236, 2011 WL 11545824 (Va. Cir. Ct. Sept. 2, 2011).

138. Emails From Lauren Kurtz, Executive Dir., Climate Sci. Legal Def. Fund, to author (June 21, 2017 & Sept. 13, 2017) (on file with author). CSLDF ultimately paid for Dr. Mann's defense through its nonprofit fundraising efforts; Mann's private law firm counsel also contributed considerable hours pro bono. *Id.*

obtain Dr. Mann's correspondence on the receiving rather than sending end, by requesting copies from his coauthor Dr. Malcolm Hughes at the University of Arizona. Such tactics demonstrate that until state laws are uniformly scholar-protective, defeating intrusive records requests in one venue may merely invite a game of whack-a-mole.

Once focused on the University of Arizona, E&E additionally sought thirteen years of email from Dr. Hughes's colleague, Dr. Jonathan Overpeck, a lead author for the UN Intergovernmental Panel on Climate Change 2007 report that earned a Nobel Peace Prize. E&E's complaint made plain its goal of discrediting these climate change scientists, describing, for example, its need to probe "the important public policy issue of *alleged* catastrophic man-made global warming."¹³⁹

Arizona's public records law provides no express exemption for academic research, but the Arizona Education Code generally exempts from disclosure, in relevant part: (1) trade secrets; (2) "unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer reviews"; and (3) information developed by university employees, contractors, or collaborators "if the disclosure of this data or material would be contrary to the best interests of this state."¹⁴⁰ Protecting documents based on the "best interests of the state" cannot be done on a categorical basis by document type, but rather requires a document-specific inquiry (typically involving in camera review) that balances the competing interests in disclosure and nondisclosure, in which the state must show the likelihood of "specific, material harm" from an individual document's release.¹⁴¹

In the E&E case, Dr. Overpeck testified that responding to E&E's expansive records request required him to locate "over ninety thousand pages of emails" that he had stored on various computers, programs, and operating systems across the seven-year record request period, and spend many hours per day for a six-week period during what was supposed to be an academic sabbatical in Guatemala.¹⁴² The fact that records response obligations required Dr. Overpeck to lose "the opportunity for language immersion which was the purpose of the sabbatical itself," and "sacrifice[] a significant experience with [his] family,"¹⁴³ as

139. Complaint at 2, *Am. Tradition Inst. v. Univ. of Ariz.*, No. C2013-4963, 2013 WL 4968306, ¶ 7 (Ariz. Super. Ct. Sept. 5, 2013) (emphasis added).

140. ARIZ. REV. STAT. ANN. § 15-1640(A) (2018).

141. *Phoenix Newspapers, Inc. v. Ellis*, 159 P.3d 578, 583 (Ariz. Ct. App. 2007) (quoting *Mitchell v. Super. Ct.*, 690 P.2d 51, 54 (Ariz. 1984)).

142. Declaration of Dr. Jonathan Overpeck ¶¶ 12–13, *Energy & Envtl. Legal Inst. v. Arizona Bd. of Regents*, No. C2013-4963 (Ariz. Super. Ct. July 28, 2014) (copy on file with author).

143. *Id.* ¶ 13.

well as distracted him from research, teaching, and administrative duties for the University of Arizona, was not the worst of it, however.

To Dr. Overpeck, it was clear that E&E's records request was made for purposes having nothing to do with ensuring the integrity of his scientific work, because E&E failed to seek any of his data, and instead requested only his email communications.¹⁴⁴ Further, E&E had used previously hacked University of East Anglia emails as exemplars in accusing Dr. Overpeck of incivility in his discussion of a colleague in what was clearly intended to be a private email communication,¹⁴⁵ making plain its interest in character attack and reputational damage. Thus, Overpeck wrote:

[I]t would seem the real reason for E&E's request is to seek my email records merely in hopes of misstating, misquoting, taking my statements or those of others out of context, or otherwise twisting their meaning to attempt to burden, embarrass, or harass climate researchers such as myself.¹⁴⁶

Based on his own ordeal in responding to E&E's request, Overpeck stated:

[I]f other colleagues were required to cull through tens of thousands of pages of emails and prepare a log of withheld emails, as I was, it would create such a significant potential for individual and collective disruption... that such process alone would result in a major competitive disadvantage to Arizona's universities.... If [our] scientists could not be assured of confidentiality, indeed even assured of being free from the burden of responding to public records requests, I believe they may elect one of the many choices outside of Arizona's public universities.¹⁴⁷

Dr. Overpeck's case has already had two trips to the Court of Appeal and two remands to trial court, as Arizona judges continue to disagree over the scope of the Education Code exemptions for scholar records. As of this writing, the case may be headed for a third appeal, keeping the status of Dr. Overpeck's records in limbo four years after case filing, and three years after a ruined sabbatical, with university defense costs continuing to mount (and the university potentially liable for E&E's attorney's fees should the records requester eventually prevail). Along the way, however, the trial court has notably opined that (1) the targeted professors were effectively on notice of their lack of

144. *Id.* ¶¶ 15 & 17. Dr. Overpeck notes that he had already made his data publicly available, as per best scientific practices in paleoclimatology. *Id.* ¶ 16.

145. *Id.* ¶ 18.

146. *Id.* ¶ 14.

147. *Id.* ¶ 19.

communicative privacy because “[a]t the time the emails were generated . . . they were state employees using their employee email addresses,” and the “emails relate to research work . . . as employees of the University of Arizona”; that (2) there is a strong “presumption favoring disclosure of public records containing information about a topic as important and far-reaching as global warming and its potential causes”; and that (3) despite numerous institutional statements of concern (expressed in briefs and scholar affidavits) about the “chilling effect” of mandating disclosure of professors’ email, such harms are “speculative at best.”¹⁴⁸

Additionally, the trial court, which currently has the last word in the matter, has stated that scholar email is almost per se publicly accessible under Arizona’s open records law. In the court’s view: “Alternative methods of communication have been and remain available to Professors Hughes and Overpeck and any other similarly situated person should they desire to correspond in confidence regarding research projects and like endeavours [sic]”¹⁴⁹—in other words, scholars seeking intellectual privacy have the option to forswear the dominant mode of modern professional communication in favor of telephones, smoke signals, or other modes that leave no trace.

Regardless of ultimate outcome, the Arizona courts’ reluctance to find broad protection for scholar records, in some combination of the Education Code’s research records disclosure exemption and the statute’s permission for universities to withhold additional records types whose disclosure “would be contrary to the best interests of this state,” indicates that scholar records will continue to be highly vulnerable to public disclosure in that state. Indeed, as examination of scholar-records battles in a “C” state will show, even where courts appear conceptually more sympathetic to scholar privacy needs than in Arizona, their failure to establish categorical rules regarding disclosure-exempt records in the public university context keeps scholar records in an untenably precarious place. Universities and often, targeted scholars are thus

148. Under Advisement Ruling at 3–4, *Energy & Env’tl. Legal Inst. v. Arizona Bd. of Regents*, No. C2013-4963 (Ariz. Super. Ct. June 14, 2016) (copy on file with author).

149. *Id.* at 3. In so ruling, the Court ignored Dr. Overpeck’s declaration testimony regarding the utility of email communication, in which he explained how it has almost wholly supplanted communication with collaborators by phone—“[c]ollaborating over the phone about data and draft research paper language was . . . very inefficient and required a great deal of time and only at such times when all collaborating researchers might be available”—and how using the phone could even be directly damaging. Declaration of Dr. Jonathan Overpeck ¶¶ 4–5, *Energy & Env’tl. Legal Inst. v. Arizona Bd. of Regents*, No. C2013-4963 (Ariz. Super. Ct. July 28, 2014) (copy on file with author) (“[Historically] I spent so much time using a phone headset that I actually suffered some hearing loss attributed to the amount of time I spent on the phone collaborating with fellow researchers.”).

overwhelmingly likely to capitulate to records demands even where there is a reasonable statutory basis for resistance.

3. Records Harassment in a “Balancing Test” State: California

California is graded a middling “C” for scholar privacy protection: There is no disclosure exemption specific to university records, but rather, professors must generally rely on a catch-all exemption involving a weighted public-interest balancing whose results are unpredictable. Under this test, a scholar resisting record disclosure must demonstrate that “on the facts of the particular case the public interest served by not disclosing the record *clearly outweighs* the public interest served by disclosure of the record”—meaning that all doubt must be resolved in favor of disclosure.¹⁵⁰

The University of California system presently receives more than 12,000 public records requests per year.¹⁵¹ Among those are dozens designed to harass researchers pursuing lines of inquiry disfavored by records requesters, and to contest or discredit their work outside of ordinary peer review or political stakeholder processes, or both. Further, harassing CPRA requests, like those under other states’ open records laws, are notable in the degree to which they target groundbreaking researchers and thought leaders, making the requests’ substantive impact disproportionate to their number.

A vivid but not atypical example is a case in which the gun lobbyist group California Rifle and Pistol Association Foundation in 2010 sought, through CPRA requests to multiple UC researchers engaged in study of lead poisoning of federally endangered California condors, to discredit research that might be used to support state regulation of lead ammunition. Typical of items in the Foundation’s expansive fishing-expedition records requests was a request for all correspondence among members of a particular research group for a roughly five-year period containing the word “lead” and any of the following words: “isotope,” “blood,” “condor,” “ammunition,” “bullet,” or “copper.”¹⁵² Indeed, as one targeted researcher wrote, the “request sought *everything* I have done related

150. CAL. GOV’T CODE § 6255(a) (West 2018) (emphasis added).

151. UNIV. OF CAL. OFFICE OF THE PRESIDENT, 2016 ANNUAL CPRA COUNT (on file with author).

152. Declaration of Denise M. Dolezal in Support of Opposition by the Regents of the Univ. of Cal. to Petition for Writ of Mandate ex. 1, Cal. Rifle & Pistol Ass’n Found. v. Regents of the Univ. of Cal., No. CV171068 (Cal. Super. Ct. Aug. 2, 2011) (copy on file with author).

to ‘lead’ over a multi-year timeframe,” meaning that the task of identifying responsive documents alone would take her “approximately 60 hours.”¹⁵³

Another targeted researcher testified that he would have to review more than 4000 computer records and at least a dozen notebooks and binders, which would take up to one month of his time, to simply locate and provide documents responsive to the PRL request.¹⁵⁴ This time of course represented but a fraction of the time that researchers would have to devote to requesters’ agenda at the expense of their own, because every responsive document would have to be reviewed for exemption, and where potentially exempt, reviewed to determine the feasibility of redacting exempt content and providing the remainder. This would necessarily be followed by extensive meeting and conferring with records requesters regarding documents to be provided and those proposed to be withheld, and conferring with university counsel in connection with these tasks.

In determining to litigate to protect their records from disclosure—itsself a huge distraction from their professional responsibilities and one that, *inter alia*, required them to submit to hostile depositions—UC Santa Cruz researchers described, in detailed and at times deeply personal declarations, the range of harms that would accrue from the records requests. For Donald Smith, time spent responding to the Foundation’s request had, even in advance of significant document production, “significantly negatively impacted [his] ability to focus on” the teaching, student mentorship, research, publication, and administrative responsibilities that require fifty to sixty hours of his time under ordinary conditions, and had “already negatively impacted” his career advancement prospects, ability to keep commitments to collaborators, and ability to assist with professional development of research staff and graduate students.¹⁵⁵ The release of unpublished data would have “significant dire consequences” for his research program, career, and entire laboratory staff, because he would “lose control over those data and their potential publication by others.”¹⁵⁶

Myra Finkelstein echoed Dr. Smith’s concerns about the scientific process harms that would flow from forcing premature release of unpublished data and preliminary findings presented on a confidential basis to regulators. She also described harms that would flow from requiring release of data underlying

153. Declaration of Myra E. Finkelstein in Support of Opposition by the Regents of the Univ. of Cal. to Petition for Writ of Mandate ¶¶ 6–7, Cal. Rifle & Pistol Ass’n Found. v. Regents of the Univ. of Cal., No. CV171068 (Cal. Super. Ct. Aug. 2, 2011) (copy on file with author).

154. Declaration of Donald R. Smith in Support of Opposition by the Regents of the Univ. of Cal. to Petition for Writ of Mandate ¶ 19, Cal. Rifle & Pistol Ass’n Found. v. Regents of the Univ. of Cal., No. CV171068 (Cal. Super. Ct. Aug. 2, 2011) (copy on file with author).

155. *Id.* ¶ 6.

156. *Id.* ¶ 21.

qualitative public statements that can inform the public about time-sensitive matters in the long period while publication is pending. Thus, for example, Dr. Finkelstein wrote that scientists who made qualitative, research-based statements that could assist with real-time Gulf oil spill recovery would likely in the future “cho[o]se the safe route of not getting involved, rather than forfeiting their right to protect their intellectual property and safeguard their careers” if the consequence of such statements were that they would be forced to release all supporting quantitative data prepublication.¹⁵⁷

Dr. Finkelstein additionally painted a wrenching picture of the personal cost of responding to the Foundation’s records request—a request she characterized as no more than “an attempt to . . . discredit our work and reputations”—which competed with time she needed to care for premature newborn twins on top of her academic responsibilities.¹⁵⁸ She wrote that the PRL request required her to “spen[d] night and weekend hours that I would have preferred to spend with my family, or even sleep, searching for responsive documents.”¹⁵⁹

As a final matter, the Foundation litigation, like all litigation involving scholar records, required targeted faculty to spend considerable time educating the court about the variety of records that academics maintain, and how each fits into the universe of intellectual exploration, public engagement, and publications that comprise their core functions. For example, researchers had to explain how an important category of records involved in the Foundation litigation, beyond those restricted to the personal files of university professors, consisted of documents from presentations researchers had made at professional meetings attended by paid registrants, who were primarily peer scientists, where no materials were distributed and copying of posters and slides was strictly prohibited.¹⁶⁰ Although the Foundation urged that such documents and their data could not be considered prepublication because they had in some form been shared, the targeted professors described the essentiality of the peer back-and-forth regarding unpublished results, and how fully that would be compromised by forcing premature broad release: “[S]cientists often seek comments on their presented research from science peers in attendance. It is a valuable part of the creative scientific process and communicating preliminary science before submission for publication.”¹⁶¹

157. Declaration of Myra E. Finkelstein, *supra* note 152, ¶ 18.

158. *Id.* ¶ 5.

159. *Id.*

160. Declaration of Donald R. Smith, *supra* note 153, ¶ 24.

161. *Id.* ¶ 31.

In the *Foundation* case, the trial court acknowledged the academic freedom issues involved, and in particular the importance of protecting unpublished data, and indeed discussed them at length and with nuance. The court here was more receptive than the Arizona trial court in Dr. Overpeck's case to the notion that prepublication discussion among scientists (including email), and not merely data themselves, requires court protection in order to prevent the chilling of vigorous discussion, the potential for comments to be taken out of context, and the impairment of the entire deliberative process that goes into preparing a study or publication. Yet the court ultimately determined that there is no absolute privilege for researchers as a First Amendment matter; that the CPRA requires a balancing of the harms from disclosure against the harms of nondisclosure that is necessarily case-specific; and that there is a weight in the pan of disclosure, with the government required to justify nondisclosure.

In many respects, the court ultimately behaved similarly to others confronting dueling claims for records access versus records withholding in a public university context under statutes conferring significant discretion on judges to balance competing interests. First, it took a highly reductive approach to evaluating scholar records, parsing the rationales for and against disclosure of each type of document requested, even though all were in the general category of scholar research records. The court ultimately ruled that the requesters were entitled to copies of all formally published studies, and all data cited therein, as well as all formal presentations regarding lead poisoning made at conferences or before legislative bodies, including PowerPoint presentations, and any "data that the researchers relied on in making their presentations in which they failed to identify them as being preliminary."¹⁶²

Second, and related, the *Foundation* court appeared largely unsympathetic to the extraordinary demands on faculty time presented by the wide-ranging requests at issue. The court again took a crabbed view, implicitly inquiring whether it was physiologically possible for scholars to respond to the records request without losing their jobs or abandoning their families. Although the court reasoned that respondents could not be expected to relinquish all of their other obligations to respond to records requests, it held that it would be fair to require Drs. Smith and Finkelstein each to spend "one to two hours per week" producing responsive documents for as long as necessary to complete the

162. Order Re: Petition by Cal. Rifle & Pistol Ass'n Found. for Writ of Mandate at 8–9, Cal. Rifle & Pistol Ass'n Found. v. Regents of the Univ. of Cal., No. CV171068 (Cal. Super. Ct. Dec. 7, 2011) (copy on file with author).

task¹⁶³—even if, in Dr. Smith’s case, records response would require this attention across a span of eighty weeks.¹⁶⁴

Although significant time demands for responding to PRL requests are not unique to the university records context, in conventional government agencies this efficiency loss is understood to be a necessary cost of ensuring public accountability of regulators to the regulated—essentially, the frictional drag of democracy. In the university context, however, where democratic accountability rationales are far weaker, the time imposition posed by expansive records requests strongly suggests that a different calculus is in order. Thus, for example, the court could arguably (even under the required statutory balancing test) have engaged the question whether it serves the public interest to have a renowned environmental toxicologist spend up to 160 hours endeavoring to evaluate documents potentially responsive to a hostile record request, when that time would otherwise be spent advancing his teaching, research, and other knowledge-promoting activities, including data-gathering and analysis that would assist with the clearly-public-interested activity of California condor recovery.

Finally, and critically, the *Foundation* court held that although the university had prevailed on the main issues in dispute, it was not entitled to costs or fees because “the petition was not frivolous and dealt with important public and legal issues.”¹⁶⁵ The court reached this conclusion even while acknowledging that the Foundation’s goal in extracting documents through the PRA was to “attack the findings of certain researchers in order to support a political argument against banning the use of lead shot in condor habitats.”¹⁶⁶ Thus, so long as the law remains that scholar records are potentially accessible to requesters, and requested scholar records implicate issues of obvious interest to the public—in this case, condor recovery—harassment of researchers will remain a fruitful and affordable political advocacy strategy.

As records harassment of UC researchers continued post-*Foundation*, university counsel and scholars continued to fight back—albeit selectively, given the time and cost involved. Beyond the hope for case-specific victories lay the hope that the public university system *in toto* might eventually benefit from an appellate pronouncement that scholar records implicate fundamentally different issues than do conventional agency records, and must be placed

163. *Id.* at 10.

164. Declaration of Donald R. Smith, *supra* note 153, ¶ 19.

165. Order Re: Petition by Cal. Rifle & Pistol Ass’n Found. for Writ of Mandate *supra* note 161, at 11.

166. *Id.* at 3.

categorically off-limits to records requesters. Such hopes were dashed, however, in the 2013 case *Humane Society of the U.S. v. Superior Court of Yolo County*,¹⁶⁷ when the court took pains to avoid the broad policy pronouncements that the facts before it arguably invited.

Humane Society involved an animal rights organization's expansive records request to researchers at the Davis-based UC Agricultural Issues Center (AIC) in connection with a proposed California ballot measure that, on animal welfare grounds, would limit confinement of farm animals. Humane Society requesters believed the requested documents would show that AIC's researchers were influenced by agribusiness interests when preparing a report that concluded there would be adverse economic effects from the measure. The Society's request for "any records" relating to preparation and funding of the AIC report and related communications encompassed more than 3000 pages of documents, consisting of industry financial data that the researchers had obtained on a promise of confidentiality; prepublication drafts and communications among research team members; and communications between both the research team and AIC's advisory board, and the team and external consultants.¹⁶⁸

After evidence produced at trial demonstrated that the report was prepared solely with UC Davis funds,¹⁶⁹ a designated Special Master's in camera review of all responsive documents revealed no evidence of improper influence on researchers; and AIC's director submitted a highly persuasive expert declaration regarding the chilling effects on scholarship of the types of records intrusion proposed, the trial court held that UC could withhold nearly all of the requested documents under the CPRA's catch-all provision.¹⁷⁰ In affirming this decision, the appellate court reasoned that "disclosure of prepublication research communications would fundamentally impair the academic research process to the detriment of the public that benefits from the studies produced by that research,"¹⁷¹ and it described, with clear understanding, the intellectual conditions of experimentation and error permission that are prerequisite to the advance of knowledge.¹⁷²

167. 155 Cal. Rptr. 3d 93 (Cal. Ct. App. 2013).

168. *Id.* at 98–99.

169. *Id.* at 102.

170. *Id.* at 103–04.

171. *Id.* at 121.

172. *Id.* at 118 ("Privacy . . . contributes to learning . . . by insulating the individual against ridicule and censure at early stages of groping and experimentation. No one likes to fail, and learning requires trial and error. . . . In the absence of privacy we would dare less, because all our early

Importantly, the court also distinguished public university research activities from those performed in a conventional state agency, which informed its view that impinging on scholars' privacy might impair primary research in a way that mandating records release from a typical agency does not: "Data that is the result of research done for a governmental entity to inform and support an official decision of that entity may very well present a different set of interests than those presented in the academic setting where prepublication communications are at issue."¹⁷³

Notwithstanding this case-specific win for UC researcher privacy, however, the court stopped far short of providing the guidance necessary to embolden public universities and their researchers to challenge intrusive or overtly harassing records requests in other factual contexts. Indeed, after exhaustive examination and acceptance of the (seemingly generalizable) arguments advanced in favor of researcher privacy in *Humane Society*, the court wrote emphatically to disclaim any announcement of a general rule: "[O]ur decision in this case *will not create an academic researcher's exemption* immunizing disclosure of university documents in future cases. A decision regarding the catch-all exemption is necessarily limited to the facts of the particular case. *A case-by-case balancing process is required.*"¹⁷⁴

And lest that limiting pronouncement prove insufficient to deter document-production resistance, a catalogue of the time, effort, and expense required for the scholar-privacy vindication achieved in *Humane Society* should suffice: The case spanned nearly five years from the time of initial record request to appellate decision,¹⁷⁵ with the trial court proceeding alone involving approximately ten hearings and forty briefs.¹⁷⁶ This required more than a thousand hours of university staff and counsel time to litigate.¹⁷⁷ The case additionally cost UC more than \$157,000 in fees for outside retained appellate counsel, after which UC also had to pay more than \$455,000 in attorneys' fees and costs to the plaintiff even though UC overwhelmingly prevailed, because the

failures would be on record. We would only do what we thought we could do well." (quoting *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1276 n.24 (7th Cir. 1982))).

173. *Id.* at 119–20.

174. *Id.* at 117 (internal citation omitted) (emphases added). Although the court's approach no doubt disappointed UC, its narrow ruling reflects an honest reading of the CPRA's balancing test provision. Even where courts are sympathetic to scholars' PRL plight—and the fact that it may recur—they are statutorily prevented from providing satisfyingly global relief.

175. *Id.* at 98 (stating that the operative record request was filed in July 2008).

176. *Id.* at 108.

177. Email From Michael F. Sweeney, Chief Campus Counsel, Univ. of Cal. Davis, to author (May 22, 2018) (on file with author).

court determined that a small number among 3000-plus pages of records had been erroneously withheld.¹⁷⁸ Thus, far from representing a scholar-privacy triumph, the *Humane Society* litigation exemplifies the impediments to protecting scholar records under a public records law balancing test. In the words of one UC lawyer intimately familiar with the case: “*Humane Society* is Exhibit A regarding the flaws in the CPRA.”¹⁷⁹

C. Additional Harms From Record Requests to Faculty

Case studies from states whose laws make scholar records reachable by public records request reveal that such requests almost universally: (1) divert professors from their own work for extended periods to gather, review, and redact responsive documents (or for even more extended periods, to litigate

178. See Order on Motion for Attorney’s Fees & Costs at 3, *Humane Soc’y of the U.S. v. Regents of the Univ. of Cal.*, No. CV PT 08-2337 (Cal. Super. Ct. Dec. 20, 2013) (fee award amount) (copy on file with author); Declaration of Lynette Temple in Support of Opposition to Petitioner’s Motion for Attorneys’ Fees and Costs, *Humane Soc’y of the U.S. v. Regents of the Univ. of Cal.*, No. CV PT 08-2337 (Cal. Super. Ct. Oct. 9, 2013) (describing failure to produce a handful of noncontroversial documents, in some instances through inadvertence, and in other instances, due to petitioner’s failure to clarify the scope of documents sought) (copy on file with author); Email From Stella Ngai, Senior Counsel, Office of Gen. Counsel, Univ. of Cal., to author (May 11, 2018) (on file with author) (outside counsel fees).

The CPRA’s asymmetric fee-shifting provision tips heavily in record-seekers’ favor in two ways. First, and typical of fee-shifting statutes, the CPRA makes losing document withholders pay victorious requestors’ fees in all instances, whereas losing requestors must only pay a victorious withholder’s fees if the requestor’s position was “clearly frivolous.” CAL. GOV’T CODE § 6259(d) (West 2018). Second, and uncommon, is that a requestor is typically deemed per se victorious in litigation if she prevails as to any fraction of records sought, *Rogers v. Super. Ct.*, 23 Cal. Rptr. 2d 412, 419 (Cal. Ct. App. 1993), regardless of their proportional relation to the whole, or the quantum of public benefit conferred. Cf. CAL. CIV. PROC. CODE § 1021.5 (West 2018) (authorizing fee-shifting only where a party bringing suit to vindicate the public interest confers a “significant benefit . . . on the general public or a large class of persons”). In *Humane Society*, the court’s ruling that UC must release a fraction of the contested documents—and even for those, with some redactions permitted—was sufficient to make the Humane Society a prevailing plaintiff entitled to attorneys’ fees.

Although it is tempting to suggest fee reform as one partial remedy for harassing requests to faculty, such a prescription should not issue without careful consideration. The extreme information asymmetry between records requesters and records custodians means that in practice, requesters must sometimes wage all-out war to win a minor skirmish, and the fact that only a small fraction of records sought are ultimately obtained through an adversarial process does not mean they could have been obtained with less effort. Further, even where a court finds that only a few records have been unlawfully withheld, these are often (even if not in the *Humane Society* case) the most consequential. Most salient for present purposes, it is hard to conceive of a principled basis upon which to apply a different fee-shifting rule in the public university than in the conventional public agency context.

179. Email From Michael F. Sweeney, Chief Campus Counsel, Univ. of Cal. Davis, to author (March 3, 2018) (on file with author).

against record requesters to protect documents from disclosure); (2) make scholars' original research vulnerable to scooping by third parties; and (3) facilitate distortion of scholars' work, and as a result, the unfair impugning of their professional competence or ethics. Requests for scholar records also near-universally (4) chill the communication among scholars essential to the advancement of knowledge.

In extreme cases, PRL requests have alone been sufficient to cause researchers to (5) abandon politically sensitive lines of inquiry, (6) cease participation in public debate about such matters, or (7) defect from academia altogether. These seven species of harm—and this list is surely nonexhaustive—are, in my view, cumulatively sufficient to overwhelm the arguments in favor of maintaining broad public access to scholar records.

The diversion of scholars from their regular tasks—problem (1)—may seem the least compelling reason for exempting scholar records from PRLs, at least to the extent it implies that scholars' time is more valuable than other public agents' time.¹⁸⁰ One need not make this elitist claim to support protecting scholars from records requests, however, if one believes that the democratic-accountability rationale for public-records-based oversight of scholar activity is fatally weak.¹⁸¹ For the reasons here described, the public's democratic-accountability interest in policing the conduct of overtly coercive instruments of the state makes the forced reallocation of employee time at conventional state agencies considerably more tolerable. In other words, the values tradeoff between public accountability and task productivity compels a different result than in the university setting.

At the other extreme of persuasiveness, the tendency of forced disclosure (of unpublished data, manuscripts, presentations, or new ideas contained in scholar emails) to make scholars' original research vulnerable to scooping by

180. The extreme time cost of responding to expansive records requests is, however, typically the most compelling to records-request recipients. *See, e.g., supra* notes 142–143, 158–159 and accompanying text. Many faculty members whom I interviewed about their experience with records requests said that while they had nothing to hide, they greatly resented the amount of time necessary to retrieve, review, and redact responsive records, when they saw little legitimate public purpose to the exercise. This is true not only for wide-ranging, fishing expedition requests—which a recipient might succeed in convincing a court are unduly burdensome, and must be narrowed—but also for more surgical requests that may require considerable effort to identify responsive records, review them for the applicability of exemptions, and redact them where warranted.

181. The taxpayer-accountability rationale may be stronger, but it is also insufficient if one characterizes the “goods” that the public is purchasing through funding a public university to be in the nature of quality final products. In this analysis, the public interest requires aggressive protection of scholars' time for research, teaching, and public issue engagement, making the reallocation of such time to records responses a loss of taxpayer value.

third parties—problem (2)—is highly compelling: Few would argue in favor of a public policy that supports theft of intellectual property. For this reason, however, a broad exemption for scholar records is unnecessary to cure the problem. Courts interpreting state PRLs with any elasticity have been quick to recognize the harms that accrue from forcing premature disclosure of at least those scholar records that will eventually yield public-facing products, such as publications or patents. Otherwise put: While the risk of research-scooping is an argument for amendment of “F” and “D” ranked public records laws, it is not particularly compelling as to “C” and “B” states, where courts have ultimately vindicated scholars’ interests in avoiding injuries that are readily analogized to, and therefore understood as, akin to the conventional economic harm from a taking.

The most powerful reasons to better protect faculty records from rummaging by the general public are therefore the intermediate scenarios (problem (3)), such as the distortion of scholars’ records to impugn their competence (as happened to Dr. Mann), or their ethics (as happened to researchers who unknowingly received Google funding). Further, although courts have not always been sympathetic to the notion that making email communications public carries particular risks of communicative “chill” (problem (4)), scholars forced into PRL litigation to defend the privacy of this communications avenue have explained its dangers well. As Drs. Hughes and Overpeck wrote in a joint declaration:

Emails with colleagues ordinarily lack clear-cut distinctions between old ideas or insights, versus those that will comprise future research and papers yet to be published. Because the scientific process is iterative and dynamic, building tomorrow on work done yesterday, it is virtually impossible to work in a dynamic collaborative environment if we must always be concerned about a protracted court battle over whether the public can read our email. The inevitable result of these sorts of intellectual constraints and uncertainties will be to restrict the use of email, and we will certainly be forced, in unpredictable ways, to restrain our email communications within the University and with colleagues located at other institutions.¹⁸²

In severe situations not captured in the case studies above, PRL requests have caused researchers to abandon politically sensitive lines of inquiry (problem (5)), cease participation in public debate about such matters (problem

182. Joint Declaration of Malcolm Hughes & Jonathan Overpeck ¶ 21(d)–(f), Energy & Envtl. Legal Inst. v. Arizona Bd. of Regents, No. C2013-4963 (Ariz. Super. Ct. Jan. 19, 2015) (copy on file with author).

(6)), or defect from academia altogether (problem (7)). In 2006, UCLA neurobiologist Dario Ringach reluctantly ended his research on vision in monkeys (and confined his new research to human subjects) after masked animal-rights activists pounded the windows of his home during repeated trespasses, terrifying his young children.¹⁸³ Although the threat of violence was the proximate cause of Dr. Ringach's abandonment of monkey research, a closely antecedent cause was a series of records requests to UCLA regarding animal researchers that led to distribution of one of Ringach's research applications at a public protest event.¹⁸⁴

Harassing PRL requests may also cause faculty to abandon societally valuable research via social contagion, as happened with harassment of University of North Carolina epidemiologist Steve Wing. In the late 1990s, Dr. Wing aroused the concern of the North Carolina Pork Council by conducting various studies of the health effects of industrial hog farms on the low income, predominantly minority communities in which they were typically sited. In response to Dr. Wing's release of results from a study finding a range of adverse health effects among those living near such facilities, the Council besieged Dr. Wing with expansive PRL requests that placed the professor at odds with his university and required retention of private counsel. Observing this from afar, a junior faculty member at another North Carolina university told Dr. Wing that he had decided to suspend his own similar research on hog farm impacts, stating: "[I]f I have to deal with legal problems like yours, I'll never get tenure."¹⁸⁵

Similarly, after reading two environmental scientists' litigation declarations describing their experience with intrusive public records requests, one UC scholar with considerable interest in gender politics confided to me: "[T]his kind of thing has made me think twice about research topics and also what I say (and even what I 'like') on social media. I feel like you never know who's watching. . . . I may stop writing about Title IX/sexual assault for this

183. Robin Wilson, *One Animal Researcher Refuses to Hide*, CHRON. HIGHER EDUC. (Feb. 20, 2011), <http://www.chronicle.com/article/The-Animal-Researcher-Will-Not/126442> [<https://perma.cc/WS65-5ZEP>].

184. Carla Hall, *UCLA Distorts Animal Testing, Activists Allege*, L.A. TIMES (Sept. 6, 2006), <http://articles.latimes.com/2006/sep/06/local/me-animals6> [<https://perma.cc/4UPM-CF5L>].

185. Steve Wing, *Social Responsibility and Research Ethics in Community-Driven Studies of Industrialized Hog Production*, 110 ENVTL. HEALTH PERSPS. 437, 441–42 (2002). A survey of NIH researchers finding that more than half of respondents had altered their research agendas (including, for some, by abandoning entire topic areas) in the wake of congressional scrutiny also strongly suggests that research plans may be highly vulnerable to PRL-induced distortions. See Joanna Kempner, *The Chilling Effect: How Do Researchers React to Controversy?*, 5 PLOS MED. 1571 (2008).

reason. I could *maybe* handle internet trolling and that kind of thing, but a public records request sounds unbearably awful.”¹⁸⁶

Professors distressed to be targeted by PRL requests may, instead, persist in their lines of academic research, but forswear expertise-based engagement with the broader public and retreat wholly to the ivory tower. As a UC Davis animal geneticist targeted by repeated record requests from anti-GMO activists wrote in a blog post under the heading, “*Is public engagement on GMOs worth it?*”:

I have been seriously thinking about whether I want to continue communicating about the controversial topic of biotechnology, and specifically the breeding method known as genetic engineering. The political discourse and social media around this topic are so toxic.

... Would it be more pragmatic to only speak on non-controversial breeding methods so as to avoid being a target?... Are there industries I should not speak to, and as a public sector scientist how do I determine which ones are verboten?... For me most importantly, am I putting my family or students at risk in any way?¹⁸⁷

Law professor Andi Curcio at Georgia State University likewise explained her dilemma regarding public issue engagement. After she signed a letter opposing the nomination of Jeff Sessions for U.S. Attorney General, Professor Curcio (and signatories nationwide) received from a conservative political publication a request for every email for a specified date span in which she had used the words “Sessions,” “Jeff Sessions,” or “Attorney General.” She thereafter mused in her blog post:

How do you avoid such a request if you work at a public law school? You stay silent. Non-involvement with anything in the least bit controversial helps protect you from the possibility that anyone will ever ask to see the content of your emails.¹⁸⁸

Regardless of one’s view as to whether the political expressive activity of protest-letter signing is encompassed by the concept of academic freedom (and can thus be appropriately done via university email address), it is problematic for academic freedom that the mere act of signing means a law professor can no

186. Email From Anonymous Univ. of Cal. Scholar, to author (May 25, 2018) (on file with author).

187. Alison Van Eenennaam, *Anti-GMO Activists Target Public Scientists*, GENETIC LITERACY PROJECT (Oct. 14, 2016), <http://geneticliteracyproject.org/2016/10/14/alison-van-eenennaam-anti-gmo-activists-target-public-scientists> [https://perma.cc/MUY9-BJH9].

188. Andi Curcio, *Public Opposition to Jeff Sessions Results in an Open Records Request*, BEST PRACTICES FOR LEGAL EDUC. (Jan. 15, 2017), <http://bestpracticeslegaled.albanylawblogs.org/2017/01/15/public-opposition-to-jeff-sessions-results-in-an-open-records-request> [https://perma.cc/5LSM-PJYX].

longer, for example, maintain private email threads with colleagues regarding Jeff Sessions's professional qualifications for the job of Attorney General, or how to use an Attorney General nomination controversy in a constitutional law class discussion of administrative appointments.

In the most extreme cases, professors severely harassed by PRL requests may not merely abandon controversial topics or associated public discourse, but may quit academic research entirely. Paul Fischer of the Medical College of Georgia did. Dr. Fischer, like Dr. Wing, caught the unwelcome attention of industry through his conduct of public health research—in this case, on children's recognition of a Camel cigarette advertising campaign. Dr. Fischer's research revealed that the "Old Joe" character in Camel advertisements was "nearly universally recognized by six-year-old children, a level of awareness that matched the logo for the Disney channel."¹⁸⁹

When R.J. Reynolds was subsequently faced with a government enforcement action over unlawful tobacco industry promotional practices, the company subpoenaed Fischer's research records to use in its defense (by endeavoring to discredit his study). Although Fischer was able to quash the subpoena, he was unsuccessful in defeating a follow-on PRL request from the company for essentially the same information. Shortly after Fischer's university complied with a court order to turn over the requested documents—which included personal information about the three- to six-year-old participants in his study, to whose parents Dr. Fischer had pledged confidentiality¹⁹⁰—a dispirited Dr. Fisher left academia for private practice.¹⁹¹

D. What Is Bad Will Get Worse

As these case studies show, scholars and their universities must go to considerable lengths to vindicate an interest in scholarly records privacy under the majority of state public records laws. Even in a "B" state, where a PRL on its face appears to support such a privacy interest, a professor faces many obstacles in protecting documents from public disclosure. As a "D" case study

189. Paul M. Fischer, *Science and Subpoenas: When Do the Courts Become Instruments of Manipulation?*, 59 LAW & CONTEMP. PROBS. 159, 159 (1996).

190. *Id.* at 161–62. In a parallel phenomenon, university administrative staff tasked with PRL response may defect in the face of what they perceive to be faculty-harassing requests. In the UC system, staff have become demoralized in the face of onerous demands for records production that they believe compromise campus intellectual freedom; some have opted to leave. Telephone Interview with Michael F. Sweeney, Chief Campus Counsel, Univ. of Cal. Davis, to author (July 13, 2017) (on file with author) (stating that the UC Davis public records staff has experienced major turnover for this reason).

191. See HALPERN, *supra* note 7, at 8.

demonstrates, protection of scholar records under an overbroad PRL requires an extraordinary commitment of years and dollars. And in any of the four “F” states, such efforts will inevitably fail.¹⁹²

Importantly, even in a “C” state whose PRL expressly allows consideration of competing public interests in disclosure and withholding, contesting document disclosure and forcing judicial balancing on a document-by-document basis is an enormously resource-intensive exercise. It is one that universities can accordingly only afford to undertake in exceptional cases, and ultimately an impracticable way to resolve scholar-records cases. Indeed, in the wake of *Humane Society*, harassment of UC scholars has not only persisted, but increased.

Balancing tests consistently fail scholars, for a number of reasons. Courts often have crabbed views of the activities that constitute scholar thought-work, such that, for example, courts may find that a prepublication draft article is protected from disclosure, but emails through which scholars develop their ideas or express opinions are not¹⁹³—a perhaps understandable tendency given most records laws’ express instruction to construe exemptions narrowly. Second, courts frequently view claimed injuries from record production (such as communication inhibition and unfair reputational damage) as too “speculative” to overbalance the presumption that the public interest is best served by disclosure.¹⁹⁴ Finally, courts insufficiently sympathize with the extraordinary direct and opportunity costs that records requests pose for faculty, and are often

192. For example, in North Carolina (an “F” state), where there is no statutory or common law protection from disclosure for research, animal researchers have been required to disclose to PRL requesters details of planned animal experiments contained in academic research applications to a committee expressly tasked with ethics oversight in animal research personnel, *S.E.T.A. UNC-CH, Inc. v. Huffines*, 399 S.E.2d 340 (N.C. Ct. App. 1991), with the risk of harassment by animal rights activists such disclosures typically entail. Indeed, North Carolina’s PRL is so unprotective of the records of public universities that one commentator maintains that both a football coach’s playbook and a professor’s exam questions are wholly reachable through records request. Ryan C. Fairchild, *Giving Away the Playbook: How North Carolina’s Public Records Law Can Be Used to Harass, Intimidate, and Spy*, 91 N.C. L. REV. 2117, 2118–19 (2013).

193. See William K. Briggs, *Open-Records Requests for Professors’ Email Exchanges: A Threat to Constitutional Academic Freedom?*, 39 J.C. & U.L. 601, 611 (2013) (stating that even where public records laws protect professors’ teaching and research materials, “it is unlikely that either teaching or research includes scholarly email exchanges”). Further, to the extent a court relies on the prepublication nature of work to confer protection, it is unclear to what degree underlying materials (for example, interview notes or peer-review correspondence) can be protected post-publication.

194. See, e.g., *Under Advisement Ruling at 4, Energy & Env’tl. Legal Inst. v. Arizona Bd. of Regents*, No. C2013-4963 (Ariz. Super. Ct. June 14, 2016) (stating that the chilling effect on scholar communication of mandating scholar email disclosure was too “speculative” to warrant relief) (copy on file with author).

reluctant to conclude—in light of PRLs’ broad prodisclosure purpose and language—that such burdens are unreasonable.

Absent legislative correction, public records request threats to scholars’ research, teaching, and communicative privacy are only expected to increase as a matter of politics, technology, and doctrine. As an initial matter, the present polarized political climate and a decade of success of open records request strategies in distracting professors from their work and deterring them from public engagement suggests that the current trend of escalating requests will continue.¹⁹⁵

Meanwhile, the multiplication of electronic platforms and devices across which scholars communicate magnifies the work of identifying all records responsive to a public requester’s demand, and the technical difficulty of providing them. As the American Association of University Professors explains in a recent policy statement regarding “Academic Freedom and Electronic Communications,” the rise of social media use, outsourcing, cloud computing, and new communications devices have broadened the notion of the classroom and the academy, and created additional arenas of scholar vulnerability to forced disclosure of material intended to be private.¹⁹⁶ Social media sites, in particular, “blur the distinction between private and public communications in new ways,” such that the former distinction between electronic documents that faculty presume are private (communications with a finite number of known parties) and those that are public (such as websites, blogs, and faculty home pages) no longer obtains.¹⁹⁷ This technology-induced complexity is magnified by recent legal developments that are independently increasing the fuzziness of the line between personal and governmental electronic communications.

Perhaps most significant, in a 2017 ruling likely to affect other states by virtue of the deciding court’s influence,¹⁹⁸ the California Supreme Court held unanimously in *City of San Jose v. Superior Court* that where a public employee uses a personal email, voicemail, or text account to communicate about public

195. See generally Ley, *supra* note 2 (discussing public records harassment as part of a highly organized, potent, and increasingly institutionalized conservative advocacy strategy).

196. AM. ASS’N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND ELECTRONIC COMMUNICATIONS (2013), in AAUP POLICY DOCUMENTS AND REPORTS 42 (11th ed. 2014), <http://www.aaup.org/file/Academic%20Freedom%20%26%20Electronic%20Communications.pdf> [<https://perma.cc/W6U8-4UNQ>].

197. *Id.* at 50.

198. See Jake Dear & Edward W. Jessen, “Followed Rates” and Leading State Cases, 1940–2005, 41 U.C. DAVIS. L. REV. 683, 683 (2007) (stating that “the California Supreme Court has long been, and continues to be, the most ‘followed’ state supreme court”).

business, such records are subject to the state's public records law.¹⁹⁹ Although unquestionably correct as a matter of policy—a contrary rule would be an invitation to subversion²⁰⁰—the Court's ruling means that government employees have no guaranteed-private communicative space in which to discuss anything remotely related to their work. Instead, where a document requester asserts that records in a public employee's nongovernmental account pertain to public business, the request recipient will only be permitted to withhold the record if she or he submits an affidavit sufficient to demonstrate that the document is not a public record.²⁰¹

Although the *City of San Jose* case arose in the context of non-university records, it will surely apply to public university scholars' private email accounts with equal force, where it is likely to present still greater complexity and burden. The informality of email as a medium, and the corresponding tendency of emails to contain multiple subjects, has long posed challenges in identifying request-responsive documents in PRL production generally, as has the frequency with which emails combine private and arguably public matters, requiring time-consuming redaction of the former.²⁰²

To these challenges, however, one must add the difficulty of differentiating between public university scholars' diversified public roles as researcher and teacher and public intellectual, and their role as private citizen constitutionally entitled to engage in private speech, including but not limited to speech on matters of politics or policy. Absent legislative change, future hostile records requests will almost certainly encompass requests for researchers' private as well as university-address email on topics of interest. And one must imagine that, in some instances, courts will require scholars to demonstrate through laborious preparation of affidavits that certain messages from their private accounts are in

199. 389 P.3d 848, 861 (Cal. 2017). The D.C. Circuit in 2016 similarly held—in a case decided in the wake of the political furor over Hillary Clinton's use of a private email account for some government business—that the federal FOIA can reach private email accounts where those accounts contain agency records. *Competitive Enterprise Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 146 (D.C. Cir. 2016).

200. As the court noted, "[i]f public officials could evade the law simply by clicking into a different email account, or communicating through a personal device, sensitive information could routinely evade public scrutiny." *City of San Jose*, 389 P.3d at 859.

201. *Id.* at 860.

202. Even where government employees are fastidious about separating work and personal business in email—which few are, because the ease and thus temptation of commingling is so great—they cannot control what is sent to them by nongovernment parties, who are rarely mindful of the PRL vulnerability of their communications. Thus, conscientious response to a public records request often requires considerable care and redaction to protect the privacy interests of third party senders of email to government addressees.

fact private records, notwithstanding a subject-matter connection to the author's area of doctrinal expertise.

Scholar-record cases from states with broad PRLs, combined with political, technological, and legal trends that will increase scholar vulnerability to PRL requests and the burden of response, suggest that case-by-case adjudication of scholar-privacy interests is not in the public interest. These cases do, however, point to key elements of reform, by identifying certain recurrent harms that public records requests to scholars inflict at the individual, institutional, and societal level.

IV. PRL REFORM OPTIONS

A. Existing Reform Proposals

Existing proposals to address harassment of scholars through open records laws are few and skeletal; those who have analyzed the scholar-harassment problem to date have generally stopped short of making concrete recommendations. Thus, the Climate Science Legal Defense Fund, in producing an impressive analysis of PRL implications for researchers on a state-by-state basis, concludes simply by noting that PRLs have recently been amended in researcher-friendly ways in two states, and that “[w]e hope that this trend continues.”²⁰³ Similarly, Professor Aaron Ley writes that if PRLs are being misdirected to impair scholars’ intellectual freedom, “university faculty members might consider asking their representatives to clarify those laws”²⁰⁴ This observation is not an implied critique; others’ goals have simply been descriptive and cautionary, rather than prescriptive. This Part picks up where those analyses left off, by proposing a detailed legislative amendment to address the range of harms that record requests to faculty have caused or will cause.

The most fundamental challenge in attempting to draw lines between permissible and impermissible requests is that open records laws do not and cannot involve inquiry into requesters’ motives if PRLs are to serve as an independent, broadly distributed source of power to check government conduct.²⁰⁵ Yet records-seekers’ purpose in seeking records, and their intended use of records obtained, are critical as matters of policy: As David Pozen notes,

203. CLIMATE SCI. LEGAL DEF. FUND, *supra* note 117, at 7.

204. Ley, *supra* note 2, at 239.

205. See *supra* notes 38–40 and accompanying text.

“transparency,” especially once politicized, can as easily thwart democratic aims as enhance them.²⁰⁶

Further, to the extent that certain types of requesters may seem less likely to abuse requests, or more societally critical to provide with information—one could imagine, for example, reforming PRLs to preserve (only) media access to records that became unavailable to the general public—the near-impossibility of defining and defending such a line in an everyone-a-blogger era of media decentralization makes such an approach impractical.²⁰⁷ Thus, commentators have uniformly and wisely proposed PRL reforms that are recipient-oriented—that is, that restrict the persons or records reachable by public requests—rather than the persons entitled to make records requests, or the purposes for which they may make them.

A few commentators have presented precise but narrow statutory reform proposals, because their concerns are limited to a small subset of PRL harms in the public university context. As one example, Nader Mousavi and Matthew Kleiman propose to amend California’s Public Records Act to incorporate researcher-protective language modeled on the state’s Stem Cell Research and Cures Bond Act of 2004.²⁰⁸ This would safeguard intellectual property that is known only to those researchers “using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know it or use it”²⁰⁹—protections valuable to biomedical faculty, to be sure, but of limited utility to historians or climatologists.

Still others advocate non-statutory approaches to curbing PRL abuse of scholars, such as advancing new legal arguments in court to support scholar-record withholding. William Briggs urges that professorial communications containing political opinion (such as Professor Cronon’s emails regarding labor issues in Wisconsin) should be deemed PRL-unreachable personal communications regardless of whether they are sent from an “edu” email

206. See Pozen, *supra* note 22, at 160–65 (describing the need to “desacralize” transparency and recognize its raw politics, and to define anew the role of information-forcing mechanisms in promoting deliberative democracy).

207. Even before the advent of blogging and web journalism, scholars noted the multiple possible constructions of the “press” that are possible when conducting First Amendment analyses under the Press Clause. See, e.g., Michael Traynor, *Countering the Excessive Subpoena for Scholarly Research*, 59 LAW & CONTEMP. PROBS. 119, 143–45 (1996).

208. Nader Mousavi & Matthew J. Kleiman, *When the Public Does Not Have a Right to Know: How the California Public Records Act is Deterring Bioscience Research and Development*, 4 DUKE L. & TECH. REV. 1, 19 (2005).

209. CAL. HEALTH & SAFETY CODE § 125290.30(g)(2)(B) (West 2018).

address, because “they are unrelated to the official function of professors—research and classroom activities.”²¹⁰

However, even leaving aside the unsettled macro-matter of whether professors’ expression of opinion beyond their areas of disciplinary training warrants protection under the banner of academic freedom,²¹¹ and the micro-matter that not even Cronon is certain that the email at issue is properly characterizable as personal rather than professional,²¹² Briggs’s proposal leaves unaddressed the numerous issues raised by PRL requests directed at the research, teaching, and public speaking functions that form the core of a scholar’s job. Thus, even were courts to adopt Briggs’s view of the demarcation between personal and professional email, the phenomenon of harassing PRLs would remain pervasive: Dr. Mann’s, Dr. Overpeck’s, Dr. Fischer’s, Dr. Wing’s, Dr. Finkelstein’s, and Dr. Smith’s PRL battles, among many others, involve requests for records clearly professional in nature.

Additional commentators suggest a menu of reform possibilities that, although facially reasonable, seem insufficient in light of the actual litigation track record in scholar-records cases. These include a suggestion to enhance the use of balancing tests in making on-campus record production determinations and in adjudicating contested cases (tests whose problems and costs the *Humane Society* case makes plain), or to extend a reporter’s privilege to academic researchers (which is at best a qualified privilege, and inevitably leads back to a balancing test).²¹³

Another option that commentators have floated is for universities to argue that statutes that appear to apply to all public employees should in fact be construed to exclude public university scholars, because as discussed *supra*, scholars lack conventional governmental functions.²¹⁴ Although this might well have been a productive strategy if employed in early judicial contests under ambiguous state PRLs, it would seem to be a route now foreclosed in the majority of state courts, which have at least implicitly committed themselves to a contrary

210. See Briggs, *supra* note 193, at 628–29.

211. See *supra* note 86 for discussion of scholarly debates about the maximum defensible contours of academic freedom.

212. Cronon writes that, as to activities that are “political” rather than “scholarly,” including the emails that the Wisconsin Republican Party sought to obtain from him, “the boundar[y] between these two categories is harder to draw for a scholar of the modern United States than non-scholars might imagine.” Cronon, *supra* note 16.

213. LEVINSON-WALDMAN, *supra* note 75, at 12–18. For a description of reporters’ various means of protecting information from compelled public disclosure, see generally Koningisor, *supra* note 135.

214. LEVINSON-WALDMAN, *supra* note 75, at 18–20.

view.²¹⁵ Such an argument may, however, be persuasive with contemporary state legislatures contemplating PRL amendments, particularly where it appears that the functions of public university scholars were never expressly contemplated by their lawmaking predecessors in crafting broad PRLs.

Notwithstanding the disagreement over the proper remedy, commentators generally concur that statutory reform, if achievable, is the most certain route to enhancing protections for public university scholars, and that the provisions in comparatively scholar-protective PRLs are a useful starting point.²¹⁶ Reforms recently enacted in North Dakota and Rhode Island provide further helpful models, particularly because they were enacted in direct response to concerns about scholar harassment. They also suggest that—perhaps because of the interest convergence from the political right and left in protecting scholars’ work from records-request intrusions—the present political moment is particularly conducive to records law reform.

In direct response to concerns about open records harassment of public university climate scientists, Rhode Island’s legislature in 2017 amended the state’s PRL, which already protected both trade secrets and academic examination materials from disclosure, to protect:

Preliminary drafts, notes, impressions, memoranda, working papers, and work products . . . involving research at state institutions of higher education on commercial, scientific, artistic, technical, or scholarly issues, whether in electronic or other format; provided, however, any documents submitted at a public meeting of a public body shall be deemed public.²¹⁷

North Dakota’s new PRL exemption similarly protects from disclosure:

[D]ata and records, other than a financial or administrative record, produced or collected by or for [higher education] faculty or staff . . . in

215. See Charles N. Davis, *Scaling the Ivory Tower: State Public Records Laws and University Presidential Searches*, 21 J.C. & U.L. 353, 354 n.7 (1994) (stating that “[a]t least 30 state courts of last resort have ruled that universities are public agencies”). As scholar-records litigation from around the nation demonstrates, where courts have deemed universities to be public agencies as a threshold matter, they have treated scholars’ work as impliedly fair game for records requests.

216. See Fairchild, *supra* note 192, at 2154–70 & tbl. 1 (comparing PRL exemptions for various university activities across 50 states); LEVINSON-WALDMAN, *supra* note 75, at 12 (identifying scholarship-related exemptions in New Jersey, Ohio, and Utah public records laws as useful models).

217. 38 R.I. GEN. LAWS ANN. § 38-2-2(4)(K) (West 2018). For background to the Rhode Island amendment, see Lynn Arditi, *R.I. Shield Bill Is Response to ‘Climate Change Deniers’*, PROVIDENCE J. (May 17, 2016, 10:08 PM), <http://www.providencejournal.com/news/20160517/ri-shield-bill-is-response-to-climate-change-deniers> [<https://perma.cc/4WJD-4ZED>].

the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone, or in conjunction with a governmental or private entity, provided the information has not been publicly released, published, or patented.²¹⁸

While welcome and expansive compared to most state PRL scholar-records exemptions, neither law is optimally protective of researchers. Most obviously, each provision's exclusive focus on the need to protect "research" from open records requests fails to protect adequately teaching materials, other forms of faculty speech, and scholar communications of opinion that may be difficult to categorize as directly teaching- or research-related.

Further, insofar as newly enacted exemptions focus on preliminary or unreleased documents, it is unclear to what degree records may be protected once a work product is finished, or is publicly released in even a limited setting (such as a professional conference). Additionally, both statutes miss opportunities to better protect scholars' physical safety, to educate judges about newer electronic communication modes, and otherwise to respond to the range of harassment scenarios that have occurred to date. What is needed instead is,

218. N.D. CENT. CODE § 44-04-18.4(8) (2018). North Dakota's amendment, initially proposed by the state's university presidents, contains two parts. Its enhanced protection for scholar research attracted broad support. A separate provision unrelated to scholarly work, which exempted universities' Title IX investigations from records requests, aroused considerable controversy: Stakeholders were divided as to whether its true aim was to better protect complainants' confidentiality, alleged perpetrators' due process, or university reputation. See Andrew Haffner, *Bill Would Protect Title IX Cases From Open Records*, BISMARCK TRIB. (Feb. 2, 2017), http://bismarcktribune.com/news/state-and-regional/bill-would-protect-title-ix-cases-from-open-records/article_18f2133f-a922-5e4c-b271-784f2e175b98.html [<https://perma.cc/X2DU-KUPN>]; James Hoyt, *North Dakota Bill to Protect University Research From FOIA Requests Includes Title IX Exemption*, STUDENT PRESS L. CTR. (Feb. 24, 2017, 5:34 PM), <http://www.splc.org/article/2017/02/north-dakota-bill-to-protect-university-research-from-foia-requests-includes-title-ix-exemption> [<https://perma.cc/Z4AB-Q2GP>]. The packaging of a contentious Title IX records exemption with a less fraught scholar-records exemption in the North Dakota case presents an important cautionary lesson regarding the unpredictability of the legislative amendment route for curing PRL deficiencies: There is always a possibility that opening public records laws to exempt scholar records may make relevant bills Trojan horses for other agendas. This is, however, a generic legislative-process concern, and without limiting principle. Unless we are willing to live forever with demonstrably flawed laws, ultimately the best we can do is to advance surgical and well-supported amendments to receptive legislatures in propitious political times, strategize well, and hope for the best. Cf. T.S. ELIOT, *East Coker*, in *THE FOUR QUARTETS* 23, 31 (Harcourt Books 1971) (1943) ("For us, there is only the trying. The rest is not our business.").

finally, a comprehensive substantive reform that will fully address the range and depth of problems faced by public university researchers in the modern age.

What follows is an expansive model PRL scholar-records exemption provision, followed by an explanation of the rationale for inclusion of each item.²¹⁹ To minimize the translation necessary to operationalize the concepts here advocated, the proposed reforms are presented in bill-like form. Of course, the final language will need to be adapted to meet the needs and drafting style of each jurisdiction.

Finally, and importantly, I have briefly noted enhanced accountability measures that may be required in non-PRL domains to counterbalance any diminution in transparency of professors' activities induced by expanded PRL exemptions. Indeed, such measures should be undertaken irrespective of PRL reform, to increase public universities' accountability in areas of ongoing and legitimate public concern.

B. Recommended Legislative Reform

There is limited agreement among scholars, media, and advocacy groups regarding how to protect professors' freedom in teaching, research, and expression, while ensuring appropriate fiscal, administrative, and ethical accountability at public universities. There is broad consensus, for example, that both trade secrets and peer-review comments on unpublished academic articles should be protected from compelled disclosure through open records requests. Further, one would presume there exists consensus that a professor's exam questions should not be PRL-reachable, although even this barebones protection is not universally contained in state PRLs. As to non-scholarly university activities, there is equally broad consensus that all public employee salaries, including those of university faculty, should be obtainable through PRL request, even though there is not consensus that this data should be personally identifiable.²²⁰

219. In practice, legislatures may be more inclined to graft missing elements onto existing PRL exemptions than to adopt a wholly new provision, in which case this model may instead function as checklist. My goal is to make it easy for reformers to ensure that items I here propose are at least affirmatively considered, rather than omitted through failure to imagine various harassment scenarios that have obtained (and will surely recur) under existing broad PRLs.

220. See, e.g., Mike Maciag, *Disclosing Public Employee Pay Troubles Some Officials*, GOVERNING (Apr. 18, 2012), <http://www.governing.com/news/state/gov-survey-disclosing-government-employee-salaries-troubles-public-officials.html> [<https://perma.cc/NH6R-97BL>] (describing public employee discomfort with personally identifiable salary information).

Move beyond such relatively straightforward categories to murkier ones—should professors’ grant applications be obtainable through PRLs? the identities of their research sponsors? PowerPoints from conferences? lecture notes?—and the consensus dissolves. This breakdown is in part because commentary about PRL reform often presumes a false choice between university transparency and opacity, rather than recognizing that PRL requests are but one mechanism of public accountability, and in many contexts, a poor choice of tool. In fact, there is no contradiction in making an aggressive case for PRL reform while acknowledging the need not only to maintain, but to enhance, scholar accountability to the public through other means.

A threshold question in advocating broad PRL reform is whether to propose (1) presumptive exclusion of universities from state PRLs, with limited exceptions (on the model of Maine, Delaware, and Pennsylvania);²²¹ (2) presumptive exclusion of university scholars, with limited exceptions (on the model of New Jersey, Ohio, and Utah);²²² or (3) scholar-related exemptions to existing PRLs that presently encompass all university personnel. Recent public university scandals suggest that considerable skepticism would attend any effort to emulate a Pennsylvania-like PRL, which makes public university records *in toto* almost wholly unreachable by citizens and the media. The Union of Concerned Scientists notes, for example, that because of that law’s broad exemption of Pennsylvania State University records, reporters had significant difficulty accessing information about how university officials handled allegations of sexual abuse in the football program.²²³ Thus, even Pennsylvania’s legislature might not enact that state’s PRL today. Further, and most important, such a broad exemption is not justified by any claims regarding the unique functions of the university and the need to safeguard scholars’ academic freedom. The legislative choice therefore ultimately rests between options (2) and (3).

Both policy considerations and drafting concision favor option (2), the threshold exclusion of faculty records from the reach of PRLs subject to limited exceptions that do not undermine core scholar functions. Where such a political strategy appears feasible, public records might be (re)defined in statute to exclude “faculty records,” with a small number of enumerated exceptions. The most logical ones would be: published papers (to which taxpayers should have access, regardless of whether they are in paywalled or otherwise inaccessible

221. See *supra* notes 118–121 and accompanying text.

222. See *supra* note 216.

223. HALPERN, *supra* note 7, at 16.

publications); materials (such as final PowerPoints and handouts) presented in fora open to the general public; a current CV; and the funding terms of grants, contracts, and other financial arrangements.

As a pragmatic matter, however, the political lift of a scholar-records exclusion may be too heavy in states with long contrary traditions. It will therefore be wise for reform advocates to enter the legislative process with a robust fallback strategy and be prepared to make a bottom-up case for each of a large number of desired scholar-related exemptions from state PRLs if a more global strategy fails. I propose such an expansive list, designed to capture the spectrum of above-enumerated PRL harms, ranging from the physical safety of researchers to their ability to protect draft scholarly work, to protection of expression through informal media such as email.

This strategy is admittedly suboptimal for scholar protection, insofar as the onus would remain on researchers and their counsel to identify records responsive to a request and review them in light of enumerated statutory exclusions. This burden is nontrivial. The faculty records exclusions here proposed would, however, represent a considerable improvement on the status quo, in rendering off-limits to requesters vastly more scholar work product and communication than is currently protected under all but a handful of state PRLs. Further, as a practical matter, one would expect an expansive list of exclusions to have, over time, a deterrent effect on requesters (who could presumably obtain little of what they typically seek), thereby reducing scholars' response tasks.

The faculty records-exemption model is presented below as proposed amendment text that maps onto proposed statutory definitions. This text is followed by an analysis containing the rationale for each substantive provision.

1. Model Text

Definitions.

"Faculty" means professors, lecturers, and other researchers and instructors at public universities.

"Public university" means any university, college, community college, university-affiliated laboratory or medical center, or institution of higher education that receives state legislative appropriations.

"Communications" means documents, including but not limited to letters, memoranda, and informal messages, whether in hard-copy, email, electronic message, recording, or other format, transmitted or intended for transmittal to a bounded audience.

Exemptions.

With respect to public university faculty, information that is exempt unless its public disclosure is otherwise compelled by law, includes:

- (a) Records of the physical location of faculty, including but not limited to calendars, appointment logs, room and office assignments, home address, and personal phone number(s);
- (b) Research materials, including but not limited to: trade secrets; experimental or other research methods; draft documents and raw data, irrespective of whether they have resulted or will result in publication, or whether they have been publicly presented or are in draft or final form; research applications, including protocols submitted to institutional review bodies; comments from professional peers, whether or not provided through a formal peer-review process and irrespective of whether relevant publication has occurred; communications regarding research, teaching, or personal opinion; information that identifies or permits identification of human research subjects; interview notes; survey results; and documents identifying research-related meeting subjects, invitees, and attendees;
- (c) Teaching materials, including, but not limited to, test questions, scoring keys, and other records pertaining to the administration of academic examinations; lecture notes, outlines, slides, syllabi, recorded presentation materials, and assignments; materials describing classroom activities; and recordings of classroom sessions;
- (d) Professional materials related to academic expertise, including, but not limited to, materials related to presentation at, organization of, and participation in conferences, and materials related to provision of expert witness testimony; and
- (e) Grant and research funding applications, correspondence, and reports, except that the name of any funder known to the fund recipient and the amount of the funding must be disclosed.

2. Provision-by-Provision Justification

Records of the physical location of faculty, including but not limited to calendars, appointment logs, room and office assignments, home address, and personal phone number(s).

Although commentators have noted the vulnerability of animal researchers in particular to life-and-limb threats, PRL reform proposals aimed at protecting researcher's academic freedom have not expressly called out the baseline need to protect researchers' physical safety. This opportunity should be seized as part of any PRL reform effort, and expanded PRL exemption text should expressly identify (as above) the universe of public records that are safety-relevant even though they lack intellectual or expressive content.

In this vein, it is not uncommon for records requesters to seek the personal calendars or appointment records of government employees. Even where requester motivations are wholly legitimate, such as determining whether an official is receiving one-sided advice by meeting only with certain interest groups, these requests may create immediate concerns about the targeted individual's physical safety. Partly on this basis, the California Supreme Court held that under the state's Public Records Act, a *Los Angeles Times* reporter could not obtain copies of the Governor's appointment schedules, calendars, and other documents that would list his daily activities, because "the schedules and calendars necessarily reflect the daily patterns and habits of the Governor, including the occasions when he is likely to be alone...from which opportunities for access to the Governor's person may be surmised."²²⁴

As animal-researcher cases demonstrate, public university scholars may be placed at risk of injury, death, or property destruction through disclosure of personal location information.²²⁵ Yet, courts faced with broad PRL texts have sometimes found themselves unable to justify withholding documents that reveal the physical location of such researchers. Because the risk of physical harm may extend to researchers working in other controversial areas, such as abortion safety, GMO crops, and even climate change, the exemption for documents related to personal location information should be crafted broadly.

Research materials, including but not limited to: trade secrets; experimental or other research methods; draft documents and raw data, irrespective of whether they have resulted or will result in publication, or whether they have

224. *Times Mirror Co. v. Super. Ct.*, 813 P.2d 240, 242–43 (Cal. 1991) (internal quotation marks omitted).

225. See *supra* note 8 and accompanying text.

been publicly presented or are in draft or final form; research applications, including protocols submitted to institutional review bodies; comments from professional peers, whether or not provided through a formal peer-review process and irrespective of whether relevant publications have occurred; communications regarding research, teaching, or personal opinion; information that identifies or permits identification of human research subjects; interview notes; survey results; and documents identifying research-related meeting subjects, invitees, and attendees.

Statutory schemes and case law confer widely varying degrees of protection for research, the area of academic freedom most frequently litigated in scholar PRL cases. Although protection for trade secrets appears to be universal in state law—and courts have readily grasped the need to allow universities to retain control over data that will cause pecuniary loss if released—this protection is sometimes contained only in non-PRL statutes. To eliminate ambiguity, the exception should be listed expressly among PRL exemptions. Because research methods are a form of “proprietary” information that are protected under laws such as Virginia’s PRL, but may not qualify as “trade secrets,”²²⁶ a separate protection for methods is required.

“Draft documents” may include manuscripts, analyses, slide presentations, and more, all of which are scholar thought-products that implicate academic freedom interests. State PRLs are inconsistent (and sometimes ambiguous) as to whether these documents’ protection from disclosure is contingent on (a) whether they will result in a peer-reviewed product, (b) whether they have in any form been publicly released, or both, and courts have not satisfactorily answered these questions.

Thus, where courts have accepted scholars’ arguments that nondisclosure of a draft scientific manuscript is necessary to protect the integrity of the academic peer-review process, they have implicitly left unresolved the PRL vulnerability of, for example, a non-peer-reviewed scholar intellectual product, such as a draft op-ed. This type of product also requires experimentation with argument and craft without fear of embarrassment through premature

226. Methods may not qualify as trade secrets because, *inter alia*, they may be well-known and thus do not represent intellectual property. Pursuant to an honest reading of an “F”-rated PRL, for example, the North Carolina Court of Appeals held that University of North Carolina animal researchers must release to a student animal rights organization details of animal experiments to be performed, rejecting the notion that research methods met the test for (disclosure-exempt) “trade secrets.” *S.E.T.A. UNC-CH, Inc. v. Huffines*, 399 S.E.2d 340, 344 (N.C. Ct. App. 1991) (“We cannot permit a procedure to be withheld from the public merely because someone chooses to label it a ‘trade secret,’ when it is performed daily by many people and taught in schools all over the world.”).

divulgence of inchoate or inelegantly expressed ideas, however, necessitating an exemption for scholar writings that are not subjected to peer review.

Additionally, as the *Foundation* case indicates, courts may prove unsympathetic to arguments that nonfinal documents released in limited settings (such as to coprofessionals at a conference) should not be fair game for records requests. This kind of “gotcha” logic—on the basis of which the *Foundation* court required Drs. Finkelstein and Smith to hand over to records requesters various data that they had shared with professional colleagues or collaborators, simply because they had not expressly indicated in all communications that such data were “preliminary”²²⁷—is insensitive to the importance of context in information-sharing, and inhibits scholars from obtaining input on work-in-progress for fear of waiving a defense to PRL document production. Similarly, any requirement to turn over raw data without enabling a researcher to correct or contextualize it invites misinterpretation (if data are perceived to be flawed) or research scooping (if the data are perceived to be valid).

For these reasons, scholars’ draft documents should be PRL-exempt irrespective of whether they will result in a peer-reviewed publication, or whether they have been publicly presented. Research applications justify protection from disclosure on the same ground as draft documents: They are nonfinal products whose compelled public release may inhibit candid communication about uncompleted research. Their release may also invite misinterpretation because, for example, proposed methods may differ from those ultimately approved.

Although judges readily grasp the harm to the research enterprise induced by forcing public release of peer-review comments once that harm is explained through briefing and scholar declarations, courts in states with overbroad PRLs may nonetheless be powerless to protect such documents’ release, given the disclosure-as-default philosophy underlying PRLs and the need to construe exemptions narrowly.²²⁸ Furthermore, the need for universities and scholars to perpetually rejustify withholding of peer-review materials in states that lack either an express statutory exemption for them or a categorical statement from a

227. See Declaration of Donald R. Smith, *supra* note 154, ¶¶ 24, 29; Declaration of Myra E. Finkelstein, *supra* note 153, ¶ 19; see also *supra* notes 160–161 and accompanying text.

228. Arkansas, Montana, and New Mexico join North Carolina as states with nearly nonexistent statutory protections for research that does not qualify as a trade secret, and at minimum, it is difficult to imagine on what basis peer-review correspondence could be withheld from the public in these jurisdictions. See CLIMATE SCI. LEGAL DEF. FUND, *supra* note 117, at 34–35 (Arkansas), 105–06 (Montana), & 116–18 (New Mexico) (discussing “F”-ranked states for scientific researchers).

court of last resort is tremendously wasteful of litigant and judicial resources. For these reasons, peer-review materials should be made uniformly exempt from disclosure via statute.²²⁹

Communications regarding research encompass a variety of exchanges that cannot be characterized as part of the formal peer-review process, and thus may remain vulnerable to public disclosure even though their confidentiality is likewise important to provide scholars the associative freedom and thought space to develop their ideas. Further, scholars routinely communicate about a wide range of teaching and university matters that implicate academic freedom, but are unrelated to research.

To concretize the issue: an email from a professor who studies gender discrimination to a group of faculty peers might simultaneously encompass a synopsis of her research-in-progress on the topic, a recommendation for managing discussions of discrimination issues in the classroom, and a personal opinion informed by disciplinary expertise about her university's handling of a pending discrimination lawsuit. While all of this email's subcomponents involve academic freedom interests, and exemplify the type of substantive intra-faculty discussion of contested social and pedagogical ideas that sound public policy should support in the university context, it is unclear whether any of the subthreads would qualify for protection under PRL exemptions narrowly drawn to protect scholarly research. It is clear, however, that such informal lines of intra-faculty communication would be readily chilled through forced public disclosure.

Additionally, and problematically, the informality of email as a medium leads to inevitable commingling of topic threads, requiring complex and resource-intensive redaction processes where scholar-records PRL exemptions implicitly contemplate the more formal, focused communications of the typewriter era. In a related point, courts' general suspicion of newfangled communicative modes unimagined by PRL drafters—though perhaps explicable with reference to the mean age of judges—may make courts unduly reluctant to protect email and other contemporary forms of “records,” as Dr. Overpeck's ordeal in Arizona Superior Court reveals. For this reason, PRLs

229. To argue that peer-review materials should not be available to the general public on a wish-to-know basis through open records laws is not to reify the academic peer-review process, or to assert that there are no societal need-to-know interests that can trump the importance of that process's confidentiality in other contexts. Thus, for example, the U.S. Supreme Court has held unanimously (and I believe correctly) that peer-review comments about a scholar and her or his colleagues may be reachable through EEOC subpoena where they are relevant to determining whether unlawful discrimination has occurred in the tenure process. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 201 (1990).

should directly protect all forms of scholars' communications regarding research, teaching, or personal opinion.

Case law also suggests that express PRL protection is required for information that identifies or permits identification of human research subjects: In the Joe Camel matter, Dr. Fischer was ultimately only able to protect the identify of his child research subjects from release to R.J. Reynolds by virtue of a fortuitous amendment of Georgia's open records law during the pendency of the tobacco company's lawsuit.²³⁰ Further, such protection is not available under all state PRLs.

Interview notes and survey data should also be protected to preserve the confidentiality typically promised to research subjects, and to preserve researchers' ability to conduct human subjects research in future. This falls far short of creating an evidentiary or testimonial "research privilege" that prevents third-party academics from being subpoenaed in formal civil or criminal proceedings, where compelling state interests in truth-seeking may be at stake.²³¹ Rather, it is simply an immunity from being required, by any member of the public, for any stated or unstated reason, to hand over primary research materials on demand.

As a final matter, documents identifying research-related meeting subjects, invitees, and attendees warrant PRL exemption. Demanding lists of invitees to nonpublic meetings is well within the existing range of PRL harassment techniques, and it threatens to chill the associational freedom necessary to full academic exchange.

Teaching materials, including but not limited to, test questions, scoring keys, and other records pertaining to the administration of academic examinations; lecture notes, outlines, slides, syllabi, recorded presentation materials, and assignments; materials describing classroom activities; and recordings of classroom sessions.

Although PRL harassment has to date primarily involved scholars' research activities, and outside interest groups have made only limited demands for teaching materials, such materials remain vulnerable to compelled disclosure through records request under many state laws. Indeed, under PRLs like North Carolina's, even exam questions appear to be reachable.²³² States like Louisiana

230. Fischer, *supra* note 189, at 162 (describing 1993 amendment of Georgia's PRL to permit protection of the names of research subjects, but not of other research data collected pursuant to assurances of confidentiality).

231. See POLSKY, *supra* note 135.

232. Fairchild, *supra* note 192.

and New Hampshire, in contrast, have foreseen this risk and included appropriate exemptions that should be universally adopted and expanded.²³³

Where requesters have sought teaching materials, their requests have often had a distinctly political cast; as open records harassment strategies become more entrenched, it is easy to imagine an upscaling of this tactic. Thus, for example, the corporatist educational reform group National Council on Teacher Quality has, through PRL requests, sought professors' classroom syllabi as a purported means of evaluating instructional quality, albeit in some cases unsuccessfully.²³⁴ Requests for teaching materials have also come from the political left: In Kentucky, the nonprofit group People for the Ethical Treatment of Animals requested both materials describing classroom activities involving animals, and the names of the faculty involved. Absent a clearly applicable PRL exemption, a court ruled that the University of Kentucky must provide the materials, although it allowed redaction of faculty personal information.²³⁵

The reputational and even physical harm that may ensue from such queries, and the classroom chill they might prospectively induce, is self-evident. For these reasons, a broad PRL exemption for teaching-related activity should supplement an exemption for research-related activity.

Grant and research funding applications, correspondence, and reports, except that the name of any funder known to the fund recipient and the amount of the funding must be disclosed.

The most obvious rationale for the at-least-partial application of PRLs to public universities is protection of the public fisc from waste and fraud, for it is in acceptance of direct appropriations that these institutions most resemble conventional government agencies. Thus, where universities are presently within the scope of a state open records law, it seems appropriate for their financial affairs to remain open to scrutiny through PRL requests, be these for records of salaries, administration budget, football stadium cost overruns, or the

233. CLIMATE SCI. LEGAL DEF. FUND, *supra* note 117, at 82 (Louisiana [protecting exam materials and many types of teaching materials]) & 111–12 (New Hampshire [protecting exam materials only]). Although Louisiana's teaching materials exemption extends only to materials that have not been distributed to students, there is no reason such distribution should act as a waiver of a professor's confidentiality claim vis-à-vis the broader public.

234. Nat'l Council for Teacher Quality, Inc. v. Curators of Univ. of Mo., 446 S.W.3d 723 (Mo. Ct. App. 2014). The University of Missouri successfully resisted a request for course syllabi by convincing the court that they were protected under the Federal Copyright Act. *Id.* at 724.

235. Univ. of Ky. v. PETA, Inc., No. 15-CI-2595, at 7–8 (Ky. Cir. Ct. Feb. 28, 2017), <http://www.csldf.org/resources/University-of-Kentucky-v-PETA-Ky-Fayette-Cir-Ct-2017.pdf>.

tab for catered functions. Nothing in the proposed exemption text above would limit public access to such records.

A gray area that quickly emerges, however—and that necessarily complicates PRL reform motivated by a desire to protect scholars' intellectual freedom—arises at the money/scholarship interface. Simply put: Doesn't the public have a right to know who is giving money directly to university researchers, to discern whether professors are but mouthpieces for hire? Although unacknowledged in the literature on the PRL plight of scholars, the motivation of at least some characterizable as "harassers" is often laudable: to determine whether infusions of private money are driving public scholars' research agendas, shaping their conclusions, or both.

This dynamic is obvious from, for example, requests by the consumer watchdog group U.S. Right to Know for UC Davis agricultural researchers' communications with Monsanto and other agribusiness giants (many of these scholars have indeed received funding from such companies). It likewise surfaces in requests from the ethics watchdog group Campaign for Accountability for communications between various public university scholars of privacy or information technology and Google (from whom some of these scholars have also received funding). In seeking such records, requesters may proceed from the premise that scholars' views that align with those of a corporate funder must clearly have been purchased, rather than that powerful stakeholders have simply sought out those views in academia congruent with their own, and paid to amplify them. The problem is that with ostensible smoking-gun funding documents in one hand, and researchers' corporate-interest-convergent research output in the other, requesters can (through dubious but tendentious causal logic) suggest intellectual corruption where there is none, discrediting honest scholars in the process.

To be sure, instances of pay-to-play exist in academia, and nondisclosure of research funding sources often warrants public concern. When, for example, Columbia Business School professor Frederic Mishkin wrote a white paper praising Iceland's economic stability shortly before that country's collapse—without revealing his receipt of more than \$100,000 for the study from the Iceland Chamber of Commerce—onlookers cried foul, and the University's funding disclosure policies were quickly reformed in the incident's wake.²³⁶ A Harvard Medical School professor likewise dismayed students by lecturing on

236. John A. Byrne, *'Inside Job' Causes Changes at Columbia*, POETS & QUANTS (May 18, 2011), <http://poetsandquants.com/2011/05/18/inside-job-causes-changes-at-columbia> [<https://perma.cc/U43C-X3L9>].

the benefits of cholesterol-lowering medications and dismissing a student's question about their side effects, without revealing his financial relationships with five manufacturers of those drugs.²³⁷

More recently, the Campaign for Accountability has through public records requests uncovered troubling instances of public university professors downplaying the impact of payday lending on low-income consumers without disclosing both payments and editorial input received from the payday-lender-backed Consumer Credit Research Foundation.²³⁸ Unfortunately, however, open records requests are a crude and problematic means of identifying such conflicts, and have significant potential for collateral damage, even while being so piecemeal and unpredictable that they cannot act as a meaningful system of scholar-ethics oversight.

Among the problems with the use of PRL requests to tease out the phenomenon of views-for-hire is that: (1) PRL requesters' methods are highly biased, inevitably involving requests for non-representative subsets of scholar documents that can be unfairly presented to suggest researchers' wholesale intellectual capture vis-à-vis study topics;²³⁹ (2) PRL requesters' methods are often sloppy, erroneously pulling innocent scholars into the net of those with undisclosed alleged ethical conflicts;²⁴⁰ and (3) the decontextualized documents produced through the open records process can obscure differences in funding terms that are highly salient with respect to the likelihood that payment has

237. Duff Wilson, *Harvard Medical School in Ethics Quandary*, N.Y. TIMES (Mar. 2, 2009), <http://www.nytimes.com/2009/03/03/business/03medschool.html>.

238. See Kevin Wack, *How the Payday Lending Industry Shapes Academic Research*, AM. BANKER (Feb. 5, 2018, 3:01 PM), <http://www.americanbanker.com/news/how-the-payday-lending-industry-shapes-academic-research> [<https://perma.cc/47UC-UQF6>] (describing emails obtained through PRL request from an Arkansas Tech professor that detail the undisclosed funder's editorial input into a research study, and litigation against a Kennesaw State University professor for similar documents).

239. See Eenennaam, *supra* note 187 (discussing record requesters' lack of interest in funding she received from non-industry sources, and in the portion of her work not involving GMOs). Similarly, U.S. Right to Know critics of UC Davis's Dr. Pamela Ronald ignore her collaboration and coauthorship of a book with an organic farming leader . . . to whom she is also married. See PAMELA C. RONALD & RAOUL W. ADAMCHAK, *TOMORROW'S TABLE: ORGANIC FARMING, GENETICS, AND THE FUTURE OF FOOD* (2008).

240. See Adam Rogers, *Google's Academic Influence Campaign: It's Complicated*, WIRED (July 14, 2017, 7:00 AM), <http://www.wired.com/story/googles-academic-influence-campaign-its-complicated> [<https://perma.cc/ZLF3-H65J>] (describing the unjustified aspersions cast on multiple scholars as a result of the Campaign for Accountability's superficial PRL research in connection with its Google Transparency Project).

tainted a scholar's views, again leading to unfair inferences of intellectual corruption.²⁴¹

Because reputations are hard to build, quick to destroy, and difficult to rehabilitate—scandals make page 1, but retractions only page 9—funder-related information required to be disclosed through PRLs should be confined to barebones disclosure of direct funding sources known to individual scholars, and their amounts. Ethical issues and potential conflicts should instead be vetted through non-PRL accountability mechanisms that simultaneously provide fairer process for scholars, and provide the public with greater systematic transparency as to research funding, as described below.

C. Alternative Accountability Mechanisms

Policing the research ethics of the professoriate involves many and complex issues, and comprehensive treatment of how these interact substantively and politically with potential PRL reform would require its own article. In advocating for aggressive PRL reform to exempt from disclosure most scholar records, however, a few general observations about compensatory measures are in order. First, there is a legitimate societal interest in ensuring the intellectual independence of university professors, and in making it possible for the public to discern whether private funders are overtly or subtly coopting research agendas or slanting conclusions.

There is also a strong societal interest in preventing the unwarranted tarnishing of scholarly reputations where corruption is not in fact occurring. Given record requesters' mixed record of navigating this fraught terrain responsibly, such issues are likely best addressed not through open records laws, but via alternative accountability mechanisms. These mechanisms may include a combination of mandatory affirmative disclosures of funding and conflicts of interest; institutional policies regarding funder control of research outputs, including publications; and ombuds functions, among others.

Second, even were PRLs to function wholly honorably, records requests as a tool of research-ethics policing in the academy can at best tell half the story, because they cannot reach the activities of private university scholars, who also

241. See *id.* (describing, for example, the Campaign for Accountability's failure to distinguish between known, direct awards from Google to researchers (which could foreseeably influence their viewpoints), and Google funding sources either unknown to researchers because the sources were so indirect, or involving no past or future funder contact because funding came through a court settlement award (which could not realistically alter viewpoints)).

seek funding from a variety of sources and have the potential to be influenced thereby. Thus, alternative accountability mechanisms imposed by professional disciplines, university associations, and otherwise can be both fairer and more comprehensive as a means of ensuring scholars' intellectual integrity.

As but one example of an area ripe for improvement: Academic journals vary widely in the degree to which they require disclosure of funding sources or conflicts of interest, with biomedical journals among the most disclosure-promoting, and student-edited law reviews the least.²⁴² Because there is ample evidence that funding sources can compromise objectivity,²⁴³ journals in fields with more lenient policies should strengthen disclosure requirements to increase the credibility of their publications and help immunize their authors against charges of unrevealed sources of potential bias.

Universities and their constituent departments could also require or encourage faculty to disclose their funding sources on websites; on course syllabi, where relevant; and on publicly available forms.²⁴⁴ A partial model is the Statement of Economic Interests form that California's Fair Political Practices Commission requires public university scholars to file annually with their campus, which, unlike the state's open records law, has been customized to reflect ways in which state universities differ from conventional state agencies.²⁴⁵

242. See Robin Feldman et al., *Open Letter on Ethical Norms in Intellectual Property Scholarship*, 29 HARV. J.L. & TECH. 339, 344 (2016) (noting that “[i]n contrast to medical research, legal research lags well behind, both in terms of the establishment of ethical codes and methods of enforcing those codes. . . . Law journals generally do not request information on conflicts of interest and do not require disclosure of such information”).

243. See, e.g., David B. Resnik et al., *Conflict of Interest and Funding Disclosure Policies of Environmental, Occupational, and Public Health Journals*, 59 J. OCCUPATIONAL & ENVTL. MED. 28, 28 (noting the “strong relationship between industry sponsorship of research and outcomes favorable to the sponsor” in biomedical research). For example, articles on new cancer drugs supported by pharmaceutical company funding were 1.5 times more likely to report positive funding than those without industry financial support, and “articles published in two top medical journals in 2001 in which an author disclosed a financial COI [conflict of interest] were 2.3 times more likely to report positive results than articles without any such disclosures.” *Id.* As the authors observe in advocating for more robust journal disclosure policies and institutional sanctions for their violation, “[b]iases need not be intentional and may operate at a subconscious level. An investigator with a COI may not even be aware that he or she is making choices that tend to slant the outcomes [of] a study in a particular direction.” *Id.*

244. See, e.g., *Frederic Mishkin*, COLUM. BUS. SCH., <http://www.gsb.columbia.edu/faculty/fmishkin> [https://perma.cc/ZKY6-SHQY] (disclosing Professor Mishkin's funding in the wake of negative publicity regarding unrevealed conflicts of interest).

245. See *Instructions for Completing Form 700-U*, CAL. FAIR POL. PRACS. COMMISSION, http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Form%20700/2017-18/Form_700_U_2017_2018.pdf [https://perma.cc/BD3H-9K5N] (describing the disclosures that must be made by university researchers funded in whole or part by nongovernmental sources).

A further possibility is to impose disclosure obligations on university research donors rather than donees (a regime known as “transfer of value” reporting), just as the Affordable Care Act requires drug and medical device manufacturers to report a wide range of gifts to physicians and hospitals.²⁴⁶ This might be particularly helpful in daylighting practices such as scientific ghostwriting, which typically involve transfers of money as well as manuscripts.

Additionally, departmental or university policies should clarify the degree to which researchers must disclose any results, review promises they have made or editorial control they have ceded to funders, and prohibit or require justification of certain terms of engagement. Thus, for example, while it may sometimes be appropriate to allow funders to check research results to guard against error (even where the public might misapprehend this as improper, and even though the need to preclear results may unconsciously bias researchers), requiring funder approval for publication of results raises more troubling ethical issues.²⁴⁷

Further, although a hallmark of harassing demands for scholar records is that requesters rarely ask for raw data (their motivations being political attack rather than empirical verification), requiring researchers to post such data affirmatively where possible would also increase transparency and the ability to detect and to deter research fraud. Here, as in the funding-disclosure realm, there is great variability in norms across academic disciplines, with fields like climate science far ahead of fields like experimental psychology.²⁴⁸

246. See *Health Policy Brief: The Physician Payments Sunshine Act*, HEALTH AFF. (Oct. 2, 2014), <http://www.healthaffairs.org/doi/10.1377/hpb20141002.272302/full> (describing new public reporting requirements for medical product manufacturers and purchasing organizations in Section 6002 of the Affordable Care Act).

247. A University of California systemwide policy, for example, states that a contract or grant cannot normally be approved if it limits “freedom to publish or disseminate results.” *Chapter 1-400: Publication Policy and Guidelines on Rights to Results of Extramural Projects or Programs*, U.C. OFF. OF THE PRESIDENT, <http://www.ucop.edu/research-policy-analysis-coordination/resources-tools/contract-and-grant-manual/chapter1/chapter-1-400.html#ch1-410> [https://perma.cc/88GA-8WFM].

248. See, e.g., Uri Simonsohn, *Just Post It: The Lesson From Two Cases of Fabricated Data Detected by Statistics Alone* (Jan. 29, 2013) (unpublished manuscript), http://papers.ssrn.com/abstract_id=2114571 (describing author’s efforts to obtain two academic psychologists’ raw data to confirm suspicions of research fraud, and the salutary effects that affirmative data-posting would have in detecting and deterring fraud). Simonsohn urges that journals, granting agencies, universities, or other entities overseeing research either promote or require data posting as the default, with exceptions where data is proprietary, personally identifiable, intended for later use by the original researchers, or for other reasons necessarily confidential. *Id.* at 2–5. Such a measure would also aid in addressing the “replication crisis,” i.e., the concern, mounting across the sciences in the past decade, that many experimental results touted as important cannot be reproduced. See generally Jonathan W. Schooler, *Metascience Could Rescue the Replication Crisis*, 515

Finally, audits and other institutional oversight mechanisms, such as creating a public-facing ombuds function, might prove both a procedurally fairer and a more effective means of policing financial and nonpecuniary impropriety than the records-rummaging-followed-by-aspersion-casting that often results from the PRL process. A university ombuds office could, for example, investigate not only complaints about undisclosed funding sources (were those to contravene a particular rule or policy), but public complaints about alleged scientific misconduct (such as the climate denialist claims underlying “Climategate”), unethical research activities (such as violations of animal welfare protocols or fabricated data sets), or unethical publication (including, the phenomenon of ghostwriting). Although each of these avenues presents its own costs and policy challenges, scholars and universities advocating for expanded scholar-records exemptions from PRLs would be wise, as a matter of policy and politics, to suggest accountability-enhancing measures that could offset and indeed improve upon legitimate aspects of certain intrusive requests for scholar records.

CONCLUSION

In this Article, I have endeavored to show how politically motivated requests for public university professors’ records frequently lead to distortion of scholars’ work and unfair damage to their reputations. These records requests also impair the candid communication among scholars that is necessary to develop, contest, and refine new ideas. Further, they deter research into critically important but controversial areas, and take a considerable psychic toll on request recipients. Indeed, this toll may be so substantial that scholars simply leave public universities.

Simultaneously, the significant time required to respond to record requests diverts scholars from their core research and teaching functions, including—in an unfortunate cycle that incentivizes ongoing harassment—work on subjects disfavored by records requesters. Most distressing, harassing requests for scholar records deprive the public of the ultimate taxpayer dividend from investment in public universities: the fruits of uninhibited inquiry, in the form of new knowledge.

I have also here argued that the asymmetry in subjecting public but not private university scholars to records requests has no rational justification, given

NATURE 9 (2014), http://www.nature.com/polopoly_fs/1.162751/menu/main/topColumns/topLeftColumn/pdf/515009a.pdf (discussing the importance of replicating results from empirical research).

that neither group is involved in extramural governance, and that the two groups perform identical tasks. Additionally, by subjecting only government entities to disclosure requirements, PRLs lead to over-scrutiny of public universities and under-examination of private institutions in ways that may amplify the systemic bias against the public sector²⁴⁹ that has characterized U.S. political narrative since the 1980s, and that poses a particular threat at present.

As a final matter, although I acknowledge that some intrusive public records requests to scholars are motivated by legitimate and important concerns about research integrity, I suggest that opening professors' academic records to "rummaging by the world at large"²⁵⁰ is at best a crude and at worst a dangerous mechanism for policing ethics. Instead, those hoping to raise the bar on university research ethics should support alternative accountability mechanisms, including more robust intradisciplinary practices and university policies. Unlike public records requests, these mechanisms would apply fairly across all academic researchers, and across public and private institutions alike.

Exempting public university scholar records from state open records laws will enable public records laws to do their job, and researchers to do theirs. The potential societal payoffs from this legislative intervention may be as dramatic as preventing human disease (by reducing cigarette smoking), decreasing hunger and malnutrition (through crop experimentation), and protecting the planet's atmosphere (through research on climate change mitigation). My hope is that this Article will help reformers and legislators refocus public records laws on the democracy-promoting functions they were meant to perform, and liberate public universities to create the knowledge necessary for a democratic citizenry to meet its most urgent challenges.

249. See Pozen, *supra* note 22, at 47–49 (discussing the role of transparency laws in promoting "anti-public-sector-bias").

250. *Forsham v. Califano*, 587 F.2d 1128, 1137 (D.C. Cir. 1978).