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Article

THE BLURRED BLUE LINE: REFORM IN AN ERA OF PUBLIC & PRIVATE POLICING

Seth W. Stoughton*

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I. INTRODUCTION

In April 2017, the Alabama Senate voted to authorize the formation of a new police department. Like other officers in the state, officers at the new agency would have to be certified by the Alabama Peace Officers Standards and Training Commission. These new officers would be "charged with all of the duties and invested with all of the powers of law enforcement officers."[1] Unlike most officers in Alabama, though, the officers at the new agency would not be city, county, or state employees. Instead, they would be working for the Briarwood Presbyterian Church, which would be authorized under

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* Assistant Professor of Law, University of South Carolina School of Law. I am grateful to Geoff Alpert, Colin Miller, and Nick Selby for their helpful comments and suggestions. I am thankful for the research assistance of Emily Bogart, Ashlea Carver, Courtney Huether, and Colton Driver, and for the editorial assistance provided by the American Journal of Criminal Law. As always, I am deeply grateful for the support of Alisa Stoughton.

[1] S.B. 193 (Ala. 2017), https://legiscan.com/AL/text/SB193/id/1522071.

Senate Bill 193, to "appoint and employ one or more persons to act as police officers to protect the safety and integrity of the church and its ministries."[2]

The prospect of a private church with its own police department seems like a radical departure from modern practices. The contemporary conception of policing, after all, views it as a primarily and foundationally governmental activity.[3] That observation is easy to take for granted. After all, "maintaining order and controlling crime are paradigmatic governmental functions."[4] That is certainly the role that most police agencies see themselves as fulfilling,[5] and, by and large, that is also how the public sees policing. The uniformed police officers that we see driving around; that we read about in the news; and that we watch in reality shows like *COPS*, crime dramas like *Law & Order*, and comedies like *The Other Guys* are, without exception, government employees.[6] This will strike most people as entirely unremarkable, and for good reason. By any common conception, "the police are government incarnate."[7] There is, and we expect there to be, law enforcement even when the government does not provide or contract for basic services like water, sanitation services, or roads.[8] Indeed, policing is symbolized by the evocative image of the Thin Blue Line, which represents the bulwark that defends civilized society from criminal anarchy.Yet the perception of law enforcement and crime-fighting as exclusively governmental activities is inaccurate as both a historical matter and a modern description. Given the historical, operational, and legal overlap between public and private policing, the Thin Blue Line is neither particularly thin nor exclusively blue. This is not a revelatory observation. Elizabeth Joh and David Sklansky, among others, have written about private policing,[9] and there is a substantial body of literature about what is variously called "plural policing," "joint policing," or "third-party policing."[10] Prior efforts, however, do not fully illustrate the

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[2] S.B. 193 (Ala. 2017), https://legiscan.com/AL/text/SB193/id/1522071.

[3] U.S. PRIVATE SECURITY COUNCIL, LAW ENFORCEMENT AND PRIVATE SECURITY: SOURCES AND AREAS OF CONFLICT AND STRATEGIES FOR CONFLICT RESOLUTION 1 (1977) ("The prevention and control of crime has traditionally be viewed by many citizens as a function of government provided by public law enforcement agencies.").

[4] David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1168 (1999).

[5] *See* Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611 (2016) (discussing the law enforcement's self-image as the "Thin Blue Line" that separates society from chaos).

[6] The equation of law enforcement with government is pervasive, so much so that fictional depictions often use the police as a foil for private investigators who have a characteristically tense relationship with law enforcement. Sherlock Holmes, Jack Reacher, Harry Dresden, and Paul Blart are defined in large part by their engagement in law enforcement activities despite not being government agents.

[7] David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89, 89 (2006).

[8] This is not to suggest that every governmental entity and subdivision provides independent policing services; that is certainly not the case. Many towns and cities contract with other jurisdictions, such as neighboring cities or the surrounding county, to provide police services. In very remote areas, state police or federal agents may be the only law enforcement officers operating in the jurisdiction.

[9] Sklansky, *supra* note 7, at 89; Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 596 (2005) [hereinafter Joh, *Conceptualizing*]; Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 55 (2004) [hereinafter Joh, *Paradox*]; Sklansky, *supra* note 4, at 1168.

[10] *See generally* Hayden P. Smith & Geoffrey Alpert, *Joint Policing: Third Parties and the Use of Force*, 12 POLICE PRAC. & RES. 136 (2011); MAZEROLLE & RANSLEY, THIRD PARTY POLICING (2006); PLURAL POLICING: A COMPARATIVE PERSPECTIVE (Trevor Jones & Tim Newburn eds., 2006); ADAM CRAWFORD, PLURAL POLICING: THE MIXED ECONOMY OF VISIBLE PATROLS IN ENGLAND AND WALES

distortions in the line that separates public and private policing. This Article contributes to an on-going conversation about modern conceptions of policing. Perhaps more importantly given the broad consensus that policing is in need of reform, this article explores some of the ways in which the blurred blue line should affect the way we think about police reform.[11]

Part I describes the evolution of modern policing, tracing the emergence of the now-familiar police department from a mixed heritage of public and private efforts. That evolution is not clearly linear; instead, American policing grew out of the domestic adoption of English institutions such as shire-reeves, constables, night watches, and thief-takers, as well as the creation of domestic institutions like rural slave patrols and city guards organized to prevent slave rebellions. These early institutions, a mix of private and public entities, shared responsibility for a variety of different tasks that today we categorize as central to law enforcement efforts.

Part II explores the modern practice of policing, illustrating the operational overlap between public and private policing. Building on Elizabeth Joh's and David Sklansky's work on private policing, and on my own work on police moonlighting,[12] it describes four different phenomena that can blur the blue line: private policing, semi-public private policing, semi-private public policing, and public policing.

Part III identifies how a broader appreciation of the blurred line of public and private policing might affect police reform efforts. I first refute the argument that the blurred blue line has no role in the reform debate. I then identify three categories where the concept may prove relevant: information gathering, the distribution of police resources, and the regulation of policing itself. Within each category, I suggest how a broader conception of policing—one that incorporates the spectrum of public and private behaviors—could inform a range of important conversations. I offer no specific prescriptions; my goal with this piece is not to provide a set of solutions, but rather a set of possibilities.

II. THE EVOLUTION OF PUBLIC AND PRIVATE POLICING

Just as the need for security and safety is nothing new, the police function—deterring, identifying, and apprehending criminals—is hardly innovative. The methods in which those functions are fulfilled, though, have changed significantly over time. In the colonial era and the early days of the United States, what we would today identify as the police function was not fulfilled by governmental agencies. "[M]ost of the institutions historically

(2005); MARK BUTTON, PRIVATE POLICING (2002); Rick Sarre & Tim Prenzler, *The Relationship Between Police & Private Security: Models and Future Directions*, 24 INT'L J. COMP. & APPLIED CRIM. JUST. 91 (2000) (providing examples from Australia); Michael E. Buerger, *The Politics of Third-Party Policing*, 9 CRIME PREVENTION STUD. 89 (1998) (discussing "the forced recruitment of agents . . . to act on behalf and direction of the police to control human behavior").

[11] U.S. PRIVATE SECURITY COUNCIL, *supra* note 3, at 1 ("The prevention and control of crime has traditionally be viewed by many citizens as a function of government provided by public law enforcement agencies.").

[12] Seth W. Stoughton, *Moonlighting: The Private Employment of Off-Duty Officers*, (forthcoming 2017) (on file with University of Illinois Law Review).

responsible for law enforcement would not be recognizable to us as police."[13] Indeed, "[t]he concept of a publicly funded entity designed to serve and protect society is a relatively recent historical development."[14] In this Part, I trace the predecessors of that development.

First, a clarification. Elizabeth Joh defines modern private policing as "the various lawful forms of organized, for-profit personnel services whose primary objectives include the control of crime, the protection of property and life, and the maintenance of order."[15] She correctly observes early law enforcement efforts, such as I will describe in this Part, "are not analogous to the private, commercial companies offering policing services today, but are better classified as examples of community obligations, volunteer efforts, and vigilantism."[16] As a result, she warns, "one should be cautious in tracing a continuous development of private policing from the earliest forms of community self-protection to the present day."[17] I happily concede her point, and I echo her warning. This article, though, is focused on the blurred line between public and private policing. To that end, it is worthwhile to trace the evolution of policing from earlier efforts, both public and private. As this Part will demonstrate, public and private policing did not evolve separately. To the contrary, from the earliest inception of modern policing it has been all but impossible to draw clear distinctions between public and private—which is to say, governmental and non-governmental—policing.

A. The Complicated Origins of Modern Policing

The government's role in law enforcement is perhaps most identifiable in the form of the early English shire-reeve, a title that gives us the modern word "sheriff." The shire-reeve was a monarchical officer, selected by and answerable to the monarch.[18] Shire-reeves were principally tax-collectors,[19] although they had the authority to assemble a group of men known as a *posse comitatus*—literally "the power of the county"[20]—when needed to keep the peace or apprehend a felon. The shire-reeves received a portion of the taxes they collected as pay, creating a perverse incentive. As a result, "many [reeves] exploited the power their position gave them for their own financial gain."[21] The existing legal system "predictably "led to abuses and made [reeves] rather unpopular figures."[22] The low regard in which they were held is observable at least as early as the 1400s in the form of Robin Hood's nemesis, the corrupt and oppressive Sheriff of Nottingham (or, differently titled, the Reeve of Nottinghamshire).

[13] KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA 27 (2007).

[14] JAMES F. PASTOR, THE PRIVATIZATION OF POLICE IN AMERICA 33 (2003).

[15] Joh, *Paradox*, *supra* note 9, at 55.

[16] Joh, *Conceptualizing*, *supra* note 9, at 579–80.

[17] *Id.* at 585.

[18] PASTOR, *supra* note 14, at 35.

[19] WILLIAMS, *supra* note 13, at 31.

[20] *Id.*; ARNOLD S. TREBACH, THE GREAT DRUG WAR: AND RATIONAL PROPOSALS TO TURN THE TIDE 163 (2005).

[21] *See generally* ELIZABETH M. HALLAM, THE PLANTAGENET CHRONICLES (1995).

[22] WILLIAMS, *supra* note 13, at 31.

Although the shire-reeve was the clearest example of a governmental agent, perhaps the most recognizable precursor of the modern law enforcement agency was the night watch system that originated in cities and larger towns in the mid-1200s.[23] Every able-bodied, adult male was required to participate in the watch, charged with taking the occasional shift patrolling the town or city at night and sounding an alarm when necessary.[24] There was no compensation, direct supervisor, or clearly identified duties. Though initially a symbol of distinction, working as a watchman eventually became something of "a public joke"; participation may have been a public duty, but it was one that was often fulfilled through private transactions as citizens hired substitutes if they had the financial means to do so.[25] "By the seventeenth century only those who could not hire a substitute actually assumed [the] onerous duties. Once started, this practice introduced to police work those who were less and less qualified to do the work."[26] As a result, night watchmen were "unarmed, untrained, under-supervised, often unwilling, and frequently drunk."[27]

In England, local jurisdictions in and around London began paying watchmen in 1735, and most were doing so by 1785.[28] At the same time, the watch system became more formalized, developing minimum qualifications, a command structure, and record-keeping requirements.[29] Even then, "'although [the watch] function was certainly specialized, it is not always clear that it was policing. Very often, [watchmen] acted only as sentinels, responsible for summoning others to apprehend criminals, repel attack, or put out fires.'"[30]

The watch system may be the clearest predecessor to modern policing, but even in its time it did not operate alone. In 1797, thefts of cargo from boats on the Thames led a small group of distinguished citizens, including celebrated jurist Jeremy Bentham, to approach the West India Planters Committee and the West India Merchants Committees associations with a proposal to create a private police force.[31] With the permission of the government, the Thames Police—officially the West India Merchants Company Marine Police Institute—began operations the next year.[32] Parliament passed the appropriately titled *Act for the More Effectual Prevention of Depredations on the River Thames* to support England's first

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[23] *Id.*

[24] *Id.*

[25] DAVID R. JOHNSON, AMERICAN LAW ENFORCEMENT: A HISTORY 3 (1981).

[26] *Id.*

[27] *Id.* at 31–32; *see also* PASTOR, *supra* note 14, at 36 (describing watchmen as "ill-trained, ill-equipped groups of men [who] often lost control and violated laws and created violence in the quest to institute 'law and order'").

[28] WILLIAMS, *supra* note 13, at 32.

[29] *Id.*

[30] *Id.* at 27 (quoting David H. Bayley, *The Development of Modern Policing*, *in* POLICING PERSPECTIVES, AN ANTHOLOGY 67 (Larry K Gaines & Gary W. Cordner eds., 199[8])).

[31] 19 THE WORKS OF JEREMY BENTHAM: NOW FIRST COLLECTED 330–34 (John Bowring ed., Simpkin, Marshall, & Co., London; John Cumming, Dublin, 1843).

[32] Dick Paterson, *Origins of Thames Police*, THAMES POLICE MUSEUM, http://www.thamespolicemuseum.org.uk/h_police_1.html (last visited June 27, 2017).

preventative police force.[33] The Thames Police did not last long, but it sparked a broader interest in private efforts to supplement the watch system. "'By 1829[,] London had become a patchwork of public and private police forces."[34] A contemporary record reflects private police units operating in forty-five different parishes within ten miles of London.[35]

It could be difficult to distinguish the public police from private watchmen, a confusion engendered by the widespread practice of fee-based policing. According to one scholar, a police officer's public salary could be more properly described as "a retaining fee"; officers' primary income was claiming or sharing "any rewards for the detection and conviction of offenders, [whether] offered by statute, proclamation or by a private party."[36] Supplementing into that patchwork were thief-takers—individuals who would, for a fee, recover stolen property, which they often obtained by buying it from the thief with a portion of the recovery fee[37]—and "felons associations" that raised money to fund prosecutions related to crimes committed within the association's purview and which occasionally hired private patrols.[38]

B. *Policing in Colonial America*

As in England, a complicated patchwork dominated colonial America. Elected sheriffs and constables were the face of public law enforcement, but neither was particularly attractive. "Corruption . . . was quite common, with sheriffs accepting bribes from suspects and prisoners, neglecting their civil duties, tampering with elections, and embezzling public funds."[39] Constables "were paid by a system of fees, and [they] tended to concentrate on the better-paying tasks."[40] As a result, neither position was viewed as particularly respectable. "[M]any people refused to serve when elected, and the authority of each office was commonly challenged, sometimes by violence."[41] According to one text, "By the 1650s[,] Bostonians had become so adept at avoiding service that the colony's government had to threaten citizens with huge fines to make them assume their obligations."[42] Citizens' adeptness in dodging their obligations proved persistent. Almost a century later, in 1743, seventeen Bostonians were selected to serve as constables, but only five entered service; ten men refused and paid a fine, while two others were

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[33] 39 & 40 Geo 3 c 87.

[34] WILLIAMS, *supra* note 13, at 32 (quoting Bayley, *supra* note 30, at 63).

[35] Joh, *Conceptualizing*, *supra* note 9, at 584.

[36] Sir Leon Radzinowicz, *Trading in Police Services: An Aspect of the Early 19th Century Police in England*, 102 U. PENN. L. REV. 1, 5 (1953). The author goes on to describe how officers' remuneration included "ordinary fees" and "fees for special services, zeal and exertion." *Id.* at 8, 11. Additionally, officers sought gratuities and took private assignments from individual civilians or companies. *Id.* at 18, 20, 22.

[37] WILLIAMS, *supra* note 13, at 32.

[38] Joh, *Conceptualizing*, *supra* note 9, at 582.

[39] WILLIAMS, *supra* note 13, at 33.

[40] *Id.* at 33–34.

[41] *Id.* at 34.

[42] JOHNSON, *supra* note 25, at 5. By the mid-1700s, "many of those chosen [to serve as a watchman or constable] preferred to pay fines rather than suffer the duties of the office." *Id.* at 7.

excused from service.[43] Even the most conscientious sheriffs and constables were not engaged in what modern viewers would consider to be primarily law enforcement activity; their duties included serving warrants that had been issued by a court, but also tax collection, supervising elections, organizing road repair crews, and other civil functions.[44]

Like their English counterparts, many large towns and cities in the colonial era and early United States, particularly in the northern colonies and states, adopted a night watch system that conscripted able-bodied, adult men to keep order, watch out for fires, light street lamps, and, in Boston at least, "cry the time of night and state of the weather."[45] And as had been the case in England, the watchmen were typically not paid and had no training, no set procedure, little to no equipment, and no real command structure.[46] Citizens who could afford it hired substitutes to serve on the watch for them, ensuring that the watch was dominated by those who had no way to avoid it or no better opportunities elsewhere. These semi-privatized public officials—working class citizens who were hired to satisfy the public service obligations of the more affluent—did not burnish the image of the watch; a contemporary New York City newspaper described them as "a parcel of idle, drinking, vigilant Snorers, who never quelled any nocturnal Tumult in their Lives."[47] If anything, this poor public perception only further ensured that those who had the opportunity to avoid watch service did exactly that.

Although their duties overlapped to some extent, and although those duties included some aspects of modern policing, neither sheriffs, constables, nor the early American watch system could be clearly identified as the primary provider of law enforcement services.[48] A description of policing in New York City in the mid-1780s identifies a small host of different public officials who all shared some law enforcement responsibilities: the mayor and his chief assistant, the high constable; constables and marshals who worked primarily on commission; and watchmen who were paid (at the time) per night of work.[49]

In the American South, an economy heavily dependent on slavery gave rise to a different set of institutions that shared some of the responsibility for policing functions. In the early colonial period, overseers were responsible for controlling the slave populations on their plantations.[50] Off the plantations, private slave catchers and *ad hoc* militias hunted down runaway

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[43] JAMES F. RICHARDSON, URBAN POLICE IN THE UNITED STATES 5 (1974).

[44] WILLIAMS, *supra* note 13, at 33–34.

[45] *Id.* at 34–35; WILLIAM J. BOPP & DONALD O. SCHULTZ, A SHORT HISTORY OF AMERICAN LAW ENFORCEMENT 18 (1972).

[46] WILLIAMS, *supra* note 13, at 35. There were limited exceptions; for example, the Boston night watch began paying night watchmen in the early 1700s, although there is some dispute as to exactly when. BOPP & SCHULTZ, *supra* note 45, at 18 (reporting that Boston's night watchmen first received compensation in 1712); *A Brief History of the Boston, MA Police Department*, BOSTON POLICE MUSEUM, http://bostonpolicemuseum.com/history.html (last visited June 27, 2017) [hereinafter *BPD Museum*] (putting the date at 1707).

[47] ROBERT C. WADMAN & WILLIAM THOMAS ALLISON, TO PROTECT AND TO SERVE: A HISTORY OF POLICE IN AMERICA 11 (2003).

[48] WILLIAMS, *supra* note 13, at 35.

[49] BOPP & SCHULTZ, *supra* note 45, at 26–27.

[50] WILLIAMS, *supra* note 13, at 36.

slaves, returning them for a fee.[51] In 1661, the first slave code shifted responsibility from private slave owners to the public—meaning the white population—leading to the creation of more formalized militias. These militias "began making regular patrols to catch runaways, prevent slave gatherings, search slave quarters, keep order at markets, funerals, and festivals, and generally intimidate the black population."[52] As with the sheriffs, constables, and watch, the militias were assisted by private individuals. In the late 1600s, whites were first authorized and then legally required to assist in the recovery of runaway slaves, with the captors entitled to a reward.[53] In the early 1700s, under the threat of a Spanish invasion, South Carolina bifurcated the duties of the militias and patrols: militias were responsible for dealing with external threats, while patrols focused on preventing slave revolts and dealing with runaways.[54] Other southern governments followed suit, and slave patrols became common.[55]

Although the slave patrols appear to be public entities, the reality is more complex. Slave owners were averse to outside intervention, including government intervention intended to reinforce owners' control over their slaves. Such intervention "represented not only a usurpation of [a slave owner's] authority but also a personal slight, implying that the master was not up to the task of controlling his slaves."[56] Different jurisdictions sought to address this aversion in different ways. Some rural slave patrols were paid from public coffers, others were made up of volunteers, while others consisted of unpaid conscripts.[57] Regardless of their exact organization, their duties were largely similar—prevent insurrection by intimidating the black population—and they were given wide discretion to determine whether and how to carry out those duties in any given situation.[58]

Southern anxieties about slave revolt were not limited to rural plantations. Early on, cities and towns' "enforcement [was] entrusted to private individuals and the existing watch," but soon the model of the rural slave patrol was adopted in the form of city guards.[59] Unlike the night watches that they supplanted, the city guards were armed and uniformed from early on, with Charleston, South Carolina establishing what may be the nation's first uniformed patrol in 1783.[60] Such efforts took considerable public resources. By the early 1800s, the single largest item in Charleston's city budget was funding for the slave patrol.[61] These organized, uniformed, patrol-based entities came into existence more than thirty years before anything we would recognize today as modern police agencies.

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[51] *Id.*

[52] *Id.* at 37.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 37–39.

[56] *Id.* at 38.

[57] *Id.* at 40–41.

[58] *Id.* at 40–41.

[59] *Id.* at 41–42.

[60] Savannah, Georgia, followed suit in in 1796, with Richmond, Virginia, adopting uniforms in 1800. *Id.* at 42.

[61] RICHARDSON, *supra* note 43, at 19.

C. *The Emergence of Modern Policing*

The first "modern" municipal police departments began to appear in the 1830s,[62] largely in response to rioting and civil unrest.[63] One of the first metropolitan police departments in the country was funded not from the public coffers but by the bequest of a wealthy philanthropist who wanted "Philadelphia to provide more effectually than they do now for the security and property of the persons . . . by a competent police."[64] As that phrasing suggests, the police forces of the time were not universally admired. Indeed, the concept of a public police force was attacked on both fiscal and philosophical grounds. Fiscally, a publically funded police force would be more expensive than a sheriff, who worked on commission, or night watchmen, who were still often conscripted. Philosophically, the creation of a full-time, paid police force would give a substantial amount of authority to the government, raising concerns about excessive power and the invasion of personal liberties.[65] Despite these concerns, early police forces began to supplement, then supplant, the watch systems.[66]

As American policing became more formalized, police agencies somewhat reluctantly added detective bureaus. The reluctance stemmed from the fact that the detectives' "specialized function carried with it the imperative to become involved with criminals," and that involvement threatened to undermine the legitimacy of the agency's primary duty: patrol.[67] Such concern was well-founded. Ostensibly charged with solving crimes, particularly property crimes, in practice "[t]he primary goal of the detective was to recover stolen property and share in the reward, not to arrest the thief."[68] In this way, detectives in early American policing were similar to their English counterparts, the thief-takers; through a system for the recovery of stolen property known as "compromises," detectives "negotiated with thieves and offered immunity for the return of property. The victim would pay the detective a 'reward,' which the detective would share with the thief."[69] Many detectives worked on their own behalf or for a private security company in addition to their work for their public employer.[70] Even when they were

[62] Exactly which city first created a municipal police department remains contested. Many police agencies date their origins on the development of a day-time watch service. For example, Philadelphia is often cited as the first police agency in the United States because it created a paid, day-time watch in 1833, despite abandoning the effort three years later. CHARLES R. SWANSON ET AL., CRIMINAL INVESTIGATION 3 (2003). Similarly, the Boston Police Department is typically dated to 1838, when the city organized its day watch even though it had started paying night watchmen more than a century before. *BPD Museum*, *supra* note 46. New York City, for its part, began paying watchmen in 1658, shortly before the British took it, under the name of Nieu Amsterdam, from the Dutch. BOPP & SCHULTZ, *supra* note 45, at 18–19.

[63] RICHARDSON, *supra* note 43, at 21.

[64] BOPP & SCHULTZ, *supra* note 45, at 35.

[65] PASTOR, *supra* note 14, at 36.

[66] In many cases, police forces proved to be significantly more effective than night watch systems. In the 1840s, for example, the twenty-two person Boston police force "captured more criminals than the entire rival body of over two hundred night watchmen." BOPP & SCHULTZ, *supra* note 45, at 37.

[67] GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 24 (1988).

[68] *Id.*

[69] *Id.*

[70] *Id.* at 28 (describing how the "line between the public and private sectors was blurred as detectives went back and forth, sometimes working for both [private and public employers] simultaneously").

working under the auspices of a public police agency, "much of policing took on the character of a contractual relationship negotiated between clients (or victims). The clients sought protective, investigative or enforcement services, while the agents (i.e., police) supplied such services in return for a fee, reward or share of recovered goods."[71]

By the 1850s, police agencies were a common fixture of large cities, although the officers themselves were not readily identifiable: they did not typically wear uniforms.[72] But despite the rise of the police department in its modern incarnation, it would be a mistake to think that law enforcement was exclusively or even primarily a governmental responsibility. Municipal police agencies with limited jurisdiction were simply unable to accommodate large-scale commercial entities operating on an interstate or national scale, such as railroads, banks, and mining companies.[73] This was particularly true in the West and Midwest, which had relatively few public police officers.[74] Without a strong federal police presence, private organizations stepped in to fill the gap. In 1850, as localities across the country continued to establish their own police agencies, Allan Pinkerton formed the Pinkerton National Detective Agency.[75] Pinkerton agents engaged in sting operations, solved crimes, and hunted down criminals,[76] all of which are likely to strike the modern reader as more within the purview of public police than private security.[77]

By the 1880s, all of the major cities in the United States had created municipal police agencies, and states soon followed suit. Following Texas's early 1870 example, other southwestern states began creating state police agencies at the turn of the century.[78] State police continued to expand over the next few decades, with the momentum eventually shifting from general service police agencies to dedicated highway patrols during the Great Depression.[79] Throughout this period, private security was in decline as states and local governments increased their expenditures on law enforcement,

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[71] PASTOR, *supra* note 14, at 37.

[72] BOPP & SCHULTZ, *supra* note 45, at 39. There was both public and internal controversy about police uniforms. Public critics condemned uniforms as imitative of royal livery, while many officers feared that wearing a uniform would only invite attack. *Id.* at 39–40 (describing the sentiment among officers "that the job was dangerous enough without advertising that one was an officer"); *see also* JOHNSON, *supra* note 25, at 25. The officers may have had a point. In in 1700s, watchmen in Charleston, South Carolina, had become so reviled that sailors "began to purposefully target the watchmen on their rounds, sometimes beating them severely." WADMAN & ALLISON, *supra* note 47, at 12. As a result, it took decades before uniforms were accepted. Three of the largest police agencies—Boston, New York, and Chicago—adopted uniforms in 1858, 1860, and 1861, respectively. JOHNSON, *supra* note 25, at 29.

Notably, officers began carrying firearms as a matter of course at about the same time, although many police agencies still prohibited them as a matter of official policy. *Id.* at 30. When cities began to authorize officers to carry firearms, it "only recognized what was becoming standard." *Id.*

[73] PASTOR, *supra* note 14, at 38.

[74] *Id.*

[75] *Id.* Although the Pinkerton National Detective Agency was not the first private security company in the United States, it was by far the largest and most successful. SWANSON ET AL., *supra* note 62, at 4.

[76] MARX, *supra* note 67, at 28–29.

[77] Then, as now, the proper balance of public and private policing was a matter of debate, with private security forces criticized as tools of the wealthy. PASTOR, *supra* note 14, at 38–39.

[78] H. KENNETH BECHTEL, STATE POLICE IN THE UNITED STATES: A SOCIO-HISTORICAL ANALYSIS 35–39 (1995).

[79] *Id.* at 42–44.

encouraged by private industry and large companies that preferred to shift the costs of security from their account books to the public coffers.[80] The decline of private policing, however, was temporary. The next Part addresses the contemporary practices that continue to blur the line between public and private policing.

III. THE BLURRING OF THE BLUE LINE

The prior Part described the complicated and inconsistent evolution of public and private efforts that gave rise to modern policing, demonstrating both the muddled heritage and the fact that there has likely never been a point in time at which public and private policing could be clearly distinguished. As leading scholars have pointed out, private policing efforts are difficult to casually conceptualize. David Sklansky, for example, has argued that private policing is functionally indistinguishable from both the public police and from the public more generally.[81] Elizabeth Joh has argued that "traditional legal scholarship has demonstrated too shallow an understanding of private policing in action," which she attributes to the assumption "that private policing is a monolithic entity."[82] Building on Elizabeth Joh's and David Sklansky's work on private policing, this Part turns to the modern era by describing four different phenomena: private policing, semi-public private policing, semi-private public policing, and public policing.[83] Each, it seems, has the potential, if not the tendency, to blur the line that separates—or doesn't—public and private policing.

My objective in this Part is to demonstrate the substantial overlap that exists in private and public policing as they are currently practiced. In so doing, I do not mean to suggest that any interstices between the two are inconsequential, nor do I intend to argue that the points of comparison are universally applicable. Indeed, my goal is to offer some support for Sklansky's argument: as it is practiced, public and private policing can come close to being functionally indistinguishable.[84] Indeed, the line is blurred in both directions to an extent that has not been fully appreciated. In the next Part, I address the potential implications of that observation on police reform efforts.

A. Private Policing

Today, the vast majority of police officers are employed at the state and local level. According to the most recent data available, more than 15,000 state and local general-purpose law enforcement agencies employ almost

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[80] PASTOR, *supra* note 14, at 39.

[81] Sklansky, *supra* note 4, at 1270–75.

[82] Joh, *Conceptualizing*, *supra* note 9, at 596.

[83] Elizabeth Joh has persuasively argued that it is a mistake to view private policing as monolithic, as there are at least five dimensions of variation in (goals, resources, legal powers, jurisdiction, and organizational location) and four distinct types of private policing (protective policing, intelligence policing, publically contracted policing, and corporate policing). Joh, *Conceptualizing*, *supra* note 9, at 596. This valuable taxonomy informs, but cannot structure, my analysis here.

[84] Sklansky, *supra* note 4, at 1270–75.

725,000 full-time officers.[85] Additionally, more than 1,700 special jurisdiction agencies—agencies with either a special geographic jurisdiction, such as a university or public transportation system, or with limited enforcement responsibilities such as alcohol control agencies—employ an additional 57,000 full-time officers.[86] The 638 constables and marshals' agencies left in the country employ a total of about 3,500 full-time officers.[87] In total, there are approximately 780,000 full-time, sworn law enforcement officers working for state or local governments in the United States. The ratio of 252 officers per 100,000 people means that there is one state or local officer for roughly every 400 people (one officer for every 300 adults) in the population.[88]

What about the private security industry? Although precise numbers are difficult to come by,[89] one thing is certain: there are more—probably *many* more—individuals working in private security than in public policing.[90] As of 2015, the Bureau of Labor Statistics estimated that there were almost 1.1 million private security guards responsible for "guard[ing], patrol[ing] or monitor[ing] premises."[91] The National Association of Security Companies agrees, estimating that, in 2006, "between 11,000 and 15,000 private security companies employ[ed] more than 1 million guards."[92] The broader private security industry, which includes individuals who conduct background investigations, provide armored transport services, offer personal protection, manage correctional facilities, and perform security-related tasks other than those that fall under the general classification of "patrol," is even larger.[93]

[85] BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATS., NCJ 233982, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), http://www.bjs.gov/content/pub/pdf/csllea08.pdf.

[86] *Id.*

[87] *Id.*

[88] LINDSAY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, AGE & SEX COMPOSITION: 2010, at 2 tbl.1 (May 2011), http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf. (There are an additional 120,000 full-time law enforcement officers employed by the federal government, spread over 73 different law enforcement agencies. Of that number, over a third (37.3%) engage in "criminal investigation and enforcement duties," while almost a quarter (23.4%) perform police response and patrol. The remainder works in immigration or customs inspection (15.3%), corrections (14.2%), security and protection (5.1%), and court operations (4.7%).) REAVES, *supra* note 85, at 1. (Including federal officers, there are 900,000 full-time, sworn officers in the United States, or one officer for about every 300 adults in the population.)

[89] This is true in part because there is no uniform definition about what constitutes "private security." For a useful discussion of the conceptual difficulties that complicate attempts to define that term, see Clifford D. Shearing & Philip C. Stenning, *Modern Private Security: Its Growth and Implications*, 3 CRIME & JUST. 193, 195–98 (1981).

[90] Joh, *supra* note 9, at 1; Sklansky, *supra* note 4, at 1175.

[91] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL EMPLOYMENT AND WAGES: 33-9032 SECURITY GUARDS (May 2015), http://www.bls.gov/oes/current/oes339032.htm; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: SECURITY GUARDS AND GAMING SURVEILLANCE OFFICERS (2016–17 ed.), http://www.bls.gov/ooh/protective-service/security-guards.htm.

[92] KEVIN STROM ET AL., DOCUMENT NO. 232781, THE PRIVATE SECURITY INDUSTRY: A REVIEW OF THE DEFINITIONS, AVAILABLE DATA SOURCES, AND PATHS MOVING FORWARD 4-8 (Dec. 2010), https://www.ncjrs.gov/pdffiles1/bjs/
grants/232781.pdf.

[93] STROM ET AL., *supra* note 92, at 4-6. One study estimates the number of "full-time security workers to be between 1.9 and 2.1 million." Press Release, ASIS Int'l, Groundbreaking Study Finds U.S. Security Industry to be $350 Billion Market (Aug. 12, 2013), https://www.asisonline.org/News/Press-Room/Press-Releases/2013/Pages/Groundbreaking-Study-Finds-U.S.-Security-Industry-to-be-$350-Billion-

Further, private security as an industry is growing faster than public policing. The Bureau of Labor Statistics predicts that the ten-year period from 2014 to 2024 will see 4% growth in public policing, but 7% growth in the private security industry.[94] This follows ten-year predictions from 2012 to 2022 of 5% and 12%, respectively.[95] Historically, the thirty-year period from 1980 to 2010 saw an 80% growth in contract security firms.[96] Local police departments, on the other hand, saw only a 34% increase in officers in the twenty-six years between 1987 and 2013.[97] Further, the total number and rate of growth does not include individuals who work in a primarily security capacity for non-security businesses, such as loss prevention employees working for retail stores, or the wide range of employees who have *some* security-related responsibilities, even if their primary duties are unrelated to security.[98]

Regardless of whether they are employed by a traditional security company or some other enterprise, private employees conduct a range of what we would otherwise identify as law enforcement activities. The comparison can be a point of pride for security personnel and a selling point for their employers. Elizabeth Joh's seminal article on the private security industry opens with a quote from a security guard describing his agency as "very policelike."[99] That description captures the broad involvement of private security personnel in patrol, investigations, and surveillance, as well as their authority to stop, search, and arrest. Uniformed security guards engage in patrol on behalf of private businesses, community centers, and neighborhoods. In many gated communities, security guards physically control space[100] by screening vehicles and pedestrians at entry checkpoints

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Market.aspx [hereinafter *Groundbreaking Study*]. I have intentionally left unmentioned the private security industry's "hardware security" component, which manufactures, installs, and monitors alarm systems. Although closely related to law enforcement, this function may be seen as distinct from the modern conception of policing. There are some potential parallels, though: law enforcement agencies have been instrumental in installing and monitoring emergency call boxes in some public spaces; these alarms are a familiar sight on many university campuses.

[94] *Compare* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, POLICE AND DETECTIVES (2016–17 ed.), http://www.bls.gov/ooh/protective-service/police-and-detectives.htm#tab-6 (visited Feb. 21, 2017), *with id.*, SECURITY GUARDS & GAMING SURVEILLANCE OFFICERS, http://www.bls.gov/ooh/protective-service/security-guards.htm#tab-6 (last visited June 27, 2017). Different facets of the private security industry may grow even faster. A study by ASIS Int'l, a professional organization for the security industry, and the Institute of Finance and Management, a professional organization for financial controllers, estimated that private investigations would see 21% growth and information technology security would see 22% through 2020. *Groundbreaking Study*, *supra* note 93.

[95] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, POLICE AND DETECTIVES (2014–15 ed.), http://www.bls.gov/ooh/protective-service/police-and-detectives.htm (Dec. 19, 2013); *id.*, SECURITY GUARDS & GAMING SURVEILLANCE OFFICERS, BUREAU OF LABOR STATISTICS (Dec. 19, 2013), http://www.bls.gov/ooh/protective-service/security-guards.htm.

[96] STROM ET AL., *supra* note 92, at 4-3.

[97] REAVES, *supra* note 85, at 1.

[98] Sklansky, *supra* note 4, at 1175 (listing "store clerks, insurance adjustors, and amusement park attendants" as non-security employees who nevertheless have some security-related responsibilities).

[99] Joh, *Paradox*, *supra* note 9, at 49 (quoting Bud Hazelkorn, *Making Crime Pay*, S.F. CHRON. MAG., Aug. 17, 2003, at 14, 17).

[100] Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2199 (2014) ("Policing is, to a significant extent, the exercise of control over space."); *see also* STEVE HERBERT, POLICING SPACE: TERRITORIALITY AND THE LOS ANGELES POLICE DEPARTMENT 9–11, 21–23 (1997).

that only residents and duly designated guests are permitted to pass.[101] They respond to complaints and alarms, from the mall security officers called to deal with an obnoxious patron in the food court to mobile security officers who respond to residential burglar alarms. With both a preventative and responsive aspect, private security patrol closely parallels the public police patrol function.

Patrol is the "mainstay of police work,"[102] but policing also includes an investigative component; police agencies are expected to investigate and solve crimes so they can apprehend offenders and support successful prosecutions.[103] Those investigations may include surveillance, either targeted surveillance that tracks a subject suspected of wrong-doing[104] or drag-net surveillance that captures a range of individuals in an attempt to ferret out wrong-doing that has not yet been identified.[105] Just as private parties parallel the public police's patrol function, so too do they engage in similar investigative behaviors. "Private detectives increasingly are hired not only to watch for shoplifters, but also to investigate and not infrequently to spy on, everyone from insurance claimants and litigation opponents to employees, business partners, and even prospective neighbors."[106]

In addition to targeted surveillance, private security efforts include pervasive surveillance of public or private space. Such surveillance is not intended to gather information about a particular person, but rather to observe the behaviors of a group of people (whoever happens to be in camera range) so that wrongdoers can be identified in real time or after the fact. Casino surveillance is perhaps the most obvious example of privately administered pervasive surveillance. In Nevada, for example, the Gaming Commission requires licensed casinos that operate at least three gaming tables to have the capacity to "monitor and record: (a) each table game area with sufficient clarity to identify patrons and dealers; and (b) each table game surface, with sufficient coverage and clarity to simultaneously view the table bank and determine the configuration of wagers, card values, and game outcomes."[107] According to a long-time casino security engineer, a large casino like the

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[101] EDWARD JAMES BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES 2–3 (1997) (estimating that over 20,000 gated communities existed in the United States as of 1997).

[102] ERIC J. FRITSCH ET AL., POLICE PATROL ALLOCATION AND DEPLOYMENT 17 (2008); *see also* Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 879–80 (2014).

[103] Indeed, this expectation is so persistent that the failure to do so is considered newsworthy. Martin Kaste, *Open Cases: Why One-Third of Murders In America Go Unresolved*, NPR (Mar. 30, 2015, 5:04 AM), http://www.npr.org/2015/03/30/395069137/open-cases-why-one-third-of-murders-in-america-go-unresolved; Jace Larson, *New Harris County Numbers Show Many Unsolved Crimes*, CLICK2HOUSTON (May 18, 2015), http://www.click2houston.com/news/investigates/new-harris-county-numbers-show-many-unsolved-crimes/33082726; Lyndsay Winkley, *Murders Mostly Solved, Not Minor Crimes*, SAN DIEGO UNION TRIB., Apr. 11, 2015, http://www.utsandiego.com/news/2015/apr/11/police-clearance-rates-murders-fbi-stats/.

[104] *See, e.g.*, United States v. Jones, 565 U.S. 400 (2012).

[105] For example, the New York Police Department's surreptitious surveillance of Muslim communities in New Jersey. Adam Goldman, *Tape Surfaces of Caller Outing NYPD Spying in NJ*, ABC EYEWITNESS NEWS 11 (July 25, 2012), http://abc11.com/archive/8748471/.

[106] Sklansky, *supra* note 4, at 1176.

[107] NEVADA GAMING COMM'N, SURVEILLANCE STANDARDS FOR NONRESTRICTED LICENSES, SURVEILLANCE STANDARD 2(1) (2005), http://gaming.nv.gov/modules/showdocument.aspx?documentid=2944.

Bellagio may have more than 2,000 active cameras.[108] While this is a rather extreme example, and one largely directed at private space, private surveillance in more public areas is a fact of modern life: outward facing security cameras are a common feature of parking lots, gas pumps, ATMs, apartment building entrances, urban storefronts, and so on.

Not only do private actors share many of the duties of their public counterparts, they often share some of the same legal powers. At common law, private citizens had the power to arrest—the proverbial "citizen's arrest"—but it was limited. Like public officials, private citizens could arrest for felonies committed outside of their presence, but could only arrest for misdemeanors and breaches of the peace committed in their presence.[109] If the person arrested for the misdemeanor was not the perpetrator of the crime, or if no felony had actually been committed, a public officer was immune from civil and criminal liability so long as they had a good faith belief amounting to probable cause at the time of the arrest. But a private citizen had no such protection; even with a good-faith, probable cause belief that the perpetrator committed a crime, civilians remained potentially liable for a range of intentional torts and their criminal analogues.[110] Private security guards, on the other hand, have less to worry about.

The law in many jurisdictions gives more flexibility to private businesses and their employees than it does to citizens. Statutes that codify the common-law doctrine known as "shopkeeper's privilege" or "merchant's privilege," for example, provide a probable cause defense for business owners and employees who arrest someone for larceny.[111] Further, merchants may be explicitly authorized to use force to effectuate the arrest or protect their property in a way that private citizens are not.[112] Such statutes may provide "absolute immunity from civil liability for intentional torts . . . which may occur during the apprehension and detention of a customer suspected for shoplifting."[113] And while a merchant and the merchant's agents face *less* civil or criminal liability than a private individual would, the perpetrator of the crime may face *more*; in some states, resisting a merchant or private security guard's attempt to arrest carries a separate criminal penalty in much the same way that it is a crime to resist a police officer's attempt to arrest.[114]

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[108] Jon Brodkin, *Casino Insider Tells (Almost) all About Security*, NETWORKWORLD (Mar. 7, 2008, 12:00 AM), http://www.networkworld.com/article/2284208/software/casino-insider-tells--almost--all-about-security.html.

[109] Note, *The Law of Citizen's Arrest*, 65 COLUM. L. REV. 502, 504–05 (1965) [hereinafter *Citizen's Arrest*]; *see also* Carroll v. United States, 267 U.S. 132, 157 (1924).

[110] *Citizen's Arrest*, *supra* note 109, at 511. Some states have provided substantive protections by immunizing private citizens who have some quantum of proof—probable cause or reasonable cause are the two most common—supporting their actions. U.S. DEP'T OF JUSTICE, NAT'L CRIM. JUST. REFERENCE SERV. (NCJRS), NCJRS 146908, SCOPE OF LEGAL AUTHORITY OF PRIVATE SECURITY PERSONNEL apps. C1 & C2 (1976) [hereinafter NCJRS, SCOPE OF LEGAL AUTHORITY], https://www.ncjrs.gov/pdffiles1/Digitization/146908NCJRS.pdf.

[111] Amanda G. Main, Note, *Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief*, 39 BRANDEIS L.J. 289, 293–94 (2000).

[112] *Id.* at 295.

[113] ALAN KAMINSKY, A COMPLETE GUIDE TO PREMISES SECURITY LITIGATION 82 (2008).

[114] *See, e.g.*, FLA. STAT. ANN. § 812.015(6) ("An individual who . . . resists the reasonable effort of a . . . merchant [or] merchant's employee . . . commits a misdemeanor of the first degree.").

Private security guards acting on behalf of their employers are not just given more protection than private citizens, they may also be given more authority. In some states, private security guards are explicitly equated to public police. In South Carolina, for example, an individual "hired or employed to provide security services on a specific property is granted the authority and arrest power given to sheriff's deputies" while on that property, so long as the security guard is "registered or licensed."[115] Further blurring the line between public and private policing, it is the South Carolina State Law Enforcement Division that does the registering and licensing for security guards in the state, as well as playing a central role in the regulation of private security and investigations businesses and employees.[116]

The equation of private actors with public officials also plays prominently in the history of bounty hunting. The authority for bounty hunting dates from 1873, when the Supreme Court held that, under the common law, a bondsman has "dominion" over a defendant whose bond he had paid.[117] That control, the Court held, "is a continuance of the original imprisonment."[118] By virtue of the private contract, the private bondsman, in essence, stands in the shoes of the public law enforcement official who had originally imprisoned the defendant:

> Whenever [the bondsmen] choose to do so, they may seize [the defendant] and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. *It is likened to the rearrest by the sheriff of an escaping prisoner.*[119]

Given that authority, it should be no surprise that private parties engage in the rather specialized function of fugitive apprehension. According to one source, private "[b]ounty hunters claim to catch 31,500 bail jumpers per year, about 90 percent of people who jump bail in the United States."[120]

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[115] S.C. CODE ANN. § 40-18-110 (2000). For a more thorough, if slightly outdated, discussion of statutes and common law governing private security, see NCJRS, SCOPE OF LEGAL AUTHORITY, *supra* note 110.

[116] S.C. CODE ANN. §§ 40-18-30 to -100 (2000).

[117] Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1873).

[118] *Id.*

[119] *Id.* (emphasis added). A few states explicitly prohibit bounty hunting, while most states impose a variety of regulations that limit the common law rules. *See* Brian R. Johnson & Ruth S. Stevens, *The Regulation and Control of Bail Recovery Agents: An Exploratory Study*, 38 CRIM. JUST. REV. 190, 194-200 (2013); *see also* Collins v. Commonwealth of Va., 720 S.E.2d 530, 532–33 (Va. 2012) (holding that state law requiring bounty hunter licensure abrogated their common law rights to enter the state to seize individuals). The common law rules presumably remain in effect in the 18 states that do not have statutes regulating bounty hunting. Johnson & Stevens, *supra* note 119, at 200.

[120] Robert J. Meadows, *Bounty Hunters*, 1 THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA 155 (Wilbur R. Miller ed., 2012).

Indeed, private actors may well have *more* authority than public officers.[121] They are not regulated by the Fourth, Fifth, or Sixth Amendments or the state analogues that restrict police actions, nor are they subject to federal statutes like 42 U.S.C. § 1983 and 18 U.S.C. § 242 or judicial remedies like the exclusionary rule. Because they are private actors, "[p]rivate police have been held exempt from the Fourth Amendment and the *Miranda* rules—as well as from restrictions on entrapment and statutory disclosure requirements."[122] As a result, private actors can act when public officers cannot, without the quanta of proof that would be required to support police action and without fear of the same remedial mechanisms. In 2013, for example, an appellate court in North Carolina held that a private security guard hired by a Homeowners' Association to patrol a private neighborhood was not a state actor and thus was permitted to conduct a traffic stop without reasonable suspicion or probable cause.[123]

Though the authority wielded by public police officers and private security actors can differ in meaningful ways, it is not always easy for the casual observer to determine who is whom. Private security guards often wear uniforms reminiscent of police uniforms, and their marked patrol vehicles may be emblazoned with phrases indicative of governmental service, such as "Metro Public Safety."[124] They may be permitted or required to wear or carry badges and credentials that only a close read will identify as

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[121] *See, e.g.*, MALCOLM K. SPARROW, NEW PERSPECTIVES OF POLICING, MANAGING THE BOUNDARY BETWEEN PUBLIC AND PRIVATE POLICING 6 (Sept. 2014) ("[P]rivate police agents, being constitutionally classed as citizens . . ., can legally do things that public police cannot."); Johnson & Stevens, *supra* note199, at 192 (stating, in the context of bounty hunters, that private actors "have unique powers that far surpass those of the police in America.").

[122] Sklansky, *supra* note 4, at 1240.

[123] State v. Weaver, 752 S.E.2d 240 (N.C. Ct. App. 2013). The court went on to hold that if such a quantum of proof *was* required, it existed in this case based on the security officer's estimate of the vehicle's speed. *Id.* The basis for that estimate was not provided, *id.*, although a public police officer would almost certainly have testified about specialized training and experience in visually estimating vehicle speeds. *See generally* Seth W. Stoughton, *Evidentiary Rulings as Police Reform*, 69 MIAMI L. REV. 429, 445–54 (2015). For example, the Ohio Supreme Court ruled in 2010 that "an officer's unaided visual estimation of a vehicle's speed is sufficient evidence to support a conviction for speeding . . . without independent verification [i.e., without the use of mechanical identification through radar or LIDAR] if the officer is trained . . . and is experienced in visually estimating vehicle speed." Barberton v. Jenney, 929 N.E.2d 1047, 1049 (Ohio 2010). The Fourth Circuit has adopted a more nuanced approach, holding that an officer's visual estimate "that a vehicle is traveling in significant excess of the legal speed limit" may not need independent corroboration to establish a quantum of proof, but, "where an officer estimates that a vehicle is traveling in only slight excess of the legal speed limit, and particularly where the alleged violation is at a speed differential difficult for the naked eye to discern, an officer's visual speed estimate requires additional indicia of reliability to support probable cause." United States v. Sowards, 690 F.3d 583, 592 (4th Cir. 2012). It is worth noting, in that case, the Fourth Circuit held that the trial court clearly erred by finding the officer was trained to estimate speeds: "[T]here was not testimony or evidence that [the officer] received any specialized training in the estimation of vehicle speeds." *Id.* at 589. The court stated that visual estimates can be supported by "radar, pacing methods, or other indicia of reliability," and although the court's discussion is not an endorsement of visual estimates, it may be that specialized training can be an indication of reliability. *See id.* at 592–93.

Although the court divorces the two points in its discussion, it may be that specialized training is an "additional indicia of reliability" that, like radar and pacing methods, can support probable cause. Regardless, it appears that the private security officer in *Weaver* was not expected to provide the same justification for a visual speed estimate that likely would have been required of a public police officer.

[124] *Weaver*, 752 S.E.2d 240.

belonging to a private actor.[125] And sometimes even knowing that a uniformed officer is paid by a private security agency, rather than a public police department, won't sufficiently distinguish between private and public policing efforts.

B. Semi-Public Private Policing

Complicating the task of cleanly distinguishing between public and private security is the close working relationship that can exist between the two. This is a relatively recent phenomenon in the United States. "Historically, a patronizing, if not suspicious and antagonistic, attitude on the part of public police toward their private counterparts seem[s] to have been the dominant theme."[126] As of 1972, "no city . . . contracted directly with a private firm for all police services, and less than 1 percent of the cities surveyed dealt with private firms for subservice functions like crime labs."[127] In 1977, the United States Private Security Advisory Council, which advised the Law Enforcement Assistance Administration at the Department of Justice, identified several major barriers between private and public policing, which they "ranked [in] order of pervasiveness and intensity[:]

- lack of mutual respect[;]
- lack of communication[;]
- lack of cooperation[;]
- lack of law enforcement knowledge of private security[;]
- perceived competition[;]
- lack of standards [for cooperation; and]
- perceived corruption."[128]

Perhaps the most significant barrier, however, was the belief that public policing was about protecting public concerns, while private security efforts were directed exclusively at private concerns.[129] "[P]rivate security," it was thought, "ought to stay well away from the realm of investigation and public service, and to take a purely passive and preventative role."[130]

Times have changed. Although the status differential and other factors undoubtedly remain an area of conflict between public police and private security agencies, there appears to be a higher degree of cooperation than in earlier eras. In 2004, the International Association of Chiefs of Police issued

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[125] *See, e.g.*, 14B N.C. ADMIN. CODE § 16.0405 ("While engaged in their official duties, a private investigator shall be allowed to carry, possess, and display a badge . . . The badge shall be gold with dark blue lettering. . . . The badge shall be displayed in a folding pocket case with the badge displayed on one side of the case and the Private Investigator's pocket credential . . . displayed on the opposite side of the case.").

[126] Sarre & Prenzler, *supra* note 10.

[127] BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE 18 (1998).

[128] U.S. PRIVATE SECURITY COUNCIL, *supra* note 3, at 2–3.

[129] *Id.* at 5–10.

[130] Sarre & Prenzler, *supra* note 10, at 93.

a summit report urging laws of "the major law enforcement and private security organizations [to] make a formal commitment to cooperation."[131] Public-private partnerships were to be viewed as "a preferred tool to address terrorism, public disorder, and crime."[132] Further, public entities were more willing to make use of private security agencies. By the late 1990s, it was estimated that about 45% of local government entities were hiring private companies to provide at least some security services.[133] In all likelihood, that number has only increased. Government agencies employ the third largest number of private security employees, after only manufacturing firms and retail businesses, "and the expenditures for such services run in the multibillion dollar range."[134]

What exactly are those private security agencies doing for their public employers for that multibillion dollar payoff? The short answer is, "Just about everything." Private security guards have been used to supplement traditional public policing by, for example, providing static, preventative security. Today, thousands of federal buildings around the country are protected by some 15,000 private security guards contracted by the Department of Homeland Security's Federal Protective Service.[135] Local governments, meanwhile, contract with private security agencies to guard "public buildings, sports arenas, schools, public housing projects, convention centers, courts, airports, and other public facilities.[136] Local governments also fund private security efforts. In Washington, D.C., the Private Security Camera Incentive Program provides "a rebate for residents, businesses, nonprofits, and religious institutions to purchase and install security camera systems on [the exterior of] their property and register them with the Metropolitan Police Department."[137] The stated purpose of the program is "to help deter crime and assist law enforcement with investigations."[138] As of October 2016, the program has issued more than 900 rebates, funding the installation of more than 2500 private security cameras.[139]

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[131] PRIVATE SECURITY/PUBLIC POLICING: VITAL ISSUES AND POLICY RECOMMENDATIONS 19 (2004).

[132] *Id.*

[133] Sklansky, *supra* note 7, at 92. Note that this does not include local government agencies that contract for "police support services, such as accounting, maintenance, communications and dispatch, data processing, towing illegally parked cars, fingerprinting prisoners, crime laboratory investigations, performing background checks on job applicants, guarding school crossings, directing traffic, transporting prisoners, and guarding prisoners in hospitals." BENSON, *supra* note 127, at 18. That type of administrative and subservice support for policing efforts is admittedly important, but outside my narrow focus on the direct provision of policing services.

[134] BENSON, *supra* note127, at 18.

[135] STROM ET AL., *supra* note 92, at 4-15.

[136] BENSON, *supra* note127, at 18; *see also* Sklansky, *supra* note 4, at 1177.

[137] Office of Victim Servs. & Just. Grants, *Private Security Camera Incentive Program*, MAYOR MURIEL BOWSER, DC.GOV, http://ovsjg.dc.gov/service/private-security-camera-system-incentive-program (last visited June 27, 2017).

[138] *Id.*

[139] OFFICE OF VICTIM SERVS. & JUST. GRANTS, PRIVATE SECURITY CAMERA INCENTIVE PROGRAM REPORT, DATA AS OF OCTOBER 4, 2016, http://ovsjg.dc.gov/sites/default/files/dc/sites/ovsjg/service_content/attachments/Private%20Security%20Camera%20Program%20Report%20to%20Council%20-%20October%202016.pdf.

Security personnel and private security efforts are not purely passive; private policing can also be responsive.[140] For example, local governments contract with private security agencies to provide many different aspects of the patrol function previously fulfilled by public police, including directing traffic when necessary.[141] Government entities might also use private contractors to respond to some calls for service. Burglar alarms are a perfect example: when an alarm accurately identifies a burglary in progress, it may be vastly preferable to have a police officer—with a potentially faster response time and the benefit of more training, better equipment, and the availability of backup—respond to the scene. Unfortunately, alarms are rarely accurate; various studies have found that false positives account for up to 95% of all alarms.[142] And there can be *lots* of alarms; "alarm responses account for 10 percent to 30 percent of all calls for police service."[143] A Department of Justice report estimated in 1998 that responding to alarms cost public law enforcement agencies $1.5 billion[144] (more than $2.2 billion in 2016 terms[145]). To preserve scarce resources, many police agencies have stopped responding to non-verified alarms, meaning alarms that are triggered but have not been verified by a video or auditory feed or a live complainant such as a resident or security guard.[146] And when public police pull out, "private police can contribute . . . by patrolling and by handling certain service functions, such as alarm response."[147]

Beyond the relatively limited context of burglary alarms, private security personnel also engage in proactive policing by patrolling assigned beats.[148] Although the paradigmatic deployment of private security patrols involves personnel reporting incidents to sworn, public officers,[149] private security employees engage in what many modern viewers would consider to be more invasive law enforcement activities. Parking enforcement is perhaps the least objectionable aspect of proactive, invasive policing,[150] but it may also be true

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[140] PASTOR, *supra* note 14, at 49 (stating that "the Toronto Police Department reports that more than 60 percent of all calls to the police are handled by 'alternative response' units, which could include private policing acting as a supplement to public police departments").

[141] Sklansky, *supra* note 4, at 1177.

[142] PASTOR, *supra* note 14, at 50.

[143] *Id.*

[144] RANA SAMPSON, U.S. DEP'T OF JUSTICE, FALSE BURGLAR ALARMS, PROBLEM-ORIENTED GUIDES FOR POLICE NO. 5, at 1 (2002), http://www.cops.usdoj.gov/pdf/e05021556.pdf. Adjusted for inflation to represent 2015 dollars, the total estimate is almost $2.1 billion. *See* CONSUMER PRICE INDEX INFLATION CALCULATOR, BUREAU OF LABOR STATISTICS, http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=15&year1=1998&year2=2015, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited June 27, 2017).

[145] CONSUMER PRICE INDEX INFLATION CALCULATOR, BUREAU OF LABOR STATISTICS, http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1500&year1=1998&ye ar2=2016 (last visited June 27, 2017).

[146] Francie Grace, *Burglar Alarms Cops Won't Answer*, CBS NEWS (Apr. 14, 2003), http://www.cbsnews.com/news/burglar-alarms-cops-wont-answer/.

[147] PASTOR, *supra* note 14, at 50.

[148] *Id.*

[149] BENSON, *supra* note127, at 18 ("East Hills, Long Island, employs thirty security officers to patrol the town on a twenty-four-hour basis...he officers are uniformed but unarmed, and they call the local police when they observe a problem.").

[150] Sklansky, *supra* note 4, at 1177.

that private police perform "more stops, searches, and interrogations than is often imagined."[151]

On some occasions, semi-public private policing blurs the line even further, as when political subdivisions hire private security companies to be the *primary* provider of policing services.[152] Kalamazoo, Michigan, for example, contracted with the private security company Charles Services "for street patrol and traffic control."[153] Under that arrangement, "private personnel were sworn in as deputy sheriffs in order to ensure compliance to the law, but the personnel were paid by the hour so that they could be released during slow periods and provided in larger force during peak periods."[154] Hiring a private firm as the primary provider of policing services isn't common, but Kalamazoo isn't unique. At least seven other jurisdictions have contracted with private security agencies to provide policing services, including two—Indian Springs, Florida, and Buffalo Creek, West Virginia—that did so for over five years.[155]

C. Semi-Private Public Policing

Just as private security employees can operate as semi-public entities, public police can be semi-privatized. Examples can be found in special jurisdiction agencies, special appointments, and the widespread practice of private employers hiring off-duty officers to engage in law enforcement or security services.

Special jurisdiction agencies are police organizations that serve either a special geographic jurisdiction that does not align with political subdivisions—university or transit police, for example—or engage in specialized enforcement activities, such as the Enforcement Division of Nevada's Gaming Control Board.[156] As of 2008, the last year for which data were available, there were more 1,700 special jurisdiction agencies that employed just under 57,000 full-time, sworn officers.[157] Many of these, perhaps most, do little to blur the line between public and private policing.[158] But some do. The Federal Reserve System, a somewhat unique public/private entity, has its own law enforcement agency, the United States Federal Reserve Police.[159] Officers may be "designated or authorized by the [Federal Reserve

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[151] *Id.* at 1179.

[152] Joh, *Conceptualizing*, *supra* note 9, at 614–15 (discussing Kalamazoo, Michigan); Joseph Lyons, *Privatization of Police Services*, FLA. DEP'T OF LAW ENFORCEMENT 5 (Sussex, New Jersey); Amy Goldstein, *The Private Arm of the Law*, WASH. POST, Jan. 2, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/01/01/AR2007010100665.html (North Carolina); MARX, *supra* note 67, at n.4 (Florida).

[153] BENSON, *supra* note127, at 20.

[154] *Id.*

[155] *Id.*

[156] ENFORCEMENT DIVISION, NEV. GAMING CONTROL BD., GAMING COMM'N, http://gaming.nv.gov/index.aspx?page=46.

[157] REAVES, *supra* note 85, at 8.

[158] Of the more-than 1,700 special jurisdiction police agencies, most serve public school districts (250), higher education facilities (779), transportation systems (167), parks and recreational areas (124), and hospitals or other health care facilities (48).

[159] 12 U.S.C. § 248(q).

Board] or a reserve bank," and are authorized to carry firearms, make arrests, and access law enforcement information.[160] Another example, and one less connected to government entities, can be found in private universities' police departments. Campus police officers at Yale, for example, "wear New Haven Police Department badges and are invested with their powers of arrest through the City of New Haven," even though "the Yale Police Department and New Haven Police Department are in fact two separate entities."[161] The blurring of public and private policing can be even more dramatic. Headquartered in Memphis, Tennessee, the FedEx Corporation is a publicly traded multinational business organization with annual revenue of more than $50 billion in 2016.[162] It doesn't just maintain a massive fleet of air carriers that service more than 350 airports, it also maintains a private police force. Because Tennessee law allows for the creation of "transportation security officers"[163] who have "all of the powers of a peace officer,"[164] FedEx employs a (relatively small) number of officers can who can make arrests, apply for warrants, initiate pursuits, carry weapons, and participate in a Regional Joint Terrorism Task Force.[165]

Tennessee is not the only state that allows private entities to establish police forces. In Arizona, a private railroad company can, on its own, designate "railroad police," who "aid and supplement . . . law enforcement agencies . . . in the protection of railroad property and the protection of the persons and property of railroad passengers and employees."[166] Other states blur the line between public and private policing even more. In Virginia, a private corporation or the private owner of "any place within the Commonwealth" can ask a circuit court judge to appoint a "special conservator of the peace."[167] A special conservator can be designated a "law-enforcement officer" and may identify themselves as "police" on uniform or badge, including a badge that bears the state seal.[168] Special conservators can serve up to a four-year term, and in that time "have all the powers, functions, duties, responsibilities and authority" of a police officer, at least within "such geographical confines as the court may deem appropriate . . . within the confines of the county, city or town where the corporate applicant is located."[169] Courts may, but need not, "limit the use of flashing lights and sirens on personal vehicles used by the conservator in the performance of his

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[160] 12 U.S.C. § 248(q)(3).

[161] Leigh J. Jahnig, Note, *Under School Colors: Private University Police as State Actors Under § 1983*, 110 NORTHWESTERN U. L. REV. 249, 264 n.96 (2015) (quoting Bharat Ayyar, *City, Campus Jurisdictions Overlap for Police Depts.*, YALE DAILY NEWS (Nov. 5, 2007), http://yaledailynews.com/blog/2007/11/05/city-campus-jurisdictions-overlap-for-police-depts/ [http://perma.cc/7MQQ-HXHW]).

[162] FEDEX ANNUAL REPORT 2016, http://annualreport.van.fedex.com/2016/.

[163] TENN. CODE ANN. § 38-3-120(j)(2017).

[164] *Id.* § 38-3-120(j)(3).

[165] Gary Fields, *FedEx Takes Direct Approach To Battling Terrorism, Crimes*, WALL STREET J., Oct. 9, 2003, http://www.wsj.com/articles/SB106564839659803900.

[166] ARIZ. REV. STAT. ANN. § 40-856 (2015).

[167] VA. CODE ANN. § 19.2-13A (2017).

[168] *Id.*

[169] *Id.*

duties."[170] A special conservator must register with the Department of Criminal Justice Services and may have to go through basic police training, although exemptions are permissible.[171] There are, however, benefits to going through a police academy. A special conservator "who has completed the minimum training standards established by the Department of Criminal Justice Services . . . has the authority to [e]ffect arrests, using up to the same amount of force as would be allowed to a law-enforcement officer employed by the Commonwealth or any of its political subdivisions when making a lawful arrest."[172] Special conservators of the peace are public officers who may be requested by a private corporation or property owner, but the special conservator is a public officer and not (necessarily) an employee of the requesting party. Special Conservators are, in essence, privately requested police officers without an agency; they work outside both the normal market controls of a private security company and the normal political controls of a local police officer.

Not every private entity can create their own police force, nor do most of them need to do so. Private interests can leverage public policing by shifting the costs of security from their own expenditure to the public coffers. According to a review of Walmart stores in the Tampa area, for example, local police agencies "logged nearly 16,800 calls" over the course of a year, or "two calls an hour, every hour, every day."[173] One officer described the situation this way: "We are, as a department, at the mercy of what they [Walmart] want to do."[174] According to retail analyst Burt Flickinger, "Law enforcement becomes in effect a taxpayer-paid private security source for Walmart."[175]

Private industry does not always rely on the largess of public police; various investigative efforts may be privately funded. In the early 1980s, the National Automobile Theft Bureau, a not-for-profit organization "dedicated exclusively to fighting insurance fraud and crime,"[176] provided personnel and funding for a joint operation with the Tennessee Department of Revenue and the Metropolitan Nashville Police Department that, under the supervision of a prosecutor, used extensive undercover investigations to target vehicle theft in eastern Tennessee.[177] More recently, licensed taxis in Los Angeles pay a $30 monthly fee to fund police sting operations directed at ferreting out unlicensed taxis since 2006.[178] In the modern era of ride-sharing apps like Uber and Lyft, this funding has been used to identify drivers who illegally

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[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] Zachary T. Sampson et al., *Walmart, Thousands of Police Calls. You Paid the Bill.*, TAMPA BAY TIMES (May 11, 2016), http://www.tampabay.com/projects/2016/public-safety/walmart-police/.

[174] *Id.*

[175] *Id.*

[176] NAT'L INS. CRIME BUREAU, OUR STORY, https://www.nicb.org/about-nicb/our_story (last visited June. 21, 2017).

[177] DAVID H. MCELREATH, ET AL., INTRODUCTION TO LAW ENFORCEMENT 168 (2013).

[178] OFFICE OF THE CITY CLERK, CITY OF LOS ANGELES, COUNCIL FILE NUMBER 06-0142, IMPROVED BANDIT TAXI ENFORCEMENT PROGRAM (Feb. 21, 2017), https://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=vcfi.dsp_CFMS_Report&rptid=99&cfnumber=06-0142.

accept cash payment (instead of demanding payment through the app, as required).[179]

Businesses can acquire police services even more directly by hiring uniformed officers to provide law enforcement services while they're off-duty, a practice known as "moonlighting."[180] According to a recent survey of more than 160 police agencies that collectively employ over 143,000 full-time, sworn officers—almost a fifth of all non-federal officers in the country—the vast majority of police agencies permit officers to engage in moonlighting.[181] And officers take advantage of that opportunity more frequently than one might expect: the agencies that track the relevant data reported that 42.63% of their full-time, sworn employees worked in a law enforcement capacity for a private employer.[182] To the casual observer, it can be difficult or impossible to distinguish between moonlighting and public policing, as off-duty officers typically wear the same uniform and provide the same wide range of services that on-duty officers might otherwise provide. The single most important difference—how an officer is being compensated—is something that observers simply are not privy to.

> [U]niformed officers may be paid for providing security at a night club or bar or for directing traffic outside of a church or synagogue. Officers may also receive free or discounted rent at an apartment complex (so-called "courtesy officers") in exchange for parking their marked police vehicle in a visible spot or for responding, when off-duty, to non-emergency calls like noise complaints. Officers may be compensated directly by the private entity that hires them, or the employer may pay the city or agency so the officer's compensation is channeled through the public payroll system. Officers may also receive collateral benefits from private employers, such as employee discounts and earlier-than-public access to information and products.[183]

The manner in which officers engage in moonlighting can further blur the line. Some agencies employ in-house coordinators to facilitate officers' off-duty employment; private employers who want to hire off-duty officers approach the agency itself, which then makes the job available to officers. Other agencies take a more hands-off approach, leaving it to private employers and individual officers to find each other and work out the details of a moonlighting job, subject only to agency approval. This has created something of a private market for off-duty officers. Phoenix-based security

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[179] Nick Sibilla, Opinion, *LAPD Should Stop Stings Against Uber*, ORANGE CNTY. REGISTER (Cal.) (Dec. 9, 2016), http://www.ocregister.com/articles/hundreds-737920-arresting-taxis.html

[180] *See* Stoughton, *supra* note 12. There is no uniform terminology within law enforcement

[181] *See* Stoughton, *supra* note 12; *see also* Albert J. Reiss, Jr., *Private Employment of Public Police*, *in* PRIVATIZATION AND ITS ALTERNATIVES 226 (William T. Gormley ed., 1991); WILLIAM C. CUNNINGHAM ET AL., THE HALLCREST REPORT II: PRIVATE SECURITY TRENDS, 1970 TO 2000, at 286–90 (1990); ALBERT J. REISS, JR., PRIVATE EMPLOYMENT OF PUBLIC POLICE (1989).

[182] Stoughton, *supra* note 12.

[183] *See* Stoughton, *supra* note 12.

firm Law Enforcement Specialists, for example, takes a traditional approach to providing security personnel, but offers off-duty officers instead of regular security guards.[184] The technology start-up CopsForHire takes a different tack, having establishing a "platform for the on-demand marketplace of cops working off-duty."[185] Their online marketplace follows the example of Uber, the popular ride-sharing app, by connecting private employers with local officers who would be interested in working off-duty. The appeal of this approach isn't limited to officers who independently seek their own moonlighting opportunities; police agencies can also adopt the CopsForHire platform for internal use, essentially hiring CopsForHire to play a coordinating role.[186]

The existence of special jurisdiction police agencies, the special appointment of officers, and the widespread practice of moonlighting all have the potential to partially privatize public policing.

D. Public Policing

In contrast with the specialized agencies, officers, and duties discussed in the previous section, one might think that an on-duty officer at a municipal public agency is a clear and definitive example of purely public policing. Sometimes that may be the case. But certain investigative techniques, funding and equipment, and the reliance on private parties to assist with police investigations can all blur the line between public and private policing.

On at least some occasions, officers act in an official capacity outside of the jurisdiction in which they have lawful authority. The International Liaison Program implemented by the New York Police Department, for example, has stationed Intelligence Officers in 13 cities far outside of the geographic boundaries of New York. "The world-wide presence allows NYPD officers at the scene of a terrorist attack to provide information to the NYPD's counterterrorism command structure."[187] When that is the case, officers may be effectively limited to doing no more than what any "ordinary" individual might do. In essence, officers may fulfill their public position even without the mantle of state authority.

Outside the relatively confined context of extrajudicial action, several common investigative tactics depend on obscuring the line separating public and private action, and for good reason; officers simply would not be effective if they operated in a way that continually advertised their official affiliation. But the very reason that these tactics are effective also creates the potential for them to blur the line between public and private action. In plainclothes operations, for example, officers engage in surveillance or proactive patrol

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[184] *Do the Comparison: Off-Duty Police Officers vs. Security Guards*, LAW ENFORCEMENT SPECIALISTS, http://offdutypoliceofficers.com/.

[185] COPSFORHIRE.COM, https://www.copsforhire.com/ (last visitedJune 27, 2017); Email correspondence with Rob McDermott, Sept. 1, 2016 (email on file with author).

[186] Taylor Soper, *Seattle Police Department Picks CopsForHire as Platform to Handle Off-Duty Assignments*, GEEKWIRE (Oct. 10, 2016, 3:49 pm), http://www.geekwire.com/2016/seattle-police-department-picks-copsforhire-platform-handle-off-duty-assignments/.

[187] N.Y.C. POLICE FOUND., INTERNATIONAL LIAISON PROGRAM, http://www.nycpolicefoundation.org/programs/international-liaison-program/ (last visited Feb. 21, 2017).

while wearing civilian attire rather than police uniforms. The objective is to observe people without advertising officers' official identities until it becomes advantageous to do so; e.g., when initiating an investigative detention. The difficulty of identifying officers in these circumstances has become an issue in several high profile incidents, including the shootings of Amadou Diallo and Sean Bell.[188] Undercover operations blur the line of public and private policing even more, as officers assume the role of a civilian. There are different degrees of "cover" under which an officer can operate. At one end of the spectrum is superficial cover, as with officers engaged in prostitution stings or reverse-stings.[189] Other operations require modest preparation, as with officers who create misleading personal accounts to investigate child pornography.[190] At the far end of the spectrum is sophisticated cover identities that require what is known as "backstopping," the creation of fictitious information to support a cover identity.[191] The paradigmatic example of a sophisticated undercover operation involves an officer using a cover identity to infiltrate a criminal network,[192] but that is hardly the only example. In "stash-house stings," undercover officers recruit suspects to help them rob non-existent drug dealers, which requires them to create a fake stash house (where the arrest will ultimately take place).[193] Some undercover operations can be even more sophisticated. In late 2013, for example, the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives was rocked by the public disclosure of a series of sting operations in which ATF agents operated fake pawn shops or other private businesses that

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[188] Cara Buckley & William K. Rashbaum, *A Day After a Fatal Shooting, Questions, Mourning, and Protest*, N.Y. TIMES, Nov. 27, 2006, at B1, http://www.nytimes.com/2006/11/27/nyregion/27shot.html; Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html.

[189] In a prostitution sting, officers pretend to be clients, or "johns," who solicit sex from suspected prostitutes, who they later arrest. *See, e.g.*, Commonwealth v. Fisher, 627 A.2d 732 (Pa. Super. 1993) (describing a prior case involving "a sting operation wherein police officers acted as "johns" and were solicited by prostitutes who offered to perform various sexual acts for specific sums of money"). In a reverse sting, officers pretend to be prostitutes and arrest the would-be johns. *See, e.g.*, Connecticut v. One 1985 Gray Buick Automobile, 1998 WL 518610 (Conn. Sup. Ct. Aug. 11, 1998) ("The operation was a reverse prostitution detail intended to target "johns," the prostitutes' customers, by arresting them, seizing their vehicles, and seeking their forfeiture. As part of the sting, officer Patricia Beaudin, a police decoy, or undercover female police officer, posed as a prostitute, stood on the corner of Broad Street and Allen Place and waited to be approached by a prospective customer.").

[190] According to the testimony of an FBI Deputy Assistant Director, "FBI Agents and task force officers go online undercover into predicated locations utilizing fictitious screen names and engaging in real-time chat or E-mail conversations with subjects to obtain evidence of criminal activity." Testimony of Keith Lourdeau Before the House Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection, May 6, 2004, https://archives.fbi.gov/archives/news/testimony/combating-the-exploitation-of-children-through-peer-to-peer-network.

[191] *See, e.g.*, JOHN M. MACDONALD & JERRY KENNEDY, CRIMINAL INVESTIGATION OF DRUG OFFENSES: THE NARCS' MANUAL 121–35 (1983).

[192] ATF Agent William Queen's infiltration of the Mongols motorcycle gang, for example. *See* WILLIAM QUEEN, UNDER AND ALONE: THE TRUE STORY OF THE UNDERCOVER AGENT WHO INFILTRATED AMERICA'S MOST VIOLENT OUTLAW MOTORCYCLE GANG (2005).

[193] Brad Heath, *ATF Uses Fake Drugs, Big Bucks to Snare Suspects*, USA TODAY, June 28, 2013, http://www.usatoday.com/story/news/nation/2013/06/27/atf-stash-houses-sting-usa-today-investigation/2457109.

conducted illegal transactions (such as purchasing illegal firearms and stolen goods) so as to eventually arrest their "customers."[194]

Beyond plainclothes and undercover operations, the use of informants is another common investigative practice that can blur the line between public and private policing.[195] Informants can be passive, in the sense that they pass along information to the police but play no other role in the investigation, but it is active informants, who engage in information gathering or participate in operations at the explicit direction of officers, who raise the specter of private policing. Informants can set law enforcement priorities,[196] work to attract would-be wrong-doers,[197] and facilitate prolonged investigations.[198]

Like certain investigative techniques, the way in which police acquire and deploy surveillance or investigative equipment can blur the blue line, particularly in the modern era of stretched public budgets. As part of its 2006 downtown, urban revitalization efforts, for example, the Minneapolis Police Department partnered with the Target Corporation to install security cameras.[199] The number grew from the original 30 to over 100 cameras deployed in the 40-block area, monitored by both private security personnel and the city police department.[200] In 2012, Target Corporation's Vice President of Assets Protection estimated that Target has partnered with about two dozen cities to provide similar access to security cameras. Target is far from alone. A range of private businesses in metropolitan Grand Rapids, for example, allow public police agencies to access and monitor their security video feeds in real time.[201] In Minneapolis, the SafeZone Collaborative formed a 501(c)(3) organization, then successfully lobbied for the metropolitan area to be zoned as a Downtown Improvement District (a type

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[194] John Diedrich & Rauel Rutledge, *ATF Uses Rogue Tactics in Storefront Stings Across Nation*, MILWAUKEE WIS. J. SENTINEL, Dec. 7, 2013, http://archive.jsonline.com/watchdog/watchdogreports/atf-uses-rogue-tactics-in-storefront-stings-across-the-nation-b99146765z1-234916641.html; Conor Friedersdorf, *Feds Paid a Teen to Get a Neck Tattoo of a Giant Squid Smoking a Joint*, ATLANTIC, Dec. 12, 2013, http://www.theatlantic.com/politics/archive/2013/12/feds-paid-a-teen-to-get-a-neck-tattoo-of-a-giant-squid-smoking-a-joint/282279/.

[195] ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 25–27 (2011) (describing how "snitching is sprinkled throughout the system like salt, flavoring every kind of case from burglary to corporate fraud and political corruption" and noting that "federal defendants have been rewarded for cooperation in connection with every single type of federal crime, including murder, sexual abuse, and child pornography").

[196] NATAPOFF, *supra* note 195, at 35–36.

[197] Perhaps the most famous example was the Abscam investigation, in which Melvin Weinberg, working under the direction of the FBI, created a fictitious company, approached state and federal officials, and paid bribes in exchange for political favors. See, e.g., *The Two Faces of Abscam*, THE NEW YORK TIMES, May 5, 1981, http://www.nytimes.com/1981/05/05/opinion/the-two-faces-of-abscam.html (describing Weinberg as "the convicted confidence man who helped identify the investigation's targets and stage its bribery transactions").

[198] *See* NATAPOFF, *supra* note 195; Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155 (2009); Andrea L. Dennis, *Collateral Damage? Juvenile Snitches in America's "Wars" on Drugs, Crime, and Gangs*, 46 AM. CRIM. L. REV. 1145 (2009).

[199] Bob Giles, *Minneapolis Public-Private Surveillance Effort with Target Corp.*, SECURITY INFO WATCH (Apr. 18, 2012), http://www.securityinfowatch.com/article/10702225/minneapolis-safezone.

[200] *Id.*

[201] Garret Ellison, *Police Getting Real-Time Access to Private Security Cameras in Downtown Grand Rapids*, MLIVE (June 29, 2014), http://www.mlive.com/news/grand-rapids/index.ssf/2014/06/police_getting_real-time_acces.html.

of Business Improvement District[202]), where a special tax on property owners funds continued security efforts.[203]

Public officers have come to rely on private actors for everyday police operations. Private police support services—such as private companies that provide call-taking and dispatch services[204] or private forensic laboratories that contract with police agencies[205]—are common, but so, too, is private entanglement in what would otherwise appear to be public police investigations. Before it merged with the Insurance Crime Prevention Institute, for example, the National Automobile Theft Bureau—a private, not-for-profit organization supported by the private insurance industry—managed databases that collected information about stolen vehicles.[206] In many states, law enforcement officers were required to report information about motor vehicle thefts to the Bureau, including details about the vehicle and the theft itself.[207] A more contemporary and mundane example of officer reliance on private actors may be found in the context of DUI enforcement. According to the most recent Uniform Crime Reporting data, more than 1 million persons were arrested for driving under the influence in 2015.[208] Some number of those arrestees were subjected to a blood draw, initiated by officers to obtain the suspects' blood-alcohol levels. In 2016, the Supreme Court held that warrantless blood-testing for DUI purposes violated the Fourth Amendment's prohibition on unreasonable searches absent exigent circumstances or, presumably, the suspect's consent.[209] Regardless of whether a blood sample is taken pursuant to a warrant, exigency, or consent, it is typically not an officer who draws blood. Although precise data are unavailable, it seems safe to say that task is typically left to a medical professional;[210] indeed, state law

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[202] For more on Business Improvement Districts, see generally Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999).

[203] Giles, *supra* note199.

[204] Michelle Perin, *Private 911 Police Telecommunications: Same Job, Different Boss*, OFFICER.COM (July 16, 2013), http://www.officer.com/article/10959085/private-9-1-1-police-telecommunications-same-job-different-boss.

[205] JJ Velasquez, *Austin Contracts Dallas Forensic Lab To Address Rape Kit Backlog*, COMMUNITY IMPACT NEWSPAPER (Texas) (Nov. 3, 2016, 2:02 pm) https://communityimpact.com/austin/central-austin/city-county/2016/11/03/aust
in-contracts-dallas-forensic-lab-address-rape-kit-backlog/; *Police Eye Partnership with Portland Crime Lab*, TOWN OF CAPE ELIZABETH NEWS (Mar. 31, 2008), https://www.capeelizabeth.com/news/2008/crimelab.html; *Palm Bay Partners with Cellmark Forensics*, SPACE COAST DAILY (Feb. 8, 2014), http://spacecoastdaily.com/2014/02/palm-bay-partners-with-cellmark-forensics/.

[206] Gary T. Marx, *The Interweaving of Public & Private Police Undercover Work*, *in* PRIVATE POLICING (Clifford D. Shearing & Phillip C. Stenning eds., 1987).

[207] *Id.*

[208] FBI, 2015 Crime in the United States tbl.29, https://web.archive.org/web/20170216005201/https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29 (last visited June 21, 2017).

[209] Birchfield v. North Dakota, 136 S. Ct. 2160, 579 U.S. ___ (2016).

[210] The Supreme Court, at least, has assumed that it will be medical professionals, not officers, conducting blood draws. *See Birchfield*, 136 S. Ct. at 2167, 579 U.S. at ___ ("A technician with medical training uses a syringe to draw a blood sample from the veins of the subject, who must remain still during the procedure, and then the sample is shipped to a separate laboratory for measurement of its alcohol concentration."); Missouri v. McNeely, 133 S. Ct. 1552, 1561 (2013) ("[A] police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test."). This is not to suggest that we should take the Court's unsupported empirical assertions at face value. For a discussion of the Court's reliance on

may impose such a limitation.[211] In short, in the context of blood samples, officers' investigative efforts are heavily dependent on the cooperation of private actors.[212] In some jurisdictions, "cooperation" is misleading; the assistance of medical professionals is so essential that state law may require medical authorities to assist police investigations by performing blood draws upon an officer's request when the suspect consents or when the state's implied-consent rule is implicated.[213]

IV. POLICE REFORM & THE BLURRED BLUE LINE

The prior two Parts illustrate how the popular conception of policing as an exclusively or primarily governmental activity is wrong as both a historical and contemporary matter, demonstrating that the Thin Blue Line is neither as thin nor as blue as it first appears. This Part explores the implications of that observation in the context of police reform. Calls for police reform are nothing new; indeed, criticism of modern policing predates policing itself.[214] Over at least the last 85 years, a legion of public commissions have studied policing at either a national or local level and used their findings to make reform recommendations, from the Wickersham Commission's 1931 *Report on Lawlessness in Law Enforcement*, which addressed issues with Prohibition enforcement, to President Obama's Task Force on 21st Century Policing, which released its final report in 2015.[215] Private organizations and nonprofits

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questionable facts and the problems that can arise, see Stoughton, *supra* note 102; Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59 (2013); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012).

[211] *See, e.g.*, N.Y. STATE VEH. & TRAF. LAW § 1194(4)(a)(1) (West, Westlaw through 2017 legislation) ("At the request of a police officer, the following persons may withdraw blood for the purpose of determining the alcoholic or drug content therein: a physician, a registered professional nurse, a registered physician assistant, a certified nurse practitioner, or an advanced emergency medical technician as certified by the department of health.").

Officers are not entirely dependent on private actors. Arizona law allows blood to be drawn for investigative purposes by "a physician, a registered nurse, or another qualified person," ARIZ. REV. STAT. ANN. § 28-1388 (2017), and state courts have read "another qualified person" to include officers who receive specialized specific trained in blood draws. Arizona v. May, 112 P.3d 39, 42 (Ariz. Ct. App. 2005). The Arizona Governor's Office of Highway Safety provides the principal funding for the state's Law Enforcement Phlebotomist Program, which certifies officers after a one-week training course is funded by the state. Ariz. Governor's Office of Highway Safety, Phlebotomy Program, https://www.azgohs.gov/programs/default.asp?ID=48. It is not yet clear how this program will adapt to the restrictions on warrantless blood testing. *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 579 U.S. ___ (2016).

[212] I recognize, of course, that there are a number of public medical institutions, including university hospitals that do not fit into a strict definition of "private actors."

[213] Ordinarily, a search warrant can compel a suspect to furnish a blood sample, Schmerber v. California, 384 U.S. 757, 765 (1966), but a writ of assistance would be needed to compel a third-party to facilitate the search. State law typically permits medical providers to assist law enforcement upon request. *See, e.g.*, ARIZ. REV. STAT. ANN. § 28-1388 (stating that a medical professional "may withdraw blood"); N.Y. STATE VEH. & TRAF. LAW § 1194(4)(a)(1) (similar). Some states, however, go further by requiring assistance as a matter of statutory law. *See, e.g.*, N.C. GEN. STAT. § 20-139.1(c) ("[W]hen a blood . . . test is specified as the type of chemical analysis by a law enforcement officer, a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood sample . . . and no further authorization or approval is required".). It is not yet clear how mandatory cooperation statutes will be applied now that involuntary blood draws request a warrant or exigent circumstances.

[214] *See supra* notes 65–66 and accompanying text.

[215] NAT'L COMM'N ON LAW OBSERVANCE & ENF'T, NO. 11 REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 3–6 (1931); PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF

have done the same,[216] as have academics and other commentators[217] Since the shooting death of Michael Brown by Ferguson, Missouri, Police Officer Darren Wilson in the summer of 2014 and the national emergence of the #BlackLivesMatter movement,[218] there has been an unprecedented consensus among community members, commentators, politicians, and police executives that reform of some type is necessary.[219]

The relevance of the blurred blue line to police reform efforts depends on one's perspective on reform and the emphasis one puts on different types of reform.[220] One plausible position, for example, is that the conflation of public and private policing as it is described in this Article has no conceptual or practical implications for police reform. Such conflation lacks conceptual salience to the extent that one's interest in reform is limited to a particular category of actions—the infringement of individual privacy, liberty, and autonomy—only when those actions are performed by a particular entity—government agents. In that case, it may be argued, the dual observations that both governmental and non-governmental actors perform the same invasive actions and that they both also engage in behaviors that are not invasive may be irrelevant. And even if there were conceptual implications, one might reject the implications of the blurred blue line on practical grounds. Police reform, the argument goes, can be a distressingly slow and uneven process when it is limited to public police agencies; attempts to broaden the way we look at policing could further limit both the scope and pace of reform.

Those positions, and others of the same vein, are not without some merit, but they miss the point. My argument is neither that the distinctions between public and private policing should be ignored for purposes of reform nor that

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THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 33 (May 2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf; *Corruption in Uniform; Excerpts of What the Commission Found: Loyalty Over Integrity*, N.Y. TIMES (July 7, 1994), http://www.nytimes.com/1994/07/07/nyregion/corruption-uniform-excerpts-what-commission-found-loyalty-over-integrity.html?pagewanted=all (discussing the Knapp and Mollen Commissions); JAMES G. KOLTS, SPECIAL COUNSEL, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT (July 1992), http://www.clearinghouse.net/chDocs/public/PN-CA-0001-0023.pdf; EISENHOWER FOUND., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, http://www.eisenhowerfoundation.org/docs/kerner.pdf (last visited June 27, 2017) (discussing the Kerner Commission); HUM. RTS. WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES, THE CHRISTOPHER COMMISSION REPORT [hereinafter SHIELDED FROM JUSTICE], https://www.hrw.org/legacy/reports98/police/uspo73.htm (last visited June 27, 2017).

[216] *See, e.g.*, SHIELDED FROM JUSTICE, *supra* note 215 (detailing reports of incidents in various cities to demonstrate barriers to police accountability).

[217] No single footnote, nor even an entire article, is sufficient to list the range of scholars who have studied policing and offered suggestions for improvement on everything from agency culture to the use of force.

[218] The #BlackLiveMatter hashtag first appeared on social media after neighborhood watch volunteer George Zimmerman shot and killed Trayvon Martin. *About the Black Lives Matter Network*, BLACKLIVESMATTER, http://blacklivesmatter.com/about/ (last visited June 27, 2017). It grew into an organized movement after the events in Ferguson. *A HerStory of the #BlackLivesMatter Movement*, BLACKLIVESMATTER, http://blacklivesmatter.com/herstory/ (last visited June 27, 2017).

[219] This is not to suggest that all parties agree on what police reform should look like; that is certainly not the case.

[220] *See, e.g.*, Stoughton, *supra* note 5, at 611–12 (identifying calls for reforms to training, equipment, policies and procedures, and law).

both should be targeted for reform. Instead, my point is that a more holistic understanding of what policing *is* can better inform conversations about what policing *should be.* Even divorced from any particular policy preference, the blurred blue line is a relevant consideration for anyone interested in police reform. In every incarnation, reform efforts are directed at changing the nature of the police community/relationship, using a combination of incentives and disincentives to change officer behavior. A broader recognition of public and private policing, after all, can inform both the goals and mechanisms, the ends and the means, of police reform. In the following sections, I explain how a broader conception of policing, one that appreciates the blurred blue line, may affect the way reformers approach information gathering, the distribution of police resources, and the regulation of policing.

A. Information Gathering

Expanding the conventional understanding of policing to include at least some aspects of both public and private policing offers a potentially rich source of new information. There are, of course, meaningful differences that should lead us to be wary of casual comparisons. In the context of private security, Elizabeth Joh has persuasively argued that there are at least five dimensions of variation (goals, resources, legal powers, jurisdiction, and organizational location) and four distinct types of private policing (protective policing, intelligence policing, publicly contracted policing, and corporate policing) that make it a mistake to view private policing as a monolithic entity.[221] In the same vein, it would be a mistake to conflate public and private policing by citing to similarities without appreciating the dimensions of variation and distinct types of policing being performed. Accounting for those distinctions, however, may provide valuable information about how the various types of policing are performed differently given not just the variations that Joh identified, but also sharp distinctions in training, equipment, staffing, and agency principles. Those differences, once identified, can be scoured for lessons that may be applicable across the blurred blue line.

Recall, for example, that registered or licensed security guards in South Carolina who are "hired or employed to provide security services on a specific property [are] granted the authority and arrest power given to sheriff's deputies" while on that property.[222] Whether and how those private security services differ in practice from geographic security services provided by government entities, such as court security officers and county sheriff's deputies, can inform a range of policy decisions about who should secure government properties and, by going beyond the limited consideration of cost, how they should do so. The same thing is true with the private security patrol function; a superficial acknowledgement that it exists could be deepened to a

[221] Joh, *Conceptualizing*, *supra* note 9, at 596.

[222] S.C. CODE ANN. § 40-18-110 (2000). For a more thorough, if slightly outdated, discussion of statutes and common law governing private security, see NCJRS, SCOPE OF LEGAL AUTHORITY, *supra* note 110.

more robust understanding about how it compares to public police patrol not just in terms of cost, which is the most common consideration,[223] but also in terms of legitimacy and effectiveness given the different aspects of the police function: law enforcement, order maintenance, and service provision. That, in turn, could lead to a more informed policy decision to discourage or promote greater integration of public and private policing.[224] These issues have been formally addressed internationally, but have received scant attention in the United States.

There is, perhaps, little public interest in the static security or private patrol function themselves, but it is also true that the blurred blue line can be a source of information about the more controversial issues of police practices, including the use of force. It is often said that the state holds a monopoly on violence. It would be more accurate to say that the state holds a monopoly on legitimizing violence; government determines whether the use of force is permissible *ex ante*, primarily through the legislative process, and *ex post*, primarily through the executive (law enforcement) and judicial (adjudication) processes. Although a number of studies have sought to identify factors that correlate with police violence,[225] it remains true that there is a startling lack of reliable national or regional data about police uses of force.[226] A number of voices have called for more robust data-gathering efforts, including some voices within the federal government itself,[227] and it may well be that case that expanding the dataset by including the use of force by private police may provide valuable insights. If a comparative review finds that there is a discrepancy in public and private police use force, which seems likely, thorough analysis can determine whether that discrepancy is solely attributable to the different functions that public and private officers fulfill, whether other factors—training, equipment, culture, organizational structure, the distinct legal standards that apply, and so on—affect how force is used. Further, analysis may help identify the role of force in advancing a

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[223] *See, e.g.*, John Kiedrowski et al., *Police Civilianisation in Canada: A Mixed Methods Investigation*, 27 POLICING & SOC'Y 1 (Feb. 6, 2017).

[224] *See, e.g.*, PLURAL POLICING, *supra* note 10, at 12–23, 34–54 (discussing the integration of formal police bodies with private policing efforts in Netherlands and the funds allocated by the United Kingdom's Crime and Disorder Act of 1998 toward developing auxiliary patrol regimes).

[225] There are far too many sources to cite in a single footnote, but they include Christopher J. Harris, *Police Use of Improper Force: A Systemic Review of the Evidence*, 4 VICTIMS & OFFENDERS 25 (2009); GEOFFREY P. ALPERT & ROGER G. DUNHAM, UNDERSTANDING POLICE USE OF FORCE (2004); William Terrill & Michael D. Resig, *Neighborhood Context and Police Use of Force*, 40 J. RESEARCH IN CRIM. & DELINQUENCY 291 (2003); Geoffrey P. Alpert & John M. MacDonald, *Police Use of Force: An Analysis of Organizational Characteristics*, 18 JUST. Q. 393 (2001); GEOFFREY P. ALPERT & ROGER G. DUNHAM, U.S. DEP'T OF JUSTICE, NAT'L CRIM. JUST. REFERENCE SERV. (NCJRS), NCJRS 183648, AN ANALYSIS OF POLICE USE-OF-FORCE DATA (2000); Charles Crawford & Ronald Burns, *Predictors of the Police Use of Force*, 1 POLICE Q. 41 (1998); Robert Worden, *The "Causes" of Police Brutality: Theory and Evidence on Police Use of Force*, *in* AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE (William A. Geller & Hans Toch eds., 1995); James J. Fyfe, *Police Use of Deadly Force: Research & Reform*, 5 JUST. Q. 165 (1988); Richard E. Kania & Wade C. Mackey, *Police Violence as a Function of Community Characteristics* 15 CRIM. 27 (1977).

[226] GEFFREY ALPERT ET AL., Untitled Book, Chapter 3 ("While individual police agencies collect information about their officers, providing a 'worm's eye view' of specific incidents, there is an almost complete lack of national data, effectively precluding a broader 'bird's eye view.'").

[227] *See, e.g.*, FBI, UNIFORM CRIME REPORTING, NATIONAL USE-OF-FORCE DATA COLLECTION, https://ucr.fbi.gov/use-of-force (last visited June 27, 2017).

particular function. To the extent that the public and private policing share the same goals, for example, one might study how the different rates of force relate to relative effectiveness in deterring crime or building public trust.

B. *The Distribution of Police Resources*

In addition to providing information about practices that may translate between private and public policing, the blurred blue line can be a source of information about the distribution of police resources and the nature of policing in different contexts. Policing is widely viewed as redistributive; the communities that provide the lion's share of the tax revenue that funds public policing efforts are typically not where the majority of policing takes place. Or, to provide a more nuanced view, those communities may receive a different mix of policing services than poorer communities; more community policing and problem-oriented policing, for example, and less enforcement oriented or zero-tolerance policing. Expanding the conception of policing to include private policing efforts, however, may change our understanding: the distribution of police resources may be less uneven while, at the same time, the nature of police activities may be even more lopsided. Returning to the debate about police uses of force, for example, the fact that black people are affected disproportionately is often explained, at least in part, by the fact that officers have more of a presence in the lower-income, higher-crime minority communities. This may well be the case if we define "officers" as public officers working their regular duty assignments. But if we take into account private policing efforts, the picture may change – defining police more broadly, we may find that there is a heavier police presence in high-income communities than was previously appreciated. If that's true, a racial discrepancy in the use of force may have less to do with police presence and officer-civilian interactions and more to do with the *nature* of policing and the quality of those interactions. So much seems intuitive—officers are, after all, far more likely to use force when making an arrest than during the course of a interaction unrelated to an enforcement action—but accounting for the full scope of policing activities will provide substantially more precision than current data permits.

Even outside the use-of-force context, efforts to accurately chart the distribution of police resources may fall short if they do not take the blurred blue line into account. These accounts are important, and not just for traditional crime control reasons. Economic modeling suggests that the allocation of police resources can influence crime, of course, but it can also affect housing prices, aggregate welfare, income inequality, and integration.[228] If correct, those observations have important policy implications. "[S]ocieties with high levels of income inequality may face a complicated dilemma. Concentrated [police] protection may maximize aggregate welfare but exacerbate social disparities. In contrast, in more equalitarian societies, dispersed protection simultaneously maximizes

[228] Sebastion Galiani et al., *Stirring Up a Hornets' Nest: Geographic Distribution of Crime* (Nat'l Bureau of Econ. Res. Working Paper No. 22166, Apr. 2016), http://www.nber.org/papers/w22166.pdf.

aggregate welfare and reduces social disparities."[229] But exploring the relationship between current practice and its policy implications assumes that current practice—the allocation of protective services—is easy identifiable. David Thacher, for example, has compared geographic measurements of income inequality against the number of publicly employed police employees per crime committed in that geographic area to find that "[p]olice protection has become more concentrated in the most advantaged communities—those with the highest per-capita incomes and the largest share of white residents."[230] Even relatively sophisticated measures may provide a misleading picture if they fail to account for the blurred blue line. Contemporary accounts may be under-inclusive if they omit private policing efforts, and they may be over-inclusive if they assume that public policing efforts have a consistently public orientation.

In a less academic vein, the allocation of police resources has traditionally been primarily concerned with police patrol.[231] That is, there has historically been a heavy emphasis on making sure that there was sufficient coverage, which is often defined by referring to the number of officers that cover a geographic area given the number and nature of calls for service.[232] Agencies make allocations based on the estimated number of on-duty officers, but while traditional methods account for factors like officers who are out sick or on vacation, they do not directly take into account factors like private policing efforts or officer moonlighting (that is, off-duty officers who are working in a police capacity for private employers). Incongruously, agencies that justify moonlighting policies by referring to the ameliorative effect of having off-duty officers handle calls for service may not take those effects into account when designing their patrol systems. A more comprehensive understanding of policing resources may provide benefits to the allocation of on-duty resources.

C. The Regulation of Policing

Understanding the blurred blue line may also prove to be an important consideration in how society regulates the practice of policing. Effective regulation requires an accurate understanding of the regulated activity. As I have written elsewhere in the context of constitutional regulation,[233] factual misunderstandings about the police environment, police practices, and officer motivations can result in a misalignment between the legal or administrative regulation and the world that regulation was intended to effect. That misalignment, in turn, can result in the over- or under-regulation of policing, which is to say the over- or under-protection of rights. A similar observation may apply in the context of public and private policing: an incomplete understanding of policing can lead to regulation that is focused exclusively

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[229] *Id.* at 4.

[230] David Thacher, *The Distribution of Police Protection*, 27 J. QUANTITATIVE CRIMINOLOGY 275 (2011).

[231] *See, e.g.*, FRITSCH ET AL., *supra* note 102.

[232] *Id.*

[233] Stoughton, *supra* note 102.

on policing as it is conducted by public officials *not* because the regulatory decision was driven by informed consideration of the options but instead because the blurred blue line was not considered at all. In this section, I discuss two possible ways that a broader conception of policing might affect constitutional and sub-constitutional regulation.

The Fourth Amendment limits the government's ability to infringe on civilians by requiring that such invasions be "reasonable."[234] This restriction has given rise to what has been described as a "mess"[235] of "embarrass[ing]"[236] rules that seek to guide courts as they answer two interrelated questions: whether the government engaged in a search at all and, if so, whether that search was reasonable. With regard to the first part of that inquiry, the Supreme Court has developed the third-party doctrine, which obviates Fourth Amendment protections for information that has been knowingly revealed to a third party. The doctrine flows from the propositions that the Fourth Amendment protects reasonable expectations of privacy and that an individual does not have a reasonable expectation of privacy in information that they share. [237] The third-party doctrine is deeply controversial among legal scholars and civil rights advocates. It is "the Fourth Amendment rule scholars love to hate[,] the *Lochner* of search and seizure law, widely criticized as profoundly misguided."[238] Many, though not all, of the criticisms arise from the observation that an individual can share something and still expect it to be private and the intuition that such an expectation ought to be honored. Consider, for example, the criticism of the Court's decision in *United States v. Miller*, which held that bank records—checks, deposit clips, and the like—were not protected by the Fourth Amendment in part because the information was "voluntarily conveyed to the banks and exposed to their employees."[239] In his highly influential search & seizure treatise, Wayne LaFave criticized that decision, quoting a California state court opinion that read, "It cannot be gainsaid that the customer of a bank expects that the documents, such as checks, which he transmits to the bank in the course of his business operations will remain private."[240] As Criminal Procedure students know, criticisms of that nature are grounded in the observation that, in many contexts, our social norms rely on other people *not* looking at, not remembering, or not analyzing information that we display to them. We expect that, in most cases, people will use any information we give them for the limited purpose that we gave it to them. But not the police. Officers look at us *differently*. A number of objections to the third-party doctrine reflect discomfort with the idea of ignoring broad social norms about the communication of information.

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[234] U.S. CONST. amend. IV.

[235] Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973).

[236] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

[237] Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.").

[238] Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009).

[239] 425 U.S. 435, 435 (1976).

[240] 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(c), at 975 (5th ed. 2012) (quoting Burrows v. Superior Court, 13 Cal. 3d 238 (1974)).

The blurred blue line both complicates the picture and offers a principled way to think about the third-party doctrine in non-absolute terms. Critics who advocate for the eradication of the third-party doctrine because it does not incorporate our behavioral norms and supporters who advocate for its continued application because it has some value even though it cuts against social expectations may both have an incomplete picture in mind. In some contexts, we casually expose information with the expectation that it will remain private. But in other contexts a reasonable person should know that the information they disclose is likely to be subjected to more than casual review, even if such review *isn't* by the police. The blurred blue line can help draw that line; sometimes it's reasonable to expect that a private party will look at information in the same way that a public police officer would. A more holistic view of policing might lead one to the position that the knowing exposure of information that a reasonable person could expect to be subjected to police-like scrutiny obviates the expectation of privacy, but a knowing exposure of information to a private party who is not reasonably expected to analyze that information in a police-like way does not. Applying the third-party doctrine through the filter of the blurred blue line might lead to a rule that bank records lack Fourth Amendment protection (to the extent they may be subject to internal audit by bank personnel) but call records remain protected because no one at the phone company is likely to subject them to critical analysis. There are, no doubt, a host of considerations that my hastily sketched out approach fails to take into account. My point here is not that limiting the third-party doctrine is normatively better than leaving it unchanged, eliminating it, or modifying it in some other way. Instead, my point is only that the blurred blue line offers a perspective that is largely missing from existing conversations about the constitutional regulation of policing.

A full appreciation for the blurred blue line may also provoke new conversations about the sub-constitutional regulation of policing, including what I describe here as semi-public private policing and semi-private public policing. As discussed above, I surveyed several hundred police agencies that collectively employ almost 20% of the non-federal officers in the country about moonlighting, the practice of permitting off-duty officers to work in a police capacity for private employers.[241] I found substantial variety in the way the practice is regulated by state law and administrative policies.[242] For example, under California law, the public agency that employs the officer bears "'any and all civil and criminal liability' arising from an off-duty officer's actions, even those taken on behalf of a private employer."[243] Mississippi, in contrast, makes the private employer liable for an off-duty officer's actions and omissions; the state and state subdivisions are explicitly exempted.[244] Given the frequency and importance of police moonlighting, this area is overdue for serious policy discussions.

[241] Stoughton, *supra* note 12.
[242] Stoughton, *supra* note 12, at pts. II & III.
[243] Stoughton, *supra* note 12, at pts. II & III (citing CAL. PENAL CODE § 70(d)(2) (2016)).
[244] Stoughton, *supra* note 12, at pts. II & III (citing MISS. CODE ANN. § 17-25-11(3) (2016)).

The same may be said for private efforts that support public policing. Increasingly, traditional police agencies are relying on private entities to not only gather massive quantities of information, but also to *analyze* that information. For police agencies, the goal is actionable intelligence; private vendors can provide information that agencies can readily act upon. Summaries of Federal Bureau of Investigation memoranda filed in *United States v. Rettenmaier*, for example, reflected that the FBI used the Geek Squad, Best Buy's computer repair service, as a "tripwire" to detect child pornography on customers' computers.[245] The Bureau maintained what was described as a "close liaison with the Geek Squad management in an effort to glean case initiations and to support the division's Computer Intrusion and Cyber Crime programs." Geek Squad technicians were reportedly paid as confidential informants, receiving a bounty each time they found incriminating evidence.

Private actors do more than gather and sift through data; governmental agencies also rely on them to provide insight into how to *use* the information that has been collected and assessed. Police agencies and political subdivisions rely on private analysis to identify a range of problems and to develop operational solutions. For example, Palantir Law Enforcement, a division of a California-based company named for the magical seeing stones in the Lord of the Rings, advertises in its marketing materials that it "provides the LAPD with a full suite of analytical capabilities, including geospatial search, trend analysis, link charts, timelines, and histograms."[246] It does so by reviewing data from multiple databases and making connections that might otherwise elude investigators. As a result, the investigative response is predicated on the results of third-party analysis: it is the private entity that identifies whom investigators should speak to, how to infiltrate criminal organizations, and so on.[247] Further, police agencies, like law schools or other institutions of higher education, may hire strategic consultants to review practices or other data and made a range of recommendations about training, operations, community engagement, and so on. The Baltimore Police Department, for example, spent more than a quarter million dollars on a "police department consulting service contract" to develop "a strategic plan with goals and objectives for three and five years."[248]

Adopting a broad conception of policing may mean more robust regulation at three different points: the collection of data, the analysis of that data, and the response to that analysis. It does not appear, however, that the Constitution has sufficient regulatory reach. The constitution regulates

[245]Scott Moxley, FBI Used Best Buy's Geek Squad to Increase Secret Public Surveillance, OC WEEKLY, Mar. 8, 2017, http://www.ocweekly.com/news/fbi-used-best-buys-geek-squad-to-increase-secret-public-surveillance-7950030.

[246] Responding to Crime in Real Time, PALANTIR, http://www.palantir.com/wp-assets/wp-content/uploads/2014/03/Impact-Study-LAPD.pdf.

[247]Shane Harris, Palantir Technologies Spots Patterns to Solve Crimes and Track Terrorists, WIRED, July 31, 2012, http://www.wired.co.uk/article/joining-the-dots.

[248] Mark Reutter, Meet Baltimore's $560-an-hour Cop Consultant, BALT. BREW, Apr. 24, 2013, https://baltimorebrew.com/2013/04/24/meet-baltimores-560-an-hour-cop-consultant/.

private actors who engage in state action,[249] but that happens most clearly when a governmental agent explicitly directs the private actor's course of action. Sub-constitutional regulation may be necessary when the private actor is simply selling information—which was *not* gathered explicitly or exclusively for government purposes—to a public police agency. In the world of meta-data and large-scale analytics of consumer information, the blurred blue line serves as a reminder of the potential need to regulate information and information services that are sold or provided to the police, especially when the police are one of several potential buyers.

V. CONCLUSION

Modern policing is conceived of as the Thin Blue Line, a wall of police officers who are all that stands between ordered, civilized society and the anarchic, criminal element that constantly threatens it. But as evocative as that dramatic imagery is, it inaccurately suggests that public officers are the exclusive provider of policing services. That has never been the case. Building on existing literature, this article explored the historical and contemporary overlaps between public and private policing, demonstrating that the Thin Blue Line is neither as thin nor as blue as it first appears. To identify the nature of those overlaps, this article described four different phenomena: private policing; semi-public private policing; semi-private, public policing; and public policing. Each category abounds with everyday behaviors that blur the line between public and private policing. From private security guards initiating traffic stops in gated neighborhoods and patrolling government buildings to privately created police forces, from off-duty police officers working in uniform for private employers to the use of plainclothes officers and police informants, modern policing efforts are best described as "the blurred blue line." The fact that such efforts are utterly ordinary only strengthens the argument that the popular conception of policing requires revision: the blurred blue line is not some exceptional aspect of contemporary policing, it *is* contemporary policing.

This article explored some of the ways in which a broader conception of policing, one that takes into account the blurred blue line, might affect the process of police reform. A more holistic understanding of what policing *is* can better inform conversations about what policing *should be*. In every incarnation, reform efforts are directed at changing the nature of the police community/relationship through a combination of incentives and disincentives to change officer behavior and police culture. A broader recognition of public and private policing can inform both the goals and mechanisms, the ends and the means, of police reform. It can do so in at least three ways. First, expanding the conventional understanding of policing to include at least some aspects of both public and private policing offers a potentially rich source of new information about how policing is performed and the extent to which policing efforts may be considered successful.

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[249] *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982); Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).

Second, a greater appreciation for the blurred blue line may lead us to rethink the distribution of police resources in society. Consider that racially disparate aspects of policing—including stops, arrests, and uses of force—are often related to the relatively heavy police presence in poor, minority communities. In short, the story goes, police just go where the crime is. That may be true of *public* officers, but if we take into account private policing efforts, the picture may change – defining police more broadly, we find that there is a far heavier police presence in high-income communities than was previously appreciated. That suggests that the racial discrepancy in police activities may have less to do with police presence and the number of officer-civilian interactions and more to do with the *nature* of policing and the quality of those interactions. Taken seriously, the blurred line between public and private policing may lead us to reconsider systemic problems, their underlying causes, and promising solutions.

Third and finally, understanding the blurred blue line may also prove to be an important consideration in how society regulates the practice of policing. Effective regulation requires an accurate understanding of the regulated activity; an incomplete understanding of policing can lead to regulation that is focused exclusively on policing as it is conducted by public officials *not* because the regulatory decision was driven by informed consideration of how policing should be defined but instead because the blurred blue line was not considered at all. From constitutional conundrums such as the third-party doctrine to state workers compensation liability, the blurred blue line brings into sharp focus a range of regulatory considerations that are customarily overlooked.

This Article intentionally does not provide a normative determination about the blurred blue line. My goal was not to establish that it is good or bad; my goal was instead to establish that it *is*. Going beyond the conventional understanding of policing will not simplify the process of police reform. If anything, a more robust appreciation of the blurred blue line will complicate something that is already complex. Yet this additional complexity is necessary to fully understand policing so that lasting reform becomes possible.

Article

STATE V. BRELO AND THE PROBLEM OF ACTUAL CAUSATION

Ben Gifford*

Abstract

In criminal and tort law, the concept of causation is typically broken down into two components: actual and proximate causation. While the latter concept is often viewed as complicated and morally fraught, the former is treated as a simple, counterfactual relation: X *is a cause of* Y *if and only if* Y *would not have happened but for* X.

Despite its apparent simplicity, this standard picture of actual causation appears to break down in a number of cases. In particular, cases involving concurrent sufficient causation—in which multiple "causes, each of them sufficient to bring about the same harm, are present on the same occasion"—create problems for the standard picture, because each cause's sufficiency renders every other cause unnecessary. Although such cases are rare, they highlight a potentially fatal flaw in the but-for theory of actual causation. Furthermore, cases of concurrent sufficient causation do arise. Recently, in State v. Brelo, *a police officer was acquitted for the role he played in the deaths of an unarmed couple—despite the fact that the officer had inflicted fatal gunshot wounds on each of the victims—because the judge found that other officers had inflicted fatal wounds as well. In acquitting the officer, the judge relied explicitly on the theory that the lethality of the gunshot wounds inflicted by each officer rendered every other officer's gunshot wounds unnecessary to the victims' deaths.*

Using Brelo *as a reference point, this essay explores the problems inherent in the standard picture of actual causation, and it evaluates commonly proposed defenses, modifications, and replacements to this picture. This essay concludes that the standard picture must be abandoned and that at least one replacement—the "NESS" theory of causation—shows some promise. Although NESS is problematic in its own right, it may be the*

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best of bad bunch when compared with other leading contenders in the legal literature.

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I. INTRODUCTION

On November 29, 2012, Cleveland police officer Michael Brelo, along with over 100 of his fellow officers, embarked on a high-speed car chase after receiving reports of gunfire coming from a 1979 Chevrolet Malibu.[1] The chase—which covered more than twenty miles and reached speeds of 100 miles per hour—culminated in a shootout after the officers stopped and cornered the Malibu.[2] The shootout, however, turned out to be one-sided, as the reports of gunfire had been mistaken, and the car's occupants, Timothy Russell and Malissa Williams, were unarmed.[3] Unaware of this fact, Brelo and twelve other officers fired a total of 137 rounds at Russell and Williams, as the couple remained seated in their car.[4] Brelo was responsible for firing over a third of those rounds, "including at least 15 shots after he reloaded and climbed onto the hood of Mr. Russell's [car] and the other officers had stopped firing."[5] When the dust settled, both Russell and Williams were dead, having sustained twenty-three[6] and twenty-four[7] gunshot wounds, respectively.

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[1] Mitch Smith & Ashley Southall, *Cleveland Police Officer Acquitted of Manslaughter in 2012 Deaths*, N.Y. TIMES (May 23, 2015), http://www.nytimes.com/2015/05/24/us/michael-brelo-cleveland-police-officer-acquitted-of-manslaughter-in-2012-deaths.html.

[2] *Id.*

[3] *Id.* ("[P]rosecutors said the noise apparently was the result of the car's backfiring.").

[4] *Id.*

[5] *Id.*

[6] State v. Brelo, No. CR-13-580457-A, slip op. at 17 (Ohio Ct. C.P. Cuyahoga Cty. May 23, 2015).

[7] *Id.* at 21.

A grand jury indicted Brelo on two counts of voluntary manslaughter,[8] and Brelo opted for a bench trial before Cuyahoga County Judge John P. O'Donnell.[9] After hearing expert testimony from three medical examiners, Judge O'Donnell found that four of Russell's twenty-three gunshot wounds had been fatal, and that Brelo had inflicted at least one of these fatal wounds.[10] Similarly, Judge O'Donnell found that seven of Williams's twenty-four gunshot wounds had been fatal,[11] and that Brelo had inflicted at least one of these fatal wounds as well.[12]

The judge was unable to find, however, that Brelo had inflicted all of the fatal wounds suffered by Russell and Williams,[13] and the judge therefore acquitted Brelo on the grounds that the State had failed to prove Brelo actually caused either death.[14] Brelo was not convicted under a theory of accomplice or conspiracy liability either, nor did the judge consider a lesser charge of attempted manslaughter.[15]

The verdict in *State v. Brelo* made immediate headlines,[16] in no small part because the acquitted officer was white, while the unarmed victims were black.[17] Exactly six months earlier, Cleveland had witnessed the police killing of another unarmed African American, twelve-year-old Tamir Rice.[18] In the wake of Rice's death—and myriad other high-profile cases of unarmed blacks dying at the hands of the police[19]—Brelo's acquittal was viewed by many as

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[8] *Id.* at 7. In addition to Brelo, "[f]ive supervisors were charged with misdemeanor counts of dereliction of duty." Associated Press, *Ohio: Police Officers Charged in Deadly Chase*, N.Y. TIMES (May 30, 2014), http://www.nytimes.com/2014/05/31/us/ohio-police-officers-charged-in-deadly-chase.html.

[9] Smith & Southall, *supra* note 1.

[10] *Brelo*, slip op. at 19.

[11] *Id.* at 24.

[12] *Id.* at 25.

[13] *See id.* at 19 ("I . . . cannot find beyond a reasonable doubt that Brelo took the four gunshots causing the four fatal wounds, any one of which by itself would have caused Russell's death."); *id.* at 25 ("Brelo caused at least one fatal wound to Williams's chest . . . and maybe all five, but . . . one or two other officers inflicted two other fatal wounds . . . .").

[14] *Id.* at 20–21 ("Brelo's deadly shot would have caused the cessation of life if none of the other three were fired, but they were and that fact precludes finding beyond a reasonable doubt that Russell would have lived 'but for' Brelo's single lethal shot."); *id.* at 25 ("I cannot find beyond a reasonable doubt that but for Brelo's fatal shot(s) to Williams's chest she would have lived.").

[15] The judge did consider a lesser charge of felonious assault, but he acquitted Brelo of this charge as well. *See* Associated Press, *Prosecutor Faults Judge in Cleveland Police Verdict*, N.Y. TIMES (May 30, 2015), http://www.nytimes.com/2015/05/31/us/lawyer-says-judge-used-faulty-logic-in-cleveland.html. ("[The prosecutor] said the judge had . . . considered the wrong lesser charge—felonious assault—when he should have considered attempted voluntary manslaughter or aggravated assault.").

[16] *See* Smith & Southall, *supra* note 1; *see also* Lora Moftah, *Michael Brelo Verdict: Cleveland Police Officer Found Not Guilty of Voluntary Manslaughter*, INT'L BUS. TIMES (May 23, 2015, 10:59 AM), http://www.ibtimes.com/michael-brelo-verdict-cleveland-police-officer-found-not-guilty-voluntary-1935970; Holly Yan, *Brelo Verdict: Cleveland Officer Acquitted After Shooting Unarmed Couple — Now What?*, CNN.COM (May 26, 2015, 12:33 AM), http://www.cnn.com/2015/05/25/us/cleveland-police-verdict-up-to-speed/.

[17] Smith & Southall, *supra* note 1.

[18] Emma G. Fitzsimmons, *12-Year-Old Boy Dies After Police in Cleveland Shoot Him*, N.Y. TIMES (Nov. 23, 2014), http://www.nytimes.com/2014/11/24/us/boy-12-dies-after-being-shot-by-cleveland-police-officer.html. The officer in Rice's case was not indicted. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shootiing-cleveland.html.

[19] Annie-Rose Strasser, *Man Dies After Being Put in Choke-Hold by NYPD*, THINKPROGRESS (July 18, 2014, 9:19 AM), http://thinkprogress.org/justice/2014/07/18/3461602/nypd-choke-hold-man-dies/ (describing the death of Eric Garner); Associated Press, *Ferguson, Missouri Community Furious After Teen Shot Dead by Police*, HUFFINGTON POST (Aug. 9, 2014, 11:46 PM),

further evidence that our criminal justice system allows law enforcement officers to act with impunity.[20] One particularly vexing aspect of Brelo's acquittal, however—the aspect on which this essay focuses—was the justification upon which Judge O'Donnell relied in reaching his decision: namely, that the prosecution failed to prove beyond a reasonable doubt that Brelo caused the deaths of Russell and Williams.

Although there are multiple ways of interpreting Judge O'Donnell's finding that the prosecution failed to prove causation,[21] the judge appeared to express the view at various points in his opinion that the fatal wounds inflicted by Officer Brelo could not have caused the deaths of Russell and Williams simply because other officers had inflicted fatal wounds as well.[22] In expressing this view, Judge O'Donnell weighed in on a longstanding metaphysical debate regarding the question of whether concurrent sufficient causes—"causes, each of them sufficient to bring about the same harm, [that] are present on the same occasion"[23]—can be said to have caused a given harm. By answering this question in the negative, Judge O'Donnell implied that neither Officer Brelo nor any other officers who inflicted fatal wounds caused the victims' deaths.

In order to assess this counterintuitive result, it is important as a preliminary matter to explicate the concept of causation. In both criminal and tort law, causation is generally broken down into two sub-concepts: that of actual causation (or causation-in-fact) and that of proximate causation (or legal causation).[24] The concept of actual causation is a capacious one[25] and is generally identified with the concept of necessity—or *sine qua non*—such that X is a cause of Y if and only if X is a necessary condition of Y.[26] Put another way, whether X is a cause of Y generally reduces to the counterfactual question whether Y still would have happened "'but for' (had it not been for)" X.[27] Given the prominence of this counterfactual test, actual causation is often referred to as "but-for" causation.

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http://www.huffingtonpost.com/2014/08/09/ferguson-teen-police-shooting_n_5665305.html (describing the death of Michael Brown); Oliver Laughland & Jon Swaine, *Six Baltimore Officers Suspended Over Police-Van Death of Freddie Gray*, THE GUARDIAN (Apr. 20, 2015, 7:23 PM), http://www.theguardian.com/us-news/2015/apr/20/baltimore-officers-suspended-death-freddie-gray.

[20] Shaun King, *How the Brelo Verdict in Cleveland Proves Laws Protecting People from Police Are Broken*, DAILY KOS (May 26, 2015, 11:55 AM), http://www.dailykos.com/story/2015/5/26/1387822/-How-the-Brelo-verdict-in-Cleveland-proves-laws-protecting-people-from-police-are-broken.

[21] *See infra* text accompanying notes 66–73.

[22] *See* State v. Brelo, No. CR-13-580457-A, slip op. at 16–17; 25 (Ohio Ct. C.P. Cuyahoga Cty. May 23, 2015).

[23] H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW 123 (2d ed. 1985).

[24] Burrage v. United States, 134 S. Ct. 881, 887 (2014) ("The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause." (citing H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW 104 (1959))).

[25] *See* Paroline v. United States, 134 S. Ct. 1710, 1719 (2014) ("Every event has many causes . . . and only some of them are proximate." (citation omitted)); Charles E. Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941, 941 (1935) ("Causation in fact as the term is used in law is very inclusive. It means any and all antecedents, active or passive, creative or receptive, which were factors actually involved in producing a consequence.").

[26] *See* HART & HONORÉ, supra note 23, at 110.

[27] United States v. Hatfield, 591 F.3d 945, 948 (7th Cir. 2010) ("That is the minimum concept of cause."); *see also* MODEL PENAL CODE § 2.03(1) (AM. LAW INST. 1985) ("Conduct is the cause of a result when . . . it is an antecedent but for which the result in question would not have occurred.").

The concept of proximate causation, by contrast, is both more discerning and less clearly defined than that of actual causation; it is "a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.'"[28] Whereas inquiries into actual causation generally ask whether *X* is a *sine qua non* of *Y*, inquiries into proximate causation ask whether there is "some direct relation between the injury asserted and the injurious conduct alleged."[29] The need for a concept of proximate causation arises out of the concern that certain actual causes—the butterfly flapping its wings halfway around the world[30]—must be ruled out as legally irrelevant.[31] Proximate causation thus acts as a check on actual causation, in order to ensure that we do not assign liability in cases where "the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity."[32]

Because of its flexibility, and the inherently moral nature of its inquiry,[33] proximate causation is often viewed as more complicated than the straightforward, counterfactual concept of actual causation.[34] Actual causation's straightforwardness, however, is gained at the expense of its completeness: although the concept of necessity accurately reflects our intuitions about causation in most situations, there are a number of corner cases in which the counterfactual analysis of causation appears to break down.[35] One notable class of such corner cases—returning to Judge

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[28] Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 654 (2008) (quoting Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 272 n.20 (1992)).

[29] *Holmes*, 503 U.S. at 268.

[30] The so-called "butterfly effect" has its modern origins in the 1972 paper *Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?*, which MIT Professor Edward Lorenz presented to the American Association for the Advancement of Science. *See* Edward N. Lorenz, Professor, Mass. Inst. of Tech., *Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?* (Dec. 29, 1972), http://eaps4.mit.edu/research/Lorenz/Butterfly_1972.pdf. In his paper, Professor Lorenz asks whether "two particular weather situations differing by as little as the immediate influence of a single butterfly will generally after sufficient time evolve into two situations differing by as much as the presence of a tornado." *Id.* at 2. The stipulation that the two initial weather situations differ only by the influence of a single butterfly is of course equivalent to the counterfactual question: what would have happened to a particular weather situation if it had (or had not) been influenced by a single butterfly? If the answer to Professor Lorenz's question is that the ultimate presence of the tornado is contingent on the initial influence of the butterfly, then the butterfly is an actual cause of the tornado.

[31] The butterfly's flapping is of course doubly legally irrelevant, as we do not generally hold butterflies responsible for their actions.

[32] Paroline v. United States, 134 S. Ct. 1710, 1719 (2014) (citing Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 838–39 (1996)).

[33] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 189 (5th ed. 2009) ("The decision to attach causal responsibility for social harm to one, rather than to another, factor is made in a hopefully common-sense manner, or by application of moral intuitions, a community sense of justice, and/or public policy considerations." (citation omitted)).

[34] *See* Lawrence Crocker, *A Retributive Theory of Criminal Causation*, 5 J. CONTEMP. LEGAL ISSUES 65, 67 (1994) ("Judges comment from time to time on how difficult is the concept of legal or proximate causation in comparison to the straightforward concept variously referred to as 'cause in fact' or 'scientific' or 'but for' causation."); *see also Exxon*, 517 U.S. at 838 ("It is true that commentators have often lamented the degree of disagreement regarding the principles of proximate causation and confusion in the doctrine's application . . . ." (citation omitted)); MODEL PENAL CODE AND COMMENTARIES § 2.03 cmt. 1 at 255 & n.1 (AM. LAW INST. 1985) (discussing the "obscurity of [the] concept" of proximate causation).

[35] *See* Burrage v. United States, 134 S. Ct. 881, 890 (2014) (acknowledging "the undoubted reality that courts have not *always* required strict but-for causality, even where criminal liability is at issue"); Crocker, *supra* note 34 ("Philosophers of science, by contrast [with judges], are inclined towards the view that scientific causation or cause in fact is terribly difficult.").

O'Donnell's opinion in *Brelo*—involves instances of concurrent sufficient causation, in which multiple "causes, each of them sufficient to bring about the same harm, are present on the same occasion."[36] The problem with such cases is that each cause's sufficiency renders every other cause unnecessary to the result in question (because if each cause is sufficient to produce the result, then the result still would have occurred "in the absence of"[37] every other cause). And if none of the individual causes is necessary to the result in question, then—according to the standard picture of actual causation—none of them actually caused that result.

In light of this counterintuitive conclusion, this essay uses the *Brelo* case as a jumping-off point for exploring the question whether concurrent sufficient causes are actual causes. Section A begins by analyzing the standard picture of actual causation in greater detail, and section B addresses the challenges that concurrent sufficient causation creates for that picture. Section C then discusses attempts to defend the standard picture, along with proposals by various commentators to revise[38] or replace[39] our definition of actual causation in cases of concurrent sufficient causation. Section D assesses whether the standard picture of actual causation can be saved, whether we should instead adopt any of the proposals to revise or replace it, and whether concurrent sufficient causes are—in the final analysis—actual causes. Section E concludes that the standard picture of causation is likely due for a replacement and that the NESS (Necessary Element of a Sufficient Set) test provides the most promising framework for defining causation.

II. THE STANDARD PICTURE OF ACTUAL CAUSATION: BUT-FOR CAUSATION

As discussed above, the question whether *X* actually caused *Y* is generally reduced to the question: "Would *Y* have occurred if *X* had not occurred?"[40] If the answer is that *Y* would have occurred without *X*, then *X* is not a cause of *Y*; otherwise, *X* is a cause of *Y*. This intuitive reduction dates back at least to David Hume, who wrote that "we may define a cause to be *an object, followed by another . . . where, if the first object had not been, the second never had existed.*"[41] In the philosophical literature, Hume's counterfactual analysis has been championed most prominently by the late David Lewis, whose paper *Causation*[42] inspired a shift toward counterfactual analyses of causation from

[36] HART & HONORÉ, supra note 23, at 123.

[37] *Burrage*, 134 S. Ct. at 887.

[38] *See* MODEL PENAL CODE AND COMMENTARIES § 2.03 cmt. 2 at 259 (arguing that but-for causation should be redefined in terms of "the precise way in which the forbidden consequence occurs").

[39] *See* WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 234 (2003) (arguing that we should replace the but-for test altogether in cases of concurrent sufficient causation, and that we should ask instead whether "the defendant's conduct [was] a substantial factor in bringing about the forbidden result").

[40] HART & HONORÉ, supra note 23, at 110.

[41] DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 60 (Tom L. Beauchamp ed., 2000).

[42] David Lewis, *Causation*, 70 J. PHIL. 556 (1973) [hereinafter Lewis, *Causation*]; *see also* DAVID LEWIS, *Postscript to "Causation"*, *in* PHILOSOPHICAL PAPERS VOLUME II 159 (1987) [hereinafter Lewis, *Postscript*].

the previously dominant paradigm of "causation as constant conjunction."[43] In Anglo-American jurisprudence more broadly, Hume's definition of causation has "undoubtedly [been] the historical antecedent to the law's dominant test for cause-in-fact in torts and criminal law, the 'but for' test of liability."[44]

In order to better analyze the concept of but-for causation, it may be helpful to rely on a concrete illustration. Borrowing an example from the philosopher J. L. Mackie, we might imagine the following two sequences: In sequence A, we place a chestnut on a stone, and we hit the chestnut with a hammer; after the hammer makes contact with the chestnut, the chestnut becomes flatter than it was before. In sequence B, we place a chestnut on a hot metal surface, and we hit the chestnut with a hammer; just as the hammer makes contact with the chestnut, the chestnut explodes.[45] In the first sequence, Mackie suggests, the blow from the hammer has caused the chestnut to become flatter, because but for the blow, the chestnut would have remained round.[46] In the second sequence, by contrast, the blow from the hammer has *not* caused the chestnut to explode (assuming that the hammer did not push the chestnut into the surface and increase its temperature), because the chestnut would have exploded from being on the hot metal surface, even but for the blow.[47] Although the two sequences look quite similar at a superficial level, we are easily able to distinguish the one in which the hammer blow is a cause from the one in which the hammer blow is not a cause by reference to the counterfactual framework of but-for causation.

We may gain even deeper insights into the standard picture of actual causation by applying the counterfactual framework to the more metaphysically (and morally) fraught subject of homicide.[48] Revisiting the key question in *Brelo*, we might ask: Did Officer Brelo actually cause the deaths of Timothy Russell and Malissa Williams? This question, according to the counterfactual analysis discussed above, can be reduced to the following question: Would Russell and Williams still have died had it not been for Brelo's actions (or, more specifically, would Russell and Williams have died if Brelo had not shot them)? If the answer is that Russell and Williams would

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[43] *See* John Collins, Ned Hall & L. A. Paul, *Counterfactuals and Causation: History, Problems, and Prospects*, *in* CAUSATION AND COUNTERFACTUALS 1 (John Collins, Ned Hall & L. A. Paul eds. 2004). This prior paradigm, also inspired by David Hume, draws its inspiration from the same passage quoted above: "we may define a cause to be *an object, followed by another, and where all objects, similar to the first, are followed by objects similar to the second*." HUME, *supra* note 41, at 60. The two definitions provided by Hume—that of causation as constant conjunction and that of causation of counterfactual dependence—led Lewis to remark that "Hume defined causation twice over." Lewis, *Causation*, *supra* note 42, at 556.

[44] MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 392 (2009).

[45] J. L. MACKIE, THE CEMENT OF THE UNIVERSE 29 (1974).

[46] *See id.* at 29–30.

[47] *See id.*

[48] Homicide, like "mayhem, arson, [and] damage to property" is a "result crime," Marcelo Ferrante, *Causation in Criminal Responsibility*, 11 NEW CRIM. L. REV. 470, 470 (2008), which means that "causing a particular result is a material element" of the offense, MODEL PENAL CODE AND COMMENTARIES § 2.03 cmt. 1 at 255. *But see* MOORE, *supra* note 44, at 15–17 (rejecting the distinction between result crimes and "conduct-crimes" on the grounds that all "conduct-crimes" can be framed in terms of the causation of a result).

have died notwithstanding Brelo's actions, then the counterfactual framework suggests that Brelo did not actually cause their deaths. Otherwise (if Russell and Williams would have lived had Brelo not acted), the counterfactual framework suggests that he did.

Of course, as soon as the counterfactual analysis is applied to the *Brelo* example, it becomes clear that causation in homicide cases requires an immediate qualification that was not necessary in the chestnut-striking scenarios: Unlike the flattening of the chestnut, which might never have occurred had it not been for the hammer's blow, Russell's and Williams's deaths—like the deaths of all human beings—would have occurred eventually, no matter what happened to them. After all: "Murder is never more than the shortening of life; if a defendant's culpable act has significantly decreased the span of a human life, the law will not hear him say that his victim would thereafter have died in any event."[49] It seems, then, that a more appropriate way of framing the question of whether Brelo caused the deaths of Russell and Williams is to ask: Would Russell and Williams have died *when* they did, had it not been for Brelo's actions?[50] At least in the case of an inevitable result like death, it is essential to make a temporal qualification to the counterfactual analysis of causation.[51]

This temporal qualification, it should be noted, has several significant consequences. The first—which, in related contexts, Professor Michael Moore has referred to as "promiscuity"[52]—is that the qualification expands the universe of actual causes for a given death. We might imagine, for example, that "a defendant makes an insignificant contribution to a combined causal process, e.g. . . . by administering a slight scratch to a man bleeding to death."[53] If it is true that the victim would have died at a slightly different time without the scratch, then the counterfactual analysis (with the temporal qualification introduced above) suggests that the scratch was a cause of the victim's death. While this consequence may appear counterintuitive at first, it becomes clear upon further reflection that it carries with it some significant benefits; as Professors Hart and Honoré recognize, "it is important to cleave to the principle that the slightest acceleration . . . e.g. by shooting a man strapped in the electric chair, is homicide."[54] It seems likely, then, that a

[49] People v. Phillips, 414 P.2d 353, 358 (Cal. 1966), *overruled on other grounds by* People v. Flood, 957 P.2d 869 (Cal. 1998); *see also* HART & HONORÉ, supra note 23, at 240 ("Since everyone dies, 'causing death' involves the notion of shortening the span of life which the victim might normally expect . . . ." (citation omitted)).

[50] *See* DRESSLER, *supra* note 33, at 186.

[51] The legal repercussions of death's inevitability may be observed in other areas of temporal qualification as well, such as the common law year-and-a-day rule, according to which "a homicide case would be barred unless the victim died within a year and one day of the injury." Neil M. B. Rowe, *The Year-and-A-Day Rule: A Common Law Vestige That Has Outlived Its Purpose*, 8 JONES L. REV. 1, 2 (2004).

[52] *E.g.*, MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 269 (1993).

[53] HART & HONORÉ, supra note 23, at 352.

[54] *Id.* at 345.

counterfactual theory of causation has to accept a multitude of actual causes in order to account for inevitable results like death.[55]

A second consequence of temporal qualification is that it opens the door for causes that *delay* a result (because, but for the cause, the result would not have happened *when* it did). In some cases, this may seem unproblematic; if, for example, "*A* poisons *B* so that *B* is too ill to sail on a voyage and *B* dies of the poison a day after the ship is lost with all on board, it would be natural to say that *A* had caused *B*'s death . . . ."[56] In other cases, however—particularly in cases where an actor is trying to prevent a result and succeeds only in delaying it[57]—it seems unnatural to refer to a delaying influence as a cause. In order for the standard picture of actual causation to account for this consequence, either it must accept that delaying influences are causes (even when they don't seem like it),[58] or it must provide a credible explanation for the asymmetry between influences that accelerate a result and influences that delay a result.[59]

A final consequence of temporal qualification is that it leaves unresolved how to treat certain cases in which an event *X* neither accelerates nor delays a result *Y*, yet in which *X* intuitively seems to be a cause of *Y*. One class of such cases, of which *Brelo* might be considered a member, is the class involving instances of concurrent sufficient causation. Such cases present a number of challenges to the standard picture of actual causation. The next section explores these challenges in greater depth.

[55] It is worth noting here that a counterfactual theory of causation recognizes a broad universe of causes even before introducing the temporal qualification discussed above. *See supra* note 30. Furthermore, the temporal qualification is uniquely necessitated by inevitable results like death. In the case of result crimes with avoidable results, there is no analogous need to specify the time at which the result occurs. *See, e.g.*, Controlled Substances Act, 21 U.S.C. § 841(b)(1)(C) (2012) (defining a penalty enhancement provision that applies to drug dealers if the use of their drugs results in "serious bodily injury").

[56] HART & HONORÉ, supra note 23, at 240 n.41.

[57] *See, e.g.*, MOORE, *supra* note 44, at 413 ("For example, you throw gasoline on my house and light it up. I desperately try to put out the fire by throwing water on it. My water slows the fire somewhat but does not extinguish it and my house is destroyed. On the [counterfactual view that includes a temporal qualification], my water-throwing is as much a necessary condition of my house's destruction as your gas-throwing and lighting . . . .").

[58] *See* JONATHAN BENNETT, EVENTS AND THEIR NAMES 69–72 (1988). Bennett starts with an example in which a nurse gives a massage to a terminally ill patient, thereby slightly delaying the patient's death. *Id.* at 69–70. Although it may not seem like the massage is a cause of the patient's death, Bennett argues, we can equally imagine a case in which the "massage saves the patient's life and he dies years later in an accident." *Id.* at 70. Here, Bennett argues, even though it delayed the patient's death, "the massage *is* a cause of his death," because but for the massage, the patient would not have died in the accident. *Id.*

[59] *See* Penelope Mackie, *Causing, Delaying, and Hastening: Do Rains Cause Fires?*, 101 MIND 483, 494–95 (1992). On Mackie's theory, the difference between a "hastener" and a "delayer" is that a hastener typically "*prevents a later occurrence of an X only by bringing about the X that it hastens*," whereas a delayer typically "*helps to bring about the X that it delays . . . only by preventing an earlier occurrence of an X*." *Id.* at 494. In the case of death, for example, "[a] typical delayer of a death . . . is something that helps to bring about a death only by preventing a death, and that is why it is not naturally described as a cause of a death." *Id.* at 495. In the case of Bennett's nurse, for example, the massage brings about the patient's death only by preventing the patient's death. *See supra* note 58. An atypical delayer, by contrast, "does *not* 'bring about only by preventing,'" and may therefore be described as a cause. *Id.* In the case of the poison that prevents *B* from sailing on the doomed voyage, for example, the poison does not bring about *B*'s death only by preventing his death at sea; it does so by triggering some sort of fatal chemical reaction. *See supra* text accompanying note 56.

III. A PROBLEM WITH THE STANDARD PICTURE: CONCURRENT SUFFICIENT CAUSATION

As discussed above,[60] one of the most vexing aspects of the *Brelo* decision is the logic by which Judge O'Donnell reached the defendant's acquittal: despite finding beyond a reasonable doubt that Officer Brelo had inflicted fatal wounds on both Russell[61] and Williams,[62] Judge O'Donnell was unable to find beyond a reasonable doubt that Brelo had inflicted all of the fatal wounds suffered by Russell[63] and Williams,[64] and Judge O'Donnell therefore concluded that "the essential element of causation was not proved for both counts."[65] This logic is vexing because it seems to imply that there is no officer for whom the element of causation could be proved, despite the fact that Russell's and Williams's deaths were obviously caused.

It is worth noting, at the outset, that Judge O'Donnell's decision can be read as an issue of epistemological limitations: on this reading, there was in fact a set of gunshot wounds that actually caused Russell's and Williams's deaths—i.e., but for each of those wounds, Russell and Williams would not have died *when* they did—but it is impossible to determine beyond a reasonable doubt whether any of the wounds inflicted by Officer Brelo were members of that set. Indeed, there are sections of Judge O'Donnell's opinion where he appeared to be making just this point: In discussing Russell's death, for example, Judge O'Donnell wrote that the medical examiner who performed the autopsy testified that all four of Russell's fatal wounds were inflicted prior to death, but that the medical examiner "could not offer an opinion on which antemortem wound caused death first, leaving me as the finder of fact to guess at which of the four undoubtedly deadly bullets caused the 'cessation of life.'"[66] While it is a bit unclear from this passage why all four antemortem wounds could not have caused Russell's death (if, for example, Russell's time of death would have been different had each wound not been inflicted), it is possible that Judge O'Donnell had in mind a situation of "obstructed cause,"[67] in which one of Russell's wounds fixed his time of death, such that the time of death would not have been different even if all the other fatal wounds had not been inflicted.[68] According to such an interpretation, one of Russell's wounds was the *coup de grâce*, but Judge O'Donnell could only guess at whether that wound was inflicted by Officer Brelo (and "[g]uessing and being convinced beyond a reasonable doubt are incompatible").[69]

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[60] *See supra* text accompanying notes 21–23.

[61] State v. Brelo, No. CR-13-580457-A, slip op. at 20 (Ohio Ct. C.P. Cuyahoga Cty. May 23, 2015).

[62] *Id.* at 25.

[63] *Id.* at 19.

[64] *See id.* at 24–25.

[65] *Id.* at 33.

[66] *Id.* at 20 (citation omitted).

[67] DRESSLER, *supra* note 33, at 188.

[68] *See id.* ("Under such circumstances, [the other gunshot wounds are] no more the cause of [the victim's] death than if, just a split-second before [the other gunshot wounds were inflicted, the victim] had been struck by a bolt of lightning that killed him instantly.").

[69] *Brelo*, slip op. at 20. One issue with this interpretation is that Judge O'Donnell appeared to accept the medical examiner's testimony that all four of Russell's wounds were inflicted prior to death, *see id.*,

Judge O'Donnell's decision can also be read, however, as an issue of metaphysics: on this reading, the mere fact that Russell and Williams suffered multiple fatal wounds rendered it impossible for any individual wound to have caused their deaths. Such a reading would help explain Judge O'Donnell's exclusive focus on the fatal wounds inflicted on Russell and Williams,[70] and it would also be consistent with other sections of his opinion. For example, at the outset of his general discussion of the causation element of Officer Brelo's charges, Judge O'Donnell wrote: "If the evidence demonstrates that the conduct of two of more officers combined to produce the deaths, Brelo can be found to be the "but for" cause so long as the conduct of the others alone would not have caused the deaths . . . ."[71] Similarly, in finding that the prosecution had failed to prove the element of causation with respect to Williams's death, Judge O'Donnell wrote: "With . . . killing wounds from one or two people other than the defendant, I cannot find beyond a reasonable doubt that but for Brelo's fatal shot(s) to Williams chest she would have lived."[72] In both of these sections, Judge O'Donnell appeared to be expressing the view that concurrent sufficient causes—"causes, each of them sufficient to bring about the same harm, [that] are present on the same occasion"[73]—are not actual causes according to the standard picture of actual causation.

The problem of concurrent sufficient causes—a perennial favorite in 1L criminal law courses—can perhaps be articulated best within the framework of but-for causation that was discussed in section A. There we saw that Officer Brelo's actions could be classified as but-for causes of the deaths of Russell and Williams if (and only if) it was the case that Russell and Williams would not have died *when* they did, but for Brelo's actions.[74] The problem with concurrent sufficient causes, however, is that they may independently ensure that a particular result happens at a particular time, such that the result still would have happened *when* it did, even but for each of the independent causes. We might imagine, for example, that "*D1* shoots *V* in the heart; simultaneously and independently, *D2* shoots *V* in the head. *V* dies instantly. Medical evidence indicates that either attack alone would have killed *V* instantly."[75] In this case, *V* would have died *when* he did (instantly) from *D1*'s bullet to the heart, even if *D2* had not shot him in the head. Conversely, *V* would have died *when* he did (instantly) from *D2*'s bullet to the head, even if *D1* had not shot him in the heart. On the standard picture of actual causation—

but he also appeared to accept the testimony that only one of these wounds—"Wound 2"—would have caused "a nearly immediate death" *id.* at 18. It seems that the only plausible way for both parts of this testimony to be true is for Wound 2 to have been the final fatal wound inflicted on Russell (otherwise, all other fatal wounds would have been inflicted postmortem). Judge O'Donnell did not address this issue. Furthermore, it is unclear what Judge O'Donnell meant by his discussion of "which antemortem wound caused death *first*," *id.* at 20 (emphasis added), given that the first antemortem wound seems to be the least likely to fix the time of death (put another way, it is the wound for which it is least likely that, but for that wound, Russell would not have died *when* he did).

[70] *See id.* at 17–21 (focusing on the four fatal wounds suffered by Russell); *id.* at 21–25 (focusing on the seven fatal wounds suffered by Williams).

[71] *Id.* at 16–17.

[72] *Id.* at 25.

[73] HART & HONORÉ, supra note 23, at 123.

[74] *See supra* text accompanying notes 49–51.

[75] DRESSLER, *supra* note 33, at 187.

even after we include the temporal qualification—it would appear that neither *D1* nor *D2* caused *V*'s death, despite the fact that *V*'s death was clearly caused.[76]

Furthermore, this problem is not merely an obscure classroom hypo; concurrent sufficient causation has preoccupied state legislatures[77] and legal commentators,[78] and the Supreme Court recently discussed the problem in the 2014 case *Burrage v. United States*.[79] At issue in *Burrage* was a penalty enhancement provision of the Controlled Substances Act[80] (CSA) that imposes a twenty-year minimum prison sentence for the unlawful distribution of a Schedule I or II drug[81] "if death or serious bodily injury results from the use of such substance."[82] The question before the Court was whether this "results from" penalty enhancement required the government to prove that the drugs distributed by a defendant were a but-for cause of a victim's death or injury, or whether a lesser showing of "contributing" causation would suffice for the imposition of liability.[83] The Court held that the enhancement requires a showing of but-for causation, given that "it is one of the traditional background principles 'against which Congress legislate[s]' . . . that a phrase such as 'results from' imposes a requirement of but-for causation."[84] The Court also noted, however, that this requirement might not apply in cases where "multiple sufficient causes independently, but concurrently, produce a result."[85] The assumption underlying the Court's qualification here was that concurrent sufficient causes are not but-for causes.[86]

It is worth noting, at this point, that the problem of concurrent sufficient causation can be interpreted in multiple ways. On one interpretation, we may hold that the standard picture of actual causation is accurate, that this picture cannot accommodate concurrent sufficient causes, and that concurrent sufficient causes are therefore not actual causes. On another interpretation, we may hold that the standard picture of causation is accurate, that this picture can be modified in order to accommodate concurrent sufficient causes, and that the problem discussed above is therefore not a problem at all. On a final interpretation, we may hold that concurrent sufficient causes are actual

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[76] *See id.*

[77] *See, e.g.*, Ark. Code Ann. § 5-2-205 (West) (developing a rule that allows causation to be proven in the event that a defendant is one of multiple concurrent sufficient causes); Ala. Code § 13A-2-5 (same); Me. Rev. Stat. tit. 17-A, § 33 (same); N.D. Cent. Code Ann. § 12.1-02-05 (West) (same); Tex. Penal Code Ann. § 6.04 (West) (same).

[78] *See* MODEL PENAL CODE AND COMMENTARIES § 2.03 cmt. 2 at 259 (AM. LAW INST. 1985).

[79] 134 S. Ct. 881 (2014).

[80] 21 U.S.C. §§ 801–904 (2012).

[81] Schedule I and II drugs are those with "a high potential for abuse." *Id.* § 812(b).

[82] *Id.* § 841(b)(1)(C).

[83] *See Burrage*, 134 S. Ct. at 885. Whereas some courts, such as the Seventh Circuit, had held that a defendant had to be a but-for cause of a victim's death in order to be liable for the "results from" enhancement, United States v. Hatfield, 591 F.3d 945, 948 (7th Cir. 2010) (finding that "but for" causation is "the minimum concept of cause"), the Eighth Circuit had held that the enhancement required only a showing of "contributing" causation, *see* United States v. Burrage, 687 F.3d 1015, 1021 (8th Cir. 2012); United States v. Monnier, 412 F.3d 859, 862 (8th Cir. 2005), where a "contributing cause" is "a factor that, although not the primary cause, played a part in the death," *Burrage*, 687 F.3d at 1019.

[84] *Burrage*, 134 S. Ct. at 889 (quoting Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525 (2013)).

[85] *Id.* at 890 (citing *Nassar*, 133 S. Ct. at 2525).

[86] *See id.*

causes, that the standard picture of causation is unable accommodate them, and that the standard picture must therefore give way to a picture of causation that is able to accurately account for concurrent sufficient causation. In order to explore these different interpretations further, the next section discusses attempts to defend the standard picture, as well as commentators' proposals to revise[87] and replace[88] the standard picture in order to accommodate cases of concurrent sufficient causation.

IV. Proposed Solutions to the Problem of Concurrent Sufficient Causation

As discussed above, concurrent sufficient causation creates a problem for the standard picture of actual causation.[89] Judge O'Donnell articulated this problem in *Brelo* by noting the tension between the fact that Russell and Williams "were shot at by 12 people other than Brelo,"[90] and the fact that "Brelo can be found to be the 'but for' cause so long as the conduct of the others alone would not have caused the deaths."[91] This tension becomes acute once we note that multiple people likely inflicted fatal wounds on Russell[92] and Williams[93] and that no one appears to have been a but-for cause (and thus, on the standard picture, an actual cause) of their deaths.[94] In order to resolve this tension, this section articulates various solutions that commentators have proposed to the problem of concurrent sufficient causation. These solutions are divided into three categories: defenses of the standard picture of causation, modifications of the standard picture of causation, and proposed replacements to the standard picture of causation.

A. Defenses of the Standard Picture of Causation

According to Michael Moore, "[t]here is an old saying in philosophy to the effect that one person's *reductio ad absurdum* is another person's valid inference."[95] Applying this aphorism to the problem that concurrent sufficient causation creates for the standard picture, Moore notes: "One response of the counterfactual theorist is to admit that there is no causation in [these] cases."[96]

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[87] *See* MODEL PENAL CODE AND COMMENTARIES § 2.03 cmt. 2 at 259 (AM. LAW INST. 1985).

[88] *See* LAFAVE, *supra* note 39.

[89] *See* Larry Alexander, *Michael Moore and the Mysteries of Causation in the Law*, 42 RUTGERS L.J. 301, 301–02 ("Except for cases of overdetermination, where two or more causes are sufficient to produce the wrong and thus neither one is necessary, the cause-in-fact inquiry has been thought to be unproblematic.").

[90] State v. Brelo, No. CR-13-580457-A, slip op. at 16 (Ohio Ct. C.P. Cuyahoga Cty. May 23, 2015).

[91] *Id.* at 16–17.

[92] *Id.* at 21.

[93] *Id.* at 25.

[94] *See* Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1775 (1985) ("In the vast majority of cases, the but-for test works quite well as a test of actual causation. But in certain types of cases, it results in a finding of no causation even though it is clear that the act in question contributed to the injury. These are cases of *overdetermined causation* . . . .").

[95] MOORE, *supra* note 44, at 414.

[96] *Id.*

Although Moore finds such a response untenable,[97] there is undeniable elegance to a solution that is capable of preserving the standard picture of actual causation in its entirety.[98] According to this solution, there is nothing particularly vexing about Judge O'Donnell's logic in *Brelo*: if it is in fact the case that multiple officers inflicted fatal wounds on Russell and Williams, then none of those officers actually caused the victims' deaths.[99]

The view that concurrent sufficient causes are not actual causes is perhaps best articulated by J. L. Mackie: Using an example in which "a match is struck and touched with a red-hot poker at the same time, and a flame appears," Mackie writes that "the striking and the touching together caused the flame to appear."[100] While it may seem intuitive that the two factors together acted as causes, Mackie's account becomes more controversial when he adds that, "if the match was affected in both these ways simultaneously, we cannot say that either by itself caused this."[101] This is the view that Moore rejects above. David Lewis expresses a similar formulation to Mackie when he argues that concurrent sufficient causes "have an equal claim to be called causes" and that we may either "say that each is a cause or . . . that neither is a cause (in which case we can still say that the combination of the two is a cause)."[102] This notion—that concurrent sufficient causes may be causes when viewed in combination, but not when taken in isolation—finds expression in Judge O'Donnell's opinion in *Brelo* as well: there Judge O'Donnell wrote that, "while there is no question that [Russell's and Williams's] deaths were caused *by police bullets generally*, the state must prove in this case that they were caused *by Brelo's bullets specifically*."[103]

Whether we are satisfied by this solution—according to which concurrent sufficient causes are not actual causes—depends in large part on how strongly the solution violates our "pre-theoretical intuitions" about concurrent sufficient causes.[104] Setting aside, for the moment, what a complete defense of the standard picture would mean for legal liability in cases of concurrent sufficient causation,[105] it may seem counterintuitive to say that striking the match and touching it with a poker together cause it to light, but that neither striking the match nor touching it with the poker independently cause it to light. This initial implausibility, however, may give way somewhat if we consider cases in which a single sufficient cause is broken down into independently sufficient constituents. We might imagine, for example, that an individual *D* shoots and kills an individual *V* by firing a single bullet. Here it seems uncontroversial to say that the bullet caused *V*'s death. We might

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[97] *See id.* at 415 ("Of course there is causation in such cases, and a theory that cannot account for that fact cannot be an acceptable theory of causation.").

[98] This elegance derives, at least in part, from the fact that the standard picture matches our intuitions about causation in such a wide variety of cases., *see* Alexander, *supra* note 89; Wright, *supra* note 94.

[99] *See supra* text accompanying notes 70–73.

[100] MACKIE, *supra* note 45, at 47.

[101] *Id.*

[102] David Lewis, *Causation as Influence*, 97 J. PHIL. 182, 182 (2000).

[103] State v. Brelo, No. CR-13-580457-A, slip op. at 16 (Ohio Ct. C.P. Cuyahoga Cty. May 23, 2015) (emphasis added).

[104] *See* MOORE, *supra* note 44, at 414.

[105] *See* infra text accompanying notes 145–148.

imagine further, however, that the bullet in fact consisted of a left half and a right half, and that either half, if somehow fired by itself, would have been sufficient to cause *V*'s death. Based on this elaboration, it may be less counterintuitive to say that neither the left half of the bullet nor the right half of the bullet caused *V*'s death, even though the bullet as a whole did.[106]

B. Modifications of the Standard Picture of Causation

Whereas proponents of the first solution above defend the standard picture of actual causation in its entirety and conclude as a result that concurrent sufficient causes are not actual causes, a second prominent solution seeks to modify the standard picture in order to preserve both the counterfactual analysis of causation and the commonly held pre-theoretical intuition that concurrent sufficient causes are actual causes. Proponents of this second solution elaborate on the temporal qualification that we saw above,[107] and they argue that it is not enough, in order for *X* to be a cause of *Y*, that *Y* would not have occurred *when* it did but for *X*; instead, proponents of this approach contend, it must also be the case that *Y* would not have occurred *how* it did but for *X*.[108] Put another way, when defining a given harm that has been caused, we must specify "the precise way in which the forbidden consequence occurs."[109]

In order to better understand how this modification approach operates, it might be helpful to revisit the hypothetical discussed above in which *D1* and *D2* inflict simultaneous, fatal gunshot wounds on *V*.[110] There, we noted, the standard picture (with the temporal qualification) fails to grant causal status to either of *D1*'s or *D2*'s actions, because *V* still would have died *when* he did (instantly), even if either actor had not shot him.[111] According to the modification approach just introduced, however, the problem with the standard picture here is that it has led us to define the harm in question in too "course-grained"[112] a way: as *V*'s death *simpliciter*. Instead, proponents of the modification approach contend, we should alter the standard picture in order to define the harm in a more "fine-grained"[113] fashion: as *V*'s death *from two gunshot wounds*.[114] Having redefined the harm to include the way in which it occurred, we may now say that, but for *D1*'s or *D2*'s actions, *V* would not

[106] The example here is inspired by J. L. Mackie's account of "quantitative over-determination." MACKIE, *supra* note 45, at 43. There Mackie—elaborating on the scenarios described above, *see supra* text accompanying notes 45–47—notes that a hammer may be more than sufficient to flatten a chestnut, because "a somewhat lighter blow would have sufficed. Even if part of the hammer-head had been absent, this result would still have come about." MACKIE, *supra* note 45, at 43.

[107] *See supra* text accompanying notes 49–59.

[108] *See* DRESSLER, *supra* note 33, at 187–88 ("A preferable method of resolving the causal quandary is to retain the but-for test in these circumstances, but to elaborate on it. Two extra words are added, so that the test becomes: 'But for *D*'s voluntary act would the social harm have occurred when *and as* it did.'").

[109] MODEL PENAL CODE AND COMMENTARIES § 2.03 cmt. 2 at 259 (AM. LAW INST. 1985).

[110] *See supra* text accompanying notes 75–76.

[111] DRESSLER, *supra* note 33, at 187.

[112] Michael S. Moore, *Thomson's Preliminaries About Causation and Rights*, 63 CHI.-KENT L. REV. 497, 512 n.68 (1987).

[113] Michael Moore, *For What Must We Pay? Causation and Counterfactual Baselines*, 40 SAN DIEGO L. REV. 1181, 1237 (2003).

[114] *See* DRESSLER, *supra* note 33, at 188.

have died *from two gunshot wounds*.[115] *D1* and *D2* are therefore both causes of *V*'s death *from two gunshot wounds*, because if *D1* had not shot him (and *D2* had), then *V* would have died only *from one gunshot wound* (and vice-versa).[116]

Applying the modification approach to the *Brelo* case, it seems as though we may now have a framework for saying that Officer Brelo actually caused Russell's and Williams's deaths. In the former case, for example, Judge O'Donnell found "beyond a reasonable doubt that [Brelo] caused at least one of" Russell's four fatal wounds.[117] If, following the discussion above, we define the harm Russell suffered as death *from four fatal gunshot wounds*, then Officer Brelo's actions may become a cause, because, but for Brelo's actions, Russell's harm would have been only death *from three or fewer fatal gunshot wounds*.[118] Similarly, in Williams's case, Judge O'Donnell found "beyond a reasonable doubt that Brelo caused at least one fatal wound" out of the seven fatal wounds that Williams suffered.[119] If we define Williams's harm as death *from seven fatal gunshot wounds*, then we may conclude that Officer Brelo caused this harm as well.

C. Replacements to the Standard Picture of Causation

The first two solutions discussed so far have attempted to salvage, at least in part, the standard picture of actual causation as but-for causation. There is a third type of common solution to the problem of concurrent sufficient causation, however, which aims to replace the standard picture, at least in certain cases. This section will discuss two such approaches: the "substantial factor"[120] approach, and the "NESS"[121] approach.

1. The "Substantial Factor" Approach

While the problem of concurrent sufficient causation has led some commentators to call for the defense or modification of the standard picture of counterfactual causation, it has led other commentators to call for the picture's replacement. On one such view, commentators have contended that we should not ask whether a given result would have occurred but for a given individual's conduct, but we should ask instead: "Was the . . . conduct a

[115] *See id.*

[116] *See* MODEL PENAL CODE AND COMMENTARIES § 2.03 cmt. 2 at 259 (AM. LAW INST. 1985) (describing a situation of concurrent sufficient causation in which a victim dies from "two mortal blows," and arguing that, in this situation, "the result should be characterized as 'death from two mortal blows.' So described, the victim's demise has as but-for causes each assailant's blow.").

[117] State v. Brelo, No. CR-13-580457-A, slip op. at 19 (Ohio Ct. C.P. Cuyahoga Cty. May 23, 2015).

[118] In this discussion and the following discussion on Williams's death, I have followed Judge O'Donnell's lead in focusing exclusively on fatal wounds. It would likely be a more honest application of the modification approach to say that Russell died *from twenty-three gunshot wounds*, *id.* at 17, and that Williams died *from twenty-four gunshot wounds*, *id.* at 21, and that neither of these fine-grained harms would have occurred but for Officer Brelo's actions.

[119] *Id.* at 25.

[120] *See* LAFAVE, *supra* note 39.

[121] *See* Wright, *supra* note 94, at 1774.

substantial factor in bringing about the . . . result?"[122] What qualifies as a substantial factor, in turn, is largely left to our commonsense intuitions. As Professor William Prosser, one of the early champions of the "substantial factor" test, famously said: "The phrase is sufficiently intelligible to any layman to furnish an adequate guide to the jury, and it is neither possible nor desirable to reduce it to lower terms."[123]

The "substantial factor" approach, it should be noted, does not aim to wholly supplant the standard picture of counterfactual causation; as Prosser explains: "In ordinary cases . . . it comes out at the same door as the 'but for' rule."[124] Instead, according to proponents of the substantial factor approach, but-for causation is viewed as sufficient, but not necessary, for the purposes of qualifying something as an actual cause.[125] We can thus say that concurrent sufficient causes—such as *D1*'s shot to the heart and *D2*'s shot to the head in the case of *V*'s death[126]—are actual causes because they are substantial factors, even though they are not but-for causes. Similarly, applying this approach to the *Brelo* case, we can say that Officer Brelo's actions were a substantial factor in Russell's and Williams's deaths, and thus that they were an actual cause of those deaths, even if Russell and Williams still would have died (and even if they still would have died *when* they did) but for Brelo's actions.

2. *The "NESS" Approach*

In addition to the substantial factor approach, there is another framework that is often touted as a potential replacement for the standard picture of but-for causation: "the 'NESS' (Necessary Element of a Sufficient Set) test."[127] This test has been given its most prominent formulation by Professor Richard Wright, and it "has gained increasing support in the legal academy"[128] over the past few decades. On Wright's account, the NESS test says that "a particular condition was a cause of a specific consequence if and only if it was

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[122] LAFAVE, *supra* note 39; *see also* RESTATEMENT (SECOND) OF TORTS § 431 (AM. LAW INST. 1965) ("The actor's negligent conduct is a legal cause of harm to another if . . . his conduct is a substantial factor in bringing about the harm."); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 189 (2d ed.) ("When each of two or more causes is sufficient standing alone to cause the plaintiff's harm, courts usually drop the but-for test. So far as they rely upon any test of causation at all when the but-for test fails, they may invoke the 'substantial factor' test.").

[123] William L. Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 379 (1950).

[124] *Id.*

[125] *See* HART & HONORÉ, supra note 23, at 123 ("For [Prosser] cause in fact is a 'substantial factor . . . .'").

[126] *See supra* text accompanying notes 75–76.

[127] *See* Wright, *supra* note 94, at 1774; Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1019 (1988).

[128] Mark Bartholomew & Patrick F. McArdle, *Causing Infringement*, 64 VAND. L. REV. 675, 729 n.310 (2011); *see* David A. Fischer, *Insufficient Causes*, 94 KY. L.J. 277, 277 (2006) ("Indeed, several prestigious scholars now advocate some version of the NESS test, and the American Law Institute's new Restatement (Third) of Torts: Liability for Physical Harm replaces the substantial factor test with a version of the NESS test." (citations omitted)); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 cmt. f (AM. LAW INST. 2005) ("[T]he fact that [another] person's conduct is sufficient to cause [a] harm does not prevent [an] actor's conduct from being a factual cause of harm . . . if the actor's conduct is necessary to at least one causal set.").

a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence."[129] Given the somewhat abstract nature of this formulation, it may be helpful to apply the NESS test to the examples we have discussed so far.

Beginning with the case of *D1*, *D2*, and *V*, the NESS test asks us to specify "a set of antecedent actual conditions that was sufficient for the occurrence of the consequence." In this hypothetical, there are two such sets: (1) the set including *D1* shooting *V* in the heart and *V* being alive when the gunshot wound took effect; and (2) the set including *D2* shooting *V* in the head and *V* being alive when the gunshot wound took effect. Each of these sets was *actually* sufficient for the occurrence of *V*'s death, and *D1*'s actions were necessary to the sufficiency of the first set (but for *D1*'s actions, the first set would have consisted only of a living *V*), while *D2*'s actions were necessary to the sufficiency of the second set (for the same reasons). According to the NESS test, then, both *D1* and *D2* are actual causes of *V*'s death.[130]

Moving to the *Brelo* case, we can use the NESS test to explain how Officer Brelo could have been an actual cause of Russell's and Williams's deaths on one reading of Judge O'Donnell's opinion, but not on the other. On the metaphysical reading,[131] all officers who inflicted fatal wounds on Russell and Williams were actual causes of their deaths, for the same reasons just discussed in the case of *D1*, *D2*, and *V*.[132] On the epistemological reading,[133] however, it is possible that Brelo was not an actual cause. Returning to the discussion of Russell's death, we saw that Officer Brelo's actions might have been "obstructed,"[134] such that the fatal wounds he inflicted were effectively blocked from running their course by the fatal wounds inflicted by other officers. It is possible, for example, that Brelo inflicted a fatal wound—call it "Wound A"—that would have killed Russell within minutes,[135] but that another officer inflicted a subsequent fatal wound—call it "Wound B"—that actually killed Russell instantly.[136] In such a case, we would not want to say that Brelo actually caused Russell's death.[137]

The NESS test confirms our intuition here. In order to apply the test to the scenario just described, we begin again by specifying each "set of antecedent actual conditions that was sufficient for the occurrence of" Russell's death. One clear set, of course, is the set containing the antecedent

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[129] Wright, *supra* note 94, at 1774.

[130] For additional applications of the NESS test to overdetermination cases, see Kimberly D. Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2202–04 (1994).

[131] *See supra* text accompanying notes 70–73.

[132] The sufficient set of which each fatal shot is a necessary element is the set including only that shot and the living victim at the time the shot took effect.

[133] *See supra* text accompanying notes 66–69.

[134] DRESSLER, *supra* note 33, at 188.

[135] Judge O'Donnell actually found that Brelo likely inflicted such a wound. State v. Brelo, No. CR-13-580457-A, slip op. at 19 (Ohio Ct. C.P. Cuyahoga Cty. May 23, 2015).

[136] Dressler offers a similar hypothetical in his discussion of obstructed cause. *See* DRESSLER, *supra* note 33, at 188.

[137] *See id. But see, e.g.*, Bennett v. Commonwealth, 150 S.W. 806, 808 (Ky. 1912) ("The law will not stop, in such a case, to measure which wound is the more serious, and to speculate upon which actually caused the death. In many such cases the commonwealth would be helpless; for each defendant would go free because it could not be proven against him that his wound was the fatal one.").

actual conditions of Wound B being inflicted and Russell's being alive at the time Wound B took effect. Wound B is clearly necessary to the sufficiency of this set (for the reasons discussed above in the case of *D1*, *D2*, and *V*), and the officer who inflicted Wound B was therefore an actual cause of Russell's death according to the NESS test. Wound A, by contrast was *not* "a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence." In order to pass the NESS test, Wound A would have needed to be a member of a set of antecedent actual conditions containing Wound A being inflicted and Russell's being alive at the time Wound A took effect. Given that Russell was not actually alive at the time Wound A took effect, this set of antecedent conditions did not *actually* exist, and Officer Brelo (on this hypothetical "obstruction" account) was therefore not an actual cause of Russell's death according to the NESS test.[138]

V. EVALUATING THE PROPOSED SOLUTIONS

In the previous section, we saw various proposals for solving the problem of concurrent sufficient causation, ranging from a complete defense of the standard picture[139] to a complete replacement of but-for causation.[140] This section evaluates these proposals and highlights some of the more serious obstacles that each of them faces. Drawing on criticisms from the philosophical literature[141] and hypotheticals developed for the purpose of this essay,[142] this section argues that the complete defense and the modification approach face insurmountable obstacles, but that one replacement approach—the NESS test[143] —may provide a workable theory of causation that is able to account for cases of concurrent sufficient causation. Although the NESS test is not without its flaws, it offers the most promising framework for defining actual causation across a wide range of cases, including those cases that the standard picture fails to cover.

A. Evaluating Defenses

As discussed above, [144] one of the most straightforward responses to the problem of concurrent sufficient causation is to say, simply, that there is no

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[138] Wright describes a similar scenario in which *P* drinks tea that was poisoned by *C*, but then is shot and kill instantly by *D* before the poison can take effect. Here, Wright says: "*C*'s poisoning of the tea still would not be a cause of *P*'s death if the poison did not work instantaneously but the shot did. The poisoned tea would be a cause of *P*'s death only if *P* drank the tea and *was alive when the poison took effect.* That is, a set of actual antecedent conditions sufficient to cause *P*'s death must include poisoning of the tea, *P*'s drinking of the poisoned tea, and *P*'s being alive when the poison takes effect. Although the first two conditions actually existed, the third did not. *D*'s shooting *P* prevented it from occurring. Thus, there is no sufficient set of *actual* antecedent conditions that includes *C*'s poisoning of the tea as a necessary element. Consequently, *C*'s poisoning of the tea fails the NESS test." *See* Wright, *supra* note 94, at 1795.

[139] *See supra* section C.1.

[140] *See supra* section C.3.

[141] *See, e.g.*, MOORE, *supra* note 44, at 415 (arguing that a complete defense of the standard picture is untenable).

[142] *See infra* text accompanying notes 175–77.

[143] *See supra* section C.3.ii.

[144] *See supra* section C.1.

problem, and that concurrent sufficient causes are not actual causes at all. On this account, defendants who are concurrent sufficient causes of a result in a result-crime prosecution[145]—such as *D1* and *D2* in the hypothetical discussed above,[146] or Officer Brelo on the metaphysical reading of Judge O'Donnell's opinion[147]—can be convicted at most of attempt.[148] Moore has argued that such a response is unacceptable, if for no other reason than that a denial of causal status to concurrent sufficient causes violates our pre-theoretical intuitions about causation.[149] While Moore's blanket appeal to pre-theoretical intuitions may be a bit oversimplified,[150] there are good reasons for believing that he is ultimately correct.

In order to understand a potentially fatal weakness in the complete defense of the standard picture, it is helpful to examine another class of cases in which the counterfactual analysis of causation appears to break down: cases of preemption.[151] In preemption cases, an event *X* causes a result *Y*, but if *X* had not occurred, another event *Z* would have caused *Y* instead (we therefore say that *X preempted Z*).[152] These cases challenge the standard picture, because *X* seems to cause *Y*, but *Y* still would have happened but for *X*.[153] We might imagine, for example, that an assassin, *A*, is seeking to kill a target, *B*, and that *A* chooses to carry out his mission by poisoning *B*'s afternoon tea.[154] If *B* drinks the poisoned tea and dies, then on any intuitive account of causation, it would appear obvious that *A* was a cause of *B*'s death.[155] We might elaborate on the hypothetical, however, and stipulate that a second assassin, *C*, was independently planning to shoot and kill *B* at the same time that *B* actually died of the poisoning.[156] But *C* saw *A* poison *B*'s tea and decided as a result that there was no need for her to shoot *B*.[157] Since *B* still would have died *when* he did but for *A*'s poisoning him (because *C* would have shot him), it seems that the only way to defend the standard picture of causation in its entirety is to say that *A* did not cause *B*'s death.

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[145] *See supra* note 48.

[146] *See supra* text accompanying notes 75–76.

[147] *See supra* text accompanying notes 70–73.

[148] *See* MODEL PENAL CODE § 5.01(1) (AM. LAW INST. 1985) ("A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: . . . when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part . . . .").

[149] *See* MOORE, *supra* note 44, at 415 ("In any case, no one really believes such denials.").

[150] This author, at least, does not have a pre-theoretical intuition that concurrent sufficient causes are actual causes.

[151] *See generally* Jonathan Schaffer, *Trumping Preemption*, 97 J. PHIL. 165 (2000); *see also* MOORE, *supra* note 44, at 419–25; Christopher Hitchcock, *The Metaphysical Bases of Liability: Commentary on Michael Moore's Causation and Responsibility*, 42 RUTGERS L.J. 377, 381–82 (2011); Lewis, *supra* note 102, at 185–89; Michael McDermott, *Redundant Causation*, 46 BRIT. J. PHIL. SCI. 523, 528–31 (1995); Wright, *supra* note 94, at 1775–77.

[152] *See* Hitchcock, *supra* note 151, at 381 ("Suppose, for example, that Defendant shoots Victim through the heart. Accomplice . . . shoots Victim a moment later, her bullet piercing Victim's heart after he has already died . . . .").

[153] *See* McDermott, *supra* note 151, at 528.

[154] *See* Crocker, *supra* note 34, at 68.

[155] *See id.*

[156] The timing is significant, because as discussed above, in order for *X* to cause the death of *Y*, it must be true that *Y* would not have died *when* he did but for *X*. *See supra* text accompanying notes 49–59.

[157] *See* Crocker, *supra* note 34, at 68.

This is a tough pill to swallow. We might say, following the discussion above,[158] that the poisoning and the preempted shooting together caused *B*'s death, but even if we accept this somewhat metaphysically odd combination (what, after all, is the ontological status of a combined poisoning/preempted shooting?), it seems quite counterintuitive to take the next step and say that neither by itself caused *B*'s death. In order to preserve our pre-theoretical intuitions about causation—and to account for the causal status of actions like *A*'s poisoning of *B*'s tea—we will likely have to make at least some modifications to the standard picture.

B. *Evaluating Modifications*

This brings us to the modification approach discussed above.[159] There we saw a proposed solution to the problem of concurrent sufficient causation that maintained the general contours of the standard picture of counterfactual causation but tweaked this picture slightly by defining the results of causal processes in a "fine-grained"[160] fashion. Instead of asking simply whether *Y* would have occurred *when* it did but for *X*, the modification approach asks whether *Y* would have happened *how* it did but for *X*. This focus on *how* a result is produced appears at first to come with a number of explanatory benefits. It allows us to say that *D1* and *D2* are both causes of *V*'s death (because but for either one's action, *V* would not have died *from two gunshot wounds*)[161] and that Officer Brelo caused the deaths of both Russell and Williams (for similar reasons).[162] It also allows us to say, in the preemption case involving *A*, *B*, and *C*,[163] that *A* caused *B*'s death, because but for *A*'s actions, *B* would not have died *how* he did (i.e., from *poisoning*), even though he would have died *when* he did (because *C* was standing ready to shoot and kill him).[164]

Despite these benefits, however, the modification approach raises some difficult questions once we try to decide what to include in the *how*.[165] For example, in the case of *D1*, *D2*, and *V*, we might imagine that—as in the original hypothetical—*D1* shoots *V* in the heart, *D2* simultaneously shoots *V* in the head, and *V* dies instantly.[166] We might imagine further, however, that—unlike in the original hypothetical — *D1*'s bullet by itself would have taken some time to kill *V*, whereas *D2*'s bullet by itself would have killed *V*

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[158] *See supra* text accompanying notes 100–106.

[159] *See supra* section C.2.

[160] Moore, *supra* note 113, at 1237.

[161] *See supra* text accompanying notes 75–76.

[162] *See supra* text accompanying notes 117–19.

[163] *See supra* text accompanying notes 154–58.

[164] *See* Crocker, *supra* note 34, at 68.

[165] *See id.* at 68 n.10 ("[T]he hypothetical can be modified to make *A*'s action and *C*'s foregone action as similar as you like. *C* may abandon her plan to shoot *B* in the head when she sees *A* pull out his pistol and aim it at *B*. *B*'s death by gunshot wound to the head is then compatible with causation by either *A* or *C*, and *A*'s action is not necessary. If we increase the specificity of the description of the death by including the detail that the shot came from *A*'s gun, then *A*'s shooting is a necessary condition of *B*'s death. But the circularity of building the causation into the description of the death robs the characterization of all analytical force.").

[166] *See* DRESSLER, *supra* note 33, at 187.

instantly. It seems clear in this case that *D2* is an actual cause of *V*'s death; but for *D2*'s shot, *V* would not have died *when* he did (*instantly*) *and* he would not have died *how* he did (*from a gunshot wound to the head*). It also seems safe to say that *D1* is not an actual cause of *V*'s death (assuming, of course, that *D2* still would have shot *V* at the same time regardless of whether *D1* acted); but for *D1*'s involvement, *V* still would have died *when* he did (*instantly*), *and* he still would have died *how* he did—at least if we define *how V* died as *from a gunshot wound to the head*.[167]

But what if we define *how V* died as *from a gunshot wound to the head after suffering a gunshot wound to the heart*? Under this expression of "the precise way in which the forbidden consequence occurs,"[168] it appears that *D1 is* a but-for cause of *V*'s death, because *V* would not have died *from a gunshot wound to the head after suffering a gunshot wound to the heart* had it not been for *D1*'s shooting him in the heart.[169] Taking this argument to its logical conclusion, it seems that *everything* is a but-for cause of *V*'s death, because for any actual event *X*, we can say: but for *X*, *V* would not have died *from a gunshot wound to the head in a world in which X*.[170] To give a provocative example, we might say that President Obama being elected in 2008 caused *V*'s death, because but for President Obama's election, *V* would not have died *from a gunshot wound to the head in a world in which Obama is elected President*. To give an even more provocative example, we might say that humanity's future colonization of Mars caused *V*'s death, because but for the future colonization of Mars, *V* would not have died *from a gunshot wound to the head in a world in which we one day colonize Mars*.[171] Without a disciplined way of expressing "the precise way in which the forbidden consequence occurs," the modification approach to the problem of concurrent sufficient causation becomes meaningless.

In order to salvage the approach, then, there must be some limiting principle that can help us explain why certain aspects of *how* a result occurs—*V*'s dying *from a gunshot wound to the head*—are relevant to the concept of actual causation, whereas other aspects—*V*'s dying *prior to the future colonization of Mars*—are not. An initial principle that helps us avoid some

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[167] The situation described here is similar to the situation of "obstructed cause" discussed earlier. *See id.* at 188. An implicit problem with the modification approach—which is illustrated here through the revised version of the *D1*/*D2*/*V* hypothetical—is that the approach may lead us to classify obstructed causes as actual causes, because but for those obstructed causes (at least in cases like those at hand, where the obstructed cause is an injury that is actually inflicted), the result in question might not have occurred *how* it actually did.

[168] MODEL PENAL CODE AND COMMENTARIES § 2.03 cmt. 2 at 259 (AM. LAW INST. 1985).

[169] *Cf.* Lewis, *Postscript*, *supra* note 42, at 198 ("Boddie eats a big dinner, and then . . . poisoned chocolates. Poison taken on a full stomach passes more slowly into the blood, which slightly affects the time and manner of the death. If the death is extremely fragile, then one of its causes is the eating of the dinner. Not so.").

[170] *See* MOORE, *supra* note 44, at 412 (criticizing "the extraordinary promiscuity introduced into the counterfactual theory by" the specification of *how* a result is produced, and arguing that, if we define an event in terms of the exact way in which it occurs, "then the number of conditions necessary for that event with exactly these properties is staggering").

[171] *See id.* at 412–13 ("Consider [a] house destruction by fire. If this occurred three years after Princess Diana's death, then a relational property of the event is that it occurred three years after Princess Diana died. Princess Diana's death was necessary for the event to have this property, so Princess Diana's death was one of the causes of the house destruction.").

of the more absurd consequences just articulated is to ignore obviously irrelevant properties when defining *how* a given result occurs. One framework for thinking about which properties are relevant is to draw a distinction, common in philosophy, between *relational* and *non-relational* properties. Relational properties, broadly construed, are "properties which somehow depend on the state of things 'outside' the object to which the property is attributed" and which can be contrasted with "non-relational or intrinsic properties which somehow uniquely concern the object of attribution."[172] *V*'s dying *prior to the future colonization of Mars* or *in a world in which Obama is elected President* would therefore be relational properties, because they "depend on the state of things 'outside'" the circumstances of *V*'s death (no matter how *V* died, he would have died *prior to the future colonization of Mars* and *in a world in which Obama is elected President*). *V*'s dying *from a gunshot wound to the head*, on the other hand, would be non-relational, because it would "uniquely concern" the circumstances of *V*'s death (*V*'s blood loss, bone fractures, and muscle tears would all speak to the presence of the bullet).

By "stipulat[ing] away changes in relational properties"[173] when assessing which aspects of *how* a result occurs are relevant to the modification approach, we are able to alleviate the worry raised above that everything will be a but-for cause of everything else.[174] Unfortunately, no sooner have we moved past this worry than another confronts us: there are conceivable cases of concurrent sufficient causation (and preemption) in which no non-relational property of the result is changed by the presence or absence of each individual cause.

In order to illustrate such a case, we might imagine the following scenario: *D1* and *D2*, our assailants from earlier, are still out to kill *V*.

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[172] Paul Teller, *A Poor Man's Guide to Supervenience and Determination*, *in* LAWS OF NATURE, CAUSATION, AND SUPERVENIENCE 9, 11 (Michael Tooley ed., 1999).

[173] Moore, *supra* note 113, at 1241.

[174] It is of course true that we are left with an even broader universe of causes after defining our result in terms of *how* it occurred. *See* Moore, *supra* note 113, at 1241 ("Even if one stipulates away changes in relational properties, the [focus on *how* a result occurs] generates enormous promiscuity."). It will be the case, for example, that *A*'s poisoning *B* is a but-for cause of *B*'s dying *with poison in his system*, even if *C* shoots and kills *B* before the poison can run its course. *See supra* text accompanying notes 154–157. Although this is counterintuitive, it is not necessarily problematic. For example, while it would seem incorrect here to say that *A* was the cause of *B*'s death *simpliciter*, we can imagine *C* arriving to collect *B*'s body, noticing that the presence of poison in *B*'s system may jeopardize *C*'s claim to the bounty on *B*'s head, and exclaiming "if only he hadn't [drunk the tea], *this* wouldn't have happened — and by 'this' he means the death." Lewis, *Postscript*, *supra* note 42, at 198. It is possible, in other words, that *A* may be a cause of *B*'s death under certain descriptions but not others. *See id.* at 199 n.22 ("How can it ever be right to say *A*, and equally right to say not-*A*? — Because sometimes what you say is itself the decisive part of the context that resolves vagueness and sets the standards whereby the truth value of what you say is determined."). J. L. Mackie comes to a similar conclusion in drawing a distinction between "*facts*" and "*events*." *See* MACKIE, *supra* note 45, at 46. Drawing on an example originally devised by Harvard Law School Professor James Angell McLaughlin, *see* James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 155 n.25 (1925), Mackie describes a scenario in which a desert traveler dies of thirst after having his water can poisoned by one enemy and then punctured by another (who was unaware of the actions of the first enemy), *see* MACKIE, *supra* note 45, at 44. Of the traveler, Mackie says, "we cannot say that the puncturing of the can . . . caused his dying — since he would have died anyway . . . . *That he died*, and *that he died of thirst*, are distinguishable facts, and hence distinguishable results. . . . But if we think of an effect as a concrete event, then the event which was the traveller's death was also his death from thirst, and we must say that the puncturing of the can caused it, while the poisoning did not." *Id.* at 46.

However, instead of personally shooting *V*, the two assailants have decided to camp out in a distant bunker, from which they are able to communicate with an armed drone.[175] Their ability to communicate with the drone, however, is limited; in fact, they may do so only through two buttons that are situated within the bunker. If either of these buttons is pressed on a given day, then at noon on the following day, the drone will set out on a mission to find and kill *V*. Specifically, the drone's command system works as follows: at eleven o'clock each morning, the command system searches through the button log from the prior day, in no particular order, and it counts the number of buttons that were pushed. If that number is greater than zero, then the command system changes its status to "kill"; an hour later, at noon, the command system checks whether its status has been set to "kill," and if it has, it sends the drone to find and kill *V*.

One day, *D1* hits one of the buttons, and *D2* hits the other button. The following day at eleven, the command system counts up the number of buttons pushed on the prior day (two), assesses whether that number is greater than zero (it is), and sets its status to "kill." At noon, the command system checks whether its status has been set to "kill" (it has), and it sends the drone to find and kill *V*. An hour later, at one o'clock, the drone finds *V* in his home and shoots him in the heart. *V* dies instantly.[176]

In this hypothetical, it appears to be the case that, even if *D1* or *D2* had not acted, *V* still would have died *exactly when* and *exactly how* he actually did. If only *D1* (or only *D2*) had pushed a button, the command system still would have counted up the number of buttons pushed the prior day (one), it still would have assessed whether that number was greater than zero (it would have been), and it still would have set its status to "kill." At noon, the command system still would have checked whether its status was set to "kill" (it would have been), and it still would have sent the drone to find and kill *V*. From there, everything would have operated exactly as it actually did, and *V* still would have died at one o'clock in his home from a gunshot wound to the heart. In this situation, but for either assailant's action, every non-relational (or intrinsic) properties of *V*'s death would have been exactly the same.[177]

It seems, then, that the proponent of the modification approach is caught between a rock and a hard place. On the one hand, if the proponent argues

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[175] Although strictly irrelevant to the metaphysical question of causation, we can stipulate that *D1* and *D2* are acting independently. Maybe the bunker is a military bunker, and *D1* and *D2* have independently broken into it in order to make use of the equipment.

[176] This hypothetical is inspired by Professor Jonathan Schaffer's discussion of Morgana and Merlin in his article *Trumping Preemption*. *See* Schaffer, *supra* note 151, at 165.

[177] Given the physical laws of the actual world, this may not, strictly speaking, be true. As Lewis notes in *Causation as Influence*, each of our actions has minor "gravitational effects" on the state of the world, *see* Lewis, *supra* note 102, so it is possible that, had *D1* or *D2* not pressed a button, the distribution of matter in the universe would have been different, and the non-relational properties of *V*'s death would have changed as a result. This concession does not undermine the conclusion of the hypothetical, because even if it is true in the actual world that every antecedent action has at least a negligible effect on the non-relational properties of every consequent result, we can easily imagine a world in which this is not the case, yet in which actual causation still exists. We might imagine, for example, taking another page out of Schaffer's Morgana and Merlin hypothetical, *see* Schaffer, *supra* note 151, at 165, that *D1* and *D2*'s bunker magically shields either assailant from having any physical influence on the outside world, except for their ability to press the buttons that communicate with the drone.

that *V*'s death would have been different but for either assassin's action (because, for example, *V*'s death would not have resulted *from two button pushes*), then the proponent must appeal to relational properties, at which point everything becomes a cause of *V*'s death.[178] On the other hand, if the proponent appeals to the complete defense approach discussed in section C.1 and argues that neither *D1* nor *D2* actually caused *V*'s death (but instead that the two button pushes together actually caused the death), then we still have the potentially fatal counterargument from the preemption cases discussed above.[179] Either way, the standard picture of actual causation faces significant, if not insurmountable, obstacles.

C. Evaluating Replacements

Given the problems discussed above with the complete defense of counterfactual causation and the modification approach, it seems that the best viable solution to the problem of concurrent sufficient causation is to look for a replacement of the standard picture. This section begins by evaluating the "substantial factor" approach discussed above,[180] before proceeding to analyze the NESS test.[181]

1. The "Substantial Factor" Approach

As discussed above, one common solution to the problem of concurrent sufficient causation is to replace the standard picture of but-for causation and instead define an actual cause as anything that is a "substantial factor" in bringing about a given result.[182] This approach has the benefit of avoiding the technical counterfactual analysis inherent in the concept of but-for causation, and its commonsensical formulation allows jurors to appeal to their intuitions in determining whether causation has been proven in a given case.[183]

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[178] *See supra* text accompanying notes 168–71.

[179] *See supra* text accompanying notes 151–158. The drone hypothetical can easily be rewritten as a preemption case. Instead of searching through the entire button log from the prior day, for example, the command system might just stop once it sees that one button has been pushed, and at that point it might set its status to "kill" without checking whether the other button has been pushed as well. In this case, the second button, if pushed, will have no causal impact because it will be preempted by the pushing of the first button. If the first button had not been pushed, however, the second button would have been checked by the command system, and it would have led to exactly the same result. While it might be more intuitive here than in the case of the poisoning and preempted shooting to say that the actual cause is the entire two-button system, *see supra* text accompanying note 158, it still seems wrong to say that the first button push was not an actual cause of *V*'s death. *See* Schaffer, *supra* note 151, at 165–66.

[180] *See supra* section C.3.i.

[181] *See supra* section C.3.ii.

[182] *See* Burrage v. United States, 134 S. Ct. 881, 890 (2014) (describing the "line of authority, under which an act or omission is considered a cause-in-fact if it was a 'substantial' or 'contributing' factor in producing a given result"); Commonwealth v. Paquette, 451 Pa. 250, 254 (1973) ("A defendant's actions are the legal cause of death if they are a direct and substantial factor in bringing it about."); State v. McDonald, 953 P.2d 470, 474 (Wash. Ct. App. 1998) ("The 'substantial factor' test supplants the 'but for' test in criminal cases involving multiple causes . . . ."); LAFAVE, *supra* note 39; *see also* RESTATEMENT (FIRST) OF TORTS § 432(2) (AM. LAW INST. 1934) ("If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about.").

[183] *See* Prosser, *supra* note 123.

Furthermore, the substantial factor approach allows us to reach the same result as the standard picture in the main line of cases, while moving beyond the standard picture and accounting for corner cases that the standard picture fails to address (such as those involving concurrent sufficient causation and preemption).

The unfortunate flipside of the substantial factor approach's commonsensical appeal and broad reach, however, is that we have no way of defining what a "substantial factor" is. As Professor Robert Strassfeld argues, "the formula is either contentless, or it reintroduces and complicates counterfactual inquiry."[184] Put another way, the approach is generally expressed in an analytically vacuous way, such that a "substantial factor" is just defined as a but-for cause, unless multiple sufficient causes are present, in which case "substantial factor" is left undefined.[185] Furthermore, given its amorphous nature, the substantial factor test invites jurors to import moral considerations into their determinations of actual causation,[186] instead of confining those considerations to their appropriate place in determining proximate causation.[187] Without further definition, then, the substantial factor approach is likely insufficient as a replacement to the standard picture of actual causation. While the approach appears on the surface to solve the problem of concurrent sufficient causation, it does so at the expense of metaphysical robustness; when it comes to a relation as central to our legal system as causation, we cannot simply throw up our hands and say: "I know it when I see it."[188]

2. *The "NESS" Approach*

This leaves us with the NESS approach as a final candidate for solving the problem of concurrent sufficient causation.[189] Like the substantial factor approach, the NESS test is able to account for the common intuition that

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[184] *See* Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 355 (1992) ("It directs the factfinder to measure the significance or substantiality of a particular cause against an unspecified yardstick." *Id.*).

[185] *See* HART & HONORÉ, supra note 23, at 124 ("Little . . . seems to be gained by describing, even to a jury, such cases in terms of the admittedly indefinable idea of a 'substantial factor.'"); MOORE, *supra* note 44, at 88–89 ("Notice that the substantial factor test 'solves' the overdetermination problem mostly because it does not say enough to get itself into trouble in the overdetermination cases. It thus allows our clear causal intuitions full play in these cases. . . . This amounts to saying that one should use the necessary-condition test when it works, but when it yields counterintuitive results (as in the overdetermination cases) one should not use it but rely on naked causal intuition."); David A. Fischer, *Causation in Fact in Omission Cases*, 1992 UTAH L. REV. 1335, 1347 ("In cases not involving multiple sufficient causes, conduct cannot be a substantial factor in causing a result unless it was necessary to produce the result. In multiple-sufficient-cause cases, however, but-for causation is not required, and courts simply leave to the jury, without further definition, the question of whether the conduct was a substantial factor." (citation omitted)).

[186] Wright, *supra* note 94, at 1783 (describing "the emptiness of the undefined substantial-factor formula and the danger of its being used to introduce proximate-cause issues into the actual-causation inquiry").

[187] *See supra* text accompanying notes 28–32.

[188] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[189] There are, of course, numerous theories of causation that have not been discussed here. *See generally* MOORE, *supra* note 44. NESS is merely a "final candidate" among the commonly proposed solutions that are covered in this essay.

causation exists in cases of concurrent sufficient causation,[190] and it also matches our intuition that causation does not exist in certain other cases, such as those involving "obstructed cause."[191] Furthermore, the NESS test accounts for our intuition that causation exists in cases of preemption. Returning to our example in which *A* poisons *B*'s tea while *C* lies in wait,[192] we can say that *A*'s poisoning of *B*'s tea passes the NESS test while *C*'s shooting of *B* does not. This is because *A*'s poisoning of *B*'s tea is a necessary element of a sufficient set of *actual* antecedent conditions including *B*'s drinking the poisoned tea and *B*'s being alive at the time the poison took effect, whereas *C*'s shooting of *B* is not a member of any set of *actual* antecedent conditions because *C* did not *actually* shoot *B*.[193]

Despite the NESS test's ability to account for our intuitions across a wide range of cases, the framework is not without its flaws. One common objection to the NESS test is the "promiscuity" concern,[194] which was already discussed above in the context of temporal qualification.[195] According to a particularly acute formulation of this objection, which Professor Mark Kelman describes as the "subset problem,"[196] the NESS test "is so inherently manipulable"[197] that it grants causal status to almost anything. Kelman offers two examples to illustrate his point: In one, "P murders V shortly after A shouted encouraging words like, 'Kill the scum.'"[198] According to the NESS test, Kelman writes, "*A* must be deemed a cause" of V's death, because even if P was actually willing enough to kill V without A's encouragement, there is some actual subset of P's willingness that was insufficient by itself to cause P to kill V, but was sufficient when taken together with A's encouragement. A's encouragement is thus a necessary element of a sufficient set of antecedent actual conditions including itself and an appropriate subset of P's willingness to kill V.[199] Kelman's second example paints a similar picture: here, "V falls down a stairway that D left unlit," but "V was very drunk, so drunk that he would have fallen regardless of the amount of light."[200] As in the case of P and A, Kelman argues, a "plausible subset of [V's] drunken state is that he was drunk enough to fall only if the stairway was unlit," and the lack of lighting is thus a necessary element of the sufficient set of actual conditions containing itself and this "plausible subset."[201]

Two immediate responses are available here: The first is that the NESS test's capaciousness is a feature and not a bug. For the same reason that the NESS test may count as causes A's encouragement or D's failure to light the stairway, the test is also able to account for causation in certain cases that the

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[190] *See supra* text accompanying notes 129–30.
[191] *See supra* text accompanying notes 133–38.
[192] *See supra* text accompanying notes 154–57.
[193] *See* Wright, *supra* note 94, at 1795.
[194] *See* MOORE, *supra* note 44, at 488–89.
[195] *See supra* text accompanying note 52.
[196] Mark Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-KENT L. REV. 579, 603 (1987).
[197] *Id.* at 604.
[198] *Id.*
[199] *See id.*
[200] *Id.* at 607.
[201] *Id.*

standard picture fails to address. For example, we might imagine a pollution case in which "five units of pollution were necessary and sufficient for [a given] injury and . . . each of seven defendants discharged one unit of pollution."[202] On the standard picture of causation, no defendant would be an actual cause of the injury, because but for any defendant's actions, the injury still would have occurred.[203] On the NESS theory, however, each defendant's unit of pollution is a necessary element of a sufficient set of actual antecedent conditions containing five units of pollution.[204] The "subset problem" may thus be viewed as a core component of the NESS test's machinery; the ability to focus on multiple subsets of actual antecedent conditions is essential to the test's explanatory power.

The second response to Kelman's criticism is that he wrongly assumes that we can "disaggregate" all actual antecedent conditions.[205] It is one thing to admit, as Wright does in the pollution case above, that "if one defendant discharges five units of pollution and a second defendant discharges two units," then there exists a sufficient set of actual antecedent conditions containing three units of the first defendant's pollution and two units of the second's.[206] It is quite another to say that an individual's drunkenness or willingness to kill can be broken into component parts.[207] Although, as was just discussed, the "promiscuity" created by disaggregation is not necessarily a problem in the first place, we should note that an acceptance of the NESS test and its attendant focus on sufficient subsets does not require us to adopt a radically reductionist ontology.[208] We may say in response to Kelman's examples of P's reduced willingness and V's reduced drunkenness that such subsets simply do not exist.

However, while the foregoing responses may seem promising, the NESS test faces another, more fundamental problem: the notion of "sufficiency" upon which it relies may introduce "vicious conceptual circularity."[209] According to this objection, expressed most forcefully by Professors Richard Fumerton and Ken Kress, there is a distinction between "lawful sufficiency"—i.e., sufficiency that depends on the laws of nature[210]—and "causal sufficiency"—i.e., sufficiency that depends on "a species of natural law that we call 'causal law' or 'law of causal succession.'"[211] In order for the NESS test to work, Fumerton and Kress argue, the concept of sufficiency on

[202] Wright, *supra* note 94, at 1793.

[203] *See id.*

[204] *Id.*

[205] *See* Jane Stapleton, *Choosing What We Mean by "Causation" in the Law*, 73 MO. L. REV. 433, 474–77 (2008).

[206] Wright, *supra* note 94, at 1793.

[207] *See* Kelman, *supra* note 196, at 604, 607.

[208] *See generally* CARL G. HEMPEL, *Reduction: Ontological and Linguistic Facets*, *in* THE PHILOSOPHY OF CARL G. HEMPEL: STUDIES IN SCIENCE, EXPLANATION, AND RATIONALITY 189 (James H. Fetzer ed. 2001); Ansgar Beckermann, *What is Property Physicalism?*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF MIND 152 (Ansgar Beckermann, Brian P. McLaughlin & Sven Walter eds. 2009); Fabrice Correia, *Ontological Dependence*, 3 PHIL. COMPASS 1013 (2008).

[209] Richard Fumerton & Ken Kress, *Causation and the Law: Preemption, Lawful Sufficiency, and Causal Sufficiency*, LAW & CONTEMP. PROBS., Autumn 2001, at 83, 84; *see* MOORE, *supra* note 44, at 495; Stapleton, *supra* note 205, at 472–73.

[210] *See* Fumerton & Kress, *supra* note 209, at 92–93.

[211] *Id.* at 93.

which it relies cannot be one of lawful sufficiency, because certain lawfully sufficient sets of actual antecedent conditions will contain necessary elements that are not causes.[212] For example, "when the sun is at a forty-five degree angle, and the shadow is five feet tall, law-like connections entail that the flagpole is ten feet tall. But it would surely be a mistake to claim that the shadow causes the flagpole to be ten feet tall."[213] The key concept of sufficiency on which the NESS test relies, then, must be the concept of causal sufficiency.[214] But if the NESS test relies on the concept of causal sufficiency, then it must also rely on the concept of a causal law; and if the NESS test "deploys the concept of a causal law in defining causation, surely [its] critics will charge [it] with a vicious form of circularity—[the] NESS test for causation is nearly tantamount to defining causation as causation."[215]

This objection is serious, as it cuts to the core of the NESS framework. Furthermore, Wright does not seem to contest the basic allegation that the NESS test relies upon the concept of causal sufficiency. In responding directly to Fumerton and Kress,[216] he concedes that the NESS test incorporates "a notion of causal sufficiency which requires that all the conditions specified in the antecedent and the consequent be concretely instantiated on the particular occasion."[217] It is this concession that allows us to say, in cases of preemption, that the preempted cause is not a NESS, because it was not "concretely instantiated."[218] The question, then, is not whether the NESS test depends on some notion of causal law, but whether this dependence robs the framework of its analytical content.

One possible answer to this question, although by no means a conclusive response, is that the appeal to causal laws is not unique to the NESS test and that the test is no more robbed of its analytical content than any other causal theory that relies on the concepts of necessity and sufficiency. The standard picture, for example, which defines causation entirely in terms of necessity,[219] must also rely on a notion of causal, as opposed to natural, law. To illustrate, we may return to the flagpole case and say: but for the flagpole's being ten feet tall, either the sun would not be at a forty-five degree angle or the shadow would not be five feet tall. Just as "it would surely be a mistake to claim that the shadow causes the flagpole to be ten feet tall,"[220] it would also be a mistake to claim that the flagpole causes either the sun not to be at a forty-five degree angle or the shadow not to be five feet tall. Even though the flagpole's height is lawfully necessary to the latter disjunction, it is not causally necessary, which means that the standard picture must rely on some notion of causal law as well.

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[212] *See id.* at 100–02.

[213] *Id.* at 101–02.

[214] *See id.* at 101.

[215] *Id.* at 102; *see* MOORE, *supra* note 44, at 495.

[216] *See* Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1103 n.113 (2001).

[217] *Id.*

[218] *See supra* text accompanying notes 192–193.

[219] *See supra* section A.

[220] *See* Fumerton & Kress, *supra* note 209, at 101–02.

Of course, the NESS test is not absolved of its flaws merely because those flaws are shared by other theories of causation. However, the fact that those flaws are shared does enable the NESS test to stand out as more promising than its competitors. Unlike the complete defense of the standard picture and the modification approach discussed above, the NESS test offers a framework for thinking about concurrent sufficient causation that does not suffer from fatal idiosyncrasies. And unlike the substantial factor test, the NESS test provides us with more than our unguided intuitions. Although the criticisms raised by Fumerton and Kress are serious and must be resolved before we can claim to have developed a truly comprehensive theory of causation, the NESS test offers a better theoretical foundation than any of the commonly proposed alternatives.

VI. CONCLUSION

The recent case of *State v. Brelo* provides us with a contemporary lens through which to view the classic problem of concurrent sufficient causation. As this essay illustrates, cases of concurrent sufficient causation challenge the standard picture of actual causation as but-for causation. This challenge must be resolved either by defending the standard picture—and thereby denying causal status to concurrent sufficient causes—or by modifying or replacing the standard picture. As this essay argues, the standard picture is likely due for a replacement. Although none of the commonly proposed replacements is perfect, the NESS test provides the most promising framework for defining actual causation in a way that is both intellectually rigorous and that matches our intuitions across a number of cases. According to the NESS approach, we may conclude that concurrent sufficient causes are actual causes.

Article

THE CO-PRODUCTION OF SECURITY IN THE UNITED STATES AND FRANCE

Thierry Delpeuch and Jacqueline E. Ross*

Abstract

Do local crime-fighting partnerships function differently in the United States and France? We compare local security partnerships in the United States and France to examine the remarkable differences between local security partnerships in the United States and France, which differ in part due to the minimal proactive resources, centralizing pressures, and the absence of community policing which characterize such partnerships in France, in contrast to the United States, where these features have been considered essential ingredients of local crime-fighting partnerships. We conclude that the dearth of proactive police resources for partnership initiatives, the primacy of national enforcement priorities, and the lack of community policing makes for a relatively less central role of the police in French local security partnerships, in comparison to their American counterparts, which law enforcement and municipal policy tend to control the agenda of local security partnerships, sometimes pitting one segment of local communities against other residents. The relatively more marginal role of the police in French crime-fighting partnerships makes it harder for the French police to harness such partnerships to their own enforcement agenda, which in turn makes non-police actors, including weak actors such as non-profit organizations, more influential in French partnerships. We found a number of partnerships which used this relative autonomy to experiment with novel approaches to public safety problems.

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I. INTRODUCTION

Over the past several decades, police in the United States and France have changed the ways they make sense of the world by including a mix of outsiders in their process of acquiring and assessing information. In the English-speaking world, successive waves of reforms have introduced community policing, problem-oriented policing, and intelligence-led policing[1] into the day to day practices of law enforcement agencies. Many of these initiatives embrace what we call the "partnership paradigm," in which law enforcement works with outsiders to analyze intelligence and develop solutions collaboratively.[2]

The United States developed local security partnerships in the 1990s.[3] But even France, which did not undergo the successive cycles of police reform that swept the United States, the UK, and Australia, introduced local security partnerships into its otherwise centralized security governance from the 1980s on.[4] In the United States and France alike, such partnerships incorporate non-

[1] Nick Tilley, *Community Policing, Problem-Oriented Policing and Intelligence-Led Policing*, *in* HANDBOOK OF POLICING 311, 311–39 (T. Newburn ed., 2003).

[2] POLICE EXEC. RES. F. & Annie E. Casey Found., COMMUNITY POLICING: THE PAST, PRESENT AND FUTURE (L. Fridell & M.A. Wycoff eds., 2004); ADAM CRAWFORD, THE LOCAL GOVERNANCE OF CRIME: APPEALS TO COMMUNITY AND PARTNERSHIPS (Oxford Univ. Press 1999); Adam Crawford, *Networked Governance and the Post-Regulatory State? Steering, Rowing and Anchoring the Provision of Policing and Security*, 10 THEORETICAL CRIMINOLOGY 449–79 (2006); Ian Loader, *Plural Policing and Democratic Governance.* 9 SOC. & LEGAL STUD. 323, 323–45 (2000).

[3] David M. Kennedy, *Old Wine in New Bottles: Policing and the Lessons of Pulling Levers*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 155, 155—170 (David Weisburd & Anthony A. Braga eds., Cambridge Univ. Press 2006).

[4] Thierry Delpeuch, *Les Nouvelles Politiques de Sécurité en Trompe-l'œil? Les Réformes Dans le Champ de la Sécurité Publique à l'épreuve des Recherches en Sciences Sociales*, 61 DROIT ET SOCIÉTÉ 849, 849–880 (2006); Jacques De Maillard & Sebastian Roché, *Crime and Justice in France: Time Trends, Policies and Political Debate*, 1 EUR. J. CRIMINOLOGY 111, 111–13 (2004).

police actors into new forms of collective deliberation about crime and urban disorder.[5]

In France, this represented a departure from the centralized governance of enforcement priorities, since it permitted mayors, housing officials, social workers, and transport officials to play a role in defining local security concerns.[6] Regular meetings about security matters allowed participants to highlight the concerns of local residents, to influence the police response, and to distribute responsibility for the prevention and detection of crime across the full range of the participants in local security partnerships.[7] As a result, these partnerships acquired some ability to adapt national enforcement policy to local needs.[8]

In the French centralized state, police participation in local security partnerships presents a bit of a puzzle, since the French police, unlike American law enforcement are not appointed by or accountable to local municipalities.[9] Indeed, it is often said that the French police are supposed to serve the interests of the state, while the American police serve their citizenry more directly. [10] Why then, is French law enforcement so invested in local security partnerships?

This is really a question about the disparate contexts in which such partnership initiatives developed across the Atlantic divide. We propose to compare local security partnerships in the United States and France in order to study the impact that three factors have on the ways in which police partner with communities to address local problems of crime and security. These factors are community policing, the proactive turn in policing, and decentralized security governance. Much of the literature about crime-fighting partnerships focuses on English-speaking countries, in which community policing is a normal feature of police work; in which police who participate in local security partnerships can draw on proactive crime-fighting tactics—such as the use of undercover tactics—to address highly localized

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[5] Jenny Fleming & Jennifer Wood, *Introduction: New Ways of Doing Business: Networks of Policing and Security*, *in* FIGHTING CRIME TOGETHER: THE CHALLENGES OR POLICING AND SECURITY NETWORKS 1, 1–14 (Univ. New South Wales Press 2006); DOMINIQUE GATTO & JEAN-CLAUDE THOENIG, LA SÉCURITÉ PUBLIQUE À L'ÉPREUVE DU TERRAIN. LE POLICIER, LE MAGISTRAT, LE PRÉFET (1993); Francois Bonnet, Jacques De Maillard, & Sebastian Roché, *Plural Policing of Public Places in France. Between Private and Local Policing*, 2 EUR. J. POLICING STUD. 285, 294–303 (2015).

[6] Christian Mouhanna, *Coproduction, Cohérence et Concurrence? Réflexions sur la Coopération élus-Policiers en Matière de Sécurité*, *in* PEURS SUR LES VILLES, 103-120 (J. Ferret & C. Mouhanna eds., Presses Universitaires de France 2005); Tanguy Le Goff, *Réformer la Sécurité par la Coproduction: Action ou Rhétorique?*, *in* RÉFORMER LA POLICE ET LA SÉCURITÉ – LES NOUVELLES TENDANCES EN EUROPE ET AUX ETATS-UNIS 81, 81–104 (Sebastian Roché ed., 2004).

[7] Virginie Gautron, *La Coproduction Locale de la Sécurité en France: un Partenariat Interinstitutionnel Déficient* 7 CHAMP PÉNAL/PENAL FIELD (2010).

[8] CLIVE HARFIELD & KAREN HARFIELD, INTELLIGENCE, INVESTIGATION, COMMUNITY AND PARTNERSHIP (Oxford Univ. Press 2008); JACQUES DONZELOT & ANNE WYVKENS WYVEKENS, LA MAGISTRATURE SOCIALE: ENQUÊTES SUR LES POLITIQUES LOCALES DE SÉCURITÉ (2004); T. Jones & T. Newburn, *The Transformation of Policing? Understanding Current Trends in Policing Systems*, 42 BRIT. J. CRIMINOLOGY 129, 138–39- (2002); Tanguy Le Goff, *Les Contrats Locaux de Sécurité à L'épreuve du Terrain: Réflexions sur L'action Publique Locale en Matière de Sécurité*, 20 POLITIQUES ET MANAGEMENT PUBLIC 105, 105–19 (2002); Jacques De Maillard, Le Partenariat en Représentations. Contribution à L'analyse des Nouvelles Politiques Sociales Territorialisées, 18 POLITIQUES ET MANAGEMENT PUBLIC 21, 21–41 (2000).

[9] JEANMARC BERLIERE, RENE LEVY, HISTOIRE DES POLICES EN FRANCE (Nouveau Monde Ed. 2011).

[10] *Id.*

crime problems such as open-air drug markets; and in which security governance actively promotes local experimentation with disparate policing strategies.[11] These features are such integral parts of the American model of what policing should look like, and so intertwined with American notions of how local security partnerships should function, that it is hard to imagine how local security partnerships can work without them.[12]

Studying France, however, allows us to do just that. France is a valuable contrast case, because it allows us to explore local security partnerships in a highly centralized policing system which briefly experimented with and then abandoned community policing and makes it difficult to deploy proactive resources for partnership initiatives (due to the constraints imposed by centralized security governance.)[13] Yet France has nonetheless developed a robust system of local security partnerships. How do these partnerships compare with their American counterparts? What is the impact of these key systemic differences on the ways in which such partnerships function as sites for the exchange of ideas; for the definition of problems of common concern; for the analysis of intelligence; and for the co-construction of new approaches to address the phenomena they bring into focus?

Our comparison builds on a literature that frames partnerships as sites for the mobilization of local actors around negotiated objectives and pooled resources,[14] which the participants adapt to local needs and conditions.[15] Public actors come from diverse institutions and walks of life.[16] They must be able to develop and try out alternative definitions of security problems and be willing to experiment with novel solutions.

In comparison to their Australian and Anglo-American counterparts, we will argue that French partnerships also devolve greater power to non-police actors, de-centering the police in collective deliberations. In the United States, the United Kingdom, and Australia, police attempt to influence partnership deliberations by acquiring close familiarity with local neighborhoods and their residents.[17] But in France, where local security partnerships do not go hand-in-hand with community policing, police liaisons sometimes are not as familiar with local neighborhoods and have less direct contact with local residents.[18] As we will argue, their knowledge of local conditions is heavily mediated by their institutional contacts with housing and transport officials

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[11] DOMINIQUE MONJARDET, CE QUE FAIT LA POLICE. SOCIOLOGIE DE LA FORCE PUBLIQUE (La Découverte 1996).

[12] JACQUES DONZELOT, CATHERINE MEVEL, ANNE WYVEKENS, FAIRE SOCIETE. LA POLITIQUE DE LA VILLE AUX ÉTATS-UNIS ET EN FRANCE (Seuil 2003).

[13] SEBASTIAN ROCHÉ, POLICE DE PROXIMITÉ (Seuil 2005).

[14] JENNIFER WOOD & BENOIT DUPONT, DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY (Cambridge Univ. Press 2006); Benoit Dupont, *Security in the Age of Networks*, 14 POLICING AND SOC'Y 76, 76–91 (2004).

[15] Le Goff, *supra* note 6, at 81–104.

[16] Fleming & Wood, *supra* note 3, at 1–14; ADAM CRAWFORD, THE LOCAL GOVERNANCE OF CRIME: APPEALS TO COMMUNITY AND PARTNERSHIPS (Clarendon Press 1997); Diana Gordon, *Democratic Consolidation and Community Policing: Conflicting Imperatives in South Africa*, 11 POLICING AND SOCIETY 121, 121–50 (2001).

[17] Jennifer Wood, *Dark Networks, Bright Networks and the Place of the Police*, *in* FIGHTING CRIME TOGETHER – THE CHALLENGES OF POLICING AND SECURITY NETWORKS 246, 246–69 (Jenny Fleming & Jennifer Wood eds., Univ. New South Wales Press 2006).

[18] CHRISTIAN MOUHANNA, LA POLICE CONTRE LES CITOYENS? (Champ Social ed., 2011).

and the municipalities' own employees. The relationship of police intelligence units to partnership liaisons illustrates this difference. In large American cities like Chicago, intelligence units cultivate contacts with police liaisons to local partnerships because of the liaisons' in-depth local knowledge, often based on the liaisons' own local contacts as community policing officers.[19] By contrast, French intelligence units within the police value local security partnerships that provide them with access to outsiders, including institutional actors and local residents; it is these outsiders themselves who are the French intelligence units' preferred sources of intelligence.[20] Liaison officers are themselves of value to intelligence units and other police professionals because of the information they derive from their institutional partners and because they are able to mobilize these partners' operational resources.[21]

Our research is based on research we conducted from 2007 to the present in four American cities and approximately eight French municipalities. (The exact number depends on whether one includes suburbs in the total count.) We studied 14 metropolitan areas in France[22] and 4 in the United States.[23]

In order to understand the circulation of intelligence in local security partnerships, we conducted more than 500 "open-ended, semi-structured" field interviews with both police and non-police participants in local security partnerships. There are a number of options for gathering this kind of data;[24] we combined the "informal conversational interview" with elements of the "general interview guide approach," in which the investigator uses a checklist of issues to be explored but adapts the wording and order of questions to the expertise of individual respondents.

In each French and American city, we studied local security partnerships, through interviews with police, Gendarmerie and non-police participants (such as prosecutors, municipal officials, political leaders, French prefectural personnel, housing, transportation and school officials, social workers, and a variety of non-governmental organizations),members of intelligence units, specialized investigative units, and ground-level units who partner with liaison officers to local security partnerships. We also met with police

[19] Interviews with commander and deputy commanders and analysts of Chicago Police Department Intelligence Unit (2008).

[20] Interviews with intelligence analysts of the Service Zonal des Renseignements Territoriaux (in the French National Police) and with the Delegate for Cohesion of Police with the Population (a position for retired police officers who are tasked with improving police-community relationships) for the high-crime security zone of Bordeaux (2013). The position of Delegate for Cohesion of Police with the Population was created by the Direction Générale de la Police Nationale, by internal regulation, on May 11, 2009. Jacques de Maillard, C. Gayet-Viaud & F. Jobard, *Une innovation policière: les délégués à la cohésion police-population*, LES CAHIERS DE LA SECURITE (forthcoming, 2017).

[21] Interviews with Gendarmerie officers (in the département of Marne) (2015); Interviews with the police commissioner of Roubaix and with Roubaix police officers who served as liaisons to local schools, (2009).

[22] Paris, Lille/Roubaix, Grenoble, Montpellier, Bordeaux, St. Etienne, Mantes-la-Jolie, Rennes, Nantes, Strasbourg, Marseille, Chalons-en-Champagne, Peau, Lyon.

[23] Chicago and Aurora, Illinois, Norfolk, Virginia, and Tampa, Florida.

[24] MICHAELQUINN PATTON, QUALITATIVE RESEARCH & EVALUATION METHODS (4th ed., SAGE Publications 2015); GARY KING, ROBERTO. KEOHANE, & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH (Princeton Univ. Press 1994); YVONNE S. LINCOLN & EGON G. GUBA, NATURALISTIC INQUIRY (SAGE Publications 1985).

officials who specialize in juvenile justice and juvenile crime prevention, including members of police-run recreational centers and members of the Gendarmerie's youth crime prevention brigades. And we of course interviewed the command hierarchy at each location.[25]

Interviews aside, we observed partnership meetings, internal police meetings, went on ride-alongs and foot patrols with ground-level units (such as rapid intervention teams and patrol units), and reviewed training materials, including: briefing materials, internal police bulletins, intelligence reports, minutes and agendas for meetings of local security partnerships.

Our research thus uses case studies in French and American sites to explore the ways local security partnerships collaborate in defining and analyzing public safety problems that matter to the participants.

We draw on these case studies to develop and illustrate our findings about the surprising resilience of French local security partnerships, in spite of minimal proactive resources, centralizing pressures, and the absence of community policing. We illustrate our findings with examples of partnership practices drawn from different research sites in both countries, with particular emphasis on Nantes and Bordeaux, in France, and Aurora and Chicago, in the United States.

The resilience of French partnerships is evident from continued problem-solving interactions among participants; from their continuing exchange of information and collective deliberation about public safety problems; and from their willingness to coordinate their interventions and rely on each other's commitments.[26] But, as we argue, the dearth of proactive police resources for partnership initiatives, the primacy of national enforcement priorities, and the lack of community policing makes for a relatively less central role of the police in local security partnerships in comparison to their American counterparts. This makes it harder for the French police to harness such partnerships to their own enforcement agenda, which in turn makes non-police actors, including weak actors such as non-profit organizations, more influential in French partnerships. As shown below, we found a number of partnerships which used this relative autonomy to experiment with novel approaches to public safety problems.

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[25] In both countries, interviews were conducted with command hierarchy of each police department, including the chief (or in France, the director), the deputy chief, unit commanders, supervisors, police liaisons to local security partnerships, and with commanders and staff of intelligence units as well as community policing officers (in the U.S. only, as there were no equivalent positions in France.) Interviews were also conducted with officials from public housing, transportation, school, municipalities, recreational facilities, and social work organizations, and specifically, with those officials responsible for security and/or for partnerships with the police. All interviews were anonymized.

[26] Anne Cecile Douillet & Jacques de Maillard, *Le magistrat, le maire et la sécurité publique : action publique partenariale et dynamiques professionnelles,* 49 (4) REVUE FRANCAISE DE SOCIOLOGIE, 793, 794-818 (2008).

II. PARALLEL DEVELOPMENTS AMID DIFFERING CONTEXTS: THE EMERGENCE OF LOCAL SECURITY PARTNERSHIPS IN THE UNITED STATES AND FRANCE

Local security partnerships in the United States and France arose from the increasing political salience of concerns about crime[27] and offered means of addressing the "quality of life" concerns that coalesced around neighborhoods where signs of neglect and disorder were highly visible[28]. Limited resources made it appealing to off-load responsibility for security matters to other actors,[29] who in return receive some say in how security problems are defined and addressed.

Despite these commonalities, however, French and American versions of local security partnerships took root in very different soil. In the United States, the influence of evidence-based policy-making techniques encouraged the development of intelligence-led policing, which itself followed on the heels of reform movements that became known as "community policing" and "problem oriented policing."[30] The September 11 attacks further channeled intelligence-led policing, in particular, into efforts to improve the coordination of local, state, and federal law enforcement agencies and to give intelligence analysts a greater role in the design of enforcement strategies.[31] If community policing had encouraged ground-level actors to get to know the communities they policed, problem-oriented policing had encouraged police and residents to deliberate collectively about how to address the priority concerns of local residents.[32] Intelligence-led policing, in turn, formalized a repertoire of tested approaches to a variety of crime problems.[33] These served as a resource to the police in partnership deliberations about security concerns, reinforcing police claims to expertise as well-as their agenda-setting capacity.[34]

French security governance, too, increasingly requires the police to make more efficient use of their resources.[35] Nonetheless, intelligence-led policing has not had the same influence in France, in which policing strategies are developed centrally, in a highly politicized context, and with little input from

[27] Laurent Bonnelli, LA FRANCE A PEUR. UNE HISTOIRE SOCIALE DE L'INSÉCURITÉ 391, 398 (La Découverte 2008).

[28] SEBASTIAN ROCHÉ, SOCIOLOGIE POLITIQUE DE L'INSÉCURITÉ (PUF 1998).

[29] Mouhanna, *supra* note 6.

[30] NICK TILLEY & KAREM BULLOCK, CRIME REDUCTION AND PROBLEM-ORIENTED POLICING (Willan Pub. 2003).

[31] David L. Carter, Jeremy G. Carter, *Intelligence-led Policing: Conceptual Considerations for Public Policy*, 20 (3) CRIMINAL JUST. POL'Y REV., 310, 313–25 (2009).

[32] John Eck, *Science, Values, and Problem-oriented Policing: Why Problem-oriented Policing*, IN POLICE INNOVATION: CONTRASTING PERSPECTIVES 123, 117–32 (David Weisburd & Anthony. Braga eds., Cambridge Univ. Press 2006).

[33] Tilley, *supra* note 1.

[34] Jenny Fleming, *Working through Networks: The Challenge of Partnership Policing*, in FIGHTING CRIME TOGETHER:THE CHALLENGES OF POLICING AND SECURITY NETWORKS 94, 87-115 (Jennifer Fleming & Jennifer Wood eds., Univ. New South Wales Press 2006).

[35] Jacques de Maillard, Stephen Savage, *Comparing Performance: The Development oPolice Performance Management in France and Britain*, 22 (4) POLICING AND SOC'Y *363*, 364-83 (2012).

outside experts or professional analysts.[36] In the United States, by contrast, the teachings of intelligence-led policing, like earlier reform movements, were disseminated in part by the federal government (which uses ILP to obtain local assistance in protecting national security and detecting potential terrorists), by professional associations of analysts and police chiefs (like the IACP), and by criminologists developing new approaches in close collaboration with the police.[37]

Nor has community policing fared much better in France. A two-year experiment with community policing ended in 2003, leaving the police and Gendarmerie increasingly disconnected from the residents of the neighborhoods they police.[38] Yet community policing seems to facilitate local security partnerships in their American settings. Knowing their neighborhoods and their constituency well makes it easier for American police to discuss local concerns knowledgeably and to address them effectively.[39] (This is not to say that community policing is omnipresent in the United States, or that it always functions effectively; only that a strong tradition of community policing, where it does exist, can facilitate local security partnerships.).[40]

Relatedly, policing is largely handled at the state and local level in the United States, while French security governance is highly centralized. In American cities, police superintendents report to the mayor, who retains primary responsibility for setting enforcement priorities.[41] French mayors, by contrast, long insisted that fighting crime is not their job.[42] French municipal police forces are responsible for traffic control and enforcement of administrative ordinances.[43] American police forces are therefore more accountable to local government and more dependent for their legitimacy on how they are perceived by local constituencies than their French counterparts, who are, formally at least, accountable only to the national government.

Centralization of the French National Police and French National Gendarmerie means that enforcement priorities and quantitative performance measures are determined by the Minister of the Interior;[44] and most police personnel rotate regularly across different regions. [45] This translates into very limited local input into how a *département* is policed and very little local accountability.[46] It also makes the police unfamiliar with their frequently

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[36] FABIEN JOBARD, JACQUES DE MAILLARD, SOCIOLOGIE DE LA POLICE. POLITIQUES, ORGANISATIONS, REFORMES, 210 (Armand Colin, 2015).

[37] Martin Innes, *Policing Uncertainty: Countering Terror through Community Intelligence and Democratic Policing*, 605 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. *222*, 222-241 (2006). Jeremy. G. Carter, Scott W. Phillips, 25 (4) *Intelligence-led Policing and Forces of Organizational Change in the United States*, 335, POLICING AND SOC'Y, 333-57 (2015).

[38] Roché, supra note 13; Mouhanna, *supra* note18.

[39] WESLEY SKOGAN, COMMUNITY POLICING: CAN IT WORK? (W. Skogan ed., Wadsworth Pub. 2003).

[40] *Id.*

[41] LARRY K GAINES, VICTOR E. Kappeler, POLICING IN AMERICA (Routledge 2014).

[42] Le Goff, *L'insécurité Saisie par les Maires. Un Enjeu de Politiques Municipale*, 55 REVUE FRANÇAISE DE SCIENCE POLITIQUE 417, 415–44 (2005).

[43] VIRGINIE MALOCHET, LES POLICIERS MUNICIPAUX (Presses Universitaires de France 2007).

[44] Berlière, supra note 9.

[45] Monjardet, *supra* note 11, at 271–74.

[46] *Id.*

changing environment, as they are not anchored enough in their environments to know their residents well, at least over the long-term. This compound the effects of Nicolas Sarkozy's 2003 decision to abandon community policing, and the effects of subsequent decisions to centralize street level patrols and rapid intervention units, which are no longer assigned permanently to any particular neighborhood.[47]

Centralized security governance thus makes it difficult to adapt priorities and enforcement strategies locally.[48]In the United States, the decentralized governance of security makes it easier for the police to be responsive to their partners.[49] After all, municipal police, in the United States, are accountable to their mayors—who are also responsible for piloting local security partnerships.[50] American police officers are often recruited from the cities where they work and are therefore more likely to be familiar with the neighborhoods they police.[51] Because their priorities are set locally, it is easier for American police to align enforcement priorities and performance measures with the choices made and performance criteria adopted in local security partnerships. [52]

At the same time, there has been a greater emphasis on national security in American law enforcement in the wake of the September 11 attack. This took the form of greater federal pressures on state and local police forces to assist in protecting the national infrastructure against terrorist attacks, to assist federal authorities in the investigation of terrorist threats, and to assist in the enforcement of federal immigration laws.[53] Accordingly, local security partnerships in both countries must carve out a place for themselves against a background of national pressures and demands on their resources.

Despite these shared background pressures, local security partnerships in the United States have developed, as part of a tradition that favored decentralized security governance, closer police contacts with local communities (with the advent of community policing) and drew on a wide repertoire of proactive tactics and resources, under-written in part by the influence of intelligence-led policing and federal financing for partnership initiatives that have collateral benefits for national security.[54] These factors may seem to favor the partnership model. Yet local security partnerships also flourish in France, where none of these conditions are present to the same degree. What explains this?

Our research suggests some reasons why. The circumstances in which local security partnerships took root explain the ways in which such partnerships prove useful to the French police and why they function

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[47] ROCHÉ,*supra* note 13.

[48] Monjardet, supra note 11 at 135.

[49] ROBERT REINER, THE POLITICS OF THE POLICE (Oxford University Press, 2010).

[50] GAINES &KAPPELER, *supra* note 41.

[51] David Weisburd, Stephen D. Mastrofski, Ann M. McNally, Rosann Greenspan &James J. Willis, *Reforming to Preserve: COMPSTAT and Strategic Problem Solving in American Policing,* 2 (3) CRIMINOLOGY & PUB POL'Y *421,* 422 (2003).

[52] *Id.*

[53] Jeremy G. Carter, *Inter-organizational Relationships and Law Enforcement Information Sharing Post-September 11 2001,* 38 (4) J. OF CRIME AND JUST. 522, 523(2015).

[54] Carter &Carter, *supra* note 31.

differently from their American counterparts. In what follows, we juxtapose French partnerships with American partnerships, using the American examples to illuminate the unique features of local security partnership in France and to help explain the partnership model's persistent hold and growing influence on local security governance in a seemingly unfavorable context.

In particular, we contend that, in the United States, local intelligence partnerships were developed to complement community policing, while in France, such partnerships represent an effort to compensate for the intelligence deficits that followed the abolition of community policing in 2003. Institutional contacts with partners who are in direct contact with different segments of the community palliate the effects of reducing direct, informal interactions between police and residents.

III. WHY LOCAL SECURITY PARTNERSHIPS THRIVE IN FRANCE

A. How Local Security Partnerships in France Counteract Centralization and Related Constraints on Proactive Resources

In France, local security partnerships allow law enforcement to counteract the handicap of centralization and the related constraints on proactive resources and local anchoring of police units—all of which were reinforced by the end of the French experiment with community policing. Such partnerships help the National Police and National Gendarmerie carve out some measure of local autonomy and serve as a counterweight to centralized security governance by helping the police to adapt enforcement priorities to local conditions and to explain or compensate for doing poorly according to purely quantitative measures of police performance. In 2007, in particular, it became easier for France's local security partnerships to play this role, with the enactment of a new law that requires the National Police and National Gendarmerie to work with mayors and other institutional actors in local security partnerships. [55] French mayors now hire security officials to develop crime prevention programs, oversee after-school programs to keep teenagers off the streets, and supervise video-surveillance in public areas, as part of a growing industry of situational crime-prevention in France.[56] In recent years, the French government further reinforced the role of local security partnerships by designating certain impoverished, high-crime neighborhoods as "priority security zones" eligible for special funding to promote urban development.[57]

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[55] Loi no. 2007-297 du 5 mars 2007 relative a la prévention de la délinquance [Law n. 2007-297 of March 5, 2007 on Crime Prevention], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 5, 2007.

[56] Tanguy Le Goff, LES MAIRES NOUVEAUX PATRONS DE LA SECURITE, 118 (Presses universitaires de Rennes 2008).

[57] France has 64 such security zones. *See* Anne-Charlotte Dusseaulx, *Zones de Sécurité Prioritaires, Mode D'emploi*, LE JDD, (Aug. 14, 2012), http://www.lejdd.fr/Societe/Actualite/Zones-de-securite-prioritaires-mode-d-emploi-543334.

Though the government did not allocate additional manpower to the new priority zones, the designation of the zones promoted close cooperation between police and institutional partners and legitimated efforts by the police to fine-tune enforcement priorities to the conditions and needs of these zones.[58] Coordinating with local security partnerships permitted law enforcement officers along with their institutional partners to experiment with an expanded range of proactive approaches, combining targeted crime-fighting efforts with preventive strategies, and pooling police and non-police resources to implement these strategies.

For example, residents in one of the new priority zones of Nantes complained vociferously, from 2012 onwards, of teenagers continuously riding noisy motorcycle around certain public housing blocks late at night, in so-called motorcycle "rodeos" that create traffic hazards while intimidating residents and generating a great deal of noise.[59] Targeted police patrols only encouraged the practice, as local teenagers used cat-and-mouse tactics to evade the police. To address these concerns, the local security partnership for the neighborhood developed and coordinated a new initiative to experiment with two new approaches.[60] The municipality hired a local driving school to organize a series of free motorcycle workshops for local teenagers, to prepare them for the licensing examination while teaching safe driving skills.[61] The workshops also discouraged risky practices, encouraged drivers to wear helmets, and channeled local kids into dedicated practice areas, including obstacle courses and races in controlled environments, away from heavy traffic and local residents. At the same time, the police abandoned high-speed chases in favor of new efforts to track and confiscate motorcycles used by ring-leaders of local motorcycle rodeos—once the drivers had parked their motorcycles and left.[62]

But local security partnerships not only coordinate with and harness the proactive resources of other institutional actors outside the police. Such partnerships also help the police themselves mobilize proactive resources and try out new ways of deploying them. For example, in a priority zone of Bordeaux (known as Cenon), a local commander and partnership liaison officers worked closely with local merchants, security guards for local supermarkets, and municipal security official to address the harassment of local merchants by local residents.[63] Together, they analyzed patterns of incidents in order to determine who was involved in intimidation of merchants who did not want to assist drug dealers in laundering their proceeds; which incidents were aimed at driving out businesses that were not Muslim-owned,

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[58] Interviews with commanders of priority security zones and prefects' security delegates, in Nantes (2015), Marseille (2016) and Bordeaux (2013).

[59] Interviews in Nantes with three high-level security officials of the mayor's office and the city's urban development manager for the priority security zones of Nantes, along with interviews with members of the manager's development team and with the police commander for the Nantes' priority security zone (2015) and his second and third-in command.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Interviews with the commissioner of Cenon (a priority security zone of Bordeaux) and with the Cenon Delegate for the Cohesion of Police with the Population (2013).

that retailed alcohol, or that sold non-hallal meat; which incidents were aimed primarily at extorting money from the merchants; and which incidents served primarily to protect or shift a drug dealer's retail operations, by driving out non-cooperating businesses and replacing them with fast-food operations that could serve as hangouts and lookout spots for drug-dealers.

In the high priority security zones of Nantes and Bordeaux, the police created and allowed partnerships to benefit from locally anchored police units, which were freed (to some extent) from having to respond to calls for service.[64] This allowed their commanders to identify the extortion of neighborhood merchants as priorities, develop their own proactive tactics, and mobilize dedicated resources for addressing them.[65] In the Bordeaux suburb of Cenon, in particular, a commander who served as a local liaison officer spoke to his partnership network of local merchants, security guards, and municipal officials every morning to find out which businesses were being targeted that day. These efforts were to pinpoint where incidents seemed to be clustering and to identify the key ringleaders, so the police could diagnose the likely motivations behind the incidents and develop a deployment plan for the afternoon.[66] Depending on their analysis of the incident clusters and motivations of the participants, the commanders would deploy units in the afternoon either to step up protection of certain locations, to disrupt certain open-air drug markets, or to pursue and question particular suspects.

When the police themselves could not mobilize proactive resources, institutional partners had to triage their concerns to identify those that could be handled without police involvement. Working together with the police and with local security partnerships, for example, municipal security officials in one neighborhood of Nantes analyzed a slew of complaints generated by gathering places of juveniles—examining group dynamics, and looking more closely into who took part in these gatherings and why. The aim was to identify problems that the city could handle without directly involving the police. Some of the gathering spots that the Nantes partnership analyzed turned out to be meeting points for truant school children and unemployed drop-outs who lived in the area; others were open-air drug markets.

The partners then worked out a variety of different crime prevention approaches for assembly points that were not dominated by professional drug trafficking networks. If problems of noise or vandalism were traced to individual trouble-makers such as unemployed young people, mediators working for the mayor of Nantes and roving youth counselors from non-profit organizations were dispatched to get to know identified ring-leaders and to help find them internships and job training programs. When no particular individuals could be singled out and partnership officials attributed noisy

[64] Interviews with the police commissioner in charge of the sector of Bordeaux that contains the Cenon priority security zone; with the captain in charge of rapid intervention units for Cenon (2013); with the commander of the neighborhood police station for the priority security zone of Nantes (2015); and with the municipal security directors of the Mayor's Offices of Bordeaux (2013) and Nantes (2015).

[65] *Id.*

[66] Interview with the commander of the rapid intervention units of Cenon (a priority security zone of Bordeaux) Bordeaux (2013).

gatherings to school-aged children who had no place to go after school, the Nantes municipality developed hired juveniles in targeted age-groups to plant trees and shrubbery in their neighborhoods, develop their own soccer field, and to participate in the design and landscaping of such sports installations. This made it possible for the police to conserve their own resources and to target their crime-fighting efforts more narrowly.

These efforts to develop proactive security strategies for high-crime neighborhoods tend to compensate, in certain selected areas, for some of the limits that France's centralized security governance imposes on the use of proactive investigative tactics that are commonplace in the United States. In contrast to the U.S., France has no recent tradition of using undercover buy-bust tactics to disrupt open air drug markets infiltrating drug trafficking local drug organizations with undercover agents, or of recruiting local offenders to work undercover against their local bosses.[67] The legal tools for undercover tactics have existed since 1991 and have been updated in 2004 and 2007, through legislation that expands such tactics beyond the realm of narcotics interdiction.[68] But the 2004 reforms that generalized undercover tactics to organized crime and terrorism conceived of these tactics as tool reserved for the investigation of only the most sophisticated international crime syndicates, as a marker of France's efforts to modernize its most elite and specialized crime-fighting units.[69] This makes undercover tactics unavailable as a local crime-fighting tool.

Local security partnerships alleviate these constraints on proactive resources and afford the police greater tactical maneuver room. One way in which they do so is by making some of the proactive resources of intelligence units—used historically to fend off threats to public order—available to investigate the local underground economy and drug trafficking. In particular, by in turn making the resources of local security partnerships available, somewhat surreptitiously, to assist the intelligence services in their study of the underground economy.[70] Local security partnerships play this nodal role, in part, because of the difficulties intelligence units encounter in partnering with criminal investigative units within the police and because of the difficulties intelligence units increasingly encounter—due to reduced police contact with local residents—in obtaining information from the neighborhoods they are meant to monitor.[71]

In some areas, intelligence units participated directly in local security partnerships in order to improve their relationships with housing officials,

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[67] Berlière, *supra* note 9; R. Lévy, DU SUSPECT AU COUPABLE: LE TRAVAIL DE POLICE JUDICIAIRE, 77 (Méridiens-Klincksieck 1987).

[68] CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] 706–80, 781 (Fr.).

[69] Loi 2004-204 du 9 mars 2004 de **Loi Perben II [Law 2004-204 of March 9, 2004 on Perben II]**, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 9, 2004

[70] Bonnelli, *supra* note 27.

[71] This was the common theme of respondents in all interviews conducted by the authors with intelligence officers of the Renseignements Territoriaux (intelligence service of the French National Police) as well as with criminal investigators of the Surete (criminal investigative service of the National Police) in all cities studied.

school principals, municipal employees, and other institutional partners.[72] Direct participation also gave them a cover for contacting local merchants, social workers, and members of neighborhood watch groups who might otherwise have been hesitant to speak to intelligence agents.[73] And in some parts of France, intelligence officials assisted priority security zones in "testing" the effectiveness of partnership initiatives by conducting opinion surveys of a selected panel of neighborhood residents—selected in part for their willingness to play a relay function between police and residents, and for being deemed "representative" captors of "community sentiment." [74] This not only provided feedback to the partnerships but allowed intelligence agents to take the pulse of a neighborhood (in an admittedly unscientific fashion), as intelligence agents are required to prepare regular reports on the "ambiance", as a barometer of tensions in high-crime neighborhoods.[75]

B. How Local Security Partnerships Compensate for the Lack of Direct Community Contact with Law Enforcement

Local security partnerships in France not only loosen constraints on proactive resources while adapting national enforcement directives to local conditions. Such partnerships also compensate for the dearth of informal interaction between police and residents.[76] Concern about this lack of meaningful contact developed, in part, as a response to urban riots in France, which intensified in 2005.[77] Local security partnerships were potentially an important source of data that could assist the police in detecting "weak signals" of impending unrest.[78] The dismantling of community policing made it particularly urgent for the French National Police and Gendarmerie to find institutional partners who could act as intermediaries and as sources of information in high-crime or riot-torn neighborhoods.[79] At the same time, housing officials, common carriers, municipal employees, municipal police forces and even social workers became more concerned for their own safety and therefore more willing to cooperate with the police.[80]

It is both a measure of the social distance between police and local residents and a potential palliative to this estrangement that local security partnerships, in France, are generally confined to institutional stake-holders,

[72] Interviews with intelligence analysts of Renseignements Territoriaux (French National Police) in St. Etienne (2012); Interviews with partnership coordination unit of the French National Police (responsible for analyzing partnership intelligence about local crime problems in high-crime neighborhoods) in Nantes (2015).

[73] *Id.*

[74] Interview with the police official in charge of local security partnerships for the priority security zones of Bordeaux (2013).

[75] Interview with police intelligence analysts responsible for Cenon in Bordeaux (2013).

[76] Mouhanna, *supra* note 18 at 34–58.

[77] *Id.*

[78] Interviews with general staff of the Public Security branch of the National Police in Grenoble (2008 and 2009).

[79] *Id.*

[80] Interviews with crime prevention specialists in Grenoble (2008), including with heads of two youth outreach organizations; managers in charge of security for two separate public housing management companies; the head of security for public transportation; and the commander of Grenoble's municipal police.

such as prefects, housing officials, and municipal employees.[81] In the United States, by contrast, local security partnerships frequently involve direct contact with residents and community groups, with whom the police meet for public deliberation and debate about local security governance.[82] This difference is at least partly due to historical circumstance that local security partnerships in the United States have emerged as part of a larger shift to community policing, which puts beat officers in regular contact with members of the communities they patrol and increases informal communication between police and residents.[83] Meetings with community groups and neighborhood watch groups are meant to be one more point of regular contact between police and communities.

In France, however, the government dismantled a short-lived experiment with community policing in 2003, reorienting the police to what was redefined as their core crime-fighting mission.[84] For that reason, municipal officials, social workers, and recreational centers play crucial roles in linking state institutions to residents in crisis, including crime victims, at-risk juveniles, and angry residents who feel abandoned by state institutions.[85] Local security partnerships are to some extent used to dampen the impact of reforms that have eliminated foot patrols and reduced informal contact with residents. Institutional partners are both a source of information about what is going on in a neighborhood as well as buffer and mediator in police relationships with the public.[86]

If institutional partners act as intermediaries in France, it is the police themselves who serve as crucial intermediaries in American partnerships.[87] Community policing makes this role easier, by multiplying informal interactions and encouraging residents to turn to the police for help with a host of problems not directly related to crime-fighting. However, decentralized security governance also facilitates this role. Because American law enforcement agencies are politically accountable to their mayors, rather than to the federal government, police chiefs tend to coordinate security governance with municipalities in ways that allow the police to serve as relays between the public and municipal services responsible for making repairs and enforcing housing codes, as well as state prosecutors whom they ask for special protocols for offenses of particular concern to local residents.[88] This

[81] DONZELOT et al *supra* note 12; SKOGAN, *supra* note 39.

[82] Wesley Skogan, *Community Policing: Origins, Concepts and Implementation*, *in* THE HANDBOOK OF KNOWLEDGE-BASED POLICING: CURRENT CONCEPTIONS AND FUTURE DIRECTIONS 43, 43–57 (T. Williamson ed., John Wiley & Sons 2008).

[83] WESLEY SKOGAN, ON THE BEAT: POLICE AND COMMUNITY PROBLEM SOLVING (Westview Pub. 1999); WESLEY SKOGAN & SUSAN M. HARNETT, COMMUNITY POLICING, CHICAGO STYLE (Oxford Univ. Press 1997); Wesley Skogan, *Community Policing in the United States*, *in* COMPARISONS IN POLICING: AN INTERNATIONAL PERSPECTIVE 86, 86–112 (J.P. Brodeur ed., Avebury 1995); JACK R. GREENE & STEPHEN D. MASTROFSKI, COMMUNITY POLICING: RHETORIC OR REALITY (Praeger Pub. 1988).

[84] Roché, *supra* note 13.

[85] Interviews with municipal officials in charge of security for Saint-Etienne (2013) and Nantes (2015).

[86] Interviews with commanders of patrol units for Public Security Branch of National Police in Grenoble and Roubaix (2006-2009).

[87] Interviews with beat officers in Aurora, Tampa, Chicago, and Norfolk.

[88] Interviews with local security officials in Aurora, Illinois, Tampa, Florida, Norfolk, Virginia, and Chicago, Illinois (2008-2009).

is more difficult in France, not only because the police do not answer to mayors, but also because prosecutors answer only to the Ministry of Justice, over which local officials hold no sway.[89]

IV. THE PLACE OF LOCAL SECURITY PARTNERSHIPS IN LOCAL SECURITY GOVERNANCE: HOW FRENCH AND AMERICAN PARTNERSHIPS DIFFER

In France, local security partnerships thus serve as a mechanism for adapting national security governance to local needs. But because local security partnerships emerged in a centralized context, in which proactive resources are tightly constrained and community contacts are limited, the partnerships that emerged differ significantly from their American counterparts. The very different contexts in which French and American partnerships have developed have made it far easier for American law enforcement to integrate local security partnerships into a police-dominated security agenda, aligning partnership activities with the command hierarchy's own enforcement priorities. Contextual factors make French police far more dependent on outside partners, while American partnerships tend to look to the police for solutions. As a result, French partnerships give institutional partners greater sway over enforcement priorities and strategy and greater freedom to experiment with approaches of their own.

What are these contextual factors, and how do they affect the role of local security partnerships in local security governance?

A. How the Relay Function of American Police Liaisons Integrates Partnerships into an Over-arching Strategy for Security Governance

One reason American police can harness local security partnerships to their own agenda is that most policing is handled by municipalities.[90] Police and mayors can advance a unified agenda that folds the elimination of public nuisances and urban disorder into the fight against crime.[91] Police chiefs tend to coordinate security governance with municipalities in ways that allow the police to serve as relays and intermediaries between participants in local security partnerships and municipal services responsible for making repairs and enforcing housing codes.[92] Local police can direct vice and drug units to be responsive to community concerns.[93] This can permit an integrated response whereby specialized units build criminal cases that target an identified nucleus of offenders, while local security partnerships use an array

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[89] Monjardet, *supra*, note 11, at 28–33.

[90] GAINES & KAPPELER, *supra* note 41.

[91] Interviews with unit commanders and general staff of police chiefs in Aurora, Tampa, Norfolk, and Chicago.

[92] *Id.*

[93] *Id.*

of punitive and preventive programs to deal with a wider range of peripheral figures and at-risk juveniles.[94]

American partnership officials also serve as relays to state prosecutors responsible for developing policies on how to classify and punish certain types of offenses of particular concern to residents in high-crime neighborhoods.[95] In Chicago, for example, federal prosecutors, though not formally accountable to municipal authorities, are sufficiently dependent on local police cooperation and on the legitimacy they obtain from coordinating their efforts with local security partnerships that federal prosecutors frequently develop programs to enforce federal gun laws more aggressively and to employ racketeering charges against gang-members or other prolific offenders whom the police and local security partnerships identify as priority targets (though the willingness of local security partnerships to participate in this selection process is highly variable.)

Accordingly, American police officers serve as an important intermediary and resource for participants in local security partnerships, due to their ability to mobilize municipal repair services; to alert municipal officials to potential housing code violations by problem landlords; and to persuade federal prosecutors and task forces to investigate vandalism, gang violence, and drug trafficking hot spots.[96] This in turn allows the police to incorporate local security partnerships into an overarching crime control strategy.

In France, by contrast, the National Police and Gendarmerie do not work for the mayors of the communities they police; accordingly, there is a stricter separation between crime-fighting and the elimination of nuisances and other "quality of life" issues.[97] The French police do not function as the residents' relay to city services. They cannot do favors for residents by mobilizing services over which they have no authority. Instead, the other institutional actors serve as buffers between the police and the public. American police departments may use their ability to address quality-of-life concerns to increase their legitimacy even when crime rates remain constant, while the French police are largely judged by their success in bringing down crime; quality of life issues are entrusted to other public actors at the municipal and regional level.[98]

However, these national differences can be overstated, insofar as local security partnerships in France have also brought quality of life issues to the fore.[99] In Bordeaux, municipal officials have started to set up working groups of police, municipal officials, and local residents, using joint walking tours of high-crime areas to develop a shared vision of ways in which the design of public spaces could be improved both to reduce crime and to foster shared use of public areas by different age groups. These "citizen workshops" are part of a new effort to involve residents directly in partnership projects, and municipal officials regularly conduct public opinion surveys about public

[94] *Id.*
[95] Interviews with community police officers in Chicago, Aurora, Tampa, and Norfolk (2008-2009).
[96] *Id.*
[97] Le Goff, *supra* note 56.
[98] Maillard & Savage, *supra* note 36, at 364.
[99] Douillet & de Maillard, *supra* note 26, at 796.

safety problems and about proposed projects in order to reduce the bias inherent in the process of self-selection by members of the public. By contrast, from 2007–2008, in particular, Chicago's efforts to promote urban renovation of high-crime neighborhoods often coalesced around efforts to evict tenants involved in drug-dealing or gang activity, or to enforce housing codes against landlords who allowed gang-members to use their properties. Information gathered in beat meetings allowed the "troubled housing task force" to use crime-fighting partnerships to remove tenants, condemn properties, and to tear down buildings in areas earmarked for gentrification.

Despite the Interior Ministry's focus on crime rates, recurring urban riots have made it necessary for the police to work closely with outside partners to reduce tensions in riot-prone neighborhoods and to monitor "weak signals" of impending unrest.[100] Because improved quality of life may reduce the risk of urban riots, French law enforcement agencies work with institutional partners to address concerns about petty crime and public nuisances that fall outside their core crime-fighting responsibilities.[101]

For example, local security partnerships debate the extent to which the frequency of car burnings should be viewed as a weak signal of increasing public unrest and impending riots. To help clear this up, police in Nantes have started working closely with Canadian arson experts and auto insurance companies to differentiate those car fires that can be attributed to insurance fraud from those that function as a form of public protests. A dedicated team of criminal investigators learned how to identify new sources of DNA evidence in the immediate vicinity of a car fire and how to use databases of insurance companies to discern inconsistencies indicative of fraud.

B. How Direct Community Participation in American Security Partnerships Mobilizes Punitive Resources of Non-Police Actors and Reinforces the Integration of Partnership Initiatives into the Command Hierarchy's Governance Strategy

Another factor that makes it easier for American partnerships to integrate partnership initiatives with a law enforcement agenda is that direct participation by local residents in beat meetings and other partnership forums helps the police mobilize a punitive response to crime problems without drawing on police resources.[102] In both Chicago and Aurora, local security partnerships allow the police to enlist some residents in municipal efforts to expel gang-members and drug-dealers from their neighborhoods. For example, residents assist municipal authorities in identifying landlords who allow gang-members or drug-dealers to congregate in their buildings. The

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[100] Thierry Delpeuch, Renaud Epstein, & Jacqueline E. Ross, *The Joint Production of Security in Local Security Partnerships: French Initiatives in Local Risk Management,* in COMPARING THE DEMOCRATIC GOVERNANCE OF POLICE INTELLIGENCE (Thierry Delpeuch & Jacqueline E. Ross, eds. 2016).

[101] *Id; See also* interviews with criminal investigators in Sureté (criminal investigative unit) of Public Security branch of National Police in Nantes (2013).

[102] Interviews with community policing officers who participate in beat meetings in Aurora, Tampa, Norfolk, and Chicago (2008-2009).

police, in turn, contact public housing inspectors to investigate housing code violations and put pressure on landlords to make repairs, to secure entryways, and to eject tenants who have repeatedly been arrested for drug or gang-related offenses.[103]

In Aurora, community partnerships have also made it possible for the police to push through municipal ordinances that impose hefty fines on landlords who fail to maintain their properties or fail to enforce anti-gang and anti-drug provisions in their leases. Aurora also enacted ordinances that allow the police to negotiate anti-trespassing agreements with landlords, whereby identified drug-dealers or gang-members can be banned from visiting the landlords' buildings and arrested for trespass if they violate the ban. Aurora and Chicago have negotiated similar agreements with public housing authorities, who are now required to terminate the leases of tenants involved with gangs or drugs. The Aurora police may now bill landlords of problem locations for the expense of responding to an excessive volume of calls for service. Information provided by residents who participate in local security partnership can be instrumental in this process, and the inclusion of members of the public in local security partnerships effectively enables the police to cooperate with some members of a community against others.[104]

Mobilizing community members to target problem residents for expulsion is far more difficult in France, because there are few legal provisions that permit such measures except in exceptional circumstances (though Marseille has begun working closely with housing officials to expel prolific offenders from public housing.)[105] The fact that French partnerships rarely include members of the public makes it harder for the police to make use of conflicts between different groups of residents to take action against problem residents, though citizen petitions serve as alternatives to direct community participation in partnerships, prompting prosecutors to seek more severe criminal sanctions for chronic troublemakers.[106] The greater obstacle to mobilizing a punitive response appears to be the difficulty of bypassing criminal sanctions in favor of purely administrative sanctions (such as expulsions) against problem residents.[107]

C. How the Ability to Mobilize Proactive Police Resources Integrates Local Security Partnerships into the Command Hierarchy's Governance Strategy

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[103] *But cf.* Matthew Desmond and Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third Party Policing for Inner City Women*, 78 AMERICAN SOCIOLOGICAL REVIEW 117-151 (2013) (suggesting that the strategy of expelling gang-members from public housing often ends up hurting the victims of domestic abuse.

[104] Interviews with members of Troubled Housing Task Force of City of Chicago and with officials in Aurora's municipal housing code enforcement division as well as with community policing officers in Chicago and Aurora (2008-2009).

[105] Interviews with members of National Police intelligence units (Renseignements Territoriaux) and general staff of Public Security branch of National Police in Marseille (2015).

[106] *Id.*

[107] *Id.*

Because American law enforcement agents don't have to subordinate local law enforcement priorities to a national agenda, it is easier for them to align partnership concerns with their force-wide enforcement strategy by making proactive resources available for partnership crime-fighting initiatives.[108] This means that American law enforcement agencies can often harness partnership concerns for the enforcement priorities of other units, increasing arrest and clearance rates for detective units while addressing high-crime hot spots of concern to community members.[109]

In Aurora, Illinois, for example, local security partnerships generated a flow of information about problem locations, which partnership officers overlaid onto a map of addresses that regularly generated an inordinate number of emergency calls for service, to hone in on problem locations. Municipal officials would target these addresses for housing code inspections, taking over buildings from landlords who allowed gang-members to use their buildings for illegal purposes. In Chicago, specialized municipal task forces that identified locations for urban renovation and gentrification regularly obtained information about troubled housing units that had been targeted for code enforcement in order to coordinate police initiatives against high-crime hot spots with municipal plans for demolition and construction of new, higher-priced housing units, sometimes instrumentalizing anti-crime initiatives of police and local security partnerships for their own urban redesign projects.

Partnership officers (known as C.O.P. officers) in Aurora were free to deploy a variety of proactive enforcement strategies to investigate problem locations that were identified through citizen complaints, thus making it possible to satisfy participants in local security partnerships while assisting drug and gang units in criminal enforcement. But C.O.P. officers could also investigate crimes proactively without waiting for citizen complaints or an upsurge in crime, through efforts to get to know local offenders and their patterns of offending. C.O.P. officers would receive regular reports about the release of known burglars from prison and conduct periodic surveillance of their residences to determine whether they were still conducting burglaries, and, if possible, to catch them in the act. C.O.P. officers also visited local pawnshops. A new ordinance—worked out jointly by police and municipal leadership—required pawnshop owners to record the names and addresses of all persons who pawned property and the serial number of the property they pawned. C.O.P. officers would regularly check the registers to ascertain whether known burglars were pawning stolen property. When the police identified an increase in the theft of precious metals from junkyards and public installations, C.O.P. officers visited pawnshops to trace the metals that had been pawned.

Despite being ground-level actors, C.O.P. officers possessed an unusual freedom to mobilize investigative resources from other units, in order to

[108] Interviews with the chief of police of Aurora (2008–09, 2017), the deputy chiefs of Tampa and Norfolk, and district commanders in Chicago, (2008–09, 2017).

[109] *Id*; *see also* interviews with community policing officers and lieutenants and commanders in charge of local security partnerships in Chicago, Tampa, Aurora, and Norfolk (2008–09).

implement surveillance, deploy bait cars, set up undercover buy bust operations, and conduct periodic noise and seatbelt details at strategic locations, which provided them with opportunities to search for motorists for weapons and drug.

In Tampa, Florida, the command hierarchy employed a similar strategy to optimize the use of intelligence gleaned through local security partnerships, relying largely on lieutenants to look for patterns in intelligence from C.O.P. officers in different districts. But Tampa went further in integrating partnerships into a unified enforcement strategy by requiring lieutenants to not only respond to partners' concerns, mobilize the necessary resources, and harmonize partnership goals with those of other proactive units, but also mine partnership intelligence for leads relating to the chief's core enforcement priorities (which focused largely on property crimes, in Tampa, rather than gang violence and drug trafficking, as in Aurora).

Without the constraints of a nationally mandated enforcement agenda, American law enforcement agencies more easily integrate local security partnerships into an overarching plan for security governance. Being able to adapt enforcement policy to local needs (and to develop new initiatives, such as Tampa's local, police-run food banks and soup kitchens) makes it easier for police to align the direction of local security partnerships with their own strategic plans for security governance.

But the larger implications of local initiatives may not always be evident to participants in local security partnerships, who may view themselves as addressing security problems, while security policy may in fact assist the city in making sweeping changes to the urban landscape. In Chicago, aggressive enforcement of housing codes and anti-gang ordinances made it possible for the police to use local security partnerships to facilitate a strategic redesign of urban neighborhoods, through expulsion of gang-members from neighborhoods that city government intended to renovate and gentrify, leading to the relocation of many lower-income families from Chicago to nearby cities such as Elgin and Aurora.

By contrast, French law enforcement lacks the leverage that would allow them to align partnership initiatives with the objectives of other units and to integrate them into a larger plan for local security governance.[110] Thus French partnership officers in many cities complain that their institutional partners report community concern about juveniles selling drugs out of common areas of public housing projects, but that drug units are unwilling to make arrests when offenders are unlikely to receive significant sentences from judges who care little about low-level violations.[111]

A reduction in proactive resources since 2008 has also made it harder for French police to impose their own security agenda on local security partnerships.[112] In France, supervision of local security partnerships is usually concentrated in one sector chief (in the National Police) or one brigade commander (in the National Gendarmerie), who must cover an area far larger

[110] Interviews with National Police liaisons to local security partnerships in Marseille, France (2015).
[111] *Id.*
[112] Delpeuch, Epstein, & Ross, *supra* note 100.

than that assigned to individual C.O.P. officers or even district commanders in most American cities.[113] Sector chiefs and brigade commanders have only a limited ability to deploy patrol units proactively, to monitor hot spots, or to organize proactive surveillance details, as patrol units have been greatly reduced in size and must now cover a much wider geographical area.[114] Street-level officers spend more than 90% of their time responding to calls for service and are also frequently mobilized to provide security details for visiting dignitaries, to keep order at demonstrations and soccer matches, and to serve judicial notices on witnesses summoned by judicial officers.[115] Police drug units, too, are so lightly staffed that sector chiefs have only a very limited ability to mobilize narcotics investigators for proactive investigations of drug trafficking networks.[116]

The proactive resources police liaisons can mobilize also depend on whether the liaisons themselves are freed from reactive obligations.[117] In this regard, both American and French jurisdictions make some effort to free partnership officers from quantitative performance measures that concentrate on "collars" and seizures, giving officers some freedom to build up relationships with institutional partners.[118] But there is significant variation in the degree of autonomy partnership liaisons enjoy, in France as well as the United States.[119] In Aurora, for example, community oriented policing officers do not have to respond to calls for service. They can do so selectively, to gather intelligence about what is happening in their neighborhood. They must still account for their time, but the police department has developed codes to keep track of proactive interventions. A "Code 10" deployment, for example, does not, like most other codes, record a response to a call for service; instead, it represents an action the C.O.P. officer initiates on his own initiative (such as a foot patrol), and requires him to record whom he saw on his foot patrol and what he observed. In Chicago, by contrast, community policing officers remain responsible for answering calls for service; as a result, most of their time is taken up with reactive obligations, leaving them little time to initiate their own interventions.

Partnership officials' freedom to initiate proactive interventions also depends, in both countries, on relief from quantitative performances measures that assess officers' productivity by clearance rates and numbers of arrests. During weekly meetings, Aurora C.O.P. officers were asked what proactive strategies they had initiated to address the types of problems that had been reported in their neighborhoods. The work of C.O.P. officers was visible to

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[113] Interviews with Gendarmerie commanders in Lille (2008) and St. Etienne (2014), describing both local and nationwide operations which the commanders have supervised or implemented.

[114] *Id.*

[115] *Id.*

[116] Interviews at all French interview sites, especially with criminal investigators in the surete (criminal investigative units) of the Public Security branch of the National Police in Saint Etienne (2012) and Rennes (2015).

[117] Interviews with patrol officers, criminal investigators, and community poling officers at all French and American interview sites, including, especially, interviews with liaison officers to local security partnerships in Cenon (2013), Roubaix (2009), and Norfolk (2008–09, Aurora (2008–09).

[118] *Id.*

[119] *Id.*

other officers and supervisors because C.O.P. officers briefed patrol units during roll call on persons of interest and high-priority offenders that they wanted them to look for while out on patrol. C.O.P. officers also prepared written reports of their activities and the intelligence they had gathered, providing these to their lieutenants and the chief, and reporting back on the operational payoff of the proactive activities, either through their own surveillances, arrests, and recruitment of informants, or through the enforcement actions of the special operations unit to whom they funneled names of targets, informants, and targeted surveillance assignments.

In both France and the United States, however, partnership officials' freedom of action in building up relationships with other actors also derived in no small measure from being judged in more qualitative terms, by their skill in building working relationships with institutional partners and, in the United States, with residents and community organizations.[120] These officers were valued for their ability to ensure a flow of information from institutional partners or members of the public for their ability to mobilize them to action in times of crisis and for their success in convincing other institutional actors to take on quality of life issues and preventive tasks. These efforts allow other units within the police to concentrate on the enforcement tasks that they viewed as central to their mission.[121]

With their limited access to proactive police resources and with national resources generally directed to national enforcement priorities, the French police and gendarmerie must rely on non-police actors who take part in local security partnerships as for ideas and personnel, in order to devolve tasks that fall outside nationally mandated enforcement parameters onto cooperating institutional partners and, in order, wherever possible, to adapt national priorities to local needs.[122] This dependence on institutional partners is only heightened by the fact that the French police cannot command the repair or administrative enforcement services of local municipalities or the resources and priorities of prosecutors, who report to the Ministry of Justice.[123] This makes the French police less useful to their institutional partners, by comparison with their American counterparts, and consigns their role to more traditional enforcement strategies, such as sending patrols to hot-spots during designated time zones, or conducting periodic identity checks.[124]

Despite this measure of freedom from quantitative performance measures, the limited resources they command to develop intelligence proactively make French partnership officials more dependent on their institutional partners, who assist the police in developing actionable intelligence and to whom the police can outsource problems that they do not have the enforcement resources to handle themselves.[125] This means that

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[120] Donzelot, Mével, & Wyvekens, *supra* note *12*.

[121] Interviews with liaison officers to priority security zones of Bordeaux (2013), Saint Etienne (2012), Roubaix (2009), Norfolk (2009) and Aurora (2008-2009).

[122] Mouhanna, *supra* note 6, at 118.

[123] Interviews with National Police at all French sites.

[124] Interviews with police liaisons to local security partnerships in Saint-Etienne (2012) and Nantes (2015).

[125] This is based on authors' interviews at all French sites.

French partnership officials rely on housing officials to report squatters, hot-spots, the take-over of cellars to store stolen goods, or hiding places where drugs and weapons may be stashed.[126] Housing and transportation officials pass incident reports and video-surveillance footage along to the National Police and Gendarmerie, in exchange for fast action on complaints involving violence against their personnel.[127] This enables the police to target the right places and time frames for their patrols, to document illegal occupation of common areas, and to build low-level criminal cases for trespass and disturbance of the peace against identified groups of offenders.[128] Housing officials also provide the police with empty apartments from which they can conduct surveillance of open-air drug markets.[129]

Enforcement actions of this sort are largely designed to show that the police is responsive to the community's concerns (as relayed through these institutional partners) not to assist the drug unit in meeting its investigative goals, which often focused on networks of dealers rather than on particular hot-spots.[130] Unlike the undercover buy-busts that enable Aurora C.O.P. officers to satisfy their community partners while boosting the productivity of drug units, the enforcement initiatives of French partnership officials do not count towards the largely reactive obligations and performance indicators of the other police units they succeed in mobilizing; for that reason, French drug units often resist doing hot spot drug sweeps, which they see as additional demand on their time, even if such enforcement initiatives sometimes serve similar goals.[131]

In France, proactive police resources are devoted, above all, to the task of anticipating protests, riots, strikes, and other threats to public order.[132] This is the domain of the intelligence services who advise prefects and police chiefs of impending unrest and negotiate with unions and other organizations that plan public protests.[133] The aim of these informal contacts is to minimize the disruptive impact on public thoroughfares, and to reduce the potential for violence.[134] The command hierarchy can then adapt its deployment of uniformed units proactively to head off problems. This certainly involves a proactive use of police personnel, as it requires the police to anticipate events and to free up operational resources to head off problems before they occur.[135] But public order policing is not a primary preoccupation of local security partnerships; the centrality of public order concerns is, in part, what

[126] Interviews with police liaisons to local security partnerships in Saint-Etienne (2012) and Nantes (2015).

[127] *Id.*

[128] *Id.*

[129] Interviews with criminal investigators (members of the *Sûreté* départementale) of Grenoble (2008) and Saint-Etienne (2012).

[130] *Id.*

[131] Interviews with police liaisons to local security partnerships in Roubaix (2009), Saint-Etienne (2012), and Nantes (2015).

[132] Monjardet, *supra* note 11, at 28-33.

[133] Interviews with intelligence analysts of Renseignements Territoriaux in Bordeaux (2013), Strasbourg (2014), Nantes (2015), and supervisors in the Paris headquarters of the Renseignements Territoriaux (2015).

[134] *Id.*

[135] *Id.*

commentators mean when they speak of the French police as serving, first and foremost, the state itself rather than its citizens.[136]

Dependence on their institutional partners thus makes it necessary for the French police to be responsive to their institutional partners' concerns, and harder for them to instrumentalize such partnerships for their own purposes, such as meeting the crime reduction goals set by the national government. And because of their limited direct contacts with residents---due to the lack of direct community participation in local security partnerships and the lack of a strong community policing tradition---the French are particularly reliant on institutional partners for the design of alternative intervention strategies, e.g. through prevention, education, and recreational offerings.

Even where police exert influence on partnerships, internal divisions make it harder to harness partnerships to a unified law enforcement agenda, or to coordinate effectively with local stake-holders. In Montpellier, for example, local security partnerships had fragmented into two parallel groupings, one of which had coalesced around the chief of the intelligence unit, and involved social workers and public health professionals, while the other had coalesced around the police official responsible for local security partnerships, who had built a working relationship with the head of the municipal police and the elected security officials working for the mayor's office.[137]

These two groups had developed opposite approaches to dealing with the significant homeless population in the city center. The group that dominated the local security partnership and worked closely with the mayor's office had put together a plan to vaccinate the dogs of the homeless, as a form of outreach. The chief of the intelligence unit strongly opposed the plan, arguing that it would attract more homeless people to the city center and that the homeless would be better served in the suburbs, which housed a number of residential methadone clinics. To carry weight with the other stakeholders (including his rival within the police), the intelligence chief had personally interviewed and put together files on every homeless person in the city, which allowed him to document how many of them had dogs, how many of them had drug problems, and to argue based on these data about which proportion of the homeless population would be better served by the plan he had developed with suburban drug treatment centers.

Accordingly, French partnership officials must allow local security partnerships to develop their own agendas. In Bordeaux, for example, the police and the city experimented with new ways to assist merchants who complained about vandalism and about the take-over of common areas of a shopping center by a gang of local teenagers. The merchants were encouraged to hire trained youth mediators in lieu of their customary security guards and to open a dialogue with young people instead of pressuring them to leave. At the same time, the city deployed outreach coordinators to the shopping centers from local job-training programs and recreational facilities. Their own lack of

[136] Monjardet, *supra* note 11, at 28–33.

[137] Interviews with police liaison to local security partnerships, intelligence analyst, chief of municipal police, deputy for security of Mayor's office, and public housing officials, all in Montpellier.

resources accounts to some extent for the willingness of the French police liaisons to entertain analyses of crime problems that recast them as social problems instead of crime. As a result, local security partnerships like those in Bordeaux and Nantes can harness resources to the concerns of diverse institutional actors, while American variants often align partnership initiatives with the command hierarchy's own priorities.

D. How Federal Anti-Terrorism Measures Tie Local Security Partnerships into the Command Hierarchy's Security Strategy

In the United States, one impetus for police efforts to integrate local security partnerships into an overarching security strategy has been federal pressure. After the September 11 attacks, local police has been pressured to better align local law enforcement with national efforts to fight terrorism. The September 11 attacks made cooperation against terrorism a priority and led to the creation of Fusion centers and Joint Terrorism Task Forces to create closer links between local, state, and federal law enforcement and greater pooling of intelligence relevant to the identification of terrorists threats. But joint terrorism task forces and fusion centers could not themselves link anti-terrorism initiatives to local security partnerships, as these task forces and resource centers had no clear role to play in local security networks and had no obvious utility, at first, for the ordinary crime-fighting objectives around which these security partnerships had been built.

Since cities retained their primary focus on local crime, federal authorities and municipal police chiefs had to find new ways of harnessing police expertise in the interdiction of ordinary crime to the newly prioritized federal objectives. In particular, federal officials sought to extend the network effects of local security partnerships to the investigation of terrorism. But in the United States, the federal government cannot simply mandate state compliance with national enforcement priorities. Unable to dictate local security policy, the federal government attempts to influence local police departments indirectly, by disseminating the best practices, standards, and teachings of intelligence-led policing, and linking the adoption of such policies to the disbursement of federal aid to local police departments. At the same time, federal officials developed new initiatives to convince members of local security partnerships that information-sharing and cooperation with terrorism task force officials had operational payoffs for their ordinary enforcement activities. In Norfolk, Virginia, a convenience store task force coordinated municipal housing officials, local police, and joint terrorism task force agents in joint investigations that were prompted by the discovery (by city police officers active in local security partnerships) that local convenience stores with ties to overseas terrorists also violated local excise tax laws. The convenience store task force made it possible to identify municipal housing code violations, while permitting the police to build prosecutable cases against their owners and federal task force agents to investigate local links to overseas terror cells.

Other federal efforts to influence local law enforcement operations have been less successful, however. For example, a federal initiative sought to supplant Norfolk's local database of offenses with federal ones that covered the narrower range of crimes of interest to the federal government. Norfolk police officers resisted demands by their command hierarchy to feed the new database with case details from their own investigations, because investigators preferred using their own, more comprehensive and therefore more useful local database. The federal effort to introduce intelligence-led policing through top-down reforms failed because it introduced a solution in search of a problem. By contrast, efforts to tie anti-terrorism investigators into local security partnerships succeeded, in the case of the convenience store task force, because it coupled local crime-fighting with national security intelligence, which made federal resources available for local problems in search of solutions, allowing local security partnerships to identify both the nature of the local problem and a solution that would harness the established infrastructure and expertise of the partnership. In American cities, the search for compromise and engagement between local, state, and federal enforcement priorities bore fruit when the federal government offered resources to intelligence units as solutions that local security partnerships matched with identified problems of salience to their members.

This way of integrating local security partnerships into local and even national enforcement agendas is possible in the United States because the federal government can only obtain local cooperation by offering resources linked to the adoption of federal enforcement goals. This indirect form of influence leaves local police considerable autonomy in developing their own enforcement priorities, allowing them to take their partners' wishes into account in developing crime control strategies, in exchange for intelligence and close cooperation.

In France, by contrast, increased national vigilance about terrorism can be mandated without making more resources available for local security needs in other domains. Quality of life concerns of local security partnerships recede into the background, and harnessing police resources becomes more difficult when the police must divert resources to secure potential soft targets. While local security partnerships persist despite the diversion of resources to nationally mandated enforcement agendas, including the prevention of terrorist attacks, the relative dearth of police resources reduces the ability of the police to harness such partnerships to their own enforcement agenda and their established repertoire of approaches.

V. LOCAL SECURITY PARTNERSHIPS, EXPERTISE, AND EXPERIMENTATION

Perhaps because they are less integrated into the command hierarchy's enforcement priorities and its over-arching security strategy, French partnerships are open to experimentation with a range of security approaches and to input from a variety of outside experts, often competing with each other for influence on security policy. But in American cities where local security

partnerships have been tied into a coordinated crime control strategy developed jointly by mayors and police chiefs, expertise of this sort tends to be developed primarily by the police.

In Aurora, for example, C.O.P. officers who had received extensive training in urban planning for situational crime prevention have taken on, as part of their proactive responsibilities, the analysis of vulnerabilities in businesses that have repeatedly been victimized or used as a relay point for fleeing offenders. A C.O.P. officer reported preparing a lengthy analysis of the risk factors posed by a gas station that had been the frequent victim of robberies. The officer highlighted ways in which clutter in the gas station shielded what was going on inside from observation. This type of expertise helped the officer build relationships with local businesses and gave him an important voice on community walk-alongs, during which he advised local residents about vulnerabilities and dangerous conditions in their communities that he could mobilize the mayor's office to remedy. In places such as Aurora, specialized expertise thus dovetailed with community policing, while improving the police role in the partnership with other stakeholders, though this was not the case in cities in which the police fostered specialized expertise and developed specialized intelligence tools to develop a city-wide rather than neighborhood-specific approach to particular crime problems, such as gang-related shootings.

In France, the National Police and Gendarmerie are starting to develop specialized expertise in situational crime prevention, which enables them to advise local business on how to enhance their security.[138] In the Gendarmerie, some brigade commanders now introduce their situational crime prevention experts to their institutional partners and propose their services as a way of weighing in, preventively, on a number of urban renewal projects.[139] By tying this expertise more closely into local security partnerships, the Gendarmerie hopes to turn local businesses into a better source of information for the police about what is going on their neighborhoods, and, where possible, to tap these businesses for assistance in addressing a variety of economic dislocations that may lead to violent protests or riots.[140] But these efforts are still nascent and are rarely able to harness partnership initiatives to the enforcement priorities of the command hierarchy.[141]

Instead, in French partnerships that operate more autonomously. Without being closely integrated with the enforcement goals of the police, experimentation and specialized claims of expertise often coalesce around initiatives developed by other institutional partners, particularly weak actors whose primary influence on partnership deliberations derives from their development of data bases integrating a wide variety of different inputs and their specialized training in ancillary disciplines.[142]

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[138] Interviews with police officers and gendarmes who advise local businesses on situational crime prevention, in Saint-Etienne, Nantes, Bordeaux, and Marseille.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] These actors include: non-profit organizations that advise municipalities on urban planning and on the recruitment of so-called "youth mediators" for outreach to at-risk juveniles; officials who run so-

In Grenoble, for example, nonprofit organizations tested pilot programs that compared different types of mediation and youth-outreach programs, to advise the prefect on whether it was preferable to recruit outreach personnel directly from the neighborhoods where they would be deployed or from other areas. In Toulouse and Montpellier, municipal stake-holders who question the police approach to certain crime problems have sponsored their own diagnostic studies of particular crime problems, age-groups, and underserved communities, and have established their own local "observatories" of crime. These complement police statistics on urban violence, graffiti, and other "incivilities" with data from a variety of non-police sources, such as fire departments and hospitals, to get a more accurate estimate of the extent of the problem, as a check on the data presented by the police in partnership meetings.

VI. Conclusion

In both the United States and France, local security partnerships have developed as a response to resource constraints, with the aim of devolving greater responsibility for the management of security onto other institutional partners while garnering greater legitimacy for police operations as the product of collective deliberation. These partnerships have developed increasing influence as knowledge communities, with an emphasis on open, multilateral exchanges of information, the development of new forms of security expertise, negotiated analyses, and shared responsibilities with non-police actors.

In France, local security partnerships function as the main sites for adapting national crime control policy to local needs, which they do by delegating more responsibility for security governance to institutional partners who serve as crucial intermediaries in neighborhoods and by developing their own proactive approaches. These partnerships can function more autonomously than their American counterparts, both because police dependence on outsiders makes it imperative for the police to satisfy the demands of their institutional partners, and because the development of outside expertise by these partners makes such partners more influential in steering the course of local security partnerships.

Comparison of French and American partnerships make it possible to identify factors that explain both local and national variation among local security partnerships. Reduced levels of informal interaction between police and local residents appears to increase political reliance on institutional intermediaries in local security partnerships. The extent to which partnership participants are freed from reactive obligations also determines the degree to which partnership regimes can mobilize resources to address community concerns and assist their institutional partners. This in turn affects police influence on local security partnerships and the ability of the command hierarchy to mobilize partnership intelligence for the enforcement ends of

called "crime observatories" that collate police crime statistics with incident reports from fire departments, hospitals, and other sources. *See* Delpeuch &Ross, *supra,* note 100.

other intelligence regimes. Finally, the influence of local security partnerships on the command hierarchy in turn depends on whether institutional partners wield sufficient outside expertise to persuade the command hierarchy of the salience of the problems that matter to the partnership and of the promise of the approaches they develop.

Article

TIME FOR A DIVORCE: UNCOUPLING DRUG OFFENSES FROM VIOLENT OFFENSES IN FEDERAL SENTENCING LAW, POLICY, AND PRACTICE

Lucius T. Outlaw III*

The Editorial Board of the AMERICAN JOURNAL OF CRIMINAL LAW *intends to maintain a high standard of technical excellence in publishing every issue. The Editorial Board expends special effort through a carefully planned system of checks and controls to present its work free of error. Notwithstanding these efforts, the Article 'Time for a Divorce: Uncoupling Drug Offenses from Violent Offenses in Federal Sentencing Law, Policy, and Practice', by Lucius T. Outlaw, III. 44 AJCL p.49 (Fall, 2016), contained errors which were unplanned by either the Author or the Journal. In the interest of academic integrity, we have elected to print a corrected version of the Article. This final draft includes all changes authorized by the Author and should replace the original Article found earlier in this Volume. While the Editorial Board strives to publish error-free content, mistakes will occasionally happen. It is the Journal's duty to acknowledge these errors and bring them to the attention of our readers as soon as possible. We sincerely hope this reprint accomplishes that goal.*

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I. INTRODUCTION

There is a growing sentiment that the United States imprisons far too many people for far too long, especially for non-violent drug crimes. This sentiment is leading to unique collaborations between the political left and right aimed at reducing the "mass incarceration" caused by the war on drugs and its affiliated policies.[1] Remarkably, when it comes to drugs, the pendulum of crime policy is swinging from the long dominant "tough on crime" extreme towards a more compassionate and reasoned understanding of drug crimes and the impact of imprisonment on defendants and their families and communities.

However, one issue lost in the reform discussion is how throughout federal sentencing law and practice, drug offenses are pervasively linked to violent offenses to lengthen prison sentences. Throughout federal criminal statutes, sentencing guidelines and policies, drug crimes and violent crimes are not only treated equally, but also interchangeably to increase a defendant's prison sentence.[2] This interchangeable equivalence is ingrained in federal criminal statutes and sentencing guidelines providing some of the lengthiest terms of imprisonment.[3]

These statutes, guidelines, and policies were intended to remove serious offenders primarily responsible for the drug related violence from the community for extended periods of time. The equivalency and interchangeability of violent offenses with non-violent drug offenses, however, has resulted in a growing gap between intent and results.[4] It has

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[1] *See generally* Inimai M. Chettiar, *A National Agenda to Reduce Mass Incarceration*, BRENNAN CTR. FOR JUSTICE (Apr. 27, 2015), https://www.brennancenter.org/analysis/national-agenda-reduce-mass-incarceration (discussing methods of reducing mass incarceration).

[2] *See, e.g.*, 18 U.S.C. § 924(e) (2012) (known as the Armed Career Criminal statute, which imposes a 15-year mandatory minimum sentence when a defendant convicted of possessing a firearm as a prohibited person has two prior convictions "for a violent felony or serious drug offense, or both. . . .").

[3] *Id.*

[4] Christopher Ingraham, *Here's How Much Americans Hate Mandatory Minimum Sentences*, WASH. POST (Oct. 1, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/01/heres-how-much-americans-hate-mandatory-minimum-sentences/.

contributed significantly to the country's mass incarceration problem and its growing elderly prison population (whose healthcare and other needs are co-opting an increasing percentage of our criminal justice resources), and has aggravated the racial disparities in our prison population.[5]

If we are truly serious about reducing our over-reliance on imprisonment and confronting the disparities tied to the "war on drugs" and federal drug policies, then an action-item that must be on the agenda is de-coupling violent conduct from non-violent drug conduct for sentencing purposes. This article discusses one such policy—the career offender guideline—as an example of the wayward approach of equating drug offenses with violent offenses. It also discusses a recent effort and recommendation by the United States Sentencing Commission (the "Sentencing Commission") to mitigate the consequences of equating drugs with violence under the career offender guideline—a first step that likely will go nowhere because of Congress.

II. THE CAREER OFFENDER GUIDELINE

The career offender guideline is Section 4B1.1 of the United States Sentencing Guidelines ("U.S.S.G.").[6] The section holds that a defendant is a career offender, and therefore subject to the accompanying enhanced penalties, if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
> (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
> (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[7]

Offenders who qualify are exposed to the enhanced penalties provided in the section.[8] The enhanced penalties come in the form of drastically altered guidelines coordinates that subject a defendant to guidelines ranges at or near the maximum terms of imprisonment allowed by the statute of conviction.[9] First, the offender's base offense level is set at the greater of: (a) the level applicable to the offense of conviction; or the more likely, (b) the level set by the table within the career offender guideline.[10] The table establishes offense

[5] *Id.*

[6] U.S Sentencing Guidelines Manual § 4B1.1 (U.S. Sentencing Comm'n 2015).

[7] U.S Sentencing Guidelines Manual § 4B1.1(a) (U.S. Sentencing Comm'n 2015).

[8] *See* 28 U.S.C. § 994(h) (2006) (directing the Sentencing Commission to specify prison terms "at or near the maximum the term" for qualifying career offenders).

[9] *Id.* For the unfamiliar, the Sentencing Guidelines specify a base offense level for every federal offense, and that pre-set offense level increases or decreases based on enumerated contextual factors of a particular case. The base offense level with the adjustments produces a final offense level that ranges from one to forty-three. Separately, to account for the varying criminal records of defendants, the Commission established a point-based system for measuring a defendant's criminal record and status at the time of the instant conviction. A defendant's total number of criminal history points determines into which of the six criminal history categories he/she falls. Using the guidelines' sentencing table, the final offense level is cross-referenced with the defendant's criminal history category to yield a defendant's presumptive sentencing range

[10] 28 U.S.C. § 994(h) (2012).

levels high enough to meet Congress's mandate that career offenders receive prison sentences "at or near the maximum term authorized."[11] The second alteration places all qualifying career offenders, no matter their actual criminal history point total, in criminal history category VI – the guidelines' highest category.[12]

Qualifying as a career offender changes the entire landscape of a defendant's prison exposure. It can transform a sentencing exposure that normally would be a few years into decades of imprisonment, and even life imprisonment.[13] As a real world example, I once had a client, Mr. Derrick Allen, who was charged with distributing 18 grams of heroin for $1000.[14] Mr. Allen had three prior convictions for distributing small amounts of drugs: a) nine bags of crack worth $20 each; b) six bags of cocaine, 21 heroin gel caps, and 17 morphine pills—valued altogether at $425; and c) three small bags of marijuana and 24 bags of cocaine—valued altogether at $174.[15] He had no history of violence or using weapons.[16] Everyone recognized that Mr. Allen was a drug addict who sold small amounts of drugs to fund his addiction. Nonetheless, because of his three qualifying non-violent drug convictions, Mr. Allen's presumptive post-trial guidelines range went from 33 to 41 months imprisonment (non-career offender range based on offense level 14 at criminal history category V) to a career offender range of 151 to 181 months imprisonment (offense level 29 at criminal history category VI).[17] Due to the career offender guideline, Mr. Allen's four convictions (the instant offense and the three priors) for distributing a total of $1779 in drugs, without violence or a weapon, increased Mr. Allen's presumptive guidelines range by 400%.[18]

III. HISTORY OF THE CAREER OFFENDER GUIDELINE[19]

Mr. Allen's case shows the problem of focus here: how the equating of non-violent drug offenses with violent offenses to increase imprisonment has led to the over-punishment and over-incarceration of non-violent drug offenders. It was not supposed to be this way. Sticking with the career offender guideline, a review of the provision's history shows that Congress's

[11] *Id.*

[12] U.S Sentencing Guidelines Manual § 4B1.1(b) (U.S. Sentencing Comm'n 2015).

[13] *Id.*

[14] United States v. Derrick Allen, No. 1:14CR00198, (D. Md. 2015).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Somewhat realizing the absurdity of a career offender sentence for Mr. Allen, the government agreed to a plea agreement where the government sought a sentence of 108 to 132 months. Thankfully, the Honorable James K. Bredar credited Mr. Allen's non-violent history and obvious drug addiction, and imposed a sentence of 66 months.

[19] For the history of Career Offender guidelines this article relies greatly on what I believe is the most comprehensive deconstruction of the guideline: Amy Baron-Evans & Jennifer Coffin, Unraveling and 'Deconstructing' the Career Offender Guideline, (Apr. 25, 2010), https://www.fd.org/pdf_lib/WS2011/Deconstructing_Offender_Guideline.pdf.

intent was not to create a means to incarcerate non-violent drug offenders and addicts such as Mr. Allen for decades of their lives.[20]

In passing the Sentencing Reform Act ("SRA") in 1984, Congress directed the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants."[21] To Congress, the defendants in these categories were those who: (1) were at least eighteen years old; (2) had been convicted of a felony that was either a "crime of violence" or an offense described in certain provisions of the Controlled Substances Act and/or Controlled Substance Import Act; and (3) had previously been convicted of two or more prior felonies, each of which was a crime of violence or an offense described in the Controlled Substances Act and/or Controlled Substance Import Act.[22]

For drug offenders, Congress's goal was not to punish with near statutory maximum sentences all "repeat drug traffickers, but rather a specific type of repeat offender who posed the most danger to society and was responsible for distributing large amounts of illegal drugs."[23] Congress's target was repeat drug offenders:

- for whom drug trafficking is "extremely lucrative";
- who distribute drugs to "an unusual degree" through "continuing patterns of criminal activity";
- who have "substantial ties outside of the United States from whence most dangerous drugs are imported into the country"; and
- who have the resources and contacts to "to escape to other countries with relative ease in order to avoid prosecution."[24]

In other words, Congress wanted the career offender guideline to reach and punish kingpins and major drug traffickers, who by the nature of their continuous criminal conduct, are at or near the top of the drug trafficking chain, and who benefit from the money, resources, and foreign contacts not available to lower level drug offenders.

The career offender guideline was part of the Sentencing Guidelines that debuted on November 1, 1987.[25] The inaugural career offender guideline was similar to the current version in that it applied to offenders with predicate convictions for violent or controlled substance offenses.[26] However, the reach

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[20] *See id.* at 2 (finding the United States Sentencing Commission "significantly deviated" from Congress'original directive concerning the career offender guideline).

[21] 28 U.S.C. § 994(h) (1988).

[22] *Id.*

[23] S. REP. NO. 98-225, at 175 (1983).

[24] *Id.* at 20, 212.

[25] *See* U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING pt. C, Analysis of Career Offender at 3 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_C12_Career_Offenders.pdf.

[26] *Id.*

of "controlled substance offense" is much more expansive today than what it was in 1987.[27]

From the start, the Sentencing Commission interpreted Congress's directive (Section 994(h)) in regards to drug offenses far beyond what Congress intended.[28] Rather than limiting the reach of the career offender guideline to kingpins and the like, the Sentencing Commission has continually extended the provision to reach federal and state controlled substance offenses that prohibit "the manufacture, import, export, distribution" (or possession with the intent to do any of these things) of drugs and are punishable by imprisonment for a term exceeding one year.[29] This unexplainable expansion has brought nearly every federal and state drug offense other than simple possession within the ambit of the career offender guideline, and as a result, exposes addicts, low level street dealers, and others responsible for mere drops in the ocean of drug trafficking to the harsh sentences suggested by the career offender guideline.

The Sentencing Commission's expansion of the career offender guideline to reach state drug offenses, in particular, is a direct contravention of congressional intent. Section 994(h) directed the Sentencing Commission to craft the career offender guideline to reach offenders who had previous convictions for drug offenses described in three pieces of federal legislation: the Controlled Substances Act, the Controlled Substances Import and Export Act, and the Drug Trafficking Vessel Interdiction Act of 2008.[30] Neither Section 994(h) nor its legislative history directs the Sentencing Commission to designate *state* drug offenses as career offender predicates.[31] If Congress intended for state drug offenses to serve as career offender predicates, it certainly knew how to do so.[32]

The absence of language relating to state drug convictions in Section 994(h) should be seen as an intentional choice by Congress. At least one circuit has done so. In *United States v. Knox*,[33] the Seventh Circuit aptly explained how the Sentencing Commission went far beyond Congress's call when the Commission promulgated the career offender guideline. The specific question before the circuit court was whether Section 994(h) reached a drug conspiracy conviction charged under 21 U.S.C. Section 846.[34] The court started its analysis by noting that Section 994(h) reflected Congress's intent for the career offender guideline to reach a select and defined set of

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[27] *Id.* at 3–4 (reviewing the history of the definition of "controlled substance offense"). The definition of "crime of violence" has also greatly expanded since 1987, but will not be examined for the purposes of this article.

[28] *See* Baron-Evans & Coffin, *supra* note 19, at 12–15 (summarizing the history of amendments to §4B1.1 that expanded the universe of federal and state drug offenses that qualified as career offender predicates).

[29] U.S. Sentencing Guidelines Manual § 4B1.2(b) (U.S. Sentencing Comm'n 2015).

[30] 28 U.S.C. § 994(h)(1)(B) (2012).

[31] *See also* S. Rep. No. 98-225 (1983).

[32] *See, e.g.*, 21 U.S.C. §§ 841(a), (b) (2012) (providing for increased penalties for prior convictions for a "felony drug offense").

[33] 573 F.3d 441 (7th Cir. 2009).

[34] *Id.* at 448.

drug offenses.[35] The court then deconstructed Section 994(h) to show how the Sentencing Commission's career offender guideline includes drug offenses not enumerated in the statute.[36] Next, the court noted that while the Sentencing Commission had the authority to include drug offenses not identified in Section 994(h), "nothing in the text requires the Commission to do so," and therefore the Commission's decision to include additional drug offenses "reflect[s] an exercise of discretion."[37] However, the court stressed, "[s]uch policy decisions made by the Commission in developing the Guidelines are not binding on sentencing courts."[38] As the *Knox* court recognized, the Sentencing Commission has steadily added state and other drug offenses not listed in Section 994(h) to expand the career offender guideline's definition of "controlled substance offenses" well-beyond what Congress wanted.[39]

Early on, the Sentencing Commission relied solely on Section 994(h) as its authority for the expansion.[40] This justification met its end in the 1990s, when some circuits began vacating career offender sentences on the ground that the Commission had exceeded the plain statutory language of Section 994(h).[41] In response, the Sentencing Commission changed course and amended Section 4B1.1 to switch the Commission's reliance from Section 994(h) to the general grant of authority provided by 28 U.S.C. Section 994(a)-(f), (o), and (p), to justify the expansion of the career offender guideline's definition of "controlled substance offense."[42] Missing from this shift was the required explanation and empirical evidence justifying the Sentencing Commission's policy decision to expand the reach of Section 4B1.1 beyond the drug offenses included in Section 994(h)'s plain language.[43] To this day, the Sentencing Commission has remained silent as to the "data" or "comments" justifying its expansion of the career offender guideline to reach nearly every drug offense.

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[35] *Id.* ("[T]he precision with which § 994(h) includes certain drug offenses but excludes others indicates that the omission of § 846 was no oversight.").

[36] *Id.* at 448–449; *see also id.* at 449 ("Relying on the general guideline promulgation authority under 28 § 994(a)-(f), the Sentencing Commission has gone beyond the specific offenses listed in § 994(h) . . . .").

[37] *Id.* at 449.

[38] *Id.* at 449-450 (citing *Kimbrough v. United States*, 552 U.S. 85, 101–02 (2007)).

[39] *See also* Sarah F. Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1172–73 (2010) (noting that courts applied the career offender provision in 2,321 drug-related cases in 2008, compared to 616 drug-related cases in 1996).

[40] *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. background (U.S. SENTENCING COMM'N 1990) ("28 U.S.C. § 994(h) mandates that the Commission assure that certain 'career' offenders, as defined by the statute, receive a sentence of imprisonment 'at or near the maximum term authorized.' Section 4B1.1 implements this mandate.").

[41] *See, e.g.*, United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993); United States v. Ballazerius, 24 F.3d 698 (5th Cir. 1994) (Both cases were superseded by the Commission amending the Guidelines in 1994 (amendment 528) that altered the source of the Commission's authority for the career offender guideline); *See* United States v. Lightbourn, 115 F.3d 291, 293 (5th Cir. 1997) ("The amendment to the sentencing guidelines speaks directly to this point and effectively eliminates the concerns of the Bellazerius court.").

[42] U.S. Sentencing Guidelines Manual § 4B1.1 1 cmt. background (U.S. Sentincing Comm'n 2014).

[43] *See* 28 U.S.C. § 994(o) (2012) (authorizing the Commission to revise the guidelines "in consideration of comments and data" the Commission received).

In sum, the career offender guideline is contrary to the words and intent of Congress. The goal of Congress was to bring the full weight of federal sentencing to bear on repeat offenders at the top of the drug distribution chain. [44] The goal was *not* to expose drug addicts, low-level drug traffickers, and street dealers to near maximum statutory penalties. Yet, without sufficient explanation, that is what the Sentencing Commission has done by repeatedly expanding the reach of the career offender guideline to nearly every state and federal drug offense.

IV. IMPACT OF THE CAREER OFFENDER GUIDELINE

For the past ten years, career offenders have consistently accounted for between 3% and 3.6% of all federal prison inmates each year.[45] Because of their lengthy sentences, career offenders now account for more than 11% of the total federal prison population, or 20,329 federal career offender inmates for fiscal year 2014.[46] One sign of progress is that the percentage of career offenders receiving a sentence within their career offender guideline range has fallen from 43.5% in fiscal year 2005 to 27.5% in fiscal year 2014.[47] However, while career offenders are increasingly receiving sentences below their presumptive career offender guideline ranges, they are still receiving lengthy sentences. For fiscal year 2014, the average career offender sentence was 147 months imprisonment, or slightly more than 12 years.[48] For that fiscal year, slightly over half (50.9%) of career offenders received a prison sentence between 10 and 20 years, 13.8% received sentences of 20 years or more, 25% received sentences between five and ten years imprisonment, and only 10.3% received a sentence of less than five years.[49]

In accordance with its design, the career offender guideline has a profound impact on the offense levels and criminal history category placements of qualifying defendants. Take for example the 2,269 defendants sentenced as career offenders in fiscal year 2014.[50] For nearly half (46.3%), the career offender guideline caused an increase in both the final offense level and criminal history category.[51] An additional 32.6% of these offenders saw an increase in their offense level, but not their criminal history category.[52]

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[44] *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. background (U.S. SENTENCING COMM'N 2014) (explaining the goal of the career offender guidelines is to "focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate."). Indeed, as recently stated by the current chair of the Sentencing Commission, the career offender guideline is part of a regime that "ensure[s] that the most dangerous or serious offenders will continue to receive appropriately severe sentences." Chief Judge Patti B. Saris, *A Generational Shift for Drug Sentences,* 52 AM. CRIM. LAW REV. 1, 21 (2015), http://www.ussc.gov/sites/default/files/pdf/news/speeches-and-articles/article_saris_112014.PDF.

[45] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 18, fig. 1 (2016), http://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements.

[46] *Id.* at 24.

[47] *Id.* at 22.

[48] *Id.* at 18, Key Findings.

[49] *Id.* at 24.

[50] *Id.* at 18.

[51] *Id.* at 21.

[52] *Id.*

Another 12.4% saw an increase in their criminal history category, but not their offense level.[53] In total, for fiscal year 2014, "the career offender designation affected the final guideline range for the majority (91.3%) of offenders sentenced under [the career offender guideline]."[54]

A. *The Logical and Moral Failure of the Career Offender Guideline*

The career offender guideline's over-expansive definition of "controlled substance offense" is not the provision's only fault. As the title and subject of this article suggests, the career offender guideline is a logical and moral failure because of its predicate equivalency of drug offenses and violent offenses.

The career offender guideline puts qualifying drug offenses on the same footing as qualifying violent offenses. If a prior drug conviction meets the definition provided by Section 4B1.2(b) of the guidelines, it holds the same predicate weight and consequences as a conviction for armed robbery, rape, arson, or murder.[55] This is true even if the prior drug offense did not involve violence or a firearm or other weapon.[56] Indeed, a conviction for selling $100 of cocaine is as equally a qualifying predicate as killing another person for $100 of cocaine.

Once a defendant qualifies as a career offender, he/she is exposed to a predetermined punishment range, regardless of whether his/her qualifying predicates are for drug offenses, violent offenses, or a mixture of both.[57] The result is a sentencing mechanism that allows absurdist consequences that are unjustifiable logically and morally. Two defendants who share an instant offense that triggers the career offender guideline are subject to the same range of punishment even if one defendant's predicate convictions are for violent crimes, and the other defendant only has non-violent drug offense predicates.[58] For instance, a defendant with two priors for selling small amounts of drugs is subject to the same offense level, criminal history category, and therefore presumed sentencing range, as a defendant with two priors for rape, murder, or arson.

Because these absurdist outcomes are not only possible, but probable, the career offender guideline must be seen as a policy failure. There is no plausible justification for a sentencing policy that subjects repeat low-level drug traffickers to the same sentencing exposure as repeat violent offenders.

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[53] *Id.*

[54] *Id.*

[55] However, after *Johnson v. United States,* 135 S. Ct. 2551 (2015) (discussed later), there are even *less* crimes that qualify as violent felonies triggering the enhanced penalties provided by the Armed Career Criminal Act, the career offender guideline, and similar enhanced penalty statutes and guideline provisions.

[56] U.S. Sentencing Guidelines Manual § 4B1.1(b) (U.S. Sentencing Comm'n 2014).

[57] The instant crime or offense provides the only variation in sentencing exposure under Section 4B1.1(b). The longer the statutory maximum penalty for the instant crime of violence or drug offense, the higher the assigned career offender offense level. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(b) (U.S. SENTENCING COMM'N 2014). However, consistent with the remainder of the guideline, there is no difference in the designated offense level based on the instant offense being either a crime or violence or a drug crime.

[58] U.S. Sentencing Guidelines Manual § 4B1.1(b) (U.S. Sentencing Comm'n 2014).

These absurdist outcomes are assisted by the career offender guideline tethering a career offender's offense level to the statutory maximum of the instant offense. This is a problem because many federal drug offenses carry statutory maximums that exceed those for violent offenses. For instance, a drug offender convicted for violating 21 U.S.C. Section 841(b)(1) faces a statutory maximum of life imprisonment, compared to a statutory maximum of twenty years for a robbery offender convicted under 18 U.S.C. Section 1951 or an arson offender convicted for violating 18 U.S.C. Section 844(i). Under the career offender guideline, the drug offender's offense level is 37, while the robbery and arson offenders share a level 32.[59] This translates into the drug offender having a presumptive guideline range (before any deductions) of 360 months to life, while the range for the arson and robbery offenders is 210 to 262 months imprisonment.

B. *The Missing Kingpins: The Misapplication of the Career Offender Guidelines.*

Congress trusted the Sentencing Commission to structure the career offender guideline in a manner flexible enough to distinguish between drug offenders.[60] As explained by a leading Commission lawyer in 1987:

> Reasonably construing [Congress's decision to empower the Commission to draft the career offender guideline] in its present context and in light of the total legislative history, it is sensible to conclude that Congress did not intend a purely mechanical application which would be unduly harsh in some instances and inconsistent with the overall instructions to the Sentencing Commission. Counsel further doubts that Congress would desire the Commission to adopt a strict, literalistic reading which exacerbates prison impact. Most members of the legislative body would probably appreciate a less extreme, more flexible approach, so long as it clearly achieved the fundamental objective of severely punishing career criminals.[61]

Unfortunately, a "purely mechanical application" that "exacerbates prison impact" is a fitting description of the career offender guideline as it currently exists. The career offender guideline applies whether the defendant is a low-level street dealer or major trafficker responsible for distributing tons of illegal narcotics. All that matters is whether the instant and past convictions meet the expansive definition of "controlled substance offense." Section 4B1.1's failure to distinguish drug offenders has resulted in an unwarranted

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[59] *Id.*

[60] *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. background (U.S. SENTENCING COMM'N 2014). ([T]he Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate....").

[61] Memorandum from John Steer to the U.S. SENTENCING COMM'N, (March 26, 1987), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/031988_Career_Offender.pdf.

and prejudicial uniformity—i.e. all qualifying drug offenders, regardless of conduct or culpability, are exposed to the same near-maximum penalties. It is a problem the Sentencing Commission's staff recognized and warned about in 1988:

> In its current form, the Career Offender guideline is potentially both under-inclusive and over-inclusive. . . . As amended, the guideline focuses exclusively on the count of conviction, rather than the conduct involved, both as to the instant offense and the prior offenses. . . . In much the same way, the guideline is also potentially over-inclusive. It makes no distinction between defendants convicted of the same offenses, either as to the seriousness of their instant offense or their previous convictions. For example, two defendants convicted of the same federal drug felony . . ., each with two prior drug offenses, would be subject to the same career offender sanction, even if one defendant was a drug "kingpin" with serious prior offenses, while the other defendant was a low-level street dealer whose two prior convictions for distributing small amounts of drugs resulted in actual sentences of probation.[62]

It should come as no surprise that the Sentencing Commission's steady expansion of "controlled substance offense" has led to a dramatic increase in the number of defendants qualifying as career offenders. For fiscal years 1996 through 2011, the annual number of career offenders more than doubled from 909 career offenders to 2,157 career offenders.[63] The number reached 2,269 career offenders for fiscal year 2014.[64] While the Sentencing Commission has also expanded the definition of "crime of violence" for career offender purposes, recent statistics show that the incessant increase in the number of career offenders is largely due to the expanded definition of "controlled substance offense." From 2008 through 2012, 11,516 defendants were sentenced as career offenders.[65] Of these, a drug trafficking offense was the primary offense for 8,503 offenders, or 73.8% of the defendants.[66] Firearm and robbery offenses were a distant second and third, constituting 10.9% and 7.7% of the defendants, respectively.[67]

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[62] Memorandum from Gary J. Peters to the U.S. SENTENCING COMM'N (March 25, 1988), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/031988_Career_Offender.pdf.

[63] U.S. SENTENCING COMM'N, *supra* note 25, at 9.

[64] U.S. SENTENCING COMM'N, QUICK FACTS: CAREER OFFENDERS, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf (2015).

[65] Sentencing data (demographic, departures/variances, sentencing by guideline provision) held by the U.S.S.C. is available through the interactive "sourcebook" on the commission's website: http://isb.ussc.gov/Login. This data was compiled using the "Offenders Receiving Career Offender/Armed Career Criminal Adjustments in Each Primary Offense Category" available under the "All Tables and Figure" portion of the interactive sourcebook.

[66] *Id.*

[67] *Id.*

This raises the question of who are the drug offenders sentenced as career offenders—are they the kingpins and major drug suppliers Congress sought to reach, or low-level/street level dealers and addicts? Statistics show that the overwhelming majority is the latter. For instance, in 2012, more than half (52.1%) of the 2,232 defendants sentenced as career offenders saw increases in both their final offense level and criminal history category.[68] For these offenders, the average increase was *seven offense levels* (from 24 to 31) and *two criminal history categories* (from IV to VI).[69] In contrast, for *only 5%* of the career offenders sentenced in 2012 did the career offender guideline have no impact on an offender's offense level or criminal history category (because their pre-career offender numbers were already at career offender levels).[70]

Finally, the career offender guideline has also failed to punish the class of recidivist drug offenders it was designed to reach. An analysis by the Sentencing Commission determined that the "recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions shows that their rates are much lower than other offenders who are assigned to criminal history category VI."[71] The Sentencing Commission found that offenders in criminal history category VI had a recidivism rate two years after release of 55%.[72] For the subset of offenders who were career offenders because of violent crime predicates, the rate was 52%.[73] In comparison, career offenders with drug crime predicates had a much lower recidivism rate of 27%, which "more closely resembles the rates for offenders in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules in Chapter Four of the *Guidelines Manual*."[74] As a result, the Sentencing Commission concluded that the "career offender guideline thus makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses."[75] Simply put, the over-inclusion of qualifying drug offenses has resulted in harsh, unnecessarily long prison sentences that have little correlation to the recidivism risk posed by many drug offenders sentenced as career offenders.

C. Career Offender Guideline & Racial Sentencing Disparity

A key motivation for the promulgation of the sentencing guidelines was the growing sentencing disparity between minority and white defendants for similar offenses. Unfortunately, 15 years after enactment, the Sentencing Commission found that the "increasingly severe treatment of other crimes,

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[68] U.S. SENTENCING COMM'N, QUICK FACTS: CAREER OFFENDERS, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf (2013).

[69] *Id.*

[70] *Id.* at 2.

[71] U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM, 134 (2004).

[72] *Id.*

[73] *Id.*

[74] *Id.* (emphasis in original).

[75] *Id.* (emphasis in original).

particularly drug offenses and repeat offenses, has widened the gap among different offender groups," and the "sentencing guidelines and mandatory minimum statutes, have a greater impact on Black offenders than did the factors taken into account by judges in the discretionary system . . . ."[76] In other words, elements of the guidelines are exacerbating the racial sentencing divide, not narrowing it. The career offender guideline and its expansive inclusion of drug offenses, the Sentencing Commission determined, is a key contributor to this growing disparity:

> In 2000, there were 1,279 offenders subject to the career offender provisions, which resulted in some of the most severe penalties imposed under the guidelines. Although Black offenders constituted just 26 percent of the offenders sentenced under the guidelines in 2000, they were 58 percent of the offenders subject to the severe penalties required by the career offender guideline. Most of the offenders were subject to the guideline because of the inclusion of drug trafficking crimes in the criteria qualifying offenders for the guideline . . . . Commentators have noted the relative ease of detecting and prosecuting offenses that take place in open-air markets, which are most often found in impoverished minority neighborhoods. . ., which suggests that African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers. . . ."[77]

These findings were made before the Supreme Court rendered the sentencing guidelines advisory in *United States v. Booker*.[78] Despite this monumental decision, the racial disparity among career offenders has not only persisted post-*Booker*, it has widened. The percentage of black career offenders increased from 58.8% of all career offenders pre-*Booker* to 64.9% as of September 2011.[79] In comparison, the percentage of white career offenders decreased from 24.7% of all career offenders pre-*Booker* to 19.4% as of September 2011.[80] This racial disparity narrowed slightly in fiscal year 2014: 59.7% of career offenders were black, 21.6% were white, and 16% were Latino.[81] According to the Sentencing Commission the racial disparity represents an "'institutionalized unfairness' . . . built into the sentencing rules themselves rather than a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges."[82]

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[76] U.S. SENTENCING COMM'N, *supra*, note 71, at 135.
[77] *Id.* at 133–34.
[78] 543 U.S. 220 (2005).
[79] U.S. SENTENCING COMM'N, *supra* note 25, at 10.
[80] *Id.*
[81] *Quick Facts: Career Offenders,* U.S. SENTENCING COMM'N, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf (2015).
[82] U.S. SENTENCING COMM'N, *supra*, note 71, at 135.

V. LACK OF EMPIRICAL EVIDENCE LINKING DRUGS AND VIOLENCE

From nearly all perspectives—design, logic, moral, and application—the career offender guideline is a failure. Its continued existence and use is therefore justified only if there is a demonstrable link between drugs offenses and violent offenses warranting their continued interchangeable equivalency under Section 4B1.1.

That drugs and violence go hand-in-hand is a largely unchallenged and readily accepted presumption that pervades the public consciousness and crime policy. Yet, as exposed by Utah law professor Shima Baradaran, there is a near complete lack of scholarship and study supporting the presumed link.[83] In addition to exposing the lack of empirical support for the presumed link between drugs and violence, Professor Baradaran has demonstrated how the little empirical evidence that is available shows that the link is unclear at best. She is not alone in her conclusion.[84]

Perhaps the dearth of reliable scholarship is due to the lack of agreement as to what "link" actually means. In other words, what does it mean to say that drugs and violence are "linked"? You ask ten different people, you will likely get ten varied responses. But generally, when people say drugs and crime are linked, they are referring to one or a combination of the following three relationships (or models) as established by the often cited work of Paul Goldstein:

1) A person commits a violent act as a result of using/ingesting drugs (the psychopharmacological model);
2) A drug user engages in "economically-oriented" violent crime (e.g. robbery) to support his/her drug use (the economic compulsive model);
3) Violence is intrinsically involved with the distribution and sale of illegal drugs (the systemic model). [85]

Each model provides a separate and distinct context for the interplay between drugs and violence. These contexts reflect variations among the

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[83] Shima Baradaran, *Drugs and Violence*, 88 S. CAL. REV. 227, 233–34 (2015).

[84] *See id.(citing* Robert Nash Parker & Kathleen Auerhahn, *Alcohol, Drugs, and Violence*, 24 ANN. REV. SOC. 291, 294 (1998) ("In general, little evidence suggests that illicit drugs are uniquely associated with the occurrence of violent crime."); Eric J. Workowski, *Criminal Violence and Drug Use: An Exploratory Study Among Substance Abusers in Residential Treatment*, 37 J. OFFENDER REHABILITATION 109, 118 (2003) ("These findings reveal a weak relationship between substance abuse and violence among this addict population and, clearly, not all addicts are violent. In fact, most of this population is not."); Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship*, 63 ALB. L. REV. 749, 756 (2000) (stating that the final report of a task force established to study the drug-violence nexus "concluded that drug-crime relationships were not nearly as clear or as strong as politicians and legislatures had presumed based upon the motivations for enacting the drug laws"); Jeffrey Fagan, *Interactions Among Drugs, Alcohol, and Violence*, HEALTH AFFAIRS, Winter 1993, at 65, 75 (finding that despite the accumulating evidence on the validity of the drugs-violence relationship, persistent difficulty in establishing causal linkages remains); Michelle Torok et al., *Conduct Disorder as a Risk Factor for Violent Victimization and Offending Among Regular Illicit Drug Users*, 41 J. DRUG ISSUES 25, 25-26 (2011) ("Despite the available evidence, little is actually known about the causal mechanisms associating substance use and violence.").

[85] Paul Goldstein, *The Drugs/Violence Nexus: A Tripartite Conceptual Framework*, 39 J. OF DRUG ISSUES (1985), http://www.drugpolicy.org/docUploads/nexus.pdf.

models as to the victims of the violence, the motivation for the violence, what drugs are involved, and the role drugs played in the violence. For instance, under the psychopharmacological model the "violence may involve drug use by either offender or victim. In other words, drug use may contribute to a person behaving violently, or it may alter a person's behavior in such a manner as to bring about that person's violent victimization."[86] In comparison, under the systemic model the "[v]ictims of systemic violence are usually those involved in drug use or trafficking."[87]

Goldstein's tripartite scheme remains the leading and most commonly cited framework for the link between drugs and violence.[88] This is understandable – Goldstein's models provide clean and clear lines between varying violent conduct and drug activity. However, even Goldstein admitted that there was insufficient empirical evidence to support his models, and that it was impossible to assess the causal relationship for key parts of his scheme.[89] Indeed, Goldstein recognized that more data was needed because "[n]o evidence currently exists as to the proportions of violence engaged in by drug users and traffickers that may be attributed to each of the three posited models."[90]

Despite the lack of data, Goldstein's three models served as the foundation of a lost in history effort by the federal government in the mid-1990s to measure the link between drugs and violence.[91] The effort was a 28-member task force assigned to "report to the United States Sentencing Commission specific findings, conclusions, and recommendations concerning the relationship (if any) between drugs and violence."[92] The task force's membership included high-ranking attorneys from the Justice Department's criminal division, law professors, medical school professors, nursing school professors, economists, professors of criminology, social scientists, high-ranking lawyers from the Office of National Drug Control Policy, a federal district court judge, the staff director of the Sentencing Commission, legal advisors from the U.S. Department of Health & Human Services, and a number of congressional aides.[93] Ex-officio members included a former director of the Office of National Drug Control Policy, the Senator Edward Kennedy, a commissioner of the Sentencing Commission, New Jersey Governor Christine Todd Whitman, U.S. Representative Bobby Scott, and U.S. Attorney General Janet Reno.[94] The task force's extensive

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[86] *Id.*

[87] *Id.*

[88] Hannah Laqueur, *Uses and Abuses of Drug Decriminalization in Portugal*, 40 LAW & SOC. INQUIRY 746, 770–71 ("Paul Goldstein's (1985) tripartite classification scheme remains the most commonly cited framework for understanding the possible connections [between drugs and violence.").

[89] Paul Goldstein, *supra* note 86 ("The incidence of psychopharmacological violence is impossible to assess at the present time, both because many instances go unreported and because when cases are reported the psychopharmacological state of the offender is seldom recorded in official records.").

[90] *Id.*

[91] Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship Symposium on Drug Crimes*, 63 ALB. L. REV. 749, 755 (2000).

[92] *Id.* at 749.

[93] *Id.* at 749, n. 1.

[94] *Id.*

effort included reviewing prominent research on the issue, funding four original studies, and having experts present research to the task force.[95]

In the end, after two years of trying, the task force failed to reach any unanimous conclusions.[96] On June 27, 1996, the task force released its "unreconciled" final report.[97] The report was "unreconciled" because it contained a politically troublesome conclusion supported by the task force's academic members, but not by its government and political members. The conclusion causing the divide: "drug-crime relationships were not nearly as clear or as strong as politicians and legislatures had presumed based upon the motivations for enacting drug laws."[98] In a stinging criticism of drug laws "built on the premise that long-term imprisonment of drug offenders would abate violent crime," the report further concluded that there was "no evidence that such policies decreased either drug use or violence . . .[and] the retention of such policies, premised on the belief that drugs cause violence, could hinder the adoption of other, more appropriate, remedies."[99]

The final report did not go so far as to say that there was no relationship between drugs and violence. However, the report made clear that "whether any link existed at all depended on which of the [Goldstein] three types of drug-violence relationships was being examined and the quality of the research available."[100] In other words, without more research, the only thing that was clear was that the existence and strength of any link varied among the Goldstein models, as well as among drug types, across time, and across different drug markets.[101]

Not much has changed since the task force issued its final report twenty years ago. The "tough on crime" perspective that promotes imprisonment still dominates and has led to a drastic increase in the number of federal statutes imposing mandatory minimum sentences (particularly for drug offenses) and an exploding prison population.[102] In the intervening two decades, research into the link between drugs and violence has not improved, has not firmly validated the link, and has not advanced the discussion much.[103]

VI. *JOHNSON V. UNITED STATES*: THE UNINTENDED CONSEQUENCE

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[95] *Id.* at 754.

[96] The task force was impaired by predictable political forces given the topic, as well as more mundane but critical disagreements such as how to define "violence." *Id.* at 751–52, 754–55.

[97] *Id.*at 749.

[98] *Id.* at 756.

[99] *Id.* at 757–58.

[100] *Id.*at 749 n.1.

[101] *Id.* at 756 57.

[102] At year-end 1985 there were 502,507 adult prisoners in federal and state correctional institutions combined. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Prisoners in 1996 (1997), http://www.bjs.gov/content/pub/pdf/p96.pdf. By year-end 1996, the combined prison population was up to 1,182,169 adult prisoners. *Id.* At year-end 2014, there were 1,561,500 adult prisoners in federal and state correctional institutions combined. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014 (2015), http://www.bjs.gov/content/pub/pdf/p14.pdf. Among those years, the federal prison population increased from 40,223 inmates in 1985, to 105,544 inmates in 1996, to 210,567 inmates in 2014.

[103] Baradaran, *supra* note 83, at 276 81 (discussing more recent studies and concluding, "Overall, the drug violence link is at the very least over-exaggerated and lacks reliable empirical support.").

DRUG OFFENDERS WILL SUFFER

In *Johnson v. United States,*[104] an 8-1 opinion by the late-Justice Scalia, the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA") was too vague to survive constitutional due process review. In doing so, the Supreme Court struck a boundless definition of what constituted a violent offense that had been used for many years to impose 15-year mandatory minimum sentences.[105] *Johnson* has unleashed a torrent of litigation that is redefining (and significantly limiting) what constitutes a violent offense not only for the ACCA, but also for the career offender guideline and other enhanced penalty provisions containing residual clause clones.[106] This litigation is leading to reduced sentences for a significant number of ACCA and other defendants collectively by hundreds of years.[107]

While *Johnson* has provided a windfall of relief for defendants whose prior convictions are no longer deemed violent under law, the decision brought no relief for ACCA, career offender, or other enhanced penalty defendants who received or face elongated sentences because of non-violent drug convictions. Indeed, a tragic unintended consequence of *Johnson* may be an *increase* in the number of drug defendants sentenced under the ACCA and career offender guideline. That is because as *Johnson* each day limits the world of defendants susceptible to enhanced penalties for "violent" offenses, prosecutors will likely fill the gap with defendants whose drug offenses and prior convictions offer no *Johnson*-like constitutional bar. Finding comfort in the unproven, yet readily accepted and preached belief that violence is a natural extension of illegal drug activity, it is easy to see how prosecutorial forces will realign themselves in this post-*Johnson* world. Their strategy will shift to bringing in federal court more defendants whose drug convictions make them unquestionably qualified for the enhanced penalties provided by the ACCA, the career offender guideline, and similar enhanced penalty statutes and guideline provisions. The result will be a dramatic increase in the number of non-violent drug offenders sentenced to unreasonably long and overly punitive prison sentences, while the number of repeat "violent" offenders suffering the same fate will nose-dive.

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[104] 135 S. Ct. 2551 (2015).

[105] The residual clause held that a prior crime qualified as a violent offensee under the statute if the crime "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 2555.

[106] *See* United States v. Gardner, 823 F.3d 793, 804 (4th Cir. 2016) (indicating defendant's prior conviction for North Carolina common law robbery cannot qualify as a ACCA violent felony after *Johnson*); United States v. Parnell, 818 F.3d 974 (9th Cir. 2016) (holding that armed robbery conviction under Massachusetts statute does not qualify as a ACCA violent felony post-*Johnson*); United States v. Pawlak, 822 F.3d 902, 911 (6th Cir. 2016) (joining the 3rd and 10th Circuits in holding that in light of *Johnson*, the identical residual clause in career offender guideline is unconstitutionally vague); United States v. Bell, 158 F. Supp. 3d 906 (N.D. Cal. 2016) (indicating that post-*Johnson* the felony offenses of assault on a federal officer and robbery of government property were not crimes of violence triggering enhanced penalties provided by 18 U.S.C. § 924(c)).

[107] As of the end of June 2016, more than 500 *Johnson*-based petitions had been filed in one month in the Fourth Circuit and 350 petitions were pending in the Eighth Circuit. *See* Ann E. Marimow, *One of Scalia's final opinions will shorten some federal prison sentences*, WASH. POST (June 24, 2016), https://www.washingtonpost.com/local/public-safety/small-words-big-consequences-for-possibly-thousands-of-federal-prisoners/2016/06/23/0d3d7934-3199-11e6-95c0-2a6873031302_story.html.

Johnson is a landmark decision that is changing the face and practice of federal sentencing. But the decision also highlights the continuing lack of sentencing proportionality and balance suffered by non-violent drug offenders who receive enhanced sentences. While the reach of enhanced penalties for "violent" offenses shrinks, their reach for drug offenses has only known growth. This circumstance is not just a distortion, but a perverted misuse of Congress's authorization and intent for these enhanced penalty provisions. Without a focused effort now to decouple non-violent drug offenses from violent offenses in these statutes and provisions, the "mass incarceration" that nearly everyone finds troublesome will only worsen and swell.

VII. U.S.S.C.'S FIRST STEP AT DECOUPLING THE CAREER OFFENDER GUIDELINE

On July 28, 2016, the Sentencing Commission submitted a report to Congress concerning its multi-year study of "statutory and guideline definitions relating to the nature of a defendant's prior conviction...and the impact of such definitions on the relevant statutory and guideline provisions," with a particular focus on the career offender guideline.[108] The study included "a detailed analysis of career offenders' prior criminal history and recidivism after release from federal prison."[109]

As the study progressed, the data caused the Sentencing Commission to have "concerns that the career offender directive fails to meaningfully distinguish among career offenders with different type of criminal records and has resulted in overly severe penalties for some offenders."[110] In particular, the data showed that Section 4B1.1's formulaic approach failed to adequately account for and differentiate how a defendant qualified under the provision, most notably drug convictions as compared to violent convictions. These concerns were fueled by four findings during the study:

1) Career offenders are primarily convicted of drug trafficking offenses – nearly three-quarters (74.1%) of career offenders in fiscal year 2014 were convicted of a drug trafficking offense and would have been sentenced pursuant to §2D1.1 (offenses involving drugs and narco-terrorism).

2) Career offenders are sentenced to long terms of incarceration, receiving an average sentence of more than 12 years (147 months).

3) As a result of these lengthy sentences, career offenders now account for more than 11 percent of the total Bureau of Prisons population.

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[108] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS, 1, 6 (2016), http://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements.

[109] *Id.* at 2.

[110] *Id.*

4) Even though they continue to receive lengthy sentences, career offenders are increasingly receiving sentences below the guideline range, often at the request of the government. During the past ten years, the proportion of career offenders sentenced within the applicable guideline range has decreased from 43.3 percent in fiscal year 2005 to 27.5 percent in fiscal year 2014, while government sponsored departures have steadily increased from 33.9 percent to 45.6 percent.[111]

These findings, and the concerns they caused, led the Sentencing Commission to more closely examine the relationship between an offender's career offender status and the nature of his/her instant offense and prior convictions. To achieve this, the Commission categorized the study's subjects into three distinct categories based on their prior and instant offenses: drug trafficking offenses only, violent offenses only, and mixed.[112] By the end, the "Commission found clear and notable differences" concerning the reach, impact and efficacy of Section 4B1.1 among the three categories of career offenders.[113]

The first "clear and notable" difference is that "career offenders who have committed a violent instant offense or a violent prior offense generally have a more serious and extensive criminal history, recidivate at a higher rate than drug trafficking only career offenders, and are more likely to commit another violent offense in the future."[114] The Sentencing Commission found that close to half of the violent only offenders (42.1%) and mixed offenders (44.5%) were already in criminal history category VI prior to application of the career offender guideline, compared with just 23.3% of drug trafficking only offenders.[115] Another comparative gap was found when the Commission looked at recidivism rates among the three categories of career offenders.[116] Just over half (54.4%) of drug trafficking only career offenders were arrested for a new crime or an alleged violation of supervised release within eight years of their release from prison, compared to recidivism rates of 69.4% for mixed career offenders and 69.0% for violent only career offenders.[117]

The second "clear and notable difference" the Commission discovered is that the career offender guideline has "the greatest impact on federal drug trafficking offenders" because of the high statutory maximums provided by federal drug offense statutes, particularly 21 U.S.C. Section 841.[118] Generally, "federal drug trafficking offenders often face much higher statutory maximum penalties than those offenders convicted of a violent federal

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[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 2, 26.
[115] *Id.* at 30. "[O]ffenders in the drug trafficking only category were distributed to a greater extent across CHC III through VI." *Id.* The Commission's analysis consisted of a 20% random sampling of the 2,269 offenders sentenced under §4B1.1 in fiscal year 2014. *Id.* at 30 fig. 10.
[116] *See id.* at 38–42. The Commission analyzed the records of 1,988 career offenders who re-entered the community in calendar years 2004 through 2006. *See id.* at 38.
[117] *Id.* at 40–41.
[118] *Id.* at 3.

offense."[119] For instance, for fiscal year 2014, 31.7% of drug trafficking only offenders had an instant offense carrying a life imprisonment maximum punishment, compared to just 10.5% of violent only offenders.[120] This disparity translates into a related disparity in the criminal history and offense level impact of Section 4B1.1. "More than half (57.5%) of offenders in the drug trafficking only category had both an increased final offense level and [criminal history category] as a result of the application of the career offender guideline, as compared to approximately 40 percent for each of the other two categories."[121]

These "clear and notable differences" led the Sentencing Commission to conclude its study by recommending amendments to Section 994(h) (and thereby Section 4B1.1) designed to "differentiate between career offenders with different types of criminal records," and focus the career guideline on offenders who have committed at least one "crime of violence."[122] The amendments are needed, according to the Commission, because of "clear and notable differences between drug trafficking only career offenders and those career offenders who have committed a violent offense," and also because "drug trafficking only career offenders are not meaningfully different than other federal drug trafficking offenders and therefore do not categorically warrant the significant increases in penalties provided for under the career offender guideline."[123]

Just looking at recent history, it is doubtful that Congress will act on the Sentencing Commission's recommendations. In 2011, the Commission strongly urged Congress to reduce the mandatory minimum penalties for drug offenses and expand the safety valve provided by 18 U.S.C. Section 3553(f) to reach more drug offenders.[124] The Commission argued that the reforms were needed because "certain mandatory minimum provisions apply too broadly, are set too high, or both, to warrant the prescribed minimum penalty for the full range of offenders who could be prosecuted under the particular criminal statute" which has "led to inconsistencies in application of certain mandatory minimum penalties" and racial disparities in sentencing.[125] The Commission echoed these recommendations in 2015 in support of the Sentencing Reform Act then pending in Congress.[126] Despite these recommendations, which were based on the Commission's extensive study of the issues, Congress has failed to implement any of the recommended

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[119] *Id.* at 31.

[120] *Id.* at 32 (fig. 11).

[121] *Id.* at 33.

[122] *Id.* at 3. The Commission also found that "[e]ven though they continue to receive lengthy sentences, career offenders are increasingly receiving sentences below the guideline range, often at the request of the government." *Id* at 2.

[123] *Id.* at 27.

[124] U.S SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 1, 355 (2011), http://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

[125] *Id.* at 345, 347.

[126] U.S Sentencing Comm'n, Statement on Bipartisan Sentencing Reform Legislation: House Judiciary Committee votes to Approve the Sentencing Reform Act (H.R. 3713) (Nov. 18, 2015), http://www.ussc.gov/about/news/press-releases/november-18-2015.

reforms.[127] There is no reason to believe that the Sentencing Commission's recommendation to amend Section 994(h) will not suffer the same fate of inactivity.

VIII. CONCLUSION

The career offender guideline provides a vivid example of the problem with equating drug offenses with violent offenses for sentencing purposes. The problem starts with the lack of objective and empirical evidence demonstrating a link between drugs and violence, and continues through to the racial disparity in sentencing caused by sentencing policies based on the perceived link. Interchanging drugs with violence for sentencing leads to not only morally deficient sentencing practices and outcomes, but illogical and ineffective ones as well. It is time to de-couple drugs and violence for sentencing if we truly are going to address the mass incarceration problem that is fueling the divide between many citizens and law enforcement (and the courts), crippling our inner city communities, consuming an increasing amount of our country's resources, and bestowing on this country the dubious honor of having the world's largest prison population.

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[127] Take for example the Smarter Sentencing Act first introduced in 2013, which would (among other things) significantly reduce the mandatory minimums imposed by 21 § U.S.C. 841. Despite the bi-partisan origin of bill, and the wide bi-partisan list of sponsors, the bill has yet to receive a floor vote in the Senate. The legislation's companion bill in the House of Representatives has faced a similar fate.

Note

HEALTHCARE'S TICKING TIME BOMB: THE 60-DAY RULE AND *KANE*

Vincent A. Recca*

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I. INTRODUCTION

Fulfilling one of his signature campaign promises after months of contentious debate, on March 23, 2010, President Obama signed what some have called "the most expansive social legislation enacted in decades,"[1] the Patient Protection and Affordable Care Act (ACA). Though the ACA is well known because of its more controversial provisions (including the individual mandate and the contraception mandate), it also contains one of the

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[1] Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill with a Flourish*, N.Y. TIMES (Mar. 23, 2010), http://www.nytimes.com/2010/03/24/health/policy/24health.html?_r=0.

government's newest weapons against healthcare fraud: the so-called 60-day rule.[2] Under the rule, a healthcare provider who has "identified" an overpayment has up to 60 days to return the overpayment before it becomes an "obligation" within the meaning of the Civil False Claims Act (FCA), thereby subjecting healthcare providers to potential FCA liability.[3] Functioning as both a carrot and a stick, the 60-day rule gives providers an incentive to investigate and return overpayments, while, at the same time, allows the government or private individuals to recover the overpayments by filing False Claim Act or *qui tam* claims.

Unfortunately for providers, the legal meaning of "identify"—and therefore, what is required of providers to avoid liability—has been ambiguous. The Centers for Medicare and Medicaid Service (CMS) intended to publish a final rule, which would have clarified the 60-day rule, specifically the term "identify," in 2015.[4] However, due to "significant policy and operational issues," CMS delayed the publication and implementation of a final rule for one year.[5]

During the delay, in a case of first impression, a court was forced to confront the ambiguity and construe the word "identify" for the first time. As this Essay will demonstrate, the court's interpretation of "identify" in *Kane ex rel. United States v. Healthfirst, Inc.*,[6] threatens to turn the 60-day rule into a ticking time bomb of liability for certain providers.

An intricate and nuanced opinion, *Kane* leaves many questions unanswered, provides little practical guidance for providers, and underappreciates the difficulties faced by providers, who often participate in both the Medicaid and Medicare programs. *Kane* does make clear, however, that even though CMS published a final rule which definitively clarifies the meaning and usage of "identify" in the ACA for Medicare Parts A and B providers, there is currently no rule that applies to Medicaid providers.[7] This Essay argues that, in cases involving Medicaid providers, courts should follow the final rule instead of *Kane*. Furthermore, this Essay illuminates how the final rule, itself unclear in places, is clearer than *Kane* regarding requirements for compliance and is consistent with the final rule previously published for Medicare Parts C and D providers.

This Essay is structured as follows: Part I explains the Medicare and Medicaid systems and examines the contours of the healthcare fraud problem; Part II explains the FCA and its history; Part III describes the 60-day rule in detail and its connection to the FCA; Part IV describes *Kane* and the court's reasoning; and Part V examines the final rule for Parts A and B providers and advocates that courts follow the rule's provisions and spirit in Medicaid cases.

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[2] 42 U.S.C. § 1320a-7k(d)(2)(A) (2012).

[3] 42 U.S.C. § 1320a-7k(d)(3).

[4] *See* Medicare Program; Reporting and Returning of Overpayments; Extension of Timeline for Publication of the Final Rule, 80 Fed. Reg. 8247, 8247–48 (Feb. 17, 2015) (stating that CMS had up to three years from the publication of the proposed rule to adopt a final rule).

[5] *Id.* at 8248.

[6] 120 F. Supp. 3d 370 (S.D.N.Y. 2015).

[7] *Id.* at 392; Requirements for Reporting and Returning of Overpayments, 42 C.F.R. § 401.305 (2016).

II. MEDICARE AND MEDICAID: AN OVERVIEW OF THE PROGRAMS AND FRAUD

In fiscal year 2015, the United States government spent $634 billion on mandatory Medicare benefits and administrative payments.[8] In the same year, the government contributed $350 billion to the Medicaid program.[9] Taken together, both programs cost $984 billion.

The impact of these figures cannot be understood without comprehending the size and scope of these programs. Medicare is a federal program that pays for individuals over the age of 65 who receive certain healthcare services.[10] In 2015, an estimated 55 million Americans participated in the Medicare program.[11] The program consists of four parts: Part A, which covers hospital services, hospice care, and certain home health services;[12] Part B, which covers mostly outpatient services and doctor's office visits;[13] Part C, which pays private health plans to cover Medicare services for eligible enrollees who enroll in participating private plans;[14] and Part D, which covers the cost for certain outpatient prescription drugs.[15]

Medicaid provides healthcare services to Americans who qualify as low-income.[16] The federal government and the state governments jointly operate and fund the program, with the federal government matching state funding by at least 50 percent.[17]

Given the programs' cost, dizzying complexity, and national reach, there is tremendous potential for mistakes, fraud, and abuse.[18] Tackling healthcare fraud has been a priority of the federal government, particularly the Department of Justice, since at least 1993.[19] More recently, in 2009, the

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[8] *See* CONGRESSIONAL BUDGET OFFICE, MARCH 2016 MEDICARE BASELINE (2016), https://www.cbo.gov/sites/default/files/51302-2016-03-Medicare.pdf (demonstrating that, in fiscal year 2015, mandatory benefits outlays equaled $632 billion and that mandatory administrative outlays totaled $2 billion).

[9] CONGRESSIONAL BUDGET OFFICE, DETAIL OF SPENDING AND ENROLLMENT FOR MEDICAID FOR CBO'S MARCH 2016 BASELINE (2016), https://www.cbo.gov/sites/default/files/51301-2016-03-Medicaid.pdf.

[10] PATRICIA A. DAVIS ET AL., CONG. RESEARCH SERV., R40425, MEDICARE PRIMER 1 (2013).

[11] Press Release, Ctrs. for Medicare and Medicaid Servs., On its 50th Anniversary, more than 55 Million Americans Covered by Medicare (July 28, 2015), https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2015-Press-releases-items/2015-07-28.html.

[12] DAVIS, *supra* note 10, at 7.

[13] *Id.* at 11.

[14] *Id.* at 18.

[15] *Id.* at 19.

[16] THE KAISER COMM'N ON MEDICAID & THE UNINSURED, MEDICAID: A PRIMER 3 (March 2013), https://kaiserfamilyfoundation.files.wordpress.com/2010/06/7334-05.pdf.

[17] *Id.* at 5.

[18] In fiscal year 2014, the Government Accountability Office estimated that Medicare made $59.9 billion in "improper payments" and that Medicaid made $17.5 billion of such payments. Together, these two programs accounted for approximately 62 percent of all "improper payments" made by the federal government in fiscal year 2014. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-92T, FISCAL OUTLOOK: ADDRESSING IMPROPER PAYMENTS AND THE TAX GAP WOULD IMPROVE THE GOVERNMENT'S FISCAL POSITION 6 fig.2 (2015).

[19] U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9–44.100 (1997), https://www.justice.gov/usam/usam-9-44000-health-care-fraud.

Department of Justice and the Department of Health and Human Services announced the formation of the Health Care Fraud Prevention and Enforcement Action Team (HEAT), which is designed to "increase coordination and optimize criminal and civil enforcement."[20] On the civil side, the federal government has focused its attention on the FCA and *qui tam* actions. In fiscal year 2015, the Department of Justice collected $1.9 billion in settlements and judgments in healthcare fraud cases involving the FCA.[21] Recovered healthcare funds represent 54 percent of all federal funds recovered in fiscal year 2015 by the Department of Justice via FCA cases.[22] Thus, FCA and *qui tam* claims are two of the most important weapons in the government's battle against healthcare fraud.

III. THE FALSE CLAIMS ACT AND *QUI TAM* ACTIONS: THEIR HISTORY AND MOVING PARTS

The FCA and *qui tam* claims are rooted in ancient English law and have existed in some form since the thirteenth century.[23] The FCA, first known as "the Lincoln Law" or the "Informer's Law," was originally codified in 1863 as a reaction to widespread fraud by government contractors during the Civil War. [24]

Today, the FCA imposes liability on actors for a broad array of conduct.[25] The 60-day rule is only implicated, however, under § 3729(a)(1)(G), which is commonly referred to as the "reverse false claims provision."[26] Under this provision a provider is liable when it:

> knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.[27]

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[20] Press Release, Dep't of Justice, Justice Department Recovers $3.5 Billion From False Claims Act Cases in Fiscal Year 2015 (Dec. 3, 2015), https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015.

[21] *Id.*

[22] *See id.* (announcing that the Department of Justice recovered approximately $3.5 billion from FCA cases in fiscal year 2015, $1.9 billion of which was recovered from healthcare cases).

[23] Note, *The History and Development of Qui Tam*, 1972 WASH. U. L. Q. 81, 83 (1972).

[24] United Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S.Ct. 1989, 1996 (2016); John T. Boese, *Fundamentals of the Civil False Claims Act and Qui Tam Enforcement*, in AMERICAN BAR ASSOCIATION ET AL., 10TH NATIONAL INSTITUTE ON THE CIVIL FALSE CLAIMS ACT AND *QUI TAM* ENFORCEMENT A-1 (2014); HARRY LITMAN & JOESPH ZWICKER, A NEW PRACTITIONER'S GUIDE TO THE FEDERAL FALSE CLAIMS ACT: BRAVE NEW WORLD RECENT NEW DEVELOPMENTS IN FEDERAL AND STATE FALSE CLAIMS ACT LITIGATION, http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/25-1_fca_101_presentation.authcheckdam.pdf.

[25] *See generally* 31 U.S.C. § 3729(a) (2012) (detailing the various bases for liability under the FCA).

[26] Boese, *supra* note 24, at A-3.

[27] 31 U.S.C. § 3729(a)(1)(G).

This provision was enacted in 1986 to capture situations in which parties have an obligation to return money to the federal government.[28] In particular, many healthcare providers that participate in the Medicare and Medicaid programs may face liability under this section.[29]

A private party known as a "relator" can bring a claim under the FCA in what is known as a *qui tam* action.[30] *Qui tam* is an abbreviation of the Latin phrase, "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which translates to "who brings the action for the king as well as himself."[31] Under the FCA, private parties can file a claim under § 3729 "for [themselves] and for the United States government."[32] Once a case is filed, it remains under seal for 60 days, during which time the government can investigate and decide if it wishes to intervene on behalf of the relator, decline to intervene, settle the case, or ask for an extension to consider its options.[33] If the government intervenes, it takes "primary responsibility" for pursuing the case.[34] The beauty of the *qui tam* action from the perspective of the relator is that, if the relator wins, the relator is awarded a share of the damages—between 15 and 25 percent if the government intervenes and between 25 and 30 percent if it does not.[35] While those percentages might seem small given the amount of effort needed to litigate a case, there is actually the potential for a large windfall: under the FCA, a party that is found liable is liable for between $5,500 and $11,000 in damages per claim.[36] The FCA also awards treble damages.[37] Additionally, the FCA awards prevailing relators with attorney's fees and reimburses them for necessary costs.[38] The potentially large damage awards, treble damages, attorney's fees, and costs provide a powerful incentive for private parties to file *qui tam* actions.

IV. THE FCA IN THE HEALTHCARE CONTEXT AND THE 60-DAY RULE

The "reverse false claims" provision of the FCA, § 3729(a)(1)(G), is a potential hazard for healthcare providers that participate in the Medicare and Medicaid programs. The ACA significantly expanded the potential scope of liability under the FCA for healthcare providers by adding the so-called 60-day rule. Specifically, the ACA imposes an obligation on providers to return overpayments.[39] The overpayment must be returned "by the later of . . . the

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[28] Boese, *supra* note 24, at A-4.

[29] *See infra* Part II.

[30] ROBIN PAGE WEST, ADVISING THE QUI TAM WHISTLEBLOWER: FROM IDENTIFYING A CASE TO FILING UNDER THE FALSE CLAIMS ACT 2 (2nd ed. 2009); *see also* 31 U.S.C. § 3730(c) (2012) (using the phrase "*qui tam*").

[31] WEST, *supra* note 30, at 1.

[32] 31 U.S.C. § 3730(b)(1).

[33] 31 U.S.C. § 3730(b)(2)-(3).

[34] 31 U.S.C. § 3730(c)(1).

[35] 31 U.S.C. § 3730(d)(1)-(2).

[36] The FCA explicitly contains a damages range of $5,000 to $10,000. 31 U.S.C. § 3729(a) (2012) This range, however, is tied to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note (2012). The range was increased in 2014. 28 C.F.R. § 85.3(a)(9) (2014).

[37] 31 U.S.C. § 3729(a).

[38] 31 U.S.C. § 3730(d)(1)-(2).

[39] 42 U.S.C. § 1320a-7k(d)(1)(a) (2012).

date which is 60 days after the date on which the overpayment was identified; . . . or the date any corresponding cost report is due."[40] If a provider fails to return an overpayment, the overpayment becomes an "obligation" within the meaning of § 3729(a)(1)(G) of the FCA, thereby exposing the provider to FCA liability.[41] The ACA defines an "overpayment" as "any funds that a person receives or retains under subchapter XVIII [Medicare] of this title or XIX [Medicaid] to which the person, after reconciliation, is not entitled under such subchapter."[42]

Because of the complexity of reporting and reimbursement requirements, overpayments can easily occur in both Medicare and Medicaid programs. Providers participating in the Medicare program are reimbursed for services they provide.[43] In order to ensure reimbursement, however, providers must "maintain sufficient financial records and statistical data for proper determination of costs payable under the program."[44] Providers must compile this data into an annual cost report.[45] Because Medicaid is jointly run at the federal and state levels, Medicaid providers must also comply with their respective state requirements to be reimbursed.[46] Given these onerous reporting requirements and the amount of data that must be compiled and submitted, a provider could easily miss the 60-day deadline.

Adding to the risk of accidentally retaining an overpayment is the ambiguity of the term "identify" in the 60-day rule. The ACA does not include a definition of "identify."[47] CMS did attempt, however, to provide some guidance to providers on the meaning of the term.

In a proposed rule, CMS suggested that a provider has identified an overpayment when a provider has "actual knowledge of the existence of the overpayment or acts in reckless disregard or deliberate ignorance of the overpayment."[48] In the proposal, CMS stated that, "Congress' use of the term 'knowing' in the ACA was intended to apply to determining when a provider or supplier had identified an overpayment."[49] Thus, CMS explicitly linked "identify" to the ACA's definition of "knowingly" contained within the FCA.[50] In cases where providers were unsure if the government had made an overpayment, the proposed rule stated that providers were to make a "reasonable inquiry" with "all deliberate speed" to avoid being found to have acted with reckless disregard or deliberate ignorance.[51] In such cases, the 60-

[40] 42 U.S.C. § 1320a-7k(d)(2)(A)-(B).

[41] 42 U.S.C. § 1320a-7k(d)(3).

[42] 42 U.S.C. § 1320a-7k(d)(4)(B).

[43] 42 C.F.R. § 413.5(a) (2015); 42 C.F.R. § 413.60(c)(2015).

[44] 42 C.F.R. § 413.20(a).

[45] 42 C.F.R. § 413.20(b); 42 C.F.R. § 413.24 (2015).

[46] *See Financing & Reimbursement*, MEDICAID.GOV, https://www.medicaid.gov/medicaid-chip-program-information/by-topics/financing-and-reimbursement/financing-and-reimbursement.html (last visited July 25, 2017) (describing some state reimbursement methods).

[47] *See* 42 U.S.C. 1320a-7k(4) (defining various terms but not the term "identify").

[48] Medicare Payments; Reporting and Returning of Overpayments, 77 Fed. Reg. 9179, 9182 (Feb. 16, 2012).

[49] *Id.*

[50] *See* 42 U.S.C. § 1320a-7k(4)(A) (stating that "knowingly" will "have the meaning given [the] terms in section 3729(b) of Title 31" [of the FCA]).

[51] Medicare Payments; Reporting and Returning of Overpayments, 77 Fed. Reg. at 9182.

day deadline would start at the end of the "reasonable inquiry."[52] Finally, CMS proposed a ten-year "lookback" period for overpayments, meaning providers would have to identify and return overpayments that were made within the past ten years.[53] CMS selected a ten-year period because ten years is the "outer limit" of the statute of limitations in the FCA.[54] CMS argued that its proposed definition of "identify," coupled with the ten-year lookback period, offered providers an incentive and the necessary guidance to perform due diligence in determining whether an overpayment was made.[55]

Though this rule provided some guidance to providers, it was nevertheless met with backlash from the industry. Some felt that the meaning of a "reasonable inquiry" was unclear.[56] Similarly, others argued that the ten-year lookback window would "impose a significant administrative burden on providers."[57] As a result of these complaints, CMS delayed the publication of the final rule.[58]

V. *KANE*—AND A DIFFERENT DEFINITION OF "IDENTIFY"

Unfortunately for providers, judicial guidance on the term "identify" came before publication of the final rule. On August 3, 2015, Judge Edgardo Ramos of the Southern District of New York issued a now-infamous decision denying a motion to dismiss in a *qui tam* case involving the 60-day rule that hinged on the word "identify."[59]

A. Factual and Procedural Background

Kane highlights the unique peril that healthcare providers face due to the complex billing systems and legal requirements imposed on the industry. This case, and the potential for huge liability under the FCA, arose from a software glitch in a billing system.[60] Healthfirst, Inc., a non-profit insurance program, contracted with the New York State Department of Health to provide certain services to its Medicaid enrollees.[61] In return, the Department of Health paid

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[52] *Id.*

[53] *Id.* at 9184.

[54] 31 U.S.C. § 3731(b)(2) (2012); Medicare Payments; Reporting and Returning of Overpayments, 77 Fed. Reg. at 9184.

[55] Medicare Payments; Reporting and Returning of Overpayments, 77 Fed. Reg. at 9182, 9184.

[56] *See* John T. Bentivoglio et al., *CMS Issues Proposed Rule on Overpayments to Medicare Providers and Suppliers*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES (Feb. 27, 2012), https://www.skadden.com/insights/cms-issues-proposed-rule-overpayments-medicare-providers-and-suppliers. (discussing the challenges providers and suppliers will face under CMS's Proposed Rule).

[57] Asha M. Natarajan & Lawrence W. Vernaglia, *Medicare's 60-Day Proposed Refund Rule Imposes Significant Liability on Providers*, FOLEY & LARDNER LLP (April 17, 2014), https://www.healthcarelawtoday.com/2014/04/17/medicares-60-day-proposed-refund-rule-imposes-significant-liability-on-providers/.

[58] *See* Medicare Programs; Reporting and Returning of Overpayments; Extension of Timeline for Publication of the Final Rule, 80 Fed. Reg. 8247, 8247 (Feb. 17, 2015) (stating that CMS had up to three years from the publication of the proposed rule to adopt a final rule).

[59] Kane *ex rel.* United States v. Healthfirst, Inc., 120 F.Supp. 3d 370, 384 (S.D.N.Y. 2015).

[60] *Id.* at 375.

[61] *Id.* at 376.

Healthfirst a monthly fee.[62] To provide services to its Medicaid enrollees, Healthfirst subcontracted with participating providers who would, in turn, provide the covered healthcare services.[63] Healthfirst paid its participating providers a share of the reimbursement fees from the Department of Health.[64] To do so, Healthfirst sent the participating providers electronic remittance forms that documented the services provided and the amount of money Healthfirst would pay each provider.[65] These forms contained electronic "codes" that permitted providers to charge "secondary payors," such as other insurance carriers or the patients themselves, for certain services rendered.[66] The remittance forms for services provided to Medicaid enrollees, however, should have contained an entirely different code that would have indicated that participating providers could not charge secondary payers at all.[67] Unbeknownst to Healthfirst, the remittance forms did not contain the proper codes, allowing providers to improperly charge secondary payors.[68]

Beginning in 2009, participating providers improperly billed secondary payors, including the Medicaid program, for services rendered.[69] Eventually, in 2010, auditors from the Office of the New York State Comptroller approached one of Healthfirst's participating providers, Continuum Health Partners Inc.[70] Continuum discovered the software glitch, contracted with a programmer to fix it, and ordered an employee, Robert Kane, to investigate exactly which claims had been erroneously billed to Medicaid.[71]

In February 2011, Kane emailed upper-level management a spreadsheet that contained more than 900 potentially erroneous claims, which totaled over $1 million.[72] In his email, Kane indicated that further analysis was required before the full magnitude of the problem could be ascertained.[73] According to the court, the spreadsheet was overly inclusive because Continuum had properly billed approximately half of the claims; it had, however, improperly billed the other half.[74] Four days after sending the spreadsheet, Robert Kane was terminated.[75]

Representatives of the Comptroller's office approached Continuum again in March and informed the corporation about more suspect claims.[76] Continuum began reimbursing the Department of Health in April 2011 and did not complete reimbursement until March 2013, a little over two years after Robert Kane had revealed the extent of the problem.[77]

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[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.* at 376–77.
[70] *Id.* at 377.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 377–78.

In April 2011, Robert Kane sued Continuum and other providers in the Healthfirst network under the FCA.[78] Both the United States Attorney's Office for the Southern District of New York and the New York State Attorney General's office investigated Kane's claims and eventually intervened in the case.[79]

The government alleged that Continuum and the other defendants violated the "reverse false claim" provision of the FCA.[80] Specifically, the government argued that, by waiting more than two years to return the payments, Continuum failed to take the necessary steps to identify and return the false claims and was therefore liable under the FCA.[81] In response to the suit, the defendants filed a motion to dismiss.[82]

B. *The Structure and Reasoning of Judge Ramos's Ruling*

Judge Ramos began his comprehensive and detailed opinion by examining the FCA, some of its recent amendments, and the ACA.[83] The key issue was whether the 60-day rule in the ACA had been triggered and, if so, at what point.[84] As a result, the Court was forced to consider if and when the defendants "identified" any overpayments.[85] Thus, the meaning of "identified" "govern[ed] the outcome of the motion[] before the Court."[86]

The government argued that Kane's spreadsheet identified the overpayments and, therefore, the clock began ticking in February of 2011 when Kane emailed the spreadsheet.[87] The government also urged the court to adopt a definition of "identified" that tracked the definition of "known" in the FCA.[88] Thus, according to the government, a person "identifies" an overpayment within the meaning of the ACA when he or she "determine[s], or should have determined through the exercise of reasonable diligence, that [he or she] received an overpayment."[89] In response, the defendants maintained that the spreadsheet merely put them on notice of *potential* overpayments; in the court's words, the defendants wanted to define "identified" as "classified with certainty."[90] The court was thus faced with two competing definitions of "identified."

To address this ambiguity, the court first turned to the word's plain meaning. Because the word was undefined in the statute, the court looked to its "ordinary, common-sense meaning."[91] Unfortunately, the court found that

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[78] *Id.* at 378.
[79] *Id.*
[80] *Id.*; *see supra* notes 23–26 and accompanying text (explaining the reverse false claim provision).
[81] *Kane*, 120 F. Supp. 3d. at 378.
[82] *Id.* at 379.
[83] *Id.* at 379–81.
[84] *Id.* at 381.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 383.
[88] *Id.* at 384.
[89] *Id.*
[90] *Id.*
[91] *Id.* (quoting United States v. Dauray, 215 F.3d 257, 260 (2d Cir. 2000)).

it did not have an ordinary meaning.[92] Dictionary definitions included "to prove," "name," "pinpoint," and "distinguish."[93]

Because of this wide definitional variation, the court was forced to abandon its search for the common meaning of "identify" and instead turned to traditional canons of statutory interpretation. In particular, the court interpreted the provision in light of its legislative history and overall purpose.[94] Additionally, the court considered CMS's interpretation as codified in its proposed rule.[95]

Both sides argued that the legislative history of the ACA supported their respective interpretations. According to the defendants, the original House version of the ACA included the same 60-day rule but used the word "know" instead of "identify."[96] Because the term "know" would have carried with it the broader definition of knowledge contained in the FCA, this change, the defendants argued, signaled Congress's intention to have a higher, narrower threshold of liability.[97] The court rejected this argument, reasoning that it was "equally plausible that Congress included [the word "know"]... in order to indicate that the FCA's knowledge standard should apply," especially because "the legislative record [was] silent as to why Congress chose one word over [the other] that in many contexts might be used synonymously." [98]

The court reasoned that the legislative history actually indicated that "Congress intended for FCA liability to attach in circumstances [like this one,] where ... there is an established duty to pay money to the government, even if the precise amount due has yet to be determined."[99] Thus, the court agreed with the government that an overpayment is "identified" when providers are "put on notice of a potential overpayment, rather than the moment when an overpayment is conclusively ascertained."[100]

Furthermore, the court did not think that the government's broader definition would lead to absurd results and was inconsistent with Congress's purpose. It rejected the defendants' argument that the practical requirements of identifying overpayments under the government's definition would be impossible to meet, given the stringent billing requirements under Medicare and Medicaid and the overall complexity of medical billing systems and procedures.[101] According to the court, the defendants' interpretation would "make it all but impossible to enforce the reverse false claims provision of the FCA in the arena of healthcare fraud."[102] The defendants' narrow definition, "identify with certainty," would also create a "perverse incentive to delay learning the amount due."[103] This would "relegat[e] the [60-day] period to

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[92] *Id.* at 385.
[93] *Id.* at 384–85.
[94] *Id.* at 386–88.
[95] *Id.* at 391–93.
[96] *Id.* at 386.
[97] *Id.*
[98] *Id.* at 387–88.
[99] *Id.* at 388.
[100] *Id.*
[101] *Id.* at 388–89.
[102] *Id.* at 390.
[103] *Id.*

merely the time within which they would have to cut the check," because their "obligation to pay would not be triggered until *after* they have done the work necessary to determine conclusively the . . . amount owed."[104]

The court felt that it is precisely this "perverse incentive" that Congress wanted to avoid when it passed the ACA and defined Medicare and Medicaid overpayments as "obligations" within the meaning of the FCA.[105] The defendants' interpretation would "frustrate Congress's intention to subject willful ignorance of Medicaid overpayments to the FCA's stringent penalty scheme" and would therefore thwart the purpose of the 60-day rule as an important protection against the possibility of healthcare fraud.[106] Congress, in its ongoing battle against fraud, "intentionally placed the onus on providers, rather than on the government, to quickly address overpayments."[107]

Finally, the court examined but did "not place significant weight upon the interpretation provided by" CMS or its proposed rule.[108] The proposed rule for Medicare Part A and B providers stated that providers "identify" an overpayment when they have actual knowledge, or act with deliberate ignorance or reckless disregard. Additionally, an unsure provider must undertake a "reasonable inquiry . . . with all deliberate speed"; failure to make a reasonable one inquiry could result in the provider being found to have acted with reckless disregard or deliberate ignorance.[109] The court noted that the "reasonable inquiry" language in the proposed rule closely tracked the language in a final rule that implemented the 60-day rule for Medicare Part C and D providers: under the final rule, a provider identifies an overpayment when it "determines, or should have determined its existence through the exercise of reasonable diligence."[110] Even though the rule does not apply to Medicaid providers like the defendants, the court felt that the rule's "logic plainly [did]" because the rule's underlying policy considerations "readily extend to the Medicaid context."[111] Thus, even though the court did not explicitly rely on the final rule for Medicare Part C and D providers or the proposed rule for Parts A and B providers, the court opined that its and the government's definition of "identified" was consistent with both the final and proposed rules.[112]

Thus, Judge Ramos ultimately dismissed the defendants' motion to dismiss[113] and concluded that a provider has "identified" an overpayment when it is put on notice of the claim's existence.

Kane, however, left many questions unanswered and provided limited practical guidance for providers. To be sure, *Kane* was an "easy" case in the sense that both the Office of the New York State Comptroller and Robert

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[104] *Id.*
[105] *Id.*
[106] *Id.* at 391.
[107] *Id.*
[108] *Id.* at 391–93.
[109] Medicare Program; Reporting and Returning of Overpayments, 77 Fed. Reg. 9179, 9182 (Feb. 16, 2012).
[110] *Kane*, 120 F. Supp. 3d at 392 (quoting 42 C.F.R. §§ 422.326(c), 423.360(c) (2016).
[111] *Id.*
[112] *Id.*
[113] *Id.* at 400.

Kane himself put the defendants on notice. Furthermore, they had well over 60 days to return the overpayments. Because of these clear-cut facts and the procedural posture of the case, the court did not have to, and indeed did not, elaborate on what a provider must do when it is put on notice of the existence of a potential overpayment. Nor did the court define or describe what a provider has to do when conducting a "reasonable inquiry," short of completely ignoring the overpayments.

Finally, *Kane* undervalued the serious costs and burdens its interpretation would place on providers. Given the complexity of the medical billing system and the sheer size of some healthcare provider's operations, it is possible that, just as the defendants argued, *Kane*'s "on-notice" standard would impose an "unworkable burden" on providers.[114] Investigating the existence of every potential overpayment could involve retrieving physician and patient records, interviewing physicians, nurses, and patients, or even retaining outside counsel.[115] Thus, this extra burden on providers could transform the 60-day rule from an incentive to cooperate into an unavoidable ticking time bomb for providers.

VI. THE FINAL RULE

In February 2016, CMS published a final rule that defined "identify" for Medicare Parts A and B providers. The new rule states that:

> A person has identified an overpayment when the person has, or should have through the exercise of reasonable diligence, determined that the person has received an overpayment and quantified the amount of the overpayment. A person should have determined that the person received an overpayment and quantified the amount of the overpayment if the person fails to exercise reasonable diligence and the person in fact received an overpayment.[116]

This new rule is very similar to the language of the final rules for Parts C and D providers.[117] One noticeable difference is that it requires providers to quantify the amount of the overpayment; there is no explicit quantification requirement for Part C and D Providers.[118] Additionally, the final rule reduced the lookback period to six years.[119]

When adopting the rule, CMS noted that it sympathized with providers about the lack of clarity in the original proposed rule.[120] Accordingly, this rule

[114] *Id.* at 388–89.

[115] *Id.*

[116] Medicare Program; Reporting and Returning Overpayments, 81 Fed. Reg. 7654, 7683 (Feb. 12, 2016) (codified at 42 C.F.R. § 401.305(a)(2)).

[117] 42 C.F.R. § 422.326(c) (2016) (Part C providers); 42 C.F.R. § 423.360(c) (2016) (Part D providers); *See Kane*, 120 F. Supp. 3d at 392 (noting the similarity between the final rule for Part C and D providers with the then-proposed rule for Parts A and B providers).

[118] 42 C.F.R. § 422.326(c) (Part C providers); 42 C.F.R. § 423.360(c) (Part D providers).

[119] Medicare Program; Reporting and Returning Overpayments, 81 Fed. Reg. at 7683–84.

[120] *See id.* at 7660–65 (noting several instances where the drafters agreed with commentators about the need for added clarity).

is an attempt to provide, and in fact does provide, much-needed guidance to providers and clarifies their burdens under the law. Unlike *Kane*'s "on notice" standard, the rule and its corresponding commentary clarify the meaning of the word "identify" and when the clock starts.[121] According to CMS, when a provider receives "credible information" about a potential overpayment, it needs to "undertake reasonable diligence to determine whether an overpayment has been received and to quantify the amount."[122] The 60-day clock begins ticking on either the day the provider has completed the reasonable diligence or on the day when the provider receives the credible information and fails to use reasonable diligence to determine the existence of an overpayment.[123] CMS also made it explicit that "part of identification is quantifying the amount, which [itself] requires a reasonably diligent investigation."[124]

While this rule is certainly an improvement over the opaque *Kane* standard, it too leaves many questions open. For example, though "reasonable diligence" is a legal term of art, it is unclear exactly what reasonable diligence in the healthcare industry, with its complex billing and coding systems, actually entails. In the rule's commentary, CMS simply stated that reasonably diligent investigations should not take longer than six months, unless the investigations are "unusually complex," and that investigators should utilize "statistical sampling, extrapolation methodologies, and other methodologies as appropriate."[125]

Furthermore, CMS has broadly defined "credible information" as information that "supports a reasonable belief that an overpayment may have been received."[126] By adopting this definition, CMS rejected a clearer "credible evidence" standard, one that commenters described as a "well-understood concept" in the field.[127] Some commenters have posited that the new, broader standard of "credible information" will "undoubtedly lead to numerous factual disputes regarding the quality of information received by providers"—disputes that could have possibly been avoided had the better-understood concept of "credible evidence" been used.[128]

Thus, while the final rule clarifies the burden placed on providers, what constitutes "reasonable diligence," "credible information," and, therefore, what triggers the 60-day countdown, remains ambiguous. Nevertheless, because of this added clarity, in cases involving Medicaid providers, courts should eschew *Kane*'s "on-notice" standard and instead should apply the final rule for Medicare Parts A and B providers. This option presents a clearer standard of liability for providers and is easier to comply with, but is also, from a court's perspective, easier to apply.

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[121] Medicare Program; Reporting and Returning Overpayments, 81 Fed. Reg. at 7659–64.
[122] *Id.* at 7661.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 7661–62.
[126] *Id.* at 7662.
[127] *Id.*
[128] Jaime L.M. Jones & Brenna E. Jenny, *Takeaways from Medicare's 60-Day Overpayment Rule*, LAW360 (Feb. 12, 2016, 3:28 PM), http://www.law360.com/articles/758871/takeaways-from-medicare-s-60-day-overpayment-rule.

VII. CONCLUSION

Healthcare fraud will likely continue to grow a pace with increased Medicare and Medicaid spending. Currently, Medicare and Medicaid spending are projected to grow over the coming years.[129] The 60-day rule is an important weapon in the government's war against fraud and waste. That said, however, the rule need not be turned against healthcare providers themselves by adding to their already onerous legal and billing requirements. The *Kane* standard threatens to do just that. Providing little guidance for providers, it adds more complexity to their compliance processes and destroys an incentive to cooperate with the government by rendering compliance within the 60-day time period nearly impossible. Consequently, while the rule is still in its infancy, in Medicaid cases courts should decline to follow *Kane* and should instead follow the language and spirit of the final rule for Medicare Part A and B providers.

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[129] *See* OFFICE OF THE ACTUARY, CTRS. FOR MEDICARE & MEDICAID SERVS. NATIONAL HEALTH EXPENDITURE PROJECTIONS 2016-2025 (2015), https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/proj2016.pdf (projecting that national health spending will grow at an average rate of 5.6 percent per year).

Essay

CHANGING TACK IN THE NIGHT: THE SUPREME COURT'S MISAPPLICATION OF KATZ

Ari Herbert*

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I. INTRODUCTION

At the dawn of telephone privacy cases, *Katz v. United States*[1] emerged from the horizon as the "lodestar" for Fourth Amendment caselaw.[2] Twelve years later, the Supreme Court revisited and distorted that precedent in *Smith v. Maryland*.[3] The distortion remains today. In light of the NSA metadata collection revelations, some courts have balked at applying *Smith*, fearing that it would invariably sanction otherwise-privacy-infringing surveillance. Other judges have steadfastly applied *Smith*. The result is a treacherous ship

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[1] 389 U.S. 347, 347 (1967).

[2] Smith v. Maryland, 442 U.S. 735, 739 (1979).

[3] *See generally id.*

graveyard of caselaw flotsam. Yet harken, for hope remains—a path through the watery labyrinth exists!

This essay attempts to rediscover the true lodestar by highlighting the logical fallacies of *Smith* in Part I. Then in Part II, this essay argues that notwithstanding the flaws in it, courts should apply the *Smith* framework since ironically the test itself is not outcome determinative. Finally in Part III, this essay argues that *Smith* could actually serve as a useful tool for shaping the legal debate over any future metadata collection by employing the *context-specific inquiry* proffered in cases such as *Klayman v. Obama*.[4]

II. IN *SMITH*, THE COURT GOT *KATZ* AND THE FOURTH AMENDMENT WRONG

Katz v. United States laid out a clear approach to non-physical Fourth Amendment searches, but the opinion has since been misconstrued. The Supreme Court ruled in *Katz* that an unreasonable search occurred when police used a hidden recording device to listen to a telephone call made in a public phone booth.[5] But a little more than a decade later, the Court revisited the Fourth Amendment in *Smith v. Maryland* only to contort that ruling.[6] The *Smith* opinion is marked by an internal dissonance resulting from two errors that Court made.

A. *The* Smith *opinion mischaracterized what the Katz test laid out*

To start, the Court in *Smith*, while claiming to apply the *Katz* test, actually devised an entirely new one. In *Katz*, the Court asked if there was an expectation of privacy[7] and if there was an invasion of it.[8] If so, the Court would (and did) proceed to considering whether the invasion was an unreasonable search.[9] While announcing that it was employing the same test,[10] the Court in *Smith* looked first to whether there was a subjective expectation of privacy, but then turned to whether that expectation was

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[4] 957 F. Supp. 2d 1, 38 (D. D.C. 2013).

[5] *Katz*, 389 U.S. at 349, 359.

[6] *Smith*, 442 U.S. at 739.

[7] *See Katz*, 389 U.S. at 351-52 (considering whether the petitioner sought to maintain his phone call as private).

[8] *See id.* at 353 (concluding that a search occurred when the government electronically listened in on the petitioner's phone call).

[9] U.S. CONST. amend. IV; *see also Katz*, 389 U.S. at 354 (posing the question of whether the search was constitutional).

[10] Some scholars argue that the *Smith* opinion explicitly adopts the Harlan concurrence from *Katz* as the Court's new test. *E.g.*, Christine S. Scott-Hayward et al., *Does Privacy Require Secrecy? Societal Expectations of Privacy in the Digita Age*, 43 Am. J. Crim. L. 19, 25 (2015); Peter Winn, Katz *and the Origins of the "Reasonable Expectation of Privacy" Test*, 40 McGeorge L. Rev. 1, 7 (2009) (incorrectly asserting that, in *Mancusi v. DeForte*, 392 U.S. 364 (1968), the Supreme Court "officially recognized [Harlan's concurrence] as the essence of" *Katz*, where the Court in fact cited to the majority opinion). But this is not so. In *Smith*, the Court insisted that it was merely mechanically applying the *Katz* test. Ignoring this is to ignore the linguistic gymnastics the *Smith* court employed. In fact, the *Smith* majority opinion cites to the Harlan concurrence only once, 442 U.S. at 740, and it does so to buttress its peculiar reading of Katz, *id.*—not to reject the "old" *Katz* test and adopt the Harlan concurrence instead.

objectively reasonable.[11] To explain this second prong, the Court plucked the word "justifiable"[12] out of the phrase "privacy upon which [the petitioner] justifiably relied."[13] Then, the Court asserted that the word "reasonable" is a synonym.[14] This is problematic.

The word "justifiably" may have merely been an expression of sentiment that didn't modify the *Katz* test at all. Notably, the Supreme Court doesn't interpret the prefatory clause of the Second Amendment to modify or characterize the right to bear arms.[15] Likewise, it's reasonable to interpret the test laid out in *Katz* as unmodified by the word "justifiably." The court may have just been noting that Katz was actually correct in his fear for his privacy—he was in fact being spied on after all.

It's also worth noting that justifiable and reasonable are not wholly synonymous. True, the two words may at times be used somewhat interchangeably, but they may just as easily (if not typically) indicate entirely different meanings. Justifiability indicates proving the correctness of something or vindicating something.[16] Reasonableness, on the other hand, evokes notions of moderation and sensibility.[17] The upshot of this distinction is that it casts doubt on the entire ruling. The Court in *Smith* was either shockingly remiss or willfully inattentive to deciphering what the Court in *Katz* actually ruled.

Professor Orin Kerr recently noted another similar verbal slight of hand that the Supreme Court accomplished around the same time,[18] when Justice White, in *United States v. White*, framed a Fourth Amendment question as "what expectations of privacy are constitutionally 'justifiable.'"[19] Professor Kerr correctly points out that in so using the word justifiable, Justice White actually expressed a notion of reasonableness.[20] Perhaps as Professor Kerr suggests, the switch was unintentional.[21]

Regardless, under the current test, the Fourth Amendment is triggered only if both of the *Smith* requirements are met,[22] which puts the analysis upside down. Historically, the onus has always been on the government to justify its actions. The protection from unreasonable searches was not predicated on a reasonable expectation of privacy. Rather, "the right of the people to be secure in their . . . papers, and effects, against *unreasonable searches* and seizures, shall not be violated."[23] Because of *Smith*, citizens

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[11] *Smith*, 442 U.S. at 740, 743.

[12] *Id.* at 740.

[13] *Katz*, 389 U.S. at 353.

[14] *Smith*, 442 U.S. at 740.

[15] District of Columbia v. Heller, 554 U.S. 570, 577 (2008) (The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose.").

[16] *See Justification*, BLACK'S LAW DICTIONARY (4th pocket ed. 2011).

[17] *Reasonable*, BLACK'S LAW DICTIONARY (4th pocket ed. 2011).

[18] Orin Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 128 (2015).

[19] 401 U.S. 745, 752 (1971).

[20] Kerr, *supra* note 17.

[21] *See id.* ("The switch appears inadvertent rather than deliberate.").

[22] *Smith*, 442 U.S. at 745–46.

[23] U.S. CONST. amend. IV (emphasis added).

have to affirmatively show that their privacy rights are reasonable. This represented a paradigmatic shift.

B. Whether people actually have expectations of privacy is subjective

Another source of discord within *Smith* is the assertion by the Court that it "doubt[ed] that people in general entertain any actual expectation of privacy in the numbers they dial."[24] Aside from this generalization being factually unsupported, it also runs afoul of what the Court in *Katz* expressed regarding the distinction between public and private: "What a person *knowingly exposes to the public*, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[25]

Placing a call may well entail exposing phone numbers to the phone company, but the act does not expose anything to the public at large. While dialing a phone number may not seem inherently private, it would be strange to find that people routinely know who their neighbor calls. In other words, that information is private in the same way that what films, literature, religious texts, and personal products that people purchase are also considered private. Although lower courts are bound to follow the precedent of *Smith*, pointing out its flaws should help clarify the law in this contentious area.

III. RECOGNIZING THE SHORTCOMINGS OF THE *SMITH* OPINION DOES NOT ENTITLE COURTS TO JETTISON IT AS INAPPLICABLE

In *Klayman v. Obama*, the court held that the nature of the metadata question presented there was categorically different from the metadata question presented before the Supreme Court in *Smith*.[26] This contention is patently false. In *Klayman*, the court admitted that "what metadata *is* has not changed over time."[27] While the court attempted to distinguish the case by pointing to the increased information that may now be drawn from metadata, that speaks more likely to the reasonableness prong of the *Smith* test as opposed to the applicability of the test per se. So maybe metadata queries now violate an expectation of privacy that is reasonable because of the increased information that can be metadata can reveal. By straying from the *Smith* framework, the court in *Klayman* may have missed the opportunity to make a lasting mark on how the Fourth Amendment is interpreted. Instead, the prize ship is to be won by making arguments within the context of *Smith*.

A. The expectation of privacy is entirely subjective

Whether there's an expectation of privacy in phone records is by its nature a subjective question. Obviously, some people don't expect that their phone

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[24] *Smith*, 442 U.S. at 742.
[25] *Katz*, 389 U.S. at 351 (emphasis added) (citations omitted).
[26] *Klayman*, 957 F. Supp. 2d at 31.
[27] *Id.* at 35.

records are private—just as there are those who feel the opposite. But within the scope of NSA suits, it seems fair to presume that the suing parties do entertain an expectation of privacy. Otherwise, it would be odd for them to sue in the first place. And so the real debate here is over the expectation of privacy (or lack of) by society in the aggregate.

On one end of the spectrum, there's Justice Alito fairly pointing to the shrinking expectation of privacy in our society where technology is pervasive.[28] This assertion has merit. So much of our lives is volitionally broadcast to the world through social media and more. Still, it seems unfair and unwise to bar all future litigants purely because of the shifting nature of society.

B. The Court's conception of reasonableness is unrealistic

Even assuming that there is an expectation of privacy, a question remains as to whether that expectation is reasonable. In *ACLU v. Clapper*, the court pointed to the fact that phone users voluntarily convey their information to their phone providers.[29] The court then applied *Smith* to hold that, consequently, any privacy expectations are unreasonable per se.[30] This contention doesn't hold up to scrutiny.

To begin with, the Supreme Court in *Smith* relied on prior precedent that doesn't seem to speak precisely to the matter at hand. In *Miller*, the Court ruled that a "depositor takes the risk, in *revealing his affairs* to another, that the *information* will be conveyed."[31] But phone metadata doesn't reveal user affairs like monetary transactions. Nor are users conveying the information that the government is obtaining. Instead, the government is using metadata to piece together individuals' otherwise undisclosed affairs and information. Today, metadata information alone can reveal "a wealth of detail about . . . familial, political, professional, religious, and sexual associations.

Even if using a phone service equates to a conveyance of the same nature as in *Miller*, Justice Sotomayor's concurrence in *United States v. Jones* makes the compelling point that "[t]his approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[32] Given the trending ubiquity of technology, it's difficult to imagine that reasonable expectations of privacy will be found anywhere for much longer. And it's doubtful that the

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[28] United States v. Jones, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring). Anecdotally, Judge Alex Kozinski is trying to counteract this general phenomenon by commenting on the phone conversations of strangers near him while out and about in public. Alex Kozinski, *On Privacy: Did Technology Kill the Fourth Amendment?*, Cato Institute (Nov./Dec. 2011) http://www.cato.org/policy-report/novemberdecember-2011/privacy-did-technology-kill-fourth-amendment ("I, for example, have taken to staring at people who talk loudly in their cell phones in public. I nod when they say something that sounds positive, and laugh when they say something funny. I try to make them feel that I am part of their conversation — because, thanks to them, I am."). So maybe Justice Alito's observation isn't destined to remain accurate.

[29] 959 F. Supp. 2d 724, 751 (S.D.N.Y. 2013).

[30] *Id.*

[31] *Smith*, 442 U.S. at 744 (emphasis added) (quoting United States v. Miller, 425 U.S. 435, 443 (1976)).

[32] *Id.* at 957.

Court in *Smith* thought that they were eradicating all future bastions for privacy.

In fact, *Smith* actually seems to provide a basis for finding against NSA metadata programs. The Court noted in *Smith* that "[n]either the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers."[33] Previously, police had to do a great deal more work to connect dots after looking at phone information. No longer is this the case. So expectations of privacy in phone metadata may be reasonable given the substantively different yield of metadata searches today.

IV. USING THE CONTEXT-SPECIFIC INQUIRY HAS STRONG BENEFITS FOR OUR COMMON LAW TRADITION

Essentially, by finding that there is an expectation of privacy and that it is reasonable, any intrusion of this privacy is therefore a search under the Fourth Amendment. In order for any future metadata collection to be constitutional, the search itself would have to be reasonable. Typically, any search issued without a warrant is unreasonable per se. Since NSA metadata collection has not been carried out under warrants, the context-specific inquiry could be a highly useful mechanism for determining the constitutionality of such programs.

The context-specific inquiry seeks to juxtapose three competing interests and determine policy in the direction of the weightier interests.[34] The inquiry looks to (1) the nature of the privacy that would be intruded upon, (2) the character of such intrusion, and (3) the nature and immediacy of the government's interest.[35] The benefit of holding the debate within this context may not appear obvious, but it has significant advantages.

Maintaining that metadata collection, as a matter of law, never constitutes a search could be quite dangerous. If the program ever became abusive to a group of society, lower courts would be powerless. Parties would have to either appeal to the Supreme Court to overturn precedent or stake their claims in the forum of democracy, which has at times in history been unsympathetic to (if not the very cause of) civil liberty and civil rights abuses. Yet if the courts were to hold that metadata collection does constitute a search, this allows for a more fluid landscape while maintaining the structural integrity of Fourth Amendment caselaw. This is where the Sotomayor and Alito arguments could and should be tested against each other.

The judges who are opposed to the NSA policy should refrain from arguing outside the *Smith* context since the Supreme Court would be entirely justified in dismissing their opinions as off the mark. Whereas by working within the *Smith* framework, lower courts can build up a body of caselaw supporting their view, and the national dialogue will be less characterized by speaking past each other. On the other hand, ruling that the NSA metadata

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[33] *Smith*, 442 U.S. at 741.

[34] *Klayman*, 957 F. Supp. 2d at 38 (quoting Chandler v. Miller, 520 U.S. 305, 314 (1997)).

[35] *Id.*

collection program is a search will create a burden for the government to overcome. However, governmental actions of this weight should face a burden. Government should have to prove that it has the authority to act in such extreme manners.

It won't be impossible, or even unlikely, that other courts will differ in their balancing of these three factors, and ultimately, this disagreement will be good for society. Ironically, one benefit of our federal court system is the ability of different circuits to develop circuit splits with each other. This allows them to act as little laboratories of common law policy, testing different ways of resolving national legal issues. To be sure, a patchwork of discordant caselaw is far from ideal in the long run. But in the short run, having different courts hash out this balancing test to different results will eventually lead to the strongest arguments being proffered and given the chance to take hold. That way, if the Supreme Court does look at the metadata collection programs, it will have a rich tapestry of opinions and insight to draw from and ultimately reach its decision. More importantly, whatever that decision may be, it won't require firing a broadside against *stare decisis* to tack away in the future. Instead, if the program eventually does become abusive, all that will be needed is to recognize that certain factors in the context-specific inquiry have become weightier than others.