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### Secrecy Creep

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## ARTICLE

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### SECRECY CREEP

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CHRISTINA KONINGISOR<sup>†</sup>

*Legal scholars have long been fascinated by the topic of government secrecy. Yet they have largely focused their attention on federal secrecy, rarely exploring secrecy in other contexts. This Article addresses this gap. It turns its attention to state and local government secrets, applying the lens of federal secrecy to the subfederal regime. In doing so, it identifies a troubling new development in state and local law: the migration of powerful federal secrecy protections, initially developed to shield the national security state, into the state and local context. I refer to this process as “secrecy creep.”*

*By illuminating the architecture of state and local secrets, this Article makes three central contributions. First, it offers a descriptive account of subfederal secrecy. Second, it illuminates the process of secrecy creep, highlighting the ways that federal secrecy protections have migrated into state law to shield state and local governments. Third, it warns of the perils of this migration, arguing that these federal secrecy protections often sit uneasily within the distinct legal structures and traditions that exist at the state and local levels.*

*Further, it reveals that secrecy creep raises special concerns in the context of policing. While the process of police militarization has received ample attention in recent years, this Article reveals the existence of a parallel intellectual trend—a kind of “national security-ization” of local police. These local law enforcement agencies have not only gained increased access to military weapons and the surveillance devices of the national security agencies, but they have also gained increased access to the robust informational protections that shield these weapons and tools from public view. This creates a feedback loop: the more that local police rely on military*

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*equipment and federal surveillance technologies, the more persuasive their arguments for borrowing these federal secrecy protections become. In this way, illuminating the process of secrecy creep adds a new dimension to contemporary discussions of police power and constraints.*

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## INTRODUCTION

In September of 2010, Mark Zuckerberg and Cory Booker appeared on the Oprah Winfrey Show to announce that Zuckerberg was donating \$100 million to Newark’s public schools.<sup>1</sup> At the time, Booker was serving as mayor of Newark; Zuckerberg, just twenty-six years old, still enjoyed his reputation as Silicon Valley wunderkind. The announcement was met with widespread praise.<sup>2</sup> But before long, their reform efforts had stalled. Six months into the project, Booker had not appointed a new superintendent or drafted a comprehensive plan for education overhaul. Two years later, Booker’s administration had spent one-fifth of the donation—\$20 million—on consulting fees alone.<sup>3</sup>

In April of 2011, a group of Newark parents filed a public records request under New Jersey’s public records law for correspondence between Booker and Zuckerberg describing how the \$100 million donation had been spent.<sup>4</sup> Booker’s office denied the request on a number of grounds. But one of its central claims was that the emails were protected by executive privilege.<sup>5</sup> In its denial, Booker’s office cited *Nero v. Hyland*, a 1978 New Jersey Supreme Court decision recognizing an evidentiary privilege for the communications of the governor.<sup>6</sup> *Nero*, in turn, relied on the U.S. Supreme Court’s 1974

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<sup>1</sup> Dale Russakoff, *Schooled*, NEW YORKER (May 12, 2014), <https://www.newyorker.com/magazine/2014/05/19/schooled> [<https://perma.cc/DJ2D-LLF4>].

<sup>2</sup> See, e.g., Miguel Helft, *From Young Mogul, A Gift on the Scale of Philanthropy’s Elders*, N.Y. TIMES (Sept. 24, 2010), <https://www.nytimes.com/2010/09/25/technology/25facebook.html> [<https://perma.cc/H3JA-3AW8>].

<sup>3</sup> Russakoff, *supra* note 1.

<sup>4</sup> Plaintiffs’ Brief in Opposition to Defendants’ Motion to Dismiss at 1-2, 7-8, *Secondary Parent Council v. City of Newark*, No. L-6937-11 (N.J. Super. Ct., Dec. 6, 2011).

<sup>5</sup> Letter from Anna P. Pereira, Corporation Counsel, City of Newark, to Laura Baker, Secondary Parent Council (July 19, 2011), [https://www.aclu-nj.org/download\\_file/view\\_inline/783/632](https://www.aclu-nj.org/download_file/view_inline/783/632) [<https://perma.cc/3ENS-AH4D>].

<sup>6</sup> *Id.*; *Nero v. Hyland*, 386 A.2d 846, 853 (N.J. 1978).

decision in *United States v. Nixon* recognizing a qualified constitutional privilege for the communications of the President.<sup>7</sup>

The privilege articulated in *Nixon* is robust, rooted in constitutional separation of powers principles, and tethered to the “unique” diplomatic and military responsibilities of the President.<sup>8</sup> Even so, it had migrated into state law to shield gubernatorial records, and it was now being invoked to protect the emails of a city mayor—a position that has no formal role in the state constitutional scheme.<sup>9</sup> The privilege had traveled far from its origins. This raised a number of questions. Should a city mayor enjoy an executive communications privilege? Should a governor? To what extent are the law and policy concerns that animate the presidential privilege applicable to state and local government?

Scholars have long been fascinated by secrecy in government. Historians, political scientists, economists, and sociologists have examined all facets and corners of this topic.<sup>10</sup> Legal scholars have not been immune to this trend. They, too, have explored fundamental questions about the federal secrecy ecosystem, asking what information the federal government should keep secret, what it does keep secret, and the process by which those secrets are either hidden or revealed.<sup>11</sup> More recently, legal scholars have explored the ecosystem surrounding information leaks in federal government,<sup>12</sup> the distinctions between various types of government secrets,<sup>13</sup> the feasibility of

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<sup>7</sup> *Nero*, 386 A.2d at 853.

<sup>8</sup> *United States v. Nixon*, 418 U.S. 683, 706-08, 715 (1974).

<sup>9</sup> See generally N.J. CONST.

<sup>10</sup> See generally, e.g., THE ECONOMICS OF TRANSPARENCY IN POLITICS (Albert Breton, Gianluigi Galeotti, Pierre Salmon & Ronald Wintrobe, eds. 2016) (exploring the economic impacts of secrecy and transparency in government); 3 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 3 (Guenther Roth & Claus Wittich, eds., Bedminster Press 1968) (exploring bureaucratic secrecy); Dennis F. Thompson, *Democratic Secrecy*, 114 POL. SCI. Q. 181 (1999) (exploring the problem of holding the government accountable without undermining its efficacy).

<sup>11</sup> The legal literature on government secrecy is voluminous: a recent Westlaw search shows approximately 2,000 law review articles with titles containing the word “secret.”

<sup>12</sup> See generally Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387 (2015) (describing a new “deluge” leak); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013) (outlining the ecology of government leaks and demonstrating the ways that various types of leaks advance the goals of government actors).

<sup>13</sup> See generally David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010) (outlining the distinctions between “deep” and “shallow” secrets in government).

controlling government information in the Internet age,<sup>14</sup> and the legal exceptionalism of national security secrecy.<sup>15</sup> The list goes on.<sup>16</sup>

Yet legal scholars have paid less attention to government secrecy outside of the federal context. Even such basic questions as the types of information state and local governments keep secret, the legal underpinnings for state and local secrecy regimes, and the ecosystem surrounding government leaks at the state and local level have often been left unexplored.<sup>17</sup> There is one notable exception: the topic of police secrecy, which has received more sustained attention from scholars.<sup>18</sup> But even this subset of the literature is limited in certain respects. Scholars have largely focused on discrete issues within local law enforcement—for example, the availability of police disciplinary records<sup>19</sup>—or they have treated police transparency as one facet of the broader

<sup>14</sup> See generally Mark Fenster, *The Implausibility of Secrecy*, 65 HASTINGS L.J. 309 (2014) (cataloguing the ways that the government fails to control information).

<sup>15</sup> See Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 212-16 (2013) (describing the unique procedures that shield national security information).

<sup>16</sup> Other topics include, for example, the relationship between statutory and constitutional rights of access, see generally Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909 (2006), and the use of specific secrecy tools like the Glomar response, see generally Michael D. Becker, Comment, *Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check*, 64 ADMIN. L. REV. 673 (2012).

<sup>17</sup> Scholars have addressed discrete issues relating to state and local secrecy. See, e.g., Megan Craig & Madeleine Davison, *Secrecy in Death Records: A Call to Action*, J. CIVIC INFO., Dec. 2020, at 45, 47-50 (exploring secrecy in state death records); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 532-51 (2007) (reviewing the history of the reporter's privilege in the states); Daxton "Chip" Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, J. CIVIC INFO., Sept. 2019, at 1, 11-18 (exploring trade secrecy exemptions in the states). And scholar-practitioners and communications and journalism scholars have done excellent work exploring questions implicating transparency and secrecy in the states. See, e.g., Richard J. Peltz-Steele & Robert Steinbuch, *Transparency Blind Spot: A Response to Transparency Deserts*, 48 RUTGERS L. REC. 1, 11-23 (2020) (listing publications that explore state freedom of information laws); see also RICHARD J. PELTZ-STEELE, *THE LAW OF ACCESS TO GOVERNMENT* 169-230 (2012) (exploring secrecy in state and federal law enforcement and corrections agencies); David Cuillier & Bruce E. Pinkleton, *Suspicion and Secrecy: Political Attitudes and Their Relationship to Support for Freedom of Information*, 16 COMM'N L. & POL'Y 227 (2011) (exploring how public attitudes toward government transparency affect freedom of information policies).

<sup>18</sup> See, e.g., Hannah Bloch-Wehba, *Exposing Secret Searches: A First Amendment Right of Access to Electronic Surveillance Orders*, 93 WASH. L. REV. 145, 149-50 (2018) (arguing for a First Amendment right of access to law enforcement agencies' electronic surveillance records); Barry Friedman, *Secret Policing*, 2016 U. CHI. LEGAL F. 99, 105-09 (arguing for greater public participation in the rules that govern police); Jonathan Manes, *Secrecy & Evasion in Police Surveillance Technology*, 34 BERKELEY TECH. L.J. 503, 557-66 (2019) (arguing in favor of greater transparency and oversight of police surveillance technologies).

<sup>19</sup> See generally Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839 (2019) (arguing against the disclosure of police disciplinary records).

question of how best to regulate law enforcement agencies.<sup>20</sup> They have rarely expanded their scope of inquiry to make connections between secrecy in policing and secrecy in other realms of state and local government.<sup>21</sup>

The obvious explanation for this oversight is that much of the existing secrecy scholarship focuses on national security secrecy.<sup>22</sup> And state and local governments play a limited role in both generating and protecting this information.<sup>23</sup> State and local secrecy, as a consequence, is often perceived as involving lower stakes.

The reality is more complex. National security responsibilities do not always cleave neatly at jurisdictional borders.<sup>24</sup> For example, local governments—and especially local police—have played a central intelligence-gathering role in counterterrorism efforts in the wake of September 11.<sup>25</sup> More importantly, there is a vast landscape of government secrecy that exists beyond the national security context, and even beyond the federal secrecy regime altogether. Each time a police department refuses a reporter's request under the state public records law, a governor asserts executive privilege, or a state judge closes the courthouse doors, subfederal secrecy law is implicated.

These state and local decisions matter. Federal secrets—and national security secrets, in particular—are often far removed from the everyday experiences of citizens.<sup>26</sup> The actions of state and local government, in

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<sup>20</sup> See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1848-49 (2015) (describing lack of police transparency as part of a broader argument for stronger ex ante rules governing policing).

<sup>21</sup> See *infra* note 34.

<sup>22</sup> See *supra* notes 12–16. There are two ways to define “national security secrets.” A formal approach would cabin the term to officially classified material. See Exec. Order No. 13,526 § 1.2(a), 3 C.F.R. 298, 298-99 (2010) (describing classification levels). A functional approach would encompass information substantially related to the national defense or foreign affairs regardless of whether the information has been formally classified. See, e.g., Classified Information Procedures Act, Pub. L. 96-456, § 1(b), 94 Stat. 2025, 2025, *reprinted in* 18 U.S.C. app. at 414 (defining national security as “the national defense and foreign relations of the United States”). This Article largely employs a functional approach but uses the classification standards as a touchstone: it uses the phrase to refer both to information that has been formally classified and information that most likely would have been classified had it been generated by a federal rather than a state or local agency. For a critique of the hazy and often circular definitions of national security articulated by the government, see Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1579-84 (2011).

<sup>23</sup> See discussion *infra* Section I.C.

<sup>24</sup> See *infra* Section I.C.

<sup>25</sup> See K. JACK RILEY, GREGORY F. TREVERTON, JEREMY M. WILSON & LOIS M. DAVIS, *STATE AND LOCAL INTELLIGENCE IN THE WAR ON TERRORISM*, at xi-xiii (2005) (describing local law enforcement agencies' counterterrorism efforts); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 306-10 (2012) (describing federal-subfederal intelligence cooperation after 9/11).

<sup>26</sup> See Pozen, *supra* note 12, at 574 (noting that the realm of national security is where “the executive’s activities [are] least visible to the average citizen”); see also Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 606 (2017) (noting that the federal government in general is more removed from the everyday lives of citizens).

contrast, tend to have an immediate and tangible impact on individuals' daily lives.<sup>27</sup> This is especially true in the law enforcement context, where robust informational protections can shield repeat offenders and systemic abuse.<sup>28</sup> For communities of color, and especially for Black communities, the stakes could not be higher.<sup>29</sup> If we truly care about democratic governance and accountability at the state and local level, then we must grapple with the landscape of state and local government secrets.

This Article charts the contours of this subfederal secrecy regime, using the framework of national security secrecy as a point of reference. It outlines the basic legal framework governing state and local secrets, exploring distinctions in secrecy regimes at the federal and subfederal levels. It then describes the relative scarcity of national security secrets in state and local government, and explores how this affects the legal underpinnings of the subfederal secrecy regime. Conversely, it highlights the types of secrets that state and local government officials are most concerned with safeguarding.

This descriptive account sets the stage for this Article's primary contribution. Once the lens of federal secrecy is applied to state and local government, the most significant feature of this subfederal regime comes into focus: the migration of powerful federal secrecy protections into state law. Specifically, secrecy protections developed to shield the national security state have migrated over time into state law and practice to protect a variety of state

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<sup>27</sup> Davidson, *supra* note 26, at 570-72 (describing the breadth of local governments' activities and responsibilities).

<sup>28</sup> See, e.g., Kendall Taggart & Mike Hayes, *Secret NYPD Files: Officers Who Lie and Brutally Beat People Can Keep Their Jobs*, BUZZFEED NEWS (Mar. 5, 2018, 5:58 AM), <https://www.buzzfeednews.com/article/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious> [<https://perma.cc/BFQ9-JS3J>] (describing how leaked NYPD personnel records showed hundreds of officers had committed fireable offenses but were permitted to keep their jobs).

<sup>29</sup> See, e.g., Derek Hawkins, *Officer Charged in George Floyd's Death Used Fatal Force Before and Had History of Complaints*, WASH. POST (May 29, 2020, 6:47 PM), <https://www.washingtonpost.com/nation/2020/05/29/officer-charged-george-floyds-death-used-fatal-force-before-had-history-complaints> [<https://perma.cc/46KJ-UDNL>] (describing barriers to accessing history of complaints against the police officer who killed George Floyd); Colleen Long, *Investigator Who Leaked Chokehold Officer's Records Resigns*, ASSOCIATED PRESS (Mar. 23, 2017), <https://apnews.com/article/ece63cd7ae5c4c248ba6dd75fd59b90> [<https://perma.cc/VK37-U8M8>] (noting that the four substantiated complaints against the officer who killed Eric Garner were made public only after being leaked). I should emphasize, however, that transparency should not be equated with accountability. See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 892-94 (2006) (arguing that the promise of increased transparency does not guarantee a better informed, more responsive democracy). Improved access to information alone cannot address existing power imbalances embedded within the law. This is especially true in the context of policing. See Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 778 (2021) (arguing that true police reform requires shifting power from the police to the communities who are policed). But increased transparency in policing can, under certain conditions, serve as a useful initial step. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2144-45 (2017) (arguing that certain targeted transparency measures may help "democratiz[e]" policing).

and local government entities. State judges have applied presidential executive privilege protections to the records of state governors; local police departments have reproduced records' classifications systems meant to protect national security secrets; and state legislators have carved out holes in the state public records laws to shield law enforcement agencies from public oversight.

I refer to this process as “secrecy creep.”<sup>30</sup> And I argue that we should be wary of this trend. The adoption of these powerful secrecy protections creates discordance in the law: the textual, structural, and historical underpinnings of the federal secrecy regime are distinct from the subfederal regime, and these national security protections often sit uneasily within the state legal framework.<sup>31</sup> Further, the distinct structure and nature of state and local government exacerbates the negative consequences of excessive government secrecy, imposing unique harms that do not necessarily surface in the federal context. State and local governments are not monitored by the same internal and external systems of checks and balances, and these secrecy tools allow state and local officials to aggregate power while shielded from public view.<sup>32</sup> Illuminating these hidden channels allows state judges and legislators to take steps to curb the more harmful effects of this trend.

Describing the problem of secrecy creep has further implications. In recent years, there has been a national debate over the growing militarization of police, or the large-scale transfer of military weapons and equipment to local law enforcement agencies.<sup>33</sup> This excavation of state and local secrecy surfaces a parallel development in the law. It shows that just as physical weapons developed for battlefields have been imported into American cities and towns, powerful informational protections developed in the national security context have begun to spill over into state and local law. I refer to this as the “national security-ization” of local police.

Exploring this process adds a new dimension to contemporary discussions of police power and constraints.<sup>34</sup> It tethers the police's

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<sup>30</sup> For further explanation of this phrase, see *infra* note 156.

<sup>31</sup> See discussion *infra* subsection III.B.1.

<sup>32</sup> See discussion *infra* subsection III.B.2.

<sup>33</sup> See, e.g., Press Release, U.S. Senate Subcomm. on Fin. & Contracting Oversight, One-Third of ‘Excess’ Military Equipment Sent to Local Police Departments Was New (Sept. 9, 2014), <https://www.hsgac.senate.gov/subcommittees/fco/media/one-third-of-excess-military-equipment-sent-to-local-police-departments-was-new-mccaskill-hearing-reveals> [https://perma.cc/4PFQ-CJVE] (“Local police departments in 49 of 50 states have more Mine-Resistant Ambush Protected vehicles (MRAPs) than their state's National Guard units.”); Philip V. McHarris, *Why Does the Minneapolis Police Department Look Like a Military Unit?*, WASH. POST (May 28, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/05/28/explaining-militarized-police-response-protesters-after-killing-george-floyd> [https://perma.cc/MV34-K3HD] (“Police departments have come to resemble military units . . .”).

<sup>34</sup> While the police militarization, secrecy, and surveillance scholarship has remained somewhat siloed, a handful of scholars have examined the connections between police militarization, surveillance,

augmented physical capabilities—in terms of both weapons and surveillance equipment—to its expanded authority to keep its activities secret. And it demonstrates that the ramping up of police weaponry alongside police secrecy is not coincidental. Rather, these two processes are engaged in a feedback loop: the more that local police rely on military weapons and federal surveillance technologies, the more persuasive their arguments for borrowing national security secrecy protections become.

Finally, it illuminates a new channel of legal migration. National security scholars have examined the movement of legal ideas into and out of the national security sphere.<sup>35</sup> In the wake of September 11, in particular, they have explored the ways that rapid changes in national security law have affected other legal realms.<sup>36</sup> But much of this scholarship explores the ratcheting down of due process protections as they cross into and out of the national security context.<sup>37</sup> This Article, in contrast, describes the ratcheting up of secrecy protections as they cross out of the national security sphere and into state law.

One final caveat: I do not exhaustively chronicle secrecy in federal, state, and local government. Rather, I focus attention on a smaller subset of secrets: national security secrets in the federal context, and executive branch secrecy in state and local government.<sup>38</sup> The topic of government secrecy is vast: virtually every government action arguably implicates transparency or secrecy in some way. Homing in on national security secrets in the federal government, and the extent to which the absence of a national security

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and secrecy more broadly. *See, e.g.*, Manes, *supra* note 18, at 514-19 (noting federal secrecy requirements that link police adoption of federal surveillance tools to increased police secrecy).

<sup>35</sup> *See, e.g.*, Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1097 (2003) (“[T]here is a strong probability that measures used by the government in emergencies will eventually seep into the legal system even after the crisis has ended.”); Shirin Sinnar, *Essay, Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1569 (2016) (describing the adoption of “rule of law” concepts into the national security context). This scholarship is part of a much larger body of works examining the concept and process of legal migration. *See, e.g.*, G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 180-82 (1998) (describing state courts’ interpretation of state constitutional rights provisions in “lockstep” with analogous federal provisions); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 460 (2010) (examining the ways that constitutional concepts and doctrines from one substantive area cross over into another).

<sup>36</sup> *See, e.g.*, LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM 2 (2008) (describing how expanded executive authority in the wake of terrorist attacks often ends up being applied in other contexts).

<sup>37</sup> *See, e.g.*, Sinnar, *supra* note 35, at 1611-12 (describing the risk that watered-down rule of law concepts “affect interpretation[s] of the original standards”); Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After Abu Ali*, 88 TEX. L. REV. 1501, 1501 (2010) (describing the concern that trying terrorism suspects in Article III courts would “sanction exceptional departures from procedural or evidentiary norms that will eventually become settled as the rule”).

<sup>38</sup> I define “executive branch” secrecy at the local level broadly to include most functions of the local government, including local law enforcement. *See* Davidson, *supra* note 26, at 571-72 (describing the blurring of lines between branches at the local level).

apparatus affects the secrecy regime at the state and local level, renders this subject more manageable.<sup>39</sup> Further, much of the existing literature on federal secrecy explores secrecy in the national security state, and the framework this scholarship erects serves as a natural starting point for comparison. Using the lens of national security secrecy to explore subfederal secrets therefore makes sense from an analytic perspective as well.<sup>40</sup>

This Article proceeds in three parts. Part I offers a high-level overview of government secrecy at the federal, state, and local level. It focuses attention first on federal secrets—and more specifically, on the creation and protection of national security secrets. It then addresses secrecy in state and local government: it outlines the legal regime that governs state and local secrets, explores the types of secrets that state and local officials are most concerned with protecting, and examines the role of state and local actors in generating and shielding national security secrets. Part II then describes the problem of secrecy creep, chronicling the various informational protections developed to shield national security secrets that have since been adopted by state judicial, legislative, and executive branches. Finally, Part III explores the implications of this process. It describes the benefits and harms of secrecy creep and offers potential solutions, suggesting ways that we might better regulate the adoption of federal secrecy tools by state and local actors.

## I. GOVERNMENT SECRETS

The topic of secrecy in government is vast: any government requirement that restricts or disseminates information arguably falls within its scope. References in the legal literature to “government secrecy,” however, tend to

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<sup>39</sup> I confine this Article to the topic of government secrecy without interrogating the broader transparency law backdrop against which this secrecy occurs, nor engaging with the many scholarly critiques of this body of law. Such an inquiry is beyond the scope of the present project. I will briefly note, however, that some of these broader critiques of transparency law writ large apply differently in the state and local context. For example, David Pozen has criticized the federal transparency law regime for overexposing much of the executive branch while underexposing the national security agencies. See David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 154-56 (2018). The example of secrecy creep suggests that local law enforcement agencies, like the national security agencies, are likewise underwatched. Yet it is less clear that these myriad other, non-law enforcement state and local agencies suffer from overattention. Indeed, in a previous work, I have suggested that this may be less of a concern at the subfederal level. See Christina Koningsor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1496-98, 1537-38 (2020).

<sup>40</sup> I do not address these tools on their merits: scholars have previously critiqued the use of these secrecy protections in the national security context, where they originated, and I do not repeat this work. See generally Becker, *supra* note 16 (criticizing the use of *Glomar* to deny requests for information); David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005) (criticizing use of the mosaic theory).

refer to a narrower slice of secrecy—usually executive branch secrecy,<sup>41</sup> often with an emphasis on national security information. This Part at first follows this mold, providing an overview of federal secrecy that is largely concerned with the infrastructure of national security secrets. It then departs from this model by exploring the nature and structure of secrecy in state and local government, which is largely oriented around non-national security information. In doing so, it sets the stage for further exploration of how the federal secrecy regime has influenced—and arguably distorted—secrecy in state and local government.

### A. Federal Secrets

A wealth of scholarship addresses the nature and scope of the federal secrecy regime.<sup>42</sup> This Section briefly summarizes that work, both to provide a point of reference for later discussions of states' secrets and to introduce the national security secrecy protections that have recently migrated into state and local law. The goal of this Section is not to provide a comprehensive account of secrecy in federal government, but rather to offer context for a subsequent exploration of the process of secrecy creep.

#### 1. Constitutional Secrecy

The U.S. Constitution mentions the word “secrecy” just once: Article I, Section 5 requires that the House of Representatives keep and publish a journal of its proceedings “excepting such Parts as in their Judgment may require Secrecy.”<sup>43</sup> Although this is the only explicit reference to government secrecy contained in the text, the Constitution separately describes circumstances under which secrecy is prohibited. Article II, Section 3 requires that the President periodically inform Congress about the state of the union,<sup>44</sup> for example, and the Sixth Amendment requires a public trial in criminal proceedings.<sup>45</sup>

Despite the scarcity of clear textual commands involving government secrecy—or its inverse, government transparency—structural features of the Constitution are often invoked to justify both greater and lesser protection for government secrets. In the context of the executive branch, for example, constitutional separation of powers principles have formed the basis of the

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<sup>41</sup> See, e.g., Pozen, *supra* note 13, at 276 (restricting analysis to “secrets used in the formulation or administration of executive branch public policy”); Fenster, *supra* note 14, at 317 (describing the formal and informal laws and norms that enable executive branch secrecy).

<sup>42</sup> See, e.g., *supra* notes 12–16.

<sup>43</sup> U.S. CONST. art. I, § 5, cl. 3.

<sup>44</sup> *Id.* art II, § 3.

<sup>45</sup> *Id.* amend. VI.

President's executive privilege.<sup>46</sup> Yet these structural arguments support the transparency side of the ledger as well. The Constitution is designed to compel the separate branches of government to communicate with one another to function effectively—to enact legislation,<sup>47</sup> appoint judicial nominees,<sup>48</sup> or ratify treaties.<sup>49</sup>

Constitutional history sheds little additional light on the permissible scope of executive branch secrecy. Certain features of the constitutional drafting process are relevant: the Constitutional Convention, for example, took place in secret.<sup>50</sup> The Supreme Court has invoked this fact to support its construction of the executive privilege.<sup>51</sup> But to the extent that the drafters discussed secrecy in government at all, they tended to make only passing reference to the types of information that we would consider national security secrets today, such as military intelligence<sup>52</sup> or the negotiations preceding a treaty.<sup>53</sup> At the same time, they were also wary of excessive secrecy, warning of the perils of an unwatched and unmonitored government.<sup>54</sup> In sum, for nearly every constitutional argument there is in support of federal secrecy—textual, structural, or historical—there is also a counterargument in support of transparency in government.

## 2. Statutory Secrecy

Perhaps the most visible way that the federal government shields its national security secrets is through “a complex and often overlapping” patchwork of federal statutes that criminalize the unauthorized disclosure of classified information.<sup>55</sup> Foremost among these laws is the 1917 Espionage

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<sup>46</sup> See *United States v. Nixon*, 418 U.S. 683, 708 (1974) (“The [executive] privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”).

<sup>47</sup> U.S. CONST. art. I § 7.

<sup>48</sup> *Id.* art. II § 2, cl. 2.

<sup>49</sup> *Id.*; see also Pozen, *supra* note 13, at 300 (“The quintessential structural feature of the Constitution, the distribution of powers across the coordinate branches, serves as an information-forcing device.”).

<sup>50</sup> *Nixon*, 418 U.S. at 705 n.15.

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., Letter from George Washington to Patrick Henry (Feb. 24, 1777), in *THE PAPERS OF GEORGE WASHINGTON* 437 (Dorothy Twohig, Philander D. Chase, Beverly H. Runge, Frank E. Grizzard, Jr., Mark A. Mastromarino, Elizabeth B. Mercer & Jack D. Warren eds., 1985) (describing the importance of military secrecy).

<sup>53</sup> See, e.g., *THE FEDERALIST* NO. 64 (John Jay) (describing the importance of secrecy in treaty negotiations).

<sup>54</sup> See, e.g., Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *IX THE WRITINGS OF JAMES MADISON* 103 (Gaillard Hunt ed., 1910) (“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”).

<sup>55</sup> STEPHEN P. MULLIGAN & JENNIFER K. ELSEA, *CONG. RSCH. SERV., R41404, CRIMINAL PROHIBITIONS ON LEAKS AND OTHER DISCLOSURES OF CLASSIFIED DEFENSE INFORMATION* 1 (2017).

Act.<sup>56</sup> Enacted upon the eve of the United States' entrance into the First World War, the statute criminalizes the improper sharing of information "connected with the national defense."<sup>57</sup> A variety of other statutes separately criminalize the unauthorized disclosure of classified or sensitive information. They prohibit government employees from disclosing classified information,<sup>58</sup> for example, or criminalize the dissemination of certain types of information, such as the identities of covert agents.<sup>59</sup>

A second group of federal "secrecy" statutes govern the dissemination of government information more broadly.<sup>60</sup> The most prominent of these is the Freedom of Information Act.<sup>61</sup> The structure of this law is most likely familiar to readers. In broad strokes, it creates a presumption of public access to government records but carves out nine specific categories of records to be withheld from public view. The most significant of these exemptions offer protections for classified documents, inter-agency and other privileged communications, documents containing private information, trade secrets, and law enforcement records.<sup>62</sup> The statutes that regulate classified material largely affect federal employees; it is through FOIA, in contrast, that the average citizen is most likely to interact with the federal secrecy regime.

### 3. Executive Secrecy

The President has a variety of tools at his disposal to shield information from public view.<sup>63</sup> But these powers are at their apex in the national security context. The Supreme Court has held that the President enjoys near-plenary control over national security information, reasoning that the chief executive's responsibilities as commander in chief of the military vests him or her with inherent authority to control national security information, apart from any explicit constitutional grant.<sup>64</sup> Further, the President enjoys exclusive authority to enact the procedures by which the classification process is governed.<sup>65</sup>

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<sup>56</sup> Espionage Act of 1917, ch. 30, 40 Stat. 217 (codified at 18 U.S.C. §§ 793-798).

<sup>57</sup> *Id.* § 793(c).

<sup>58</sup> 18 U.S.C. § 1924.

<sup>59</sup> 50 U.S.C. §§ 3121-26.

<sup>60</sup> *See, e.g.*, The Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896 (codified at 5 U.S.C. § 552a); The Government in Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (codified as amended in scattered sections of 5 and 39 U.S.C.).

<sup>61</sup> 5 U.S.C. § 552; *see also* Pozen, *supra* note 39, at 118 (describing FOIA as the "canonical piece of transparency legislation").

<sup>62</sup> 5 U.S.C. § 552(b)(1)-(7).

<sup>63</sup> *See, e.g., id.* § 552(b) (outlining FOIA exemptions).

<sup>64</sup> *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1987).

<sup>65</sup> *See* Exec. Order No. 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010) (proscribing a new "uniform system" for classifying national security information).

Trillions of pages of government records are now classified and excluded from public view.<sup>66</sup> Legislators, scholars, and even executive branch officials have called attention in recent years to the problem of over-classification. They have noted that the executive branch has every motivation to shield documents from public view, but little incentive to limit or reverse the classification process.<sup>67</sup> As a consequence, there has been a staggering growth in federal secrecy in recent decades, especially in the wake of 9/11.<sup>68</sup> Huge sections of the executive branch are now walled off from public view, including much of the national security state.<sup>69</sup>

A second, less formalized way that the executive branch exerts control over national security secrets is by exercising prosecutorial discretion over whether and when to pursue leaks of classified information. Such leaks occur daily in Washington, and yet the prosecution of leakers is still exceedingly rare: one scholar has put the percentage of indictments of leakers at “close[] to zero.”<sup>70</sup> The handful of prosecutions that do move forward, however, tend to have far-reaching effects. They serve to remind government officials of the stiff penalties they face for releasing sensitive or classified information to the public, and they send a message about the types of secrets the administration has prioritized.<sup>71</sup>

#### 4. Judicial Secrecy

The federal judiciary both creates and abides by a separate set of institutional rules intended to protect government secrets. It reviews classified documents in camera,<sup>72</sup> for example, or permits ex parte filings when national security information is implicated.<sup>73</sup> Further, a wholly separate

<sup>66</sup> PUB. INT. DECLASSIFICATION BD., TRANSFORMING *THE SECURITY CLASSIFICATION SYSTEM* 5 (2012), <https://www.archives.gov/files/declassification/pidb/recommendations/transforming-classification.pdf> [<https://perma.cc/4KBL-RD97>].

<sup>67</sup> See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 417 (2004) [hereinafter 9/11 COMMISSION REPORT], <https://govinfo.library.unt.edu/911/report/911Report.pdf> [<https://perma.cc/UTB9-U2T3>] (“No one has to pay the long-term costs of overclassifying information, though these costs—even in literal financial terms—are substantial.”).

<sup>68</sup> See Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 133 (2006) (describing the growth in secrecy post-9/11).

<sup>69</sup> See Fenster, *supra* note 29, at 922-23 (describing how overclassification hinders FOIA); David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1118-23 (2017) (noting the extent to which national security information is shielded under FOIA).

<sup>70</sup> Pozen, *supra* note 12, at 536.

<sup>71</sup> See Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and A Closer Look at the Feasibility of Protecting Leakers*, 56 WM. & MARY L. REV. 1221, 1257-58 (2015) (discussing the significant impact of the few prosecutions that are ultimately undertaken against classified information leakers).

<sup>72</sup> See, e.g., 5 U.S.C. § 552(a)(4)(B) (permitting in camera review).

<sup>73</sup> See, e.g., *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) (“[T]he court has inherent authority to review classified material ex parte, in camera as part of its judicial review function.”).

judicial apparatus oversees and regulates the gathering of foreign intelligence information.<sup>74</sup> In this way, the judiciary works to ensure that the legal process itself will not unleash national security secrets.

Separately, federal courts have interpreted the law in ways that facilitate the executive branch's ability to both generate and protect national security secrets. There are myriad examples of such judicially-created tools of executive secrecy. But especially relevant to the subfederal context are the various evidentiary privileges the federal judiciary has granted to the chief executive.<sup>75</sup> Three subsets of this privilege, in particular, have implications for the subfederal secrecy regime: the federal state secrets privilege, the presidential communications privilege, and the deliberative process privilege.

The first of these, the federal state secrets privilege, is the most straightforward. It permits the President and high-ranking executive officials to shield information when there is a reasonable danger that disclosure would harm national security. Its protection is absolute.<sup>76</sup> The presidential communications privilege, in contrast, is a qualified one that shields the chief executive's communications with close advisors.<sup>77</sup> First articulated in *United States v. Nixon*, the privilege gives rise to a rebuttable presumption of protection, placing the burden on the opposing party to overcome this presumption with a demonstration of need.<sup>78</sup>

The final executive privilege, the deliberative process privilege, is also qualified. It permits the executive branch to withhold predecisional, advisory records from public view.<sup>79</sup> It sweeps more broadly than the other two privileges, shielding not only the records of the President and his top advisors, but also those held by agency officials throughout the executive branch.<sup>80</sup> Yet it is also a weaker privilege, more difficult to secure than the presidential communications privilege, and more easily overcome.<sup>81</sup> Together,

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<sup>74</sup> Foreign Intelligence Surveillance Act, 50 U.S.C. § 1803.

<sup>75</sup> See Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491 (2007) (noting that executive secrecy is "most visible and most notorious when [it] take[s] the form of an executive privilege claim").

<sup>76</sup> See *United States v. Reynolds*, 345 U.S. 1, 7 (1953) (recognizing absolute privilege for state secrets). The federal state secrets privilege is sometimes referred to as a subset of the executive privilege and sometimes as a wholly separate privilege held by the executive branch. Compare, e.g., *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 541 (D.C. Cir. 1977) (referring to the state secrets privilege as a type of executive privilege), with *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 398 n.2 (D.C. Cir. 1984) (referring to the executive privilege as distinct from the state secrets privilege).

<sup>77</sup> See generally *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>78</sup> *Id.* at 708, 713-15.

<sup>79</sup> See *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) ("The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need.").

<sup>80</sup> *Id.* This is the privilege enshrined in Exemption 5 of FOIA. 5 U.S.C. § 552(b)(5).

<sup>81</sup> See *Redland Soccer Club, Inc. v. Dep't of Army*, 55 F.3d 827, 854 (3d Cir. 1995) ("The privilege, once determined to be applicable, is not absolute.").

these three privileges grant the President ample authority to shield information from public view.

The federal judiciary has enabled executive branch secrecy in other ways as well. One striking example is the federal courts' narrow interpretations of FOIA. Congress attempted to limit the executive branch's authority to shield information with the enactment of the federal statute, and yet the courts have consistently construed this statute in ways that advance, rather than impede, secrecy in government.<sup>82</sup> The judicially-created "Glomar response," for example, permits the federal agencies to refuse to acknowledge the mere existence of requested records.<sup>83</sup> The federal courts also grant an unusual level of deference to agencies' national security determinations in FOIA cases.<sup>84</sup> Taken together, these various doctrines and decisions substantially enhance the federal secrecy regime.

### B. States' Secrets

The scarcity of national security secrets in the state and local context alters the landscape of the subfederal secrecy regime. This Section examines what secrecy looks like in state and local government, setting the stage for a later exploration of the ways that the federal secrecy architecture—which is largely oriented around the protection of national security secrets—has bled into state and local law in recent decades.

The full landscape of subfederal secrecy is as vast and unchartable as that of the federal regime. Any intentional withholding of information by state and local government arguably qualifies. To render this topic more manageable, I use national security secrecy as a touchstone. I do not exhaustively catalogue the various sources of subfederal secrecy, but rather explore points of divergence from the federal regime—taking the federal discussion of national security secrecy as a roadmap, and then following this same terrain through state and local law and practice.

#### 1. Constitutional Secrecy

Like the federal Constitution, the fifty state constitutions contain surprisingly few explicit references to secrecy in government. Many state

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<sup>82</sup> See generally Kwoka, *supra* note 15.

<sup>83</sup> *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976); *Mil. Audit Project v. Casey*, 656 F.2d 724, 733 (D.C. Cir. 1981).

<sup>84</sup> Kwoka, *supra* note 15, at 187; see, e.g., *Maynard v. CIA*, 986 F.2d 547, 555 (1st Cir. 1993) ("[I]n determining whether withheld material relates to intelligence sources or methods, the court must accord substantial weight and due consideration to [the agency]." (internal quotation marks omitted)).

constitutions require that elections be conducted via secret ballot,<sup>85</sup> for example, or permit legislative proceedings to be closed to the public “when secrecy is required.”<sup>86</sup> Overall, however, few state constitutions address government secrecy in any meaningful way.<sup>87</sup> The same holds true for transparency in government. Most states enumerate certain circumstances under which openness is constitutionally mandated—they require a list of public expenditures be disclosed periodically,<sup>88</sup> for instance, or provide instructions for publicizing constitutional amendments.<sup>89</sup> But rarely do these constitutional provisions go further.<sup>90</sup>

Every state constitution divides power among the three branches of government,<sup>91</sup> and, in theory, many of the structural arguments made for or against secrecy in government could apply at the state level as well. Yet distinctions do exist.<sup>92</sup> For one, many state constitutions enshrine separation of powers explicitly within the text,<sup>93</sup> and state judges have debated whether these provisions suggest a more rigid separation between the branches than exists at the federal level.<sup>94</sup> Further, while the structure of state government may nominally imitate that of the federal government, there are marked distinctions in how these branches operate. Differences in how state legislatures are constituted can hinder the development of a fully

<sup>85</sup> See, e.g., ALA. CONST. art. V, § 3 (“Secrecy of voting shall be preserved.”); ARIZ. CONST. art. 7, § 1 (same).

<sup>86</sup> ARK. CONST. art. V, § 13; see also COLO. CONST. art. V, § 14 (“The sessions of each house . . . shall be open, unless when the business is such as ought to be kept secret.”).

<sup>87</sup> There are exceptions: the North Carolina Constitution, for example, still contains a Reconstruction-era prohibition on “secret political societies.” N.C. CONST. art. I, § 12; see also Dillard S. Gardner, *The Continuous Revision of Our State Constitution*, 36 N.C. L. REV. 297, 300 (1958) (noting that this provision was enacted in 1875).

<sup>88</sup> See, e.g., IOWA CONST. art. 3.02, § 18 (“An accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws, at every regular session of the general assembly.”).

<sup>89</sup> See, e.g., COLO. CONST. art. V, § 24 (“No law shall be revived, or amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length.”).

<sup>90</sup> One exception is Florida, which contains an express constitutional right of access to government information. FLA. CONST. art 1, § 24.

<sup>91</sup> Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederal Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190-91 (1999).

<sup>92</sup> See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 238-39 (2009) (noting that each state has its own distinct distribution of powers).

<sup>93</sup> See Rossi, *supra* note 91, at 1191 (noting that 35 state constitutions contain this clause).

<sup>94</sup> Compare, e.g., *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924-25 (Fla. 1978) (relying on separation of powers provision to uphold nondelegation doctrine), with *Brown v. Heymann*, 297 A.2d 572, 576-77 (N.J. 1972) (declining to construct separation of powers more rigidly based on an explicit constitutional provision).

professionalized legislative branch, for instance, magnifying the power of the state executive branch relative to the state legislature.<sup>95</sup>

There are historical distinctions as well. In contrast with the U.S. Constitution, many states' constitutions were drafted in public view.<sup>96</sup> Moreover, many state constitutions have been repeatedly amended or even replaced altogether, making the task of ferreting out the views and intentions of the "framers" far more difficult.<sup>97</sup> As a consequence, state judges tend not to look as rigorously at original intent as an interpretive method.<sup>98</sup> Such historical distinctions can alter the way that state judges resolve questions of secrecy in government as well.

## 2. Statutory Secrecy

There are no state statutes comparable to those restricting the disclosure of classified information at the federal level, since there is no formal classification system in the states. Arguably the closest analogue is the assortment of state statutes that prohibit information disclosures in the criminal law context, such as those that require secrecy in grand jury proceedings.<sup>99</sup> Overall, however, the statutory regime governing information disclosures in state and local government is both less coherent and less punitive than that which governs national security information.<sup>100</sup>

There is greater overlap in federal and state law when it comes to public records statutes. Every state has a public records law providing a private right of access to government information, and the structure of these statutes broadly resemble that of FOIA: government information is presumptively accessible to the public, with certain enumerated exemptions.<sup>101</sup> One key

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<sup>95</sup> See JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS 168-69 (2005) ("Congress's high degree of professionalization and busy calendar make it a far more potent generator of legislative initiatives than its unprofessionalized, part-time state counterparts . . ."). There are distinctions embedded in the constitutional text as well. See G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 339 (2003) (providing examples of these textual differences).

<sup>96</sup> See discussion *infra* notes 340-41.

<sup>97</sup> GARDNER, *supra* note 95, at 27-29.

<sup>98</sup> *Id.* at 11 (noting state courts' "general unwillingness to address the intentions of the drafters and ratifiers of the state constitution").

<sup>99</sup> See, e.g., N.Y. PENAL LAW § 215.70 (McKinney 2020) (criminalizing the intentional disclosure of grand jury information without authorization); MO. ANN. STAT. § 540.120 (West 2020) (violating grand jury oath of secrecy is a Class B misdemeanor). Statutes requiring confidentiality in police records are also somewhat analogous. See generally Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. 153, 158 (2019).

<sup>100</sup> See generally MULLIGAN & ELSEA, *supra* note 55, at 1 (describing the legal regime governing the unauthorized disclosure of classified information).

<sup>101</sup> See Koningisor, *Deserts*, *supra* note 39, at 1475-79 (providing an overview of state public records laws).

distinction, however, is how central these laws are to the broader government secrecy regime. At the federal level, secrecy conflicts are often concentrated around leaks of classified information.<sup>102</sup> At the state level, in contrast, these public records laws tend to serve as the locus for government secrecy disputes.<sup>103</sup> As a consequence, these statutes play an outsized role in holding the government accountable to the public.<sup>104</sup>

### 3. Executive Secrecy

There is no classification system at the state level. To the extent that state executive branch officials shield government information, they tend to do so by exercising discretionary tools made available to them by the judicial and legislative branches: state agencies withhold records under a public records act exemption,<sup>105</sup> for example, or police officers withhold investigatory records pursuant to a common law privilege.<sup>106</sup>

The absence of classified information alters the nature of “leaks” investigations at the state and local level as well. Today, this term usually refers to efforts to identify the source of classified information that has been disclosed without authorization.<sup>107</sup> Yet historically, these types of national security leak investigations were fairly rare. For centuries, such inquiries were more typically focused on identifying the sources of confidential information about criminal proceedings in state and local court.<sup>108</sup> Such efforts continue at the state and local level today,<sup>109</sup> in the context of both unauthorized disclosures of grand jury information and leaks of law enforcement

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<sup>102</sup> See generally Pozen, *supra* note 12, at 513.

<sup>103</sup> See, e.g., *Nero v. Hyland*, 386 A.2d 846, 848-49 (N.J. 1978) (involving a dispute over a public records claim); *Killington, Ltd. v. Lash*, 572 A.2d 1368, 1370-71 (Vt. 1990) (same).

<sup>104</sup> See Koningisor, *Deserts*, *supra* note 39, at 1536-42 (defending the importance of public records statutes to public oversight at the state and local level).

<sup>105</sup> See, e.g., *id.* at 1506 (“Florida law, for example, contains 1,000 exemptions to public disclosure.”).

<sup>106</sup> See, e.g., *In re Marriage of Daniels*, 607 N.E.2d 1255, 1266 (Ill. 1992) (recognizing law enforcement investigatory privilege); *Reinstein v. Police Comm’r of Bos.*, 391 N.E.2d 881, 886 (Mass. 1979) (same).

<sup>107</sup> See Pozen, *supra* note 12, at 513 (exploring the ecosystem of federal leaks).

<sup>108</sup> See Christina Koningisor, *The De Facto Reporter’s Privilege*, 127 YALE L.J. 1176, 1215, 1219, 1221, 1228, 1230 (2018) [hereinafter Koningisor, *Privilege*] (describing these investigations).

<sup>109</sup> See, e.g., *People v. McKee*, 24 N.E.3d 75, 79 (Ill. App. Ct. 2014) (reversing lower court decision to compel reporter to reveal his source of leaked grand jury materials).

investigatory materials.<sup>110</sup> Yet these investigations do not garner the level of public attention that national security leaks investigations now receive.<sup>111</sup>

Of course, governors and mayors—like the President—must routinely contend with information leaks to the press, from drafts of state budgets to the contents of emails.<sup>112</sup> Yet broader structural impediments blunt the impact of state and local government leaks. Arguably, the most important of these developments is the collapse of local media, which has made it less likely that information about state and local government will make its way into the press.<sup>113</sup> As a consequence, leaks seem to play a lesser role in the information ecosystem surrounding state and local government than they do in the federal context.

#### 4. Judicial Secrecy

State judges likewise have a variety of tools at their disposal to shield information from public view. It is no accident that the judiciary is described as the “most secretive” branch.<sup>114</sup> Yet this Section confines itself to much the same terrain as the previous discussion of federal judicial secrecy, concentrating on sources of subfederal secrecy that are in some way adjacent to the national security secrecy regime. This allows for a more targeted inquiry into two types of judicial secrets that are especially central to the process of secrecy creep: executive privilege in the states, and state court interpretations of public records laws.

State courts have diverged in their approach to gubernatorial privilege claims. Many have recognized a state common law deliberative process privilege analogous to the federal one.<sup>115</sup> This makes sense: the same common law history supports the protection of predecisional records at both the state and federal level, and policy concerns about the chilling of government speech

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<sup>110</sup> See, e.g., *In re Search of Verizon Wireless, State of California, City and County of San Francisco* (Mar. 1, 2019), <https://www.rcfp.org/wp-content/uploads/2019/07/Bryan-Carmody-Search-Warrant-RCFP.pdf> [<https://perma.cc/R7QJ-5R9P>] (categorizing the leak of a police report as a criminal theft violation under Cal. Penal Code § 484(a)).

<sup>111</sup> Cf. Koningisor, *Privilege*, *supra* note 108, at 1204 n.153 (noting that the *N.Y. Times* ran sixty-four stories and letters when one of its reporters was jailed for refusing to name a source).

<sup>112</sup> See, e.g., Carl Golden, Opinion, *I Was Press Secretary for 2 N.J. Governors: Trump Will Fail in Crusade Against Leaks*, N.J. STAR LEDGER (Feb. 28, 2017, 11:40 AM), [https://www.nj.com/opinion/2017/02/i\\_was\\_press\\_secretary\\_for\\_2\\_nj\\_governors\\_trump\\_wil.html](https://www.nj.com/opinion/2017/02/i_was_press_secretary_for_2_nj_governors_trump_wil.html) [<https://perma.cc/3DKF-YAFV>] (“[Governors] deal[] with leaks and their fallout almost daily.”).

<sup>113</sup> See discussion *infra* subsection III.B.2.

<sup>114</sup> Joel Cohen, *An Interview with Judge Richard A. Posner*, ABA J., July 2014, at 53, 56.

<sup>115</sup> See, e.g., *Gwich* in Steering Comm. v. State of Ala., Off. of the Governor, 10 P.3d 572, 579 (Ala. 2000) (recognizing common law deliberative process privilege); *City of Colo. Springs v. White*, 967 P.2d 1042, 1049-50 (Colo. 1998) (same); *Ostoin v. Waterford Twp. Police Dep’t*, 471 N.W.2d 666, 668 (Mich. 1991) (same).

apply in both contexts.<sup>116</sup> The federal state secrets privilege, in contrast, has surfaced only rarely at the state level. The federal courts have emphasized that the privilege is “not to be lightly invoked,”<sup>117</sup> available only where there is “a palpable threat to national security.”<sup>118</sup> Unsurprisingly, state judges tend to look unfavorably on these claims. I could find no examples of a state court extending an absolute privilege to shield government secrets. Few state or local officials have even tried.<sup>119</sup>

In other words, the deliberative process privilege is sufficiently removed from the national security realm to make its application in the state context fairly uncontroversial. The federal state secrets privilege, in contrast, is so closely tethered to national security concerns that its inapplicability to state and local government secrets is likewise undisputed. That leaves the confidential communications privilege, often referred to at the state level as the gubernatorial communications privilege. This is the most contested of the three.<sup>120</sup> It is also the privilege that is most vulnerable to secrecy creep.

State courts have diverged in their treatment of gubernatorial privilege claims.<sup>121</sup> In the wake of *Nixon*, a handful of courts adopted an equivalent gubernatorial communications privilege.<sup>122</sup> But most of these early cases recognized some amalgamation of the different strands of executive privilege. They tended to blur the lines of these evidentiary shields and use the phrase “executive privilege” interchangeably to refer to different types of

<sup>116</sup> See, e.g., *White*, 967 P.2d at 1047 (describing the privilege’s origins in British law). *But see* *Babets v. Sec’y of Exec. Off. of Hum. Servs.*, 526 N.E.2d 1261, 1263 (Mass. 1988) (declining to recognize deliberative process privilege).

<sup>117</sup> *United States v. Reynolds*, 345 U.S. 1, 7 (1953).

<sup>118</sup> *U.S. Steel Corp. v. United States*, 578 F. Supp. 409, 413 (Ct. Int’l Trade 1984).

<sup>119</sup> See, e.g., *Rubin v. City of Los Angeles*, 190 Cal. App. 3d 560, 577 (Cal. Ct. App. 1987) (rejecting Los Angeles’s claim to the state secrets privilege articulated in *Reynolds*, reasoning that only the federal government may invoke this privilege).

<sup>120</sup> Many decisions recognizing a privilege have been handed down over strong dissents. See, e.g., *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 489 (Ohio 2006) (Pfeifer, J., dissenting); *Freedom Found. v. Gregoire*, 310 P.3d 1252, 1267 (Wash. 2013) (Johnson, J., dissenting).

<sup>121</sup> Roughly ten states have addressed the existence of the executive communications in the gubernatorial context. Four have adopted the privilege into state law. See *Taft*, 848 N.E.2d at 474; *Freedom Found.*, 310 P.3d at 1256; *Doe v. Ala. Superior Ct., Third Jud. Dist.*, 721 P.2d 617, 625 (Ala. 1986); *Nero v. Hyland*, 386 A.2d 846, 853 (N.J. 1978). Four have recognized some amalgamation of the executive communications privilege and the deliberative process privilege. See *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 785 (Del. Super. Ct. 1995); *Hamilton v. Verdow*, 414 A.2d 914, 925 (Md. 1980); *Killington, Ltd. v. Lash*, 572 A.2d 1368, 1374 (Vt. 1990); *Vandelay Ent., LLC v. Fallin*, 343 P.3d 1273, 1278-79 (Okla. 2014). One has recognized a privilege modeled on *Nixon*, but amended its scope. *Republican Party of N.M. v. N.M. Tax’n & Revenue Dep’t*, 283 P.3d 853, 866 (N.M. 2012). And one has rejected the privilege outright. *Babets*, 526 N.E.2d at 1263.

<sup>122</sup> See, e.g., *Doe*, 721 P.2d at 622-23 (recognizing a constitutionally-based privilege modeled on *Nixon*); *Nero*, 386 A.2d at 853 (same).

informational protections.<sup>123</sup> It is only more recently that courts have begun to cleanly distinguish between the constitutional and common law privileges.<sup>124</sup> This has set the stage for a clearer-eyed treatment of *Nixon* and its applicability to gubernatorial records.

Only a handful of states have squarely addressed this question. But two of them—Ohio and Washington—have essentially adopted the Court’s reasoning in *Nixon* into state law.<sup>125</sup> Both state supreme courts have recognized a constitutional privilege explicitly modeled on the presidential communications privilege, one that creates a presumptive shield for gubernatorial communications and places the burden on the party seeking disclosure to demonstrate need.<sup>126</sup> Further, both decisions rely heavily on analogues between the constitutional role of the governor in state government and that of the president in the federal context.<sup>127</sup> Both were also handed down over strong dissents.<sup>128</sup>

Evidentiary privileges are not the only place where state courts have followed the lead of the federal judiciary. State judges have also adopted the doctrines and practices developed by federal judges to curtail the transparency effects of FOIA. States have expressly permitted state and local agencies to issue a Glomar response,<sup>129</sup> for example, or borrowed the federal courts’ deferential approach to government claims of harm.<sup>130</sup> As in the federal context, these written and unwritten doctrines and practices have helped to expand the subfederal secrecy regime.

### C. Federal Secrets in the States

A potential counterargument to this Article’s critique of secrecy creep is that state and local governments are inextricably intertwined with the national security state. Disentangling national security concerns from state

<sup>123</sup> See, e.g., *Guy*, 659 A.2d at 785 (mixing elements of both the deliberative process and confidential communications privileges); *Verdow*, 414 A.2d at 925 (same); *Killington*, 572 A.2d at 1374 (same).

<sup>124</sup> In 1997, the D.C. Circuit issued an opinion clearly setting forth the distinctions in both origin and substance of the deliberative process and presidential communications privilege. See *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). State and federal courts have begun to disentangle these privileges in the wake of that decision. See, e.g., *Freedom Found.*, 310 P.3d at 1261 n.6 (relying on *In re Sealed Case* to distinguish between two privileges). But see *Vandelay Ent.*, 343 P.3d at 1278-79 (continuing to mix elements of the two privileges).

<sup>125</sup> *Dann*, 848 N.E. 2d at 484; *Freedom Found.*, 310 P.3d at 1260.

<sup>126</sup> *Dann*, 848 N.E. 2d at 485-87; *Freedom Found.*, 310 P.3d at 1261-63.

<sup>127</sup> See *Dann*, 848 N.E. 2d at 484 (recognizing that the “same interests” are advanced in the gubernatorial context); *Freedom Found.*, 310 P.3d at 1260 (noting that both the governor and the president are vested with executive power).

<sup>128</sup> See *supra* note 120.

<sup>129</sup> E.g., *N. Jersey Media Grp. Inc. v. Bergen Cnty. Prosecutor’s Off.*, 146 A.3d 656, 667 (N.J. Super. Ct. App. Div. 2016).

<sup>130</sup> E.g., *Va. Dep’t of Corr. v. Surovell*, 776 S.E.2d 579, 584 (Va. 2015).

and local government, under this view, creates a false dichotomy. Governors oversee the National Guard, after all, and mayors must shield their cities from national security threats.<sup>131</sup> Further, national security information is routinely shared across these borders. In 2012, President Obama issued an entire directive dedicated to streamlining procedures for sharing classified materials with state, local, and tribal governments.<sup>132</sup>

Such information sharing, however, creates less definitional confusion than might be expected. When state and local actors obtain access to national security materials, they are pulled under the broader umbrella of the federal secrecy regime. State and local actors who received classified information must abide by the same secrecy laws and regulations that bind federal officials.<sup>133</sup> The mere possession of national security information passed along by federal actors does not meaningfully impact the distinct secrecy ecosystem that exists at the state and local level.

These lines become more blurred when state and local actors themselves generate intelligence information with a national security dimension.<sup>134</sup> This happens most often in the law enforcement context. There is a long history of federal-state cooperation with intelligence gathering. Most infamously, police departments routinely assisted the FBI under Director J. Edgar Hoover in its investigations into civil rights and anti-war groups in the 1950s and 60s.<sup>135</sup> Yet when these activities, and the abuses they entailed, eventually came to light, local police departments largely backed away from such collaborative efforts. Many shuttered their intelligence-gathering units altogether.<sup>136</sup>

This changed again in the wake of September 11, when local police were reenlisted in federal intelligence-gathering efforts, this time in the fight against terrorism.<sup>137</sup> Federal officials reasoned that police officers' knowledge of local communities would allow them to recognize when something was amiss, permitting them to serve as the first line of defense against another domestic terrorism attack.<sup>138</sup> A wealth of new federal-local intelligence-

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<sup>131</sup> See, e.g., 9/11 COMMISSION REPORT, *supra* note 67, at 390 (noting the “growing role for state and local law enforcement agencies” in “identifying terrorist suspects”).

<sup>132</sup> OFF. OF THE CHIEF SEC. OFFICER, DEP'T OF HOMELAND SEC., CLASSIFIED NATIONAL SECURITY INFORMATION PROGRAM FOR STATE, LOCAL, TRIBAL AND PRIVATE SECTOR ENTITIES (2012), <https://www.dhs.gov/sites/default/files/publications/mgmt-classified-national-security-program-implementation-directive.pdf> [<https://perma.cc/9VT7-D2QA>].

<sup>133</sup> *Id.* at 7-8.

<sup>134</sup> I use the word “intelligence” to refer to information that is “gathered clandestinely through eavesdropping or other data collection methods . . . to provide a longer-term view of a problem and shape longer-term interventions.” RILEY ET AL., *supra* note 25, at 2.

<sup>135</sup> Waxman, *supra* note 25, at 298.

<sup>136</sup> See *id.* at 300-01 (citing litigation, embarrassment, and corruption as key motivators).

<sup>137</sup> 9/11 COMMISSION REPORT, *supra* note 67, at 390, 427.

<sup>138</sup> See *id.* at 427; RILEY ET AL., *supra* note 25, at 1.

gathering initiatives sprung up.<sup>139</sup> These included fusion centers—or data-sharing sites where federal, state, and local agencies share intelligence information—as well as joint terrorism task forces, or partnerships between federal and subfederal agencies to engage in counterterrorism efforts.<sup>140</sup>

These arrangements have allowed state and local law enforcement agencies to funnel intelligence information to federal agencies. Yet they have not necessarily given rise to a profusion of national security secrets in state and local government. There is a rich body of cross-disciplinary literature examining the relationship between the federal national security agencies and local law enforcement agencies in combatting terrorism.<sup>141</sup> It reveals that police departments have been largely relegated to the role of information gatherers in these joint federal-local efforts, collecting the raw data used to identify terrorism threats but rarely assisting with the intelligence analysis that converts this information into a more traditional national security secret.<sup>142</sup> As one scholar put it, “local agencies lack the analytical resources to pull together the disparate data points that are gathered in the name of counterradicalization intelligence and stitch them into a coherent narrative.”<sup>143</sup> In other words, even when the police engage in activities with a national security dimension, they do not necessarily gain access to national security secrets.<sup>144</sup>

This leaves a final scenario. Some larger police departments operate not at the direction of the federal government but independently to combat national security threats.<sup>145</sup> This presents the most difficult case: it is no accident that many of the examples of secrecy creep chronicled here arise in the context of the New York City Police Department, which has modeled its intelligence unit in the image of the CIA.<sup>146</sup> Local agencies that function like national security agencies, one could argue, should have access to these heightened secrecy protections.

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<sup>139</sup> RILEY ET AL., *supra* note 25, at 3.

<sup>140</sup> Waxman, *supra* note 25, at 333.

<sup>141</sup> See, e.g., Mathieu Deflem, *Social Control and the Policing of Terrorism: Foundations for a Sociology of Counterterrorism*, 35 AM. SOCIOLOGIST 75, 89 (2004) (predicting police departments will resist federalization of counterterrorism efforts); William J. Stuntz, Essay, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2138 (2002) (predicting an expansion of the power of local police in the wake of 9/11).

<sup>142</sup> See, e.g., RILEY ET AL., *supra* note 25, at 58 (“[I]t is striking how limited the analytic capacity is at the local level.”); Waxman, *supra* note 25, at 334 (“[M]any joint task forces do not actually provide opportunities for serious intergovernmental deliberation because their decisionmaking tends to be dominated by their federal leadership . . .”).

<sup>143</sup> Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX. L. REV. 1715, 1735 (2010).

<sup>144</sup> For a definition of “national security secrets,” see *supra* note 22.

<sup>145</sup> There is no uniform definition of what constitutes a “national security threat.” The federal government has increasingly expanded the definition to encompass a wide variety of risk areas, including trade, travel, organized crime, and public health. See Donohue, *supra* note 22, at 1575.

<sup>146</sup> See discussion *infra* subsection II.D.2.

The most forceful response is that it is this model of policing that is flawed, not the bounds of the law. Rather than ramp up the secrecy tools of local law enforcement agencies to close the gap between these functional activities and formal legal protections, we should instead ramp down the national security-type activities of local police departments. In other words, if this Article's critique of secrecy creep breaks down along functionalist grounds, then the problem is the erasure of the functional lines dividing federal and local agencies, not the inadequate nature of police departments' secrecy protections.<sup>147</sup>

That being said, I do not argue that these secrecy tools must never be used in the state and local context. Some measure of secrecy creep may be justified under certain conditions.<sup>148</sup> But such exceptions will be limited. And even accepting the possibility that some amount of secrecy creep is inevitable, even necessary, we must nonetheless remain thoughtful about the drawbacks of this process, and the ways that we might mitigate their more harmful effects.

## II. SECRECY CREEP

There is a wealth of scholarship addressing the topic of legal migration, or the process by which legal doctrines, concepts, tropes, and practices move over time.<sup>149</sup> The entire field of comparative law could be framed as a study of the movement of legal ideas.<sup>150</sup> A subset of this literature, however, explores legal migration specifically in the national security context. This scholarship is largely concerned with the ways that "extraordinary" circumstances can lead to legal exceptions that then ossify, becoming permanent fixtures in the law.<sup>151</sup>

Much of this work is focused on the legal reverberations of the 9/11 attacks. Scholars have explored, for example, how expanded information-gathering and surveillance programs have watered down criminal processes in the United States,<sup>152</sup> or the risk that prosecuting accused terrorists in the

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<sup>147</sup> See discussion *infra* subsection III.B.4.

<sup>148</sup> See discussion *infra* Section III.A.

<sup>149</sup> Various terms have been used to describe this process, including "drift," see J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 871 (1993), "seep[age]," Gross, *supra* note 35, at 1097; "borrowing," Tebbe & Tsai, *supra* note 35, at 463, and "migration," Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1616 (2006). I use the term "creep" because of its association with the concept of "mission creep."

<sup>150</sup> See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993) (arguing that societies borrow laws from one another, making most law operate differently than originally intended).

<sup>151</sup> Gross, *supra* note 35, at 1097; see also DONOHUE, *supra* note 36, at 2 ("New powers end up being applied to nonterrorists—often becoming part of ordinary criminal law.").

<sup>152</sup> See, e.g., Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 524 (2006)

domestic legal system will weaken domestic criminal protections more broadly.<sup>153</sup> Professor Shirin Sinnar has tweaked this formula somewhat by examining legal migration in the opposite direction—into, rather than out of, the national security sphere.<sup>154</sup> Specifically, she chronicles how the executive branch has taken legal terms of art from constitutional law and applied them in diluted form to the national security context, usually in an effort to persuade the public that the government is sufficiently constrained. She refers to this as the borrowing of “rule of law tropes.”<sup>155</sup> And she warns that these tropes can become entrenched in the law, coalescing over time into an acceptable interpretation of the original doctrine or rule.<sup>156</sup>

Here, I build on Professor Sinnar and others’ work by illuminating a distinct migratory stream: the movement of federal secrecy doctrines and rules out of the national security context and into state law. While legal scholars have long been preoccupied by the expansion of national security secrecy more generally, this particular migratory channel has been largely overlooked. Rather than examine the ratcheting down of due process protections as they cross into and out of the national security realm, this Article describes the ratcheting up of secrecy protections as they enter into the state and local context.

Before exploring this process further, a clearer definition of “secrecy creep” is needed.<sup>157</sup> As it is used in this Article, this term refers to: (1) a legal doctrine, rule, statute, or practice; (2) used to shield records or information from disclosure; (3) initially developed by the federal government to protect national security-related records or information; and (4) subsequently applied to protect state or local government records or information. The following sections explore some examples.

### A. Methodology

Any study of state and local law poses a research challenge. The universe of relevant actors is vast: each of the fifty states has its own executive, legislative

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(warning that the growth of the National Security State could wear away at “the civil liberties protections, checks and balances, and oversight by independent actors (e.g., judges) that we normally associate with the criminal process in the United States”).

<sup>153</sup> See, e.g., Vladeck, *supra* note 37, at 1501 (“[T]hey put pressure on the courts to sanction exceptional departures from procedural or evidentiary norms that will eventually become settled as the rule.”).

<sup>154</sup> Sinnar, *supra* note 35, at 1609-12.

<sup>155</sup> *Id.* at 1609.

<sup>156</sup> *Id.* at 1611.

<sup>157</sup> This Article explores the way that national security secrecy protections have spread from the federal to the state and local context. But the term “secrecy creep” could be used to describe other migrations of secrecy tools—for example, throughout different substantive realms of a single legal system. See *infra* note 412 and accompanying text.

and judicial branches; and each state executive branch separately hosts dozens, sometimes hundreds, of state-level agencies.<sup>158</sup> Further, there are roughly 90,000 local government entities, and many local governments house a variety of smaller governing units, such as police departments, fire departments, zoning boards, and school boards. One state official estimated that there are 10,000 state and local governments and subgovernments in New York state alone.<sup>159</sup>

In light of the complexities involved with studying state and local government, I began my research at the federal level. I first surveyed the existing scholarship exploring legal exceptionalism in the national security context,<sup>160</sup> supplementing this literature with my own experiences litigating against various federal intelligence and law enforcement agencies.<sup>161</sup> I then drew up an initial list of twelve federal secrecy tools that were developed specifically to shield national security secrets.<sup>162</sup>

Next, I turned to state law and practice to determine which of these secrecy tools had begun to surface in the state and local context. In doing so, I relied upon both formal legal sources—such as state statutes and case law—as well as less formal sources, including briefs, agencies' public records responses, documents obtained through public records requests, and news reports. After I located one example of a federal secrecy tool being used in the state or local context, I then searched the records of other states to see if the same protections were being applied elsewhere. I primarily conducted this research by filtering for all state statutes or cases on Westlaw and then plugging in various keywords—for instance, “Glomar,” “confirm nor deny,” and “existence or nonexistence”—to see whether and where the response had

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<sup>158</sup> See Koningisor, *Deserts*, *supra* note 39, at 1468-69.

<sup>159</sup> *Id.* at 1468 n.32.

<sup>160</sup> See, e.g., Kwoka, *supra* note 15, at 212-16 (examining judicial deference to national security claims); Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Claims*, 97 B.U. L. REV. 103, 116-38 (2017) (examining procedural innovations developed to shield national security secrets); Susan Nevelow Mart & Tom Ginsburg, *[Dis-]Informing the People's Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725, 734-752 (2014) (examining judicial deference to national security claims); Pozen, *supra* note 40, at 650-57 (examining mosaic theory claims).

<sup>161</sup> The author has litigated FOIA cases against the Bureau of Alcohol, Tobacco, Firearms and Explosives; CIA; Department of Defense; DEA; FBI; Office of the Director of National Intelligence; and Secret Service Agency; as well as engaged in administrative-level FOIA negotiations with a wide variety of military and intelligence agencies.

<sup>162</sup> This list includes the mosaic theory; the Glomar; deference to national security claims; excluding law enforcement agencies from statutory transparency oversight; the executive communications privilege; the state secrets privilege; classification; criminal laws prohibiting the unauthorized disclosure of classified information; the Classified Information Procedures Act; protections for national security information in immigration proceedings; leaks investigations; and protections for national security information under the Foreign Intelligence Surveillance Act. This initial list is not intended to be exhaustive, but rather concentrates on the most prominent of these federal secrecy tools.

spread. I concluded that of the twelve federal secrecy tools that I initially compiled, at least five had begun to migrate into state law.<sup>163</sup>

This is an imperfect research method: the major case databases are incomplete,<sup>164</sup> and it is virtually impossible to search state and local agency records in any systematic way. There is no centralized repository for state and local agency records, and few subfederal agencies even collect data on public records responses.<sup>165</sup> As a consequence, the examples of secrecy creep that I provide in this paper are, by necessity, somewhat scattered and haphazard. In some cases, this makes it difficult to determine how representative these examples are of the broader legal trends they describe.<sup>166</sup> For instance, only two states have enshrined the Glomar response directly into the text of state law.<sup>167</sup> In contrast, it is impossible to determine exactly how widespread use of the Glomar is at the agency level: there are hundreds of thousands of state and local agencies operating across the country, and little substantive data available about public records denials.<sup>168</sup> In spite of the limitations of this research approach, however, this survey of the legal migration of federal secrecy tools still allows for valuable, if preliminary, insights into a troubling recent development in the law.

### B. *Secrecy Creep in the Judicial Branch*

Secrecy creep is prevalent in the judicial branch. State judges have proven receptive to state and local officials' secrecy claims, adopting a variety of informational protections from the federal context. This Section explores two categories of examples: state courts' adoption of the presidential communications privilege to shield gubernatorial records; and their adoption of various judicial doctrines developed by federal judges to shield national security secrets under FOIA.

#### 1. The Gubernatorial Communications Privilege

In *United States v. Nixon*, the Supreme Court recognized a qualified privilege for the President's communications, one that is rooted in separation

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<sup>163</sup> See *id.*

<sup>164</sup> See generally Merritt McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101 (2021) (describing missing unpublished federal appellate decisions from Westlaw, LexisNexis, and Bloomberg Law).

<sup>165</sup> Only two states—Vermont and Massachusetts—aggregate public records data, and they do so only for state-level agencies. Koningsor, *supra* note 39, at 1480.

<sup>166</sup> I've addressed the representativeness of each secrecy tool in the sections below: for executive privilege, see *supra* note 121; for Glomar responses, see *infra* notes 167–68; for the mosaic theory, see *infra* note 229; for national security deference, see *infra* note 243; and for institutional isomorphism, see *infra* notes 286–91 and accompanying text.

<sup>167</sup> IND. CODE ANN. § 5-14-3-4.4 (West 2020); ME. REV. STAT. ANN. tit. 16, § 807 (West 2020).

<sup>168</sup> See *supra* note 165.

of powers principles.<sup>169</sup> A number of state supreme courts have since imported this decision into state law, relying on *Nixon* to establish an analogous constitutional privilege for gubernatorial communications.<sup>170</sup> In this way, the gubernatorial communications privilege easily fulfills three of the four definitional prongs of national security secrecy creep: it is an informational protection developed in the federal context that has since migrated into state law.

It is the final prong of this definition—the protection’s origins in the national security context—that is less obviously satisfied. One view of the presidential communications privilege is that it derives from the President’s generalized need to preserve confidentiality in his communications, apart from any specific subject matter.<sup>171</sup> There is some language in *Nixon* to support this view. The Court notes, for example, that the “need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties” is “common to all governments.”<sup>172</sup> Under this reading, the privilege is rooted not in national security concerns but in a more universal need for high-level decisionmakers to engage in candid debate. The privilege less obviously qualifies as an example of national security secrecy creep.

A second reading of *Nixon*, however, grounds the communications privilege more firmly in the President’s Article II powers,<sup>173</sup> including her diplomatic and military responsibilities.<sup>174</sup> Under this interpretation, the President has absolute authority to shield state secrets from disclosure, but she also enjoys a more generalized privilege that shields communications at the margins of these national security duties.<sup>175</sup> The Supreme Court alluded to this view when it noted in *Nixon* that “[t]he need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment.”<sup>176</sup> In other words, even if a communication does not meet the high qualifying threshold of a federal state

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<sup>169</sup> 418 U.S. 683, 706 (1974).

<sup>170</sup> See, e.g., *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 483 (Ohio 2006); *Republican Party of N.M. v. N.M. Tax’n & Revenue Dep’t*, 283 P.3d 853, 870 (N.M. 2012); *Freedom Found. v. Gregoire*, 310 P.3d 1252, 1261 (Wash. 2013).

<sup>171</sup> Professor Mark Rozell refers to this as the “candid advice” defense of executive privilege. For a summary, see MARK J. ROZELL, EXECUTIVE PRIVILEGE 46-48 (2002).

<sup>172</sup> *Nixon*, 418 U.S. at 705.

<sup>173</sup> See *id.* at 705-06 (stating that the privilege “has similar constitutional underpinnings” as those that “flow from the nature of [the] enumerated powers”).

<sup>174</sup> U.S. CONST. art. II, § 2.

<sup>175</sup> Professor Rozell refers to this as the “national security” defense of executive privilege. For a summary, see ROZELL, *supra* note 171, at 46-48, 50-51.

<sup>176</sup> *Nixon*, 418 U.S. at 715; see also *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020) (linking executive privilege to the President’s role as commander of the armed forces).

secret, it may still prove integral to the President's unique constitutional duties, including those related to national security. A central function of the privilege, under this view, is to provide the President with decisional elbow room to fulfill these responsibilities.

Seen from this light, an incongruity emerges between the strong secrecy protections articulated in *Nixon* and the actual, day-to-day activities of a state governor. As one state supreme court justice noted in a dissent to his court's adoption of *Nixon*, a governor has no duties comparable to the President's national security activities, "no stealth bombers, nuclear weapons, or immediate plans for war."<sup>177</sup> There is "little, if anything, that the governor handles that a little more public scrutiny could drastically harm," the Justice reasoned. "No death of American citizens or international conflict will result."<sup>178</sup>

One way to resolve the tension between these two readings of *Nixon* is to focus not on the fact of the privilege, but on its degree. Even if we accept that *Nixon* permits some form of protection for gubernatorial communications—one rooted in governors' valid need for "candid, objective, and even harsh opinions" in their decisionmaking processes<sup>179</sup>—it may not justify such a deferential rendering of the privilege. *Nixon* vests the President with a presumptive evidentiary shield, one that can be overcome only by a showing of need.<sup>180</sup> A reviewing court will not reach the applicability of the privilege until this burden is met,<sup>181</sup> and the opposing party must demonstrate particularized need even when allegations of misconduct by high-level officials are involved.<sup>182</sup> Baked into this strong formulation of the privilege, under this view, is the President's unique national security responsibilities. By extending such a deferential privilege to a governor—who commands no army and negotiates no treaties—the state courts engage in secrecy creep.<sup>183</sup>

Put another way, there are two alternative ways to conclude that the state courts' adoption of the privilege set forth in *Nixon* qualifies as an example of secrecy creep. Under the first, the presidential communications privilege is inextricably intertwined with the President's unique diplomatic and military responsibilities under Article II, and by importing this privilege into the state context, courts improperly endow governors with secrecy protections designed to shield the national security state. Alternatively, even if one

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<sup>177</sup> Freedom Found. v. Gregoire, 310 P.3d 1252, 1267 (Wash. 2013) (Johnson, J., dissenting).

<sup>178</sup> *Id.* at 1269.

<sup>179</sup> *Nixon*, 418 U.S. at 708.

<sup>180</sup> *Id.* at 708-09, 713.

<sup>181</sup> *Id.* at 713.

<sup>182</sup> *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997).

<sup>183</sup> This view of *Nixon* has likewise surfaced in the state case law. *See, e.g.*, Republican Party of N.M. v. N.M. Tax'n & Revenue Dep't, 283 P.3d 853, 870 (N.M. 2012) (endorsing a watered-down view of *Nixon* based on comparatively circumscribed gubernatorial duties).

accepts that some privilege is needed to shield gubernatorial communications, importing the deferential privilege outlined in *Nixon* takes this protection a step too far. Adopting *Nixon* wholesale into state law vests a governor with secrecy protections designed to be strong enough to protect information at the margins of the President's military and diplomatic duties. Both are plausible readings of Supreme Court precedent, and both support the conclusion that state courts have engaged in secrecy creep by adopting the privilege articulated in *Nixon* to shield their governors.<sup>184</sup>

Further, this migration does not necessarily end at the governor's door. One lesson that emerges from this study of secrecy creep is that secrecy tools, once imported into state law, rarely stay put.<sup>185</sup> In that vein, local chief executives have begun to lay claim to a "mayoral" communications privilege as well. As noted, Cory Booker invoked the privilege while serving as mayor of Newark.<sup>186</sup> There are other examples as well. The mayor of Anchorage, Alaska, for instance, has claimed the mayoral communications privilege to shield an economic report generated by an executive committee.<sup>187</sup> And in Maryland, a county executive invoked the privilege to quash a deposition in a civil lawsuit concerning a fatal shooting by a county police officer.<sup>188</sup>

The obvious legal flaw in these arguments is that mayors have no formal role in the state constitutional structure.<sup>189</sup> The privilege's origins in separation of powers principles would seem to foreclose its extension to local government altogether. And from a policy perspective, we may be hesitant to vest local officials with such broad secrecy powers: after all, the duties of a mayor are even more attenuated from the national security responsibilities of the President than those of a governor. The courts in Alaska, New Jersey, and Maryland all rejected these specific privilege claims, but they all left open the question of whether the mayor enjoys a communications privilege under state

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<sup>184</sup> Scholars are likewise divided over the extent to which national security concerns animate the confidential communications privilege. Compare, e.g., ROZELL, *supra* note 171, at 44-46 (2002) (invoking national security secrecy as an "argument[] in favor of executive privilege"), with ROBERT M. PALLITTO & WILLIAM G. WEAVER, *PRESIDENTIAL SECRECY AND THE LAW* 195 (2007) (criticizing Rozell for "refer[ring] repeatedly to national security as a potential justification for executive privilege" when "the Supreme Court in *United States v. Nixon* drew a clear line between matters that involve national security and those that do not"). Yet even Pallitto and Weaver acknowledge that these lines tend to blur in practice. See, e.g., *id.* at 212 (noting that the Bush Administration invoked the executive communications privilege to shield advisors' 9/11 testimony despite the obvious national security implications).

<sup>185</sup> See discussion *infra* subsection III.B.3.

<sup>186</sup> See *supra* note 5 and accompanying text.

<sup>187</sup> *City of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 593 (Alaska 1990).

<sup>188</sup> *Johnson v. Clark*, 21 A.3d 199, 212 (Md. 2011).

<sup>189</sup> See GARDNER, *supra* note 95, at 163 (noting that "most state constitutions grant the state legislature plenary power to create or dissolve local governments").

law.<sup>190</sup> Such claims help illustrate one of the perils of national security secrecy creep: these secrecy protections, once unloosed, can be difficult to contain. And the further away they move from their origins in the national security context, the shakier their legal and historical foundations become.

## 2. The Glomar Response

In the mid-1970s, the CIA located a sunken Soviet nuclear submarine deep on the ocean floor. It spent \$350 million building a ship that could surface the Soviet vessel, and then constructed an elaborate cover story: the inventor Howard Hughes would pretend that he had commissioned the ship for the purpose of mining manganese from the sea floor.<sup>191</sup> To help keep its cover, the CIA named the ship the Hughes Glomar Explorer.<sup>192</sup> But the mission was ultimately unsuccessful: the submarine broke into pieces as it was lifted from the ocean floor.<sup>193</sup>

Word of the project soon leaked, and reporters began submitting FOIA requests to the CIA for records about the intelligence information obtained through the mission.<sup>194</sup> This left the CIA in a bind. Acknowledging that it had responsive records might alert the Soviets that the program had failed, but stating that it had no responsive records would be a lie.<sup>195</sup> A lawyer from the CIA came up with a creative solution. He told the reporter that either confirming or denying that the CIA had responsive records would reveal whether the covert program existed, which was itself a national security secret.<sup>196</sup> This became known as the Glomar response.

The Glomar has vexed countless FOIA requesters in the decades since. These responses are notoriously difficult to challenge. Federal courts are highly deferential to Glomar claims, permitting them to stand so long as the agency provides a “logical or plausible” reason.<sup>197</sup> Federal agencies routinely issue Glomars to protect government information that is already widely

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<sup>190</sup> See *Anchorage Daily News*, 794 P.2d at 593 n.16; *Johnson*, 21 A.3d at 213 n.8; Trial Order at 5, *Secondary Parent Council v. City of Newark*, No. ESX-L-6937-11, 2012 WL 6695041, (N.J. Super. Ct. Law Div. Dec. 19, 2011).

<sup>191</sup> *Phillippi v. CIA*, 655 F.2d 1325, 1327 (D.C. Cir. 1981).

<sup>192</sup> The vessel was built by the company Global Marine—hence the term “Glo-Mar.” *Mili. Audit Project v. Casey*, 656 F.2d 724, 729 (D.C. Cir. 1981).

<sup>193</sup> *Id.* at 728-29.

<sup>194</sup> *Phillippi*, 655 F.2d at 1327.

<sup>195</sup> See Radiolab, *Neither Confirm Nor Deny*, WNYC STUDIOS at 15:00 (June 4, 2019), <https://www.wnycstudios.org/podcasts/radiolab/articles/confirm-nor-deny> [<https://perma.cc/W82Z-WDHA>] (interviewing the CIA lawyer who created the Glomar response).

<sup>196</sup> *Id.*

<sup>197</sup> *Wolf v. CIA*, 473 F.3d 370, 375 (D.C. Cir. 2007) (internal quotation marks omitted) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir.1982)).

known.<sup>198</sup> As one federal judge noted, the response “encourage[s] an unfortunate tendency of government officials” to shield information that is “more embarrassing than revelatory of intelligence sources or methods.”<sup>199</sup>

For many decades, the Glomar remained tethered to the national security context and confined to federal law.<sup>200</sup> This is no longer so.<sup>201</sup> In 2012, the Associated Press published a series of Pulitzer Prize-winning stories describing a secret New York City Police Department unit formed after 9/11 to surveil Muslim communities in New York.<sup>202</sup> The program targeted 28 “ancestries of interest,” including “American Black Muslims,”<sup>203</sup> and its disclosure elicited a fierce backlash from the public.<sup>204</sup> In the wake of these revelations, two Muslim men, Talib Abdur-Rashid and Samir Hamshi, submitted a request for records relating to the NYPD’s surveillance of them. At the time, Hamshi was a graduate student at Rutgers University, while Abdur-Rashid served as a well-known imam at a mosque in Harlem.<sup>205</sup> The men reasoned that learning whether and how they had been monitored would help cast light on the nature and scope of the controversial program more broadly.<sup>206</sup>

The NYPD responded with a Glomar, arguing that to either confirm or deny the existence of such records would allow the targets of law enforcement investigations to know that they were being surveilled. In doing so, the agency failed to cite any state law sources, relying instead on a federal FOIA exemption and various other federal statutes that shield national security-related information, including a provision that applies specifically to classified

<sup>198</sup> See *id.* at 378 (explaining that the Glomar cannot be waived by “mere public speculation, no matter how widespread”).

<sup>199</sup> *ACLU v. Dep’t of Def.*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005).

<sup>200</sup> Although the response has its origins in the national security context, it has spread to other parts of the federal law. See *infra* note 412 and accompanying text.

<sup>201</sup> For an excellent discussion of state and local governments’ adoption of the Glomar response, see A. Jay Wagner, *Controlling Discourse, Foreclosing Recourse: The Creep of the Glomar Response*, 21 *COMM’N L. & POL’Y* 539 (2016). I build on this work by exploring additional examples of state courts’ acceptance of the Glomar; as well as by exploring Glomar responses at the administrative level.

<sup>202</sup> Matt Apuzzo & Adam Goldman, *Inside the Spy Unit that NYPD Says Doesn’t Exist*, ASSOCIATED PRESS (Aug. 31, 2011), <http://www.law.uh.edu/faculty/eberman/security/AP%20reporting%20on%20NYPD%201.pdf> [<https://perma.cc/Y7GP-S4CT>].

<sup>203</sup> *Id.*

<sup>204</sup> Matt Apuzzo & Adam Goldman, *After Spying on Muslims, New York Police Agree to Greater Oversight*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/nyregion/nypd-spying-muslims-surveillance-lawsuit.html> [<https://perma.cc/X2FS-4WZ9>].

<sup>205</sup> CJ Ciaramella, *Meet the Muslims Suing the Cops for Their Own Surveillance Records*, VICE (Mar. 29, 2016, 11:50 AM), <https://www.vice.com/en/article/avymk4/meet-the-muslims-suing-the-cops-for-their-own-surveillance-records> [<https://perma.cc/Z4FQ-G7TQ>].

<sup>206</sup> *Abdur-Rashid v. N.Y.C. Police Dep’t*, 100 N.E.3d 799, 811 (N.Y. 2018).

information.<sup>207</sup> The men decided to sue the city over the denial, and the case, *Abdur-Rashid v. New York City Police Department*, eventually made its way up to the New York Court of Appeals.<sup>208</sup> There, the state's highest court held that the agency's use of the Glomar was permissible under the state public records law.<sup>209</sup>

The decision was widely criticized by journalists, activists, and civil rights lawyers, who feared the decision marked only the beginning of the Glomar's wider adoption into state law.<sup>210</sup> A review of lower court decisions and administrative-level denials, however, reveals that this migratory process has already been underway for some time. In 2012, for example, the Supreme Court of Ohio allowed a county prosecutor's Glomar response to proceed unchallenged.<sup>211</sup> And in 2016, a New Jersey appellate court held that state and local agencies could refuse to confirm or deny the existence of records under the state public records law.<sup>212</sup>

Further, a review of administrative-level records reveals that state and local governments across the country have been quietly issuing Glomars for years. The Pennsylvania State Police Department, for example, routinely refuses to confirm or deny the existence of police investigative records,<sup>213</sup> even writing the Glomar into its public records policy.<sup>214</sup> A county social services agency in Minnesota has issued a Glomar in response to a request for a

<sup>207</sup> See Brief of Petitioner-Respondent at 7, *Hashmi v. N.Y.C. Police Dep't*, No. 631, 2015 WL 13775379, at \*7 (N.Y. App. Div. Oct. 14, 2015) (describing these denials and asking whether the "NYPD believes itself to be a federal agency dealing with national security issues").

<sup>208</sup> 100 N.E.3d 799 (N.Y. 2018).

<sup>209</sup> See *id.* at 807 ("[W]hen there is a FOIL request as to whether a specific individual or organization is being investigated or surveilled, the agency—in order to avoid 'tipping its hand'—must be permitted to provide a Glomar-type response.").

<sup>210</sup> See, e.g., Jonathan Peters, *State Court Rules that Local Agencies Can Use a Classic CIA Tactic to Evade FOI Requests*, COLUM. JOURNALISM REV. (June 8, 2016), [https://www.cjr.org/united\\_states\\_project/new\\_york\\_freedom\\_of\\_information\\_glomar.php](https://www.cjr.org/united_states_project/new_york_freedom_of_information_glomar.php) [<https://perma.cc/AG5Q-29ZX>] ("Unfortunately, given the significance and novelty of the ruling, the court didn't address some of the media's major concerns in much detail, or at all."); Tim Cushing, *NY Appeals Court Gives NYPD Even More Opacity By Upholding Its 'Glomar' Powers*, TECHDIRT (Apr. 3, 2018, 3:23 AM), <https://www.techdirt.com/articles/20180401/10113539539/ny-appeals-court-gives-nypd-even-more-opacity-upholding-glomar-powers.shtml> [<https://perma.cc/6LM9-JDS7>] (criticizing a government disclosure exemption that allows an agency to be "belligerently indifferent to its obligations to the public").

<sup>211</sup> State *ex rel.* McCaffrey v. Mahoning Cnty. Prosecutor's Off., 976 N.E.2d 877 (Ohio 2012).

<sup>212</sup> N. Jersey Media Grp. Inc. v. Bergen Cnty. Prosecutor's Off., 146 A.3d 656, 667 (N.J. Super. Ct. App. Div. 2016).

<sup>213</sup> See, e.g., DiMartino v. Pa. State Police, No. 340, 2011 WL 10841570, at \*2 (Pa. Commw. Ct. Sept. 19, 2011) (affirming this response as consistent with the state's open records law); Mahoney v. Pa. State Police, No. 339, 2011 WL 10841247, at \*2 (Pa. Commw. Ct. Sept. 19, 2011) (same).

<sup>214</sup> See *Right-to-Know Request*, PA. STATE POLICE, <https://www.psp.pa.gov/contact/Pages/Right-to-Know-Request.aspx> [<https://perma.cc/J3LS-XQY3>] ("To the extent that this request seeks or may be construed to seek Pennsylvania State Police records involving covert law enforcement investigations . . . the Department can neither confirm, nor deny the existence of such records without risk of compromising investigations and imperiling individuals.").

welfare benefits application.<sup>215</sup> A police department in Tampa replied to a request for investigatory records with a Glomar.<sup>216</sup> And police departments in multiple states—from Kansas<sup>217</sup> to Florida<sup>218</sup> to Maine<sup>219</sup>—have issued them in response to requests concerning police surveillance records. The Glomar has already spread throughout state law.

### 3. The Mosaic Theory

The “mosaic theory” of information refers to the idea that individual pieces of data assembled together may reveal more than the sum of their parts. The concept itself is not new,<sup>220</sup> but its salience has grown in recent years as technological advances have allowed for ever-larger datasets and increasingly sophisticated data analyses.<sup>221</sup> The mosaic theory is perhaps most closely associated with the Fourth Amendment today, invoked by those fearful of government surveillance as grounds for establishing stronger protections against government searches.<sup>222</sup> Yet this theory in fact originated in the inverse context—as a way for the government to shield information, especially national security information, from the public.<sup>223</sup>

The government has long argued that broad swaths of information must be kept secret to prevent bad actors from assembling small, seemingly harmless facts into sensitive national security disclosures.<sup>224</sup> Government agencies—and the federal intelligence agencies, in particular—have relied on the mosaic theory to justify withholding large volumes of records from public

<sup>215</sup> See *Seeber v. Weiers*, No. A04-288, 2004 WL 2283489, at \*1 (Minn. Ct. App. Oct. 12, 2004) (“County staff also informed appellant that they were not permitted to confirm or deny the existence of any such application.”).

<sup>216</sup> *Lorei v. Smith*, 464 So. 2d 1330, 1331-32 (Fla. Dist. Ct. App. 1985).

<sup>217</sup> Letter from Jamie L. Cook, Assoc. Gen. Counsel, Kansas City Police Dep’t, to Mike Katz-Lacabe, Dir. of Rsch., Ctr. for Hum. Rts. & Privacy (May 4, 2015), <https://twitter.com/mlacabe/status/640974792342945792/photo/1> [<https://perma.cc/PY2Q-DCUF>].

<sup>218</sup> Letter from Daniel L. Abbott and Samuel I. Zeskind, Attorneys for the City of Sunrise, Fla., to Nathan Freed Wessler, ACLU (Mar. 20, 2014), <https://www.aclu.org/other/sunrise-fl-response-aclu-refusing-confirm-or-deny-existence-responsive-records> [<https://perma.cc/ENS7-4Y26>].

<sup>219</sup> Curtis Waltman, *Maine State Police “Can Neither Confirm nor Deny” Use of Cellphone Surveillance*, MUCKROCK (Nov. 9, 2016), <https://www.muckrock.com/news/archives/2016/nov/09/msp-glomar> [<https://perma.cc/96QE-LYPW>].

<sup>220</sup> See, e.g., *In re Edge Ho Holding Corp.*, 176 N.E. 537, 539 (N.Y. 1931) (“Very often the bearing of information is not susceptible of intelligent estimate until it is placed in its setting, a tile in the mosaic.”).

<sup>221</sup> See, e.g., *United States v. Jones*, 565 U.S. 400, 409 n.6 (2012) (describing the “dragnet-type law enforcement practices” made possible by GPS tracking).

<sup>222</sup> *Id.* at 404-05.

<sup>223</sup> *Maynard v. CIA*, 615 F.3d 547, 562 (1st Cir. 1993).

<sup>224</sup> See *FOIA Guide, 2004 Edition: Exemption 1*, U.S. DEP’T JUST. (July 23, 2014), <https://www.justice.gov/oip/foia-guide-2004-edition-exemption-1> [<https://perma.cc/HFE5-TVS8>] (claiming a statutory basis for the mosaic theory).

disclosure under FOIA.<sup>225</sup> The federal courts, in turn, have granted substantial deference to the government's mosaic theory claims, reasoning that judges lack sufficient expertise to determine what information poses a national security risk.<sup>226</sup> They have accepted speculative claims of potential harm across broad categories of records.<sup>227</sup> At the extreme end, they have essentially abdicated review over mosaic theory claims altogether.<sup>228</sup>

This theory has now made its way into the state and local context as well.<sup>229</sup> State and local officials have invoked the mosaic theory to withhold large categories of information, and state judges have largely deferred to these government claims. State and local law enforcement agencies, in particular, have turned to the mosaic theory to justify broad withholdings of public records. In the New York Glomar case, for example, the NYPD's Chief of Intelligence argued that the mere fact of whether certain surveillance records exist "cannot be assessed in isolation, but rather forms part of a larger mosaic which can be used to analyze the NYPD's counter-terrorism operations."<sup>230</sup> The Court of Appeals, in turn, relied on this affidavit and the mosaic theory more broadly to justify its acceptance of the NYPD's Glomar.<sup>231</sup>

Other law enforcement agencies have asserted mosaic theory claims as well.<sup>232</sup> This theory has repeatedly surfaced in litigation over records involving police departments' use of cell site simulators, for example, more commonly known as Stingrays. These surveillance devices permit law enforcement agencies to gather a range of information from users' phones, such as locational data or even the content of the user's communications.<sup>233</sup>

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<sup>225</sup> See Pozen, *supra* note 40 (summarizing mosaic theory cases).

<sup>226</sup> See, e.g., *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) (noting that the courts are "ill-equipped" to review information classifications).

<sup>227</sup> *Id.*

<sup>228</sup> See, e.g., *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002) (noting its hesitancy "to conduct a judicial inquiry into the credibility of [] security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise").

<sup>229</sup> It is difficult to determine how widespread use of the mosaic theory is: legal databases like Westlaw are incomplete, and there is no centralized database of public records responses to determine how often agencies invoke this theory in their administrative-level denials. See discussion *supra* note 168. I located the examples referenced here largely through different keyword searches of all state law cases in Westlaw.

<sup>230</sup> Affidavit of Thomas Galetti ¶ 43, *Abdur-Rashid v. N.Y.C. Police Dep't*, No. 101559/2013, 2014 WL 12738768 (N.Y. Sup. Ct. Feb. 11, 2014).

<sup>231</sup> *Abdur-Rashid v. N.Y.C. Police Dep't*, 100 N.E.3d 799, 811 (N.Y. 2018). There are other examples of the NYPD invoking the mosaic theory. See, e.g., *Asian Am. Legal Def. & Educ. Fund v. N.Y.C. Police Dep't*, 964 N.Y.S.2d 888, 894 (N.Y. Sup. Ct. 2013) (arguing against the release of even redacted records because they contain "strands of information . . . [that] can still be used to decipher sources, methods, and capabilities").

<sup>232</sup> The NYPD has also invoked the mosaic theory to protect other surveillance tools, such as the Z Backscatter x-ray van. See *infra* notes 256–57 and accompanying text.

<sup>233</sup> *Cell-Site Simulators/IMSI Catchers*, ELEC. FRONTIER FOUND. (Aug. 28, 2017), <https://www.eff.org/pages/cell-site-simulatorsimsi-catchers> [<https://perma.cc/4P7N-YYXB>].

Law enforcement agencies have asserted mosaic theory claims to justify withholding virtually all records relating to their use of these devices. In Tucson, for instance, an FBI affidavit submitted in state court claimed that even minor details about the Stingray “may reveal more information than their apparent insignificance suggests because, much like a jigsaw puzzle, each detail may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.”<sup>234</sup>

The mosaic theory serves as such a powerful tool for the government because it is nearly impossible to argue against. Those seeking access to government information can rarely prove that a stray piece of information will *not* prove damaging, once combined with other, as-yet-unknown bits of data. This has spooked judges. As one federal court reasoned, “given judges’ relative lack of expertise regarding national security and their inability to see the mosaic, we should not entrust to them the decision whether an isolated fact is sensitive enough to warrant disclosure.”<sup>235</sup> Pushed to its logical conclusion, the mosaic theory strips the judiciary of its ability to oversee government secrecy altogether.<sup>236</sup>

#### 4. Deferring to Government Assertions of Harm

There is a final procedural innovation developed to shield national security information that has recently migrated into state law: granting special deference to government assertions of national security harm. Under Exemption 1 of FOIA, classified records are protected from disclosure only when they have been “properly classified.”<sup>237</sup> Congress included this provision to ensure the judiciary would exercise oversight of classified material, overriding a Supreme Court decision that restricted judicial review of classification decisions.<sup>238</sup>

Despite Congress’s repeated insistence on *de novo* judicial review of an agency’s FOIA withholdings,<sup>239</sup> however, federal courts have continued to rubberstamp the agency’s claims of national security harm. Specifically, they have accorded “substantial deference” to agency affidavits asserting that records are classified, requiring only that the agency’s withholding be “logical,” “plausible,” and made in good faith.<sup>240</sup> Tellingly, although the statute itself proscribes *de novo* review of agency decisions, federal judges have

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<sup>234</sup> *Hodai v. City of Tucson*, 365 P.3d 959, 964 (Ariz. Ct. App. 2016).

<sup>235</sup> *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002).

<sup>236</sup> *See* Pozen, *supra* note 40, at 652 (describing the Third Circuit’s decision in *North Jersey Media* as an “abdication of mosaic theory review”).

<sup>237</sup> 5 U.S.C. § 552(b)(1).

<sup>238</sup> *See* Kwoka, *supra* note 15, at 213 (explaining that the new statute overruled the Supreme Court precedent in *EPA v. Mink* to require proper classification of documents).

<sup>239</sup> 5 U.S.C. § 552(a)(4)(B).

<sup>240</sup> *See, e.g.,* *Maynard v. CIA*, 986 F.2d 547, 555-56 (1st Cir. 1993).

referred to the standard of review in these national security cases as the “substantial weight standard.”<sup>241</sup> This approach is unusual: as one experienced FOIA litigator put it, “Take any other type of civil litigation, and imagine how the suit would play out if the law required judges to presume that one side was telling the truth. And then imagine it being the side that also has exclusive access to the evidence. Welcome to FOIA.”<sup>242</sup>

Yet this judicial innovation, too, has lately spilled over into state law. Specifically, the Virginia Supreme Court held in 2015 that state courts must accord “substantial weight” to the Virginia Department of Corrections’ determinations of harm under the state public records law.<sup>243</sup> In reaching this decision, the court embraced the federal courts’ approach to national security disclosures under FOIA. The state court noted that in the national security context, the federal courts “accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record.”<sup>244</sup> Ensuring the security of state prisons, the court reasoned, is likewise “an extraordinarily difficult undertaking,” and therefore deference to the state corrections agency is equally warranted. On this basis, it concluded that state courts should accord “substantial weight” to the Virginia Department of Corrections’ assertions of harm.<sup>245</sup>

In an echo of FOIA’s drafting history, the Virginia legislature ultimately overrode the court’s decision, amending the statute the following year to prohibit courts from according any weight to an agency’s determination that an exemption applies.<sup>246</sup> Even so, the decision illustrates how easily secrecy innovations developed by the federal judiciary can make their way into state law.

### C. Secrecy Creep in the Legislative Branch

National security secrecy creep is less prevalent in the legislative branch, but it still occurs. Perhaps the clearest illustration is the decision by a state legislature to enshrine these federal informational protections into state law. Indiana’s legislature, for example, amended the state public records statute in 2013 to allow a Glomar response when it is needed to “preserve the integrity of a law enforcement investigation” or to “protect public safety.”<sup>247</sup> While Congress could be seen as acquiescing to the Glomar by failing to override

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<sup>241</sup> See, e.g., *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980).

<sup>242</sup> David McCraw, *FOIA Litigation Has Its Own Rules, but We Deserve Better*, JUST SEC. (Mar. 15, 2016), <https://www.justsecurity.org/29974/foia-litigation-rules-deserve> [<https://perma.cc/HD2C-XA5S>].

<sup>243</sup> *Va. Dep’t of Corr. v. Surovell*, 776 S.E.2d 579, 585 (Va. 2015). This is the only example I found of the substantial weight standard being used in state law.

<sup>244</sup> *Id.* at 584 (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)).

<sup>245</sup> *Id.* at 585.

<sup>246</sup> See VA. CODE ANN. § 2.2-3713(E) (2020).

<sup>247</sup> IND. CODE ANN. § 5-14-3-4.4 (West 2020); Me. Rev. Stat. tit. 16, § 807 (West 2020).

this judicial innovation—the response itself appears nowhere in the text of FOIA<sup>248</sup>—state legislatures in Indiana and Maine have taken this secrecy measure a step further by actively encoding it into state law.

Further, state legislatures have taken steps to exclude entire agencies—and more specifically, police departments—from statutory transparency obligations. This is not a perfect example of secrecy creep. It is difficult to prove that efforts to carve these agencies out of statutory oversight originated in the national security context. But these state-level developments at least mimic the exclusion of the federal intelligence agencies from statutory oversight at the federal level. While FOIA technically applies to every federal agency, in practice it contains gaping holes for classified records and national security-related materials. This has the effect of excluding intelligence agencies like the CIA and NSA almost entirely from its reach.<sup>249</sup>

A comparison can be made to the exclusion of state and local police departments from state transparency laws. In Colorado, for example, the state legislature has carved state and local law enforcement agencies out of the state public records law altogether, enacting a separate and weaker law to govern the disclosure of police records.<sup>250</sup> In other states, certain exemptions sweep so broadly that they have the practical effect of excluding police materials almost entirely. Perhaps most famously, New York until recently extended robust statutory protections for police personnel records, shielding even substantiated instances of police misconduct from public view.<sup>251</sup> This exclusion of police departments from general transparency obligations at the very least tracks the “rise and rise” of national security secrecy in the federal context.<sup>252</sup>

#### D. *Secrecy Creep in the Executive Branch*

Executive agencies, especially state and local law enforcement agencies, have independently facilitated secrecy creep, apart from the secrecy tools delegated to the executive from the judicial and legislative branches. This Section explores how law enforcement agencies’ adoption of the tools and tactics of the national security state has separately facilitated the process of secrecy creep.

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<sup>248</sup> See 5 U.S.C. § 552.

<sup>249</sup> See, e.g., CIA, FREEDOM OF INFORMATION ACT ANNUAL REPORT (2018), [https://www.cia.gov/readingroom/docs/CIA\\_FY2018\\_FOIA\\_Annual\\_Report.pdf](https://www.cia.gov/readingroom/docs/CIA_FY2018_FOIA_Annual_Report.pdf) [<https://perma.cc/B54A-VCYD>] (showing that the CIA granted in full only around 5 percent of the FOIA requests).

<sup>250</sup> See generally Colorado Criminal Justice Records Act, COLO. REV. STAT. §§ 24-72-301 to -309 (2020); see also *id.* § 24-72-305(5) (permitting law enforcement agencies to withhold records when disclosure would be “contrary to the public interest”).

<sup>251</sup> N.Y. CIV. RIGHTS LAW § 50a (repealed 2020).

<sup>252</sup> See Pozen, *supra* note 39, at 154.

### 1. Adopting Federal Surveillance Tools

A vast physical infrastructure supports the national security state, ranging from massive data warehouses to miniscule listening devices.<sup>253</sup> Increasingly, state and local law enforcement agencies are utilizing this infrastructure, especially these physical tools of surveillance.<sup>254</sup> And as these surveillance devices migrate from the national security context into state and local policing, the informational protections used to keep these tools secret have inevitably followed.

The Z backscatter van, for example, is a vehicle outfitted with an x-ray device powerful enough to scan cars and buildings as it passes by. Initially developed by a private company, the military was an early adopter of this technology, purchasing the vans as early as 2005 to scan for improvised explosive devices in Afghanistan and Iraq.<sup>255</sup>

Eventually, the NYPD began using these vans as well. A reporter who learned of this new surveillance technology submitted a state public records request to the NYPD for documents relating to the acquisition, use, and safety testing of these vehicles. The city refused the request, relying on various federal secrecy tools to justify its denial. It invoked the mosaic theory, for example, to argue that the documents could be “combined with other strands of information that are already publicly available” to allow bad actors to circumvent the technology.<sup>256</sup> And it advanced the Glomar-type claim that whether or not the NYPD had even purchased the vehicles was itself a protected secret.<sup>257</sup>

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<sup>253</sup> See, e.g., Press Release, Nat'l Sec. Agency, Groundbreaking Ceremony Held for \$1.2 Billion Utah Data Center (Jan. 6, 2011), <https://www.nsa.gov/news-features/press-room/Article/1630552/groundbreaking-ceremony-held-for-12-billion-utah-data-center> [<https://perma.cc/EYT7-QU8F>] (describing a one million square-foot data center); Aaron Kofford, *Cross-Domain Maritime Surveillance and Targeting (CDMaST)*, DEF. ADVANCED RSCH. PROJECTS AGENCY, <https://www.darpa.mil/program/cross-domain-maritime-surveillance-and-targeting> [<https://perma.cc/U989-VAB5>] (describing surveillance tools research).

<sup>254</sup> See generally Kevin D. Haggerty & Ricard V. Ericson, *The Military Technostructures of Policing*, in *MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM* 43, 54-59 (Peter B. Kraska ed., 2001) (describing the transfer of military technologies).

<sup>255</sup> See *\$9.5M for Special Z-Backscatter Scan-Vans to Afghanistan & Iraq*, DEF. INDUS. DAILY (Aug. 4, 2005, 8:37 AM), <https://www.defenseindustrydaily.com/95m-for-special-zbackscatter-scanvans-to-afghanistan-iraq-0967> [<https://perma.cc/A95J-NZ5T>] (showing a \$9.5 million contract with the military in August 2005); *Z Backscatter Van*, HOMELAND SEC. TECH., <https://www.homelandsecurity-technology.com/projects/z-backscatter-van-zbv> [<https://perma.cc/LTK5-AYKC>] (technology first sold in 2003).

<sup>256</sup> Resp. Mem. of Law in Support of the Verified Answer at 4-5, *Grabell v. N.Y.C. Police Dep't*, 996 N.Y.S.2d 893 (Sup. Ct. 2014) (No. 100580/2013). Note that the author represented the petitioner in *Grabell*. All discussions in this Article are based on publicly available information, and not on anything learned while counsel.

<sup>257</sup> Aff. of Richard Daddario in Support of the Verified Answer at 7, *Grabell* (No. 100580/2013) (“[A]cknowledging the existence itself of any contracts . . . would allow the recipient to determine the number of any vans purchased.”).

The Stingray offers a further example of the ways that acquiring federal surveillance technologies can lead state and local law enforcement agencies to borrow federal secrecy protections. Police departments have routinely issued Glomar responses to withhold information about the device from the public.<sup>258</sup> They have also taken unusual steps to shield these surveillance tools from the view of other government actors. They have omitted references to the device in court orders and warrant applications, for example, implying that officers would obtain information from the telephone company directly when they in fact intended to use a Stingray.<sup>259</sup> And they have withheld operational details from the elected officials tasked with overseeing police departments, often upon the request of federal law enforcement agencies.<sup>260</sup> In this way, the adoption of federal surveillance technologies has opened the door to the use of federal secrecy protections.

## 2. Institutional Isomorphism: The Case of the NYPD

This Article's final illustration of national security secrecy creep is distinct from the examples outlined above. Rather than focus on the formal legal tools imported into the state and local context, it explores the ways that state and local actors have adopted federal secrecy behaviors more broadly. Specifically, it illustrates how local police departments have begun to mimic various features of the national security state. Sociologists have referred to this broader process of institutional homogenization as "institutional isomorphism."<sup>261</sup> This theory, though not a perfect fit, serves as a useful lens through which to examine police departments' acquisition of the traits and characteristics of the national security agencies.<sup>262</sup>

The sociologists who first described this process of institutional isomorphism identified three discrete mechanisms of institutional convergence: coercive, mimetic, and normative.<sup>263</sup> Coercive isomorphism arises when institutions respond to the same external forces, such as a shared

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<sup>258</sup> See *supra* notes 217–19.

<sup>259</sup> See, e.g., *United States v. Ellis*, 270 F. Supp. 3d 1134, 1147 (N.D. Cal. 2017); see also Manes, *supra* note 18, at 515–16 (summarizing efforts to shield Stingray records).

<sup>260</sup> See, e.g., Matt Richtel, *A Police Gadget Tracks Phones? Shhh! It's Secret*, N.Y. TIMES (Mar. 15, 2015), <https://www.nytimes.com/2015/03/16/business/a-police-gadget-tracks-phones-shhh-its-secret.html> [<https://perma.cc/D7N8-GJLG>] (noting that county supervisors were denied access to even a description of the Stingray technology).

<sup>261</sup> Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 149 (1983).

<sup>262</sup> Scholars have previously applied the theory of institutional isomorphism to various legal contexts, including the diffusion of domestic criminal justice policies. See, e.g. Ashley T. Rubin, *A Neo-Institutional Account of Prison Diffusion*, 49 LAW & SOC'Y REV. 365, 375 (2015) (using institutional isomorphism to explain prison homogenization).

<sup>263</sup> DiMaggio & Powell, *supra* note 261, at 152–54.

legal system or common cultural pressures. Mimetic isomorphism occurs when institutions respond to uncertain circumstances by imitating the decisions and policies of other organizations operating in a similar space. And normative isomorphism describes the institutional homogenization that develops when policies and other organizational decisions are guided by shared professional norms.<sup>264</sup>

Coercive isomorphism seems the least likely driver of secrecy creep. States are not, for the most part, bound by a shared external legal regime that incentivizes the adoption of these secrecy tools: to the contrary, these tools are often imported through public records laws unique to each state; or, in the case of executive privilege, through each state's constitutional structure.<sup>265</sup> On the other hand, less formal cultural pressures may exert greater force. In the wake of 9/11, for example, state and local governments almost certainly escalated government secrecy not only to ward off future attacks but also as a way of reassuring the public.<sup>266</sup> A decade and a half later, however, it now seems equally likely that the opposite is true. The public has grown accustomed to increased openness and transparency in government, or at least to efforts that gesture in this direction, and the adoption of these federal secrecy tools likely defies the public's expectation of increased government access.<sup>267</sup>

Mimetic isomorphism, in contrast, seems a more likely driver of secrecy creep. When confronted with novel claims about preserving public safety, some state judges have resolved their uncertainty by reaching for secrecy tools adopted by the federal judiciary—especially in cases where federal judges are perceived to be more “legitimate or successful” in balancing the public's competing interests in security versus transparency.<sup>268</sup> Language in some of the state court opinions adopting these federal secrecy tools suggests an unusual level of deference to federal judges in the face of these national security-type secrecy arguments.<sup>269</sup>

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<sup>264</sup> *Id.*

<sup>265</sup> See generally Koningisor, *supra* note 39. Federal laws incentivizing military weapons transfer to state and local law enforcement may play a role, to the extent that federal secrecy tools are used to shield these weapons. See, e.g., 10 U.S.C. § 2576a (authorizing the Secretary of Defense to sell equipment to state and local law enforcement agencies under certain conditions). On the other hand, these federal secrecy protections tend to be invoked more to shield federal surveillance technologies than military weapons. See discussion *infra* subsection II.D.1.

<sup>266</sup> See generally Marc Rotenberg, Foreword, *Privacy and Secrecy After September 11*, 86 MINN. L. REV. 1115, 1115-16 (2002).

<sup>267</sup> See, e.g., Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. 967, 976 (2009) (attributing the adoption of a program allowing media to visit Guantanamo Bay to “the pressures arising from cultural and societal expectations of openness and transparency regarding prisons and detention facilities”).

<sup>268</sup> DiMaggio & Powell, *supra* note 261, at 152.

<sup>269</sup> See, e.g., *Abdur-Rashid v. N.Y.C. Police Dep't*, 100 N.E.3d 799, 806 (N.Y. 2018) (“FOIA cases involving counterintelligence records are also particularly instructive.”); *id.* at 807 (“[T]he

Normative isomorphism, too, most likely plays a role. This is especially true when it comes to the present case study: the institutional isomorphism of the NYPD. Normative isomorphism describes the homogenization that occurs when policies and other organizational decisions are guided by shared professional norms.<sup>270</sup> As individuals socialized within the particularities of a profession cross institutional lines, they bring with them “a similarity of orientation and disposition” that carries over into the new organizational context.<sup>271</sup>

This process is evident in the post-9/11 evolution of the NYPD.<sup>272</sup> In the wake of the September 11 attacks, the NYPD’s police chief restructured the Department’s Intelligence Bureau—a subdivision specializing in “intelligence-led policing”—and appointed David Cohen, the former CIA station chief in New York, as its head.<sup>273</sup> Cohen, in turn, recruited a cohort of former CIA and FBI officers to serve beneath him,<sup>274</sup> secured active CIA agents to work out of the NYPD bureau,<sup>275</sup> and established the Demographics Unit, a secret division within the bureau tasked with surveilling Muslim communities in the New York area.<sup>276</sup>

Under Cohen’s direction, the Intelligence Bureau began to mimic the structure, tactics, and objectives of the CIA.<sup>277</sup> Cohen stationed police officers overseas to collect foreign intelligence information about terrorist threats,<sup>278</sup> for example, and sent an Intelligence Bureau detective to train at the Farm,

analysis in the federal cases is instructive in the unique situation presented here.”); *id.* at 833 (Stein, J., dissenting) (criticizing the majority for “endors[ing] a blind adoption of a federal judicial doctrine in analyzing a matter of state statutory construction”).

<sup>270</sup> DiMaggio & Powell, *supra* note 261, at 152–54.

<sup>271</sup> *Id.* at 152.

<sup>272</sup> See *Intelligence*, N.Y.C. POLICE DEP’T., <https://www1.nyc.gov/site/nypd/bureaus/investigative/intelligence.page> [<https://perma.cc/KAP3-MJ85>]. While the NYPD represents an extreme rather than a representative example, it is worth exploring in further detail because of the central role that large urban police forces play in the process of secrecy creep.

<sup>273</sup> See Michael Cooper, *Ex-C.I.A. Spy Chief to Run Police Intelligence*, N.Y. TIMES (Jan. 25, 2002), <https://www.nytimes.com/2002/01/25/nyregion/ex-cia-spy-chief-to-run-police-intelligence.html> [<https://perma.cc/VA2T-873P>].

<sup>274</sup> See Christopher Dickey, *The Inside Story of the CIA and the NYPD*, DAILY BEAST (July 11, 2017, 10:38 PM), <https://www.thedailybeast.com/the-inside-story-of-the-cia-and-the-nypd> [<https://perma.cc/782F-WPDM>] (reporting on a number of former CIA and FBI officers who joined Cohen at the NYPD).

<sup>275</sup> See DAVID B. BUCKLEY, INSPECTOR GEN., REPORT OF THE OIG PRELIMINARY INQUIRY INTO THE CIA-NYPD RELATIONSHIP, at ¶ 15 (2011) (“Since 2002, CIA has assigned a total of four officers to provide direct assistance to NYPD.”).

<sup>276</sup> Adam Goldman & Matt Apuzzo, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS (Aug. 24, 2011), <https://www.nbcnewyork.com/news/local/with-cia-help-nypd-moves-covertly-in-muslim-areas/1926933> [<https://perma.cc/7HR7-BSAA>].

<sup>277</sup> DiMaggio & Powell, *supra* note 261, at 149 n.2 (“By organizational change, we refer to change in formal structure, organizational culture, and goals, program, or mission.”).

<sup>278</sup> See MATT APUZZO & ADAM GOLDMAN, ENEMIES WITHIN 81 (2013) (“Cohen had begun stationing officers in foreign police departments so that in the event of a terrorist attack in, say, Paris or Toronto, the NYPD would have a direct line to information about the bomber and the device used.”).

the CIA's spy school in Virginia.<sup>279</sup> He also secured an active CIA officer to school NYPD analysts in "analytic tradecraft,"<sup>280</sup> and he selected a former CIA agent as the NYPD's "scholar in residence."<sup>281</sup>

As the Intelligence Bureau adopted the structure and techniques of the CIA, it sought access to the same broad secrecy tools that these federal intelligence agencies enjoyed. Some of these efforts lacked a legal basis. The Bureau routinely labeled its documents "secret,"<sup>282</sup> for example, even though there is no classification system at the state or local level and the markings had no legal effect.<sup>283</sup> Other efforts elicited more formal protections. The Bureau secured expansive surveillance powers by persuading a federal judge to modify a decades' old consent decree that had previously restricted the NYPD's ability to investigate political activity, for instance.<sup>284</sup> And it obtained approval to issue Glomar responses with the Court of Appeals' decision in *Abdur-Rashid*.<sup>285</sup>

The NYPD's Intelligence Bureau offers the clearest example of this process of institutional modeling.<sup>286</sup> But it is not the only one. Across the country, police departments have drawn closer to the national security state. And while these other agencies may not have experienced the same level of personnel cross-

<sup>279</sup> *Id.* at 129.

<sup>280</sup> See BUCKLEY, *supra* note 275, at ¶ 9 ("[S]he engages exclusively in training NYPD analysts in analytic tradecraft.").

<sup>281</sup> See Declaration of Marc Sageman in Opposition to Defendants' Cross-Motion for Summary Judgment at ¶¶ 1, 3, *Latif v. Lynch*, 3:10-00750, (D. Or. Aug. 7, 2015), [https://www.aclu.org/sites/default/files/field\\_document/268.\\_declaration\\_of\\_marc\\_sageman\\_8.7.15.pdf](https://www.aclu.org/sites/default/files/field_document/268._declaration_of_marc_sageman_8.7.15.pdf) [<https://perma.cc/UZ5M-X8H9>] ("I spent the following year as the scholar in residence at the [NYPD] . . .").

<sup>282</sup> See, e.g., DEMOGRAPHICS UNIT, INTELLIGENCE DIVISION, N.Y.C. POLICE DEP'T, SPORTS VENUE REPORT 1 (n.d.), <https://go.aws/36tAWaK> [<https://perma.cc/5599-K2FX>] ("The information contained in this document is N.Y.P.D. secret. It is intended for official police use only."); CYBER INTELLIGENCE UNIT, INTELLIGENCE DIVISION, N.Y.C. POLICE DEP'T., DAILY RNC BULLETS 1 (2004), <https://nyti.ms/2NZSULQ> [<https://perma.cc/A2KQ-P8Q9>] (same); Conor Friedersdorf, *Is the NYPD Worse than the NSA?*, ATLANTIC (Aug. 26, 2013), <https://www.theatlantic.com/politics/archive/2013/08/is-the-nypd-worse-than-the-nsa/279020> [<https://perma.cc/A65U-CYUE>] (stating that documents related to a new unit were stamped "NYPD SECRET" and outside the purview of "the City Council, Congress, and the White House").

<sup>283</sup> See Matt Sledge, *NYPD 'Secret' Classification For Documents 'Means Diddly' in Eyes of Legal Experts*, HUFFPOST (Sept. 16, 2013), [https://www.huffpost.com/entry/nypd-secret-classification\\_n\\_3922276](https://www.huffpost.com/entry/nypd-secret-classification_n_3922276) [<https://perma.cc/W2J6-X4BG>] ("Unlike at the federal level, however, no statute or public executive order appears to support the use of the 'NYPD Secret' label.").

<sup>284</sup> See *Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327, 329, 349-51 (S.D.N.Y. 2003) (granting approval to modification of the Handschu Guidelines, the guidelines governing NYPD investigation of political activity, conditional on NYPD compliance with certain reporting and technical requirements).

<sup>285</sup> See *Abdur-Rashid v. N.Y.C. Police Dep't*, 100 N.E.3d 799, 813 (N.Y. 2018) (upholding the NYPD's ability to neither confirm nor deny existence of records as compatible with FOIL and its policies).

<sup>286</sup> See BUCKLEY, *supra* note 275, at ¶ 3 (noting that the CIA Inspector General was "unaware of any similar relationships between the Agency and other local law enforcement entities in the United States").

pollination as the NYPD, these federal and subfederal agencies have interacted in other ways.<sup>287</sup> There are now roughly 200 joint terrorism task forces in the country, for example, which provide police officers with access to classified materials and counterintelligence training.<sup>288</sup> As early as 2002, three-quarters of state law enforcement agencies had a specialized counterterrorism unit, while more than half had a separate intelligence division.<sup>289</sup> In a survey of 200 local law enforcement agencies, more than 40 percent reported formally participating with a terrorism-related joint task force,<sup>290</sup> and some noted that their counterterrorism mandates were set by the FBI.<sup>291</sup>

There are more specific examples as well. In Los Angeles, for example, police officers received counter-surveillance training modeled on the instruction that U.S. military teams targeting al-Qaeda fighters received in Afghanistan.<sup>292</sup> As police officers become increasingly socialized into the cultures and tactics of these federal agencies through these federal-subfederal interactions,<sup>293</sup> law enforcement agencies may assume ever-stronger secrecy protections as well.

#### E. *The Mechanisms of Secrecy Creep*

Any descriptive account of legal diffusion inevitably raises a broader set of questions about the pathways of this migration. Why has this downward flow of secrecy tools occurred? What causes this dispersion of secrecy laws and norms? And how has it happened—what are the channels by which these federal informational protections travel?

There are countless explanations for why governments pursue secrecy more generally. Max Weber famously argued that all bureaucratic organizations keep secrets in order to gain an advantage over rival entities

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<sup>287</sup> The institutional isomorphism model also posits that the greater one organization depends on another, and the greater the centralization of resources, the more an organization will resemble those it depends on. DiMaggio & Powell, *supra* note 261, at 154-56. To the extent local police departments rely on federal funding, this power imbalance might help explain one of the mechanisms by which secrecy creep occurs.

<sup>288</sup> *Joint Terrorism Task Forces*, FBI, <https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces> [<https://perma.cc/3PY5-BTSM>].

<sup>289</sup> RILEY ET AL., *supra* note 25, at 7, 12-13.

<sup>290</sup> *Id.* at 17.

<sup>291</sup> *See id.* at 31 (“In one agency that has a small number of personnel devoted to counterterrorism efforts, the FBI sets the mandate through the agency’s participation on the JTTF.”).

<sup>292</sup> George L. Kelling & William J. Bratton, *Policing Terrorism*, CIVIC BULL., Sept. 2006, at 1, 3.

<sup>293</sup> DiMaggio & Powell, *supra* note 261, at 152-54 (describing the process of socialization across organizations); Eliav Lieblich & Adam Shinar, *The Case Against Police Militarization*, 23 MICH. J. RACE & L. 105, 117 (2018) (describing how military training of police officers can lead to the broader militarization of police).

who are not privy to the same information.<sup>294</sup> Under this account, government bureaucrats will naturally seize whatever secrecy tools they have at their disposal in an effort to expand their power. Government officials, in contrast, tend to argue that such secrecy tools enhance the quality of governance. Scan the government's brief in any public records case and you'll find a litany of such utilitarian justifications: secrecy improves the quality of government decisionmaking, protects the public's privacy, or disadvantages our enemies.<sup>295</sup> Such generalized explanations, however, offer only limited insight. They may help explain government behavior more broadly, but they shed little light on the specific downward diffusion of secrecy tools from the federal to subfederal context.

Lessons derived from the federalism literature, in contrast, offer a useful gloss to layer over these broader theories, permitting a more tailored inquiry into what motivates this specific legal migration. This scholarship offers up various explanations. Under the "trickle down" account of federal-subfederal national security relations, for example, secrecy creep could be chalked up to the downward flow of expanded federal powers to the states in the wake of 9/11.<sup>296</sup> For those concerned with the "spillover effects" of national security responsibilities,<sup>297</sup> in contrast, secrecy creep could be attributed to the fear that local governments will underinvest in national security efforts because the benefits are so widely distributed. Under this account, the federal government may incentivize local participation in national security efforts by offering up federal weapons and informational protections in exchange for cooperation.

Alternatively, the theory of "picket fence federalism" posits that federal and subfederal specialist agencies may end up pursuing policy goals that are more aligned with each other than with the non-specialist agencies within their own government.<sup>298</sup> This affinity between agencies at different levels of government might offer yet another explanation for why secrecy creep is so prevalent in the law enforcement context. In the wake of 9/11, state and local law enforcement agencies were often conscripted to advance federal counterterrorism policy

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<sup>294</sup> See MAX WEBER, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 193, 233 (H.H. Gerth & C. Wright Mills eds. & trans., 2d ed. 1991) (arguing that bureaucracy defends secrecy for the sake of power as against "the outside," which may include an enterprise, a foreign, or even parliament).

<sup>295</sup> See Pozen, *supra* note 13, at 276-77 (describing such utilitarian justifications).

<sup>296</sup> See Waxman, *supra* note 25, at 313-14 (describing the trickle-down theory in the context of national security federalism); see also Stuntz, *supra* note 141, at 2139 (predicting that as the federal government expanded its authority in the wake of 9/11, "state and local governments can be expected to copy them").

<sup>297</sup> See Waxman, *supra* note 25, at 339-43 (exploring spillover effects in this context).

<sup>298</sup> See Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1236 (2001) ("'Picket fence federalism' refers to the tendency of agency officials to feel primary loyalty to the federal agencies that share the state agency's mission."). This federalism theory has obvious overlaps with the sociological theory of normative isomorphism described above.

goals, sometimes over the objections of their own governments.<sup>299</sup> These federal secrecy tools have helped to insulate these state and local law enforcement efforts, shielding the police from not only public oversight but also from oversight by generalist members of their own administrations.<sup>300</sup> In that sense, secrecy creep might be seen as a kind of byproduct of picket-fence federalism: these informational protections allow state and local police to shield their activities from the view of their own governments, freeing them up to pursue policies that are more closely aligned with federal priorities.

Ultimately, determining why state and local governments adopt federal secrecy protections is both complex and multifaceted.<sup>301</sup> But what about how it occurs—which migratory paths do these informational protections travel? This description of secrecy creep suggests that these informational protections initially migrate from the federal to the subfederal context through the executive branches. Typically, a state or local official will see their federal counterpart exercise some secrecy authority and then attempt to secure this same power for themselves.<sup>302</sup>

The more critical point of entry, however, seems to be through the judiciary, which must either bless or reject this adoption. This is how these secrecy tools ultimately travel from federal opinions into the decisions of state courts: state and local judges end up following the federal judiciary's lead.<sup>303</sup> State courts' longstanding reliance on federal interpretations of FOIA to guide their analysis of state public records laws, for instance, allows federal judicial endorsement of executive innovations like the Glomar and the substantial deference standard to slide easily into state law.

In sum, the drivers of secrecy creep are manifold: a range of forces have likely led state and local governments to adopt increasingly powerful federal secrecy tools. But the pathways of this adoption are more straightforward. State judges, especially, have incorporated the analysis and holdings of federal

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<sup>299</sup> See, e.g., Waxman, *supra* note 25, at 316-17 (describing city officials' efforts to pull the police department from a federal-local joint terrorism task force).

<sup>300</sup> See, e.g., Richtel, *supra* note 260 (describing how Stingray NDAs prevented county supervisors in California from accessing information about the surveillance devices; and how the FBI has invoked the mosaic theory to justify such broad secrecy protections).

<sup>301</sup> Of course, political and historical forces are also at play: the aftermath of the 9/11 attacks unleashed a massive tide of national security efforts that reached state and local governments as well. See Waxman, *supra* note 25, at 316, 327, 330 (“[I]n the immediate aftermath of 9/11 . . . the Justice Department requested assistance from local police agencies in locating and questioning thousands of men holding nonimmigrant visas from countries where al Qaeda was thought to be active.”).

<sup>302</sup> Again, normative isomorphism offers one potential explanation: in the wake of 9/11, as federal secrecy expanded and federal-subfederal cooperation increased, state and local law enforcement officials may have had greater opportunity to observe federal secrecy practices.

<sup>303</sup> See, e.g., Salt River Pima-Maricopa Indian Cmty. v. Rogers, 815 P.2d 900, 909-10 (Ariz. 1991) (looking to FOIA to interpret state public records law); State Bd. of Equalization v. Superior Ct., 13 Cal. Rptr. 2d 342, 347 n.10 (Ct. App. 1992) (same).

secrecy precedents into their own decisions, reasoning that the concerns motivating this expansion of secrecy at the federal level apply with equal force in the state and local context. As the next Part explores, however, this approach is often flawed—premised upon a federal-subfederal equivalence that ultimately proves false.

### III. THE IMPLICATIONS OF SECRECY CREEP

The effects of secrecy creep can be difficult to discern. Many of these secrecy tools have been adopted only recently into state and local law, and their long-term repercussions are not yet known. Further, the more successful these secrecy tools are, the less the public will know about how they are deployed. The extent to which these secrecy tools are used to shield government behavior—corruption, discrimination, violence—is, by design, almost impossible to determine. With these caveats in mind, this Part attempts to untangle the implications of secrecy creep: the benefits of applying retrofitted national security protections to the subfederal context, the costs they impose, and the ways that we might better cabin their use.

#### A. *The Benefits of Secrecy Creep*

There are advantages to legal borrowing. This practice offers efficiency benefits, allowing government officials to adopt existing legal ideas rather than build the law from scratch.<sup>304</sup> It is also effective: such borrowing permits government officials to utilize a legal idea or practice that has already been tested and proven persuasive in practice.<sup>305</sup> Further, the idea's connection to the legal system of origin may enhance its legitimacy in the eyes of the public.<sup>306</sup> As two scholars of constitutional borrowing have noted, “because of path dependence, a line of argument or idea is far easier to sustain if it has already been introduced into an area of law than if it . . . must be raised for the first time.”<sup>307</sup>

These efficiency, persuasion, and legitimacy benefits are all visible in the specific context of secrecy law. Borrowing federal informational protections most likely reduces the effort that state and local actors must expend

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<sup>304</sup> See Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 326 (1978) (recounting the argument that borrowing law from elsewhere “can be the cheapest and most efficient way of changing the law and can at the same time give the most satisfactory result”).

<sup>305</sup> See, e.g., *Abdur-Rashid v. N.Y.C. Police Dep't*, 100 N.E.3d 799, 807 (N.Y. 2018) (adopting the Glomar into state law in part based on the federal courts' justifications and reasoning).

<sup>306</sup> See Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 854-67 (2003) (offering an analysis of the legitimacy-generating effects of transplanted law through theory and example); see also Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 739-40 (2016) (arguing that following federal law gives state judges political cover).

<sup>307</sup> Tebbe & Tsai, *supra* note 35, at 476.

formulating their own rules and rationales.<sup>308</sup> It prevents state and local governments from wasting their time on ill-conceived secrecy arguments or tools by allowing them to adopt legal innovations that have already been blessed by the federal courts and proven successful in practice.<sup>309</sup> Further, these secrecy tools come with the imprimatur of the federal courts—even, in some cases, the Supreme Court.<sup>310</sup>

The most significant benefit of national security secrecy creep, however, is also the most straightforward: it improves state and local governments' ability to shield information. And there may be circumstances under which such robust secrecy protection are justified—when we might believe that state and local government actors should have the same capabilities as the federal government to withhold information from public scrutiny.<sup>311</sup> As mentioned previously, one defense of secrecy creep is that national security secrecy tools should not be limited to the federal context because national security efforts themselves are not so confined.<sup>312</sup>

In other words, while there is ample reason to be concerned about excessive secrecy in state and local government, there may also be limited circumstances under which these secrecy tools are warranted. Take the classic justification of government secrecy: the location of troops in wartime.<sup>313</sup> An analogous subfederal secret might be the identities of undercover police officers infiltrating a domestic terrorism cell. Extra secrecy protections may be required to shield these officers from retaliation.

Even if some measure of secrecy creep may be justified to protect the most sensitive state and local secrets, the difficulty lies in where to draw this line, and how best to prevent abuse of these secrecy tools once they are adopted into state and local law. The following Sections explore these and related questions. But it is important to acknowledge upfront that the secrecy creep can offer concrete benefits, including increased efficiency, enhanced quality of deliberations, and improved security.<sup>314</sup>

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<sup>308</sup> See, e.g., *Abdur-Rashid v. N.Y.C. Police Dep't*, 100 N.E.3d 799, 807 (N.Y. 2018) (noting the utility of borrowing from FOIA case law).

<sup>309</sup> See *id.*

<sup>310</sup> See, e.g., *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 484 (Ohio 2006) (citing *Nixon* to establish a gubernatorial-communications privilege).

<sup>311</sup> These arguments tend to take one of three forms: secrecy either protects individuals' privacy; preserves candor in government deliberations; or prevents criminals from circumventing the law.

<sup>312</sup> See discussion *supra* Section I.C.

<sup>313</sup> See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (“No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”).

<sup>314</sup> See generally *Pozen*, *supra* note 13, at 277, 287, 296-97, 301 (describing the benefits of secrecy under utilitarian, liberal democratic, and constitutional theory).

## B. *The Harms of Secrecy Creep*

While there may be advantages to the subfederal adoption of federal secrecy tools, the disadvantages of secrecy creep are substantial. When state and local actors adopt national security secrecy tools, they import legal innovations developed against a distinct legal and historical backdrop into state law.<sup>315</sup> This can lead to unexpected, even harmful, effects. It can produce discordance in the law, exacerbate concerns over the robustness of checks and balances at the state and local level, facilitate the horizontal spread of secrecy throughout state government, and allow local law enforcement agencies to evade public scrutiny.

### 1. Legal Discordance

The migration of federal secrecy protections into state law can produce doctrinal inconsistencies—what scholars of legal migration have referred to as legal “discordance.”<sup>316</sup> Federal secrecy tools are developed in a specific legal, historical, and political setting, and as they migrate across legal borders, this context shifts. The law and policy justifications undergirding these secrecy protections may become less stable, and these secrecy tools can sit uneasily within this new legal and historical framework. By introducing these federal secrecy protections into state law, legislators and judges may be forced to either ignore these contradictions or contort the existing law to accommodate them.

#### a. *Constitutional Discordance*

These federal secrecy tools may conflict with state constitutional law. This can be explicit: Florida’s Constitution contains an affirmative right of information access,<sup>317</sup> for example, while other state constitutions contain unusually broad protections for the press.<sup>318</sup> In these instances, broad secrecy tools may clash with the state’s constitutional text. But even when the text itself does not give rise to an especially expansive view of transparency in government, broader distinctions in constitutional structure at the state level may affect how these secrecy tools fit within this new legal framework.

The executive communications privilege offers a useful illustration. The privilege outlined in *Nixon* is tethered to the scope of the executive

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<sup>315</sup> See WATSON, *supra* note 150, at 116 (“Even when the transplanted rule remains unchanged, its impact in a new social setting may be different.”).

<sup>316</sup> See Tebbe & Tsai, *supra* note 35, at 469.

<sup>317</sup> FLA. CONST. ART. 1 § 24.

<sup>318</sup> See, e.g., *Holmes v. Winter*, 3 N.E.3d 694, 698 (N.Y. 2013) (citing the state’s strong tradition of press freedom to reject government secrecy claims).

responsibilities enumerated in Article II of the U.S. Constitution.<sup>319</sup> The constitutional responsibilities of the governor, in contrast, are more circumscribed. Some state judges have argued that these constitutional distinctions render *Nixon* incongruous with the state constitutional scheme. They have noted the obvious textual distinctions: the governor, of course, does not serve as commander in chief of the military or head of the nation's diplomatic affairs.<sup>320</sup> But they have also pointed out broader structural distinctions—most notably, that the governorship in many states is a weaker position than the presidency.

Every state has some form of plural executive, and some state constitutions provide for nearly a dozen elected executive positions, reducing the governor's authority to both appoint and remove executive officials.<sup>321</sup> Many state constitutions also provide for the election of at least some state judges rather than vesting appointment authority with the governor.<sup>322</sup> And roughly a dozen state constitutions permit the public to recall a governor.<sup>323</sup> All of these constitutional features limit the powers of the state executive further than the limitations on the President.<sup>324</sup>

It is not only that the executive branch is diminished at the state level; the state legislative and judicial branches also enjoy expanded authority. While the federal Constitution limits Congress's legislative authority to enumerated subjects, granting the remainder of its powers to the states, state constitutions do the opposite—they grant the state legislature all powers except those affirmatively prohibited.<sup>325</sup> Similarly, while the federal constitution limits the jurisdiction of the judicial branch to “cases” and “controversies,”<sup>326</sup> state constitutions tend to permit state courts greater latitude when developing rules of standing and adjudication. State courts, for example, routinely issue advisory opinions.<sup>327</sup> These legislative and judicial powers are enhanced at the expense of executive power.

Finally, as state constitutional law scholar James Gardner has noted, separation of powers principles may be construed more fluidly at the state

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<sup>319</sup> *United States v. Nixon*, 418 U.S. 683, 708 (1974).

<sup>320</sup> *See, e.g., State ex rel. Dann v. Taft*, 848 N.E.2d 472, 490-91 (Ohio 2006) (Pfeifer, J., dissenting).

<sup>321</sup> *See* GARDNER, *supra* note 95, at 169-70 (discussing the multiplicity of state elected executive officials and comparing the state framework to the President's ability to appoint and remove subordinates).

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 176.

<sup>324</sup> *Cf.* Tarr, *supra* note 95, at 334-35 (comparing common separation of powers structures among the states to the federal government).

<sup>325</sup> GARDNER, *supra* note 95, at 156.

<sup>326</sup> U.S. CONST. art. III, § 2.

<sup>327</sup> *See, e.g.,* COLO. CONST. art. VI, § 3 (authorizing advisory opinions); FLA. CONST. art. V, § 3(b)(10) (same); ME. CONST. art. VI, § 3 (same); N.H. CONST. pt. 2, art. 74 (same).

level.<sup>328</sup> Rhode Island, for example, has a history of allowing state legislators to appoint members of executive agencies.<sup>329</sup> And Connecticut and Nevada's Constitutions permit legislative committees to disapprove of agency regulations.<sup>330</sup> While each of these actions would violate separation of powers principles under the federal Constitution, state constitutions tend to apportion these powers less rigidly, blending the responsibilities of the branches in a way that the federal Constitution does not allow.<sup>331</sup>

Not all constitutional differences point in this direction. Some distinctions vest the governor with comparatively greater authority than the President. Many state constitutions contain an explicit separation of powers provision,<sup>332</sup> for example, and governors have consolidated their authority in recent years.<sup>333</sup> Further, many state constitutions stipulate that state legislatures meet only infrequently, leading to a less-professionalized legislative branch with reduced capacity to check executive power.<sup>334</sup> Such distinctions aggregate the power of the executive at the expense of the other branches. Even so, the fact of these constitutional differences—on both sides of the equation—at the very least suggests that separation of powers will be formulated differently at the state level.

This view finds support in prevailing theories of state constitutional interpretation. There is an ongoing debate among judges and state constitutional law scholars over the extent to which federal interpretations of the U.S. Constitution should guide state court interpretations of analogous parts of state constitutions. In very simplified terms, many scholars and judges have argued that state courts should rely on their state's distinct constitutional texts and histories when construing state constitutional provisions—even those containing language identical to the federal

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<sup>328</sup> See GARDNER, *supra* note 95, at 160 (“Some state constitutions . . . implement a regime of horizontal separation of powers that is far more relaxed than the counterpart regime on the national level.”).

<sup>329</sup> *In re Advisory Op. to the Governor*, 732 A.2d 55, 71 (R.I. 1999).

<sup>330</sup> CONN. CONST. art. II, amended by CONN. CONST. art. XVIII; NEV. CONST. art. III, § 1(2).

<sup>331</sup> See GARDNER, *supra* note 95, at 161 (noting that some state constitutions “allow[] a degree of blending of powers that the national Constitution does not countenance”).

<sup>332</sup> Although many state courts have viewed these provisions as “declaratory statements of relationships,” not constitutional commands. *Id.* at 171.

<sup>333</sup> Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 485-86 (2017).

<sup>334</sup> See Koningisor, *supra* note 39, at 1540 (“The legislature is a low-paying, part-time position in forty states, and state legislatures convene far less often than Congress.”).

Constitution.<sup>335</sup> State judges, in contrast, have often ignored these critiques and continued to look to federal precedent.<sup>336</sup>

This debate has been largely limited to the construction of individual rights provisions, however, which bind state courts through the doctrine of incorporation.<sup>337</sup> There is arguably even less justification for adopting federal constitutional precedent when construing the structural features of state constitutions, because the federal Constitution imposes no meaningful structural requirements on the states—there is, as Professor Gardner has noted, no “national constitutional principle of structure.”<sup>338</sup> This critique calls into question state courts’ adoption of the presidential communications privilege outlined in *Nixon*, and lends support to the view that the state courts erred by adopting a federal privilege rooted in federal separation of powers principles. This theory of state constitutional interpretation provides yet another reason for exercising caution when adopting certain federal secrecy tools into the state constitutional context.

#### b. *Historical Discordance*

These secrecy tools were also generated against a unique historical backdrop. The *Nixon* Court, for example, relied on the secrecy of the constitutional drafting process to conclude that “[t]here is nothing novel about government confidentiality.”<sup>339</sup> Many state constitutions, in contrast, were drafted in full view of the public. Pennsylvania and New York’s

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<sup>335</sup> See, e.g., WILLIAMS, *supra* note 92, at 1 (“If we are ever to produce a complete and accurate American constitutional history, we must recognize that without the state constitutions in force in 1789 the national Constitution is an incomplete text. They must all be read together.”); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) (arguing state courts should take an expansive approach to due process as the federal court retrench the doctrine); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1154 n.45 (1985) (citing authority supporting an independent interpretation to the Wisconsin Constitution). For a summary of the new judicial federalism movement, see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 771-75 (1992).

<sup>336</sup> See, e.g., WILLIAMS, *supra* note 92, at 194 (noting that state courts follow federal constitutional doctrine in the “clear majority of cases”); see also FLA. CONST. art. I, § 12 (requiring lockstep construction of searches and seizures provision). Legal scholars have also critiqued aspects of New Judicial Federalism. See, e.g., Gardner, *supra* note 335, at 837 (“[T]he communities in theory defined by state constitutions simply do not exist, and debating the meaning of a state constitution does not involve defining an identity that any group would recognize as its own.”); Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 423 (1996) (criticizing Justice Brennan’s position that state constitutional law should be used to expand individual rights for its “outcome-based motivation”).

<sup>337</sup> WILLIAMS, *supra* note 92, at 245.

<sup>338</sup> GARDNER, *supra* note 95, at 261.

<sup>339</sup> *United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974).

constitutional conventions held regular public sessions,<sup>340</sup> for example, and Ohio released transcripts from the state's constitutional convention to the public at the time of the debates.<sup>341</sup> Federal secrecy tools may not account for such historical distinctions. What is considered commonplace in the federal context may indeed be “novel” to the states.

Secrecy in state government also departs from federal tradition in other ways. Early state constitutions embody a deep suspicion of executive power, arguably even more so than the federal Constitution.<sup>342</sup> These constitutions reflect the lingering memories of abuses inflicted by autocratic leaders, first by British colonial governors,<sup>343</sup> and later by governors appointed by the Continental Congress.<sup>344</sup> They stripped power from the executive and gave it to the legislature—what Professor Gordon Wood has referred to as a “revolutionary shift” in the structure of government, one that established the state governor as a “new kind of creature, a very pale reflection” of its British forbearer.<sup>345</sup> Ohio, for example, drafted its constitution in 1802 with the explicit aim of reining in a despotic territorial governor.<sup>346</sup> In pursuit of this goal, the drafters divided executive power across a multitude of elected positions in order to constrain executive authority.<sup>347</sup> Even so, the Supreme Court of Ohio has recognized a sweeping gubernatorial privilege modeled on *Nixon*—one that the dissent criticized as insufficiently attuned to these distinct features of state constitutional history.<sup>348</sup>

The inverse is also true. Not only do federal secrecy protections fail to account for historical practices unique to the states, but they also embody federal legal traditions that are unique to the federal context. The executive branch has

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<sup>340</sup> DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS 14 (1981).

<sup>341</sup> See *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 491 (Pfeiffer, J., dissenting) (“Unlike the federal constitution, Ohio’s Constitution was created in the open.”).

<sup>342</sup> See Lawrence M. Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 37 (1988) (describing weak executive branches in early state constitutions).

<sup>343</sup> Friedman, *supra* note 342, at 37 (noting that “[f]ears of a strong executive reflected vivid colonial memories”).

<sup>344</sup> See *id.*; see also STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION 10-11 (2011) (noting that Ohio established “one of the weakest executive branches in any state” in reaction to an autocratic governor appointed by the Continental Congress).

<sup>345</sup> Gordon S. Wood, Foreword, *State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 915, 916 (2011).

<sup>346</sup> William P. Marshall, Essay, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2451 (2006).

<sup>347</sup> *Id.* An opposing view of the unitary executive is that it would be easier to monitor and therefore constrain. See THE FEDERALIST NO. 70 (Alexander Hamilton) (a unitary executive is more “narrowly watched and readily suspected”).

<sup>348</sup> See *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 493 (Ohio 2006) (Pfeiffer, J., dissenting) (“The framers of the constitution stripped the Governor of Ohio of all power and made him a mere dummy to fill the Governor’s chair.”).

long exerted plenary control over foreign affairs,<sup>349</sup> for example, and federal secrecy tools expressly reflect this practice.<sup>350</sup> Yet this legal tradition has no analogue in the states; state judges have not abdicated judicial oversight of matters relating to local police in the same way.<sup>351</sup> Importing these secrecy protections may conflict with state historical practice in this way as well.

c. *Policy Discordance*

It is not only that the legal and historical underpinnings of these federal secrecy tools can weaken as they migrate into the state context. The policy justifications undergirding these robust secrecy protections can break down as well. Federal judges presiding over FOIA cases, for example, defer to executive branch determinations of national security harm on the grounds that “[t]he judiciary ‘is in an extremely poor position to second-guess’ the predictive judgments made by the government’s intelligence agencies.”<sup>352</sup> This unusual level of deference is rooted in the judiciary’s concern about its lack of expertise when it comes to assessing threats to the national security.

Such concerns are diminished in the state and local context. State courts are better equipped, for example, to preside over assertions of law enforcement harm. As one state judge observed, while “[m]ost CIA endeavors will never see the light of day, let alone that of a courthouse; the destiny of every successful NYPD investigation is to appear before a judge.”<sup>353</sup> The federal courts may be less equipped to evaluate national security threats,<sup>354</sup> the judge reasoned, but the state courts “are not similarly handicapped in judging the soundness of [public records] exemptions based on police, privacy, or other justifications.”<sup>355</sup> Under this view, one of the central policy motivations for granting the government wide latitude in its secrecy claims simply does not hold up in the state and local context.

There are other examples. Many of the powerful federal secrecy tools chronicled here are justified in part by what Professor Jonathan Manes has referred to as the “anti-circumvention” argument,<sup>356</sup> or the claim that if

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<sup>349</sup> See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (explaining that sole authority over international relations resides with the president).

<sup>350</sup> See, e.g., *Wilner v. Nat’l Sec. Agency*, 592 F.3d 60, 76 (2d Cir. 2009) (describing the court’s reluctance to judicially review matters related to national security).

<sup>351</sup> See, e.g., *Abdur-Rashid v. N.Y.C. Police Dep’t*, 100 N.E.3d 799, 816 (N.Y. 2018) (Wilson, J., concurring) (“Our government features neither a unitary executive tasked with the national defense nor an elaborate system of classified information to which courts routinely defer.”).

<sup>352</sup> *Larson v. Dep’t of State*, 565 F.3d 857, 865 (D.C. Cir. 2009).

<sup>353</sup> *Abdur-Rashid*, 100 N.Y. 3d at 816 (Wilson, J., concurring).

<sup>354</sup> Scholars have critiqued this view. See, e.g., Kwoka, *supra* note 15, at 212-16 (critiquing federal judges’ deference to government assertions of national security harm).

<sup>355</sup> *Abdur-Rashid*, 100 N.Y. 3d at 816 (Wilson, J., concurring).

<sup>356</sup> Manes, *supra* note 18, at 507.

information were to be released to the public, criminals could use it to evade capture and skirt the bounds of the law. But as Professor Manes notes, this argument only holds up if there are, in fact, bad actors sophisticated enough to both assemble and act upon these disclosures.<sup>357</sup>

In other words, the release of government information is only damaging if someone who means to inflict harm is watching. And although difficult to prove empirically, it makes sense intuitively that such sophisticated bad actors are more likely to operate on a national or international scale. It seems more plausible that hostile foreign intelligence agencies are using information released by the CIA to exploit our national security weaknesses than it is that small-town criminals are using information released by their local police department to circumvent the law's effects.<sup>358</sup> Federal secrecy protections like the mosaic theory of intelligence are less defensible from a policy perspective if there are no bad actors out in the world gathering these strands of information. There must be someone assembling these disparate "tiles" into a comprehensible picture for such secrecy to be justified.

## 2. Reduced Public Oversight

Questions of legal fit are not the only ones raised as these secrecy tools cross over into the subfederal context. These protections also interact with the broader architecture of state and local government in ways that risk magnifying their more harmful effects. This Section explores some examples, arguing that the effects of these secrecy tools are likely intensified by the distinct structural features of state and local government, such as reduced checks and balances, diminished public oversight, and increased risk of corruption and "deep secret" entrenchment.

### a. *Reduced Checks and Balances*

Many of the checks and balances that we take for granted at the federal level—legislative investigations, split government, competitive elections—are either weaker or wholly absent at the state and local level. Governors have consolidated their power and authority in recent years,<sup>359</sup> state legislative oversight is notoriously weak,<sup>360</sup> and state executive and legislative branches tend to be controlled by the same party.<sup>361</sup> The picture is even bleaker at the local level.

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<sup>357</sup> *Id.* at 540-41.

<sup>358</sup> *See id.* ("The specter of terrorism drives secrecy with respect to run-of-the-mill policing.")

<sup>359</sup> *See* Seifter, *supra* note 333, at 518-29.

<sup>360</sup> *See* Koningisor, *supra* note 39, at 1540 (explaining how state legislative oversight is weaker than congressional oversight at the federal level).

<sup>361</sup> Seifter, *supra* note 333, at 520.

Local governments frequently combine executive and legislative functions,<sup>362</sup> local governing councils are often dominated by a single party,<sup>363</sup> and local elections are marred by poor turnout and noncompetitive ballots.<sup>364</sup> These features make it difficult for both the public and the competing branches to exercise their oversight functions and bring harmful government secrets to light.

There is also reduced government oversight in the specific context of state and local intelligence gathering. Many of the federal secrecy tools surveyed here operate within a double set of limitations in the federal context: they are subject to a broader system of government checks and balances, and then they must conform to a separate set of restrictions placed specifically upon the executive branch's intelligence-gathering capabilities. The federal government established various formal oversight mechanisms to curb its intelligence activities in the wake of the intelligence abuses of the Cold War era: Congress created a permanent congressional intelligence oversight committee and enacted the Foreign Intelligence Surveillance Act,<sup>365</sup> for example, and the executive branch adopted various internal restraints, such as executive orders limiting intelligence activities and inspector generals for national security agencies.<sup>366</sup>

These checks to government surveillance authority are diminished, if not altogether absent, at the state and local level. While the federal government responded to these intelligence abuses by enhancing government oversight, state and local law enforcement agencies largely exited from the intelligence-gathering space altogether.<sup>367</sup> As Matthew Waxman has noted, between the 1970s and 2001, "intelligence oversight at the federal level generally proceeded in parallel with intelligence atrophy at the local level."<sup>368</sup> As a consequence, when state and local law enforcement agencies re-entered the intelligence sphere in the wake of 9/11, they did so largely unshackled from these broader forms of oversight.<sup>369</sup>

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<sup>362</sup> RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 28 (8th ed. 2016).

<sup>363</sup> *Id.*

<sup>364</sup> Davidson, *supra* note 26, at 626 n.291.

<sup>365</sup> Waxman, *supra* note 25, at 299-300.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at 300; see Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 593 (2010) (describing a "generation-long hiatus" of nonfederal actors in the domestic intelligence realm).

<sup>368</sup> Waxman, *supra* note 25, at 301.

<sup>369</sup> See, e.g., APUZZO & GOLDMAN, *supra* note 278, at 179 (noting that the NYPD Intelligence group was not "burdened" by the level of oversight directed at the FBI); MICHAEL PRICE, BRENNAN CTR. FOR JUST., *NATIONAL SECURITY AND LOCAL POLICE* 31 (2013), [https://www.brennancenter.org/sites/default/files/publications/NationalSecurity\\_LocalPolice\\_web.pdf](https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf) [<https://perma.cc/BUL9-FVUK>] (describing weaknesses in NYPD civilian review board).

Further, the oversight mechanisms that do exist at the state and local level are often ill equipped to check the police's surveillance activities.<sup>370</sup> Police oversight boards and internal affairs bodies are often unable to gain access to the information and materials needed to effectively regulate police surveillance activity.<sup>371</sup> And the secrecy that shrouds these intelligence-gathering efforts makes it difficult for the public to ascribe credit or blame to local law enforcement agencies for their counterterrorism efforts.<sup>372</sup>

Moreover, even when certain localities do introduce more robust oversight mechanisms, the decentralized nature of policing means that such regulations are inconsistent and patchwork. As a consequence, state and local actors routinely borrow national security secrecy tools untethered from any broader oversight regime. These agencies benefit from federal secrecy protections without being bound by the same countervailing checks to their authority that constrain the federal government.<sup>373</sup> The balance between liberty and security that is reached at the federal level does not necessarily carry over into the state and local context.<sup>374</sup>

b. *Reduced External Oversight*

In a series of landmark decisions in the 1970s, the Supreme Court struck a balance between the government's interest in shielding national security secrets and the press's interest in informing the public. Under these precedents, the government is largely permitted to keep information secret and the press is largely permitted to publish whatever information it manages to obtain.<sup>375</sup> Alexander Bickel famously described this relationship as the "disorderly situation."<sup>376</sup> Cass Sunstein, in turn, has referred to it as the "equilibrium theory" of the First Amendment, one in which the government seeks to keep secrets, the press seeks to disclose them, and "[t]his competition ensures that if both follow their self-interest, the resulting system will work, as if by an invisible hand, to benefit the public as a whole."<sup>377</sup> Sunstein

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<sup>370</sup> See Waxman, *supra* note 25, at 336 (describing why oversight mechanisms of national security interests at the local level are ineffective).

<sup>371</sup> PRICE, *supra* note 369, at 30 (oversight boards often lack subpoena power).

<sup>372</sup> See Waxman, *supra* note 25, at 327 (noting the secrecy of national security intelligence programs).

<sup>373</sup> See *id.* (addressing the local-federal dichotomy); *supra* note 369 and accompanying text.

<sup>374</sup> See, e.g., Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004) (describing this balance).

<sup>375</sup> See *N.Y. Times Co. v. United States (The Pentagon Papers)*, 403 U.S. 713 (1971); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

<sup>376</sup> ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 80 (1975).

<sup>377</sup> Cass R. Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 899 (1986).

compared this external push-pull to the internal system of checks and balances that forces government information into the light.<sup>378</sup>

Equilibrium is only struck, however, if the government and the media are relatively equally situated. And this is vanishingly true at the state and local level. Local media is on the brink of collapse: one in five local newspapers closed between 2004 and 2018,<sup>379</sup> and half of the counties in the United States no longer have a local daily newspaper.<sup>380</sup> By almost any metric, the situation is bleak: advertising revenue is down; circulation is down; and the number of local reporters is down.<sup>381</sup> In other words, not only are these formal intergovernmental checks weaker at the state and local level, but the external oversight provided by the press is also reduced.

The collapse of local media, in turn, reduces the pathways by which information may become public. In the national security context, there are not only congressional oversight bodies and agency inspectors-general overseeing the national security state, but also a robust national media competing to unearth the government's national security secrets.<sup>382</sup> There are well-trodden paths by which national security secrets are leaked. Sophisticated actors from both the government and media serve as repeat players in the "game of leaks."<sup>383</sup> Many of these disclosures are authorized or semi-authorized by highly placed government officials.<sup>384</sup>

In the state and local context, in contrast, these pathways are less defined or even absent altogether. It is more difficult to leak information when there are no media outlets to print the disclosure. And state and local officials may be less sophisticated in navigating these channels, unaccustomed to pressing on these extra-governmental levers of information disclosure.<sup>385</sup> This makes it less likely that especially deep or destructive government secrets at the state

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<sup>378</sup> *Id.*

<sup>379</sup> See PENELOPE MUSE ABERNATHY, UNC CTR. FOR INNOVATION AND SUSTAINABILITY IN LOCAL MEDIA, THE EXPANDING NEWS DESERT 8 (2018), [https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10\\_14-Web.pdf](https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf) [perma.cc/45UP-UZGE].

<sup>380</sup> *Id.*

<sup>381</sup> *Id.* at 14 (describing a forty percent decline in weekday print circulation); PEN AM., LOSING THE NEWS: THE DECIMATION OF LOCAL JOURNALISM AND THE SEARCH FOR SOLUTIONS 24-31 (2019), <https://pen.org/wp-content/uploads/2019/12/Losing-the-News-The-Decimation-of-Local-Journalism-and-the-Search-for-Solutions-Report.pdf> [https://perma.cc/5CMV-W82F] (describing decline in print advertising).

<sup>382</sup> Media resources have continued to aggregate at the national level; the *New York Times* now has more digital subscribers than the *Washington Post*, *Wall Street Journal*, and all 250 Gannett newspapers combined. Ben Smith, *Why the Success of the New York Times May Be Bad News for Journalism*, N.Y. TIMES (Mar. 1, 2020), <https://www.nytimes.com/2020/03/01/business/media/ben-smith-journalism-news-publishers-local.html> [https://perma.cc/JL28-HT7N].

<sup>383</sup> See, e.g., Pozen, *supra* note 12, at 530.

<sup>384</sup> *Id.* at 565-72.

<sup>385</sup> See Seifter, *supra* note 333, at 521-22 (describing state agencies as strapped for both resources and expertise).

and local level will come to light.<sup>386</sup> It also accelerates the imbalance between secrecy and accountability that exists in many state and local governments. In places where the public's access to information is already restricted, these powerful secrecy tools may prove especially harmful.

c. *Increased Risk of Corruption*

Political scientists have long theorized that lower levels of government are more prone to corruption. Explanations for why this is so vary. Samuel Huntington famously argued that individuals at the top of the political hierarchy will view political power as a substitute for economic profit, while lower-level officials will compensate for their reduced political standing by exploiting their positions for financial gain.<sup>387</sup> Others have argued that reductions in media and civil society attention favor concentrated special-interest groups at the state level,<sup>388</sup> while still others point to diminished competition in state and local elections<sup>389</sup> or a lack of checks and balances in the structure of local government.<sup>390</sup> Efforts to resolve this debate have met with mixed results.<sup>391</sup> Some scholars, however, have used empirical methods to confirm that Huntington's intuition was basically right<sup>392</sup>—that corruption does in fact increase “as one goes down the political or bureaucratic hierarchy.”<sup>393</sup>

Assuming that this is so—that corruption is more prevalent at lower levels of government—then the adoption of these federal secrecy tools may compound this risk. These informational protections endow state and local officials with yet another tool to hide special interest capture and corruption.<sup>394</sup> Studies have linked the amount and intensity of public oversight to the financial health of local governments: when newspapers close, for example, municipal spending goes up.<sup>395</sup> These lower levels of

<sup>386</sup> See discussion *infra* subsection III.B.2.d.

<sup>387</sup> See, e.g., SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 68 (1968).

<sup>388</sup> See, e.g., Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 150 (2018).

<sup>389</sup> See, e.g., David Schleicher, *I Would, but I Need the Eggs: Why Neither Exit Nor Voice Substantially Limits Big City Corruption*, 42 LOY. U. CHI. L.J. 277, 284-89 (2011).

<sup>390</sup> See, e.g., Kimberly L. Nelson & Whitney B. Afonso, *Ethics by Design: The Impact of Form of Government on Municipal Corruption*, 79 PUB. ADMIN. REV. 591, 592 (2019).

<sup>391</sup> See, e.g., Gerald W. Scully, *Rent-seeking in U.S. Government Budgets, 1900-88*, 70 PUB. CHOICE 99, 100 (1991) (finding less rent-seeking at the local level).

<sup>392</sup> See, e.g., Rajeev K. Goel & Michael A. Nelson, *Corruption and Government Size: A Disaggregated Analysis*, 97 PUB. CHOICE 107, 115 (1998) (offering empirical data and analysis).

<sup>393</sup> See HUNTINGTON, *supra* note 387.

<sup>394</sup> Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 168 (2018) (noting “languid” external oversight at state level).

<sup>395</sup> Pengjie Gao, Chang Lee & Dermot Murphy, *Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance*, 135 J. FIN. ECON. 445, 448 (2020).

government, already more prone to capture, may be at further risk of corruption as they adopt these federal secrecy tools into state law.

d. *The Risk of Deep Secrecy*

Sociologist Kim Lane Scheppelle has delineated between “shallow” and “deep” secrets. A shallow secret is one whose existence is known, even if specific details remain hidden; a deep secret is one whose very existence is unknown.<sup>396</sup> The CIA’s covert black site program is an example of a deep secret: until the *Washington Post* broke the story, the public was unaware of the fact of the program.<sup>397</sup> An example of a shallow secret, in contrast, is the nuclear codes. The public knows that nuclear weapons exist and that the President can deploy them, but it doesn’t know the specifics of the program—for example, how the weapons may be unlocked.<sup>398</sup>

Professor Scheppelle largely concentrated on the private law implications of deep secrecy.<sup>399</sup> Other scholars, however, have explored the implications of deep versus shallow secrets in the public law context.<sup>400</sup> Professor David Pozen, in particular, has argued that deep secrets raise unique governance concerns, allowing power to aggregate in the hands of the powerful and denying citizens the information they need to make informed decisions about their government. While deep secrecy permeates the federal government, he contends, it is most closely associated with the national security state. The decisions made in the national security realm raise difficult legal and ethical questions, and they often carry the greatest political risks. Because the stakes are so high, national security decisionmakers naturally “gravitate toward depth.”<sup>401</sup>

From this perspective, we might expect that state and local government secrets would tend to be shallow. After all, the everyday decisions of running a city or state generally do not involve the types of complex legal or political calculations that drive officials toward deep secrecy. Yet if we also believe that deep secrets flourish where public oversight is scarce, then state and local governments may prove to be unexpected sites of deep secrecy. The public’s ability to monitor the government is hindered in many places by ineffective

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<sup>396</sup> KIM LANE SCHEPPELE, *LEGAL SECRETS* 21 (1988).

<sup>397</sup> Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST (Nov. 2, 2005), <https://www.washingtonpost.com/archive/politics/2005/11/02/cia-holds-terror-suspects-in-secret-prisons/767f0160-cde4-41f2-a691-ba989990039c> [<https://perma.cc/2F9M-V8NS>] (exposing the existence of the black site program).

<sup>398</sup> See Russell Goldman, *The ‘Nuclear Button’ Explained: For Starters, There’s No Button*, N.Y. TIMES (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/world/asia/nuclear-button-trump-north-korea.html> [<https://perma.cc/9RCC-L97N>] (examining the unknowns of the nuclear program).

<sup>399</sup> See generally SCHEPPELE, *supra* note 396 (examining secrecy in the context of fraud, privacy, and implied warranties).

<sup>400</sup> See, e.g., Kitrosser, *supra* note 75, at 514-15; Pozen, *supra* note 13, at 261.

<sup>401</sup> Pozen, *supra* note 13, at 275.

transparency laws and weak civil society actors. In these locations, local governments may operate with little oversight—there may be no journalists, no local chapter of the ACLU, and no neighborhood watch groups overseeing state or local officials.<sup>402</sup> The national security state, in contrast, is monitored by the deep and sustained efforts of activist groups and well-funded media outlets.<sup>403</sup> The vast resources dedicated to unveiling national security secrets make it more difficult for the federal government to shield deep secrets indefinitely.

There are other facets of state and local government that might facilitate deep secrecy as well. Professor Pozen has argued that political competition often exposes deep secrets as one political faction unearths sensitive or controversial decisions taken by the other.<sup>404</sup> And political competition is circumscribed at the state and local level. In 2019, only a single state—Minnesota—had a divided legislature.<sup>405</sup> State legislative and executive branches tend to be controlled by the same party as well.<sup>406</sup> And political power is often even more concentrated at the local level: as local government scholar David Schleicher has noted, “there are almost no competitive legislative seats at the local level and there is usually no competition for control of the local legislature overall.”<sup>407</sup> This lack of partisanship might also push state and local governments toward deep secrecy.

Deep secrecy is almost certainly more prevalent at the federal level: the federal government, especially the national security state, has greater reason to keep deep secrets.<sup>408</sup> But deep secrecy does exist in state and local government.<sup>409</sup> Indeed, the very purpose of the Glomar response—increasingly prevalent in the state and local context—is to protect deep secrets. And when such deep secrecy does occur, the structural features described above—ineffective transparency mechanisms and reduced political competition—may allow these deep secrets to persist. Put another way, state and local governments may be less inclined to engage in deep secrecy, but more successful in shielding those secrets from public view when they do.

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<sup>402</sup> See Koningisor, *supra* note 39, at 1526-27.

<sup>403</sup> See *supra* note 382 (discussing the aggregation of media resources at the national level).

<sup>404</sup> Pozen, *supra* note 13, at 334.

<sup>405</sup> Timothy Williams, *With Most States Under One Party's Control, America Grows More Divided*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/us/state-legislatures-partisan-polarized.html> [<https://perma.cc/Z8AQ-N8W5>].

<sup>406</sup> See Seifter, *supra* note 333, at 519.

<sup>407</sup> See David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 419 (2007) (contrasting the relative lack of competitiveness in local elections to those held on the national level).

<sup>408</sup> See Pozen, *supra* note 13, at 275 (“[D]eep secrecy may be most likely to occur, and to raise the most vexing problems, in the area of national security”).

<sup>409</sup> The NYPD’s surveillance of Muslim communities serves as an example: the program was established in 2002 but remained secret until the media broke the story in 2011. See Apuzzo & Goldman, *supra* note 202.

Given the democratic concerns that deep secrecy raises, this dynamic might be another reason to exercise caution when vesting state and local governments with these federal secrecy tools.

### 3. Intrasystem Secrecy Creep

Legal tools and concepts imported into a legal system to serve one purpose rarely remain confined to that realm. Rather, they become coopted for different ends, a process that scholars refer to as “intrasystem” legal migration.<sup>410</sup> This phenomenon has been documented across a variety of legal contexts.<sup>411</sup> But scholars and practitioners have raised specific concerns about the horizontal spread of the national security secrecy tools described here throughout the federal government. The Glomar response, for example, has been used to shield a variety of non-national security-related information, including the internal processes of the U.S. Postal Service and IRS whistleblower claims.<sup>412</sup>

It is perhaps inevitable, then, that such intrasystem migration would occur within the state and local context as well. This process is already underway with the Glomar. In the wake of New York’s adoption of the Glomar into state law, the NYPD refused to confirm or deny the existence of records unrelated to a criminal investigation.<sup>413</sup> And in response to a public records request that I submitted to the Pennsylvania State Police for records relating to its use of the Glomar, the law enforcement agency replied: “To the extent your request seeks or may be construed to seek records pertaining to covert law enforcement investigations . . . the [agency] can neither confirm nor deny the existence of such records . . . .”<sup>414</sup> The agency responded to my request for records about the Glomar with a Glomar.

These secrecy tools migrate not only horizontally, but vertically as well, from the state to the local context and vice versa. Efforts by city mayors to lay claim to an executive communications privilege offer an example.<sup>415</sup> Conversely, now that the Glomar is permissible in the local law enforcement context in New York, other state agencies may attempt to adopt it as well.

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<sup>410</sup> See Tebbe & Tsai, *supra* note 35, at 464.

<sup>411</sup> See *id.* (exploring process in constitutional law); Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277, 1279-80 (2019) (exploring this process in contract law).

<sup>412</sup> See Wagner, *supra* note 201, at 552-53.

<sup>413</sup> Decision and Order at 4, 6, *Millions March NYC v. N.Y.C. Police Dep’t*, No. 100690/2017, (N.Y. Sup. Ct. Jan. 14, 2019) (rejecting the NYPD’s claim).

<sup>414</sup> Letter from Lissa M. Ferguson, Deputy Agency Open Recs. Officer, Pennsylvania State Police, to author (May 16, 2019) (on file with author). This appears to be a boilerplate paragraph that is likely included in every public records response.

<sup>415</sup> See discussion *supra* notes 186-88 and accompanying text.

Such intrasystem movement is not inherently harmful. There may be limited circumstances under which the migration of these robust federal secrecy tools is justified, even in contexts distinct from the ones that gave rise to their initial adoption into state law. Yet the further a secrecy tool travels from its point of entry, the more attenuated it becomes from its original basis or justification. The example of Cory Booker's emails illustrates the point: the privilege grew out of the desire to shield conversations with some nexus to the military and diplomatic responsibilities of the President; Booker's office used it to shield emails about the Newark school system.<sup>416</sup>

This type of intrasystem creep may allow secrecy to spread throughout state and local government, permitting government actors to shield information under circumstances far different from the ones that gave rise to the tool's initial adoption. And if these secrecy tools drift too far from their origins—if, say, mundane information is denied with a Glomar—this could undermine public confidence in the law itself.<sup>417</sup>

#### 4. The “National Security-ization” of Local Law Enforcement

The process of police militarization—or the police's adoption of the weapons, attire, tactics, and organizational structures developed for theaters of war—stretches back decades, if not centuries.<sup>418</sup> But it accelerated in the wake of the 9/11 attacks, as funds earmarked for the fight against terrorism made their way to local police departments around the country, and federal initiatives like the 1033 Program authorized the military to transfer weapons no longer needed on the battlefields of Afghanistan or Iraq.<sup>419</sup> Since the 1990s, local governments have received nearly \$40 billion worth of military equipment—more than the entire annual defense budget of Germany.<sup>420</sup>

The police have not only obtained the weapons of war, but they have gained access to the surveillance tools and tactics of the national security state as well.<sup>421</sup> And as police import these weapons and surveillance technologies

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<sup>416</sup> See *supra* note 5.

<sup>417</sup> See Sinner, *supra* note 35, at 1611 (“[T]he recurring revelation of unnatural secret reinterpretations may erode trust in the law itself; if law can be twisted so far from its origins, is there any meaning left to the ‘rule of law?’”).

<sup>418</sup> See Rosa Brooks, *Stop Training Police Like They're Joining the Military*, ATLANTIC: IDEAS (June 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/police-academies-paramilitary/612859> [<https://perma.cc/LV4S-PUM7>] (describing the military elements of nineteenth-century police forces).

<sup>419</sup> *Id.*

<sup>420</sup> See Dexter Filkins, “Do Not Resist” and the Crisis of Police Militarization, NEW YORKER (May 13, 2016), <https://www.newyorker.com/news/news-desk/do-not-resist-and-the-crisis-of-police-militarization> [<https://perma.cc/L53M-69QD>].

<sup>421</sup> See discussion *supra* Section II.D; see also Michael German, *The Militarization of Domestic Surveillance Is Everyone's Problem*, BRENNAN CTR. JUST. (Dec. 18, 2014), <https://www.brennancenter.org/our-work/analysis-opinion/militarization-domestic-surveillance->

into state and local government, the secrecy protections that shield them from public view are often imported along with them. The Stingray device and backscatter x-ray van offer an example. By adopting these surveillance technologies, police secured access to federal secrecy protections as well: the Glomar response, for example, and the protections that accompany the mosaic theory of intelligence. We might refer to this as a kind of “national security-ization” of law enforcement agencies, comparable to the militarization of local police.

Further, as these secrecy shields grow more robust, there is less opportunity for the kind of public deliberation that might check the transfer of these weapons and technologies.<sup>422</sup> After all, the public can only oppose government actions that it is able to perceive, and the entire purpose of these technologies is to operate covertly. Further, as scholars like Professor Catherine Crump have shown, local police departments routinely access powerful surveillance technologies in secret, or at least with minimal public input.<sup>423</sup> This creates a feedback loop: stronger weapons and surveillance tools mean greater government secrecy; and greater government secrecy, in turn, allows for increased access to weapons and surveillance tools.

There are additional risks. As state and local police acquire more powerful surveillance technologies and secrecy protections, they may begin to act more like national security agencies in other ways as well. The example of police militarization is once again instructive. Anthropologist Peter Kraska has defined “militarization” along four axes: material, cultural, operational, and organizational.<sup>424</sup> A group of sociologists, in turn, has used this definition to untangle the broader effects of military weapons transfer under the 1033 program. They have found that when police forces receive more military weapons and equipment—an increase in the “material” prong—they are more likely to become militarized along the other three axes as well. They are more likely to use military language, form elite units like SWAT teams, and jump into high-risk situations.<sup>425</sup>

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everyones-problem [<https://perma.cc/S3TB-36DD>] (describing state and local law enforcement adoption of the surveillance tools and techniques of the military and national security agencies).

<sup>422</sup> See, e.g., ACLU, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING* 27 (2104), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police> [<https://perma.cc/EFR7-4XJL>] (explaining that of the 255 police departments the ACLU asked for SWAT records, 114 denied the request in part or in full).

<sup>423</sup> See Catherine Crump, *Surveillance Policy Making by Procurement*, 91 WASH. L. REV. 1595, 1608, 1635-36 (2016) (discussing the transferal of sophisticated technology from national agencies to local police departments).

<sup>424</sup> Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 1 POLICING 501, 513 (2007).

<sup>425</sup> Casey Delehanty, Jack Mewhirter, Ryan Welch & Jason Wilks, *Militarization and Police Violence: The Case of the 1033 Program*, RSCH. & POL., April–June 2017, at 1, 2.

Secrecy creep introduces similar risks. Although cause and effect in this context is difficult to untangle,<sup>426</sup> police departments, by adopting national security secrecy tools, may begin to imitate the national security agencies in other ways as well. As the example of the NYPD Intelligence Unit shows, when police agencies obtain national security secrecy protections—what we might think of as an operational feature—they may also behave more like the national security agencies along these other axes. The NYPD unit not only adopted the secrecy protections of the national security agencies, but it also secured the physical tools of surveillance utilized by the intelligence agencies (material),<sup>427</sup> adopted the intelligence agencies' language and tactics (cultural),<sup>428</sup> and created administrative ties that strengthened its connection with federal agencies (organizational).<sup>429</sup>

Put another way, if the problem with arming police officers like soldiers is that they start fighting a war, then the risk of vesting police officers with federal secrecy protections is that they begin to behave like national security agencies. Outlining the contours of secrecy creep offers an example of this “national security-ization” process. It shows how enhancing police access to one feature of the national security state may risk enhancing its access to others. The pull of this feedback loop may drag in other facets of the federal intelligence agencies as well, allowing state and local police to assume ever-greater trappings of the national security state.

### C. Potential Remedies

There are costs and benefits to secrecy at every level of government. But as this Part has shown, excessive secrecy in the state and local context introduces unique threats: the countervailing checks on government power are often lower, for example, and the risk of deep secrecy higher. This Section explores potential remedies. It describes two broad categories of solutions: first, the government could act directly to contain or reverse the process of secrecy creep; second, government or external actors could act indirectly, weakening the effects of secrecy creep by building up oversight mechanisms that act as a counterweight to enhanced government secrecy.

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<sup>426</sup> The authors of this study looked at whether obtaining military weapons caused militarization along the other axes. *Id.* I do not make any claims as to whether the adoption of federal surveillance technologies or secrecy tools is a cause or consequence of these other forms of “national security-ization.”

<sup>427</sup> See discussion *supra* subsection II.C.1.

<sup>428</sup> See discussion *supra* subsection II.C.2.

<sup>429</sup> *Id.*

### 1. Federal Government

The federal government's ability to control the process of secrecy creep is limited: legally, by the strictures of federalism,<sup>430</sup> and practically, by the vast and disaggregated nature of local government.<sup>431</sup> Even so, there are ways that the federal government might be able to help at the margins. It could reduce the scope of federal-subfederal cooperation in the space where secrecy creep is most likely to occur: namely, within law enforcement agencies. It could lessen state and local actors' access to the physical tools of surveillance, such as the safeguards imposed by the Obama administration to regulate the transfer of military-style weapons to police departments.<sup>432</sup> Or it could limit state and local cooperation in federal intelligence-gathering efforts. Shrink these sites of federal and subfederal cooperation, and state and local governments' justifications for obtaining these federal secrecy tools are likewise diminished.

In reality, such efforts will most likely be stymied by practical considerations. Many of the surveillance devices described here originated with the federal government but ended up at least partially in the hands of private companies, making it difficult to control their dissemination.<sup>433</sup> More importantly, the federal government has little incentive to scale back on such cooperation. In the intelligence-gathering realm, in particular, federal agencies are able to dramatically expand their reach by relying on thousands of state and local police officers.<sup>434</sup> The federal government has little incentive to voluntarily limit the scope of such assistance.<sup>435</sup>

Alternatively, the federal government could help counteract the effects of secrecy creep by enhancing its oversight of state and local government, especially state and local police.<sup>436</sup> It could use its oversight authority to counterbalance the reduced checks and balances at the state and local level and help uncover government misconduct hidden behind these secrecy tools. Yet again, there are

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<sup>430</sup> See Nathan James, Kristin Finklea, Natalie Keegan, Kavya Sekar & Richard M. Thompson II, CONG. RES. SERV., R43904, PUBLIC TRUST AND LAW ENFORCEMENT—A DISCUSSION FOR POLICYMAKERS 3-4 (2017) (describing the ways that federalism limits the federal government's ability to oversee local police).

<sup>431</sup> See, e.g., Waxman, *supra* note 25, at 306 n.84 (describing this diffusion).

<sup>432</sup> Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 843 (2017).

<sup>433</sup> See, e.g., Monte Reel, *Secret Cameras Record Baltimore's Every Move from Above*, BLOOMBERG (Aug. 23, 2016), <https://bloom.bg/37tQ1ul> [<https://perma.cc/T84B-DY3Y>] (discussing Baltimore's use of private sector technology for police investigations).

<sup>434</sup> See, e.g., 9/11 COMMISSION REPORT, *supra* note 67, at 390.

<sup>435</sup> See Waxman, *supra* note 25, at 292 (assuming that continued subfederal involvement in national security efforts is a "political, practical, and historically contingent reality").

<sup>436</sup> Avenues of federal oversight of local police include federal judicial oversight of constitutional violations inflicted by local law enforcement, as well as statutory authorities like 34 U.S.C. § 12601 and Title VI of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000d to 2000d-7.

both political and practical limitations to consider. The DOJ has statutory authority to investigate patterns of unconstitutional misconduct by police, for example,<sup>437</sup> and yet it exercises this authority only rarely. The Trump administration largely refrained from such efforts altogether.<sup>438</sup>

There are other paths toward improved federal oversight. The federal government could provide enhanced supervision of cooperative federal-local intelligence gathering efforts. It could, for example, condition the receipt of federal funds on local police departments' cooperation with federal intelligence guidelines.<sup>439</sup> Yet even if effective, such steps would still treat only a narrow band of shared intelligence gathering activities. The harms of secrecy creep outside of these federal-local efforts would remain unaddressed. And none of these oversight options would counterbalance secrecy in other parts of the executive branch, outside of the policing context. In the current political climate, especially, enhanced federal oversight of the police is unlikely to serve as a meaningful check on state and local government secrecy.

## 2. State Government

State government likely serves as a more promising site of reform. This holds true across all three branches. State legislatures, for example, could amend their public records laws to address specific instances of secrecy creep. They could prohibit or restrict use of the Glomar response, or close gaps in the laws' coverage of state and local law enforcement agencies by relaxing protections for police personnel records or narrowing the scope of exemptions protecting law enforcement records.<sup>440</sup> They could also overrule judicial adoption of federal secrecy tools, the way the Virginia legislature did in the wake of the state supreme court's adoption of a federal deference doctrine.<sup>441</sup>

State legislatures could take other steps as well. They could enact new laws to regulate specific surveillance devices: many states have already enacted statutes that regulate police departments' use of drones, for instance.<sup>442</sup> And they could empower state attorneys general to investigate allegations of police misconduct, similar to the federal statute that authorizes the Justice Department to investigate police departments that engage in a

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<sup>437</sup> 34 U.S.C. § 12601.

<sup>438</sup> Memorandum from Att'y Gen. Jefferson B. Sessions to Heads of Dep't Components & U.S. Attorneys 1-2 (Mar. 31, 2017); *see also* Bell, *supra* note 29, at 2129 (noting that "[o]ne of the biggest shortcomings" of the law is that "its use is politically cyclical").

<sup>439</sup> *See* Waxman, *supra* note 25, at 338.

<sup>440</sup> For example, California's legislature enacted a law in 2018 to provide greater public access to police disciplinary records. *See* CAL. PENAL CODE §§ 832.7-8 (West 2020).

<sup>441</sup> *See supra* note 246 and accompanying text.

<sup>442</sup> *See* Friedman & Ponomarenko, *supra* note 20, at 1853 (indicating that the thirteen states that have regulated drone use since 2013, most ban police drone use or impose a warrant requirement).

“pattern and practice” of unconstitutional activity.<sup>443</sup> California has already passed such a law.<sup>444</sup>

Governors could also exert stronger oversight authority. In some states, state attorneys general have enjoined city police departments from engaging in unconstitutional conduct under the doctrine of *parens patrie*.<sup>445</sup> This authority could be used to regulate police activity where secrecy creep is most prevalent. The state executive branch could also take voluntary steps to constrain its authority: the governor could issue executive orders limiting certain intelligence gathering activities, for example, the way a series of presidential executive orders has limited the intelligence activities of the national security state.<sup>446</sup>

It is the judiciary, however, that serves as the most likely source of reform. Judges have the greatest power to reverse the process of secrecy creep, or at least to mitigate its worst effects. State judges can and should be more skeptical of government efforts to import these federal secrecy tools. When these tools are rooted in constitutional principles, state courts could eschew lockstep constitutional interpretation and look afresh at state constitutional text and history.<sup>447</sup> In doing so, they could serve as a check to federal secrecy creep, rejecting some of these federal secrecy tools as ill-suited to the state constitutional context. A number of state Supreme Court justices have taken this approach in dissents to their courts’ adoption of the executive privilege articulated in *Nixon*.<sup>448</sup> These arguments may still yet prove persuasive, as more state courts are asked to rule on the existence and scope of a gubernatorial communications privilege.

State judges could also ascribe more weight to these secrecy tools’ origins in the national security state. Litigants have repeatedly argued that these informational protections are too powerful to deploy outside of the national security context.<sup>449</sup> These claims have proven only partially successful. But when considered against the broader backdrop of the state and local legal system, with its diminished checks and balances, they assume greater force. Judges could do more to consider these claims in the broader context of the

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<sup>443</sup> See 34 U.S.C. § 12601.

<sup>444</sup> CAL. CIV. CODE § 52.3 (West 2020).

<sup>445</sup> See Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of Police Reform*, 69 DUKE L.J. 999, 1007-12 (2020) (noting that state attorneys general have sought standing to enjoin local police departments under the *parens patrie* doctrine in Illinois, Pennsylvania, and New York).

<sup>446</sup> See, e.g., Exec. Order No. 11,905, 3 C.F.R. 90 (1976). *But see* Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 912-13 (2007) (arguing that such executive self-binding may enhance rather than constrain executive power).

<sup>447</sup> See discussion *supra* notes 335-37 and accompanying text.

<sup>448</sup> See *supra* note 120.

<sup>449</sup> See, e.g., Brief for Appellant at 24-26, *Freedom Found. v. Gregoire*, 310 P.3d 1252 (Wash. 2013) (No. 86384-9).

state and local legal regime. And when these tools are adopted, state judges can and should articulate clearer rules about their use.<sup>450</sup> Vague statements admonishing government actors to deploy these tools with caution will likely prove insufficient to cabin their spread.

Further, state judges could be more skeptical of government claims of harm. Some have recently taken this approach with the NYPD. When the agency claimed that the release of safety tests would permit terrorists to circumvent the Z Backscatter Van, for example, the trial court noted that the city had offered “not even a hint” as to how this information would allow criminals to evade detection.<sup>451</sup> By compelling local actors, and police departments in particular, to justify their adoption of federal secrecy tools, the courts will help to prevent their entrenchment in state and local law.

### 3. Local Government

Local governments could likewise take steps to reduce the harms of secrecy creep. Once again, reining in police departments, where the effects of secrecy creep are most concentrated, offers a place to start. The bluntest tool to reduce the prevalence of secrecy creep would be to reduce the footprint of police departments altogether. Calls to defund the police are premised on this idea: shrink the size of the police, and you lessen the amount of violence that police officers can inflict.<sup>452</sup> Reducing the scope of policing would likewise reduce the frequency and effects of secrecy creep.

In lieu of reducing the size of the nation’s police force, improving public oversight of state and local law enforcement agencies could help mitigate the harms of secrecy creep. The literature on this topic is vast: scholars and policymakers have put forth countless proposals to penetrate police opacity and impose more accountable governance structures at the local level.<sup>453</sup> A full accounting of this scholarship is beyond the scope of this project. That being said, improved oversight of police activity in general, and police intelligence-

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<sup>450</sup> See *Abdur-Rashid v. N.Y.C. Police Dep’t*, 100 N.E.3d 799, 815-16 (N.Y. 2018) (Wilson, J., concurring) (arguing for clearer rules around use of the Glomar).

<sup>451</sup> *Grabell v. N.Y.C. Police Dep’t*, 996 N.Y.S.2d 893, 902 (Sup. Ct. 2014), *aff’d as modified*, 32 N.Y.S.3d 81 (App. Div. 2016).

<sup>452</sup> See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 460-79 (2018) (reciting demands of the Movement for Black Lives to shrink the power and resources of police); see also Bell, *supra* note 29, at 2147-49 (arguing in favor of “[s]hrinking the footprint of armed bureaucrats”).

<sup>453</sup> See, e.g., ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE AND THE FUTURE OF LAW ENFORCEMENT* 190 (2017) (arguing for greater community involvement in police surveillance purchases); Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 45-46 (2019) (proposing “regulatory intermediaries”); FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING (2015) (outlining a variety of proposals for police reform).

gathering efforts in particular, could help counteract the worst effects of these secrecy protections.<sup>454</sup> Many of the proposals for enhancing local oversight of police more generally—expanding the authority of civilian oversight boards, enhancing community input regarding police surveillance, and so on—might also help counteract some of the harms of secrecy creep specifically.

Local governments could also step back from these cooperative intelligence-gathering efforts altogether.<sup>455</sup> This has already occurred in some cities. Portland withdrew from a joint terrorism task force, for example, after the city’s mayor decided he had been granted insufficient access to the task force to supervise it properly.<sup>456</sup> City councils and mayors could also resist efforts by local police to obtain federal surveillance equipment, thereby disrupting the “national security-ization” feedback loop. This, too, has already occurred in some places. When the Seattle Police Department obtained two drones without City Council approval, for example, the mayor ordered that the agency give them away.<sup>457</sup> Such steps could both lessen the instance of secrecy creep and provide more robust countervailing checks on government power when such creep does occur.

Better ex ante regulation could also help. A number of scholars have proposed stronger rulemaking as a way to better constrain police.<sup>458</sup> While the application of traditional rulemaking processes have been criticized on a number of grounds,<sup>459</sup> these processes may be more effective in areas prone to secrecy creep. For example, scholars have argued that the rulemaking paradigm is especially well suited for regulating the adoption of surveillance technologies by police departments.<sup>460</sup> None of these proposed solutions will act as a panacea. But governments at all levels can take incremental steps to address the problems associated with secrecy creep.

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<sup>454</sup> See, e.g., Kate Taylor & J. David Goodman, *New York Police Department’s Oversight Office, Fought by Bloomberg, Gets First Leader*, N.Y. TIMES (Mar. 28, 2014), <https://www.nytimes.com/2014/03/29/nyregion/inspector-general-for-new-york-police-department-isnamed.html> [<https://perma.cc/H23U-GWVN>] (reporting on the leadership of an oversight office created in response to complaints about excessive surveillance of Muslim communities). *But see* Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/MT6V-HG6D>] (arguing that such piecemeal reform is insufficient and more profound changes are needed). For a discussion of the limits of transparency, especially in the context of policing, see discussion *supra* note 29.

<sup>455</sup> See Waxman, *supra* note 25, at 314-18 (outlining the “trickle up” account of national security federalism, where local governments influence national policies).

<sup>456</sup> RILEY ET AL., *supra* note 25, at 13-14.

<sup>457</sup> Friedman & Ponomarenko, *supra* note 20, at 1853.

<sup>458</sup> See, e.g., *id.*

<sup>459</sup> See generally Ponomarenko, *supra* note 453 (describing the ways that traditional rulemaking is ill-suited to the policing context).

<sup>460</sup> See *id.* at 7 (describing the regulation of surveillance technologies as “fit[ting] comfortably within the [traditional] rulemaking paradigm”).

#### 4. Civil Society

Perhaps the most promising source of reform is the sustained and persistent actions of civil society organizations and movements. The organizing efforts of the Black Lives Matter movement have helped unleash a wave of police reforms intended to make law enforcement agencies more transparent and accountable, from repealing New York's notorious law shielding police disciplinary records to requiring the NYPD to disclose what surveillance technology it uses.<sup>461</sup> Community efforts to reclaim control of government information—for example, through organized copwatching groups—serve as a counterweight to the expansion of legal forms of government secrecy.<sup>462</sup> Such efforts have demonstrated civil society's potential to rein in state and local government secrecy.

The picture is less promising when it comes to another key component of the civil society ecosystem: the media. Yet a reinvigorated local press could likewise make great strides in helping to offset the more damaging effects of these federal secrecy tools. Armed with the financial resources required to engage in extended investigative efforts, the press could help reduce the threat posed by these secrecy protections. A stronger local media could help restore press-government “equilibrium,” minimize the likelihood of deep secrecy, and reduce the risk of corruption.<sup>463</sup>

The project of reversing local media's decline is immense.<sup>464</sup> But in brief—as I have noted elsewhere—recent innovations in local journalism show some promise.<sup>465</sup> Some non-profit models have succeeded in filling the holes left by the collapse of local journalism—*ProPublica's* new local off-shoot in Chicago, for example, or the *Texas Tribune* in Austin.<sup>466</sup> Smaller and less costly media upstarts, such as the *Vermont Digger* and *Berkeleyside*, have made impressive inroads as well.<sup>467</sup>

Other solutions have also been floated. Public funding for local journalism could help ease the financial pressures placed on media outlets, while improved regulation of social media behemoths could reduce technology

<sup>461</sup> See Press Release, N.Y.C. Council, Council Votes on Six Bills to Reform NYPD (June 18, 2020), <https://council.nyc.gov/press/2020/06/18/1990> [<https://perma.cc/5YXS-BH3J>].

<sup>462</sup> See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 410-15 (2016) (describing community-based “copwatching” groups that “turn[] . . . surveillance instruments on those in power” by video recording police interactions).

<sup>463</sup> See Gao et al., *supra* note 395, at 466 (showing that when a local newspaper closes, the number of public employees, tax revenue per capita, and cost of municipal borrowing all increase).

<sup>464</sup> See, e.g., PEN AM., *supra* note 381, at 5 (describing the “current grave state of local journalism”).

<sup>465</sup> Koningisor, *supra* note 39, at 1545-47.

<sup>466</sup> PROPUBLICA, <https://www.propublica.org/illinois> [<https://perma.cc/Z7ZY-BT6Q>]; TEXAS TRIBUNE, <https://www.texastribune.org> [<https://perma.cc/SY8M-DZL5>].

<sup>467</sup> VT DIGGER, <https://vtdigger.org> [<https://perma.cc/WQ5J-CYQS>]; BERKELEYSIDE, <https://www.berkeleyside.com> [<https://perma.cc/NV6H-4E6X>].

companies' ability to siphon off advertising revenue from media organizations.<sup>468</sup> Such efforts are modest and piecemeal, and each faces legal, political, and logistical challenges. But breathing new life into the local press—by whatever means possible—would also serve as a powerful force to counteract this enhanced secrecy in local government.

#### CONCLUSION

Legal scholars have largely neglected the contours of the state secrecy regime, focusing attention either exclusively on the federal secrecy ecosystem, or, alternatively, on only a narrow slice of state secrecy. This has left broad swaths of important government activity unexamined. This project takes preliminary steps to remedy this gap, sketching out the architecture of the state secrecy regime more broadly. But it does so only in broad strokes. This descriptive account of the state secrecy ecosystem gestures to a number of topics that would benefit from future exploration: a more comprehensive exploration of deep secrecy in state and local government, for example, or a more thorough analysis of the interpretation of structural features of state constitutions. The Article tees up a number of such topics for further inquiry.

More importantly, it identifies the most salient aspect of the state and local secrecy regime—the migration of national security secrecy protections into the state and local context—and explores it further. Years of organizing to protest police violence against Black communities has now opened up new space for reform—what political scientist John Kingdon has referred to as a “policy window.”<sup>469</sup> The lens of secrecy creep can help inform these efforts by illuminating a critical yet overlooked aspect of police power. Lighting up these migratory channels allows judges and policy-makers to take steps to curb their most harmful effects. Further, it offers decisionmakers a framework within which to evaluate subfederal government secrecy claims, and it lends new urgency to the scholarly project of excavating secrecy in state and local government.

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<sup>468</sup> See PEN AM., *supra* note 381, at 56.

<sup>469</sup> JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICY* 165-95 (2011).

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