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Articles

Other People's Papers

Jane Bambauer*

The third-party doctrine permits the government to collect consumer records without implicating the Fourth Amendment. The doctrine strains the reasoning of all possible conceptions of the Fourth Amendment and is destined for reform. So far, scholars and jurists have advanced proposals using a cramped analytical model that attempts to balance privacy and security. They fail to account for the filterability of data. Filtering can simultaneously expand law enforcement access to relevant information while reducing access to irrelevant information. Thus, existing proposals will distort criminal justice by denying police a resource that can cabin discretion, increase distributional fairness, and exculpate the wrongly accused.

This Article offers the first comprehensive analysis of third-party data in police investigations by considering interests beyond privacy and security. First, it shows how existing proposals to require suspicion or a warrant will inadvertently conflict with other constitutional values, including equal protection, the First Amendment, and the due process rights of the innocent. Then, it offers surgical reforms that address the most problematic applications of the doctrine: suspect-driven data collection and bulk data collection. Well-designed reforms to the third-party doctrine will shut down the data collection practices that most seriously offend civil liberties without impeding valuable, liberty-enhancing innovations in policing.

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Introduction

In 2010, Quartavious Davis committed a series of armed robberies at a Little Caesar's, an Amerika Gas Station, a Walgreens, an Advance Auto Parts, a Wendy's, and a beauty salon in the Miami area.[1] During the criminal investigation, the government accessed sixty-seven days of cell-site location data from Davis's service provider without a warrant.[2] The data documented Davis's approximate location during the period and showed he was physically present at the various robbery scenes during the time the crimes were committed, corroborating the eyewitness testimony and other evidence used to convict him.[3] When Davis later challenged the government's warrantless access to the cell-site data, the government relied on the third-party doctrine[4]—a constitutional rule that permits the state to access business records and transactional data about a company's consumers without constituting a Fourth Amendment "search."[5]

A panel of Eleventh Circuit judges was not impressed.[6] Davis's case drew out an inescapable flaw in the third-party doctrine. The doctrine relies on the shaky assumption that Americans should not have expectations of

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1. United States v. Davis (*Davis I*), 754 F.3d 1205, 1209 (11th Cir. 2014), *aff'd in part, rev'd in part en banc*, 785 F.3d 498 (11th Cir. 2015).

2. United States v. Davis (*Davis II*), 785 F.3d 498, 501–03 (11th Cir. 2015) (en banc).

3. *Id.* at 501–02; *see also* Brief for Am. Civil Liberties Union Found. et al. as Amici Curiae at 8–13, *Davis II*, 785 F.3d 498 (No. 12-12928), 2014 WL 7006394, at *5–10 (explaining how data collected by cell-phone towers can be used to pinpoint an individual's location).

4. *Davis I*, 754 F.3d at 1216.

5. United States v. Miller, 425 U.S. 435, 441–43 (1976).

6. *See Davis I*, 754 F.3d at 1217.

privacy in company records. The judges may have had little sympathy for Davis's privacy expectations while he was robbing the Little Caesar's, the Wendy's, and the other places, but they thought Davis should be able to expect privacy in his location information during the sixty or so days that he was *not* robbing Miami businesses.[7] On those other days, he might have been "near the home of a lover, or a dispensary of medication, or a place of worship, or a house of ill repute."[8]

Although the prosecutors had the better of the arguments based strictly on third-party doctrine precedent, the Supreme Court has strongly signaled that it is ready to revisit the issue. Justice Sotomayor has denounced the logic of the third-party doctrine,[9] and all of the justices have openly criticized other well-established Fourth Amendment rules for being out of sync with today's technological realities.[10] And so, the Eleventh Circuit panel was emboldened to recognize Davis's expectation of privacy in his cell-site location data. It ruled that the government must have a warrant to access third-party records.[11] Short-lived as the civil liberties victory was (the Circuit sitting en banc reversed the panel eleven months later[12]), the panel's opinion and reasoning in *United States v. Davis*[13] has significant value for showing where the Supreme Court's reasoning in recent data-surveillance cases may lead us.

The Eleventh Circuit panel got the outcome right but the rule wrong. The warrant requirement is sensible when police build their cases through focused attention on a particular suspect, as they did against Davis. When police seek long, detailed data histories about a specific individual, the target's civil liberties are best protected by guarantees that the data will only be accessed when police have sufficient individualized suspicion.[14] But the warrant requirement is not sensible when the police conduct an altogether different type of investigation—one that takes advantage of the searchable nature of databases.

Suppose the Miami police department had requested all cell-phone service providers to query their geolocation logs to identify any customers who were at three of the robbery locations within an hour of the respective

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7. *Id.* at 1216.

8. *Id.*

9. United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

10. *E.g.*, Riley v. California, 134 S. Ct. 2473, 2484–85 (2014).

11. *Davis I*, 754 F.3d at 1217.

12. *Davis II*, 785 F.3d 498, 518 (11th Cir. 2015) (en banc).

13. *Davis I*, 754 F.3d 1205 (11th Cir. 2014), *aff'd in part, rev'd in part en banc*, 785 F.3d 498 (11th Cir. 2015).

14. *See* Jennifer Granick, *New Ruling Shows the NSA Can't Legally Justify Its Phone Spying Anymore*, WIRED (June 13, 2014, 6:13 AM), http://www.wired.com/2014/06/davis-undermines-metadata/ [https://perma.cc/UX8R-Y4QZ] (approving of the *Davis I* opinion, in part due to its "substantive and procedural protections" for cell-phone-data collection).

robberies. This "crime-out" type of data request is markedly different from the suspect-driven request the police actually used to get Davis's records.[15] First, the privacy interests identified by the Eleventh Circuit panel are greatly reduced. The police would not know the long history of travel for Davis or anybody else whose identity was returned based on the search-query criteria. The only thing the police would know about the pool of identified customers is that they were at three of the robbery locations near the times the robberies were committed. This sort of search constrains police discretion and limits the grip of confirmation bias.[16] Rather than selecting a suspect first and looking for evidence second, crime-out investigations reverse the order.

Moreover, if the police had been building a case against some other suspect—an innocent one—this crime-out mode of searching cell-phone location data could unearth exculpating information. The query results could redirect police attention to the true culprit. Alternatively, the data could undermine the existing case. It could reveal that many people were at the sites of the three robberies around the same times for independent reasons so that the location evidence is less damning than it may initially seem.

This crime-out style of investigation could be considered a "search" on all cell-phone customers if the Fourth Amendment expands to cover third-party data in a superficially consistent way. But the illustration shows that when data is used differently—and smartly—a warrant requirement will impede significant public-safety interests while protecting only marginal privacy interests. Thus, when the Eleventh Circuit panel diligently followed the public outcry for a warrant requirement,[17] it chased a civil rights mirage.

The third-party doctrine may be dismantled soon, and for good reason. It always strained the logic and common sense of search and seizure law,[18]

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15. Crime-out investigations study clues from an already-committed crime. I explain why this category of investigations is special below. *See infra* Part V.

16. *See* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998) (describing confirmation bias as a "one-sided case-building process" whereby an individual "selectively gathers, or gives undue weight to, evidence that supports one's position while neglecting to gather, or discounting, evidence that would tell against it").

17. *See* Allison Grande, *Snooping Outcry May Push Verizon, Others to Fight NSA Orders*, LAW360 (June 6, 2013, 10:05 PM), http://www.law360.com/articles/447984/snooping-outcry-may-push-verizon-others-to-fight-nsa-orders [http://perma.cc/E7HD-T8T3] (noting public outcry against government access to cell-phone company records).

18. *See, e.g.*, Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 122–23 (2002) (arguing that the Court's use of "knowing exposure" leads to doctrinal instability); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 113 (2008) (arguing that the "Stranger Principle" is illogical and untenable); Andrew D. Selbst, *Contextual Expectations of Privacy*, 35 CARDOZO L. REV. 643, 673

and the National Security Administration's (NSA's) bulk collections of telephonic metadata have reinvigorated the demand for reform.[19] The law will shift to recognize a Fourth Amendment privacy interest in the business records that describe us, but the reformers are struggling to define the proper scope and strength of this new right.

So far, the literature on the third-party doctrine has done an admirable job identifying the privacy interests at stake[20] and the practical consequences of the disruption to good police work if the doctrine is gutted.[21] Legal scholars have considered the third-party doctrine and its alternatives using a cramped analytical model that balances privacy interests against general interests in crime fighting, and nothing else.[22]

Consequently, the most popular proposals to reform the third-party doctrine have looked backwards for solutions, embracing rules that simulate the slow and costly process of investigating crime with old tools, that restrict access to records based on the sensitivity of the information within them, and that reify traditional hierarchies of individualized suspicion.[23]

(2013) (arguing that the Fourth Amendment decisions by the Court do not match societal norms and expectations).

19. Ewen Macaskill & Gabriel Dance, *NSA Files: Decoded*, GUARDIAN (Nov. 1, 2013), http://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded#section/1 [http://perma.cc/WUQ6-VQCD]; John Villasenor, *What You Need to Know About the Third-Party Doctrine*, ATLANTIC (Dec. 30, 2013), http://www.theatlantic.com/technology/archive/2013/12/what-you-need-to-know-about-the-third-party-doctrine/282721/ [http://perma.cc/VQF4-7Z4D].

20. DANIEL J. SOLOVE, NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY 12 (2011); Selbst, *supra* note 18 at 673; Daniel J. Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. 343, 344 (2008) [hereinafter Solove, *Data Mining*] (noting airline passenger data and telephone records among those relevant privacy interests).

21. Stephen E. Henderson, *Beyond the (Current) Fourth Amendment: Protecting Third-Party Information, Third Parties, and the Rest of Us Too*, 34 PEPP. L. REV. 975, 1008–10 (2007); Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 580–81 (2009).

22. *See infra* Part III.

23. For example, the American Bar Association Standards for Criminal Justice recommend that courts categorize records based on their sensitivity and then apply increasingly heightened procedural safeguards for increasingly sensitive information. AM. BAR ASS'N., ABA STANDARDS FOR CRIMINAL JUSTICE: LAW ENFORCEMENT ACCESS TO THIRD PARTY RECORDS 55 (3d ed. 2013) [hereinafter ABA STANDARDS]; *see also* Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL'Y 757, 893–95 (2014) (criticizing traditional justifications of the third-party doctrine in the context of technological change); Richard A. Epstein, *Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations*, 24 BERKELEY TECH. L.J. 1199, 1224 (2009) (questioning whether the government should have access to personal documents stored with third parties via online services); Katherine J. Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70 MD. L. REV. 614, 660 (2011) (advocating a categorical approach in the context of searching cloud storage and social media). Christopher Slobogin's proposals, which I talk about at length later in this Article, are a hybrid: drawing from this process hierarchy, while still allowing for some pattern-driven investigation. Thus, we have the most common ground (although readers will see I disagree with aspects of his proposal as well). *See* Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 331, 338–40 (2008) (advocating for a hierarchy of records to guide protection of information

These solutions revert law enforcement to an environment where they must begin their investigations with personal observations, witness testimony, and pure instinct, as they have historically done. They unwittingly promote an outdated criminal investigation system riddled with inequities and error. And they obscure the ultimate question: How do we want law enforcement to build cases?[24]

The scholarly debate has failed to appreciate how modern computing can promote justice in ways that were impossible a generation ago. Fast computers, cheap storage, and networked data allow criminal investigations to use automated searching, and this feature has unprecedented effects on government searches. Without computers, even the most legitimate searches conducted with a warrant based on probable cause required police to tromp through houses, flip through diaries, and sift through large amounts of personal information unrelated to the investigation. Automated searches, by contrast, can tailor information access so that most irrelevant data is filtered out.

Orin Kerr put his finger on this nearly ten years ago when he pointed out that the current Fourth Amendment rules "permit extraordinarily invasive government powers to go unregulated in some contexts, and yet allow phantom privacy threats to shut down legitimate investigations in others."[25] But even Kerr, the lone defender of the third-party doctrine, justifies it on the grounds of maintaining clean rules and encourages regulators to protect privacy using the legislative process however they please.[26] Whether reforms come from courts or legislatures, scholars have provided

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and discussing the application of event-driven data mining); Christopher Slobogin, *Making the Most of* United States v. Jones *in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL'Y (SPECIAL ISSUE) 1, 14 (2012) [hereinafter Slobogin, *Making the Most of* Jones] (explaining that his theory of Fourth Amendment protection—the "proportionality principle"—requires that the justification for a search should be "roughly proportional to its intrusiveness").

24. Christopher Slobogin acknowledges that police must have ways "to *develop* probable cause." Slobogin, *Making the Most of* Jones, *supra* note 23, at 14; *see also* MARY DEROSA, CTR. FOR STRATEGIC & INT'L STUDIES, DATA MINING AND DATA ANALYSIS FOR COUNTERTERRORISM 23 (2004), http://csis.org/files/media/csis/pubs/040301_data_mining_report.pdf [http://perma.cc/NJ99-W87X]; William H. Simon, *Rethinking Privacy*, BOS. REV. (Oct. 20, 2014), http://bostonreview.net/books-ideas/william-simon-rethinking-privacy-surveillance [http://perma.cc/94SL-FJEV] (criticizing the "sentimental disposition toward past convention that obscures the potential contributions of new technologies to both order and justice"). However, this question may be less relevant if the substance of the law is objectionable. *See* Ilya Somin, *Speed Limits, Immigration, and the Duty to Obey the Law*, WASH. POST: VOLOKH CONSPIRACY (Apr. 17, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/17/speed-limits-immigration-and-the-duty-to-obey-the-law/ [https://perma.cc/67Q4-L75R] (arguing that even with a presumptive obligation to obey the law, the presumption can be overridden in the case of pernicious laws); *infra* Part III.

25. Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 COLUM. L. REV. 279, 280 (2005).

26. Kerr, *supra* note 21, at 565–66.

little guidance about how access to digital information can improve the criminal justice system.

This Article takes a wide-angle view of the third-party doctrine. It analyzes societal interests *beyond* criminal deterrence that often run into conflict with privacy—specifically, due process, equal protection, and the right to free speech. Criminal justice has many interlocking parts. If they are not considered in a holistic way, courts will introduce new problems and paradoxes in their rush to solve old ones. When the full range of societal and constitutional interests is taken into account, it is clear that some warrantless uses of third-party records positively promote civil rights. Third-party records have the potential to dramatically change criminal investigations by providing new routes for suspects to prove their innocence. They can also increase distributional justice by ensuring that evidence of suspicious behavior is investigated evenly across race and class lines. And they can facilitate crime-out investigations of the sort described above. Each of these uses of data differs in important ways from the dragnet practices that have inspired so much hostility to the third-party doctrine, and Fourth Amendment reforms should take care not to disrupt them. Otherwise, police will be consigned to traditional styles of investigation that rely much too heavily on eyewitness memory, police testimony, and intuition.[27]

That said, none of the innovations in criminal law enforcement endorsed in this Article can justify unfettered access to all third-party records for any or no reason, which the current third-party doctrine allows. Rather than defending the third-party doctrine whole cloth, this Article will show how the doctrine should be revised to protect the subjects of criminal investigations without causing unnecessary conflicts with due process, equal protection, and First Amendment values.

Courts can do this by paying less attention to the technopanic that currently shapes privacy debates and paying more attention to the aspects of Fourth Amendment privacy that dovetail with other constitutional values: namely, government accountability and reduced discretion. When these priorities are kept at the center of reforms, two concrete insights emerge: First, the Fourth Amendment should not permit the government to engage in suspicionless suspect-driven data gathering of the sort that occurred in the *Davis* case. Second, the Fourth Amendment should allow bulk data collection only if the law enforcement agency has designed protocols to ensure that the data is used in an accountable and evenhanded way. Other forms of collection—the sorts that take advantage of the filterability of data—should be left off limits from Fourth Amendment reforms.

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27. For a thorough discussion of the limitations of traditional police investigations, see *infra* Part VII.

The Article proceeds as follows: Part I explains why the third-party doctrine is unpopular and theoretically unstable. Parts II and III identify the Fourth Amendment interests that compete with the third-party doctrine: privacy (Part II) and obstruction of the criminal law (Part III). Part IV considers the law enforcement interests that predictably run up against Fourth Amendment privacy interests and demonstrates why courts have extraordinary difficulty striking a balance between them. Parts V through VIII explore some of the other societal interests that can come into conflict with new constitutional restrictions on government access to third-party records. They are (V) crime-out investigations; (VI) due process interests of criminal suspects; (VII) equal protection and distributional justice; and (VIII) the First Amendment speech interests of third parties. Each of these societal interests stands to suffer if a new Fourth Amendment rule creates overzealous privacy protections. But each can be maintained, even promoted, if the third-party doctrine is revised to protect citizens from the harms of law enforcement discretion.

Building cases through unfettered, unaccounted access to personal data kept by private parties is no doubt unacceptable as a matter of constitutional policy and common sense. But cordoning off consumer data and forcing police to use conventional methods to build their cases will have equally repugnant consequences.

I. The Problem

In *United States v. Miller*[28] and again in *Smith v. Maryland*,[29] the Supreme Court decided that government access to third-party business records is not a search. Thus, the government could collect bank records (in *Miller*) or telephone metadata (in *Smith*) without a warrant, without probable cause, and without implicating the Fourth Amendment at all.[30]

The Court reasoned in *Smith* that Americans do not and should not harbor any expectation of privacy in the phone numbers they dial because each caller knows that the telephone company uses this information to complete calls and logs it to facilitate billing.[31] Moreover, even if some callers do maintain an expectation of privacy, the expectation cannot be one that "society is prepared to recognize as 'reasonable'" since they voluntarily conveyed the information to a third party (the phone company).[32] After all, the Court had already decided that Americans take the risk of disclosure when they confide in somebody who turns out to be cooperating with the

28. 425 U.S. 435, 442–43 (1976).
29. 442 U.S. 735, 744 (1979).
30. *Miller*, 425 U.S. at 443; *Smith*, 442 U.S. at 745–46.
31. *Smith*, 442 U.S. at 742.
32. *Id.* at 743 (quoting Katz v. United States, 389 U.S. 347, 361 (1967)).

government.[33] In *United States v. White*,[34] for example, the Court held that a criminal defendant had no privacy interest in a conversation he had with a snitch who was bugged and working with the government.[35] *White* is emblematic of the Supreme Court's misplaced-trust doctrine which had been firmly established by the time *Smith* came down. For the Court, *Smith* was just a corollary to the assumption-of-risk principle established in *White*.[36] Personal information conveyed to a business or any other third party was no longer under the exclusive control of the customer. Any confidence they had that a business would not turn over the information to the government was misplaced and mistaken.

In the wake of Edward Snowden's leaks about the NSA's telephonic metadata collection programs, *Smith*'s reasoning has come under fierce attack.[37] In truth, the reasoning had serious flaws at inception. *Smith* badly overextended the reasoning from misplaced-trust cases like *White*.[38] Although *White* prevents a criminal defendant from claiming a privacy interest in his conversation with a government informant, it is critical to the holding that White's confidant was working with the government knowingly and voluntarily.[39] If the government had recorded White's conversation with another person without the knowledge and cooperation of a party to the conversation, *White* would have been indistinguishable from *Katz v. United States*,[40] which had previously concluded that bugging a telephone constituted a search.[41] *White* depended upon the voluntary cooperation of White's confidant.[42] A theoretical possibility of snitching is not enough, on its own, to remove an expectation of privacy. To fit within the misplaced-trust doctrine, the trust had to actually be misplaced.

The third-party doctrine, by contrast, does not require the voluntary cooperation of the records holder. In *Miller*, the FBI served a bank with a subpoena compelling the disclosure of Miller's bank records, whether the

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33. United States v. White, 401 U.S. 745, 752 (1971).

34. 401 U.S. 745 (1971).

35. *Id.* at 749 (citing Lopez v. United States, 373 U.S. 427 (1963)).

36. *See Smith*, 442 U.S. at 743–44 ("This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.").

37. Alexander Galicki, Note, *The End of* Smith v. Maryland*?: The NSA's Bulk Telephony Metadata Program and the Fourth Amendment in the Cyber Age*, 52 AM. CRIM. L. REV. 375, 405–14 (2015); Joseph D. Mornin, Note, *NSA Metadata Collection and the Fourth Amendment*, 29 BERKELEY TECH. L.J. 985, 1002–06 (2014).

38. Colb, *supra* note 18, at 156–57; Rubenfeld, *supra* note 18, at 113–14.

39. *White*, 401 U.S. at 752.

40. 389 U.S. 347 (1967).

41. *Id.* at 353.

42. *White*, 401 U.S. at 749 ("[The Fourth] [A]mendment affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966))).

bank wanted to cooperate or not.[43] In *Smith*, the telephone company did voluntarily cooperate with the police at the request of the investigating officers, but the Court did not tether its holding to that fact.[44] Since *Smith*, the government has been able to compel the disclosure of telephonic metadata using orders sanctioned by the Pen Register Act,[45] and the NSA telephonic metadata program relies on compulsion, too.[46] Verizon and other telecommunications companies have no choice but to hand their records over to the government.[47] In fact, in an ironic twist, telecommunications providers are obligated to keep the government's orders secret through the operation of gag orders that regularly accompany the disclosure orders.[48] Thus, the reasoning of *Smith* is strained: a user of a telephone "assumes the risk" that the metadata will be shared by the government, and then the government can exercise its subpoena power to ensure that the risk comes to pass.[49]

Smith was never popular among scholars,[50] but the sweeping collection programs brought to light by Snowden's leaks have reinvigorated the push to abandon it.[51] A reversal of the third-party doctrine, or at the very least a

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43. United States v. Miller, 425 U.S. 435, 437–38 (1976).

44. Smith v. Maryland, 442 U.S. 735, 737, 745–46 (1979).

45. Pen Registers and Trap and Trace Devices Act, 18 U.S.C. §§ 3121–27 (2012).

46. *See* Secondary Order, *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things from Verizon Bus. Network Servs., Inc., No. BR 13-80, at 1–2 (FISA Ct. Apr. 25, 2013), http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order [http://perma.cc/44YE-XJ4B] (compelling Verizon to turn over "telephony metadata" to the NSA).

47. *See id.*

48. Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2329–34 (2014).

49. Orin Kerr agrees that the Court never explained why we should believe people "assume the risk" when they disclose information to a third party. As he puts it, "assumption of risk is a result rather than a rationale." Kerr, *supra* note 21, at 564.

50. *See, e.g.*, Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1760–61 (1994) (arguing that the Court's reasoning in *Smith* has the effect of diminishing our expectation of privacy); Matthew Tokson, *Automation and the Fourth Amendment*, 96 IOWA L. REV. 581, 585 (2011) (arguing that the problems from *Smith*'s holding have expanded as Internet use increases).

51. *E.g.*, Kiel Brennan-Marquez, *Fourth Amendment Fiduciaries*, 84 FORDHAM L. REV. 611, 614–16 (2015); Timothy J. Geverd, *Bulk Telephony Metadata Collection and the Fourth Amendment: The Case for Revisiting the Third-Party Disclosure Doctrine in the Digital Age*, 31 J. MARSHALL J. INFO. TECH. & PRIVACY L. 191, 235 (2014); *see also* Deven R. Desai, *Constitutional Limits on Surveillance: Associational Freedom in the Age of Data Hoarding*, 90 NOTRE DAME L. REV. 579, 625 (2014) (arguing that statutory procedural protections for information gathering are monuments of a dead era, and that like "steam engines in a railroad museum that can still run, they do not serve our needs well"); Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1723–24 (2014) (arguing that even if bulk collection of phone records and the "metadata" program highlighted by Edward Snowden does not implicate the Fourth Amendment, we should consider "more carefully whether the courts might still have a constitutional or subconstitutional

major overhaul, seems inevitable. Recently in *United States v. Jones*,[52] which assessed the constitutionality of the warrantless use of a GPS device, all nine justices found that the use of the device constituted a Fourth Amendment search.[53] Five out of the nine believed the collection of twenty-eight days of geolocation data constituted a search even without taking the physical trespass into account,[54] and Justice Sotomayor's concurring opinion painted a target on the third-party doctrine.[55] *Smith* is on death row.

It might be there for a while.[56] Most scholars know that recognizing access to third-party records as a full-fledged search requiring a warrant and probable cause is an unworkable solution. Police need some way to build up suspicion about a suspect, and keeping every last third-party record off limits until the case progresses to probable cause would unacceptably frustrate investigations.[57] Thus, scholars have tinkered with compromises to the Warrant Clause to find a solution to the incoherence of the third-party doctrine.[58] Some have suggested varying the amount of process required depending on the sensitivity of the records.[59] Others suggest increasing procedural safeguards when the police seek greater quantities of information.[60]

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obligation to determine whether panvasive actions are adequately authorized and regulated by the Legislative Branch").

52. 132 S. Ct. 945 (2012).

53. *Id.* at 949; *id.* at 954 (Sotomayor, J., concurring); *id.* at 957–64 (Alito, J., concurring).

54. *Id.* at 956–57 (Sotomayor, J., concurring) (finding that the tracking of a citizen violates the right to privacy without comment on the physical trespass); *id.* at 964 (Alito, J., concurring) (arguing the same, and writing for Justices Ginsburg, Breyer, and Kagan).

55. *Id.* at 957 (Sotomayor, J., concurring).

56. As Andrew Ferguson cleverly put it to me in conversation, this may be California's death row. Conversation with Andrew Guthrie Ferguson, Professor of Law, Univ. of the D.C., David A. Clarke School of Law, The Seventh Annual Privacy Law Scholars Conference, Washington, D.C. (June 5, 2015)

57. Indeed, this is why federal privacy legislation designed to bolster consumer privacy rights almost always permits law enforcement to access records as long as the records have some relevance to an investigation. Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 503–07 (2013); *see also* 18 U.S.C. § 2703(d) (2012) (allowing law enforcement to access telephone and Internet communications metadata as long as they have "specific and articulable facts" to show that the date is "relevant and material" to an investigation).

58. Colb, *supra* note 18, at 188–89.

59. Stephen E. Henderson, *The Timely Demise of the Fourth Amendment Third Party Doctrine*, 96 IOWA L. REV. BULL. 39, 44 (2011). Henderson's work had great influence on the ABA standards. *Id.* at 40.

60. *See* Desai, *supra* note 51, at 611–25 (recommending procedural protections to better protect against law enforcement amassing large hoards of backward-looking surveillance data); Slobogin, *Making the Most of* Jones, *supra* note 23, at 24 (suggesting that as the length of time of a targeted public search increases, so should the level of procedural safeguards).

The constitutional soundness of these proposals is open to interpretation because the existing Fourth Amendment rules on information gathering have no clear guiding principles.[61] At a high level of abstraction, the Fourth Amendment constrains the government's investigatory powers so that its opportunities to abuse its other powers—especially its penal powers—are limited. For the last fifty years, the balance between privacy and law enforcement interests was struck by defining a Fourth Amendment search through the "reasonable expectations of privacy" test from *Katz v. United States*.[62] If government conduct interferes with a person's reasonable expectations of privacy, then that conduct is treated as a search, and the warrant requirement presumptively applies.[63] Prior to the information revolution, the courts bumped along one new technology at a time, working out a bargain between privacy intrusions and the government's interests in enforcing the law. Occasionally, new technologies like heat-sensing cameras[64] or aerial surveillance[65] would challenge the bargain and force it to adapt, but none of the early surveillance technologies fundamentally changed how law enforcement investigated. They merely enhanced the senses and observations that police were already accustomed to using. They worked at the pace of individual police officers, who had to listen in on bugs and wiretaps, observe from the helicopter, or take the thermal image. They did not—and could not—cause the system-wide disruption that cheap, fast computers do.

Computing power and the accretion of third-party records have challenged the entire framework. The *Katz* test causes problems by setting a strong presumption for a warrant requirement when investigatory conduct is treated as a "search."[66] With stakes that high, courts were naturally hesitant to call something that would colloquially be called a search a "search" for Fourth Amendment purposes.[67] If courts open the definition of "search" to cover more things, they must have the latitude to work exclusively within the Reasonableness Clause of the Fourth Amendment

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61. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 1 (1997) ("The Fourth Amendment today is an embarrassment."); John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 657 ("[R]easonableness as an analytical concept is maddeningly frustrating . . . .").

62. 389 U.S. 347, 362 (1967) (Harlan, J., concurring).

63. *Id.* at 361–62.

64. Kyllo v. United States, 533 U.S. 27, 29–30 (2001).

65. Florida v. Riley, 488 U.S. 445, 447–48 (1989).

66. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 68–70 (1998) (explaining and criticizing the Court's treatment of any warrantless search or seizure as presumptively unconstitutional absent "special circumstances").

67. *See* United States v. White, 401 U.S. 745, 753 (1971) ("Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable.").

and to avoid the Warrant Clause.[68] Reasonableness will be the touchstone. But of course, "reasonableness" isn't stone at all. It is a soup of competing interests.[69] Courts must ensure that the harms caused by government intrusion are proportional to the government's interests. Mass computing affects both sides of the ledger.

Computing does three things very well. It facilitates aggregation, persistence, and searchability. Scholars have grasped the negative potential of aggregated and persistent data.[70] A Fourth Amendment rule that gives the state easy access to large amounts of personal data can cause catastrophic distortions in the balance of power between the government and the governed. However, criminal procedure scholarship has not yet acknowledged how automated searching and filtering can dramatically change criminal investigations, largely (though not exclusively) for the better.[71]

Traditional searches of homes and effects rely on physical intrusions and human observations. By contrast, automated searches and computer-run filters can permit government access to potentially relevant information without risking observation and use of extraneous details. This difference has profound consequences for policing and for the Fourth Amendment. Without automated searchability, even the most legitimate searches performed with a warrant and based on probable cause require police to rifle through an abundance of irrelevant personal items. With automated searchability, most of the private, irrelevant information can be filtered out from police observation. If done well, automated searching can open up access to data for legitimate law enforcement purposes while

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68. *See* Akhil Reed Amar, Terry *and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1098–99 (1998) (examining how a broader definition of searches requires reasonableness as the central Fourth Amendment mandate, rather than warrants or probable cause); Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1514 (2010) (encouraging Fourth Amendment law to recognize greater coverage and to regulate police conduct by looking for unreasonable practices).

69. This problem is on naked display in the Supreme Court's consideration of *Riley v. California*, 134 S. Ct. 2473, 2484–85 (2014), a case in which the Court had to decide whether police could search the contents of a smart phone automatically pursuant to an arrest. In oral argument, the justices were groping for a middle ground between a rule that protects cell-phone privacy and a rule that allows law enforcement access. Amy Howe, *A Whole New World: Today's Oral Arguments in Plain English*, SCOTUSBLOG (Apr. 29, 2014, 5:20 PM), http://www.scotusblog.com/2014/04/a-whole-new-world-todays-oral-arguments-in-plain-english/ [http://perma.cc/Y5Z7-TL4C].

70. *See infra* Part II.

71. For example, Laura Donohue argues that data collection should always be treated as a Fourth Amendment search without regard to whether the collection and processing is done through automation. Donohue, *supra* note 23, at 765. *But see* Erin Murphy, *Databases, Doctrine & Constitutional Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 834 (2010) ("In short, rather than follow an industrial age model reliant upon physical acquisition, constitutional doctrine would transition to an information age approach based on knowledge, creation, and dissemination.").

simultaneously constraining illegitimate searches. This is an unprecedented technological development. The evolving Fourth Amendment can, and should, take advantage of this special quality of databases.[72]

The next seven Parts will show how this can be done by considering the costs and benefits of law enforcement access to third-party records one at a time.

II. Fourth Amendment Privacy

The reasoning of *Smith* is undoubtedly on shaky ground. However, articulating the privacy interests in third-party records is not an easy task either. Privacy advocates must explain why third-party data, even when collected in bulk, implicates the same level of privacy concern as listening to a private conversation or physically searching a home.

Privacy objections can be organized into four categories of harm: collection (the government acquires, maintains, and has ready access to sensitive information about the subject); risk of misuse (the government uses or discloses this information in inappropriate ways); aggregation (the accumulation of sensitive information adds an additional layer of risk); and hassle (even legitimate exercises of criminal investigation will cause a number of downstream intrusive searches and seizures).

A. Collection

The collection interest in third-party records stems from unconsented and unwanted exposure to the government about the details of our lives. Moreover, data collected by the government can be stored and maintained indefinitely.[73] As Jack Balkin has put it, "the rise of the National

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72. In many ways, this article is doing the work invited by Orin Kerr:

> Digital evidence exposes the contingency of the existing rules. It reveals how the rules generated to implement constitutional limits on evidence collection are premised on the dynamics of physical crimes and traditional forms of physical evidence and eyewitness testimony.

Kerr, *supra* note 25, at 306.

73. Candice Roman-Santos, *Concerns Associated with Expanding DNA Databases*, 2 HASTINGS SCI. & TECH. L.J. 267, 268 (2010) (describing the risks associated with DNA samples stored indefinitely by the government in DNA databases); *Government System Stores HealthCare.gov User Info 'Indefinitely,'* NBC NEWS (June 15, 2015, 3:26 PM), http://www.nbcnews.com/tech/security/government-system-stores-healthcare-gov-user-info-indefinitely-n375831 [http://perma.cc/94U2-65Y3] (describing MIDAS, a system that stores users' "names, Social Security numbers, birthdates, addresses, phone numbers, passport numbers, employment status and financial accounts" in perpetuity); Michael Martinez, *ACLU Raises Privacy Concerns About Police Technology Tracking Drivers*, CNN (July 18, 2013, 9:10 AM), http://www.cnn.com/2013/07/17/us/aclu-license-plates-readers/ [http://perma.cc/285Y-RNFB] (summarizing the ACLU's concerns regarding the government's storage of vehicle information, which sometimes remains in databases indefinitely).

Surveillance State portends the death of amnesia."[74] Some of the problems raised by collection and persistence of data are more accurately categorized as problems of risk of abuse. That is, if the state collects the details about what we purchase, where we go, and when, where, and whom we call, it will have a lot of granular information at the ready for harassment or vindictive prosecution. But I will hold off discussing the harms that come from the potential of abuse for now. They will be discussed in the next subpart. This subpart explores the harms immediately and independently imposed by the act of collection. Even apart from the potential for abuse, collection *at all* causes public unease due to the subject's lack of control.

The problems of collection (apart from abuse) are difficult to solve unless Fourth Amendment doctrine is willing to differentiate law enforcement-related government collections from other government collections. Instead, the Supreme Court has gone to great pains to *avoid* that differentiation by insisting government employers, schools, and housing inspectors must comply with Fourth Amendment rules.[75] This puts third-party doctrine reforms in a bind. If the third-party doctrine were altered to forbid the government (in any form) from collecting data on a large scale, the repercussions would be severe. The government has been intimately involved in our personal data for decades, and the sensitivity and detail of data held by government actors is breathtaking.[76] The federal government is the nation's largest employer, and the combined employment at all levels of government accounts for 7% of American jobs.[77] Thirty

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74. Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 13 (2008).

75. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (using a Fourth Amendment reasonableness standard when considering a government employer's invasion of employee privacy); New Jersey v. T.L.O., 469 U.S. 325, 333 (1985) (applying a Fourth Amendment reasonableness requirement to a search conducted by public school officials); Camara v. Mun. Court of S.F., 387 U.S. 523, 533–34 (1967) (holding that municipal housing inspection must comply with Fourth Amendment protections).

76. Bill Stuntz has made these same observations:

> There is a lot to argue about in Fourth and Fifth Amendment law, but the arguments seem to have no effect on debates about the scope of the government's power *outside* traditionally criminal areas. . . . Yet much of what the modern state does *outside* of ordinary criminal investigation intrudes on privacy just as much as the kinds of police conduct that Fourth and Fifth Amendment law forbid.

William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1017 (1995). "[P]rivacy is a poor separating mechanism: it does not distinguish what the police do from what the rest of the government does." *Id.* at 1047. Stuntz suggests reorienting debate to focus on "what makes the police different from, and more threatening than, the government in its other guises." *Id.* at 1019. But ultimately he focuses on force and coercion rather than information gathering. *Id.* at 1020. Stuntz ignored some of the differences between police powers that I identify here (specifically, the potential for aggregation and the discretion of police in directing charges and prosecutions for vindictive or inappropriate reasons).

77. Henry Blodget, *Guess What Percentage of Americans Work for the Government Now Versus the Late 1970s?*, BUS. INSIDER (July 24, 2012, 2:39 PM), http://www.businessinsider.com/percentage-of-americans-work-for-the-government-2012-7 [http://perma.cc/EW22-2EUS].

percent of Americans share their health information with their public health insurers (Medicare or Medicaid).[78] And all of us share the intimate details of our financial lives with the IRS. Government-run libraries know what we've read, public schools know what we've written, and in cities with publicly provided Internet service, the government maintains ISP records.[79]

Each of these examples theoretically can be distinguished from compelled disclosure of records to the government since they involve some amount of quid pro quo bargaining between the government and the employee, patient, and other recipients of service. But a lot of government information collection does not involve even the barest fig leaf of choice. Households randomly selected to complete the U.S. Census Bureau's long form face criminal fines if they refuse to provide the detailed information asked.[80] State and federal law compels the release of medical records for public health surveillance.[81] One of the FDA's innovative programs requires pharmacies and doctors' offices to report data on every prescription and every adverse reaction to look for side effects that went unnoticed in smaller scale clinical trials.[82] Abortion facilities in many states must make their patient-identified records available for inspection by a government official,[83] and pornography studios are under similar record-keeping requirements under federal law.[84] For the last twelve years, NASA has mapped the ocean floor using a satellite with a lens so strong that, as one researcher boasted, you could zoom in on a person on an intersection in Washington, D.C., and be able to tell whether his toes were hanging off the sidewalk.[85] Cities considering congestion taxes for environmental reasons

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78. Daniel B. Wood, *Census Report: More Americans Relying on Medicare, Medicaid*, CHRISTIAN SCI. MONITOR (Sept. 13, 2011), http://www.csmonitor.com/USA/2011/0913/Census-report-More-Americans-relying-on-Medicare-Medicaid-VIDEO [http://perma.cc/U6CH-FBXX].

79. As is the case in Culver City, California and Chattanooga, Tennessee. Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 876 (2012); *see also* James O'Toole, *Chattanooga's Super-fast Publicly Owned Internet*, CNN MONEY (May 20, 2014, 5:53 PM), http://money.cnn.com/2014/05/20/technology/innovation/chattanooga-internet/ [http://perma.cc/U46M-N7UY].

80. 13 U.S.C. § 221 (2012).

81. Michael A. Stoto, *Public Health Surveillance in the Twenty-First Century: Achieving Population Health Goals While Protecting Individuals' Privacy and Confidentiality*, 96 GEO. L.J. 703, 714 (2008).

82. *See* Barbara J. Evans, *Authority of the Food and Drug Administration to Require Data Access and Control Use Rights in the Sentinel Data Network*, 65 FOOD & DRUG L.J. 67, 67 (2010) (describing and questioning the FDA's decision to "require private healthcare data environments—such as insurers, healthcare providers, pharmacists, and other entities that hold data in administrative and clinical databases—to make data available for inclusion" in a "postmarket risk identification and analysis system").

83. *E.g.*, Greenville Women's Clinic v. Bryant, 222 F.3d 157, 179 (4th Cir. 2000).

84. 18 U.S.C. § 2257 (2012); Organization and Management for Abortion Facilities, MO. CODE REGS. ANN. tit. 19, § 30-30.060 (2006).

85. *Nova: Earth From Space* (PBS television broadcast June 26, 2013), http://www.pbs.org/wgbh/nova/earth/earth-from-space.html [http://perma.cc/326F-74G8].

could force taxpayers to transmit detailed geolocation data to the government.[86] Even the Federal Trade Commission, the self-appointed privacy enforcer, uses its subpoena power to collect consumer data and investigate fraudulent practices.[87] Thus, although many have criticized the third-party doctrine for allowing the government to circuitously collect from private industry what it couldn't collect itself,[88] the observation is incomplete. The government, in non-law enforcement forms, collects just about everything.

All of these programs are valuable and repay data subjects with direct or indirect benefits. A prohibition or significant procedural barrier to government collection of sensitive personal information is simply not workable. I do not mean to imply that a privacy interest in government noncollection is wrong or morally flawed, necessarily, but it might ask too much of the Fourth Amendment to roll back these practices now that our governments are as thoroughly data dependent as private companies.

The better approach is to recognize that we have very often permitted the government to collect highly sensitive information in noncriminal contexts that would trouble us in criminal contexts. In other words, if law enforcement data collection is a problem, it is because law enforcement is special.

First, law enforcement collection of third-party records presents *more* risk of inappropriate observation, disclosure, and abuse than similar types of collections by other agencies. Law enforcement has a much closer connection to the Executive or the controlling political party, both of which might have illegitimate interest in directing investigations to harass their rivals and dissenters. But I will account for this heightened potential for abuse of discretion in the next subpart.

Law enforcement is special in other ways, too, because of its unique power to interfere with individual liberties in the most profound ways. But these powers are wielded after the point of collection. They are incorporated into the upcoming discussions on misuse, hassle, and obstruction.

After those special features of law enforcement are accounted for, not much is left of the collection harm. Nevertheless, it would be premature to dismiss collection harms outright since there is evidence that, rationally or not, Americans are more bothered by, and more chilled by, NSA and law

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86. *See* Joe Peach, *The Success of Stockholm's Congestion Pricing Solution*, THISBIGCITY (Aug. 23, 2011), http://thisbigcity.net/the-success-of-stockholms-congestion-pricing-solution/ [http://perma.cc/4PT7-DY3A] (detailing efforts by governments to reduce traffic congestion by tracking the movement of cars in major traffic areas to tax drivers using roads during congested periods).

87. 15 U.S.C. § 49 (2012) (authorizing the FTC to "require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation").

88. TERMS AND CONDITIONS MAY APPLY (Entertainment One 2013).

enforcement collection practices than they are by other significant government collections of sensitive information.[89] Thus, even if other arms of the government collect information similar to the data that could be collected by law enforcement through the third-party doctrine, the public has exhibited a different relationship with law enforcement, and that difference deserves recognition.

B. Risk of Misuse

The risk of government misuse, both intentional and accidental, is a more concrete privacy interest than the abstract problems from collection. Misuse comes in three forms: observation, abuse of discretion, and disclosure.

Any government agent with access to sensitive information might make an inappropriate query and observe something he shouldn't. This was the harm uncovered when an internal audit of NSA employees and contractors found that some of the agents with access to sensitive records had looked up their friends and ex-girlfriends.[90] The government could also use third-party records to map social networks and associations. The victim's associations could be exploited either by inferring something about the victim or by abusing his social and political associations.[91]

Far more troubling, and more specific to the criminal investigation process, is the abuse of discretion problem. Whether or not collection is legitimate when made, a government agent might use the information strategically to pester political dissidents or personal foes. A police officer could search for criminal violations out of eagerness to bring charges. Recent scandals along these lines include prosecutions of journalists and hackers who have caused annoyance and embarrassment,[92] and the IRS's ideologically tilted treatment of nonprofit tax treatment.[93]

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89. *See* Alex Marthews & Catherine Tucker, Government Surveillance and Internet Search Behavior 28 (Apr. 29, 2015) (unpublished manuscript), http://ssrn.com/abstract=2412564 [http://perma.cc/8YDL-RPF3] (identifying a chilling effect related to increased awareness of government surveillance online).

90. Evan Perez, *NSA: Some Used Spying Power to Snoop on Lovers*, CNN (Sept. 27, 2013, 7:58 PM), http://www.cnn.com/2013/09/27/politics/nsa-snooping/ [http://perma.cc/AA64-EARA].

91. The problem of associational inference is not unique to the law enforcement context (the IRS, public hospitals, and public universities have some of this information as well), but because First Amendment case law specifically honors a freedom of association, this problem merits deliberate consideration. *See generally* Desai, *supra* note 51 (arguing that new surveillance techniques in law enforcement threaten freedom of association).

92. Emily Bazelon, *Obama's War on Journalists*, SLATE (May 14, 2013, 6:32 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/obama_s_justice_department_holder_s_leak_investigations_are_outrageous_and.html [http://perma.cc/V59C-V3N8]; Peter Ludlow, *Hacktivists as Gadflies*, N.Y. TIMES (Apr. 13, 2013, 1:36 PM), http://opinionator.blogs.nytimes.com/2013/04/13/hacktivists-as-gadflies/?_r=1 [http://perma.cc/B5BX-HF79].

93. *Judge Orders IRS to Explain Lost Tea Party Emails*, N.Y. POST (July 10, 2014, 3:55 PM), http://nypost.com/2014/07/10/judge-orders-irs-to-explain-lost-tea-party-emails/ [http://perma.cc/

If those tactics fail, the officer could deliberately disclose embarrassing details or use sensitive information to harass the victim.[94] Disclosures can also occur unintentionally if the agency has a data breach or spill and exposes the information to others.

C. Aggregation

Even if governments at various levels regularly collect sensitive data about constituents, the aggregation of *all* data presents additional privacy aggravations.[95] Each agency may collect some category of sensitive data that relates to the agency's particular charge, but as long as agencies keep their data siloed, the risk posed by rogue employees is constrained. So, too, is the harm caused by data breaches. If, by contrast, a law enforcement agency is able to collect data of the same sort maintained by all the various agencies, the risks from inappropriate observation and use are bound to grow nonlinearly.[96] First, the combination of different types of information might be more revealing because of relationships between the information.[97] In fact, even rich collections of just one type of data can reveal, through inferences, other noncollected attributes about the subject, as when geolocation data is used to determine where a person lives, eats, and works, or when telephonic metadata is used to create a detailed map of social networks.[98] And regardless of what types of inferences can or cannot be

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GP73-B2QX]; Stephan Dinan & Seth McLaughlin, *Emails Show IRS' Lois Lerner Specifically Targeted Tea Party*, WASH. TIMES (Sept. 12, 2013), http://www.washingtontimes.com/news/2013/sep/12/emails-ois-lerner-specifically-targeted-tea-party/ [http://perma.cc/EX8G-RBWP]. *But see* Josh Israel & Adam Peck, *New Records: IRS Targeted Progressive Groups More Extensively than Tea Party*, THINKPROGRESS (Apr. 23, 2014, 12:56 PM), http://thinkprogress.org/politics/2014/04/23/3429722/irs-records-tea-party/ [http://perma.cc/BY2T-YF5X] (contradicting claims that only Tea Party organizations applying for tax-exempt status received scrutiny).

94. President Obama's Privacy Review Group held out the risk of abuse as one of the most significant threats posed by the NSA's metadata collection program. Another was repurposing the information for ordinary criminal law enforcement. RICHARD A. CLARKE ET AL., PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD 110–14 (2013), https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf [https://perma.cc/MH4M-PPGX].

95. Andrew Guthrie Ferguson, *Big Data Distortions: Exploring the Limits of the ABA LEATPR Standards*, 66 OKLA. L. REV. 831, 837–40 (2014).

96. "[T]he information held by different merchants, insurers, and government agencies can readily be pooled, opening the way to assembling all the recorded information concerning an individual in a single digital file that can easily be retrieved and searched." Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 248 (2008).

97. For example, if the data subject is known to be married and also known to make multiple phone calls a week to a cell-phone number registered to a woman who is not a work colleague.

98. *See, e.g.*, Steven M. Bellovin et al., *When Enough Is Enough: Location Tracking, Mosaic Theory, and Machine Learning*, 8 N.Y.U. J.L. & LIBERTY 556, 602–27 (2014) (explaining how location data can be mined to reveal other attributes); Donohue, *supra* note 23, at 873–74 (asserting that the government can use telephony metadata to determine patterns and relationships of U.S. citizens).

made, a variety of sensitive data offers more opportunities to discover something embarrassing about a target. An aggregated database might be an irresistible honeypot for government employees.

D. Hassle

A final privacy harm comes in the form of fruitless searches, seizures, and prosecutions of individuals who turn out to be innocent. These experiences impose significant costs in terms of time, humiliation, and insecurity. I have called these costs "hassle" in other work.[99]

Some amount of hassle is inevitable in any criminal enforcement system, but it will become increasingly common if the police start to use data more aggressively to generate and follow up on predictive profiles.[100] Data-driven profiles operating on third-party records offer many benefits, including increased accuracy and equitable application. But there can be significant hassle costs, even when the profiling program meets or exceeds the relevant suspicion standards for a search, if it is applied to large quantities of data en masse. After all, we all pass through short-term phases or circumstances that seem suspicious. (We get lost and drive around the block in a "casing" fashion, or we purchase brownie mix and Bob Marley CDs on the same day.) If police had data and resources to act on all suspicious patterns, we would experience a drastic increase in the number of fruitless stops and searches for common crimes such as theft or the possession of marijuana.[101]

Out of these four privacy interests—collection, risk of abuse, aggregation, and hassle—only collection directly and inevitably clashes with the third-party doctrine. The others could potentially be managed and mitigated after third-party documents are collected. However, there is one more conception of the Fourth Amendment that comes into inescapable conflict with the third-party doctrine. Indeed, it conflicts with the whole of the law enforcement enterprise. The interest in obstruction is considered next.

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99. *See generally* Jane Bambauer, *Hassle*, 113 MICH. L. REV. 461 (2015) (identifying a societal harm when innocent individuals experience frequent searches and seizures).

100. Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 369–73 (2015) (anticipating increased use of predictive profiles by law enforcement agents).

101. For low base-rate crimes like murder, the suspicion standard will guarantee that the number of fruitless searches stays low. If the police must have a high enough "hit rate" (chance of recovery of evidence) for low base-rate crimes, they will not be able to cause much hassle.

III. Fourth Amendment Obstruction

The dominant conception of privacy argues that because we all engage in sensitive yet perfectly legal activities (health decisions, political dissent, sexual behavior, and so forth), privacy is important even if we have nothing to hide.[102] But there is another conception of privacy that seeks to dull the effects of overzealous criminal legislation. Because the substantive criminal law is so broad and complex, Fourth Amendment privacy might be called to service to ensure that we do not suffer disproportionate penalties for minor infractions.[103] In other words, we *all* have something incriminating to hide. These conceptions are not mutually exclusive and in fact coexist without much conflict in the privacy literature.[104]

The obstructionist view of privacy protects people from facing criminal charges for crimes they actually committed. It assumes that the modern criminal code is hazardous.[105] Some criminal statutes are overly complex and easy to break on a technicality (the tax code or Sarbanes-Oxley); some are too vague and wide sweeping, inviting vindictive prosecution (the Computer Fraud and Abuse Act); and some harshly penalize behavior that many (even most) do not consider objectionable (possession of marijuana, immigration violations, or copyright infringement). Obstructionist privacy instincts explain why the public reacts strongly to highly accurate means of criminal detection, such as red-light cameras, speed traps, and record-linking exercises to find "deadbeat

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102. *See generally* Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745 (2007) (discussing the "nothing to hide" argument in popular discourse about privacy and theorizing what makes privacy valuable).

103. *See* ALAN F. WESTIN, PRIVACY AND FREEDOM 35 (1967) ("Some norms are formally adopted—perhaps as law—which society really expects many persons to break."). *See generally* Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process when Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102 (2013) (arguing that given the sheer quantity of criminal statutes, Americans today bear more risk of successful prosecution if they are targeted for investigation).

104. Sometimes they coexist in the same article. *See, e.g.*, Gregory Conti et al., A Conservation Theory of Governance for Automated Law Enforcement 14–16 (Mar. 18, 2014) (unpublished manuscript), http://robots.law.miami.edu/2014/wp-content/uploads/2013/06/Shay-etal-TheoryofConservation_final.pdf [http://perma.cc/DKU2-YUFB] (exploring the possibility of both significant social harm and improved public welfare due to the efficiency of automated law enforcement surveillance).

105. There are a couple other theoretical defenses of obstruction as well. One rests on the idea that people must be given a sporting chance of getting away with crime. David M. O'Brien, *The Fifth Amendment: Fox Hunters, Old Women, Hermits, and the Burger Court*, 54 NOTRE DAME LAW. 26, 35–37 (1978). Another is what Lawrence Rosenthal has called a libertarian model that holds certain places, mainly the home, so critical to liberty and autonomy that they are practically sovereign even against the detection of crime. Lawrence Rosenthal, *Binary Searches and the Central Meaning of the Fourth Amendment*, 22 WM. & MARY BILL RTS. J. 881, 887 (2014). Neither of these theories is particularly rational or well supported once their core assumptions are exposed, as O'Brien and Rosenthal nicely demonstrate.

dads."[106] My own survey research has uncovered evidence that Americans may disapprove of narcotics-sniffing dogs because they have grown weary of the War on Drugs.[107]

The Fourth Amendment provides a convenient surface to wage a counterattack against unjust laws, but using it in this way is likely to be counterproductive. If a criminal law is unjust, the best solution is to modify the substantive law. Fourth Amendment privacy rules may look like a second-best solution if fixing the substantive law is politically infeasible, but that appearance does not hold up upon closer inspection. When a poorly conceived criminal law is left on the books, and its enforcement is constrained through privacy rights instead of substantive revisions, the result is less frequent but less fair enforcement.

The interests of political dissidents, whistle-blowers, and relatively powerless individuals may not be served when government access to third-party records is greatly restricted. After all, a highly motivated investigator can build an individualized case of suspicion against his chosen target, and he will succeed if he focuses on his target long enough. A vindictive investigator might even prefer to avoid facing hard evidence that his target looks indistinguishable from others who were not investigated. A warrant requirement (or something like it) will prevent the target or the public from having the data to show the police willfully ignored similar, allegedly suspicious behaviors when they were performed by other people.

The best way to test whether a criminal statute is appropriately defined and conscribed, and that its penalty is fair, is to aim for more evenly distributed detection so that the costs of a law are felt by the elite and politically powerful.[108] If the entire electorate runs the risk of feeling the pain of enforcement, the punishment is more likely to be proportional to the crime. I have used a "senator's daughter test" as a rough rule of thumb: if the senator's daughter has the same chance of getting caught committing a

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106. DERosa, *supra* note 24, at 16; Somin, *supra* note 24.

107. Jane Bambauer, *Defending the Dog*, 91 Or. L. Rev. 1203, 1205 (2013). This is consistent with the findings of Frank Bowman and Michael Heise, who have demonstrated a drastic decline in federal drug sentences during the 1990s. Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043, 1065–66 (2001); Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 Iowa L. Rev. 477, 479–87 (2002) [hereinafter Bowman & Heise, *Quiet Rebellion II*]. This trend in reduced prosecutions has occurred even while the drug quantity per defendant and the recidivism rate increased, meaning that more serious offenses were receiving shorter sentences. *Id.* at 504–05.

108. In the context of traffic enforcement, Elizabeth Joh has recognized the potential for technology to create a check on police discretion where law has failed to do so. Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 Calif. L. Rev. 199, 204 (2007).

crime as a relative nobody, an irrational law or unjust penalty will be revisited.[109]

Two vignettes from Harvard help illustrate the link between evenhanded enforcement and changes to the substantive law. In 2011, Aaron Swartz, a Harvard fellow and Larry Lessig protégé, was indicted for violations of federal wire fraud and hacking laws.[110] The details of his case are complex,[111] but at the heart of the charges was a scheme to circumvent security measures of MIT and JSTOR in order to download the entire library of articles hosted by JSTOR.[112] The indictment was instantly scandalous to the technorati. Many believed the prosecution was irresponsible given that JSTOR had disclaimed any interest in legal process.[113] But when Aaron Swartz later committed suicide partly due to the stress from his criminal defense, his prosecution opened a national debate about the propriety of the crimes he was charged with.[114] Earlier this year, a bill called "Aaron's Law Act of 2015" was introduced to Congress to amend the Computer Fraud and Abuse Act (CFAA) so that the act does not cover mere violations of a website's terms of service.[115] The CFAA was badly in need of these reforms before Aaron Swartz's indictment. Federal prosecutors had successfully prosecuted many computer users for accessing computer information under facts much more sympathetic than Swartz's.[116] In fact, it is by no means clear that Swartz's conduct would fall

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109. Jane Yakowitz Bambauer, *How the War on Drugs Distorts Privacy Law*, 64 STAN. L. REV. ONLINE 131, 135–36 (2012) (using the chance that the senator's daughter will get caught as a gauge for evenhanded enforcement).

110. Superseding Indictment at 10–13, United States v. Swartz, 945 F. Supp. 2d 216 (D. Mass. 2013) (No. 11-CR-10260), 2012 WL 4341933; John Schwartz, *Internet Activist, a Creator of RSS, Is Dead at 26, Apparently a Suicide*, N.Y. TIMES (Jan. 12, 2013), http://www.nytimes.com/2013/01/13/technology/aaron-swartz-internet-activist-dies-at-26.html?_r=0 [http://perma.cc/4EVQ-DCJZ].

111. I recommend Orin Kerr's summary. Orin Kerr, *The Criminal Charges Against Aaron Swartz (Part 1: The Law)*, VOLOKH CONSPIRACY (Jan. 14, 2013, 2:50 AM), http://volokh.com/2013/01/14/aaron-swartz-charges/ [http://perma.cc/WU45-TSUH].

112. *Id.*

113. Richard Adams, *Harvard's Aaron Swartz Indicted on MIT Hacking Charges*, GUARDIAN (July 21, 2011, 3:35 PM), http://www.theguardian.com/technology/2011/jul/21/aaron-swartz-indicted-hacking-charges [http://perma.cc/UAN5-A5WR].

114. Noam Cohen, *A Data Crusader, a Defendant and Now, a Cause*, N.Y. TIMES (Jan. 13, 2013), http://www.nytimes.com/2013/01/14/technology/aaron-swartz-a-data-crusader-and-now-a-cause.html [http://perma.cc/7MCA-MP9T]; Lawrence Lessig, *Prosecutor as Bully*, LESSIG BLOG, V2 (Jan. 12, 2013), http://lessig.tumblr.com/post/40347463044/prosecutor-as-bully [http://perma.cc/7SBJ-C55E].

115. H.R. 1918, 114th Cong. (2015); S. 1030, 114th Cong. (2015).

116. United States v. Auernheimer, 748 F.3d 525, 529–30 (3rd Cir. 2014) (overturning conviction, on venue grounds, of a gray-hat hacker who downloaded customers' email addresses to demonstrate a security flaw to AT&T); United States v. Drew, 259 F.R.D. 449, 451–52, 457, 467 (C.D. Cal. 2009) (overturning conviction based on violating the MySpace terms of service). The Internet slang "gray hat" refers to hackers who attempt to access restricted information to expose a system's vulnerabilities. *See generally* Robert Lemos, *The Thin Gray Line*, CNET

outside the scope of the CFAA even if the Aaron's Law amendments are adopted, since he circumvented technological, and not merely contractual, barriers.[117] But Swartz's prosecution and subsequent death finally mobilized the powerful and politically connected to demand reform.

Contrast the prosecution of Aaron Swartz with the nonprosecution of Harvard law professor Charles Nesson, who has regularly identified himself as an avid marijuana and LSD user to news outlets.[118] In an interview with *Forbes*, Nesson explained that he preferred not to keep secrets and relied on tenure to protect him from the consequences that most employees would have to face.[119] Nesson's unabashed admissions, without any subsequent criminal investigation, serve as a rather sad reminder that the criminal law informally exempts the privileged. Nesson's blatant drug use sends a shallow signal[120] that drug laws are not enforced in Massachusetts. That signal is incorrect. And it is more incorrect for some than others; during the period that Nesson began to talk openly about his drug use, Massachusetts's marijuana users were twice as likely to be arrested if they were black than if they were white.[121] The experience leaves one to wonder if the process to decriminalize personal marijuana use would have been hastened by the arrests of Nesson and other politically powerful drug users.

More generally, testing the legitimacy of a criminal law could require more, rather than less, enforcement because halfhearted enforcement will skew toward the underclass. Consider this snapshot from drug enforcement: in 1999, the U.S. Attorney for San Diego chose not to charge a single person with possession or sale of crack cocaine even though police

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(Sept. 25, 2002, 7:45 AM), http://www.cnet.com/news/the-thin-gray-line/ [http://perma.cc/5JDQ-VZUQ].

117. Kerr, *supra* note 111.

118. Lloyd Grove, *The Reliable Source*, WASH. POST (Mar. 6, 2002), https://www.washingtonpost.com/archive/lifestyle/2002/03/06/the-reliable-source/62e2b352-2ebe-4191-8d61-8cca67bac01c/ [https://perma.cc/3NDW-SL62]; Tamar Lewin, *Comments Concerning Race Divide Harvard Law School*, N.Y. TIMES (Apr. 20, 2002), http://www.nytimes.com/2002/04/20/us/comments-concerning-race-divide-harvard-law-school.html [http://perma.cc/T3JX-HJ4N].

119. Adam Tanner, *Dean of Cyberspace Charles Nesson Says It's No Use Trying to Hide Secrets*, FORBES (June 28, 2013, 8:17 AM), http://www.forbes.com/sites/adamtanner/2013/06/28/dean-of-cyberspace-charles-nesson-says-its-no-use-trying-to-hide-secrets/ [http://perma.cc/EL3W-D6MC].

120. I am borrowing this term from Bert Huang's excellent article of the same name. However, Huang writes about official licenses to engage in conduct that is otherwise illegal, whereas I am using the term here to explore the signal sent by nonenforcement of conduct that is not formally sanctioned in any way. Bert I. Huang, *Shallow Signals*, 126 HARV. L. REV. 2227, 2232 (2013).

121. AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 52 (2013). The statistics from 2001 are the most relevant. In 2008, Massachusetts decriminalized the possession of small amounts of marijuana. WILLIAM FRANCIS GALVIN, SEC'Y OF THE COMMONWEALTH RECORDS DIV., RETURN OF VOTES FOR MASSACHUSETTS STATE ELECTION 49–50 (2008).

were catching them.[122] Instead, the U.S. Attorney's office focused on the sale of marijuana.[123] The U.S. Attorney for the Eastern District of North Carolina did precisely the opposite—he chose to prosecute crack cases and ignore marijuana.[124] This information arms the public with some evidence of racially motivated prosecutorial choices since the larger minority population in San Diego (Latinos) seemed to be more likely to distribute marijuana while the larger minority population in North Carolina (African-Americans) seemed more likely to distribute crack.[125]

Since the Fourth Amendment's doctrines have the effect of offering greater protections to the educated and wealthy,[126] Fourth Amendment obstruction may have the counterintuitive effect of keeping bad laws on the books for *longer*.

Moreover, since expanded Fourth Amendment rights make the detection of other more serious, less controversial crimes harder, prosecutors and lawmakers are prone to respond by increasing the length of the sentences in order to make the most out of the cases they manage to put together. Alternatively, legislators may pass a greater number of criminal statutes or pass laws with greater breadth to give police more opportunities to make arrests.[127] Fourth Amendment obstructions unwittingly contribute to the arms race.[128]

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122. Bowman & Heise, *Quiet Rebellion II*, *supra* note 107, at 537.

123. *Id.*

124. *Id.*

125. For the size of the minority populations, see Population Estimates, July 1, 2014 for N.C. and San Diego Cty., Cal., *QuickFacts*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045214/37,06073,00 [http://perma.cc/EH5T-8E32]. The data shows that 33.2% of residents in San Diego County are Hispanic/Latino while only 5.6% are Black/African-American, and that in North Carolina, 22.1% of residents are Black/African-American and only 9% are Hispanic/Latino. *Id.* Data on drug distribution from sources other than the criminal justice system are hard to come by. African-Americans are at least perceived to be overrepresented among crack dealers. *See* Lucia Graves, *Crack-Powder Sentencing Disparity: Whites Get Probation, Blacks Get a Decade Behind Bars*, HUFFINGTON POST (Aug. 3, 2010, 3:21 PM), http://www.huffingtonpost.com/2010/08/02/crack-powder-sentencing-d_n_667317.html [http://perma.cc/N7YP-9WRL] ("'Basically whites use cocaine, blacks use crack.'"). This is one of the few instances in which we have enough information to know how the government chose to exercise leniency. If the public, or at least criminal defendants, had more information about what the government knows and systematically chooses to ignore, the consequences could have a checking effect on discretion. Mass collection of third-party data could help in this regard. *See infra* subpart VII(C).

126. *See generally* Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003) (arguing that the Fourth Amendment is applied differently to poor people such that it offers less protection).

127. Stuntz, *supra* note 76, at 1058 (explaining that if a legislature wished to ensure that police could search junkyards whenever they pleased, they could pass detailed regulations to the point where every junkyard is guaranteed to have a violation, thereby establishing probable cause in nearly any circumstance).

128. The consequences are significant. As criminal statutes multiply, police discretion to pull over or arrest anybody under the authority of *some* statute grows in step.

The interests in obstruction cannot play a great role in the design of Fourth Amendment doctrine. Obstruction for its own sake is a direct assault on law enforcement, yet law enforcement is one of the government's "most basic tasks."[129] Thus, while obstruction instincts will no doubt continue to be in the fabric of American culture, and will therefore find their way in Fourth Amendment law in some form, this Article will focus most of its analytical attention on the privacy interests identified in the last Part.

The next Part moves to the other side of the ledger and explores the interests that run against Fourth Amendment values. The first is the most frequently invoked: security. The Parts that follow will consider other interests that are more often overlooked in the course of striking a Fourth Amendment balance. Many of the privacy themes will reemerge and reveal themselves to be more compatible with third-party data collection than they initially seem. This is because, while some Fourth Amendment interests are significant at the collection stage, others dissolve into concerns about unchecked discretion and abuse.[130] The collection of third-party records are sometimes orthogonal, and sometimes antithetical, to police discretion. With the right set of rules, the collection of third-party records can help constrain government abuses of power.

IV. The Fourth Amendment v. Personal Security

The decline of the third-party doctrine's legitimacy offers courts or proactive legislators a rare opportunity to reflect on the larger purpose of the Fourth Amendment. Whatever comes to replace the third-party doctrine should curb the risks of state power without impeding the government's basic obligation to enforce its laws and to enforce them fairly. Crafting the right rule will require a complex balancing of competing interests. The most obvious countervailing interest that regularly conflicts with the Fourth Amendment is the societal interest in law enforcement to prevent and deter crime. Usually this is as far as the balancing goes. Other countervailing interests are ignored by courts and scholars alike.[131] Even if we restrict

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129. Gregg v. Georgia, 428 U.S. 153, 226 (1976) (White, J., concurring).

130. *See, e.g.*, William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REFORM 551, 552, 564–67 (1984) (raising significant policy concerns resulting from unchecked police discretion, and theorizing that such discretion undermines Fourth Amendment rights and other constitutional protections).

131. *See* United States v. Jones, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring) (noting that the legislature is "well situated . . . to balance privacy and public safety in a comprehensive way"); Epstein, *supra* note 23, at 1202 (asserting that a workable conception of privacy rights must find an appropriate mix of privacy and security); Solove, *Data Mining*, *supra* note 20, at 344 (declaring that data mining is part of the privacy–security debate). Christopher Slobogin has considered interests other than privacy that often run against the government's desire to search or seize a person (interests such as freedom from harassment and from false accusations), but he

ourselves to this age-old tension and ignore, for now, all of the other interests identified later in this Article, the balancing act is extremely challenging.

First, estimating privacy harm is a wearisome task. No matter which conception of privacy one measures (sensitivity, aggregation, obstructionism, or hassle), the subjective experience of harm varies widely. Research shows that opinions about data sensitivity and aggregation follow a bimodal distribution.[132] Some people care deeply about control of their personal information, others don't, and the two camps do not understand each other.

Second, even if we did have a consistent and generally accepted measure of privacy costs, our tolerances for those privacy invasions to fight crime will also vary. Each individual's tolerance will depend on his attitude about the specific crime investigated[133] as well as his overall impression of the government's trustworthiness and legitimacy (which may in turn depend on which political party is in power).[134]

For any particular crime, those who oppose the substance of the criminal law will be inclined to take an obstructionist position and will have very little tolerance for government investigations. For example, a proponent of the social justice movement may disagree with the law criminalizing immigration or marijuana use, and may consequently favor stringent Fourth Amendment rules when considering the investigation of those laws. Yet the same person may favor the substance of a law forbidding consumer fraud or hate crimes and would instinctively disfavor Fourth Amendment rules that frustrate the investigations of those crimes. These points of view cannot be reconciled in a single Fourth Amendment standard.

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analyzes these other interests in support of privacy rather than in opposition to it. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 6–7 (1991).

132. Jacob T. Biehl et al., *When Privacy and Utility Are in Harmony: Towards Better Design of Presence Technologies*, 17 PERS. & UBIQUITOUS COMPUTING 503, 504 (2013); *see also* Alessandro Acquisti et al., *What Is Privacy Worth?*, 42 J. LEGAL STUD. 249, 267 (2013) (finding that shoppers will value privacy of their purchasing data differently depending on how potential privacy features are framed).

133. In theory, the Fourth Amendment is indifferent to the crime that is investigated, and at least one Justice (Scalia) has insisted that a search is a search whether the police are investigating murder or jaywalking. *See* Arizona v. Hicks, 480 U.S. 321, 325 (1987) ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable."). *But see* Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 454 (2006) (encouraging courts to give greater deference to police hunches when the suspected offense is serious). But the Fourth Amendment constraints may be loosened considerably for the investigation of terrorism (even domestic terrorism). *See* United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 319–20 (1972) (explaining that judges "can recognize that domestic security surveillance involves different considerations from the surveillance of 'ordinary crime'").

134. Orin Kerr, *Liberals and Conservatives Switch Positions on NSA Surveillance*, VOLOKH CONSPIRACY (Dec. 24, 2013, 3:53 AM), http://volokh.com/2013/12/24/liberals-conservatives-switch-positions-nsa-surveillance/ [http://perma.cc/9ACD-8WKS].

Striking the right balance for the Fourth Amendment becomes all the more complex when third-party records are used to investigate more than one crime. After all, most people have much greater tolerance for law enforcement aimed at preventing serious crimes like terrorist attacks.[135] But unless the Fourth Amendment develops use restrictions prohibiting the government from using information collected in the pursuit of one type of crime in order to prosecute for another, law enforcement can exploit the possibility of detecting a serious crime to justify surveillance and enforcement of other, less dangerous crimes.[136] Even good-faith uses of surveillance to detect murder or terrorism can expand to cover more trivial crimes. Law and policy debates recognize a danger when the government's desire to detect one type of crime, like drug distribution, is parasitic on the government's collection of information under the guise of some other, more serious crime (like terrorism), and potentially could drive expansions of surveillance. For example, drug enforcement could motivate the Transportation Security Administration to continue using X-ray-style bag searches even after the development of new technologies that can search for the presence of the chemicals from explosives (and, importantly, can ignore the chemicals from illicit drugs).[137]

If privacy and security were the only interests at stake, a use restriction would achieve the optimal amount of surveillance activity. The government would engage only in the information gathering that offers decent marginal returns for detecting the serious crime justifying the intrusion in the first place. But although a use-restriction rule would elegantly solve an activity-level problem for one form of surveillance, it would also drive the police to increase other traditional types of surveillance to investigate the lesser crimes. It would also, by design, waste opportunities to repurpose already-collected data even if the surveillance activity level is calibrated to be no greater than needed for serious crime. These results will have serious consequences to the other societal interests explored in this Article—namely reduced discretion, exoneration, and evenhanded enforcement.

This Article will not offer a final, definitive path out of the bog. But it will identify values, other than general law enforcement, that should be taken into account by third-party doctrine reform efforts and will offer some

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135. Slobogin, *Making the Most of* Jones, *supra* note 23, at 14–15 ("The law, including Fourth Amendment law, routinely relaxes restrictions on the government when its aim is to *prevent* serious harm.").

136. Use restrictions are not entirely unprecedented. *E.g.*, Georgia v. Randolph, 547 U.S. 103, 106 (2006) (excluding evidence against only the *nonconsenting* resident when the other provides consent to search).

137. Andrea M. Simbro, Note, *The Sky's the Limit: A Modern Approach to Airport Security*, 56 ARIZ. L. REV. 559, 564–66 (2014); *New TSA Scanners Will Be Able to Read EVERY Molecule in Your Body and Tell What You Had for Breakfast*, DAILY MAIL (Oct. 6, 2012, 1:41 PM), http://www.dailymail.co.uk/news/article-2213892/Picosecond-Programmable-Laser-scanner-Next-generation-technology-read-molecule-body.html [http://perma.cc/5DC6-ZLRT].

first steps for reform. Those first steps include the elimination of unfettered suspect-driven data collection and some restrictions on bulk data collections.

Throughout, I will demonstrate how my proposals differ from others. I will pay special attention to proposals put forward by Christopher Slobogin[138] and by the American Bar Association[139] not because they are fatally flawed, but for just the opposite reason. Both proposals have much to offer in terms of privacy, practicability, and operability. However, both will pose unnecessary conflicts with some worthwhile innovations in policing. The criminal justice scholars are guided by many good intuitions and have raised awareness to problems that deserve to be corrected. But properly understood in the larger context of constitutional values, their proposals put the Fourth Amendment at risk of more incoherence and unintended consequences.

The next Part considers the value of crime-out investigations, which can be profitably separated from other types of investigations because of their inherent limitations on police discretion.

V. The Fourth Amendment v. Crime-Out Investigations

When scholars and judges describe the perils of the third-party doctrine, they focus attention on two forms of practice: the large-scale dragnet and the unrestricted access to a particular target's data without the faintest connection to a suspected crime. The notion that a policeman can gather the records relating to a chosen suspect without any minimum amount of individualized suspicion and without any restriction on its use reverberates precisely the sort of unchecked discretion and raw police power that offends core Fourth Amendment principles.[140] I will refer to this model of policing as "suspect-in." The policeman chooses a suspect, and then filches through third-party records in the hope that there will be some evidence of a crime. Suspect-driven policing begs the question why *this* person was singled out for attention.[141]

There is, however, a different type of investigation that does not follow the suspect-in model. Crime-out law enforcement begins the investigation

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138. *See generally* Slobogin, *Making the Most of* Jones, *supra* note 23, at 4, 18–20 (offering "a statute that attempts to operationalize mosaic theory" by defining a "data search" and creating standards for when a data search is unreasonable).

139. *See generally* ABA STANDARDS, *supra* note 23, at 5 (setting forth new standards that "relate to law enforcement investigatory access to, and storage and disclosure of, records maintained by institutional third parties").

140. *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 560 (1997) (noting that police-enforced public order laws can implicate Fourth Amendment concerns).

141. *See* Orin Kerr, *Why Courts Should Not Quantify Probable Cause*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE 131, 133–34 (Michael Klarman et al. eds., 2012) (explaining that the standard police affidavit provides only a limited picture of the police officers' reasoning).

with the clues left from an already-committed crime and traces them toward a suspect, rather than the other way around.[142] Police access to third-party records could be extremely useful without raising the concerns of suspect-in investigations because police access to data is tethered to a particular harmful event (a completed crime), and collection can be limited based on the particulars of the crime rather than the beliefs of the police.

Some routine forms of crime-out third-party data access will be noncontroversial, as when law enforcement uses routing and IP-address information to identify a malicious hacker or requests the footage of a security camera near the scene of a crime. This type of crime-out investigation would fit within a warrant requirement if access to records is expected to lead directly to, and only to, the guilty.[143] But if the Fourth Amendment evolves to require a warrant, probable cause, or even reasonable suspicion in order to access third-party records, the process might not be flexible enough to accommodate some valuable and legitimate crime-out investigating.

To illustrate, suppose a botched mugging led to a severe assault at the southeast entrance to Central Park around 9:00 p.m. on May 1, 2013.[144] Ideally, the police should be able to access third-party cell-phone records in order to identify who was near the southeast entrance to the park around that time. If the police knew which direction the perpetrators ran, the query could be narrower still: cell-phone customers who were near the entrance to the park and then traveled in the right direction. This sort of information could give the police an initial suspect pool that could then be winnowed further with the usual detective work. Police and the FBI have occasionally used location information in a crime-out sort of way to identify jewelry thieves who stole from one location and pawned at another,[145] to find a

142. This is identical, or at least very similar, to Christopher Slobogin's event-driven versus suspect-driven investigations. CHRISTOPHER SLOBOGIN, PRIVACY AT RISK, THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 191–96 (2007). It is distinguishable from Andrew Ferguson's "unknown" or "stranger" variety of law enforcement in which the police don't know the identity of their target but have selected a target based on their observations of his conduct and attributes. Ferguson, *supra* note 100, at 341–43.

143. On the other hand, access to some third-party records (such as library, hospital, and legal-representation records) might be controversial even when police are following the leads from a crime scene. In some narrow contexts, we may not even tolerate a warrant process if law enforcement detection could risk deterring guilty criminals from accessing services that we want them to have (the advice of a lawyer, for instance).

144. My example is, coincidentally, very similar to an example carried out in the ABA's report, although they assess the ethics of accessing information about the details of one particular phone number. ABA STANDARDS, *supra* note 23, at 11–13.

145. Conversation with Thomas O'Malley, Assistant U.S. Attorney, U.S. Dep't of Justice, The Seventh Annual Privacy Law Scholars Conference, Washington, D.C. (June 5, 2015); *see also* John Kelly, *Cellphone Data Spying: It's Not Just the NSA*, USA TODAY (Dec. 8, 2013), http://www.usatoday.com/story/news/nation/2013/12/08/cellphone-data-spying-nsa-police/3902809/ [http://perma.cc/33XM-472F] (describing how police have tried to use data dumps from cell towers near crime scenes to identify perpetrators).

perpetrator with the first name "Chris" who lives on "Thompkins,"[146] or to identify a rapist with a unique modus operandi who committed crimes in Pennsylvania and Colorado.[147] But they can and arguably should use this approach more often. This approach has all the more potential when the third-party records held by telecommunications providers includes video footage collected automatically by Google Glass wearers.[148]

Most existing proposals for third-party doctrine reform would not allow this type of crime-out request. The practice could not stand up to a fully loaded warrant requirement because police cannot expect to have probable cause for each and every person whose data is released. Indeed, the police can and should expect that most of the records will identify innocent cell-phone customers. The practice would also fail the more permissive reasonable-suspicion standard that Christopher Slobogin proposes should apply to searches targeting a particular place.[149] Even assuming courts would accept a purely quantitative calculation of reasonable suspicion, the perpetrators are likely to make up only a small percentage of the customers whose data could be produced under a tailored crime-out request.

The ABA Committee's report on the use of third-party records suggests that it endorses the use of records for crime-out investigations.

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146. LEXISNEXIS, CASE STUDIES: LEXISNEXIS ACCURINT FOR LAW ENFORCEMENT 3–4 (2011), http://www.lexisnexis.com/government/solutions/casestudy/accurintle.pdf [http://perma.cc/4NMR-FGAY].

147. *See* SLOBOGIN, *supra* note 142, at 191 (describing how rape investigators used a computer search of residential record data to identify males who lived in both Pennsylvania and Colorado where the rapes happened).

148. *See Google Glass and Privacy*, ELECTRONIC PRIVACY INFO. CTR., https://epic.org/privacy/google/glass/ [https://perma.cc/E2WX-H7XA] (describing the difficulty in knowing whether Google Glass is recording video and noting that all Google Glass data is housed in a cloud server). This is similar in concept to gunshot-detecting video cameras installed on some street corners. These devices alert the police and begin to transmit footage when the device is activated by the sound of a gunshot. Amit Asaravala, *Shhh . . . Do You Hear Gunfire?*, WIRED (Nov. 23, 2004), http://archive.wired.com/science/discoveries/news/2004/11/65802 [http://perma.cc/QC37-KYDZ]. Some jurisdictions have been disappointed with the performance of these systems. *E.g.*, *ShotSpotter, Gunshot Detection System, Helps Cops Find Killers*, HUFFINGTON POST (Apr. 25, 2012, 2:53 AM), http://www.huffingtonpost.com/2012/04/24/Shotspotter_n_1450650.html [http://perma.cc/4BQW-U58B]; Greg Toppo, *Gunshot Detection System in Delaware Comes Up Blank*, USA TODAY (Feb. 7, 2014, 2:40 PM), http://www.usatoday.com/story/news/nation/2014/02/07/wilmington-gunshot-cameras/5284175/ [http://perma.cc/US6T-T47X].

149. SLOBOGIN, *supra* note 142, at 28–30. However, in other work Slobogin uses a standard for reasonable suspicion that asks whether the search (as a whole) is likely to lead to more evidence of crime. Slobogin, *Making the Most of* Jones, *supra* note 23, at 22. This standard may be compatible with the one I propose here. Stephanie Pell and Christopher Soghoian also suggest using a reasonable-suspicion standard for electronic location data. Stephanie K. Pell & Christopher Soghoian, *Can You See Me Now?: Toward Reasonable Standards for Law Enforcement Access to Location Data that Congress Could Enact*, 27 BERKELEY TECH. L.J. 117, 180 (2012).

The report gives two examples: when "toll tag records allow police to learn the culprit in a fatal hit-and-run" and where hospital admission records might lead to the identification of a suspect involved in a shooting.[150] The toll-tag records in particular seem very similar—assuming that the "hit-and-runner" was not the only person driving through the relevant tollbooths within the time frame, the example suggests (without saying it) that the police would be able to comb through not only the hit-and-runner's toll-tag records, but other people's too. And yet, by their own legal scheme, law enforcement would not be able to access the records in my Central Park example or their own toll-tag hypotheticals unless the suspect is the only person, or one of only three or four, who might be identified by the records search (and could thereby meet the reasonable-suspicion standard required for medium sensitivity records).

This is an unfortunate result of the traditional tiers of Fourth Amendment suspicion. Discrete searches of records tailored to a crime have the hallmarks of good police work and Fourth Amendment legitimacy. Unlike the current, unbounded third-party doctrine, this system cannot expand to cover the universe of records. The police initiate a crime-out query of third-party records only after a crime has occurred, and they have little control over the selection of people who will be included in the returned results.[151] In other words, crime-out investigating imposes constraints on police discretion.[152]

The Fourth Amendment should not get in the way of small, crime-specific dragnets that can identify witnesses and suspects based on the specifics of a case. Returning to the New York mugging hypothetical, the police department should be able to issue a subpoena that requires the disclosure of cell-phone records on a designated temporal and geographic range. Other types of third-party records, too, should be accessible through a crime-driven subpoena that filters for factors related to a particular crime, whatever the data type.[153] The government should be able to access records

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150. ABA STANDARDS, *supra* note 23, at 3–4.

151. Even if a corrupt police officer were willing to make up a crime out of whole cloth, they would not be able to learn any information about a vindictively chosen target, unless the officer already knew the record's details of the target well enough to know that the target will be included in the query responses.

152. In the aftermath of *United States v. Jones*, Peter Swire and Erin Murphy identified limited discretion as a hallmark of good investigation practices. *See* Peter P. Swire & Erin E. Murphy, *How to Address Standardless Discretion After* Jones 1–3 (Ohio St. Univ., Moritz Coll. of Law, Working Paper No. 177, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122941 [http://perma.cc/2GNQ-N4GK] (proposing a reasonableness test under the Fourth Amendment as an alternative to the "general warrant" approach in police search and seizures).

153. One exception to this general proposition are data requests that run against law or public policy because the government has a good interest in keeping even the criminal perpetrator's records confidential. The most common example is hospital and health-care records. Because the State has an interest in making sure that all people, even criminals, are not dissuaded from seeking

about telephone calls, Internet searches, or credit-card transactions, too, if the parameters of the data request are appropriately tailored to the specifics of a particular crime.[154]

Slobogin's proposal, the ABA Standards, and most other proposals can be reconciled fairly easily with this approach. The concepts introduced here are not new to the criminal procedure scholarship. Orin Kerr has suggested that law could limit the number of transactional accounts that the police can compel at any one time.[155] And Christopher Slobogin has himself distinguished between "event-driven" and "target-driven" investigations in order to justify lower suspicion standards for the former.[156] (Event-driven investigations are equivalent to the practices that I am calling "crime-out," and "target-driven" investigations are suspect-in.) At one time, Slobogin was prepared to permit a mere "relevance" standard (which in practice is no standard at all[157]) for most private records used in a crime-out investigation,[158] but he reversed course in his more recent writing and now advocates for the use of a reasonable-suspicion standard.[159]

Slobogin did not fully flesh out why the distinction between the two investigation types mattered as much as it does.[160] Had he explained the benefits that come from crime-out investigations that hold police discretion in check, so that police have much less control in selecting who will be the subject of investigation, the usual suspicion standards (both probable cause and its more lenient cousin reasonable suspicion) would look like the poor fits they are.

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medical attention when they need it, many courts have already recognized an exception to the third-party doctrine in the context of medical records where an evidentiary privilege would apply.

154. An inappropriately tailored request will result in the return of data that is too numerous to be usefully followed up by the investigation team and that, therefore, shares the qualities of bulk data collection which, like suspect-driven investigations, I argue is contrary to Fourth Amendment values and serves no other compelling purpose.

155. Kerr, *supra* note 25, at 309. He also suggests that information collected should be subject to use restrictions and data-destruction requirements. *Id.* I have not incorporated these limitations because they could get in the way of defensive or exculpatory uses of the same information. *See supra* Part IV.

156. SLOBOGIN, *supra* note 142, at 186.

157. Ferguson, *supra* note 95, at 846 (stating that "[i]n practice, there is little required to obtain information under [the relevance] threshold" and using NSA access to telephonic metadata as an illustration).

158. SLOBOGIN, *supra* note 142, at 186. But he has consistently recommended the reasonable-suspicion standard for telephone records, medical records, and combinations of less sensitive records. *Id.* at 186, 194. He defines "reasonable suspicion" to mean a hit rate of roughly 30%, *id.* at 194, which would wipe out the sort of subpoena I describe in this Part.

159. *See* Slobogin, *Making the Most of* Jones, *supra* note 23, at 17, 28 (proposing legislation requiring crime-out data searches based on a targeted location to meet at least a reasonable suspicion standard).

160. Slobogin points to the lack of sensitivity in the information and the relatively small number of data points to justify the distinction. SLOBOGIN, *supra* note 142, at 194. I believe these are much less important than the limitations on discretion.

My proposal gives wide latitude to crime-out investigations because the privacy tradeoffs are modest. These investigations differ from the crummy scenarios motivating reform in which law enforcement accesses a particular target's personal data based on spite or a bald hunch because the opportunities for spite and misuse are greatly reduced. And crime-out investigations collect information on a vastly different scale than the NSA telephonic metadata programs. Moreover, the law enforcement interests are heightened in crime-out investigations because they will usually be prompted by a victim who has reported a crime. Thus, this lenient standard for crime-out investigating will be employed most often for crimes that cause direct harms (like theft and violence) rather than sin crimes (like drug use and gambling), which are perceived to be (and arguably are) less serious offenses.

Next we turn to the Fourth Amendment's conflict with innocence. As the next Part will show, access to third-party records should be available to the government when it has identified a suspect for a particular crime in order to avoid false arrests and wrongful convictions.

VI. The Fourth Amendment v. Due Process

When thinking abstractly about the Fourth Amendment's protections, scholars typically balance privacy against general interests in law enforcement. But once a particular suspect has been singled out, the privacy of others has the potential to obstruct that suspect's exoneration. When this happens, the diffused privacy interests of many are pitted against the acute due process interests of the few.

The state's duties to attempt to exonerate a suspect are vague. It has a duty under *Brady v. Maryland*[161] to disclose exculpating evidence to a criminal defendant, but the duty does not vest until indictment.[162] Also, *Brady* requires only that the government hand over information that it actually has; nothing in the case law obligates the government to perform additional investigation in search of evidence that might prove the defendant's innocence and someone else's guilt.[163]

Sometimes third-party records concerning the suspect himself can nullify the suspicion forming around him. Police are likely to seek out these records when working up a case against the suspect. But when a suspect's own records are ambiguous or nonexistent, third-party records about other people could shed light on what actually happened and could direct police to witnesses or alternative suspects. Video footage shot by a bystander or by an ATM surveillance camera could conflict with the government's theory about what had occurred (as it did for one Occupy

161. 373 U.S. 83, 87–88 (1963).

162. Giglio v. United States, 405 U.S. 150, 154–55 (1972).

163. *See Brady*, 373 U.S. at 87–88.

Wall Street protester[164]), or the metadata from photographs posted to Facebook might put the police on the lead of another suspect—somebody in a photograph at the right place and time who was not noticed by witnesses. Thus, third-party records could occasionally save a suspect from the heartache and personal costs of having prolonged investigatory attention focused on him. When police are working up a suspect, intrusion into other consumers' lives may be justified not just on the basis of a general societal interest in crime fighting, but also by the specific liberty interests of a suspect.

Joshua Fairfield and Erik Luna argue that criminal defendants should have access to the same digital records as the government so that the wrongly accused are better able to prove their innocence.[165] Their work in defining "digital innocence" is so thorough and convincing that the defensive access to records they propose is a no-brainer. (Indeed, on the same logic, a murder suspect in Florida convinced a judge that he should have access to phone records held by the NSA in order to defend himself.[166]) However, Fairfield and Luna do not go so far as to endorse government collection of third-party records in the investigation phase. In fact, they explicitly distance their project from government data collection, calling it "anathema to a liberal, open democracy,"[167] despite the obvious benefits that third-party data could have for innocent suspects, arrestees, and defendants.

Fairfield and Luna's unwillingness to explore exoneration as a factor in the debates about data collection is perfectly understandable. Their argument—that defendants should have the same access to records that the government does—is valid no matter how much or little the government is able to collect. A thorough discussion on the ethics of data collection would distract readers from the power of their reasoning. But their declaration against data collection is confusing given their enthusiasm for its exoneration potential. Government collection of third-party data could come to the aid not only of the wrongfully convicted (a group that constitutes as much as 1%–4% of convicts[168]) but also the wrongly arrested

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164. Nick Pinto, *Jury Finds Occupy Wall Street Protester Innocent After Video Contradicts Police Testimony*, VILLAGE VOICE (Mar. 1, 2013), http://www.villagevoice.com/news/jury-finds-occupy-wall-street-protester-innocent-after-video-contradicts-police-testimony-updated-video-6703421 [http://perma.cc/LYH3-YCP9].

165. Joshua A.T. Fairfield & Erik Luna, *Digital Innocence*, 99 CORNELL L. REV. 981, 1024–31 (2014).

166. Order Requiring Response from Government at 2–3, United States v. Davis, No. 11–60285-CR (S.D. Fla. June 6, 2013), https://assets.documentcloud.org/documents/713110/147116286-order-requiring-response-re-fisa-records.pdf [http://perma.cc/VBS9-P6KK].

167. Fairfield & Luna, *supra* note 165, at 986.

168. *See, e.g.*, *id.* at 993 (noting that the wrongful conviction rate lies between 0.5% and 1%); Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230, 7230 (2014) (estimating that 4.1% of convicts

and suspected, who could be spared the hassle and pain of searches, seizures, and charges.

This tension between normative commitments for exoneration and against collection is not unique to data. DNA databases have bedeviled criminal justice scholars for the same reasons: innocence is better served by collecting everybody's DNA, and privacy is better served by collecting nobody's.[169] Expanding Fourth Amendment privacy rights to thwart the collection of information—whether DNA or data—will come at great cost to the unlucky subset of suspects whose innocence would become apparent from that information. These tradeoffs are seldom acknowledged, so we lack the analytical tools to determine how a compromise between privacy and innocence should be reached.[170]

Even if the small chance of exonerating the innocent cannot justify third-party data collection on a vast scale, surely the interests of potentially innocent criminal defendants should tip the scales at moments when data collection is most likely to suss out exonerating information—when police have probable cause to make an arrest.

The crime-out process described in the last Part can and should be used to access records that can confirm or disprove the guilt of a specific, arrestable suspect. For example, returning to the hypothetical mugging that occurred on the southeast entrance to Central Park, suppose the criminal investigation has centered on a particular suspect and a search or arrest warrant can be justified on probable cause. Before the police take any of those formal steps, they should be able to use a crime-out subpoena to access data that might lead the police to more witnesses or other suspects. These witnesses can corroborate or refute the police's working theory of the case. Ideally, in light of how simple and inexpensive these sorts of searches could be, the government should have an affirmative obligation to access them to find evidence that supports either the government's or the defendant's arguments. But in the absence of affirmative obligation, the Fourth Amendment should at the very least avoid getting in the way.

There are other ways in which police access to third-party records might have unexpected positive effects on civil liberties. Access to third-party records may chill crime more effectively and with fewer restrictions

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sentenced to death would be exonerated if "all death-sentenced defendants remained under sentence of death indefinitely"); Marvin Zalman, *Quantitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 231 (2012) (estimating that wrongful convictions across all crimes occur at a rate of about 1%).

169. *Compare* Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161, 178 (2013) (criticizing collection), *with* Jason Kreag, *Letting Innocence Suffer: The Need for Defense Access to the Law Enforcement DNA Database*, 36 CARDOZO L. REV. 805, 808–12 (2015) (arguing for greater access to DNA databases by criminal defendants).

170. Jane Bambauer, *Collection Anxiety*, 99 CORNELL L. REV. ONLINE 195, 196–97 (2014).

on liberty than traditional law enforcement. This is one rationale for the historic rise in the number of wiretaps sought to detect white-collar crime: while law enforcement is important, prosecutors also wanted Wall Street to understand that the government is paying attention.[171] Similarly, the Rialto, California Police Department's adoption of recording equipment worn at all times by police officers in the field had the immediate effect of drastically diminishing the number of complaints about police brutality.[172] The equipment did not need to collect evidence of police abuses of force because the surveillance stopped the abuse from occurring in the first place.

Of course, there are some significant dangers to using surveillance as a means of deterrence. This sort of "preventative law enforcement" may achieve the population control outcomes that tyrannical governments always want without having to face a constitutional challenge.[173] That is, government access to third-party records may chill many good and socially productive behaviors, not just criminal ones.[174] Because it seems extraordinarily difficult to cultivate one kind of chill (crime) and not others (political dissent and other valuable behaviors), I mean only to flag this as a topic of further research.[175]

The opportunity to deter crime without activating the full machinery of arrest, prosecution, and incarceration is controversial, but well worth consideration. Bill Stuntz famously argued that America's addiction to incarceration was the result of having too few police on the streets.[176]

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171. *See* Zachary A. Goldfarb, *Insider Trading Case Snares Six*, WASH. POST (Oct. 17, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/10/16/AR2009101602494.html [http://perma.cc/3ZX7-ELHJ] (quoting Preet Bharara, U.S. Attorney for the Southern District of New York, in connection with the first investigation to use wiretaps to obtain evidence of insider trading: "As the defendants in this case have now learned the hard way, they may have been privy to a lot of confidential corporate information, but there was one secret they did not know—we were listening").

172. Rory Carroll, *California Police Use of Body Cameras Cuts Violence and Complaints*, GUARDIAN (Nov. 4, 2013), http://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints-rialto [http://perma.cc/S8NZ-VWAS].

173. Jack Balkin warns that "government will create a parallel track of preventative law enforcement that routes around the traditional guarantees of the Bill of Rights." Balkin, *supra* note 74, at 15.

174. For example, Alex Marthews and Cathleen Tucker have uncovered some evidence that government surveillance changes search behavior. Marthews & Tucker, *supra* note 89, at 28.

175. Michael Rich offers a model for assessing whether we should use technological intervention to make some crimes impossible, which includes benefits not only in the form of reduced crime, but reduced incarceration and investigation costs, too. In the case of driving under the influence, he argues we should consider redesigning technology so that drivers with a high blood-alcohol level cannot start their cars. Michael L. Rich, *Should We Make Crime Impossible?*, 36 HARV. J.L. & PUB. POL'Y 795, 805–07, 830, 846 (2013).

176. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2030–34 (2008) [hereinafter Stuntz, *Unequal Justice*]; William J. Stuntz, *Law and Disorder: The Case for a Police Surge*, WKLY. STANDARD (Feb. 23, 2009) [hereinafter Stuntz, *Law and Disorder*], http://www.weeklystandard.com/Content/Public/Articles/000/000/016/157ehmas.asp [http://perma.cc/TXU9-AR8U].

Police presence, Stuntz argued (in part based on Steve Levitt's empirical research), is a vastly more effective deterrent against both crime and police misconduct.[177] Indeed, the ABA picked up on this theme by pointing out that one of the advantages in using third-party data is to transform investigation into something much less confrontational and dangerous to police and suspects.[178] But this insight did not persuade the Committee to stray from the traditional individualized-suspicion models, and it was certainly not on the minds of the Eleventh Circuit panel when it abandoned the third-party doctrine and introduced a warrant requirement.[179]

It is a bit troubling that after third-party doctrine reform a policeman might be able to holler at a person, forcibly spin him around, press him to the hood of a car, and publicly feel up his entire body more easily than he could get access to his Amazon records. A total reversal of the third-party doctrine will add new internal inconsistencies to the body of Fourth Amendment law. More modest reforms can solve the current paradoxes brought about by the current laissez-faire third-party doctrine without adding a new set of paradoxes.

Next we will explore another aspect of the third-party doctrine's role in the criminal justice system as a whole: evenhandedness. The next Part will explore how law enforcement's use of third-party records can promote fair distribution of the costs of criminal investigation.

VII. The Fourth Amendment v. Equal Protection

The most immediate goal of criminal law enforcement is to deter the commission of crime. But to achieve that goal and to do it fairly, courts must monitor the distributional effects of law enforcement. John Hart Ely called the Fourth Amendment the "harbinger of the Equal Protection Clause."[180] Although the Supreme Court largely disagrees,[181] distributional justice is an important social goal within and outside the Fourth Amendment.

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177. Stuntz, *Unequal Justice*, *supra* note 176, at 2030–34; Stuntz, *Law and Disorder*, *supra* note 176.

178. ABA STANDARDS, *supra* note 23, at 4.

179. *See supra* notes 1–30 and accompanying text.

180. JOHN HART ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW 97 (1980). Tracey Maclin and Anthony Thompson have argued that racially disparate effects should be incorporated into the analysis of Fourth Amendment law, and Christopher Slobogin has adapted John Hart Ely's political-process theory to argue that Fourth Amendment searches on subgroups of the population must be performed in an evenhanded way. Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 362 (1998); Slobogin, *Making the Most of* Jones, *supra* note 23, at 4; Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1005–12 (1999).

181. Whren v. United States, 517 U.S. 806, 813 (1996); *see also* Robinson v. California, 370 U.S. 660, 661 n.2 (1962) (refusing to consider Fourth or Fourteenth Amendment implications of possible ulterior motives for a search incident to arrest).

Third-party records could have a starring role in a modern, more equitable style of law enforcement by facilitating pattern-based data mining—one of the least understood and most feared innovations in modern policing. Algorithmic policing has a long and distinguished list of detractors for the predictable reasons (error, power, and the lack of individualization).[182] But it has an equally impressive list of supporters.

Big data techniques came of age in the wake of the September 11th attacks. The timing was unfortunate. Early uses of data-driven crime prediction were frantically directed at solving an impossible problem: detecting terrorism.[183] Predicting which people are terrorists is a futile task because virtually no one is. Like any rare crime (e.g., mass shootings), using a lot of external data may outperform common-sense instincts about which types of people are at slightly elevated risk of committing a terrorist act, but even the best algorithms are lousy. Since the government is hell-bent on avoiding type II errors (letting a terrorist slip through), the algorithm will inevitably make a lot of false alerts.[184] Add to all this the fact that the American government's profiles attached great weight to religiosity and national origin, and the result is an understandable, deep distrust of data-driven policing within the legal academy.[185]

But most crimes are not as rare as terrorism. And some of those crimes leave patterns—watermarks in third-party records—that show a high probability that a crime has occurred. Credit-card fraud, botnets, and Ponzi

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182. BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 2–3 (2007); CAROLE MCCARTNEY, FORENSIC IDENTIFICATION AND CRIMINAL JUSTICE 64–66 (2013). I aim a sharp critique at the lack-of-individualization complaint in previous work. *See generally* Bambauer, *supra* note 99.

183. *See* HARCOURT, *supra* note 182, at 227–36 (discussing the viability of racial profiling and statistical evidence for the purpose of counterterrorism in the post-9/11 context); H. George Frederickson & Todd R. LaPorte, *Airport Security, High Reliability, and the Problem of Rationality*, 62 PUB. ADMIN. REV. (SPECIAL ISSUE) 33, 35 (2002) (explaining type I and type II errors in relation to airport security and terrorist attacks); Daniel J. Steinbock, *Data Matching, Data Mining, and Due Process*, 40 GA. L. REV. 1, 5–6 (2005) (referencing the perceived importance of data mining in post-9/11 counterterrorism planning).

184. *E.g.*, Sara Kehaulani Goo, *Cat Stevens Held After D.C. Flight Diverted*, WASH. POST (Sept. 22, 2004), http://www.washingtonpost.com/wp-dyn/articles/A39772-2004Sep21.html [http://perma.cc/KC7K-ZA4F] (reporting that a plane was diverted after singer Yusuf Islam, formerly known as Cat Stevens, boarded despite being on the government's no-fly list following his conversion to Islam).

185. *See* HARCOURT, *supra* note 182, at 230–34 (detailing why data-driven profiling is unreliable for predicting terror attacks); Solove, *Data Mining*, *supra* note 20, at 358–59 (raising a variety of concerns regarding data mining for law enforcement purposes); Steinbock, *supra* note 183, at 84 (concluding that because investigative tools like data mining raise significant due process concerns, "they should be subject to the rule of law, not located outside of it"). I am in agreement with Daniel Solove that critics of government transparency and scholars urging deference to the Executive Branch were in a shortsighted, crisis-driven panic, especially since lightning continues to be a bigger killer than terrorism. Solove, *Data Mining*, *supra* note 20, at 351.

schemes leave telltale signs in consumer transactions and communications metadata, and the algorithms used to detect them are very successful.[186]

Thus, the ABA standards committee, Christopher Slobogin, Tal Zarsky, and Andrew Ferguson have all endorsed the use of data mining to detect signs of criminal conduct under certain conditions.[187] This momentum among criminal procedure scholars may seem troubling amid the growing fears of technological change and a nontransparent government. This Part explains the guarded optimism.[188]

Pattern-driven data mining of third-party records can lead to fairer enforcement of our criminal laws through three mechanisms. First, looking at the enforcement of any one particular crime, subpart VII(A) describes how data mining can lead to more equitable enforcement by reducing the opportunities for human bias to infect decision-making. Subpart VII(B) shows that pattern-driven data mining of third-party records allows for the detection of different *sorts* of crimes—crimes that are almost entirely electronic and often committed by criminals from higher social classes. Subpart VII(C) argues that transaction data can also provide badly needed information to law enforcement supervisors, criminal defendants, and the public at large about whether criminal laws are enforced equitably.

However, none of these potential uses can be realized without bulk data collection, and that style of mass collection strains the privacy principles at the center of Fourth Amendment doctrine. This Part concludes with a proposal for facilitating pattern-driven data mining designed with appropriate checks in place. In brief, I argue that bulk data collection should be treated as a Fourth Amendment search since it presents the same risk of discretionary or harassing use as suspect-driven data collection. However, police should be able to make liberal use of the special-needs doctrine in order to collect data in bulk for experimental and accountable pattern-driven investigations.

A. Same Crime, Better Suspicion

Some crimes can be investigated crime-out rather than suspect-in. As I explained above, these types of investigations usefully constrain the government to investigating a finite set of suspects (whether they use third-party records or not). They also drive the police to follow evidence-based

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186. *See infra* subpart VII(B).

187. ABA STANDARDS, *supra* note 23, at 111; Ferguson, *supra* note 100, at 405–09; Slobogin, *Making the Most of* Jones, *supra* note 23, at 28–30; Tal Z. Zarsky, *Governmental Data Mining and Its Alternatives*, 116 PENN. ST. L. REV. 285, 311–12 (2011).

188. Tal Zarsky has argued that pattern-based data mining has the potential to radically reduce law enforcement bias and inequities if (*if*) it is done right. Tal Z. Zarsky, *Automated Prediction: Perception, Law, and Policy*, 55 COMM. ACM, Sept. 2012, at 33, 35; Zarsky, *supra* note 187, at 311–12.

leads rather than their own hunches and suspicions.[189] However, police cannot limit themselves to investigating crime-out cases. There are too many crimes with diffuse, disempowered, or unaware victims. These include attempts, financial crimes, domestic abuse, and contraband distribution.

From an equal protection standpoint, allowing the government to access third-party data has a lot of upsides when compared to the status quo. After all, police must build their cases somehow, and conventional policing puts a disproportionate share of the costs of law enforcement on poor and minority communities. The Supreme Court has approved seat-of-the-pants police investigating methods in cases like *Wardlow*,[190] *Terry*,[191] and *Gates*.[192] These have sent lower courts on the hunt for silly police narratives without any objective evidence that the policeman's inferences are a good measure of suspicion.[193] But heavy reliance on officer testimony is prone to misjudgment or even outright deceit ("testilying").[194] And judges allow officers to use squishy, subjective factors like furtive movements,[195] and inferences based on the officer's "training and

189. Although, some of those evidence-based leads, such as eyewitness testimony, have a long track record of inaccuracy and bias. Radley Balko, *Eyewitness Testimony on Trial*, REASON.COM (Apr. 8, 2009), https://reason.com/archives/2009/04/08/eyewitness-testimony-on-trial [https://perma.cc/L5LS-8JG6].

190. Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (finding that the reasonable suspicion standard was met when the police entered a "high crime area" and saw some teenaged kids burst into "unprovoked flight").

191. Terry v. Ohio, 392 U.S. 1, 6 (1968) (finding that an officer had reasonable suspicion to stop the two men when he interpreted their "elaborately casual" manner as suspicious casing behavior).

192. Illinois v. Gates, 462 U.S. 213, 229–32 (1983) (abandoning the rigid two-prong test for establishing reliability of an anonymous tip, instead adopting a totality-of-the-circumstances approach whereby a police affidavit, which noted simply that the individual implicated in the anonymous tip had made odd travel plans, could serve to justify probable cause).

193. The problem with the narratives approach to probable cause and reasonable suspicion has been roundly criticized. *See* Lerner, *supra* note 133, at 413–14 (arguing that the legal system encourages police officers to prepackage descriptions of their behavior using judicially approved language). *See generally* Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809 (2011) (arguing that the term "individualized suspicion" should be abandoned in Fourth Amendment jurisprudence); Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEXAS L. REV. 913 (2009) (arguing that courts should take into account a police officer's success rate for obtaining evidence on past warrantless searches in order to determine whether he or she had probable cause to conduct a search).

194. ALAN M. DERSHOWITZ, THE ABUSE EXCUSE 235–36 (1994); David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 480 (1999); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1037–40 (1996).

195. *E.g.*, People v. Woods, 475 N.E.2d 442, 442–43 (N.Y. 1984) (justifying a search based on suspect's movement of hand to chest).

experience,"[196] to build these suspicion narratives. These types of factors are likely to incorporate race and class biases, and they also perform poorly at predicting crime.[197]

None of these use third-party records. The conventional style of investigations is built on "small data,"[198] relying almost exclusively on the observations of individual police officers and the idiosyncratic, unaccountable, and unknowable personal algorithms that they keep in their minds.[199]

Traditional police investigations distribute their suspicion and intrusions in terribly regressive ways. When the beginning stages of an investigation are driven by police observations and curiosity, they focus disproportionately on the poor.[200] This phenomenon is not necessarily the product of any malice or bias on the part of police departments; they spend more time in low-income neighborhoods where their help is most needed and most wanted.[201] But the accumulation of recent Fourth Amendment rules has added even more distortion to the unequal attention paid to the poor. The upper classes can afford more home and more curtilage[202] and can avoid living in "high crime areas," which requires police to build

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196. *Terry*, 392 U.S. at 27; United States v. Brown, 159 F.3d 147, 149–50 (3d Cir. 1998); Harris v. State, 806 A.2d 119, 121 (Del. 2002); State v. Lafferty, 967 P.2d 363, 366 (Mont. 1998), *abrogated on other grounds*, State v. Flynn, 251 P.3d 143 (Mont. 2011).

197. "High crime area" was used as a justification in over 55% of the stops performed in New York between 2004 and 2009. Report of Jeffrey Fagan, Ph.D at 51, Floyd v. New York, 302 F.R.D. 69 (S.D.N.Y. 2014) (No. 08 Civ. 01034), https://ccrjustice.org/sites/default/files/assets/files/Expert_Report_JeffreyFagan.pdf [https://perma.cc/ZS2M-ZN8D]. Jeffrey Fagan compared the use of "high crime area" as a justification across precincts to see if the justification correlated with actual crime data. *Id.* at 51–55. They did not. *Id.* at 54. Even in the precincts with the lowest crime rates, "high crime area" was still used as a justification nearly 55% of the time. *Id.*

198. *See* Ferguson, *supra* note 100, at 337–38 (arguing that officers commonly resort to their limited observations of suspects to make predictions, which are in turn limited by the small data sample that the officer is relying on).

199. *See* Minzner, *supra* note 193, at 914–15 (showing great variability in the accuracy of police officers when assessing probable cause); Thompson, *supra* note 180, at 985–87 (describing the implicit, unaccountable decisions that each police officer develops from experience in the field).

200. *See* DAVID K. SHIPLER, THE RIGHTS OF THE PEOPLE: HOW OUR SEARCH FOR SAFETY INVADES OUR LIBERTIES 54–57 (2011) (discussing policing in low-income neighborhoods and the use of profiling).

201. As Philip Heymann claims:

> [T]he great majority of people in almost every city and the clear majority of those in the neighborhoods most threatened by both insecurity and the risks to civil liberties would, if forced to choose, prefer the new forms of policing. The advantages of personal security are that great.

Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 454 (2000).

202. For example, in *Florida v. Jardines*, 133 S. Ct. 1409 (2013), the Court found that bringing a drug-sniffing dog to the door of a house constituted a search. *Id.* at 1417–18. But because the opinion relied on physical trespass onto the curtilage, lower courts have permitted the same technique on the front doors of apartments. *See, e.g.*, State v. Nguyen, 841 N.W.2d 676, 682 (N.D. 2013) (holding that a law enforcement officer's use of a drug-sniffing dog within an apartment hallway did not violate the Fourth Amendment).

slightly more evidence before progressing to a stop or search.[203] Thus, when we force individual police officers to sniff out crime while they are on the beat, the results are unsurprisingly imbalanced. Marijuana convictions provide some evidence: minorities serve a disproportionate share of the prison time for minor drug convictions despite having drug usage rates similar to whites.[204]

The legal scholars who most forcefully accuse law enforcement of systemic racial bias have not carried the burden of laying out practical alternatives to the current system.[205] The use of data-driven policing and suspicion is probably not what they have in mind. Meanwhile, some scholars have rushed to criticize the practice of profiling with data,[206] but most have not seriously considered the injustice in a police investigation system that profiles *without* data.

Without data, police must rely on their intuitions, observations, and other highly discretionary means of investigating. With data, on the other hand, police can detect and investigate everybody who exhibits similar types of suspicious behavior without letting unconscious factors or geographic limitations affect their investigation decisions.

Today, police departments can use data to investigate crimes that were once investigated using the usual accretion of faulty evidence. They have already used social-media comments to learn about gang activity and membership,[207] and they have mined their own crime data to predict in advance precisely where and when burglaries and other crimes are likely to

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203. Police may be less familiar with the signs of suspicious or trustworthy behavior in communities that are not their own. *See* Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1281 (1998) (hypothesizing that police are less likely to detect the subtle signs that a person is law-abiding and reliable within black communities).

204. NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2014, at 188 tbl.55 (2015); Stephen Gutwillig, *The Racism of Marijuana Prohibition*, L.A. TIMES (Sept. 7, 2009), http://www.latimes.com/opinion/opinion-la/la-oew-gutwillig7-2009sep07-story.html [http://perma.cc/VAM2-9AY5]. However, the government may use drug-offense pleas to bargain away the prosecution of more serious crimes. *See generally* K. JACK RILEY ET AL., RAND CORP., JUST CAUSE OR JUST BECAUSE? (2005) (examining "the original arrest charge(s), filing charge(s), plea-bargaining processes, and criminal histories of offenders who ultimately ended up in California and Arizona prisons on low level drug charges").

205. *See, e.g.*, Charles Ogletree et al., *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 45–60 (Justin D. Levinson & Roger J. Smith eds., 2012) (cataloging the problems of implicit bias in American criminal law without specifying specific solutions).

206. *See generally* HARCOURT, *supra* note 182 (challenging the growing reliance on actuarial methods used for criminal profiling purposes).

207. Ferguson, *supra* note 95, at 842–43; Somini Sengupta, *Privacy Fears Grow as Cities Increase Surveillance*, N.Y. TIMES (Oct. 13, 2013), http://www.nytimes.com/2013/10/14/technology/privacy-fears-as-surveillance-grows-in-cities.html [http://perma.cc/UV85-3K7S].

happen.[208] This can have real implications for individual suspects. If a person with some minimal signs of suspicious behavior appears in one of these data-derived hot spots, behavior that would ordinarily fall short of the *Terry* standard could justify a stop when combined with the hot-spot prediction. Similarly, Elizabeth Joh and Andrew Ferguson have already anticipated that police could use data to more objectively and reliably define which parts of a city are "high crime area[s]" (justifying increased suspicion under *Wardlow*).[209]

So far these data-driven operations have involved public information or the police department's own crime data, so they have not taken advantage of the much richer sources of information currently residing in the servers of private companies. But if a police department did want to collect third-party records in bulk and apply a suspicion algorithm, there is little in the current law that would constrain them.

Ferguson has hypothesized that the purchases of large numbers of mini Ziploc bags (suggestive of drug dealing)[210] or purchases of fertilizer by a nonfarmer (suggestive of bomb building)[211] could contribute to suspicion. Or perhaps prescription data combined with geolocation and telephone metadata could fairly accurately predict which patients abuse and resell their Schedule II narcotics. These are just a sampling of ideas. Once the imagination is permitted to flow freely, law enforcement could come up with countless ways for transaction records, store security-camera videos, and geolocation data to be used separately or in combination to predict crime. Some of them will be able to meet high standards for correctly predicting crime, so the more important ethical questions involve issues other than efficacy.

Although data mining raises larger questions about criminal justice and privacy, the prospect of using data mining should not be casually dismissed before thoughtful consideration as to how it can be structured to make law enforcement more systematic and less discretionary.

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208. Erica Goode, *Sending the Police Before There's a Crime*, N.Y. TIMES (Aug. 15, 2011), http://www.nytimes.com/2011/08/16/us/16police.html [http://perma.cc/5ERD-GBB9]; Somini Sengupta, *In Hot Pursuit of Numbers to Ward Off Crime*, N.Y. TIMES: BITS (June 19, 2013, 10:48 PM), http://bits.blogs.nytimes.com/2013/06/19/in-hot-pursuit-of-numbers-to-ward-off-crime [http://perma.cc/2XBM-EEQ3].

209. Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000); Ferguson, *supra* note 100, at 383–87; Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV. 35, 46, 56–57 (2014).

210. Ferguson, *supra* note 100, at 335.

211. Ferguson, *supra* note 95, at 841.

B. Different Crimes

Some crimes offer little hope of detection without the aid of third-party data. Malicious hacking, possession of child pornography, laundering money through gambling websites, and insider trading leave very few clues in the physical world.[212] As Rachel Barkow says, "Law enforcement cannot literally walk a beat . . . in the business crime context."[213]

Privacy instincts that seem perfectly sensible in the context of street crime can have unfortunate unintended consequences outside of it. This is a story that has played out before, in the context of government subpoenas for first-party records (our own papers). In *Boyd v. United States*,[214] the Supreme Court ruled that a subpoena requiring the disclosure of an individual's own documents violated both the Fourth and Fifth Amendments.[215] *Boyd* is an old case involving importation records, and most of its holding has been seriously compromised by later case law, especially *Fisher v. United States*.[216] The rule from *Boyd* was destined to fail because its effects on law enforcement were severe and regressive. Railroad executives took advantage of the *Boyd* privilege to obstruct investigations into antitrust violations, which were impossible to prove without documents.[217] First-party records were overprotected. We should not repeat that mistake with third-party records.[218]

Third-party records play an important role in the early stages of white-collar crime investigations. When the SEC started its insider trading

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212. Indeed, Jack Goldsmith thinks that our concern over NSA surveillance will be moot soon enough when we realize that we need to enlist the government's help protecting against cyberattacks and cyberwar. Jack Goldsmith, *We Need an Invasive NSA*, NEW REPUBLIC (Oct. 10, 2013), http://www.newrepublic.com/article/115002/invasive-nsa-will-protect-us-cyber-attacks [http://perma.cc/ZP5X-9KVG].

213. Rachel E. Barkow, *The New Policing of Business Crime*, 37 SEATTLE U. L. REV. 435, 464 (2014).

214. 116 U.S. 616 (1886).

215. *Id.* at 634–35.

216. 425 U.S. 391, 409 (1976).

217. *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 422–32 (1995) (explaining how *Boyd* indiscriminately protected corporations under the Fourth and Fifth Amendments and tracing its doctrinal collapse).

218. Christopher Slobogin disagrees with this history and has argued that the Court may never have treated subpoenas as outside the scope of the Fourth Amendment if it had known that the Fifth Amendment protections against subpoenas would be dismantled. SLOBOGIN, *supra* note 142, at 142. Slobogin would prefer to allow subpoenas for records in the course of investigating a business or corporation but to disallow them (most of the time) if the subpoenas are used to investigate individuals. *Id.* at 186. As a descriptive matter, I do not think this is correct. Slobogin himself points out that the opinion dismantling first-party protections against subpoenas was decided on the same day as *United States v. Miller*, 425 U.S. 435 (1976), the first case establishing the third-party doctrine. SLOBOGIN, *supra* note 142, at 152. As a prescriptive matter, corporate criminal law investigations can often wind up with somebody going to jail, so it is not surprising that the courts have not wanted to build distinctions between corporate and noncorporate investigations into the Fourth Amendment doctrine.

investigation of the Galleon Group, a hedge fund that produced impossibly good results for its clients with the help of nonpublic information, the case started with a workup of its founder's telephone and email records.[219] Those records led the investigators to Roomy Khan, an Intel employee who fielded an unusual number of messages from the Galleon Group.[220] The investigators rightly expected Khan was funneling nonpublic information to Galleon's executives.[221] The SEC and FBI eventually switched to nondata means of building cases by engaging in public surveillance, securing the cooperation of informants, and eventually using wiretaps.[222] But the investigation started with data.

The SEC has its own Quantitative Analytics Unit that uses algorithms to identify suspicious trades and overly successful investment performance.[223] Algorithms can also come into service to identify less sophisticated frauds (such as the sale of nonexistent goods over several different Craigslist pages or the use of scareware).[224] And the calling behavior of prepaid "burner" cell phones can give away whether they are used for illicit purposes.[225]

The FBI is devoting a larger portion of its resources than ever before to the detection of white-collar crime.[226] This shift is admirable, especially since white-collar profiles run against the image of traditional bad guys. White-collar criminals evoke sympathies from their prosecutors that would be unimaginable in other criminal contexts. For example, Lanny Breuer aggressively fought corruption and financial fraud crimes as Assistant Attorney General, but even he hesitated before bringing charges.[227] "In reaching every charging decision, we must take into account the effect of an

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219. *Frontline: To Catch a Trader* (PBS television broadcast Jan. 7, 2014), http://www.pbs.org/wgbh/pages/frontline/to-catch-a-trader [http://perma.cc/9X8L-SZBZ]. For a description of how analyses of networks can be used in policing, see Joh, *supra* note 209, at 46–47.

220. William Alden, *Roomy Khan, Figure in Galleon Insider Case, Sentenced to One Year in Prison*, N.Y. TIMES: DEALBOOK (Jan. 31, 2013, 7:14 PM), http://dealbook.nytimes.com/2013/01/31/roomy-khan-figure-in-galleon-insider-case-sentenced-to-one-year-in-prison/?_r=0 [http://perma.cc/664J-9UAS]; *Frontline: To Catch a Trader*, *supra* note 219.

221. Alden, *supra* note 220.

222. *Frontline: To Catch a Trader*, *supra* note 219. Wiretaps are a relatively new tool applied to white-collar crime. Patricia Hurtado, *FBI Pulls Off 'Perfect Hedge' to Nab New Insider Trading Class*, BLOOMBERG (Dec. 19, 2011), http://www.bloomberg.com/news/articles/2011-12-20/fbi-pulss-off-perfect-hedge-to-nab-new-insider-trading-class [http://perma.cc/HSU7-BAG9G]; *Frontline: To Catch a Trader*, *supra* note 219.

223. Barkow, *supra* note 213, at 451–52.

224. INTERNET CRIME COMPLAINT CTR., INTERNET CRIME REPORT 13, 18 (2012).

225. Andrew Ferguson describes a great example of this from the investigation of a multi-million dollar heist in Sweden. Ferguson, *supra* note 100, at 382.

226. Barkow, *supra* note 213, at 445 & n.53.

227. *Id.* at 469.

indictment on innocent employees and shareholders,"[228] he explained. Collateral damages to employees and families are not given the same consideration when street criminals are charged with crimes.[229]

Many scholars and journalists have criticized the government for its lax enforcement and soft penalties in the white-collar space,[230] but the demand for more enforcement is on a collision course with expanded Fourth Amendment privacy protections in third-party records.[231] Law enforcement will need access to telephone and Internet communications data and other third-party records in order to track down the financial crimes.

C. Proof of Disparate Treatment

One summer evening in the District of Columbia, a truck with two young black men caught the attention of a pair of police officers.[232] The truck had been sitting at an empty intersection for about twenty seconds, and the driver was looking intently at the lap of his passenger.[233] The officers followed the truck for a short while until they could take advantage of a traffic violation—turning right without using a turn signal—to investigate further.[234] When the police approached the stopped truck, they saw proof of what they had suspected all along. The objects in the passenger's lap were two large bags of illegal drugs.[235]

The young men challenged the officers' decision to pull their vehicle over for such a trifling traffic infraction.[236] The case, *Whren v. United States*,[237] has come to be known as the precedent that allows police to make pretextual stops,[238] but the challenge was more sophisticated than that. The

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228. *Id.* (quoting Lanny A. Breuer, Assistant Attorney Gen., Speech at the New York City Bar Association (Sept. 13, 2012), http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association [http://perma.cc/9ZEK-T2VH]).

229. *Id.*

230. *E.g.*, MATT TAIBBI, THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP, at xix (2014).

231. Miriam Baer and Christopher Slobogin have foreseen this clash. Baer believes Justice Sotomayor's concurring opinion in *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., concurring), contains the seeds of a solution. Miriam H. Baer, *Secrecy, Intimacy, and Workable Rules: Justice Sotomayor Stakes Out the Middle Ground in* United States v. Jones, 123 YALE L.J.F. 393, 397–98 (2014). Slobogin, in early work, distinguished between corporate and non-corporate records. SLOBOGIN, *supra* note 142, at 186–88. The distinction may allow some white-collar investigations to proceed on lower standards.

232. These are the facts of *Whren v. United States*, 517 U.S. 806, 808–09 (1996).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 809.

237. 517 U.S. 806 (1996).

238. *See generally* Christopher R. Dillon, Whren v. United States *and Pretextual Traffic Stops: The Supreme Court Declines to Plumb Collective Conscience of Police*, 38 B.C. L. REV.

petitioners did *not* argue that the officers' actual subjective intent mattered for the purposes of their Fourth Amendment challenge. Instead, they asked for an objective rule that would look for evidence that the police did not ordinarily enforce the law that formed the basis of probable cause for the traffic stop.[239]

The petitioners in *Whren* had an uphill battle to keep the law and ethics on their side. After all, the police arguably did exactly what was expected of them: they saw something suspicious (but which fell short of the reasonable-suspicion standard required to conduct a stop), and they pursued their hunch using every legal means. Courts would struggle to condemn this type of action where the hunch actually turned out to be correct—a frequent problem when Fourth Amendment rights are defended almost exclusively by the guilty. Because some hunches are good hunches, courts are reluctant to probe these types of actions too thoroughly.[240]

Still, *Whren v. United States* haunts the academy and for good reason. If many laws are frequently broken and rarely enforced, the police have ample discretion to pull over whomever they choose. There is already evidence that drug possession prohibitions and other laws much less trivial than failing to use a turn signal are disproportionately enforced against poor and minority violators.[241] The mercy given to nearly everyone can be an invisible vehicle for bias against those unlucky few who are actually charged.[242]

Indeed, even Justice Scalia, whose opinion for the Court in *Whren* openly mocked the petitioners' proposed test, was raddled enough to point out that there is another avenue for recourse if the police enforce the laws in disproportionate ways.[243] This alternative form of recourse, the Equal Protection Clause, would not give the petitioners relief in the form of the

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737 (1997) (exploring *Whren*'s implications and discussing its merits); Geoffrey S. Kay, Note, Whren v. United States*:* *The Constitutionality of Pretextual Stops*, 58 LA. L. REV. 369 (1997) (examining *Whren*'s jurisprudential framework, *inter alia*).

239. *Whren*, 517 U.S. at 810.

240. Lerner, *supra* note 133, at 412–14.

241. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 266–72 (2009).

242. Dan Markel has explored this poignant relationship between mercy and equality. Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1442, 1478 (2004) (showing "what is wrong with mercy" in the criminal justice system and highlighting that mercy is a problem "for all those concerned about equal liberty under law"); *see also* Joh, *supra* note 108, at 232 ("The problem is that we cannot accept the positive good of discretion without the attendant risks and potential harms."). Joh believes that losing the positive aspects of discretion is an inevitable cost if technology is used to limit police discretion. *Id.* I am not so sure this is correct. Technology can be modified, over time, to incorporate new rules for positive discretion such that law breakers in certain scenarios—speeding cars that end their travel at a hospital, for example—are taken out of the enforcement pool.

243. *Whren*, 517 U.S. at 813.

exclusionary rule which, given their predicament, was their first priority.[244] But the bigger problem standing in the way of *Whren*'s proposed rule, and Scalia's compromise, is operability. We rarely have information about the unlawful conduct that police do or should know about and choose not to enforce.[245]

This could change, and change radically, with the help of third-party data. If law enforcement agencies begin to use algorithms to identify potential violations of the law, equal protection claimants will have a great resource at their disposal. Without data, the police will be able to plausibly deny that opportunities to enforce the law evenly presented themselves. With data, on the other hand, police will have to explain why they didn't act on opportunities to investigate or enforce a law when they could have.

Let me illustrate using the facts from *Whren.* If the *Whren* defendants had access to GPS data and ran a query for every instance in which a vehicle performed an illegal U-turn (e.g., not at an intersection) near a police car, the *Whren* defendants would have strong evidence of racial bias if the data showed a great racial disparity in the proportion of U-turns that were ticketed.[246]

D. Proposals

If the third-party doctrine is dismantled, courts should not reject bulk data collection outright since pattern-driven data mining has the redistributive qualities described above. Over time, they can correct popular misconceptions about what seems "suspicious," and they can even correct themselves (through machine learning) when dynamics on the ground change. Algorithms cannot guarantee evenhanded treatment, but the decisions and profiles that are programmed into an algorithm are auditable and usually tested against real outcomes (actually finding evidence of a crime, for example). Thus, they are much more accountable and fixable than the ad hoc system courts rely on today.[247]

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244. Some scholars have argued it should. *E.g.*, Brooks Holland, *Racial Profiling and a Punitive Exclusionary Rule*, 20 TEMP. POL. & C.R. L. REV. 29, 35–43 (2010).

245. Indeed, legal scholars have gone to great pains to try to estimate this missing data. For an example, see generally Katherine Y. Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L.J. 1089 (2005), building a complex model of a trooper's decision to search a stopped vehicle and analyzing the impact of racial profiling as a factor in the decision-making process.

246. In fact, third-party records can open avenues to an entirely new sort of equal protection lawsuit. If third-party data can adequately identify potential lawbreakers, police forces will have to defend racial disparities not only in arrests but in investigatory stops and searches, too. I describe how this can be done in previous work. *See generally* Bambauer, *supra* note 99 (arguing that individualization serves the purpose of reducing hassle).

247. Some factors (like prior convictions and geography, for example) that might be used in an algorithm will correlate with race and class. But quantitative systems can test whether these factors are overweighted and in any event will steer police to the factors that *do* matter (even if

Christopher Slobogin argues that we should allow statute-authorized data mining programs as long as the most affected groups have "meaningful access to the legislative . . . process" and the statute is applied evenhandedly.[248] A legislative-action requirement is overly restrictive. After all, Slobogin's proposal operates against a backdrop of traditional policing methods that require police to build their cases the usual ways—from tips and their own experiences. This status quo is even further from evenhandedness and political accountability than law enforcement-initiated data mining. In the absence of an authorizing statute, it isn't clear why police departments should be prohibited from developing pattern-based data mining programs if they are effective and less likely to be skewed toward poor and minority populations. Indeed, political process might direct police attention toward the same politically weak communities that already bear the costs of traditional policing. The politically powerful may prefer to avoid detection of the crimes that they commit—tax fraud, EPA violations, etc.—and design law to encourage detection of the crimes committed by the relatively powerless.[249]

Instead, a third-party doctrine overhaul should develop a process to allow temporary collection of third-party records for the sake of validating, and eventually applying, suspicion algorithms.[250] The legal scholars and

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they happen to correlate with race) rather than allowing racial bias to play a role on top of noisy search patterns. In an earlier article, I proposed a theory to challenge the use of an algorithm that has disproportionate effects on a minority community even when the algorithm does not intentionally make use of race information. The idea is that if minorities bear a disproportionate number of fruitless searches or stops (false positives), use of the algorithm must be reduced. *See id.* at 487–90 (analyzing how use of an algorithm can be adjusted to optimize hassle rates).

248. Slobogin, *Making the Most of* Jones, *supra* note 23, at 30–31; *see also* Christopher Slobogin, *Government Dragnets*, LAW & CONTEMP. PROBS., Summer 2010, at 107, 138–42 (proposing that Courts use a proportionality principle to determine when a search program is justified and explaining how the proportionality principle can be applied in an evenhanded way). Richard Worf has also defended the democratic process as a reasonable means of regulating searches and seizures that are conducted without suspicion. Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 TOURO L. REV. 93, 109–10 (2007). Worf comes out in support of a range of general searches and seizures that is much broader than the ones Slobogin considers or the ones I consider here.

249. On the other hand, Bill Stuntz commented long ago that this theory doesn't seem to explain much when it comes to law enforcement since taxpayers have not taken advantage of the legislative process to avoid accountability. Stuntz, *supra* note 76, at 1045.

250. This collection could be understood under Scott Sundby's composite model that distinguishes "initiatory intrusions" from "responsive intrusions." *See* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 418–20 (1988) (distinguishing government initiation of "investigatory activity in the absence of any suspicious behavior"—initiatory intrusion—from government investigation "based upon particularized suspicion"—responsive intrusion). The former marks the beginning of an investigation before any individualized suspicion can accrue. By the time police are ready to use an algorithm to identify potential criminals, the algorithm will have to live up to the appropriate individualized-suspicion thresholds.

criminologists who have devoted attention to this problem often converge on three key features for a legitimate data-mining program.[251]

First, the program should require *accuracy*. Specifically, it should have a mechanism that creates incentives for decreasing type I error (false alerts). And the government should be prohibited from actually using an algorithm until validation studies have shown that it has a low enough type I error. (Slobogin suggests 50%.[252] But the threshold could depend on what the government aims to do. Fifty percent seems right for arrests and searches, perhaps too high if the algorithm is used only to guide the use of resources for *Terry*-style questioning.[253]) To achieve the accuracy requirements, the government must keep records on the outcomes of stops, searches, and arrests stemming from the program.

Second, the program should require *accountability*. All uses of pattern-driven algorithms should be subjected to logging so that auditors and criminal defendants can review how the government has used its data-mining programs. This does not necessarily require transparency about the precise algorithm used to predict suspicious activity,[254] but criminal defendants and the general public should have access to the information necessary to build confidence in the program. At the very least, criminal defendants should have access to a general model and audit logs comprehensive enough to ensure that the algorithm performed well, that the

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251. At least one of these three features is promoted in each of the following influential works: ABA STANDARDS, *supra* note 23, at 111; INFO. SCI. & TECH. STUDY GRP., DEF. ADVANCED RES. PROJECTS AGENCY, SECURITY WITH PRIVACY 10 (2002), http://www.cs.berkeley.edu/~tygar/papers/ISAT-final-briefing.pdf [http://perma.cc/F88S-AVJP]; PALANTIR TECHS., INC., PROTECTING PRIVACY AND CIVIL LIBERTIES 4 (2012), https://www.palantir.com/wp-assets/wp-content/uploads/2012/06/ProtectingPrivacy_CivilLiberties_2012.pdf [https://perma.cc/TZA5-Y3KK]; SLOBOGIN, *supra* note 142, at 195; Zarsky, *supra* note 187, at 309–12; Ed Felten, *Accountable Algorithms*, FREEDOM TO TINKER (Sept. 12, 2014), https://freedom-to-tinker.com/blog/felten/accountable-algorithms [https://perma.cc/4KT4-UNYB]; Ed Felten, *Accountable Algorithms: An Example*, FREEDOM TO TINKER (Sept. 13, 2012), https://freedom-to-tinker.com/blog/felten/accountable-algorithms-an-example [https://perma.cc/FE6F-8EHW].

252. Slobogin, *Making the Most of* Jones, *supra* note 23, at 21.

253. Fifty percent might not be good enough if the crime is very common. Even a very accurate algorithm can force too many innocent people to undergo searches or arrests if the algorithm detects a high-occurrence crime, like possession of marijuana. I have argued that the Fourth Amendment can and should watch out for this problem. Bambauer, *supra* note 99, at 488.

254. In fact, I do not even think the algorithm should have to be interpretable. One of the benefits of machine learning is that it can assess and revise a model based on relationships between so many variables that the best algorithms may not even look like the standard ordinary least squares (OLS) regressions. Tal Zarsky does not think those benefits are worth the risks. *See* Zarsky, *supra* note 187, at 311–12 (arguing, among other things, that "adding interpretability and even causation to the data mining process could allow policymakers to assure that biases are averted").

program did not introduce new race or gender biases, and that the government did not abuse discretion in deciding which positive alerts to pursue.[255]

Finally, the subpoena should require *division of labor*. Identified records should be left with the company or collected and maintained by an independent government entity. The company or independent agency can either run the analyses on behalf of the law enforcement department and provide results only for positive alerts, or the agency can prepare a database for law enforcement use (subject to the audit-log requirement above) that has been stripped of direct identifiers.[256] Law enforcement would then make a follow-up request for identifiers on all positive alerts.

These limitations would go a long way to address the concerns and anxieties of critics. But for some scholars, the collection of third-party records for the purposes of data analysis will never be consistent with the Constitution, despite precedents like *Smith*. Laura Donohue argues that collection of information falls within the definition of a Fourth Amendment search when done in bulk, even if collection of the same type of information would not trigger a search for the occasional suspect, like the defendant in *Smith*.[257] Donohue uses the popular, rarely examined rationale that a difference in quantity creates a difference in quality.[258] That is, an occasional little peek at third-party records—a "searchlet," let's call it—was acceptable back when it was infeasible for police to do it to everybody, but now that we all face the prospect of this searchlet, it must count for Fourth Amendment purposes.

Spelling it out in this way lays bare how this type of reasoning inadvertently sows the seeds for continued inequity in the criminal justice system. If collecting data on all of us is unconstitutional, even lowlifes like Smith deserve protection. On the other hand, if courts put their energy instead into determining what makes government access to personal data invasive and threatening in the first place, whether in small or large quantities, they are more likely to find a rule that protects all citizens equally. One of the greatest threats is arbitrary or biased deployment of

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255. The ABA recommends data-use logging within their framework, too. ABA STANDARDS, *supra* note 23, at 25.

256. The data need not be "anonymized" or "deidentified" as that term of art is used in debates about reidentification risk. For instance, compare Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1744–45 (2010), who proposes using "scrub" as the new word for privacy-motivated data manipulation to recognize that true anonymity or deidentification is unrealistic, with Jane Yakowitz, *Tragedy of the Data Commons*, 25 HARV. J.L. & TECH. 1, 35–42 (2011), where I argue that "the sky is not falling" with respect to the dangers of public data. The removal of direct identifiers paired with detailed logs about data use should reduce most of the risk that a law enforcement agent will cheat.

257. Donohue, *supra* note 23, at 867–70.

258. *Id.* at 871–74.

searches and seizures. Bulk collection could mitigate, rather than exacerbate, this problem when the data is used to make investigations more systematic, consistent, and accountable.

Thus, bulk data collection without any constraints on the subsequent use for criminal-investigation purposes should be treated as a Fourth Amendment search for the same reasons that suspect-driven investigations like *Davis* should be treated as searches: because they maximally surveil the population without constraining the discretion of police. But police departments that set up a pattern-driven data-mining program with basic safeguards for accuracy, accountability, and division of labor should be treated as reasonable searches under the well-established special-needs doctrine that applies to checkpoints.[259] The jurisprudence on checkpoints has already noted with approval that the checkpoints found constitutional under the special-needs doctrine are governed by internal guidelines that minimize the discretion of the officers implementing the scheme.[260]

The next Part will consider the final counterweight to Fourth Amendment privacy: the First Amendment. Occasionally a third party will positively want to disclose evidence of its customers' criminal wrongdoing to the government. Modifications to the third-party doctrine must anticipate the clashes between the third party's speech interests and the consumer's privacy interests.

VIII. The Fourth Amendment v. the First Amendment

In *DRN v. Herbert*,[261] the plaintiff, an automatic license-plate reading service, challenged a Utah law prohibiting the use of automatic license-plate readers.[262] The law quite obviously interfered with DRN's business model and took refuge in the First Amendment to enjoin the law's enforcement.

For purposes of this exploration, I will assume DRN's speech interests in taking pictures of license plates and matching the images to public databases are valid. While the existence of a speech interest doesn't end the

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259. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 448–52 (1990) (finding that the state's interest in preventing drunk driving outweighs the slight intrusion into drivers' privacy posed by police checkpoints); Brown v. Texas, 443 U.S. 47, 51 (1979) (indicating that "in some circumstances an officer may detain a suspect briefly for questioning although he does not have 'probable cause' to believe that the suspect is involved in criminal activity, as is required for a traditional arrest"); United States v. Martinez-Fuerte, 428 U.S. 543, 556, 562, 566 (1976) (holding that checkpoint "seizures" are constitutional when conducted at permanent border patrol stations, because such seizures are less invasive than a roving patrol).

260. *Sitz*, 496 U.S. at 451–52; *Martinez-Fuerte*, 428 U.S. at 559.

261. Dig. Recognition Network, Inc. v. Herbert, No. 2:14-cv-00099-CW (D. Utah dismissed Apr. 29, 2014).

262. Complaint at 2–3, Digital Recognition Network, Inc. v. Herbert, No. 2:14-cv-00099 (D. Utah Feb. 13, 2014) [hereinafter DRN Complaint], http://www.berghel.net/privcom/DRN%20v%20Herbert.pdf [http://perma.cc/ED59-H7LM].

analysis (the law may be narrowly tailored to sufficiently important privacy interests to withstand scrutiny), the plaintiffs' First Amendment challenge is probably well founded.[263]

However, the case has an interesting wrinkle—one that was unnecessary for the plaintiffs to draw out. DRN made clear that one of its objectives was to disclose the license plate information to law enforcement "for purposes that range from utilizing near real-time alerts for locating missing persons and stolen vehicles to the use of historical license-plate data to solve crimes."[264] Thus, DRN claimed a speech interest in providing data to law enforcement.[265]

DRN may have assumed that a speech interest would be bolstered by its reference to law enforcement goals, but with the third-party doctrine on thin ice, it unwittingly waded into a constitutional quagmire. What is the greater constitutional imperative: a First Amendment right to talk to the government or a Fourth Amendment right to keep the government's ears shut?

Although First Amendment speech rights are robust, they are not unlimited. Many statutes prohibit doctors,[266] schools,[267] and telecommunications providers[268] from disclosing the personal information of their clients to *anybody* (let alone the government), and these sorts of narrowly tailored statutes are presumptively constitutional.[269] They serve significant interests in confidentiality. Confidentiality laws are appropriate for fiduciary relationships (doctor–patient, lawyer–client, priest–confessor) where broader societal interests are served by inducing candor between the counselor and the counseled. These confidentiality laws seem to live up to First Amendment scrutiny, so there's no reason to think that the same types

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263. At least I think so. *See* Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 57 (2014) (arguing that "data must receive First Amendment protection"). *But see* Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1524–28 (2015) (taking a (mostly) contrary position).

264. DRN Complaint, *supra* note 262, at 2.

265. *Id.* at 2–3.

266. 45 C.F.R. §§ 164.502(a), 512(f) (2015).

267. 34 C.F.R. § 99.30 (2015).

268. The prohibition against disclosures to the government contained in the Wiretap Act, the Stored Communications Act, and the Pen Register Act are an interesting study. When the laws protect the *contents* of communications, they obligate telecommunications providers to keep conversations confidential. *E.g.*, Wiretap Act, 18 U.S.C. § 2511 (2012) (prohibiting a person from intercepting any wire, oral, or electronic communication); Stored Communications Act, 18 U.S.C. § 2702(a) (2012) (prohibiting electronic communication service providers from knowingly divulging the contents of a communication held in electronic storage by that service); Pen Register Act, 18 U.S.C. § 3121(a) (2012) (prohibiting installation of a pen register or trap and trace device without a court order, unless the device records only the routing information relating to the communication, to the exclusion of the content of the communication).

269. *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2668 (2011) (suggesting that a HIPAA-type privacy rule would pass constitutional scrutiny).

of confidentiality interests can't interfere with disclosures to the government, even when the service provider (the doctor, the lawyer, the priest) positively *wants* to disclose criminal conduct to the government. But these fiduciary duties are rare.[270]

The speech interests of a company may also be trumped by the speech interests of their customers. When journalists and their sources are the subjects of criminal investigation, the public will have heightened interest to be sure that the state is not exploiting the criminal processes in order to squelch unwanted press. This was a concern, for example, when the Justice Department obtained two months' worth of telephone records of Associated Press journalists.[271]

However, in situations involving something less than a fiduciary relationship or the speech interests of journalists, the clash between a speaker's interests and the customer's interests should be resolved in favor of the speaker for four reasons.

First, finding otherwise would clash badly with *United States v. White*, which reaffirmed the longstanding misplaced-trust doctrine.[272] Recall from Part I that *White* decided we all take our chances that our friends and colleagues will go running to the government or may be cooperating with them already.[273] If our trust is misplaced, and our friend carries out an actual betrayal, the Fourth Amendment has always stood back and allowed the incriminating information to pass to the government.

Second, when a business decides for whatever reason to disclose evidence of criminal behavior to the government, the privacy interests of

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270. Christopher Slobogin, James Grimmelmann, and Jack Balkin have gone much further by arguing that any company that provides a service of practical necessity (e.g., telecommunications or Google's Internet search function) should be treated as information fiduciaries and should have to conform to traditional duties of confidentiality. SLOBOGIN, *supra* note 142, at 158–61; James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 904–05 (2014); Jack Balkin, *Information Fiduciaries in the Digital Age*, BALKINIZATION (Mar. 5, 2014), http://balkin.blogspot.com/2014/03/information-fiduciaries-in-digital-age.html [http://perma.cc/LV8E-U7DP]. These arguments sweep much broader than the forms of confidentiality that are likely to withstand First Amendment scrutiny. Duties of confidentiality (and the other fiduciary duties that are usually bundled alongside confidentiality) are justifiable for professions in which there is significant societal benefit from encouraging relationships of trust and candor, and for which the professional is compensated for taking on these additional duties of care. Legal relationships of trust are designed to help the *fiduciaries*, by ensuring that there will be a market for their services. Tamar Frankel, *Fiduciary Duties*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 127, 128 (Peter Newman ed., 1998). These qualities describe only a narrow set of industries that need confidentiality rules to induce information sharing.

271. Mark Sherman, *Government Obtains Wide AP Phone Records in Probe*, ASSOCIATED PRESS (May 13, 2013), http://www.ap.org/Content/AP-In-The-News/2013/Govt-obtains-wide-AP-phone-records-in-probe [http://perma.cc/GNZ4-VVKD]. These types of investigations run against federal internal-investigation policies. Brad A. Greenberg, *The Federal Media Shield Folly*, 91 WASH. U. L. REV. 437, 450 (2013).

272. United States v. White, 401 U.S. 745, 749 (1971).

273. *See supra* notes 31–39 and accompanying text.

their customers are at their nadir. Businesses are unlikely to share material that is sensitive but legal. Instead, the disclosure to the government will occur when the company has strong evidence of a crime. This is the sort of sui generis criminal detection that courts tend to separate from the definition of "search."[274] A voluntary disclosure of customer data will usually be a trustworthy signal—an autocorroborated tip.

Third, as a practical matter, incentives of businesses are usually closely aligned to their clients.[275] With the exception of companies like DRN that operate in areas where relationships between businesses and their customers have completely broken down (e.g., lenders and borrowers in default), most companies do not want to irritate their paying customer base. Thus, Google and Qwest, for example, have resisted subpoenas and FISA gag orders in order to vindicate the privacy interests of their customers.[276] Businesses need no extra incentive to collude with their paying customers who happen to engage in crime.

Finally, because the First Amendment also incorporates a (poorly understood) right of petition, companies may have two independent bases for sharing information with the government: speech rights, and the right to petition the government for help. Each of these fortifies the other.

However, it will be important for courts to monitor whether a company's disclosure of customer records is truly voluntary. What looks like voluntary disclosure may be the result of behind-the-scenes pressure from government agencies.[277] The government may design incentives so that businesses will choose to disclose records more often. Indeed, the government already does this to some extent by paying fees for searches of privately held records.[278] The government would be motivated to make voluntary disclosures more attractive if the third-party doctrine is thoroughly gutted.

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274. Illinois v. Caballes, 543 U.S. 405, 409–10 (2005).

275. Orin Kerr has made this point. Orin S. Kerr, *Defending the Third-Party Doctrine: A Response to Epstein and Murphy*, 24 BERKELEY TECH. L.J. 1229, 1235 (2009).

276. Michael Phillips, *How the Government Killed a Secure E-mail Company*, NEW YORKER (Aug. 9, 2013), http://www.newyorker.com/tech/elements/how-the-government-killed-a-secure-e-mail-company [http://perma.cc/FZ8C-YWTG]; Kim Zetter, *Google Challenges FISA Gag Orders on Free Speech Grounds*, WIRED (June 18, 2013, 4:47 PM), http://www.wired.com/2013/06/google-fisa-gag-orders [http://perma.cc/4DAL-EBTU].

277. *See, e.g.*, Balkin, *supra* note 48, at 2298–99 (arguing the government regulates speech with "new school" techniques, such as collateral censorship, coercing private cooperation, and implementing prior restraints to speech); Derek Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 83–100 (2015) (describing soft pressures the government can use to censor content).

278. *See* Chris Jay Hoofnagle, *Big Brother's Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT'L L. & COM. REG. 595, 596–97 (2004) (explaining how commercial data brokers sell access to private-sector databases to law enforcement officials).

If businesses that engage in regular snitching get more favorable treatment from their government regulators or from public grants programs, the courts could take a broad interpretation of "state action" and probe whether the disclosures are meaningfully independent from the government.[279] On the other hand, some amount of government pressure may be consistent with tactics historically deployed in order to secure the help of government informants. For example, the SEC uses game theoretic tactics by paying whistleblowers for tips leading to fraud charges, and it promises leniency to corporate employees who turn the company in before their coworkers.[280]

Putting these difficult state action issues aside, revisions to the third-party doctrine should allow companies to voluntarily disclose their business records unless common law or statutory prohibitions (consonant with the First Amendment) forbid the disclosure.

Conclusion

The third-party doctrine has become the Fourth Amendment's supervillain. It puts no constitutional limits on dragnet data collection. And it permits suspect-in investigations that can be motivated by a hunch or something worse. But in the rush to correct these flaws, reformers risk introducing new fault lines into the Fourth Amendment that will undermine its ultimate goals.

So far, critics of the third-party doctrine have called for a warrant requirement to protect personal information contained in third-party records. This type of reform will block innovations to law enforcement and entrench traditional forms of investigation by force fitting the system of individualized suspicion onto data-driven investigation methods. These reforms will have severe opportunity costs. They will save us from the risks of innovation, but they will also hinder us from harnessing the justice-enhancing power of data. Given the current inequity, inaccuracy, and lack of accountability in law enforcement, courts should not pass up an opportunity to make systemic improvements.

Indeed, well-intentioned third-party reforms might not even accomplish their basic goal of constraining government surveillance power. Consider Sudafed. Its active ingredient, pseudoephedrine, is the base for most homemade methamphetamines, as every *Breaking Bad* fan would

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279. *Cf.* Bambauer, *supra* note 79, at 919–20 (describing informal government pressures to censor speech that escape constitutional scrutiny by avoiding formal state action).

280. *See* U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM: FISCAL YEAR 2012, at 8 (2012) ("[The Dodd-Frank Act] directs the Commission to make monetary awards to eligible individuals who voluntarily provide original information that leads to successful Commission enforcement actions . . . ."); Barkow, *supra* note 213, at 439 (describing increasingly aggressive efforts to police corporate wrongdoing through the use of deferred prosecution and nonprosecution agreements to encourage corporate compliance).

know. In a parallel universe, this Article would explore the ethics and Fourth Amendment legality of government access to drug-store purchase records to find suspiciously large acquisitions of pseudoephedrine. Instead, Congress passed the Combat Methamphetamine Epidemic Act of 2005, which prohibited purchases of pseudoephedrine in large quantities by adults and in any quantity by minors.[281] It also compelled the collection and disclosure of identifying information for the purchases of small quantities.[282]

This comprehensive regulatory scheme has attracted very little criticism on Fourth Amendment privacy grounds, perhaps because the scheme is consistent with the modern regulatory state.[283] The experience with Sudafed demonstrates the danger of changing the third-party doctrine without considering the larger picture. If the government is denied access to third-party records that it needs to effectively enforce a law, it could reach the same result through comprehensive regulation and disclosure laws. This is hardly the better outcome on the basis of privacy, efficiency, or autonomy.

Although this Article has covered a wide landscape of potential pitfalls, the restructuring of the third-party doctrine can avoid them all as long as it provides a workable path to third-party records in three instances.

For crime-out investigations, police should be able to access third-party records without probable cause or reasonable suspicion. The crime-out investigatory process reduces most of the harms that come from unfettered data access and may simultaneously promote the interests of innocent, wrongly accused targets.

For pattern-driven data-mining programs, courts should permit law enforcement agencies to collect and analyze bulk records as long as there are means to test whether the programs are effective and evenhanded. These programs can contribute to a more equitable distribution of law enforcement investigations and prosecutions.

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281. Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, 120 Stat. 256 (2006) (codified at 21 U.S.C. § 830 (2012)).

282. *Id.*

283. Some have objected to the restrictions on liberty to buy over-the-counter drugs and the propensity for false arrests. Jacob Sullum, *One Box of Sudafed Over the Line: Florida Woman Arrested for Trying to Relieve Allergy Symptoms*, REASON.COM (July 28, 2014, 6:59 PM), https://reason.com/blog/2014/07/28/one-box-of-sudafed-over-the-line-florida [https://perma.cc/3R8G-NM7R]. But there has been no analysis of how this type of regulatory scheme would interact with a reformed third-party doctrine.

Finally, unless a confidentiality statute is in place, individuals and businesses should be free to voluntarily share records in their control with the government out of deference to their First Amendment rights.

To put it even more simply, courts and lawmakers do not need to change very much about the third-party doctrine to avoid its worst qualities and preserve its best ones. The most pressing privacy problems can be solved by disallowing suspect-driven investigations lacking individualized suspicion and by prohibiting unconstrained mass data collections. If Fourth Amendment or statutory law closes off these exploitative uses of third-party records, it will steer law enforcement toward more accountable uses of powerful third-party data resources.

* * *

The Arbitration Bootstrap

Christopher R. Leslie*

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> [I]t is difficult to overstate the strong federal policy in favor of arbitration . . . .
>
> —*Arciniaga v. General Motors Corp.*[1]

The Second Circuit erred when it claimed difficulty in overstating the federal policy favoring arbitration. Courts overstate this policy regularly, often with disastrous consequences for consumers, workers, and the bodies of law designed to protect their interests.

Arbitration clauses have become ubiquitous. Arbitration clauses require consumers and employees to waive their rights to bring litigation in court, leaving private arbitration as their only avenue to seek redress for violations of any law, including consumer protection laws, antitrust law, and anti-discrimination laws. The arbitration process is less protective of consumers and employees in many ways than the litigation process in public courts. Yet for consumers in many markets, arbitration clauses are unavoidable because firms impose contracts of adhesion that include mandatory arbitration clauses, which require individuals to waive their rights to sue in court.

As the Supreme Court has expanded the categories of legal claims that are subject to mandatory arbitration, firms have begun to load their mandatory arbitration clauses with unconscionable contract terms. This is arbitration bootstrapping. Arbitration bootstrapping describes situations where firms insert terms unrelated to arbitration into an arbitration clause in the hopes that judges will be more likely to enforce terms embedded in arbitration clauses. For example, firms insert terms into their arbitration clauses to shorten statutes of limitations, to reduce damages, or to prevent injunctive relief.[2] These contract terms are considered unconscionable—and, thus, unenforceable—in many states. However, the Supreme Court has interpreted the Federal Arbitration Act of 1925 (the FAA)[3] to require deference to arbitration clauses; consequently, many courts allow firms to bootstrap unenforceable contract terms into an arbitration clause in order to make unconscionable contract terms enforceable.

In theory, legal doctrines exist to protect consumers and workers from arbitration clauses that are unconscionable or that eliminate an individual's ability to seek redress for violations of the law. Most notably, state contract law makes unconscionable contracts—and unconscionable contract terms—

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1. 460 F.3d 231, 234 (2d Cir. 2006).

2. *See infra* section I(C)(2).

3. The original 1925 law was called the United States Arbitration Act, but Congress changed the name to the Federal Arbitration Act in 1947 without amending the substance of the Act. To avoid any confusion, this Article follows the accepted convention of referring to the law as the Federal Arbitration Act or FAA at all times.

unenforceable.[4] With respect to federal statutory rights, the Effective Vindication Doctrine provides that the "arbitration of the claim will not be compelled if the prospective litigant cannot effectively vindicate his statutory rights in the arbitral forum."[5]

The Supreme Court, however, has recently undermined both of these mechanisms—the unconscionability defense and the Effective Vindication Doctrine—in cases involving class action waivers in arbitration clauses. A class action waiver is a contract term that requires consumers and workers to promise neither to bring nor to participate in class action litigation against the firm.[6] By eliminating the possibility of class actions, firms can essentially immunize themselves from judicial scrutiny because the cost of bringing an individual action often exceeds the maximum potential damage award.[7] Despite this, in 2011, in *AT&T Mobility LLC v. Concepcion*,[8] the Supreme Court held that the FAA preempted state laws that treated certain class action waivers embedded in arbitration clauses as unconscionable.[9] The ruling meant that firms could evade otherwise applicable state laws against an unconscionable class action waiver simply by inserting the waiver into an arbitration clause. In 2013, the Supreme Court in *American Express Co. v. Italian Colors Restaurant*[10] considered a Second Circuit opinion that struck down a class action waiver for violating the Effective Vindication Doctrine

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4. Because contract law is state law, the unconscionability doctrine is a function of state law and varies across states. Unconscionability has two aspects: substantive and procedural. Substantive unconscionability refers to the actual terms of the contract, such as price, obligation, waiver of rights, or consequences of breach. Procedural unconscionability focuses on the process by which the contract is made, including such issues as whether the parties had equal bargaining power and whether the contract is a contract of adhesion.Most states require a combination of substantive unconscionability and procedural unconscionability before declaring a contract or a contractual term unconscionable. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (stating that under California law unconscionability requires both a procedural and a substantive element). However, under certain circumstances, some states allow a finding of unconscionability based on substantive unconscionability alone. *See, e.g.*, Maxwell v. Fid. Fin. Servs., Inc., 907 P.2d 51, 59 (Ariz. 1995) (concluding that under Arizona's adoption of the Uniform Commercial Code a claim of unconscionability can be established by showing substantive unconscionability alone). In the context of arbitration clauses, the procedural unconscionability is often established because the contract is adhesive. *See, e.g.*, Gatton v. T-Mobile USA, Inc., 61 Cal. Rptr. 3d 344, 355 (Cal. Ct. App. 2007) (noting that there is inherent inequality of bargaining power associated with contracts of adhesion). Individual terms within the arbitration agreement can be considered substantively unconscionable, as discussed in *infra* section I(C)(2).If a court determines that a contract—or contract term—is unconscionable, it can invalidate the entire contract, strike the unconscionable term, or reform the contract to avoid an unconscionable result. RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

5. *In re* Cotton Yarn Antitrust Litig., 505 F.3d 274, 282 (4th Cir. 2007).

6. *See infra* section I(C)(1).

7. *See infra* notes 67–72 and accompanying text.

8. 131 S. Ct. 1740 (2011).

9. *Id.* at 1746, 1753; *see infra* notes 67–72 and accompanying text.

10. 133 S. Ct. 2304 (2013).

because the cost of bringing an individual claim could exceed $1 million while the maximum possible recovery was less than $40,000.[11] The Supreme Court reversed, holding that "a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."[12] Consequently, the *Italian Colors* opinion substantially undermined the Effective Vindication Doctrine as a doctrine for protecting individuals from unfair mandatory arbitration clauses.[13]

In tandem, these two decisions operate to dismantle entire fields of law, including laws against fraud, deception, predatory conduct, antitrust violations, and employment discrimination. Although *Concepcion* and *Italian Colors* both involved class action waivers, this Article demonstrates how firms are harnessing the reasoning of these opinions in order to insert a variety of unconscionable contract terms into arbitration clauses. Based on the so-called federal policy favoring arbitration, many courts feel compelled to enforce these otherwise illegal contract terms so long as the terms reside in a contract's arbitration clause.

In the wake of *Concepcion* and *Italian Colors*, judges who have upheld anti-consumer terms in arbitration clauses claim to be merely implementing the will of Congress. Yet the senators and representatives who voted for the Federal Arbitration Act would not recognize today's arbitration clauses that courts are enforcing in the name of the 1925 Congress. This Article explains how enforcement of current arbitration clauses, both as to their reach and their content, is inconsistent with the purpose and text of the Federal Arbitration Act.

Part I examines how, six decades after the FAA's enactment, the Supreme Court claimed that Congress intended the FAA to cover federal statutory rights, such as antitrust and employment discrimination claims. This Part also explores how—after courts upheld the expanded reach of arbitration clauses—companies more aggressively inserted anti-consumer terms into their arbitration clauses. Firms now use arbitration clauses as a bootstrap, a mechanism to impose contract terms that would otherwise be unenforceable as a matter of contract law. For example, many state laws—as well as the contract doctrine of unconscionability—condemn contract provisions that purport to forbid class actions, truncate statutes of limitations, limit damages, preclude injunctions, or manipulate fee shifting, among other anti-consumer terms. While courts enforce these state laws in traditional contracts cases, some judges have exhibited a willingness to defer to the same terms when they are inserted into an arbitration provision. This provides a

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11. *Id.* at 2308.

12. *Id.* at 2307.

13. Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 4 (2015).

strong incentive for retailers and employers to use arbitration clauses as a vehicle for imposing anti-consumer terms that would otherwise be unenforceable.

Part II explains how the Supreme Court has invoked the legislative intent of the 1925 Congress in order to justify opinions that apply the FAA to all claims, including federal statutory claims and consumer-initiated lawsuits. Courts have further suggested that Congress intended arbitration clauses to be enforced as written, which provides a justification for deference to anti-consumer terms that would be found unconscionable under state law. Finally, the Supreme Court has asserted that the FAA preempts all state efforts to police arbitration clauses, including basic notification requirements.

Part III examines the actual legislative history of the Federal Arbitration Act. It explains that Congress was exclusively concerned with the enforceability of arbitration agreements between sophisticated businesses in commercial disputes. Congress never considered the possibility that retailers would impose mandatory arbitration clauses on their customers, let alone that these arbitration clauses would be structured to limit damages, to truncate statutes of limitations, or to otherwise remove procedural protections from consumers. The congressional intent that courts employ to enforce anti-consumer terms in arbitration clauses is an imagined one. Exploring the legislative history of the FAA shows that the 1925 Congress would not recognize the FAA that today's courts claim to be honoring.

Part IV argues that courts should stop asserting that the FAA mandates deference to—let alone strict enforcement of—contract terms as long as the terms are buried in an arbitration clause. When confronting unconscionable terms in arbitration clauses, courts can take one of three actions: enforce the unconscionable terms, sever the unconscionable terms, or strike the arbitration clause as a whole because it is so permeated by unconscionable terms. This Part explains why only the latter two options are consistent with Congressional intent and good public policy.

I. The Three Expansions of Arbitration Clauses

A. The Expanding Number of Arbitration Clauses

Well before the Supreme Court's decision in *Concepcion*, American businesses imposed arbitration clauses on their customers and employees.[14]

14. Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 499–503 (2011); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882–85 (2008); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 116 (2010).

The Court's recent endorsements of arbitration clauses have seemingly spurred more firms to adopt this tactic.[15] Mandatory arbitration clauses have come to dominate entire industries, such as cell phone service, credit cards, and cable service.[16] For example, the Consumer Financial Protection Bureau (CFPB) arbitration study found that "[s]even of the eight largest facilities-based mobile wireless providers (87.5%), covering 99.9% of subscribers, used arbitration clauses in their 2014 customer agreements."[17] Professor Jean Sternlight notes that arbitration clauses are common when consumers "purchase or rent certain products (e.g., computers, items bought through Amazon or Zappos, Starbucks gift cards, or rental equipment), enroll in schools, rent movies, or purchase auto parts."[18] Brokerage firms have made pre-dispute arbitration clauses standard in their account agreements with customers.[19] Similarly, over 98% of licensed storefront payday operations impose arbitration clauses on their borrowers.[20]

Arbitration clauses are increasingly found in both consumer and employment contracts because firms insert the clauses into contracts of adhesion. Buyers are unable to preserve their right to sue in court because firms refuse to sell goods or services unless such rights are relinquished.[21] Similarly, many workers—indeed, all workers in some industries—must waive their right to litigate violations of employment law, including illegal

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15. Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 459–60 (2014) ("And it is a fair bet that the number of companies relying on arbitration clauses has spiked since the Court's 2011 decision in *Concepcion*, where the majority lauded AT&T's arbitration clause as being fundamentally fairer and better for consumers than litigation.").

16. Homa v. Am. Express Co., 494 Fed. App'x 191, 197 (3d Cir. 2012); CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), § 1.4.1, at 10 (2015) [hereinafter CFPB ARBITRATION STUDY] ("In the private student loan and mobile wireless markets, we found that substantially all of the large companies used arbitration clauses."); *id.* § 1.4.1, at 9 ("Tens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses.").

17. CFPB ARBITRATION STUDY, *supra* note 16, § 2.3, at 7.

18. Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 95 (2012) (footnotes omitted).

19. Jill I. Gross, AT&T Mobility *and the Future of Small Claims Arbitration*, 42 SW. L. REV. 47, 48 n.6 (2012).

20. CFPB ARBITRATION STUDY, *supra* note 16, § 2.3.4, at 22; *see also id.* § 2.3, at 7 ("Six of the seven private student loan contracts in our sample (85.7%) from 2014 included arbitration clauses . . . .").

21. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 [http://perma.cc/9M7L-ADBP] ("Over the last few years, it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration. The same applies to getting a job, renting a car or placing a relative in a nursing home.").

discrimination.[22] These contracts of adhesion change the calculus of contracting because the weaker party has no voice in the contents of the contract, including in the terms within the arbitration clause. Many, if not most, consumers and workers are largely unaware that they are signing away their rights to court access.[23] And the Supreme Court has forbidden states from requiring firms to provide upfront notice of arbitration clauses.[24]

The imposition of arbitration clauses will likely increase in the coming years. Those arbitration clauses that pre-dated *Concepcion* are changing to include anti-consumer provisions such as class action waivers.[25] The Court's decisions in *Concepcion* and *Italian Colors* have signaled a judicial willingness to enforce all manner of arbitration clauses, even if the clause includes provisions that would violate state law or make effective vindication of one's rights impossible.

B. The Expanding Reach of Arbitration Clauses

Courts initially limited arbitration to use for resolving commercial disputes between merchants.[26] Businesses, however, realized that by inserting arbitration clauses into their consumer contracts, they could prevent their customers from suing them in court for alleged violations of the law. The federal courts initially resisted these attempts to subject individuals to mandatory arbitration.[27]

For decades, federal courts precluded pre-dispute arbitration clauses from covering federal statutory claims. For example, in the context of federal securities law, the Supreme Court in 1953's *Wilko v. Swan*[28] invalidated

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22. *See, e.g.*, Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1185 (9th Cir. 1998) (noting that "employers . . . require as a mandatory condition of employment . . . [as a] broker-dealer in the securities industry—that all employees waive their right to bring Title VII and other statutory and non-statutory claims in court and instead agree in advance to submit all employment-related disputes to binding arbitration"), *overruled by* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 745 (9th Cir. 2003).

23. *See* Lemley & Leslie, *supra* note 13, at 44–45 (arguing that arbitration clauses are often imposed on unaware consumers and that as a result consumers are forced to give up the right to sue in federal court).

24. *See infra* note 202 and accompanying text.

25. Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 718 (2012) ("In the near future, we can expect that even more companies will impose arbitral class action waivers as a means to insulate themselves from class actions because *Concepcion* has changed the calculus.").

26. Andrea Doneff, *Is* Green Tree v. Randolph *Still Good Law? How the Supreme Court's Emphasis on Contract Language in Arbitration Clauses Will Impact the Use of Public Policy to Allow Parties to Vindicate Their Rights*, 39 OHIO N.U. L. REV. 63, 69 (2012) ("For a number of years after the FAA's passage, the Supreme Court was careful to make a distinction between consumer/individual arbitration and business-to-business arbitration.").

27. *Id.* at 68–69.

28. 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989).

mandatory arbitration agreements, reasoning that Congress "enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights."[29] Acknowledging that while arbitration may work for inter-merchant contractual disputes, the Court concluded, "the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act."[30]

Applying the *Wilko* reasoning to antitrust law, the federal circuits uniformly held that antitrust claims were non-arbitrable. Most notably, in 1968, the Second Circuit concluded in *American Safety Equipment Corp. v. J.P. Maguire & Co.*[31] that pre-dispute arbitration agreements did not apply to antitrust litigation.[32] The court reasoned that subjecting antitrust claims to private arbitration would reduce plaintiffs' incentives to investigate and pursue antitrust actions, result in antitrust cases being decided by arbitrators who may be unqualified to understand complex antitrust issues or too biased to reach fair outcomes, and conflict with the congressional intent that federal judges decide and apply antitrust law.[33] For two decades, all circuits that considered the issue followed *American Safety* and held that antitrust claims were non-arbitrable.[34]

Similarly, courts had long held that the FAA did not apply to employment contracts or claims of employment discrimination.[35] Title VII protects "equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin."[36] Although government officials enforce Title VII, the Supreme Court has recognized that "the private right of action remains an essential means of obtaining judicial enforcement of Title VII."[37] More importantly, the Supreme Court in 1974's *Alexander v. Gardner-Denver Co.*[38] held that employees could not prospectively waive their right to litigate Title VII claims by signing employment contracts with arbitration clauses.[39]

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29. *Id.* at 438.

30. *Id.*

31. 391 F.2d 821 (2d Cir. 1968).

32. *Id.* at 827–28.

33. *Id.* at 826–28.

34. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 620–21 (1985) (highlighting the uniformity of the circuit courts).

35. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 40 (1991) (Stevens, J., dissenting) (citing cases); Textile Workers v. Lincoln Mills of Ala., 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting) ("[W]hen Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts.").

36. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

37. *Id.* at 45.

38. 415 U.S. 36 (1974).

39. *Id.* at 52, 59–60.

The Court explained that "[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."[40] In particular, the Court noted that the arbitral process was less capable of protecting workers' rights, in part because "[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."[41] Ultimately, the Court concluded that "the informality of arbitral procedure" that works well for commercial disputes "makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts."[42]

After decades of holding that arbitration clauses did not apply to federal statutory claims, the Supreme Court changed course in the 1980s. The Court acted incrementally, first holding that some federal securities fraud claims could be decided in private arbitration.[43] The Court then held that antitrust claims could be arbitrated in international fora,[44] which the lower courts expanded to all domestic antitrust claims as well.[45] Building on its prior securities and antitrust opinions, the Court next held that arbitration clauses could cover civil Racketeer Influenced and Corrupt Organization (RICO) claims, reasoning the court's "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights."[46] The Court then reasoned that all private federal securities claims could be arbitrated, reversing its holding in *Wilko*.[47]

Invoking all of its prior extensions of the FAA to federal statutory claims, the Court in *Gilmer v. Interstate/Johnson Lane Corp.*[48] held that employees could not bring individual claims of employment discrimination that violated federal law in federal court if the employee's securities registration application included an arbitration clause.[49] One commentator characterized *Gilmer* as "a surprising reversal of [the Court's] prior refusal

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40. *Id.* at 56.

41. *Id.* at 57–58.

42. *Id.* at 58.

43. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 215, 223–24 (1985).

44. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985).

45. *See* Lemley & Leslie, *supra* note 13, at 8 n.27 (collecting cases).

46. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226, 242 (1987) ("The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims.").

47. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 483–85 (1989).

48. 500 U.S. 20 (1991).

49. *Id.* at 25 n.2, 26, 28 ("The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration.").

to require arbitration of statutorily protected individual rights."[50] After *Gilmer*, federal employment discrimination claims—whether brought pursuant to Title VII, the Americans with Disabilities Act, or other statutory regimes—were covered by arbitration clauses.[51] The Court has similarly required enforcement of arbitration clauses in the context of state employment discrimination claims brought in state court despite the fact that the FAA explicitly exempts employment contracts from the Act's reach.[52]

In short, despite the absence of new evidence, the Court disavowed the reasoning of all its prior opinions that had explained the deficiencies of the arbitration process and the inability of consumers and workers to protect their statutory rights through arbitration. Instead, the Court invoked a newly created Congressional intent to make all federal claims arbitrable.[53]

C. *The Expanding Content of Arbitration Clauses*

The expansion of mandatory arbitration to cover consumer and employment contracts, and all causes of action that may arise from them, fundamentally undermines the expansive body of state and federal law designed to protect consumer and worker interests. Scholars have explained how arbitration as a process of resolving consumer conflicts unfairly favors business defendants.[54] For example, arbitration substantially limits discovery.[55] Consumers need more discovery than the firms that they are suing.[56] Similarly, plaintiff employees in employment disputes generally require more discovery to establish their claims than defendant employers need to defend themselves.[57] In addition to these procedural aspects of arbitration

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50. Doneff, *supra* note 26, at 75.

51. *See, e.g.*, Austin v. Owens–Brockway Glass Container, Inc., 78 F.3d 875, 885–86 (4th Cir. 1996) (holding that the disposal of Title VII and Americans with Disabilities Act (ADA) claims through summary judgment was correct because the plaintiff failed to submit her claims to mandatory arbitration as required in a collective bargaining agreement).

52. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (confining the FAA employment exemption to transportation workers); *infra* notes 300–13 and accompanying text.

53. *See infra* notes 300–13 and accompanying text.

54. *See, e.g.*, Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1093 (2011) (giving an example of this preferential treatment, specifically that FAA jurisprudence gives contract drafters the power to draft rules tantamount to the Federal Rules of Civil Procedure).

55. *See* Lemley & Leslie, *supra* note 13, at 14–15.

56. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 683–84 (1996).

57. *See* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 683 (Cal. 2000) ("The employees argue that employers typically have in their possession many of the documents relevant for bringing an employment discrimination case, as well as having in their employ many of the relevant witnesses. The denial of adequate discovery in arbitration proceedings leads to the de facto frustration of the employee's statutory rights."). The court subsequently rejected this argument, instead holding that consent to an arbitration agreement necessarily implies consent to adequate

that undercut consumer and employee interests, many businesses specifically structure their arbitration clauses to undermine or displace laws designed to protect consumers and workers.

1. Class Action Waivers.—Class action litigation is often necessary for the victims of business misconduct to secure any recovery for their injuries.[58] Congress created the class action vehicle "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[59] Class action litigation spreads litigation costs across a large number of plaintiffs, significantly reducing the cost per litigant.[60] The Supreme Court has recognized that "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."[61] Without class actions, individuals may be unable to protect their rights and to deter illegal conduct.[62] Indeed, Professor Myriam Gilles has argued that "class actions and aggregate litigation represent the law's best-effort at procedural democracy, at providing access to courts for groups—consumers, employees, small business owners—that would otherwise be unable to have their claims openly adjudicated."[63]

In recognition of the importance of class action litigation in holding firms responsible for their illegal conduct, many firms have sought to eliminate class actions by imposing class action waivers on their customers.

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discovery for their claim—albeit not the full discovery available in court—but that this adequacy is to be determined by the arbitrator and subject only to limited judicial review. *Id.* at 684.

58. McKenzie Check Advance of Fla., LLC v. Betts, 112 So. 3d 1176, 1184 (Fla. 2013) ("[M]any potential claims may go unprosecuted unless they may be brought as a class.") (quoting Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1212 (11th Cir. 2011)).

59. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

60. *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402–03 (1980) ("The justifications that led to the development of the class action include . . . the facilitation of the spreading of litigation costs among numerous litigants with similar claims."); Fiser v. Dell Comput. Corp., 188 P.3d 1215, 1219 (N.M. 2008) ("The class action device allows claimants with individually small claims the opportunity for relief that would otherwise be economically infeasible because they may collectively share the otherwise prohibitive costs of bringing and maintaining the claim.").

61. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

62. *See* Salvas v. Wal-Mart Stores, Inc., 893 N.E.2d 1187, 1215 (Mass. 2008) ("Class actions were designed not only to compensate victimized group members, but also to deter violations of the law, especially when small individual claims are involved." (quoting 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.36, at 314 (4th ed. 2002))); Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 514 (1996) (noting that the class action is an "effective mechanism for privately enforcing the law, deterring wrongful conduct, and compensating victims").

63. Myriam Gilles, *Procedure in Eclipse: Group-Based Adjudication in a Post*-Concepcion *Era*, 56 ST. LOUIS U. L.J. 1203, 1205 (2012).

A class action waiver requires consumers to promise not to initiate or participate in any class action against a firm.[64] The popularity of class action waivers increased in 1999

> when the National Arbitration Forum ("NAF"), a for-profit arbitral body designated in the arbitration provisions of many large companies, disseminated marketing materials cautioning corporate attorneys that the only way to insulate their clients from class action liability in general . . . was to implement arbitration provisions containing terms that expressly waive the right to class treatment.[65]

Class action waivers are now common boilerplate in many contracts.[66]

Class action waivers often render litigation prohibitively expensive for plaintiffs because the expected costs of bringing an individual claim exceed the highest possible damages award.[67] Because of the economics of individual action, frequently "the class action waiver effectively bars these claims from being brought in *any* forum."[68] The New Mexico Supreme Court has observed that "[b]y preventing customers with small claims from attempting class relief and thereby circumscribing their only economically efficient means for redress, [a] class action ban exculpates the company from wrongdoing."[69] Similarly, the New Jersey Supreme Court has explained that "[i]n addition to their impact on individual litigants, class-action waivers can functionally exculpate wrongful conduct by reducing the possibility of attracting competent counsel to advance the cause of action. Class-action

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64. The language of class action waivers is not always clear. *See* Gay v. Creditinform, 511 F.3d 369, 375 (3d Cir. 2007) ("Any claim arising out of or relating to the Product shall be settled by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association on an individual basis not consolidated with any other claim."); Provencher v. Dell, Inc., 409 F. Supp. 2d 1196, 1199 (C.D. Cal. 2006) ("The arbitration will be limited solely to the dispute or controversy between Customer and Dell . . . .").

65. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 397 (2005).

66. *See, e.g.*, Hopkins v. World Acceptance Corp., 798 F. Supp. 2d 1339, 1343 (N.D. Ga. 2011); Clerk v. First Bank of Del., 735 F. Supp. 2d 170, 174 (E.D. Pa. 2010).

67. Muriithi v. Shuttle Express, Inc., 712 F.3d 173, 178 (4th Cir. 2013) ("[I]f 'class actions are prohibited by the [Franchise Agreement], the realistic alternative would be that no individual suits are brought given that the costs of each individual arbitration has the potential to exceed any recovery.'" (alteration in original)); Muhammad v. Cty. Bank of Rehoboth Beach, 912 A.2d 88, 99 (N.J. 2006) ("In most cases that involve a small amount of damages, 'rational' consumers may decline to pursue individual consumer-fraud lawsuits because it may not be worth the time spent prosecuting the suit, even if competent counsel was willing to take the case.").

68. Gilles, *supra* note 63, at 1224; *see also, e.g.*, Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011) (explaining that without a class action the plaintiff "would be required to spend approximately $200,000 in order to recover double her overtime loss of approximately $1,867.02," and that "[o]nly a 'lunatic or a fanatic' would undertake such an endeavor"), *rev'd and remanded*, 726 F.3d 290 (2d Cir. 2013).

69. Fiser v. Dell Comput. Corp., 188 P.3d 1215, 1221 (N.M. 2008) ("On these facts, enforcing the class action ban would be tantamount to allowing Defendant to unilaterally exempt itself from New Mexico consumer protection laws.").

waivers prevent an aggregate recovery that can serve as a source of contingency fees for potential attorneys."[70] Consequently, class action waivers ultimately allow firms to insulate themselves from all liability and even scrutiny.[71] Firms have used class action waivers to prevent plaintiffs from pursuing a wide range of legal claims.[72]

Recognizing the danger posed by class action waivers, many state courts had invalidated them.[73] Courts had used primarily two methods to do so. First, some courts held that class action waivers could be held unconscionable.[74] Most notably, the California Supreme Court created the *Discover Bank*[75] rule, which held that class action waivers "in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally uncon-

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70. *Muhammad*, 912 A.2d at 100.

71. Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007) ("Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small-value claims."); Sternlight, *supra* note 25, at 725 ("If we allow companies to insulate themselves from class actions, we are effectively allowing companies to escape many legal regulations and thereby eliminating a great deterrent to company misconduct.").

72. *See, e.g.*, Anderson v. Comcast, Corp., 500 F.3d 66, 68 (1st Cir. 2007) (involving the "Massachusetts Consumer Protection Act, . . . and various common law tort theories"); Hopkins v. World Acceptance Corp., 798 F. Supp. 2d 1339, 1342 (N.D. Ga. 2011) (involving a "breach of contract, unjust enrichment, conversion, violation of Georgia RICO, violation of Georgia's Deceptive Trade Practices Act, and violation of the Truth in Lending Act").

73. *See, e.g.*, *Fiser*, 188 P.3d at 1218 ("[T]he class action ban is contrary to fundamental New Mexico public policy."); Gentry v. Superior Court, 165 P.3d 556, 569 (Cal. 2007) ("The principle that in the case of certain unwaivable statutory rights, class action waivers are forbidden when class actions would be the most effective practical means of vindicating those rights is an arbitration-neutral rule: it applies to class waivers in arbitration and nonarbitration provisions alike."), *abrogated by* Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129 (Cal. 2014). Other state courts have found class action waivers in arbitration clauses to be enforceable. *See, e.g.*, Gay v. Creditinform, 511 F.3d 369, 392 (3d Cir. 2007); Tsadilas v. Providian Nat'l Bank, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004); AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 199–201 (Tex. App.—Houston [14th Dist.] 2003, no pet.). Courts in some states were split. *Compare* Schwartz v. Alltel Corp., No. 86810, 2006 WL 2243649, at *5 (Ohio Ct. App. June 29, 2006) (finding a class action waiver established substantive unconscionability, regardless of arbitration context), *with* Hawkins v. O'Brien, No. 22490, 2009 WL 50616, at *5 (Ohio Ct. App. Jan. 9, 2009) (finding a class action waiver did not establish substantive unconscionability).

74. Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002) ("The manifest one-sidedness of the no class action provision at issue here is blindingly obvious."); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 278 (Ill. 2006) ("In sum, we hold that under the circumstances of this case, the waiver on class actions is unconscionable."); *Muhammad*, 912 A.2d at 100 ("We hold, therefore, that the presence of the class-arbitration waiver in Muhammad's consumer arbitration agreement renders that agreement unconscionable.").

75. Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

scionable."[76] Several courts followed suit,[77] though many did not.[78] Second, some federal courts held class action waivers unenforceable under the Effective Vindication Doctrine.[79] This judicial hostility toward class action waivers caused many companies to reform their arbitration clauses to make them less aggressive.[80]

The calculus fundamentally changed in 2011, when the Supreme Court in *Concepcion* overruled the *Discover Bank* rule. *Concepcion* prevented lower courts from following those jurisdictions that had condemned certain class action waivers in arbitration clauses as unconscionable.[81] Professor Maureen Weston has noted that "[a]fter *Concepcion*, a rubber-stamp effect seemed to ensue in the courts addressing the enforceability of class action

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76. Discover Bank v. Superior Court, 113 P.3d 1100, 1109 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

77. *See, e.g.*, *Kinkel*, 857 N.E.2d at 271 ("Our research reveals that other state courts have invalidated class action waivers when the contract containing the waiver is burdened by other unfair features, rendering it substantively unconscionable when taken as a whole."); Feeney v. Dell Inc., 989 N.E.2d 439, 441 (Mass. 2013) ("[W]e conclude that a court is not foreclosed from invalidating an arbitration agreement that includes a class action waiver where a plaintiff can demonstrate that he . . . effectively cannot pursue a claim against the defendant in individual arbitration according to the terms of the agreement, thus rendering his . . . claim nonremediable."), *abrogated by* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013), *as recognized in* Machado v. System4 LLC, 993 N.E.2d 332, 333 (Mass. 2013); Gilles, *supra* note 63, at 1214 ("At first, courts were skeptical of these unconscionability challenges leveled at the class action waivers, and the vast majority of early decisions upheld the waivers against this challenge. The tide turned in 2005, when the California Supreme Court decided . . . *Discover Bank* . . . .").

78. *E.g.*, Lipuma v. Am. Express Co., 406 F. Supp. 2d 1298, 1321 (S.D. Fla. 2005) ("Federal courts have . . . not hesitated to enforce arbitration agreements that precluded class action relief."); *In re* Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237, 259–60 (S.D.N.Y. 2005) (collecting cases); Rains v. Found. Health Sys. Life & Health, 23 P.3d 1249, 1253 (Colo. App. 2001) ("[A]rbitration clauses are not unenforceable simply because they might render a class action unavailable."); *see also* 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 2:14, at 97 n.30 (11th ed. 2014) (collecting cases).

79. *In re* Am. Express Merchs.' Litig., 634 F.3d 187, 198–99 (2d Cir. 2011); Kristian v. Comcast Corp., 446 F.3d 25, 29, 37, 50 (1st Cir. 2006); *In re* Elec. Books Antitrust Litig., No. 11 MD 2293, 2012 WL 2478462, at *3 (S.D.N.Y. 2012) ("Plaintiffs' affidavits demonstrate that it would be economically irrational for any plaintiff to pursue his or her claims through an individual arbitration."); *see also* Gillette v. First Premiere Bank, No. 3:13-CV-432, 2013 WL 3205827, at *4 (S.D. Cal. 2013) (noting split among courts); Lemley & Leslie, *supra* note 13, at 8–9.

80. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1458 n.141 (2008) ("[G]iven the recent successes of unconscionability challenges, the most aggressive arbitration clauses are now being scaled back."); Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825, 847 (2012) ("In other words, at the height of unconscionability's success in beating back arbitration clauses, companies responded by redrafting their provisions to make them less vulnerable to that challenge.").

81. Sternlight, *supra* note 25, at 708–09 ("As interpreted by most courts, *Concepcion* is destroying virtually all possible attacks on arbitral class action waivers.").

waivers in arbitration agreements."[82] Even judges that recognize the folly of the *Concepcion* opinion feel compelled to follow it, as one district judge noted with regret: "There is no doubt that *Concepcion* was a serious blow to consumer class actions and likely foreclosed the possibility of any recovery for many wronged individuals."[83] Dozens of courts have since upheld class action waivers in arbitration clauses.[84]

Firms responded to the *Concepcion* opinion by inserting class action waivers into their arbitration clauses.[85] Professor Gilles predicted that in the aftermath of *Concepcion*,

> class action waivers will soon seep into every contract—whether signed, clicked, mass-emailed, posted on a website, or otherwise "consented to"—until aggregate litigation itself becomes a procedural relic examined only briefly in courses on the legal history of the twentieth century, that long-ago era where legal claims were actually adjudicated in public courts of law.[86]

Her prediction has proven prescient.[87] These precluded claims include "cases brought regarding consumer fraud, consumer debt, violations of federal and state wage and hour legislation, and unpaid wages."[88]

It is important to remember, however, that *Concepcion* is not an endorsement of contractual class action waivers writ large; rather, the Court

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82. Maureen A. Weston, *The Death of Class Arbitration After* Concepcion*?*, 60 U. KAN. L. REV. 767, 782 (2012).

83. Bernal v. Burnett, 793 F. Supp. 2d 1280, 1288 (D. Colo. 2011).

84. CHRISTINE HINES ET AL., PUB. CITIZEN & NAT'L ASS'N OF CONSUMER ADVOCATES, JUSTICE DENIED: ONE YEAR LATER: THE HARMS TO CONSUMERS FROM THE SUPREME COURT'S *CONCEPCION* DECISION ARE PLAINLY EVIDENT 4, app. at 32–34 (2012), http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf [http://perma.cc/MDM7-YGLW] (noting "76 potential class action cases where judges cited *Concepcion* and held that class action bans within arbitration clauses were enforceable").

85. Arbitration clauses also regularly forbid classwide arbitration. *See* CFPB ARBITRATION STUDY, *supra* note 16 § 2.5.5, at 44–45 ("[I]n our samples, class arbitration was unavailable for 99.9% of arbitration-subject credit card loans outstanding, 97.1% of arbitration-subject insured deposits, essentially 100.0% of arbitration-subject prepaid card loads, 98.2% of arbitration-subject payday loan storefronts, and 99.7% of arbitration-subject mobile wireless subscribers."); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 884 (2008) ("[E]very consumer contract with an arbitration clause also included a waiver of classwide arbitration.").

86. Gilles, *supra* note 63 at 1208 (footnotes omitted); *see also* Gilles, *supra* note 80, at 853 ("[A]ll the clauses I examined contained class action waivers.").

87. *See, e.g.*, Jeremy B. Merrill, *One-Third of Top Websites Restrict Customers' Right to Sue*, N.Y. TIMES (Oct. 23, 2014), http://www.nytimes.com/2014/10/23/upshot/one-third-of-top-websites-restrict-customers-right-to-sue.html?_r=1 [http://perma.cc/L3T3-JUBC] (noting doubling of class action waivers); Ann Marie Tracey & Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in* AT&T Mobility LLC v. Concepcion, 45 LOY. L.A. L. REV. 435, 448 (2012) (noting that businesses quickly adapted online arbitration clauses to block the possibility of collective redress in both judicial and arbitral forums).

88. Sternlight, *supra* note 25, at 709 (footnotes omitted).

based its decision on deference to arbitration clauses. As a result, arbitration agreements have become a safe harbor for otherwise unenforceable class action waivers.[89] Absent the judicial deference to the terms in arbitration agreements, class action waivers would not be protected by *Concepcion*;[90] the *Discover Bank* rule still invalidates class action waivers contained in contracts without arbitration agreements.[91] However, in those states that make class action waivers unenforceable under certain circumstances, would-be defendants can evade these state laws by inserting their class action waivers into arbitration clauses.

After *Concepcion*—with the unconscionability defense no longer a viable tool to invalidate class action waivers in arbitration clauses—some courts turned to the Effective Vindication Doctrine to address the issue. The Supreme Court created this arbitration-specific doctrine when it held that federal statutory claims were subject to arbitration.[92] While reversing the *American Safety* rule that antitrust claims were non-arbitrable,[93] the *Mitsubishi*[94] Court held that federal statutory claims could be arbitrated "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."[95] Justice Kagan has explained the importance of the Effective Vindication Doctrine:

> The effective-vindication rule furthers the statute's goals by ensuring that arbitration remains a real, not faux, method of dispute resolution. With the rule, companies have good reason to adopt arbitral procedures that facilitate efficient and accurate handling of complaints. Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights, making arbitration unavailable or pointless.[96]

The tension between the Effective Vindication Doctrine and class action waivers is illustrated by class action litigation brought by a group of

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89. Gilles & Sebok, *supra* note 15, at 459 ("Most recently, in *American Express Co. v. Italian Colors Restaurant*, a 5–3 majority held that class action waivers embedded in arbitration clauses are enforceable even where proving the violation of a federal statute in an individual arbitration would prove too costly to pursue.").

90. *See* Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187, 192–93 (2012) ("[C]orporations and the Court are merely making opportunistic use of arbitration and the FAA's protective shield, to camouflage the 'troll' of class waiver.").

91. Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 112–13 (2012) (citing *In re* Yahoo! Litig., 251 F.R.D. 459, 465–67 (C.D. Cal. 2008)).

92. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, 640 (1985).

93. *See supra* notes 31–34 and accompanying text.

94. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

95. *Mitsubishi*, 473 U.S. at 637.

96. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2315 (2013) (Kagan, J., dissenting).

merchants against American Express. In *Italian Colors*, the merchants alleged that American Express had violated antitrust laws and brought their class action in federal court despite the fact that they had all signed contracts with arbitration clauses that contained class action waivers.[97] They argued that they could not effectively vindicate their rights through individual arbitration.[98] The plaintiffs' economist noted that the median-volume merchant in the class could expect $5,252 in trebled damages, yet the out-of-pocket expenses for bringing an individual arbitration or lawsuit "just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million."[99] Even the largest volume named plaintiff merchant could only achieve $38,549 in damages after trebling, far less than the nonrecoverable costs necessary to retain the required economic testimony.[100] The Second Circuit agreed with the merchants, concluding that "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action."[101]

The Supreme Court reversed.[102] Conceding that the class action waivers made individual arbitration prohibitively expensive, the majority asserted that "a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."[103] As a result of *Italian Colors*, firms can use arbitration clauses to prevent class actions[104] even when participation in class action litigation is the only possible mechanism to effectively vindicate one's federal rights.[105]

The combination of *Concepcion* and *Italian Colors* makes it exceedingly difficult for the victims of illegal conduct to challenge the enforceability of class action waivers.[106] This alone fundamentally undermines access to any adjudicatory forum. But the opinions also invite firms to impose other questionable contract terms that courts may be unable to declare unconscionable or unenforceable if found in an arbitration clause, as the following section explains.

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97. *Id.* at 2308 (majority opinion).

98. *Id.*

99. *In re* American Express Merchs.' Litig., 667 F.3d 204, 217–18 (2d Cir. 2012) (quoting Dr. French's affidavit), *rev'd sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

100. *Id.* at 218.

101. *Id.*

102. *Italian Colors*, 133 S. Ct. at 2312.

103. *Id.* at 2307.

104. *Id.* at 2311.

105. Lemley & Leslie, *supra* note 13, at 12.

106. *See* Sternlight, *supra* note 25, at 798–09 ("As interpreted by most courts, *Concepcion* is destroying virtually all possible attacks on arbitral class action waivers.").

2. Unconscionable and Unenforceable Terms in Arbitration Clauses.—In addition to class action waivers, firms have regularly inserted other anti-consumer and anti-employee provisions in their contracts and arbitration clauses, with varying degrees of success. Some of these terms are considered unconscionable under the common law unconscionability doctrine while others are prohibited by state statutes; in either case, some courts will not enforce these terms. This section will discuss several types of these terms: (1) truncated statutes of limitations, (2) damage limitations, (3) anti-injunction clauses, (4) fee-shifting provisions, (5) forum-selection clauses, and (6) non-coordination agreements. Each of these provisions undermines consumer protection and employment law. More importantly, these provisions would be contractually unenforceable in at least some jurisdictions but for the fact that they reside in an arbitration clause.

a. Statutes of Limitations.—Statutes of limitations serve multiple purposes. They protect defendants against unfair surprise and they preclude fraudulent or stale claims.[107] But limitations periods must be long enough to afford victims of illegal conduct sufficient time to develop the facts necessary to plead and prove their case; otherwise wrongdoers will not be held accountable and deterrence suffers.[108] The Alaska Supreme Court has explained that "[s]tatutes of limitations attempt to strike a balance between ensuring that claimants have enough time to file a claim and protecting persons from due process concerns that arise when subjected to stale charges."[109] The U.S. Supreme Court has articulated this balance as "a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."[110]

Many consumer protection laws have relatively generous statutes of limitations.[111] And, in general, the law limits the ability of businesses to contractually require their customers and employees to truncate the applicable statute of limitations. Some states allow contracting parties to reduce the prescribed statute of limitations,[112] but parties may not agree to a

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107. Christopher R. Leslie, *Den of Inequity: The Case for Equitable Doctrines in Rule 10b-5 Cases*, 81 CALIF. L. REV. 1587, 1590 (1993).

108. *See id.* at 1591 (discussing how if the "statute of limitations is too short, victims are less likely to bring suit in time, wrongdoers are less likely to be held accountable, and deterrence of the initial crime is diminished").

109. Brotherton v. Brotherton, 142 P.3d 1187, 1191 n.19 (Alaska 2006).

110. Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463–64 (1975).

111. *See, e.g.*, 15 U.S.C. § 15b (2012) (providing a four-year statute of limitations for antitrust claims).

112. *See, e.g.*, Sanders v. Comcast Cable Holdings, LLC, No. 3:07-CV-918-J-33HTS, 2008 WL 150479, at *12 (M.D. Fla. Jan. 14, 2008) ("[T]he class action waiver and truncated statute of limitations do not render the Arbitration Notice substantively unconscionable."); Blue Shield of Cal. Life & Health Ins. Co. v. Superior Court, 120 Cal. Rptr. 3d 713, 720 n.11 (Cal. Ct. App. 2011)

limitation period that is "unreasonably short."[113] Other states prohibit altogether the shortening of statutes of limitations.[114] For example, under Florida law, "[a]ny provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void."[115] Some courts have found contractual restrictions on limitations periods to be substantively unconscionable.[116] Even when speaking deferentially about parties' ability

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(noting "the well-established principle that the parties to a contract may agree to shorten or extend the statute of limitations"); Wilson Fertilizer & Grain, Inc. v. ADM Milling Co., 654 N.E.2d 848, 853 (Ind. Ct. App. 1995) ("Indiana law specifically permits parties to a contract for sale to reduce the time for filing claims to one year, and Wilson has not shown that the one-year limitation is not within the customary limits of the trade."); Nez v. Forney, 783 P.2d 471, 473 (N.M. 1989) ("[P]arties can put their own statute of limitations period in a contract, and our courts will honor it.").

113. Henning Nelson Const. Co. v. Fireman's Fund Am. Life Ins. Co., 383 N.W.2d 645, 651 (Minn. 1986); *see also* Order of United Commercial Travelers of Am. v. Wolfe, 331 U.S. 586, 608 (1947) ("[I]t is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period."); Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 266 (3d Cir. 2003) ("We recognize that a provision limiting the time to bring a claim or provide notice of such a claim to the defendant is not necessarily unfair or otherwise unconscionable. But such a time period must still be reasonable."); Hambrecht & Quist Venture Partners v. Am. Med. Int'l, Inc., 46 Cal. Rptr. 2d 33, 43 (Cal. Ct. App. 1995) ("As for shortening the limitations period, the courts will enforce the parties' agreement provided it is reasonable."); Kraly v. Vannewkirk, 635 N.E.2d 323, 329 (Ohio 1994) ("[A] provision in a contract of insurance which purports to extinguish a claim for uninsured motorist coverage by establishing a limitations period which expires before or shortly after the accrual of the right of action for such coverage is *per se* unreasonable and violative of the public policy of the state of Ohio . . . ."); Bd. of Supervisors v. Sampson, 369 S.E.2d 178, 180 (Va. 1988) (parties may alter a statute of limitations "if the contractual provision is not against public policy and if the agreed time is not unreasonably short"); Yakima Asphalt Paving Co. v. Wash. State Dep't of Transp., 726 P.2d 1021, 1023 (Wash. Ct. App. 1986) ("Parties to a contract can agree to a shorter limitations period than that called for in a general statute.").

114. ALA. CODE § 6-2-15 (2015) ("Except as may be otherwise provided by the Uniform Commercial Code, any agreement or stipulation, verbal or written, whereby the time for the commencement of any action is limited to a time less than that prescribed by law for the commencement of such action is void."); *In re* Cotton Yarn Antitrust Litig., 505 F.3d 274, 287 n.8 (4th Cir. 2007) (noting that South Carolina law "prohibits contractual shortening of statutes of limitation"); Honeywell, Inc. v. Ruby Tuesday, Inc., 43 F. Supp. 2d 1074, 1078 (D. Minn. 1999) (describing shortening of statutes of limitations as "illegal per se").

115. Palma Vista Condo. Ass'n of Hillsborough Cty., Inc. v. Nationwide Mut. Fire Ins. Co., No. 8:09-CV-155-T-27EAJ, 2010 WL 4274747, at *6 (M.D. Fla. Oct. 7, 2010) (quoting FLA. STAT. § 95.03) (alteration in original).

116. Zaborowski v. MHN Gov't Servs., Inc., 601 F. App'x 461, 463 (9th Cir. 2014) ("[T]he contract's sixth-month limitations period is substantively unconscionable."); *see also* Shahin v. I.E.S. Inc., 988 N.E.2d 873, 875 (Mass. App. Ct. 2013) ("The limitations period set out in the contract is one year from the date of the contract . . . . The limitations period thus expired one year from the date of the contract—regardless of the date of any alleged breach or its discovery. . . . [I]t is therefore invalid and unenforceable.").

to shorten statutes of limitations, courts sometimes override a contractual statute of limitations.[117]

Many businesses attempt to circumvent these rules by including shortened statutes of limitations in arbitration clauses. Attorneys advise their clients (and other attorneys) to use arbitration clauses as a mechanism for shortening the statute of limitations.[118] Unlike judges, arbiters do not have to apply the same considerations of reasonableness and have more latitude to enforce business-imposed reductions of the statute of limitations.[119] Although "reasonableness" limits the contractual ability to shorten statutes of limitations, arbitrators may not honor these limits.[120]

b. Damage Limitations.—Many laws allow successful plaintiffs to recover more than mere compensatory damages. Exemplary damages serve many important purposes, such as "to punish reprehensible conduct and to deter its future occurrence."[121] Some states—and some federal laws—limit the ability of defendants to require their consumers and employees to waive exemplary damages.[122] For example, when a federal statute provides for treble or punitive damages, parties cannot contractually waive them.[123] When a contractual limitation of damages conflicts with damages available pursuant to a state law, courts often invalidate the contract provision.[124] Independent of statutorily provided damages, courts also disallow damage caps, as well as liquidated damage clauses that have the effect of fixing

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117. *Nez*, 783 P.2d at 473.

118. *See* Edward J. Underhill, *Statutes of Limitation and Arbitration: Limiting Your Client's Exposure*, 101 ILL. B.J. 244, 244 (2013) ("Contrary to what many lawyers think, it's not safe to assume general statutes of limitation automatically apply to Illinois arbitration claims. That's why you should consider including a clause limiting your client's exposure in your arbitration agreements.").

119. *See* Lemley & Leslie, *supra* note 13, at 17 (discussing that in the context of antitrust disputes, which involve consumers suing dominant firms, selecting arbitrators from the business community creates the possibility of weakened antitrust scrutiny of defendants).

120. *See id.* at 24 (arguing that in the "new world of arbitration, plaintiffs may be forced to bring an underdeveloped case or risk losing their claims forever").

121. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

122. *See, e.g.*, Gessa v. Manor Care of Fla., Inc., 86 So. 3d 484, 493 (Fla. 2011) ("Thus, these limitation of liability provisions, which place a $250,000 cap on noneconomic damages and waive punitive damages, violate the public policy of the State of Florida and are unenforceable.").

123. *See, e.g.*, Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 154 (Cal. Ct. App. 1997) (asserting that the right to punitive damages under Title VII "ha[s] never been deemed prospectively waivable in the context of an employment dispute").

124. *See, e.g.*, Capital Equip., Inc. v. CNH Am., LLC, 471 F. Supp. 2d 951, 958 (E.D. Ark. 2006) (holding that a contractual limitation of damages provision is inapplicable to the extent that such provisions limit the statutory protections afforded to the plaintiff under the state law).

damages before breach.[125] Courts have rejected attempts to enforce contract provisions that claim to ban money damages altogether.[126]

In response to laws that allow plaintiffs to recover noncompensatory damages, many firms use arbitration clauses to attempt to limit damages. Arbitration clauses commonly prohibit punitive damages, incidental damages, and any other type of damage beyond mere compensatory damages.[127] Some arbitration clauses also claim to cap damages irrespective of actual damages.[128] Finally, some clauses claim to strip arbiters of any "authority to award any punitive or exemplary damages" or "extra contractual damages of any kind."[129]

While these terms may be unenforceable in a traditional contract interpreted by a judge, an arbiter gets to determine whether the damage-limitation provision in an arbitration clause is enforceable.[130] It is not clear

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125. *See, e.g.*, Gross v. McKenna, No. E2005-02488-COA-R3-CV, 2007 WL 3171155, at *5 (Tenn. Ct. App. Oct. 30, 2007) ("[L]iquidated damages . . . clauses are unenforceable where the actual damages caused by a breach are 'readily susceptible to accurate proof . . . .'"); Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc., 285 P.3d 1193, 1202 (Utah 2012) ("[T]he court's underlying goal is to avoid enforcement of *unconscionable* liquidated damages clauses.").

126. *See, e.g.*, Health Net of Cal., Inc. v. Dep't of Health Servs., 6 Cal. Rptr. 3d 235, 249 (Cal. Ct. App. 2003) (invalidating the clause insofar as it exculpated the defendants "from liability for any money damages for statutory and regulatory violations").

127. CFPB ARBITRATION STUDY, *supra* note 16, § 2.5.6, at 47 ("Damages limitations in prepaid card contracts with arbitration clauses were more frequent, and almost always precluded recovery of both punitive and consequential damages."); Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1025 (1996); *see, e.g.*, Anderson v. Comcast, Corp., 500 F.3d 66, 68 (1st Cir. 2007) (explaining that arbitration agreement prohibited attorney's fees and double or treble damages); O'Quinn v. Comcast Corp., No. 10 C 2491, 2010 WL 4932665, at *2 (N.D. Ill. Nov. 29, 2010) ("All parties also waive claims to punitive damages unless provided for by statute."); Gatton v. T-Mobile USA, Inc., No. SACV 03-130, 2003 WL 21530185, at *1 (C.D. Cal. Apr. 18, 2003) ("[N]o lost profits, punitive, incidental or consequential damages, other than the prevailing party's direct damages, may be awarded . . . ."); Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp., 123 Cal. Rptr. 3d 547, 555 (Cal. Ct. App. 2011) ("[T]he arbitration provision limits recovery to actual compensatory damages and does not allow for noneconomic and punitive damages.").

128. *See, e.g.*, Crewe v. Rich Dad Educ., LLC, 884 F. Supp. 2d 60, 67–68 (S.D.N.Y. 2012) (reviewing an arbitration agreement that limited the maximum amount the arbitrator can award to "the amount paid by you to us under the Agreement plus the fees and costs provided for in this paragraph").

129. PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 405 (2003); *see also* Captain Bounce, Inc. v. Bus. Fin. Servs., Inc., No. 11-CV-858, 2012 WL 928412, at *2 (S.D. Cal. Mar. 19, 2012) ("The arbitrator at such arbitration shall not be entitled to award punitive damages to any party, and the costs and fees of such arbitration shall be borne by the losing party.").

130. *PacifiCare*, 538 U.S. at 406–07 ("[S]ince we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract. . . . [T]he proper course is to compel arbitration."); *Anderson*, 500 F.3d at 72 (discussing *PacifiCare*); *In re* Universal Serv. Fund Tel. Billing Practices Litig., 300 F. Supp. 2d 1107, 1127 (D. Kan. 2003) ("[T]he extent to which the limitation of liability on punitive or exemplary damages

whether arbiters are bound to follow statutory damage rules.[131] Furthermore, some courts have held that "[a]rbitrators may award punitive damages only where the parties have expressly agreed to the arbitrator's authority to award punitive damages."[132] Arbitration creates the possibility that arbiters will enforce damage-limitation provisions that judges would invalidate.[133] Indeed, some courts have acknowledged that firms can limit damages in arbitration in ways that they cannot limit them in court.[134]

c. Anti-Injunction Clauses.—Many areas of law provide for injunctive relief.[135] Injunctive relief is often critical to remedy violations of the law. For example, in the context of antitrust law, injunctions may be necessary to restore the competitive marketplace and to eliminate the "lingering effects" of illegal anticompetitive conduct.[136] In general, businesses cannot require their customers and employees to preemptively waive their right to injunctive relief. In expanding the reach of arbitration clauses, the Supreme Court explicitly assumed that "arbitrators do have the power to fashion equitable relief."[137] Businesses, however, sometimes use arbitration clauses to limit injunctive remedies.[138] Some lawyers encourage their colleagues to use

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actually bans a treble damage award on plaintiffs' antitrust claim is . . . . [an] issue [that] must first be resolved by the arbitrator.").

131. Donald I. Baker & Mark R. Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 BUS. LAW. 395, 410 n.85 (1993) ("It is not clear whether arbitration tribunals are obliged to award mandatory treble damages by virtue of the Clayton Act."); Robert Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072, 1079 (1969) (regarding mandatory treble damages and attorney's fees, "neither of those statutory provisions would be binding on the arbitrator").

132. 7-Eleven, Inc. v. Dar, 757 N.E.2d 515, 523 (Ill. App. Ct. 2001) ("Therefore, if the arbitrator awarded punitive damages in this case, he would have exceeded his authority.").

133. *See* Larry's United Super, Inc. v. Werries, 253 F.3d 1083, 1085–86 (8th Cir. 2001) (allowing arbiter to determine whether a damage-limitation provision is unenforceable because it violates public policy).

134. *See, e.g.*, Stark v. Sandberg, Phx. & Von Gontard, P.C., 381 F.3d 793, 800 (8th Cir. 2004) (discussing punitive damages and recognizing that "the FAA allows parties to incorporate terms into arbitration agreements that are contrary to state law").

135. *See, e.g.*, 15 U.S.C. § 26 (2012) (authorizing injunctive relief "against threatened loss or damage by a violation of the antitrust laws").

136. *See, e.g.*, Wilk v. Am. Med. Ass'n, 895 F.2d 352, 366–67 (7th Cir. 1990) (upholding the grant of an injunction against an unlawful boycott).

137. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991).

138. Norfolk S. Ry. Co. v. Fla. E. Coast Ry., LLC, No. 3:13-cv-576-J-34JRK, 2014 WL 757942, at *2 (M.D. Fla. Feb. 26, 2014) (noting that an arbitration provision stated that "the arbitrator will not determine violations of criminal law and will not issue injunctive relief").

arbitration clauses "to exclude injunctive relief" that would otherwise be available to plaintiffs.[139]

Even without explicit provisions that preclude injunctive relief, arbiters are less capable of fashioning and enforcing injunctive remedies. Sometimes, arbiters simply lack the authority to enjoin defendants from illegal activity.[140] Even when an individual plaintiff in arbitration can get relief, she is generally unable to get a market-wide injunction.[141]

d. Fee-Shifting Provisions.—Many statutes have pro-plaintiff fee-shifting provisions to protect consumers. For example, antitrust law requires judges to award the successful private plaintiff—but not the successful defendant—reasonable attorneys' fees and costs.[142] Some state consumer protection and employment laws have similar protections.[143] One-way fee shifting is an important component of many statutory schemes. If the winning plaintiff cannot recover her attorneys' fees, then her costs of pursuing her claim may exceed the maximum possible award.[144] This also makes it unlikely that any attorney would take the case.[145]

Firms cannot contractually forbid statute-directed fee shifting in many states. For example, the New Mexico Supreme Court held that parties could not contract around an attorneys' fee-shifting provision that encourages private plaintiffs to enforce a statute.[146] Similarly, Ohio courts have held that contract provisions that impose one-sided fee shifting in favor of business are not enforceable.[147]

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139. James J. Calder et al., *A New Alternative to Antitrust Litigation: Arbitration of Antitrust Disputes*, ANTITRUST, Spring 1989, at 18, 19–20.

140. Gilles & Sebok, *supra* note 15, at 465 ("[B]ecause arbitrators lack the authority to enjoin ongoing wrongful activity, each claimant bringing a separate claim has no overall impact on policy or practices that have widespread effect.").

141. Doneff, *supra* note 26, at 76 ("Also, the arbitrator cannot enjoin the wrongdoer from committing the same wrong against every consumer and simply paying the consequences to the few who seek damages in arbitration.").

142. 15 U.S.C. § 15(a) (2012).

143. *See, e.g.*, Kirby v. Immoos Fire Prot., Inc., 274 P.3d 1160, 1166 (2012) (referring to "one-way fee-shifting provision" in CAL. LAB. CODE § 1194 (West 2015)).

144. Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 548–49 (S.D.N.Y. 2011) *rev'd*, 726 F.3d 290 (2d Cir. 2013).

145. *Id.* at 550–52.

146. First Baptist Church of Roswell v. Yates Petroleum Corp., 345 P.3d 310, 314–15 (N.M. 2015).

147. Scotts Co. v. Cent. Garden & Pet Co., 403 F.3d 781, 787 (6th Cir. 2005) ("[F]ee-shifting provisions on preprinted commercial contracts are generally held unenforceable by the Ohio courts . . . ."); Columbus Check Cashers, Inc. v. Rodgers, No. 08AP-149, 2008 WL 4684781, at *3–5 (Ohio Ct. App. Oct. 23, 2008).

Some firms try to evade pro-plaintiff statutory fee-shifting laws. For example, they draft their arbitration clauses to preclude all fee shifting.[148] Some arbitration clauses mandate two-way fee shifting, requiring whichever party loses to pay the winner's costs.[149] Finally, some arbitration clauses attempt to impose one-way fee shifting in favor of defendants, of the sort that Ohio law prohibits.[150]

Some courts have found the use of arbitration clauses to manipulate rules regarding fee shifting to be unconscionable or unenforceable in various settings. First, some courts have condemned arbitration-imposed two-way fee shifting provisions as unconscionable. For example, in the Ninth Circuit a "'loser pays' arbitration term was found substantively unconscionable because it put the plaintiffs in arbitration 'at risk of incurring greater costs than they would bear if they were to litigate their claims in federal court.'"[151] Second, other courts have found provisions that preclude a successful

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148. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) ("The agreement precludes any shifting of costs to Amex, even if Italian Colors prevails."); Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1247 (9th Cir. 1995) (evaluating the validity of an arbitration clause that "provides that each party will bear its own attorney's fees"); Valentine v. Wideopen W. Fin., LLC, No. 09 C 07653, 2012 WL 1021809, at *1 (N.D. Ill. Mar. 26, 2012) ("The parties expressly waive any entitlement to attorneys' fees or punitive damages to the fullest extent permitted by law."); Gatton v. T-Mobile USA, Inc., No. SACV 03-130, 2003 WL 21530185, at *1 (C.D. Cal. Apr. 18, 2003) ("[E]ach party will pay the fees and costs of its own counsel, experts and witnesses."); *see also* CFPB ARBITRATION STUDY, *supra* note 16, § 2, at 66 ("A significant share of credit card arbitration clauses directed that the parties bear their own attorneys' fees either without qualification or unless the law or contract requires otherwise (27 clauses, or 40.9%; 46.9% of arbitration-subject credit card loans outstanding).").

149. *E.g.*, *In re* Pharmacy Benefit Managers Antitrust Litig., 700 F.3d 109, 113 (3d Cir. 2012) ("[T]he expenses of the arbitration, including attorneys' fees, will be paid by the party against whom the award of the arbitrator is rendered."); Captain Bounce, Inc. v. Bus. Fin. Servs., Inc., No. 11-CV-858, 2012 WL 928412, at *2 (S.D. Cal. Mar. 19, 2012) ("[T]he costs and fees of such arbitration shall be borne by the losing party."); O'Quinn v. Comcast Corp., No. 10 C 2491, 2010 WL 4932665, at *2 (N.D. Ill. Nov. 29, 2010) ("Only if Comcast prevails in the arbitration does the customer have to reimburse Comcast for fees and costs advanced up to the extent awardable in a judicial proceeding."); *see also* CFPB ARBITRATION STUDY, *supra* note 16, § 5, at 80 ("Companies were awarded attorneys' fees in 14.1% of the 341 disputes resolved by arbitrators."); Gilles, *supra* note 79, at 859 ("[C]ustomers who are unsuccessful in arbitrating claims against Comcast and Time Warner cable must pay those companies' costs and attorneys' fees, as well any costs of appealing the judgment.").

150. *See, e.g.*, Samaniego v. Empire Today LLC, 140 Cal. Rptr. 3d 492, 499–500 (Cal. Ct. App. 2012) (finding arbitration clause unconscionable, in part, because it "require[d] plaintiffs to pay any attorneys' fees incurred by [the defendant], but impose[d] no reciprocal obligation on [the defendant]").

151. *Captain Bounce, Inc.*, 2012 WL 928412, at *11 (quoting Pokorny v. Quixtar, Inc., 601 F.3d 987, 1004 (9th Cir. 2010)); *see also* Zaborowski v. MHN Gov't Servs., Inc., 601 F. App'x 461, 463 (9th Cir. 2014) (holding a costs-and-fee-shifting clause substantively unconscionable because it unreasonably and unexpectedly allocated risks); *In re* Checking Account Overdraft Litig., 485 F. App'x 403, 406 (11th Cir. 2012) (finding fee-shifting provision unconscionable because it required "customer to pay the bank's costs in any dispute between the customer and the bank regardless of who prevail[ed]").

plaintiff from recovering attorneys' fees to be unconscionable.[152] Third, in pre-*Italian Colors* cases, some courts invoked the Effective Vindication Doctrine to invalidate arbitration clauses that blocked pro-plaintiff statutory fee shifting, reasoning that "the ban on the recovery of attorney's fees and costs in the arbitration agreements would burden Plaintiffs here with prohibitive arbitration costs, preventing Plaintiffs from vindicating their statutory rights in arbitration."[153]

In contrast, some courts invoke the Supreme Court's call for deference to arbitration clauses in order to accept firm-imposed interference with pro-plaintiff fee-shifting regimes.[154]

e. Forum-Selection Clauses.—State rules can limit judicial deference to forum-selection clauses. The location of dispute resolution is often critical. The plaintiff is afforded the choice of forum to level the playing field in situations in which a small plaintiff is suing a large corporate defendant.[155] The parties can, however, pre-designate the court in which litigation will occur by including a forum-selection clause in their contract. Absent "extraordinary circumstances," courts generally enforce forum-selection clauses.[156]

In nonarbitration contexts, however, judges can decline to enforce a forum-selection clause if they conclude that it is unconscionable or otherwise against public policy. For example, California courts can refuse to enforce a forum-selection clause that would send cases to jurisdictions—like Utah—that do not permit enhanced damages or have shorter statutes of limitations than California provides.[157] Judges in California can also prevent transfer of

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152. *Overdraft Litig.*, 485 F. App'x at 406 ("[W]e affirm the district court's finding that the cost-and-fee-shifting provision was unconscionable under North Carolina law."); Delta Funding Corp. v. Harris, 912 A.2d 104, 112 (N.J. 2006); LaCoursiere v. Camwest Dev., Inc., 339 P.3d 963, 970 (Wash. 2014) (citing cases); *see also* Valentine v. Wideopen W. Fin., LLC, No. 09 C 07653, 2012 WL 1021809, at *5–6 (N.D. Ill. Mar. 26, 2012) (recognizing theoretical possibility that the denial of attorneys' fees to a successful plaintiff could make an arbitration clause unconscionable); Schwartz v. Alltel Corp., No. 86810, 2006 WL 2243649, at *5 (Ohio Ct. App. June 29, 2006) (finding that an arbitration provision eliminating statutorily authorized attorney fees "establish[ed] a quantum of substantive unconscionability").

153. Kristian v. Comcast Corp., 446 F.3d 25, 52–53 (1st Cir. 2006). In *Kristian*, the court severed the fee clause because the governing contract had a savings clause. *Id.* at 53.

154. *See* Venture Cotton Coop. v. Freeman, 435 S.W.3d 222, 232 (Tex. 2014) (stating that the unconscionability of a fee-shifting provision is for the arbiter to decide).

155. John J. Finn, Comment, *Private Arbitration and Antitrust Enforcement: A Conflict of Policies*, 10 B.C. INDUS. & COM. L. REV. 406, 415 (1969).

156. *See* Valspar Corp. v. E.I. DuPont de Nemours & Co., 15 F. Supp. 3d 928, 934 (D. Minn. 2014) (noting that the Supreme Court has held that forum-selection clauses should be upheld absent "extraordinary circumstances").

157. *See, e.g.*, Sawyer v. Bill Me Later, Inc., No. CV 10-04461, 2010 WL 5289537, at *6 (C.D. Cal. Oct. 4, 2010) (holding that the Court may not enforce a forum-selection clause if it works

a case from California courts to Virginia courts because Virginia does not provide for class actions.[158] Consequently, a forum-selection clause that requires litigation take place in Virginia is unenforceable against California citizens.[159]

Firms can evade laws like California's by embedding their forum-selection clause in an arbitration provision.[160] Arbitration clauses often specify the site where any arbitration arising from the contract shall take place, locations that are sometimes thousands of miles away from the plaintiff.[161] Although some states would invalidate such provisions,[162] state prohibitions on out-of-state arbitration may be considered preempted by the FAA in light of the Supreme Court's pro-arbitration jurisprudence.[163]

f. Non-Coordination Clauses.—Some arbitration clauses forbid not only class actions, but all coordination among the victims of illegal conduct. Arbitration clauses commonly contain confidentiality requirements.[164] This can prevent cost sharing or even information sharing among plaintiffs seeking to recover for their injuries. For example, the agreement at issue in *Italian Colors* precluded the plaintiffs from even informally arranging among themselves to pay for a common expert report that each could use in

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against an important public policy interest in California, such as the ability to commence a class action suit).

158. Doe 1 v. AOL LLC, 552 F.3d 1077, 1084 (9th Cir. 2009) ("As to such California resident plaintiffs, *Mendoza* holds California public policy is violated by forcing such plaintiffs to waive their rights to a class action and remedies under California consumer law.").

159. *Id.*; Am. Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699, 712 (Cal. Ct. App. 2001) ("The unavailability of class action relief in this context is sufficient in and by itself to preclude enforcement of the TOS forum-selection clause.").

160. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause . . . ."); Venture Cotton Coop. v. Freeman, 435 S.W.3d 222, 229 (Tex. 2014) ("[A]rbitration agreements typically function simply as forum-selection clauses . . . .").

161. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 617, 640 (1985) (involving a Puerto Rican corporation that had to submit to arbitration in Japan because of the arbitration clause to which it had agreed).

162. Ware, *supra* note 125, at 1026 ("Another example of an arbitration clause that might be substantively unconscionable is one requiring arbitration far from the non-drafting party's home."); *see, e.g.*, Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc., 680 A.2d 618, 626 (N.J. 1996) ("[F]orum-selection clauses in contracts subject to the Franchise Act . . . . are presumptively invalid because they fundamentally conflict with the basic legislative objectives of protecting franchisees from the superior bargaining power of franchisors and providing swift and effective judicial relief against franchisors that violate the Act.").

163. Ware, *supra* note 125, at 1028 ("[S]tate statutes denying enforcement to clauses providing for arbitration outside the state are also preempted by the FAA.").

164. Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 490–96 (2008); Philip Rothman, *Psst, Please Keep It Confidential: Arbitration Makes It Possible*, DISP. RESOL. J., Sept. 1994, at 69, 69.

individual arbitration proceedings.[165] Such coordination would be absolutely necessary in the absence of class actions—which the contract explicitly prohibited—because no individual victim alone could afford to pay for an expert report.[166] As Justice Kagan noted in dissent, the agreement imposed by Amex "cut[] off not just class arbitration, but any avenue for sharing, shifting, or shrinking necessary costs. Amex has put Italian Colors to this choice: Spend way, way, way more money than your claim is worth, or relinquish your Sherman Act rights."[167] Despite the proffered efficiency justifications for arbitration, this provision was designed to create *inefficiency* in order to make claims against the defendant cost prohibitive.[168]

Prior to *Concepcion*, some state courts refused to enforce non-coordination agreements in arbitration clauses. For example, Ohio courts can invalidate confidentiality agreements where sharing information regarding consumer claims is important for the public at large.[169] Professor Jon Bauer has noted that judges in courts "increasingly insist that protective orders provide for discovery sharing with plaintiffs in similar cases and refuse to enforce private noncooperation agreements when they interfere with discovery or informal investigation in another proceeding."[170] Arbitrators are not similarly reticent, given their penchant for confidentiality. Firms, indeed, have argued that "*Concepcion* prevents state courts from disturbing confidentiality agreements included within arbitration agreements."[171]

g. Multiple Unconscionable Terms.—Sometimes a combination of the above terms can make an arbitration agreement unconscionable. When a class action waiver is coupled with a bar on awarding attorneys' fees to successful plaintiffs, courts may be more inclined to find the provisions unenforceable than they would if the agreement contained only one of the two provisions.[172] For example, the Ninth Circuit found "an arbitration

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165. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) ("The agreement also disallows any kind of joinder or consolidation of claims or parties. And more: Its confidentiality provision prevents Italian Colors from informally arranging with other merchants to produce a common expert report.").

166. *See supra* notes 97–101 and accompanying text.

167. *Italian Colors*, 133 S. Ct. at 2316 (Kagan, J., dissenting).

168. *See* Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 578 (Ky. 2012) ("Further, the potential obstacles to arbitration presented by the forbidding of class action waivers are simply not present in the case of confidentially [sic] provisions.").

169. Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161, 1180–83 (Ohio Ct. App. 2004); *see also* Ting v. AT&T, 319 F.3d 1126, 1151–52 (9th Cir. 2003) (finding confidentiality provision in arbitration clause unconscionable).

170. Bauer, *supra* note 164, at 494–95 (footnotes omitted).

171. *Schnuerle*, 376 S.W.3d at 578 (rejecting this argument).

172. *See* Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 877–78 (11th Cir. 2005) (rejecting the argument that a class action waiver renders an arbitration clause unconscionable

agreement substantively unconscionable upon review of the agreement's provisions, including claims subject to arbitration, its statute of limitations, class actions, fee and cost-splitting arrangements, remedies available, and termination/modification of the agreement."[173] Thus, even if an individual anti-consumer term does not make a contract (or its arbitration clause) unconscionable, the aggregate effect may be to do so.

3. Concepcion *as a Blueprint for Bootstrapping.*—Although *Concepcion* specifically struck down only California's rule against certain class action waivers, the opinion has potential implications beyond those waivers. By holding that judges cannot use the unconscionability doctrine to invalidate a term embedded in an arbitration agreement, *Concepcion* risks limiting the ability of courts to hold other unconscionable contract terms unenforceable. Some judges have lamented that "post-*Concepcion*, courts may not apply state public policy concerns to invalidate an arbitration agreement even if the public policy at issue aims to prevent undesirable results to consumers."[174] So long as a firm inserts an otherwise unenforceable, unconscionable term in an arbitration agreement, *Concepcion* could prevent lower courts from invalidating that unconscionable term.[175]

The unconscionable terms detailed above have more vitality in a post-*Concepcion* environment. For example, before *Concepcion*, some states held that firms could not use arbitration clauses to circumvent the prescribed statute of limitations, and that to do so would be unconscionable.[176] A California court, for instance, held that "[t]he shortened limitations period provided by [the] arbitration agreement is unconscionable and insufficient to protect [the company's] employees' right to vindicate their statutory rights."[177] Such holdings may not survive *Concepcion*, as courts have speculated that *Concepcion* may preempt state laws against shortening

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because attorneys' fees were still available and "when the opportunity to recover attorneys' fees is available, lawyers will be willing to represent such debtors in arbitration").

173. Perez v. Apollo Educ. Grp., Inc., No. 1:14–cv–00605, 2014 WL 5797148, at *4 (E.D. Cal. Nov. 6, 2014) (citing Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1180 (9th Cir. 2003)); *see also* Newton v. Am. Debt Servs., Inc., 549 F. App'x 692, 694 (9th Cir. 2013) (finding arbitration clause unconscionable in part because it required California residents to arbitrate in Oklahoma).

174. Robinson v. Title Lenders, Inc., 364 S.W.3d 505, 515 (Mo. 2012).

175. *See infra* notes 187–87 and accompanying text; *see also* Muriithi v. Shuttle Express, Inc., 712 F.3d 173, 180 (4th Cir. 2013) (*Concepcion* "was not merely an assertion of federal preemption, but also plainly prohibited application of the general contract defense of unconscionability to invalidate an otherwise valid arbitration agreement under these circumstances").

176. *E.g.*, *Apollo Educ. Grp.*, 2014 WL 5797148, at *5 ("Generally, provisions strictly requiring employees to bring all claims within one year are unconscionable."); Jewelers Mut. Ins. Co. v. ADT Sec. Servs., Inc., No. C 08-02035, 2008 WL 5383371, at *3 (N.D. Cal. Dec. 22, 2008) ("Thus, the Court finds, as a matter of law, that the contractual period of limitation is unconscionable and unenforceable.").

177. Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663, 672 (Cal. Ct. App. 2004).

statutes of limitations from being applied to arbitration clauses.[178] In one recent case, although the Maryland district court found that an arbitration clause's reduced one-year statute of limitations was unconscionable under the applicable state contract law, the Fourth Circuit reversed, holding that *Concepcion* generally preempts unconscionability arguments against arbitration clauses.[179] The implications are staggering: simply by placing an unconscionable contract term in an arbitration agreement, firms can make unconscionable terms enforceable.

Concepcion could also make it more difficult for lower courts to enforce state and federal rules against damage-limitation clauses. Before *Concepcion*, courts split on whether and when businesses could use arbitration agreements to limit damages.[180] Those courts that held damage limitations in arbitration clauses to be unenforceable did so primarily based on the doctrine of unconscionability.[181] For example, Florida courts had found damage-limitation provisions to be an "indicator of substantive unconscionability" when an "arbitration clause expressly limits [a defendant's] liability to actual damages, thereby precluding the possibility that [the defendant] will ever be exposed to punitive damages, no matter how outrageous its conduct might be."[182] Similarly, California courts held that "[a] damages limitation may be unconscionable if it contravenes public policy by limiting remedies available in the statute under which a plaintiff proceeds, or if it is one-sided."[183] But because *Concepcion* casts doubt on courts' ability to invalidate arbitration clause provisions based on uncon-

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178. *See* D'Antuono v. Serv. Rd. Corp., 789 F. Supp. 2d 308, 330–31 (D. Conn. 2011) (noting that if arbitration agreements with provisions to shorten the statute of limitations were deemed unconscionable as a matter of state law, the FAA might preempt such a state law in light of *Concepcion*'s preemption analysis).

179. *Muriithi*, 712 F.3d at 178, 180.

180. *Compare* Inv. Partners, L.P. v. Glamour Shots Licensing, Inc., 298 F.3d 314, 318 n.1 (5th Cir. 2002) ("Provisions in arbitration agreements that prohibit punitive damages are generally enforceable."), *and* McKee v. AT&T Corp., 191 P.3d 845, 860 (Wash. 2008) ("We hold the limitation on punitive damages is not unconscionable."), *with* Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 83 (D.C. Cir. 2005) ("[A]rbitration agreement's bar on punitive damages is unenforceable . . . ."), *and In re* Poly-Am., L.P., 262 S.W.3d 337, 352 (Tex. 2008) ("Permitting an employer to contractually absolve itself of this statutory remedy [(punitive damages)] would undermine the deterrent purpose [of the law].").

181. *See, e.g.*, Gatton v. T-Mobile USA, Inc., No. SACV 03-130, 2003 WL 21530185, at *11 (C.D. Cal. Apr. 18, 2003) ("The damages limitation, therefore, while not determinative, is among the group of factors that may contribute to a finding of unconscionability."); Harper v. Ultimo, 7 Cal. Rptr. 3d 418, 423 (Cal. Ct. App. 2003) (listing courts rejecting arbitration clauses based on substantive unconscionability); Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co., 408 N.E.2d 403, 409–10 (Ill. Ct. App. 1980) (noting that under the UCC consequential-damage limitations were prima facie unconscionable where personal injuries are involved).

182. Powertel, Inc. v. Bexley, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999).

183. Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp., 123 Cal. Rptr. 3d 547, 555 (Cal. Ct. App. 2011).

scionability, courts have suggested that, in light of *Concepcion*, such holdings may no longer be valid.[184]

And *Concepcion* could make it easier for firms to use arbitration clauses as a mechanism to prevent injunctive relief. Before *Concepcion*, courts invalidated anti-injunction clauses in arbitration agreements as unconscionable.[185] Some courts, however, have read *Concepcion* to preclude such invalidation of anti-injunction clauses in arbitration.[186] For example, lower courts have interpreted *Concepcion* as invalidating California's law that prohibited arbitration of claims requesting public injunctive relief.[187] Thus, California courts can refuse to enforce anti-injunction clauses in a contract without an arbitration clause. However, if a firm wishes to preclude certain injunctive relief, it can put that same—previously unenforceable—term in an arbitration clause and state judges are powerless to invalidate the term. Judges reason that after *Concepcion*, "the FAA 'preempts California's preclusion of public injunctive relief claims from arbitration . . . .'"[188] More broadly, some courts have held that plaintiffs' arguments challenging prohibitions on injunctive relief and punitive damages as "unconscionable because they undermine pro-consumer policies . . . are not viable post-*Concepcion* because state laws advancing those policies are preempted by the FAA."[189]

The combination of *Italian Colors* and *Concepcion* may inhibit judges' ability to reject oppressive forum-selection clauses. Courts previously relied on the Effective Vindication Doctrine and the unconscionability doctrine to constrain firms' ability to use an arbitration provision to impose an anti-plaintiff forum-selection clause. For example, in *Mitsubishi*, the Supreme

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184. Alvarez v. T-Mobile USA, Inc., No. Civ. 2:10-2373, 2011 WL 6702424, at *7 (E.D. Cal. Dec. 21, 2011).

185. *E.g.*, *Powertel, Inc.*, 743 So. 2d at 576; *see also* Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) (striking down provisions in arbitration clauses that denied arbiters the power to grant injunctive relief).

186. *E.g.*, Arellano v. T-Mobile USA, Inc., No. C 10-05663, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011) ("[T]he Act preempts California's exemption of claims for public injunctive relief from arbitration, at least for actions in federal court."); *see also* Schatz v. Cellco P'ship, 842 F. Supp. 2d 594, 613 (S.D.N.Y. 2012) ("[T]he Court would be hard-pressed to say that the plaintiffs' inability to obtain 'general injunctive relief' on behalf of others would render the arbitral forum inadequate.").

187. *See, e.g.*, Kilgore v. KeyBank, Nat'l Ass'n, 673 F.3d 947, 960 (9th Cir. 2012) ("We hold that the *Broughton–Cruz* rule does not survive *Concepcion* because the rule 'prohibits outright the arbitration of a particular type of claim'—claims for broad public injunctive relief." (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011))), *aff'd on reh'g*, 718 F.3d 1052 (9th Cir. 2013); Alan S. Kaplinsky, Mark J. Levin & Martin C. Bryce, Jr., *Arbitration Developments: Post-*Concepcion*—The Supreme Court Expands Upon Its Landmark Decision*, 69 BUS. LAW. 647, 652 n.45 (2014) (collecting cases).

188. Hendricks v. AT&T Mobility, LLC, 823 F. Supp. 2d 1015, 1024 (N.D. Cal. 2011) (quoting *Arellano*, 2011 WL 1842712, at *1).

189. *Alvarez*, 2011 WL 6702424, at *7.

Court noted that if "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy."[190] This is an application of the Effective Vindication Doctrine. To similar effect, applying the unconscionability doctrine, one California court invalidated a forum-selection clause because the "plaintiffs were required to travel [from California] to Washington, D.C. to litigate a claim worth 'a couple of hundred dollars.'"[191] Because the Court in *Italian Colors* and *Concepcion* undermined the Effective Vindication Doctrine and the unconscionability doctrine, respectively, prior opinions striking down forum-selection clauses are weakened. In the wake of *Concepcion*, courts are already less receptive to the argument that forum-selection clauses that make plaintiffs travel great distances to arbitration are unconscionable and, thus, unenforceable.[192]

Finally, in light of the above post-*Concepcion* holdings that pare back the ability of courts to protect consumers and employees from unconscionable—or otherwise unenforceable—terms in arbitration agreements, the legal landscape does not bode well for other anti-plaintiff terms. For example, courts have speculated that *Concepcion* may prevent courts from invalidating fee-shifting provisions in arbitration clauses that judges would otherwise find to be unenforceable due to unconscionability.[193] Courts are also more likely to uphold the insertion of anti-coordination terms into arbitration clauses in light of *Italian Colors*, in which the Supreme Court endorsed enforcement of an arbitration clause that contained an aggressive non-coordination requirement.[194] Even when firms load their arbitration clauses with a multitude of unconscionable terms, courts have suggested that *Concepcion* may preempt state laws that would use the unconscionability doctrine to strike down either the individual terms or the arbitration clause as a whole.[195]

In sum, by limiting the ability of courts to use the unconscionability doctrine as a method of constraining anti-plaintiff terms in an arbitration

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190. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985).

191. Gillette v. First Premiere Bank, No. 3:13-CV-432, 2013 WL 3205827, at *4 (S.D. Cal. June 24, 2013) (quoting Chavez v. Bank of Am., No. C 10-653, 2011 WL 4712204, at *11 (N.D. Cal. Oct. 7, 2011)).

192. *See, e.g.*, Carrell v. L & S Plumbing P'ship, No. H-10-2523, 2011 WL 3300067, at *1, *4 (S.D. Tex. Aug. 1, 2011) (compelling arbitration and dismissing case in favor of arbitration).

193. *See* D'Antuono v. Serv. Rd. Corp., 789 F. Supp. 2d 308, 331 (D. Conn. 2011) (explaining that Connecticut unconscionability law may be preempted by the FAA post-*Concepcion*).

194. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) (emphasizing the aggressiveness of the non-coordination requirement in the arbitration clause before the Court).

195. *E.g.*, *D'Antuono*, 789 F. Supp. 2d at 330–31.

clause, *Concepcion* encourages firms to load their arbitration agreements with otherwise unenforceable provisions.

D. State Efforts to Protect Consumers

Many states have sought to protect their citizens from overreaching arbitration provisions. States have tried three approaches, all of which the Supreme Court has invalidated as inconsistent with the FAA. First, some states had made certain categories of disputes non-arbitrable. For example, California law made worker actions for unpaid wages non-arbitrable[196] and the West Virginia Supreme Court held that arbitration agreements in nursing-home contracts did not apply to lawsuits for "personal injury or wrongful death."[197] The U.S. Supreme Court held that the FAA preempted California's law to protect workers.[198] The Court similarly characterized West Virginia's rule as "contrary to the terms and coverage of the FAA" and thus invalid.[199] States, in short, cannot make specific claims non-arbitrable.

Second, states sought to apply the contract doctrine of unconscionability to make certain anti-consumer terms in arbitration clauses unenforceable.[200] The *Concepcion* opinion blocked these efforts with respect to class action waivers. Lower courts have expanded *Concepcion* in order to prevent states from invalidating a variety of unconscionable contract terms, so long as the terms are coupled with an arbitration clause.[201]

Third, unable to cordon off areas of law from arbitration or to address specific anti-consumer terms, some states sought to insure that their citizens were at least informed that they were waiving their right to sue in court. A Montana statute, for instance, rendered arbitration clauses unenforceable unless the first page of the contract contained a notice "typed in underlined capital letters" that alerted readers to the arbitration clause contained within.[202] The Supreme Court invalidated the Montana law because "Montana's first-page notice requirement, which governs not 'any contract,'

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196. CAL. LAB. CODE § 229 (West 2011) ("Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate."), *invalidated by* Discover Bank v. Superior Court, 129 Cal. Rptr. 2d 393, 407–08 (Cal. Ct. App. 2003).

197. Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 292 (W. Va. 2011) ("We therefore hold that, as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence."), *vacated sub nom.* Marmet Health Care Ctr. v. Brown, 132 S. Ct. 1201, 1204 (2012).

198. Perry v. Thomas, 482 U.S. 483, 491 (1987).

199. *Marmet Health Care Ctr.*, 132 S. Ct. at 1204.

200. *See supra* notes 74–81 and accompanying text.

201. *See supra* notes 187–87 and accompanying text.

202. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996).

but specifically and solely contracts 'subject to arbitration,' conflicts with the FAA and is therefore displaced by the federal measure."[203] Other state laws requiring consumer notice of arbitration clauses were subsequently struck down as well.[204] The Court's approach precludes states from even experimenting with methods to minimize the negative consequences of anti-consumer arbitration clauses.[205]

This illustrates the clout of arbitration clauses in the landscape of contract law. In the absence of arbitration clauses, states have the power to prevent firms using contractual provisions to waive class actions, limit damages, truncate statutes of limitations, or preclude injunctions. But, according to some case law, the mere inclusion of these same provisions in an arbitration clause saps the states of their ability to protect their citizens. Similarly, the state's traditional power to require notices in consumer contracts recedes in the face of an arbitration clause.

II. The Role of Legislative Intent in the Expansion of Arbitration Clauses

We now have a legal regime where consumers and workers are forced to sign away their right to sue in court and states are essentially powerless to protect their citizens. We have arrived here because the Supreme Court has repeatedly asserted that "'[t]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered,' a concern which 'requires that we *rigorously* enforce agreements to arbitrate.'"[206] The Supreme Court has claimed three distinct intentions of the 1925 Congress that passed the FAA: an intent that the FAA apply to all federal and state claims unless explicitly exempted by Congress; an intent that the terms of arbitration clauses should be enforced *as written*; and an intent that states cannot do anything that would disfavor arbitration clauses or interfere with their enforcement. This Part presents the Supreme Court's construction of this legislative intent.

For over the first half century of the FAA's existence, courts held that federal statutory rights were non-arbitrable.[207] Beginning in the 1980s, however, the Court began to assert that Congress intended the FAA to create an "emphatic federal policy in favor of arbitral dispute resolution."[208] This congressional intent, in turn, required that "questions of arbitrability must be

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203. *Id.*

204. *See, e.g.*, Affiliated Foods Midwest Coop., Inc. v. Integrated Distribution Sols., LLC, 460 F. Supp. 2d 1068, 1072 (D. Neb. 2006) (striking down NEB. REV. STAT. § 25–2602.02).

205. Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271, 276–77.

206. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–26 (1985) (emphasis added) (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

207. *See supra* notes 28–30 and accompanying text.

208. *Mitsubishi Motors Corp.*, 473 U.S. at 631.

addressed with a healthy regard for the federal policy favoring arbitration."[209] Thus, in 1983, the Court asserted for the first time that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[210] This presumption of arbitrability could only be rebutted by proof that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue."[211] The burden of proving this rests on the party seeking to avoid arbitration.[212]

In addition to discovering a congressional intent to broaden the scope of the FAA, courts have held that they must enforce anti-consumer terms in arbitration clauses because Congress intended this. Most notably, the Supreme Court has claimed that Congress intended the FAA to preempt state laws against class action waivers in arbitration clauses.[213] In forbidding states from treating class action waivers in arbitration clauses as unconscionable, the Supreme Court asserted that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced *according to their terms*.'"[214] In requiring lower courts to enforce class action waivers in arbitration clauses, the Court held that all "courts must 'rigorously enforce' arbitration agreements *according to their terms*."[215]

Since the Supreme Court pro-arbitration era began in the 1980s, the Court has claimed in over a dozen opinions that Congress intended arbitration clauses to be enforced "as written" or "according to their terms."[216] For

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209. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

210. *Id.* at 24–25; *see also Mitsubishi Motors*, 473 U.S. at 627–28 ("[T]he congressional policy manifested in the Federal Arbitration Act . . . requires courts liberally to construe the scope of arbitration agreements covered by that Act.").

211. Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 227 (1987).

212. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

213. Aton Arbisser & Darya Pollak, Concepcion *and the Future of Pre-Dispute Arbitration Agreements*, 13 SEDONA CONF. J. 207, 208, 209 n.17 (2012) (collecting cases).

214. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (second alteration in original) (emphasis added) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

215. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

216. *E.g.*, *Italian Colors*, 133 S. Ct. at 2309; CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012); *Concepcion*, 131 S. Ct. at 1754; Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67–68 (2010); Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 301 n.8 (2010); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010); Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 593 (2008); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 454 (2003); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 947 (1995); *Volt*, 489 U.S. at 476; *see also, e.g.*, Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 87 (2002) (Thomas, J., concurring) ("[C]ourts must enforce private agreements to arbitrate just as they would ordinary contracts: in accordance with their terms."); J. Alexander Sec., Inc. v. Mendez, 511 U.S. 1150, 1151 (1994) (O'Connor, J., dissenting from denial of certiorari).

example, the *Concepcion* Court asserted that "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[217] Thus, if an arbitration clause term forbids class actions and classwide arbitrations, Congress—according to the *Concepcion* majority—intended judges to defer to that term.[218] To treat such a term as unconscionable under state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[219] Under this approach, courts defer to all manner of anti-consumer contract terms, as long as the terms are situated within an arbitration clause.

State efforts to protect their citizens from overreaching arbitration clauses have also butted up against the Supreme Court's vision of the congressional intent behind the FAA. In *Southland Corp. v. Keating*,[220] the Supreme Court asserted that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[221] Thus, the *Southland* Court construed the FAA to require *state* courts to enforce agreements to arbitrate *state* law claims. Almost sixty years after the enactment of the FAA, *Southland* was the first time that the Justices ever even considered whether the FAA applied to state courts and, by extension, state consumer protection laws.[222]

In addition to expanding the reach of the FAA in the 1980s to include federal statutory claims, the Court also asserted that Congress intended to forbid states from making any state claims non-arbitrable.[223] For example, the *Southland* opinion asserted: "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[224] The Court has further claimed that Congress intended to prevent states from doing anything to protect their citizens from unconscionable arbitration clauses imposed through contracts of adhesion.

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217. *Concepcion*, 131 S. Ct. at 1748.

218. *Id.*

219. *Id.* at 1753 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) ("California's *Discover Bank* rule is preempted by the FAA."). State courts have reasoned similarly. *See, e.g.*, AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 200 (Tex. App.—Houston [14th Dist.] 2003, no pet.) ("[T]he primary purpose of the FAA is to overcome courts' refusals to enforce agreements to arbitrate and to ensure that private agreements to arbitrate are enforced according to their terms.").

220. 465 U.S. 1 (1984).

221. *Id.* at 16. The Supreme Court inferred that Congress must have intended to preempt state law because the legislators could not bother "to address a problem whose impact was confined to federal courts," and it claimed that "the House Report contemplated a broad reach of the Act, unencumbered by state-law constraints." *Id.* at 13.

222. *Id.* at 24 (O'Connor, J., dissenting) ("Today's case is the first in which this Court has had occasion to determine whether the FAA applies to state-court proceedings.").

223. *See* Perry v. Thomas, 482 U.S. 483, 490–91, 491 n.8 (1987).

224. *Southland*, 465 U.S. at 10.

For example, in striking down Montana's requirement that contracts must clearly state if they contain an arbitration clause, the Court reiterated "we have several times said, Congress precluded States from singling out arbitration provisions for suspect status . . . ."[225] Abiding by the Supreme Court's pronouncements, courts have asserted that Congress intended the FAA to prevent states from requiring that judges, not private arbiters, hear claims for injunctive relief.[226]

In sum, judges have constructed a regime where the legal claims of consumers and employees must be decided in private arbitration, not in court. Judges have achieved this by invoking a legislative history of the FAA in which Congress intended to favor private arbitration over public litigation; Congress intended arbitration to cover federal statutory claims; Congress intended firms to be able to use contracts of adhesion to force consumers and employees to waive their rights to sue in court; Congress intended firms to be able to impose arbitration clauses that prevent class actions, that limit damages, that truncate statutes of limitations, and that preclude injunctive relief; and Congress intended to prevent states from being able to protect their citizens from arbitration clauses and their unconscionable terms even if that eliminated the ability of injured individuals to seek redress in any forum. Part III will show that each of these claims of legislative intent is false.

III. Revisiting the Legislative History of the FAA

A. The Legislative History of the FAA

Even before the founding of the country, some American businesses sought to resolve their disputes through private arbitration instead of public litigation.[227] However, the holdings of private arbiters had no legal power absent court enforcement.[228] Under the so-called revocability doctrine, either party could, at its will, refuse to honor the arbitration agreement.[229] While

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225. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

226. *E.g.*, Arellano v. T-Mobile USA, Inc., No. C 10-05663, 2011 WL 1842712, at *1 (N.D. Cal. May 16, 2011).

227. James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745, 748 (2009).

228. *Id.*

229. *Southland*, 465 U.S. at 32 (O'Connor, J., dissenting) (noting that judicial "hostility [to arbitration agreements] was reflected in two different doctrines: 'revocability,' which allowed parties to repudiate arbitration agreements at any time before the arbitrator's award was made, and 'invalidity' or 'unenforceability,' equivalent rules that flatly denied any remedy for the failure to honor an arbitration agreement" (footnotes omitted)); Charles Newton Hulvey, *Arbitration of Commercial Disputes*, 15 VA. L. REV. 238, 239–41 (1929) (comparing the law of arbitration agreements under common law with statutes); Wilson, *supra* note 91, at 98–99 ("If one party to the arbitration agreement decided it no longer wanted to arbitrate, courts refused to compel arbitration, allowing the objecting party to revoke its agreement. This rule, followed by most state and federal courts, was referred to as the 'revocability doctrine.'"); *see also* Berger & Sun, *supra* note 227, at

such revocation was problematic to the party desiring to enforce an arbitration agreement, American courts followed the English rule that "traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction" and, thus, unenforceable.[230] The Supreme Court, for example, had held in the late nineteenth century that "parties cannot by contract oust the ordinary courts of their jurisdiction."[231] Supporters of the FAA characterized the English rule as founded on "the jealousy of the English courts for their own jurisdiction."[232] American courts, nonetheless, felt obliged to follow the well-established rule. One district court judge in New York opined in 1915 that American "courts will scarcely permit any other body of men to even partially perform judicial work, and will never permit the absorption of all the business growing out of disputes over a contract by any body of arbitrators, unless compelled to such action by statute."[233]

In 1920, the New York legislature responded to the judge's invitation to "compel action" by enacting a statute that made arbitration agreements enforceable.[234] Although states like New York and New Jersey passed laws that made arbitration agreements enforceable in state court, these laws could not reach claims that sounded in admiralty—which was governed by federal law—or cases that wound up in federal court through diversity jurisdiction.[235] Because federal courts treated arbitration agreements as revocable, mer-

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750–51 ("Finally, without reliable support from the courts, adherence to an arbitration award was often privately enforced by extra-judicial means, such as threats to a merchant's reciprocal arrangements or reputation.").

230. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974). On the English courts' hostility to private arbitration, see David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 444–45 (2011).

231. Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) ("[A man] cannot, however, bind himself in advance by an agreement, which may be specially enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.").

232. H.R. REP. NO. 68-96, at 1–2 (1924) ("This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts."); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts . . . .").

233. U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1010–11 (S.D.N.Y. 1915).

234. *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 39 (1924) [hereinafter *Joint Hearings*]; Berger & Sun, *supra* note 225, at 750; Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101 (2006) ("The New York statute made all arbitration agreements enforceable, including agreements to arbitrate future disputes.").

235. *See Joint Hearings*, *supra* note 232, at 16 (statement of Julius Henry Cohen) (explaining that state arbitration laws did not apply to cases that "came into the Federal court").

chants that entered pre-dispute agreements to arbitrate could not be certain that their agreements would be enforced.

The push for federal legislation to make arbitration agreements enforceable was spearheaded by two New Yorkers—Julius Cohen and Charles Bernheimer—who sought to replicate at the federal level their success in shepherding through New York State's law. Both men worked for the New York State Chamber of Commerce—the primary mover behind New York's arbitration law—Cohen as its general counsel and Bernheimer as the chair of its arbitration committee, a position he had been elected to twelve times.[236] Cohen was also a member of the Committee on Commerce, Trade, and Commercial Law of the American Bar Association (ABA),[237] which actually drafted the FAA.[238] In 1924, Bernheimer was the primary private witness who testified before Congress. In addition to representing the Importers and Exporters' Association and the Merchants' Association of New York, he spoke as a representative of "73 business men's organizations that have added their names in formal indorsement" of the FAA.[239] Together, Cohen and Bernheimer presented the case to Congress for why arbitration agreements should be enforceable in federal court.[240]

In urging Congress to enact the FAA, Cohen and Bernheimer argued that arbitration held many advantages over traditional litigation. First, arbitration was less expensive than litigation. Cohen asserted that "the bar associations of the country" were aligned with the community in supporting arbitration as a way "to make the disposition of business in the commercial world less expensive."[241] Typical of the business community's support of the FAA, the American Bankers' Association presented a resolution to Congress that "arbitration offers the best means yet devised for an efficient,

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236. Moses, *supra* note 234, at 101.

237. *Joint Hearings*, *supra* note 232, at 13 (statement of Julius Henry Cohen).

238. The House Report noted that the FAA was drafted by an American Bar Association committee. H.R. REP. NO. 68-96, at 1 (1924) ("[This bill] was drafted by a committee of the American Bar Association and is sponsored by that association and by a large number of trade bodies whose representatives appeared before the committee on the hearing."). The proposed bill was unanimously passed by the ABA. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) [hereinafter *Arbitration Hearings*] (statement of W.H.H. Piatt).

239. *Joint Hearings*, *supra* note 232, at 5–6 (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, Chamber of Commerce of the State of New York).

240. The testimony of Cohen and Bernheimer is important, as the modern Supreme Court has relied upon their testimony in interpreting the FAA. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 274, 279 (1995).

241. *Joint Hearings*, *supra* note 232, at 13 (statement of Julius Henry Cohen).

expeditious, and inexpensive adjustment of such disputes."[242] Congress was influenced by the testimony in praise of the efficiency of arbitration.[243]

Second, supporters argued that the FAA was necessary to speed up dispute resolution in commercial matters. Bernheimer praised arbitration as more expeditious than litigation.[244] Arbitration would be quicker because issues could be

> decided upon motion papers, affidavits and such exhibits as the party chooses to submit, obviating the necessity of appearance in court, together with the calling of witnesses and the opportunity for other preliminary motions and proceedings. The whole matter should be disposed of within a few days after the application is made.[245]

Noting a three-year backlog in civil courts, supporters championed arbitration as a mechanism to remove inter-merchant disputes from state and federal courts, in order to reduce court congestion.[246] Cohen further argued that removing inter-merchant disputes from court dockets would free courts to handle other cases "without waiting for a year or two for it to be reached. In other words, you would take out all these matters of business and leave the courts free to handle the business that ought to be handled with dispatch."[247] Herbert Hoover, as the Secretary of Commerce, urged Congress to adopt the FAA because "[t]he clogging of our courts is such that the delays amount to a virtual denial of justice. . . . I believe the emergency exists for prompt action and I sincerely hope that this Congress may be able to relieve the serious situation."[248] These arguments proved influential, as Congress expressed concern about the timeliness of dispute resolution.[249]

The speed of dispute resolution was seen as particularly important in the context of disputes involving perishable goods. W.H.H. Piatt, Chairman of

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242. *Id.* at 31 (resolution of American Bankers' Association).

243. *See* David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 61 (2007) ("After the 1923 and 1924 hearings, the House Judiciary Committee and the Senate Judiciary Committee each generated a report recommending passage of the FAA. Those reports make clear that, when it enacted the FAA, Congress understood arbitration to be something inherently prompt, inexpensive, and streamlined—in other words, just the type of proceeding that had been described by the witnesses during the pre-enactment hearings.").

244. *See Arbitration Hearings*, *supra* note 238, at 5 (statement of Charles L. Bernheimer) ("But the merchant finds that arbitration is a very direct and very expeditious method. Our courts are so clogged that it is sometimes years before they can reach a settlement: but the arbitration makes a prompt settlement . . . .").

245. *Joint Hearings*, *supra* note 234, at 35–36 (statement of Julius Henry Cohen) (quoting "brief on the proposed Federal arbitration statute," submitted by Mr. Cohen).

246. *Id.* at 26 (statement of Alexander Rose, Arbitration Society of America).

247. *Id.* at 18 (statement of Julius Henry Cohen).

248. *Id.* at 21 (letter from Herbert Hoover, Secretary of Commerce).

249. *See* H.R. REP. NO. 68-96, at 2 (1924) ("It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation.").

the Committee on Commerce, Trade, and Commercial Law of the American Bar Association, testified that the FAA "would offer such opportunities for saving perishable products. A man ships a carload of potatoes in and a creditor attaches it, and the potatoes stand there on a side track and freeze or rot. Under the arbitration proposition he could save them."[250] Representatives of producers and shippers of vegetables and fruits testified in favor of the bill, asserting that arbitration would benefit business and "the whole country."[251] For example, Gray Silver, representing the American Farm Bureau Federation, told Congress that "arbitration in commercial matters . . . will be helpful in speeding business generally."[252]

The supporters of the FAA cobbled together the above arguments to suggest that the legislation was pro-consumer, but not because consumers would be in arbitration themselves. Rather, consumers would benefit, Bernheimer argued, for at least three separate reasons. First, he argued that the high costs of litigation between merchants would necessarily be passed on to consumers in the form of higher prices, and thus, enforcement of arbitration clauses in commercial contracts would ultimately redound to the benefit of consumers.[253] Second, Bernheimer argued that the relative speed of arbitration would reduce merchant costs—and ultimately consumer prices—because the FAA "will help to conserve perishable and semi-perishable food products, and save many millions of dollars in foodstuffs now wasted because of the lack of legally binding arbitration facilities."[254] Third, consumers would pay less in taxes to maintain state courthouses that were busy with intra-merchant litigation.[255]

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250. *Arbitration Hearings*, *supra* note 238, at 11 (statement of W.H.H. Piatt).

251. *Joint Hearings*, *supra* note 234, at 28–29 (statement of Henry L. Eaton).

252. *Id.* at 11–12 (statement of Gray Silver, American Farm Bureau Federation).

253. *Id.* at 7 (statement of Charles L. Bernheimer) ("The litigant's expenses—that is, whatever is necessary to cover the annual outlay for litigation or the fear of litigation, consultations with lawyers, the possibility of cancellations, and so forth, eventually creeps into the selling price as well. It is a part of the overhead of a business, and finds its reflection in the price of the articles sold, and consequently the prices of commodities involved are correspondingly increased."); *Arbitration Hearings*, *supra* note 236, at 7 (statement of Charles L. Bernheimer) ("The merchants want this very badly. It adds to the cost to the consumer if the merchant has in the calculation of his prices to consider, in his overhead, possible litigation, possible claims. All of these expenses go into the overhead running expenses of the business. No matter how little it is, it will have the result of reducing the cost, without taking it out of the purchaser or anybody.").

254. *Arbitration Hearings*, *supra* note 238, at 3 (statement of Charles L. Bernheimer); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) ("Congress, when enacting this law, had the needs of consumers, as well as others, in mind.").

255. *Joint Hearings*, *supra* note 232, at 6 (statement of Charles L. Bernheimer) ("The expense to the State and the counties in the final analysis, comes out of taxes. Taxes are paid by the consumer, big and little. I know there may be a difference of opinion on that subject but let me exemplify it: In the seller's market the seller has the advantage, and he is able to prorate his taxes into his products. He has control. In the buyer's market the reverse holds good.").

These arguments in favor of the FAA carried the day. Not a single senator or representative voted against it.[256] This is not surprising; nobody spoke or wrote in opposition to the legislation.[257]

The most important fact about the testimony, hearings, and reports leading up to congressional enactment of the FAA is that every witness, every Senator, and every Representative discussed one issue and one issue only: arbitration of contract disputes between merchants. Cohen spoke of "the disposition of business in the commercial world."[258] The judicial opinions that Cohen cited as necessitating the FAA all involved contract disputes between businesses.[259] Throughout his testimony, he described arbitration as only between businesspeople.[260] Similarly, the representative of the American Bankers' Association praised arbitration for linking bankers' interests with those of "merchants and business men."[261] Wilson J. Vance, Secretary of the New Jersey State Chamber of Commerce, praised arbitration because "few cases . . . have come actually to trial in the arbitration tribunals [because] business men have adopted the practice of getting together and settling their business differences."[262] Bernheimer, too, praised arbitration because it would "enable business men to settle *their* disputes expeditiously and economically."[263] He argued that arbitration "preserves business friendships."[264] Witnesses without contradiction described the FAA as involving situations involving "a contract *between merchants* one with another, buying and selling goods."[265] Furthermore, the New York arbitra-

256. Moses, *supra* note 234, at 110 ("Having been passed without a single negative vote in either the House or the Senate, the Federal Arbitration Act was signed into law in 1925 and became effective January 1, 1926.").

257. *Joint Hearings*, *supra* note 234, at 24.

258. *Id.* at 13 (statement of Julius Henry Cohen).

259. *Id.* at 33 (statement of Julius Henry Cohen) (citing cases); *see also* Moses, *supra* note 234, at 106 ("The hearings make clear that the focus of the Act was merchant-to-merchant arbitrations, never merchant-to-consumer arbitrations. All of the examples given by Bernheimer as to cases he knew about or cases he had personally been involved with through the New York Chamber of Commerce were cases between merchants.").

260. *See, e.g.*, *Joint Hearings*, *supra* note 234, at 41 (statement of Julius Henry Cohen) (quoting "brief on the proposed Federal arbitration statute," submitted by Mr. Cohen) ("If business men desire to submit their disputes to speedy and expert decision, why should they not be enabled to do so?").

261. *Id.* at 31 (statement of Thomas B. Paton, American Bankers' Association).

262. *Id.* at 30–31 (statement of Wilson J. Vance, Secretary, New Jersey State Chamber of Commerce).

263. *Arbitration Hearings*, *supra* note 236, at 2 (statement of Charles L. Bernheimer) (emphasis added); *see also Joint Hearings*, *supra* note 232, at 6 (statement of Charles L. Bernheimer) (describing litigation as unprofitable).

264. *Joint Hearings*, *supra* note 234, at 7 (statement of Charles L. Bernheimer).

265. *Arbitration Hearings*, *supra* note 238, at 10 (statement of W.H.H. Piatt) (emphasis added).

tion law that served as the template for the FAA was designed for arbitration between merchants.[266]

All of the examples cited of the efficacy of arbitration involved disputes between merchants. Many involved international contracts,[267] most notably disputes between British merchants and New York merchants.[268] R.S. French—who testified as a representative of the National League of Marine Merchants of the United States, the Western Fruit Jobbers' Association of America, and the International Apple Shippers' Association of America—noted the importance of enforceable arbitration agreements for large exporters and importers of perishable goods.[269] In addition to international disagreements, domestic business interests wanted their arbitration agreements among each other enforced. Trade organizations praised the FAA as facilitating arbitration among merchants in the same trade.[270] Cohen testified that "one of the rules of the trade is that if you belong to a trade you shall arbitrate your differences with them."[271]

A wide range of merchant associations endorsed the FAA. These included fruit jobbers; wholesale grocers; raisin growers; poultry, dairy, and egg producers; peach and fig growers; canners; music publishers; and coffee, sugar, and lumber producers.[272] Beyond specific industries, chambers of commerce of various cities, states, and territories gave their official support to the FAA.[273] One reason that merchant associations across disparate industries supported arbitration was the perception that merchants in contract disputes with each other would be best served by an arbiter who knew their industry.[274]

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266. Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 148–51 (1921).

267. *See, e.g.*, *Arbitration Hearings*, *supra* note 238, at 7 (statement of Charles L. Bernheimer) ("The New York Steamship Co. had a dispute with a firm of shippers in Halifax on a shipment of $17,000 worth of codfish to Para, Brazil.").

268. *Joint Hearings*, *supra* note 234, at 8 (statement of Charles L. Bernheimer) ("We handled in 1921 about 150 cases between British merchants and New York merchants, the result of the slump of 1920, when every one tried his best to get out from under by putting his load on the other fellow's shoulders if he could.").

269. *Id.* at 12 (statement of R.S. French).

270. *See, e.g.*, *id.* at 13 (statement of C.G. Woodbury of the National Canners' Association and of the Canners' League of California) (testifying that the Canners' organizations supported passage of the FAA).

271. *Id.* at 29 (statement of Julius Henry Cohen).

272. *Id.* at 21–22 (list submitted by Charles L. Bernheimer).

273. *Id.*

274. *Id.* at 27 (statement of Alexander Rose); Moses, *supra* note 232, at 111 ("Arbitration was a remedy that was well-suited, according to Cohen, 'to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or [related] questions of

Most explicitly of all, when clarifying that the FAA did not reach labor disputes, the ABA's Piatt explained that the FAA "is purely an act to give *the merchants* the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this."[275]

B. How Courts Misconstrue Legislative Intent in Arbitration Cases

Courts have repeatedly upheld both arbitration clauses and anti-consumer terms within them—as well as striking down states' ability to protect consumers—based on a claimed fealty to legislative intent. Despite Supreme Court claims to the contrary, the FAA does not reflect "a congressional declaration of a liberal federal policy favoring arbitration agreements."[276] Rather, this "so-called policy favoring arbitration appears to be one created by the judiciary out of whole cloth."[277] This subpart explains how each individual aspect of the Court's proffered Congressional intent behind the FAA is incorrect.

1. The Scope of Arbitration Clauses.—In passing the FAA, Congress intended to allow arbitration for only a narrow set of legal claims: inter-merchant contract disputes sounding in breach and maritime claims.[278] The Supreme Court opinions extending the FAA to cover federal statutory claims find no support in either the text or legislative history of the Act.[279] The Court converted an absence of evidence regarding congressional intent into proof of congressional intent.[280] It is hardly surprising, however, that neither legislators nor witnesses expressed an intent to exclude statutory claims; no one had ever conceived that future judges would misinterpret a law written for contract disputes to apply to federal statutory claims, which were not

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law.'" (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926))).

275. *Arbitration Hearings*, *supra* note 238, at 9 (statement of W.H.H. Piatt) (emphasis added); *see also* Moses, *supra* note 234, at 106 (describing Piatt's statement as "the central concept behind the Act: to provide for enforceability of arbitration agreements between merchants").

276. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The Court provided no citation for this critical proposition. *Id.*

277. Moses, *supra* note 233, at 123 ("The 1925 Congress never indicated in the slightest way that arbitration was to be favored over judicial resolution of disputes. It simply made arbitration of commercial and maritime agreements enforceable in federal court because, until 1925, such agreements had essentially been revocable at will by the parties.").

278. *Id.* at 139 ("Moreover, the FAA was never described in the legislative history as applying to any claims other than contract and maritime claims.").

279. *Id.* at 138–39.

280. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–26 (1985); Moses, *supra* note 234, at 141.

discussed at all.[281] Arbitration was not intended for statutory problems, like antitrust, but for routine commercial matters of contract interpretation, breach, and remedy.[282]

Congress intended to allow arbitration for contract disputes between merchants in the federal jurisdiction where the parties disagreed about such facts as the trade custom applied to interpret a particular contract provision.[283] Arbitrators who knew a particular trade, it was argued, were well situated to decide such factual issues quickly. Immediately after the enactment of the FAA, Cohen and a co-author noted that "[n]ot all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like."[284]

Arbitration was not intended for complex legal issues, such as those involving statutory claims. Cohen himself noted that arbitration was "not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes."[285] Instead, legal questions of statutory interpretation were "better left to the determination of skilled judges with a background of legal experience and established systems of law."[286] In short, the Supreme Court constructed a false narrative of an expansive FAA that applied to all manner of statutory claims, when the drafters, proponents, and enacting legislators designed a law intended only for addressing contract disputes between merchants.

2. Consumer and Employment Contracts.—The Supreme Court has repeatedly held that the FAA requires enforcement of arbitration clauses in consumer contracts. The Court has invoked legislative intent to justify its holdings. Congress, however, intended the FAA to allow enforcement only of arbitration agreements between merchants.[287] Congress did not intend the FAA to apply to consumer contracts. The witnesses spoke only of merchants

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281. Moses, *supra* note 234, at 139 ("Nor is there evidence that anyone at the time believed the FAA made statutory claims arbitrable.").

282. Cohen & Dayton, *supra* note 272, at 281 ("[Arbitration] is not the proper method for deciding points of law of major importance involving . . . policy in the application of statutes.").

283. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1759 (2011) (Breyer, J., dissenting) (citing substantial authority indicating that Congress intended arbitration to primarily resolve disputes of fact between merchants).

284. Cohen & Dayton, *supra* note 272, at 281.

285. *Id.*

286. *Id.*

287. *See supra* subpart (III)(A); *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) ("There is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities.").

having arbitrators, not consumers.[288] Arguments against the FAA within the ABA—which debated and drafted the statutory language that became the FAA—said nothing about consumer contracts.[289]

In particular, Congress did not intend the FAA to facilitate firms imposing arbitration clauses on consumers through contracts of adhesion. In the context of take-it-or-leave-it contracts between businesses, Cohen testified that the FAA would not facilitate adhesive contracts because regulations protected the weaker merchant.[290] The FAA's advocates repeatedly indicated that the Act would not apply to contracts of adhesion.[291] For example, in colloquy, when senators raised the issue of contracts of adhesion, the bill's supporters testified that the FAA would not apply to such situations.[292] Indeed, Piatt—the Chair of the ABA committee that drafted the FAA—testified that he would oppose legislation that would allow mandatory arbitration clauses in contracts of adhesion.[293]

Consumer contracts are different than the arbitration agreements that the 1925 Congress considered. The 1925 Congress assumed that it was addressing arbitration between businesspeople who knowingly and voluntarily agreed to arbitrate.[294] Supporters testified that arbitration was not intended to replace courts and was "purely voluntary."[295] Consumer contracts are not the product of arm's-length negotiations between parties of relatively equal bargaining power.[296] Not only are consumers denied input into the contract terms, they are often unaware that their contracts include mandatory arbitration provisions.[297] Although modern courts assume that consumers knew that they were waiving their right to participate in class

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288. *See, e.g.*, *Arbitration Hearings*, *supra* note 238, at 4 (statement of Charles L. Bernheimer).

289. *Id.* at 8 (statement of W.H.H. Piatt).

290. *Joint Hearings*, *supra* note 234, at 15 (statement of Julius Henry Cohen).

291. Moses, *supra* note 232, at 107 ("Cohen and his fellow supporters thus indicated that this bill would not apply in adhesion contracts for several reasons. First, there were protections written into law; second, protective requirements were issued by federal agencies; and third, that was simply not the intent of the legislation, which was specifically aimed at voluntary resolution of disputes between merchants.").

292. *Arbitration Hearings*, *supra* note 238, at 9 (statements of Sen. Walsh of Montana and W.H.H. Piatt) (discussing take-it-or-leave-it insurance contracts).

293. *Id.* at 10 (statement of W.H.H. Piatt) ("Speaking for myself, personally, I would say I would not favor any kind of legislation that would permit the forcing a man to sign that kindof [sic] a contract. I can see where that could be, right now.").

294. Moses, *supra* note 234, at 108 ("As Representative Graham noted in the House floor debate in 1924, '[t]his bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when *voluntarily* placed in the document by the parties to it.'"); *see also* Horton, *supra* note 228, at 447 ("[E]ven a cursory review of the FAA's legislative history reveals that Congress did not want the [FAA] to apply to contracts between parties with unequal bargaining power.").

295. *Joint Hearings*, *supra* note 234, at 26 (statement of Alexander Rose).

296. Tracey & McGill, *supra* note 87, at 461–62.

297. *Id.* at 462.

action,[298] such knowledge does not generally exist in contracts of adhesion that include arbitration clauses.[299] And the Supreme Court has forbidden states from trying to require businesses to inform consumers about arbitration clauses in their contracts.[300]

In business contracts, both parties have a similar incentive to structure a neutral arbitration process that favors neither plaintiff nor defendant because each party bears a similar risk of being the plaintiff or the defendant.[301] In contrast, in consumer contracts, the business entity is far more likely to be the defendant and thus has a strong incentive to design and impose an arbitration process that is anti-plaintiff. Consumers cannot prevent this because they have no say in designing the arbitration process. Thus, not surprisingly, the arbitration terms discussed in Part I—waiving class actions, limiting damages, truncating statutes of limitations, precluding injunctions—are all decidedly pro-defendant.

The Supreme Court has made the same errors that it made regarding consumer contracts when it has considered the arbitrability of employment contracts. When the Justices claim that Congress intended the FAA to cover employment contracts,[302] they are again misreading the legislative history.[303] During the earliest hearings for the FAA, concerns were expressed that the Act could cover employment contracts for stevedores, seamen, and railroad workers because their occupations involved interstate and foreign commerce, which was within the authority of Congress to regulate.[304] The Act's text was amended to provide that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[305] In addition to endorsing this

298. *See, e.g.*, Walther v. Sovereign Bank, 872 A.2d 735, 750–51 (Md. 2005) (holding that a "conspicuously presented" provision in an arbitration agreement waiving class action rights was valid and enforceable).

299. *See* Lemley & Leslie, *supra* note 13, at 44–45 (discussing the imposition of arbitration clauses on unaware consumers).

300. *See infra* notes 352–56 and accompanying text.

301. Supporters of antitrust arbitration assume that antitrust litigation is between merchants who know the arbiter and are equally likely to be plaintiff or defendant; they ignore consumer-initiated antitrust litigation. *E.g.*, Mark R. Lee, *Antitrust and Commercial Arbitration: An Economic Analysis*, 62 ST. JOHN'S L. REV. 1, 27 (1987).

302. Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1363–72 (1997).

303. *See id.* (discussing general principles of unequal bargaining power); Horton, *supra* note 228, at 446–47 (explaining that Congress did not intend for the FAA to apply to "contracts between parties with unequal bargaining power").

304. *Arbitration Hearings*, *supra* note 238, at 9 (statements of W.H.H. Piatt and Sen. Sterling).

305. 9 U.S.C. § 1 (2012).

explicit exception—as did Secretary of Commerce Herbert Hoover[306]—Piatt testified that it

> is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.[307]

The amendment appeased labor interests, who removed their opposition to the bill.[308]

The Supreme Court has misinterpreted the labor exception to the FAA. The Supreme Court asserted that the law "exempts from the FAA only contracts of employment of transportation workers."[309] The statutory exception was not intended to imply that employment contracts for other workers did fall within the FAA. Rather, if a worker was not engaged in interstate or foreign commerce, then Congress did not consider itself to have the authority to legislate as to the arbitrability of the worker's employment contract.[310] As Professor Moses notes, "no one in 1925—not the drafters, the Secretary of Commerce, organized labor, nor members of Congress—believed that the FAA applied to employment contracts."[311] By misreading the FAA, the Supreme Court has effectively preempted any efforts to limit arbitration of employment contracts.[312]

Furthermore, employment contracts have none of the hallmarks of the business contracts whose arbitration clauses Congress intended to make enforceable. As with consumers, the Supreme Court mischaracterizes workers' submission to mandatory arbitration as "voluntary."[313] For exam-

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306. *Arbitration Hearings*, *supra* note 238, at 14 (statement of Herbert Hoover, Secretary of Commerce).

307. *Id.* at 9 (statements of W.H.H. Piatt).

308. Moses, *supra* note 234, at 112 n.81 ("Earlier opposition by seamen and railroad employees had been diffused when a provision was added excluding them from coverage of the Act.").

309. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001).

310. *Id.* at 136 (Souter, J., dissenting) ("When the Act was passed (and the commerce power was closely confined) our case law indicated that the only employment relationships subject to the commerce power were those in which workers were actually engaged in interstate commerce."); Moses, *supra* note 234, at 106 ("Under the view of the Commerce Clause at that time, the Act did not apply to contracts of most workers. It only applied to contracts of workers actually engaged in interstate or foreign commerce, such as seamen or railroad employees, and those workers were specifically excluded.").

311. Moses, *supra* note 234, at 147; *see also Circuit City Stores*, 532 U.S. at 128 (Stevens, J., dissenting) ("[N]o one interested in the enactment of the FAA ever intended or expected that § 2 would apply to employment contracts.").

312. *See* Arbisser & Pollak, *supra* note 211, at 209 (describing multiple Supreme Court rulings which found that the FAA preempted state supreme court decisions invalidating arbitration agreements).

313. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32–33 (1991) (rejecting inequality of bargaining power between employers and employees as a reason to categorically reject arbitration agreements in employment contracts).

ple, the Court in *Gilmer* asserted that the employee—"an experienced businessman"—was not coerced into signing an arbitration agreement despite the fact that he could not work in the industry without waiving the right to litigate.[314] In contrast to the facts of *Gilmer*, most of the workers whose legal claims are blunted by arbitration clauses with class action waivers are not "experienced businesspeople" but blue collar workers who are effectively prevented from suing for illegal discrimination.[315] By failing to appreciate the limited reach that Congress intended for the FAA, the Justices have "eviscerate[d] the important role played by an independent judiciary in eradicating employment discrimination."[316]

3. Deference to Unconscionable Terms.—In over a dozen opinions, the Supreme Court has asserted—without evidence—that Congress enacted the FAA with the intent of compelling courts to enforce arbitration clauses "according to their terms" or "as written."[317] This "according to their terms" language facilitates the arbitration bootstrap because firms can put anti-consumer terms in the arbitration clause and, judges reason, the FAA requires enforcement of those terms.[318] The Court has converted its judge-made presumption of arbitrability into a presumption of contract terms being enforceable as long as they are inserted into an arbitration clause. When legislators in 1925 discussed the enforceability of arbitration agreements, they limited their inquiry—and their legislation—to the issue of allowing merchants to remove their contract disputes from federal courts to private arbitral tribunals. Congress gave no thought to the possibility that decades later firms would laden arbitration clauses with terms that were unconscionable, inequitable, or otherwise unenforceable under applicable state law.

The Supreme Court has claimed that Congress intended arbitration clauses to trump "public policy" concerns of the states, such as protecting citizens from unconscionable contract terms.[319] Thus, courts have held that precluding class action waivers would impermissibly "undermine the FAA."[320] These policy concerns do not undermine the FAA because the Act was never intended to apply to these situations. Congress did not intend the FAA to make individual terms in an arbitration clause enforceable, especially

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314. *Id.* at 33.

315. *See, e.g.*, 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 251–53 (2009) (describing the claims of maintenance and cleaning employees who had agreed to arbitrate discrimination claims).

316. *Gilmer*, 500 U.S. at 42 (Stevens, J., dissenting).

317. *See* cases cited *supra* note 214.

318. *See* Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1212–13 (11th Cir. 2011) (referring to "the FAA's objective of enforcing arbitration agreements according to their terms").

319. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011).

320. Coneff v. AT&T Corp., 673 F.3d 1155, 1159 (9th Cir. 2012).

if those terms violated state law when not incorporated into an arbitration clause.

First, although courts invoke the legislative history of the FAA to uphold class action waivers in arbitration clauses,[321] Congress did not desire enforcement of class action waivers embedded in arbitration clauses in contracts of adhesion.[322] Congress never considered class actions, waivers, or the possibility that firms would manipulate the terms of arbitration clauses in order to nullify state-law doctrines designed to protect consumers and workers. Congress never envisioned—or desired—the holdings of *Concepcion* and its progeny because Congress intended the FAA to apply only to inter-merchant disputes, not consumer contracts or consumer-initiated litigation.[323] Thus, when courts assert that they must enforce class action waivers in arbitration clauses lest they create "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[324] they are wrong.

Second, courts incorrectly invoke congressional intent when they use the FAA to uphold arbitration clause provisions that shorten statutes of limitations.[325] Congress expressed no such intention. Indeed, the only apparent reference to statutes of limitations occurred when one senator praised the fact that "most of the States have legislated . . . that no provision in the contract shortening the time of the statute of limitations shall be valid."[326] Neither the congressional reports, supporting documents, nor hearing testimony ever hinted that statutes of limitations were too long or that arbitration clauses could be used to shorten statutes of limitations. Certainly Congress never considered firms doing so in consumer contracts. Congress was concerned only with inter-merchant disputes; the claims of consumer fraud and other statutory violations that consumers are forced to arbitrate are fundamentally different than the commercial disputes that prompted Congress to enact the FAA.

Third, when courts claim that arbitration provisions limiting damages or injunctive relief must be enforced,[327] they are misreading the legislative history of the FAA. Congress did not intend the FAA to be a mechanism that firms could use to limit remedies—whether damages or injunctive relief—to

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321. *See supra* note 213 and accompanying text.

322. *See* Tracey & McGill, *supra* note 86, at 461–62 (contending that "[i]ncluding a class action waiver in a modern-day adhesion contract raises an unconscionability 'red flag' that Congress hardly could have anticipated when it adopted the FAA").

323. *See id.* (explaining that "[c]onsumer arbitration agreements lack the fundamental foundation of contractual arbitration that Congress likely anticipated: equal bargaining power").

324. *Concepcion*, 131 S. Ct. at 1753 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

325. *See supra* subpart III(A).

326. *Arbitration Hearings*, *supra* note 238, at 10 (statement of Sen. Walsh of Montana).

327. *See supra* note 189 and accompanying text.

consumers and workers.[328] Congress conceived of arbitration as a decision-making process. Supporters of the FAA championed arbitration as a more efficient mechanism for fact-finding—especially regarding trade custom—not as a device that defendants could use to preemptively cap their damages.

4. Preemption of State Laws to Protect Consumers.—Although courts hold that Congress intended the FAA to prevent states from enacting laws to protect their citizens, Congress did not intend the FAA to preempt state law. The supporters made a point of noting that the FAA did not affect state laws or state courts but rather "declares simply the policy of recognizing and enforcing arbitration agreements *in the Federal courts*[.] [I]t does not encroach upon the province of the individual States."[329] To accompany his testimony to Congress, Cohen submitted a brief that declared: "There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement. The statute can not have that effect."[330] Cohen promised that the FAA would not "infringe upon the provinces or prerogatives of the States."[331] Writing immediately after the law's enactment, Cohen reiterated that the FAA was a procedural law for federal courts and that state law determined whether arbitration agreements were enforceable in state courts.[332]

In addition to clear statements of intent that the FAA should apply neither to state courts nor state laws, other contextual evidence points to the same conclusion. First, leading up to congressional consideration of the FAA, the ABA drafted both the FAA and the Uniform State Arbitration Act (USAA),[333] which would apply to state courts in states that adopted the USAA. The latter would have been entirely unnecessary if the FAA had the reach that the Supreme Court ascribed to it sixty years later. Second, witnesses testified that they hoped that the FAA would be a model for states to follow to enact their own legislation to make arbitration clauses

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328. Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 154 (Cal. Ct. App. 1997).

329. Comm. on Commerce, Trade and Commercial Law, *The United States Arbitration Law and its Application*, 11 A.B.A. J. 153, 155 (1925) (emphasis added); *see also Joint Hearings*, *supra* note 232, at 38 (brief of Julius Henry Cohen) ("Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts."); H.R. REP. NO. 68-96, at 1 (1924) ("The purpose of this bill is to make valid and enforcible [sic] agreements for arbitration . . . in the Federal courts.").

330. *Joint Hearings*, *supra* note 232, at 40 (brief of Julius Henry Cohen); *see also* Southland Corp. v. Keating, 465 U.S. 1, 26 (1984) (O'Connor, J., dissenting) ("If characterizing the FAA as procedural was not enough, the draftsmen of the Act, the House Report, and the early commentators all flatly stated that the Act was intended to affect only federal-court proceedings.").

331. *Joint Hearings*, *supra* note 232, at 39 (brief of Julius Henry Cohen).

332. Cohen & Dayton, *supra* note 272, at 275–76 ("The statute as drawn establishes a procedure in the Federal courts . . . . It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws.").

333. Moses, *supra* note 234, at 127 n.187.

enforceable.[334] This argument makes no sense if the FAA required states to enforce arbitration clauses, as the *Southland* opinion asserted. Finally, the drafters and supporters of the FAA pronounced that "[t]he statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts."[335] Indeed, while some scholars have defended the *Southland* opinion,[336] "almost all of the commentators who have written about *Southland* agree that this case was wrongly decided and inconsistent with congressional intent."[337] In short, the FAA should not affect state legislators' efforts to protect consumers in their states from anti-consumer arbitration provisions.

In sum, the Supreme Court Justices did not simply misread the legislative history of the FAA; they made it up out of whole cloth.[338] Misreading would have required the Justices to review the pertinent hearings and reports, and then to misinterpret that record. But the Justices cite nothing from the legislative history when they assert how the 1925 Congress would have wanted the FAA applied. This is not surprising because there is nothing in the legislative record to indicate that Congress intended the FAA to apply to consumer contracts or to statutory claims; nor did Congress seek to create a federal policy that "favored" arbitration, especially a policy that prevented states from enforcing their consumer protection laws and applying their contract doctrines to arbitration clauses. Instead, all of the evidence from the historical record shows that Congress either did not consider or did not intend any of these outcomes.

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334. *Joint Hearings*, *supra* note 234, at 28 (statement of Alexander Rose).

335. Comm. on Commerce, Trade and Commercial Law, *supra* note 326, at 154; *see also id.* ("A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts.").

336. Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 169 (2002).

337. Moses, *supra* note 234, at 125–26 ("To reach its decision, the Court had to virtually ignore the legislative history that it nonetheless claimed to rely upon."); Horton, *supra* note 228, at 445–46 ("[T]he vast majority of scholars believe that Congress understood the [FAA] to be a federal procedural rule that neither applied in state court nor preempted state law."); *see also* Southland Corp. v. Keating, 465 U.S. 1, 25 (1984) (O'Connor, J., dissenting) ("One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.").

338. *See* Moses, *supra* note 232, at 113 (contending that, in reference to the FAA, "[t]he Court has, step by step, built a house of cards that has almost no resemblance to the structure envisioned by the original statute").

C. *The Policy Consequences of Misconstruing the Legislative History of the FAA*

The Supreme Court's misreading of congressional intent has created a deeply flawed policy regarding mandatory arbitration clauses. The Court-facilitated steady expansion of mandatory arbitration beyond the bounds intended by Congress has served to undermine entire bodies of both federal and state law, while leaving state legislators unable to protect their citizens.

The Supreme Court justified its expansion of the FAA's scope to include statutory claims by asserting that requiring plaintiffs to submit those claims to mandatory arbitration was not tantamount to waiving their statutory rights.[339] Even if that were true at some point in the past, it no longer holds true. With the Court's evisceration of the Effective Vindication Doctrine in *Italian Colors*, when the arbitration clause includes a class action waiver, it is, in fact, tantamount to a prospective waiver of rights.[340] Arbitration clauses that preclude classwide procedures effectively prevent consumers from pursuing relatively low-value claims, especially because attorneys generally refuse to represent individual plaintiffs in such actions.[341] Thus, it is not surprising that when defendants win motions to compel arbitration, plaintiffs generally do not arbitrate, instead letting their claims expire without remedy.[342] Even when a firm's arbitration process can be characterized as relatively "consumer friendly," few consumers exercise their contractual right to individual arbitration.[343] Several courts have recognized that forcing consumers to arbitrate individually instead of litigate effectively waives important statutory remedies.[344]

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339. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 265 (2009).

340. Lemley & Leslie, *supra* note 13, at 11. Furthermore, in many instances, a class action waiver can effectively prevent meaningful equitable relief because an arbiter's injunction applies only to the individual plaintiff, allowing a firm to continue its misconduct against other consumers. *See* Schatz v. Cellco P'ship, 842 F. Supp. 2d 594, 610–11 (S.D.N.Y. 2012) ("This clause would seem to prohibit the arbitrator from ordering Verizon to lower the prices being charged to a group of customers based on the claim of an individual customer.").

341. McKenzie Check Advance of Fla., LLC v. Betts, 112 So. 3d 1176, 1184 (Fla. 2013).

342. *See* CFPB ARBITRATION STUDY, *supra* note 16, § 6.7.1, at 59–60 ("For the 46 class cases and six individual cases in our set in which a motion to compel arbitration was granted, we reviewed the court dockets . . . for indications of a subsequent filing in arbitration. For the 46 class cases, we found 12 subsequent arbitration filings . . . . For all of the six federal individual cases in which the court granted an arbitration motion, we found no evidence in the court record that a subsequent arbitration proceeding was filed." (footnotes omitted)).

343. *See* Gilles, *supra* note 63, at 1224 ("Despite how 'quick [and] easy' AT&T's arbitration process in the *Concepcion* case may have been, 'few consumers invoked [that] process'—and one wonders if any did. Certainly, individual arbitrations of consumer claims will have a difficult time attracting lawyers, who will find little profit in representing a handful of small-claims clients." (footnotes omitted)).

344. *See* Crewe v. Rich Dad Educ., LLC, 884 F. Supp. 2d 60, 84 n.13 (S.D.N.Y. 2012) (collecting cases).

This situation is made even worse when firms employ arbitration clauses to bootstrap all manner of anti-plaintiff terms in their contracts. Shortened statutes of limitations reduce the likelihood of plaintiffs filing their claims in time. Damage-limitation provisions reduce the incentive to sue and increase the risk that even successful plaintiffs will not be fully compensated for their proven injuries. The manipulation of fee-shifting provisions increases the problem. Judges have asserted that two-way fee-shifting provisions encourage plaintiffs to bring suit.[345] While one-way pro-plaintiff fee-shifting statutes may have this effect, pro-defendant fee-shifting provisions can deter plaintiffs from bringing any action,[346] even a meritorious one, due to the fear that adjudicator error could result in significant financial penalties for the plaintiff.[347] Forum-selection clauses included in arbitration provisions can render arbitration costs prohibitive. Finally, confidentiality and related clauses can prevent victims of mass misconduct from coordinating their efforts to seek relief.

The Supreme Court seems unconcerned by these anti-plaintiff terms because, the Justices assert, consumers and employees are voluntarily agreeing to mandatory arbitration and the attendant terms. Consumers, however, are often unaware that their contracts include an arbitration clause.[348] One study out of St. John's University "found that 87% of respondents who said that they had never entered a consumer contract with an arbitration clause had indeed entered into at least one consumer contract that included a

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345. *Id.* at 83–84 ("Further, the fee- and cost-shifting provision of the Agreement here gives counsel a substantial incentive to bring a genuinely meritorious claim: It provides that 'the prevailing party shall be entitled to obtain all reasonable costs, including its reasonable attorney fees at the trial and appellate levels.'").

346. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 645 (2012) ("[B]ounty and fee-shifting clauses are plainly intended to avoid liability and not to select an alternative forum for the resolution of disputes.").

347. Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155, 160–61 (2006) (noting that the pro-defendant English rule may "deter[] meritorious litigation, particularly by litigants with limited resources."). Some courts have held that the possibility of fee shifting undermines arguments that class action waivers are unconscionable. *See, e.g.*, Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 638–39 (4th Cir. 2002) (holding that a class action waiver in an arbitration clause was not unconscionable because the plaintiff could recover her attorney's fees under the prevailing fee-shifting statutes); Brueggemann v. NCOA Select, Inc., No. 08-80606-CIV, 2009 WL 1873651, at *3 (S.D. Fla. June 30, 2009) ("The Eleventh Circuit has held that class action waivers in arbitration agreements are valid and enforceable, especially when the plaintiff would still be entitled to attorney's fees awards."); *id.* (collecting cases). However, if courts enforce class action waivers in arbitration clauses, then the "availability of attorney's fees is illusory if it is unlikely that counsel would be willing to undertake the representation." Muhammad v. Cnty. Bank of Rehoboth Beach, 912 A.2d 88, 100 (N.J. 2006).

348. Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535, 547 (2005) ("The courts are permitting the removal of large numbers of disputes from our system of justice into private forums, without the consent, agreement, or knowledge of the participants.").

pre-dispute arbitration clause."[349] Of those consumers who claimed to look for arbitration clauses and who claimed to never enter contracts that included them, "85% had . . . entered at least one contract with an arbitration clause."[350]

The relatively complex language employed in arbitration clauses exacerbates the problem. The CFPB study found that in many industries, arbitration clauses required a significantly higher level of education to understand than the remainder of the contract.[351] Even when consumers are aware that their contracts include an arbitration clause, they do not comprehend the details. Over one-third of respondents in one study believed that they could litigate their claims despite the presence of pre-dispute arbitration clauses in their contracts.[352] In another study, fewer than one in five respondents recognized that a contract that included an arbitration clause "could impact their right to a jury trial."[353] Furthermore, a majority of consumers believed—incorrectly—that they could still participate in a class action lawsuit.[354]

That mandatory arbitration is imposed on an unaware public further magnifies the harm caused by the Court's misreading the FAA to prevent states from ensuring knowing waiver of the right to litigate. The Court has claimed that states can "protect[] consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. . . . under general contract law principles,"[355] but then ignores and invalidates any state laws designed to do so.[356] The Supreme Court struck down Montana's requirement that the first page of a contract provide notice if the contract includes an arbitration clause because the law applies "specifically and solely [to] contracts 'subject to arbitration,' [and thus] conflicts with the FAA."[357]

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349. CFPB ARBITRATION STUDY, *supra* note 16, § 3.2, at 8 (citing Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, & Yuxiang Liu, *'Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements* 60 (St. John's School of Law Legal Studies Research Paper Series, Paper No. 14-0009)), http://ssrn.com/abstract=2516432 [http://perma.cc/B66N-4WHV].

350. *Id.* § 3.2, at 8.

351. *See id.* § 2.4, at 28 (In market for GPR prepaid card contracts, "the arbitration clauses . . . in most cases were written at a higher grade level (with an average Flesch-Kincaid grade level of 15.0, as compared to 11.8 for the rest of the contract) and had worse readability scores . . . ."); *id.* § 2.4, at 29 ("Storefront payday loan arbitration clauses almost always were more complex and written at a higher grade level than the rest of the payday loan contract.").

352. *Id.* § 3.1, at 3–4.

353. *Id.* § 3.2, at 7–8 (citing Sovern et al., *supra* note 347).

354. *Id.* § 3.1, at 3–4 ("When we asked consumers if they could participate in class action lawsuits against their credit card bank, more than half of those whose agreements had pre-dispute arbitration clauses thought that they could participate (56.7%).").

355. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995).

356. *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006) ("[W]e cannot accept the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on 'Florida public policy and contract law.'").

357. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996).

Under this reasoning, states cannot require any notice regarding arbitration, because any law requiring notice of arbitration, by definition, targets contracts with arbitration provisions. Nothing in the legislative history of the FAA even remotely suggests that Congress intended to interfere with state law at all, let alone prevent states from ensuring that their citizens enter arbitration agreements knowingly.[358] In short, the Supreme Court arbitration jurisprudence affirmatively thwarts truly consensual arbitration by preventing consumers from being informed that they are waiving their rights to litigate and to participate in class actions.[359]

By upholding arbitration clauses in contracts of adhesion and enforcing otherwise unenforceable contract terms as long as they are inserted into arbitration provisions, courts have dismantled the apparatus of consumer protection in the United States. Arbitration allows firms to circumvent mandatory rules, which are designed to protect consumers, by forcing consumer claims into arbitration systems that may not recognize these rules.[360] After *Concepcion*, firms can successfully preclude both class action litigation and class-wide arbitration.[361] Qualified private attorneys are unlikely to take cases to individual arbitration.[362] Professor Sternlight has explained that "[b]y permitting companies to use arbitration clauses to exempt themselves from class actions, *Concepcion* will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued."[363] Similarly, Public Citizen predicted that *Concepcion* will cause "more hidden fees and charges on your cellphone bill, more predatory lending, more discrimination—in short, a less just society."[364]

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358. *See* Casarotto v. Lombardi, 886 P.2d 931, 935 (Mont. 1994), *vacated sub nom.* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) (describing how Montana legislators "did not want Montanans to waive their constitutional right of access to Montana's courts unknowingly").

359. *See* Moses, *supra* note 346, at 542 (critiquing the Court's opinion in *Casarotto*).

360. Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1285 (2000) ("[U]nder the current system, the parties to a transaction are, indeed, able to convert mandatory laws into default laws through the use of arbitration—making the use of arbitration to resolve issues related to mandatory laws problematic.").

361. Gross, *supra* note 19, at 54 ("Academics and the media viewed *AT&T Mobility* as signaling the death of class arbitration as a method to redress small dollar value claims.").

362. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1210 (2012) ("[I]t is inconceivable that a private attorney, who might have sufficient expertise in consumer fraud, will have the economic incentive to root out consumer fraud if the only economic gain to be had is through individual arbitrations. The significant investment of resources required to identify wronged individuals and to pursue their small claims on an individualized basis likely will not justify any eventual gains.").

363. Sternlight, *supra* note 25, at 704.

364. Deepak Gupta, *Congress Must Undo Damage of U.S. Supreme Court's Latest Anti-Consumer Decision*, PUB. CITIZEN (May 17, 2011), http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3346 [http://perma.cc/8DE4-M2VM].

The claim that firms impose arbitration because it is more efficient than litigation is disproven by examining the contents of their non-consumer and non-employment contracts. Firms that impose mandatory arbitration clauses in their consumer contracts do not include such terms in their contracts with other businesses. In their empirical study, Professors Theodore Eisenberg, Geoffrey Miller, and Emily Sherwin show for firms that impose arbitration clauses on their customers and employees, "less than 10% of their negotiated non-consumer, non-employment contracts included arbitration clauses."[365] The authors conclude that "companies value, even prefer, litigation as the means for resolving disputes with peers. . . . [This] casts doubt on the corporations' asserted beliefs in the superior fairness and efficiency of arbitration clauses."[366] This suggests that arbitration in consumer contracts is designed to hurt consumers, blunt class actions, and deter consumers from pursuing their rights.

The Supreme Court has essentially held that the contract defense of unconscionability does not apply to arbitration because Congress wanted to preempt anything that would hamper arbitration. But that risks eliminating all contract defenses because whenever a contract defense is applied to a term in an arbitration clause, it prevents the strict enforcement of the arbitration clause and thus, in the Court's view, hampers arbitration.

IV. Reconciling the Legislative Intent and the Practical Reality of Arbitration Clauses

The Supreme Court's misreading of the FAA and congressional intent has created a legal regime in which firms can immunize themselves from lawsuits brought by their customers and employees. A proper, comprehensive solution would require unraveling the chain of mistakes that the Supreme Court has made regarding the FAA over the past three decades: courts would not interpret the FAA to apply to federal statutory claims;[367] courts would not use the FAA to make arbitration clauses in consumer and employment contracts enforceable; courts would not apply the FAA to state courts; and courts would not interpret the FAA to invalidate any state laws designed to regulate arbitration clauses. All of these holdings are inconsistent with the text and legislative history of the FAA. After over three decades of misrepresenting congressional intent, the Supreme Court is unlikely to see the error of its ways on any or all of these points.

Congress has been silent for far too long on the issue of arbitration. One can appreciate that legislators may be reticent to respond to every Supreme Court decision that arguably misperceives legislative intent or misapplies a

365. Eisenberg et al., *supra* note 14, at 876.

366. *Id.*

367. *See* Moses, *supra* note 232, at 144 (explaining "why arbitration of statutory rights is simply wrong").

federal statute. In interpreting the FAA, however, the Supreme Court has for decades—over the course of more than a dozen opinions—incorrectly asserted that Congress intended to enact a national policy favoring private arbitration over public litigation (even of federal statutory rights); that Congress intended to prevent state legislatures from protecting their residents from hidden, poorly written, and overreaching arbitration clauses; and that Congress intended to prevent courts from applying the otherwise applicable unconscionability doctrine to arbitration clauses and their terms. This series of judicial mistakes necessitates a congressional response. For the past few Congresses, a group of senators and representatives has introduced the Arbitration Fairness Act (the AFA).[368] As currently envisioned, the AFA would prevent enforcement of pre-dispute agreements to arbitrate employment claims, consumer disputes (including securities claims), civil rights claims, and alleged antitrust violations.[369]

While a step in the right direction, the AFA is no panacea for the problems detailed in Parts I and II. First, the AFA is unlikely to pass in the foreseeable future. Second, as written the AFA is a partial solution at best. While it pares back the reach of the FAA—which the Supreme Court improperly expanded—to reflect the intent of the 1925 Congress, the AFA does not address all of the mistakes that the Supreme Court has made with respect to the FAA. For example, the AFA does not restore the right of state legislatures to require effective notice of arbitration provisions or of state courts to apply unconscionability doctrine to the terms of an arbitration clause.[370] So long as Congress is addressing the problems created by the Supreme Court's arbitration jurisprudence, Congress should remedy all of the problems, including the arbitration bootstrap and the high court's intrusion into state prerogatives.

Short of congressional action, lower courts can still address the problem of the arbitration bootstrap by which firms insert unconscionable—or otherwise unenforceable—terms into arbitration clauses in an effort to insulate the terms from judicial invalidation. This is a relatively new front in the battle over arbitration clauses. Lower courts can still prevent *Concepcion* from being applied in an overly broad fashion that further undermines consumer protection and employment discrimination laws.

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368. *E.g.*, Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (2015); Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013).

369. Congress has already engaged in targeted arbitration reform. For example, Congress has barred defense contractors and subcontractors from imposing mandatory pre-dispute arbitration clauses in their employment contracts. Weston, *supra* note 81, at 793 (citing Department of Defense Appropriations Act of 2010, Pub. L. No. 111-18, 123 Stat. 3409 (2009)).

370. Of course, such protections would be less necessary if pre-dispute arbitration agreements were generally unenforceable, as the AFA would provide, but these state laws may still be necessary in contract disputes between merchants. The 1925 Congress never intended the FAA to preempt the ability of states to protect merchants where appropriate.

Faced with an arbitration clause that contains unconscionable terms, courts can take one of three approaches. First, courts can enforce the arbitration clause as written, unconscionable terms and all. This approach is the arbitration bootstrap. Second, courts can sever the unconscionable terms and enforce the remainder of the arbitration clause. Third, courts can conclude that so many unconscionable terms permeate the arbitration clause that severing the terms is impractical, and consequently, the arbitration clause as a whole is unenforceable. Each of these approaches will be discussed in turn. This Part concludes that only the latter two options are consistent with Congressional intent and good public policy.

A. Bootstrap

Bootstrapping refers to firms inserting unconscionable terms into an arbitration clause in the hopes that judicial deference to arbitration clauses will extend to otherwise unconscionable or unenforceable terms buried within these clauses. The *Concepcion* Court has seemingly laid the groundwork for firms to employ the arbitration bootstrap by forbidding California courts from applying that state's neutral unconscionability doctrine to arbitration clauses. Building on *Concepcion*, the *Italian Colors* opinion implicitly accepted the arbitration bootstrap by requiring enforcement of an arbitration clause that contained both a class action waiver and a non-coordination provision, which combined to make any arbitration economically irrational.

Courts should recognize when arbitration clauses are being used to bootstrap other terms into enforceability. Arbitration clauses have become firms' go-to mechanisms for inserting into contracts unconscionable terms that would otherwise be unenforceable. These terms have little—and usually nothing—to do with the arbitration process itself, whose efficiency is a function of informality, limited discovery, and streamlined proceedings.[371] Firms are essentially exploiting the following loophole created by courts: (1) certain anti-plaintiff terms are unenforceable; (2) courts should defer to arbitration clauses and uphold their provisions; thus, (3) anti-plaintiff terms inserted into arbitration clauses will benefit from this judicial deference.[372] Thus, businesses use the cover of an arbitration clause to impose anti-plaintiff terms that have nothing to do with arbitration as such and, but for their inclusion in a so-called arbitration clause, would be unenforceable.

Arbitration bootstrapping is inconsistent with the purpose of the FAA. Before the 1980s-era push by the Supreme Court to make all claims arbitrable, the Justices correctly noted that "the purpose of Congress in 1925

371. *Id.*, at 787.

372. Venture Cotton Coop. v. Freeman, 435 S.W.3d 222, 232 (Tex. 2014) ("Courts should also use care not to intrude upon arbitral jurisdiction under the guise of an unconscionability defense.").

was to make arbitration agreements as enforceable as other contracts, but not more so."[373] The 1924 House Report noted that under the FAA, "[a]n arbitration agreement is placed upon the same footing as other contracts, where it belongs."[374] Even as the Supreme Court expanded the FAA beyond the vision of Congress, the Justices repeatedly acknowledged that Congress intended the FAA "to place arbitration agreements upon the same footing as other contracts."[375] To restore equal footing, the Supreme Court would have to recognize its incorrect assertion of a national policy favoring arbitration is not only false, it is inconsistent with the Court's own admission that the FAA merely put arbitration agreements on the same footing as other contracts.[376] The Court often asserts both that the FAA puts arbitration clauses on *equal* footing and that the FAA *favors* arbitration. For example, the *Concepcion* Court asserted both that the FAA requires courts to "place arbitration agreements on an equal footing with other contracts"[377] and that the Act "embod[ies] [a] national policy favoring arbitration."[378] Yet the Court seems blind to the inherent contradiction between these assertions, let alone to the fact that only the former finds support in the legislative history of the FAA.

The arbitration bootstrap creates problems of unequal footing, in that unconscionable terms are treated differently depending on whether or not they reside in a contract with an arbitration clause. The *Concepcion* Court ignored that the *Discover Bank* rule applied to all class action waivers and did not treat arbitration clauses unequally.[379] California was not alone. For example, the courts of New Mexico invalidated unconscionable class action waivers, regardless of whether the underlying contract contains an arbitration clause.[380] It would be incongruous for these courts to be blocked from

373. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967).

374. H.R. REP. NO. 68-96, at 1 (1924).

375. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 275 (1995) ("[A] broad interpretation of this language is consistent with the Act's basic purpose, to put arbitration provisions on 'the same footing' as a contract's other terms.").

376. Moses, *supra* note 346, at 539.

377. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011).

378. *Id.* at 1749 (second alteration in original) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)); *see also Gilmer*, 500 U.S. at 24, 26 (claiming both that the FAA "place[d] arbitration agreements upon the same footing as other contracts" and created "a healthy regard for the federal policy favoring arbitration").

379. *Concepcion*, 131 S. Ct. at 1757 (Breyer, J., dissenting) ("The *Discover Bank* rule is consistent with the federal Act's language. It 'applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements.'"); *id.* at 1756 ("California law sets forth certain circumstances in which 'class action waivers' in *any* contract are unenforceable."); Tracey & McGill, *supra* note 87, at 459–60.

380. Fiser v. Dell Comput. Corp., 188 P.3d 1215, 1218–19 (N.M. 2008).

enforcing their rules so long as the waiver is buried in an arbitration clause.[381] Although class action waivers remain unenforceable in many states in a nonarbitration context,[382] firms can easily employ arbitration clauses to circumvent these state laws. Thus, "opting for arbitration, corporations can always opt out of class actions, despite a generally applicable state-law doctrine that would limit such opt outs."[383] This asymmetry is the antithesis of the equal footing that the FAA requires.[384]

B. Sever

Instead of facilitating the arbitration bootstrap, courts can sever unconscionable terms and enforce the remainder of the arbitration clause. When a contract or arbitration provision has a severability clause, it is relatively straightforward for the courts to "strike the offending unconscionable provisions to preserve the contract's essential term of arbitration."[385] Judges, however, have the power to sever unconscionable terms even if the contract does not contain a severability clause.[386] Both before and after *Concepcion*, some courts have embraced severability as a solution to unconscionable terms in arbitration clauses. For example, courts have severed from arbitration clauses provisions that unconscionably shift fees,[387] limit remedies,[388] select an unsuitable forum,[389] or shorten statutes of

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381. *See* THI of N.M. at Hobbs Ctr., LLC v. Patton, 741 F.3d 1162, 1164 (10th Cir. 2014) (holding that the FAA preempts New Mexico state law concerning the enforceability of compulsory arbitration provisions).

382. *See, e.g.*, Figueroa v. THI of N.M. at Casa Arena Blanca LLC, 306 P.3d 480, 485 (N.M. Ct. App. 2012) (discussing New Mexico public policy concerning the unenforceability of class action waivers).

383. Wilson, *supra* note 91, at 123 ("After *Concepcion*, class waivers may be invalidated as unconscionable if they are in an agreement that does not have an arbitration clause, but they may not be invalidated under the same doctrine if they are in an agreement that *does* have an arbitration clause.").

384. *Id.* ("This result is not consistent with the purpose of the FAA that is reflected in the text and legislative history: eliminating judicial hostility by ensuring that arbitration agreements are enforced on *equal* footing with other contracts."); *see also* Ware, *supra* note 125, at 1026 ("If a contract clause waiving punitive damages in court is unconscionable, then an arbitration clause prohibiting arbitral punitive damages awards is unconscionable.").

385. Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 768 (Wash. 2004); *see also* Long v. BDP Int'l, Inc., 919 F. Supp. 2d 832, 846 (S.D. Tex. 2013) ("This severability provision demonstrates the parties' intent to sever unconscionable provisions.").

386. CAL. CIV. CODE § 1670.5 (West 2011); Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 219 (3d Cir. 2003); 2 RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

387. *In re* Checking Account Overdraft Litig., 485 F. App'x 403, 406 (11th Cir. 2012).

388. *See* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 675 (6th Cir. 2003) (holding that unconscionable fee-splitting and remedies provisions could be severed).

389. *See* Willis v. Nationwide Debt Settlement Grp., 878 F. Supp. 2d 1208, 1221 (D. Or. 2012) (stating that the court "may sever the forum-selection provision from the arbitration clause and require arbitration in Oregon while enforcing the remainder of the clause").

limitations.[390] The original drafters of the FAA believed that arbitration clauses would be severable if found unenforceable.[391]

The *Concepcion* Court ruled against severing the class action waiver at issue in that case. This decision was in error. The class action waiver was unconscionable under applicable state law, which the FAA text explicitly states should govern. The *Concepcion* majority asserted that striking the class action waiver would fundamentally undermine the arbitration process, making it less efficient and less likely to be utilized. This is incorrect because the parties can engage in classwide arbitration. As Justice Breyer explained in his dissent, "a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims. Thus, if speedy resolution of disputes were all that mattered, then the *Discover Bank* rule would reinforce, not obstruct, that objective of the Act."[392]

Even given the *Concepcion* precedent, the other anti-consumer terms embedded in arbitration clauses are sufficiently distinguishable from class action waivers that courts can sever them without running afoul of *Concepcion*. The *Concepcion* Court opined that state law cannot declare contracts—including arbitration agreements—unconscionable for not providing for "judicially monitored discovery" or use of the Federal Rules of Evidence.[393] Even when state laws are facially neutral, the Court suggested that such laws would be preempted by the FAA because these laws "would have a disproportionate impact on arbitration agreements."[394]

These "disproportionate impact" arguments do not apply to the other anti-consumer terms that firms embed in arbitration clauses. Congress enacted the FAA based on representations that arbitration—for inter-merchant disputes—can be more efficient than traditional litigation.[395] None of the anti-consumer terms discussed in subpart I(C) enhance the efficiency of the arbitration process. First, truncating statutes of limitations does not make the process of arbitration efficient; it simply makes it happen sooner—and often not at all, as victims of misconduct are less likely to file their claims in time. Second, limiting remedies—whether it be a cap on damages or prohibition on equitable relief—does not make dispute resolution more efficient; it simply diminishes the likelihood that successful plaintiffs will

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390. *See Long*, 919 F. Supp. 2d at 846 (concluding that a one-year limitation period as applied to Fair Labor Standards Act claims is unconscionable and that severance is appropriate).

391. Cohen, *supra* note 264, at 156 ("[I]n the legal sense the arbitration provision is severable, in that, though unenforceable itself, it does not avoid the rest of the contract . . . ."); *see also* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 70–71 (2010) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006))).

392. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1759–60 (2011) (Breyer, J., dissenting).

393. *Id.* at 1747 (majority opinion).

394. *Id.*

395. *See supra* subpart III(A).

receive relief similar to what they could get in court. Third, provisions to override statutory fee-shifting provisions do not aid in fact-finding or arbiter decision making; they merely reduce the plaintiffs' incentive to pursue arbitration, even when plaintiffs have suffered a legal wrong. Fourth, forum-selection clauses can increase inefficiencies when the designated forum is thousands of miles away from the parties and necessary witnesses. Finally, non-coordination clauses not only fail to enhance the efficiency of arbitration; they are a major source of inefficiency. Such clauses significantly increase the cost of arbitration, to the point where individual arbitration is prohibitively expensive because the costs exceed the maximum award available at arbitration. Non-coordination clauses, like other terms that are unconscionable (in at least some jurisdictions), are neither designed nor intended to increase the efficiency of arbitration. Rather, each of these anti-consumer terms is designed to reduce the probability of arbitration actually happening because rational plaintiffs realize that the expected benefits of pursuing their claims are dwarfed by the likely costs. Because attorneys perform a similar cost–benefit analysis, these clauses also reduce the likelihood that consumers and employees can find qualified attorneys willing to take their cases to arbitration. Each of these terms is severable because none go to "the conduct of arbitration itself,"[396] which refers to how arbiters manage discovery, take evidence, and run the adjudication. The appropriate way to implement the congressional mandate of equal footing for arbitration clauses would require courts not to give more deference to anti-consumer terms if they reside in an arbitration clause.

Furthermore, the Supreme Court's "disproportionate impact" rationale creates a risk of improperly striking down consumer-protective laws that have a disproportionate effect on anti-consumer arbitration clauses. For example, the Ninth Circuit upheld the enforceability of an arbitration provision that violated Montana's rule against "adhesive agreements running contrary to the reasonable expectations of a party."[397] The court claimed to "take *Concepcion* to mean what its plain language says: Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA."[398] When courts treat neutral rules that reduce the perceived incentive to arbitrate as necessarily disfavoring arbitration—and, thus, forbidden by the FAA—this creates incentives for firms to structure their arbitration clauses in a manner that makes consumer-protective rulings appear to disfavor arbitration. Firms have tried to artificially tie arbitration clauses to their terms by including "[a] so-called blow-up clause [that] provides that if the class action waiver 'is

396. Clay v. N.M. Title Loans, Inc., 288 P.3d 888, 901 (N.M. Ct. App. 2012).

397. Mortensen v. Bresnan Commc'ns, LLC, 722 F.3d 1151, 1153–54 (9th Cir. 2013).

398. *Id.* at 1159.

found to be unenforceable, then the entirety of [the] arbitration provision shall be null and void.'"[399] The fact that a judicial decision holding that a class action waiver is unconscionable would, pursuant to the contract, move any dispute from arbitration to litigation does not make the state law—or the precipitating judicial opinion—anti-arbitration. Firms cannot hold their own arbitration clauses hostage and then assert that failure to enforce any other—unconscionable—terms in the clause would nullify the arbitration clause and thus courts must enforce the unconscionable terms. Courts should not reward such attempts to circumvent state law. Unfortunately, as it currently stands firms may be able to use poison pills to make unconscionable terms enforceable if courts are loath to enforce neutral state laws that have the incidental effect of nullifying a particular arbitration clause.

Severing unconscionable terms is not anti-arbitration. Some courts seem to treat invalidation of individual anti-consumer terms as an impediment to arbitration altogether. But the process of arbitration and the terms within the arbitration clause are separate. Provisions that shorten statutes of limitations, limit damages, or preclude injunctive relief are not inherently part of the agreement to arbitrate rather than bring claims in court; they are tangential. Firms bury them in the arbitration clause because these terms are unenforceable otherwise. There is a difference between hostility to arbitration and hostility to anti-consumer terms when they are contained within an arbitration clause. It is not anti-arbitration to enforce a general rule that invalidates particular contract terms regardless of whether they appear in an arbitration clause or not.

C. Strike

While severing an individual contract term is relatively straightforward, severing becomes more complicated when an arbitration clause has several unconscionable terms. Some arbitration clauses have unconscionable provisions woven throughout them.[400] In these cases, courts conclude that "severance is inappropriate when the entire clause represents an 'integrated scheme to contravene public policy.'"[401] Courts reason that striking an arbitration clause down in its entirety is appropriate when "one-sided arbitration provisions" are "central to the overall arbitration scheme and, therefore, the unconscionable provisions could not be severed from the arbitration provisions so as to save the parties' general agreement to

399. Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1207 (11th Cir. 2011); *see also* CFPB ARBITRATION STUDY, *supra* note 16, § 1.4.1, at 10, § 2.5.5, at 46 (stating that most arbitration clauses with class prohibitions also contain an "anti-severability" provision).

400. *See, e.g.*, Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1248–49 (9th Cir. 1994) (explaining that a highly integrated arbitration clause contained three different illegal provisions).

401. *Id.* at 1249 (quoting 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.8, at 70 (1990)).

arbitrate."[402] Other courts worry that trying "to ameliorate the unconscionable aspects of [an] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter."[403] For these reasons, the California Supreme Court held in *Armendariz*[404] that—instead of severing individual unconscionable terms—trial courts could strike down an arbitration clause entirely when it is "'permeated' by unconscionability."[405] Under the *Armendariz* rule, California "courts will not sever when the 'good cannot be separated from the bad.'"[406]

Some courts have questioned whether the *Armendariz* rule—and other states' versions of it—survives *Concepcion*.[407] In *Zaborowski*,[408] for instance, the Ninth Circuit applied the *Armendariz* principles to strike down an arbitration agreement that had five unconscionable clauses because severing would require the district judge to "assume the role of contract author rather than interpreter."[409] The dissent, however, argued that *Armendariz* was reversed by *Concepcion* because "[t]he reasoning in *Armendariz* that multiple unconscionable provisions will render an arbitration agreement's purpose unlawful has 'a disproportionate impact on arbitration agreements' and should have been preempted by the Federal Arbitration Act."[410]

Common law rules that permit courts to strike unconscionable arbitration clauses—when severability is not practical—are not preempted by the FAA. Congress explicitly wanted judges to apply the same contract

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402. Ruppelt v. Laurel Healthcare Providers, LLC, 293 P.3d 902, 909 (N.M. Ct. App. 2012).

403. Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1180 (9th Cir. 2003); *see also* Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 84–85 (D.C. Cir. 2005) ("If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." (citation omitted)); Cordova v. World Fin. Corp. of N.M., 208 P.3d 901, 911 (N.M. 2009) ("[W]e must strike down the arbitration clause in its entirety to avoid a type of judicial surgery that inevitably would remove provisions that were central to the original mechanisms for resolving disputes between the parties.").

404. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000).

405. *Id.* at 695.

406. Abramson v. Juniper Networks, Inc., 9 Cal. Rptr. 3d 422, 438 (Cal. Ct. App. 2004); *see also* Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 271 (3d Cir. 2003) ("The cumulative effect of so much illegality prevents us from enforcing the arbitration agreement.").

407. James v. Conceptus, Inc., 851 F. Supp. 2d 1020, 1032–33 (S.D. Tex. 2012) ("The general *Armendariz* rule is in serious doubt following *Concepcion*."); Ruhe v. Masimo Corp., No. SACV 11–00734, 2011 WL 4442790, at *2 (C.D. Cal. Sept. 16, 2011) ("Although the Northern District of California has indicated that some portion of *Armendariz* has been abrogated by *Concepcion*, it did not clarify what portion of *Armendariz* was abrogated.").

408. Zaborowski v. MHN Gov't Servs., Inc., 601 F. App'x 461 (9th Cir. 2014).

409. *Id.* at 464 (quoting Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1180 (9th Cir. 2003)).

410. *Id.* (Gould, J., dissenting) (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011)).

doctrines to arbitration clauses that they applied to other contracts.[411] Courts have interpreted Supreme Court precedent to hold that "[s]pecial state rules for interpreting arbitration agreements cannot coexist with the FAA because Congress intended the act as its response to a 'longstanding judicial hostility to arbitration agreements.'"[412] Striking down an arbitration clause that is overburdened with nonseverable unconscionable terms is not a "special rule" for arbitration clauses; it is an application of basic contract law principles that permit judges to refuse to enforce contracts—or contract clauses—that contain unconscionable terms.[413]

Finally, it is good public policy to strike arbitration clauses in their entirety when they contain multiple unconscionable terms. If the unconscionable terms cannot be effectively severed, courts can either strike the arbitration clause or enforce it as written, unconscionable terms and all. If courts are prohibited from striking arbitration clauses entirely, then firms have a greater incentive to weave multiple unconscionable terms throughout the arbitration provisions in order to make severing too difficult. If a firm so burdens its arbitration clause with unconscionable terms that the unenforceable terms cannot be severed in a fashion that leaves behind a functioning arbitration provision, the firm should not be rewarded.[414] Ironically, if a court does not have the power to strike a clause permeated with unconscionable terms, then the more individually unenforceable terms that the firm puts in its arbitration clause, the more likely the unconscionable terms will be enforced. Allowing unconscionable arbitration clauses to be struck provides better incentives to firms to not intentionally insert unconscionable terms throughout their arbitration agreements.[415]

Conclusion

When courts enforce anti-plaintiff terms in arbitration clauses, they claim to be honoring the will of the 1925 Congress that enacted the FAA. Such assertions are wrong for several related reasons. First, the 1925 Congress did not intend the FAA to reach statutory rights. Second, Congress did not intend the FAA to apply to consumer contracts. Third, Congress did not intend arbitration clauses in contracts of adhesion to be enforceable.

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411. 9 U.S.C. § 2 (2012) (arbitration agreements enforceable except "upon such grounds as exist at law or in equity for the revocation of any contract").

412. Venture Cotton Coop. v. Freeman, 435 S.W.3d 222, 227 (Tex. 2014) (quoting Green Tree Fin. Corp.–Ala. v. Randolph, 531 U.S. 79, 89 (2000)).

413. 2 RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

414. *See* Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1249 (9th Cir. 1994) ("Our decision to strike the entire clause rests in part upon the fact that the offensive provisions clearly represent an attempt by ARCO to achieve through arbitration what Congress has expressly forbidden.").

415. *See* Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 84–85 (D.C. Cir. 2005) ("[T]he more the employer overreaches, the less likely a court will be able to sever the provisions and enforce the clause . . . .").

Fourth, Congress did not intend arbitration clauses to serve as vehicles for non-negotiable terms that systematically undermine the rights and remedies of plaintiffs, including plaintiffs' ability to meaningfully enforce their rights. We now have a legal regime completely at odds with the modest goal that Congress did intend: to make agreements between merchants to arbitrate in order to resolve commercial disputes enforceable. Instead we have a legal system where courts are complicit in allowing firms to effectively prevent consumers and workers from protecting their rights.

If a contract term would not be enforceable if it were outside of an arbitration clause, it should not become enforceable because it is inserted into an arbitration clause. Unenforceable terms should remain unenforceable regardless of where they appear in a contract. Courts must cut the arbitration bootstrap. If a state contract rule applies to all contracts, that rule should apply equally to the contents of arbitration clauses. If courts stopped treating arbitration clauses as a legitimate vehicle for anti-consumer terms, businesses would probably stop doing so as well.

In order to implement the will of Congress, courts should either sever the unconscionable terms in an arbitration clause—or strike the arbitration clause altogether—so long as this is what the court would do when confronted with the same unconscionable terms in a contract without an arbitration clause.

Book Reviews

Implementing *Just Mercy*

JUST MERCY: A STORY OF JUSTICE AND REDEMPTION.
By Bryan Stevenson. New York: Random House, LLC, 2014.
336 pages. $28.00.

William W. Berry III*

Introduction

> I wanted you to see what real courage is, instead of getting the idea that courage is a man with a gun in his hand. It's when you know you're licked before you begin but you begin anyway and you see it through no matter what. You rarely win, but sometimes you do.[1]
>
> —Harper Lee, *To Kill a Mockingbird*

In his recent book, *Just Mercy: A Story of Justice and Redemption*, Alabama Equal Justice Initiative founder Bryan Stevenson describes the challenges and struggles of representing indigent individuals accused of serious crimes.[2] More than a memoir, Stevenson's book provides a vivid picture of the systemic injustice that often persists in the administration of criminal justice, particularly in the South.

The title of the book—*Just Mercy*—demonstrates the criminal justice paradigm shift that Stevenson attempts to undertake through his narrative. In many modern understandings of criminal law and criminal punishments, the concepts of justice and mercy appear oppositional, as two pillars of a zero-sum game. Under such an approach, the conservative view often favors a punishment that achieves "justice," while the liberal view often favors a punishment that offers "mercy," such that to require justice denies mercy and to give mercy undermines justice.[3]

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1. HARPER LEE, TO KILL A MOCKINGBIRD 128 (HarperCollins 1999) (1960).

2. *See generally* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (paperback ed. 2015).

3. Much of the academic literature describing just-deserts retribution makes exactly this point. *See, e.g.*, Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1421–28 (2004) (describing this

Stevenson's title and the thematic approach of his book take the opposite tack, marrying the two concepts of justice and mercy.[4] For Stevenson, to achieve justice means to exhibit mercy—to treat the individual accused of a crime as a person possessing human dignity. Likewise, to offer mercy—meaning to appreciate the circumstances surrounding the actions of the criminal defendant, including his personal story—is the best way to achieve justice. Put differently, Stevenson's theoretical frame advocates using mercy as a means by which to achieve justice rather than a means to avoid it.

Interestingly, this philosophical approach tracks the Court's reasoning in *Miller v. Alabama*,[5] the recent juvenile life-without-parole case that Stevenson argued before the Supreme Court and that encompasses part of his narrative. In *Miller*, the Court held that mandatory juvenile life-without-parole (LWOP) sentences were cruel and unusual punishments in violation of the Eighth Amendment because they denied the court an opportunity to consider the individual characteristics of the defendant.[6] Extending the holding from *Woodson v. North Carolina*,[7] which barred the imposition of mandatory death sentences,[8] the Court made clear in *Miller*[9] that the possibility of mitigating evidence, including evidence related to the offender's culpability and the harm caused by the crime, foreclosed mandatory juvenile LWOP sentences.[10]

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literature and arguing that equality, not conflict with justice, is the better retributive argument against mercy).

4. Stevenson is certainly not the first to marry these concepts. *See, e.g.*, *Micah* 6:8 (King James) ("He hath shewed thee, O man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?").

5. 132 S. Ct. 2455 (2012).

6. *Id.* at 2460.

7. 428 U.S. 280 (1976).

8. *Id.* at 305; William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 81–83, 96–97 (2011) (exploring the relationship of the *Woodson* doctrine to the concept of proportionality); *see also* Roberts v. Louisiana, 428 U.S. 325, 335–36 (1976) (holding another mandatory death penalty statute unconstitutional).

9. This issue remains timely, as the Supreme Court will decide next term whether *Miller* applies retroactively. *See* Louisiana v. Montgomery, 141 So. 3d 264 (La. 2014), *cert granted*, 135 S. Ct. 1546 (2015).

10. *Woodson*, 428 U.S. at 304. In the aftermath of *Miller*, then, the concept of individualized consideration of offenders opens the door, in theory, to constitutional attacks on mandatory sentencing in other contexts. *See* William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327, 329 (2014) (explaining that mandatory sentences deny offenders their day in court by prohibiting individual considerations and foreclosing the introduction of mitigating evidence). Such challenges have unfortunately not succeeded to date. *See, e.g.*, United States v. Coverson, 539 F. App'x 747 (9th Cir. 2013) (rejecting the argument that a mandatory life sentence violates the Eighth Amendment because it denies individual sentencing); United States v. Ousley, 698 F.3d 972, 975–76 (7th Cir. 2012) (holding that the Eighth Amendment does not preclude mandatory life sentences for dealers of crack cocaine); United States v. Cephus, 684 F.3d 703, 709–10 (7th Cir. 2012) (holding that the Eighth Amendment does not preclude mandatory life sentences for sex traffickers).

Another area in which increased individualized consideration of the character and actions of criminal offenders is now possible is in the sentencing of federal offenders under the now-advisory sentencing guidelines after *United States v. Booker*.[11] Despite the many provisions of the guidelines that disfavor considering such personal characteristics, the Supreme Court has held that courts must consider such circumstances to the degree that they inform the applicable purposes of punishment enumerated by the federal sentencing statute, 18 U.S.C. § 3553.[12]

Given these steps toward individualizing sentencing, this Review imagines a serious application of the principles of just mercy that Stevenson has championed in his legal career to the criminal justice system. Specifically, this Review argues that individualized consideration of criminal offenders throughout the criminal justice process—from policing to sentencing—is necessary to achieve the compatible (not competing) goals of justice and mercy.

The Review proceeds in three parts. Part I describes Stevenson's book, highlighting the principles of just mercy latent in his narrative and their connection to the individualized consideration of criminal offenders. In Part II, the Review shifts to argue that many of the current shortcomings of the criminal justice system result directly from stigmatizing alleged offenders rather than considering them individually as people possessing human dignity.[13] Finally, in Part III the Review outlines a series of criminal justice reforms drawn from Stevenson's experiences and the concepts of individualized consideration that emerge from pursuing just mercy.

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11. 543 U.S. 220, 245 (2005).

12. *See, e.g.*, Gall v. United States, 552 U.S. 38, 49–50 (2007) (holding that a sentence may be set below the benchmark sentence under the guidelines in exceptional circumstances); Rita v. United States, 551 U.S. 338, 364–65 (2007) (Stevens, J., concurring) ("Matters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civic, charitable, or public service are not ordinarily considered under the Guidelines. These are, however, matters that § 3553(a) authorizes the sentencing judge to consider. As such, they are factors that an appellate court must consider under *Booker*'s abuse-of-discretion standard." (citations omitted)); William W. Berry III, *Mitigation in Federal Sentencing in the United States*, *in* MITIGATION AND AGGRAVATION AT SENTENCING 247, 254–57 (Julian V. Roberts ed., 2011) (explaining that § 3553 may require the court to examine whether the advisory guideline sentence sufficiently reflects the applicable purposes of punishment).

13. Indeed, Justices Anthony Kennedy and Stephen Breyer recently testified before Congress about mass incarceration, complaining that the criminal justice system is "broken." Editorial, *Justice Kennedy's Plea to Congress*, N.Y. TIMES (Apr. 4, 2015), http://www.nytimes.com/2015/04/05/opinion/sunday/justice-kennedys-plea-to-congress.html [http://perma.cc/9FBH-G3T8].

I. Stories of Just Mercy—Fighting Criminal Injustice

> People generally see what they look for, and hear what they listen for . . . .[14]
>
> —Harper Lee, *To Kill a Mockingbird*

Stevenson's compelling narrative begins with the story of his first visit to death row while working as a legal intern for the Southern Prisoners Defense Committee.[15] Stevenson's job was simply to tell the client Henry that the state of Georgia would not execute him for at least a year.[16] The description of this interaction has the effect of humanizing Henry—portraying him not as a monster awaiting the wrath of society, but as a compassionate, generous man suffering nobly. Stevenson sounds one of the central themes of his book as he reflects upon this interaction:

> My short time on death row revealed that there was something missing in the way we treat people in our judicial system, that maybe we judge some people unfairly. The more I reflected on the experience, the more I recognized that I had been struggling my whole life with the question of how and why people are judged unfairly.[17]

From the beginning, Stevenson asks his audience to grapple with the same question—how and why the criminal justice system fails to administer true justice.

But he does not leave the response to chance, indicating at the outset that it has to do with the absence of mercy. Early in the book, he explains:

> This book is about . . . how easily we condemn people in this country and the injustice we create when we allow fear, anger, and distance to shape the way we treat the most vulnerable among us.[18]

And he makes clear that this approach to criminal justice has reached epic proportions, extending far beyond the series of anecdotes he subsequently offers in his book. Before one reads his stories, Stevenson wants to be sure his readers understand *the story*—the broader context of mass incarceration, the widespread use of capital punishment, the epidemic of child life-without-parole sentences, the large number of innocent individuals in prison, and the exorbitant economic costs of this system.

At the heart of this system, Stevenson makes clear, is the rejection of mercy in the name of justice. As he explains:

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14. LEE, *supra* note 1, at 199.
15. STEVENSON, *supra* note 2, at 5–7.
16. *Id.* at 7.
17. *Id.* at 13.
18. *Id.* at 14.

> We've institutionalized policies that reduce people to their worst acts and permanently label them "criminal," "murderer," "rapist," "thief," "drug dealer," "sex offender," "felon"—identities they cannot change regardless of the circumstances of their crimes or any improvements they might make in their lives.[19]

It is this dehumanizing approach to criminal offenders that Stevenson finds to be at the root of the injustice he encounters representing criminal defendants.[20] Indeed, he highlights the "vital lesson" about mercy that his work has taught him: "*Each of us is more than the worst thing we've ever done.*"[21]

Having painted this overview of just mercy, Stevenson then masterfully tells a series of stories that animate the core values he has articulated. Rather than tell them sequentially, Stevenson weaves together several narratives that play off of each other, uncovering in brutal detail the consequences of a system that attempts to achieve justice while ignoring the dignity of the individual offenders it condemns.

A. The Tragic Story of Walter McMillan

Perhaps the most moving story in Stevenson's book is the description of his representation of Walter McMillan, a man falsely accused of murder and sentenced to death in Alabama. The narrative demonstrates the many ways in which the collective actions of actors in the criminal justice system conspired to ruin McMillan's life.

One of Stevenson's early tastes of this climate of injustice (in the name of justice) occurs when he interacts with state trial judge Robert E. Lee Key.[22] Judge Key suggests that McMillan might be a member of the "Dixie Mafia" and attempts to dissuade Stevenson from representing McMillan before abruptly ending the phone call.[23]

Stevenson explains how McMillan, a middle-aged African-American man, was falsely accused and convicted of murdering an eighteen-year-old white girl, Ronda Morrison, in Monroeville, Alabama.[24] McMillan's real mistake, as inferred from Stevenson's narrative, was his affair with a married white woman, Karen Kelly, in the months preceding the murder.[25]

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19. *Id.* at 15.
20. *Id.* at 14–15.
21. *Id.* at 17–18.
22. *Id.* at 20–21.
23. *Id.*
24. *Id.* at 30, 66. Ironically, Monroeville is the home of Harper Lee, who wrote the famous novel *To Kill a Mockingbird* about a brave, white lawyer, Atticus Finch, who defends a black man in a racist community. *Id.* at 23. As Stevenson points out, however, Finch lost the case, and the town did not progress from its caricature in Lee's novel. *Id.* at 23–24. Indeed, Stevenson suggests McMillan is a modern version of the "Mockingbird"—the defendant on trial. *See id.*
25. *Id.* at 33–34.

The Alabama Bureau of Investigation (ABI) chose to believe the lies of Ralph Myers, a white man suspected in an earlier, different murder who had begun dating Ms. Kelly.[26] Myers stated that McMillan had accompanied him in the first murder and that McMillan had subsequently murdered Morrison.[27]

The ABI ignored the overwhelming evidence that the two men had never met, including Myers's inability to identify McMillan.[28] Perhaps recognizing the ridiculous and unbelievable nature of Myers's story of the murder, Sherriff Thomas Tate and the ABI arrested McMillan and charged him with sodomy, as he potentially could have sexually assaulted Myers (another lie).[29]

As McMillan's story continues, his progression through the criminal justice system is a series of encounters with bad government actors—police, district attorneys, and judges—who perpetuate a racially discriminatory legal system. It is an infuriating and tragic story, and yet the systemic nature of the problems in the case clearly extends far beyond McMillan's case. Stevenson eventually is able to win McMillan's release after many years, but by then the damage has already been done.[30]

At the heart of the thorough and consistent imposition of injustice (in the name of justice) is the failure of any of the actors to view McMillan as a human being with dignity. Instead, the prevailing view of him as a dangerous criminal monster blinds, perhaps willfully, virtually every representative of the state of Alabama that participated in his case. The deep, baseless assumptions made by police, prosecutors, and judges in the name of justice make a mockery of the concept itself.

B. The Death Penalty

Though the story of Walter McMillan provides the central narrative of Stevenson's book, he cleverly weaves a number of other stories of injustice through his account. In particular, these stories focus on the harsh realities of capital punishment and juvenile life without parole.

The story of Herbert Richardson and his execution raises important questions about the conception of justice adopted with respect to the death penalty. A Vietnam veteran, Richardson's psychological damage from war resulted in him making the reckless decision to detonate a small explosive outside the front porch of his would-be girlfriend.[31] His plan was to save

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26. *Id.* at 31–34.
27. *Id.* at 33.
28. *Id.*
29. *Id.* at 47.
30. *Id.* at 244.
31. *Id.* at 76.

her from the explosion to win her affection.[32] Sadly, the woman's ten-year-old niece found the contraption and shook it, causing a premature explosion that killed her instantly.[33]

Despite possessing no intent to kill, Herbert received a death sentence after a trial at which his incompetent lawyer, later disbarred, neglected to offer mitigating evidence.[34] Appellate courts refused to consider Herbert's ineffective assistance of counsel claims raised by Stevenson, his new lawyer.[35]

Stevenson's moving description of Herbert's final appeals and ensuing execution provide a realistic picture of the reality of capital punishment and raise obvious questions as to its utility and propriety. As Stevenson explained,

> There was a shamefulness about the experience of Herbert's execution that I couldn't shake. Everyone I saw at the prison seemed surrounded by a cloud of regret and remorse. The prison officials had pumped themselves up to carry out the execution . . . but even they revealed extreme discomfort and some measure of shame. Maybe I was imagining it but it seemed that everyone recognized what was taking place was wrong. Abstractions about capital punishment were one thing, but the details of systematically killing someone who is not a threat are completely different.[36]

By clearly showing what the death penalty really looks like in practice, Stevenson casts serious doubt on whether, in many cases, it constitutes any kind of justice.

C. Juvenile Life Without Parole

Beyond the death penalty, Stevenson also offers several stories of juvenile offenders sentenced to LWOP, including some who received mandatory LWOP sentences. He tells the unsettling story of Trina Garnett, a fourteen-year-old girl sentenced to life without parole in Pennsylvania.[37] Trina accidentally started a fire that killed two young boys.[38] The judge who imposed the mandatory LWOP sentence on Trina called the case the "saddest case" that he had "ever seen."[39] A prison guard subsequently

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32. *Id.*
33. *Id.*
34. *Id.* at 77.
35. *Id.* at 79–80.
36. *Id.* at 90.
37. *Id.* at 149–51.
38. *Id.* at 149.
39. *Id.* at 150.

raped and impregnated Trina, and the state took her newborn away and sent it into foster care.[40]

Stevenson describes another case of juvenile LWOP—the case of thirteen-year-old Ian Manuel—that is similarly depressing.[41] Ian participated in an armed robbery with two older boys and shot a woman in the cheek, almost killing her.[42] The judge sentenced Ian to life without parole and sent him to solitary confinement—where he stayed for the next eighteen years.[43]

The last part of Stevenson's book focuses on his role as the lead lawyer in *Miller v. Alabama*, which he argued before the United States Supreme Court.[44] The Court's holding that mandatory juvenile LWOP constituted a cruel and unusual punishment arguably affected over two thousand offenders.[45]

At the center of the problem in these cases was the failure to consider mitigating evidence because of the mandatory nature of the sentence. The legislature's version of justice—mandatory juvenile LWOP sentences—precluded any consideration of mercy—the personal characteristics of these offenders, including their immaturity and youth.

D. Brutality in the Name of Justice

Although not involving the death penalty or LWOP, two additional stories that Stevenson shares are particularly disturbing and reflect how deep the problems in the criminal justice system extend. The first story involves Stevenson himself as the victim. Listening to a radio program in his car on the way home from work, Stevenson parked his car outside of his Atlanta apartment and continued to listen to the program.[46] The police pulled up behind Stevenson, ordered him out the car, and pointed a gun at his head.[47] They illegally searched his car while interrogating him, ignoring his explanation that he lived in the apartment building next to his parked car.[48] Perhaps even more disturbing, many of the neighbors came out and

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40. *Id.* at 150–51.

41. *Id.* at 151–52.

42. *Id.*

43. *Id.* at 152–53.

44. *Id.* at 295–96.

45. *Id.* at 296 (noting that, as a result of the Court's holding in *Miller*, over two thousand individuals sentenced to life without the possibility of parole could potentially obtain reduced sentences); *see also* Louisiana v. Montgomery, 141 So. 3d 264 (La. 2014) (presenting the question of whether *Miller* creates a new substantive right and requires retroactive effect), *cert. granted*, 135 S. Ct. 1546 (2015).

46. STEVENSON, *supra* note 2, at 38–39.

47. *Id.* at 39–42.

48. *Id.*

began discussing whether he had robbed them or intended to rob them.[49] The attitude of the Atlanta police, both at the scene and in response to Stevenson's formal complaints, mirrors that described in the Department of Justice's recent report about police practices in Ferguson, Missouri.[50]

Perhaps even more disturbing, Stevenson recounts the story of Charlie, a juvenile held for several days in a local jail.[51] During his short time in the jail, others sexually assaulted and raped him multiple times.[52] Again, the criminal justice system, in the name of justice, created opportunities for injustice to occur.

There are certainly other stories that Stevenson briefly mentions or alludes to in the book that echo the same pattern of unjust denial of mercy. It certainly would not be surprising to learn that Stevenson has many more similar stories that did not end up in his book.

II. Principles of Just Mercy—What Needs Change

> You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.[53]
>
> —Harper Lee, *To Kill a Mockingbird*

In light of Stevenson's many examples of injustice, the obvious question is how state and federal governments ought to reform their criminal justice systems to attempt to eradicate such tragedies and prevent future ones from occurring. While policy reform is certainly essential, a theme of Stevenson's stories is that the injustices are a product of a set of deeper cultural norms.

This Part describes those proliferating norms and then argues that they stem from the stigmatization and dehumanization of alleged criminal offenders. In other words, the current system has, for the most part, embraced justice while ignoring mercy.

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49. *Id.* at 41.

50. *Compare* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 16–17 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [http://perma.cc/69U9-JHXU], *with* STEVENSON, *supra* note 2, at 42–44.

51. STEVENSON, *supra* note 2, at 115–26.

52. *Id.* at 123–24.

53. LEE, *supra* note 1, at 33.

A. The Rise of Mass Incarceration

These norms reflect a culture that fears crime and criminals. Race plays a significant role in these cultural norms, with minorities perceived as more dangerous individuals.[54] This cultural response to crime reflects a departure from the 1960s, when rehabilitation of criminal offenders through "correctional" institutions marked the dominant response to crime.[55] The replacement of this penal welfarism with a "tough on crime" penal populism has led to a prison crisis not seen before. An entire generation of politicians, Democrat and Republican alike, has continued to ratchet up the penalties for crime in the United States.[56]

It is no secret that the United States suffers from a crisis of mass imprisonment. As noted above, one in a hundred American citizens reside in prison.[57] Studies estimate that one in fifteen people born in 2001 will spend time in prison.[58] And one in three African-American men will spend time in prison.[59]

At the heart of this crisis are excessive sentences, in many cases for nonviolent crimes.[60] Federal and state statutes that impose mandatory sentences contribute to this problem,[61] as do recidivist premiums in sentences for repeat offenders.[62] Likewise, sentencing guidelines have promoted excessive sentences for decades.[63]

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54. Perhaps the best account of the tragedy of the widespread racial discrimination that infects the criminal justice system is Michelle Alexander's book, *The New Jim Crow*, which argues that the criminal justice system constitutes a modern recreation of the Jim Crow system of racial segregation. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2011).

55. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 27–28 (paperback ed. 2002) (asserting that there was a "consensus" in the 1960s accepting a correctionalist framework).

56. *See id.* at 172–74.

57. *See* ANNE-MARIE CUSAC, CRUEL AND UNUSUAL: THE CULTURE OF PUNISHMENT IN AMERICA 1–2 (2009) ("One percent of [the United States'] population is now in prison.").

58. STEVENSON, *supra* note 2, at 15; *see also* Oliver Roeder, *The Imprisoner's Dilemma*, FIVETHIRTYEIGHT (Feb. 12, 2015, 12:01 AM), http://fivethirtyeight.com/features/the-imprisoners-dilemma/ [http://perma.cc/4DZA-2HZE].

59. ALEXANDER, *supra* note 54, at 9; Roeder, *supra* note 58.

60. CONNIE DE LA VEGA ET AL., UNIV. OF S.F. SCH. OF LAW, CTR. FOR LAW & GLOB. JUSTICE, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 22–23 (2012), http://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf [http://perma.cc/D6UD-88MQ] (noting the widespread use of life-without-parole sentences in nonhomicide or nonviolent offenses).

61. *See, e.g.*, Michael Tonry, *The Mostly Unintended Consequences of Mandatory Penalties: Two Centuries of Consistent Findings*, *in* 38 CRIME AND JUSTICE 65, 105–06 (Michael Tonry ed., 2009) (suggesting that mandatory sentencing rules have resulted in increasing the number of prisoners being held after they no longer are dangerous).

62. Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 323 (2009).

63. *See* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1328 (2005) (claiming that the guidelines resulted

These policies have been part and parcel of the penal-populism movement, including the war on drugs, over the past three decades.[64] Politicians of both parties have run on tough-on-crime platforms, playing on the electorate's fear of crime.[65] The policies that result from such campaigns are both reactionary and incoherent, resulting in widespread overpunishment for crime.[66] This is particularly true with punishments for nonviolent drug offenders.[67] Without a doubt, the scope of mass imprisonment in the United States, both in terms of number of offenders and length of sentences, far exceeds anything any country has ever done in the history of the world.[68]

B. Attacking Mercy in the Name of Justice

To understand why the culture has embraced penal populism and aggressive punishment of criminal offenders, one must first understand the dominant cultural conception of justice. The idea that prevails is one of in-group/out-group psychology.[69] Essentially, there are two groups in society—those that abide by the law and those that transgress it.[70]

Under this approach, individuals in the first group deserve a benefit of the doubt and receive a presumption of innocence.[71] They are, for all practical purposes, the "good" people.[72] Individuals in the second group

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in an increase in the severity and length of punishments). Indeed, prior to the Court's decisions in *Blakeley v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), many of these guideline ranges were mandatory. William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After* Booker *and its Progeny*, 40 CONN. L. REV. 631, 647–50 (2008).

64. ALEXANDER, *supra* note 54, at 53–57.

65. GARLAND, *supra* note 55, at 13–14, 131–32, 172.

66. *Id.* at 132.

67. *Id.*

68. *See* ALEXANDER, *supra* note 54, at 4 (describing mass incarceration in the United States as a "stunningly comprehensive" regime of social dominance); CUSAC, *supra* note 57, at 1 (stating that the United States has the highest imprisonment rate of any country and the most expansive prison system in the world, housing almost 25% of the world's prisoners while accounting for only 5% of the world's population); DE LA VEGA ET AL., *supra* note 60, at 7–9 (noting that the United States often employs a number of harsh sentencing practices—such as life without parole, "three strikes" laws, and consecutive sentencing—in ways that the rest of the world does not, and concluding, "[n]ever before have so many people been locked up for so long and for so little as in the United States").

69. Molly Townes O'Brien, *Criminal Law's Tribalism*, 11 CONN. PUB. INT. L.J. 31, 42–43 (2011).

70. *See id.* (characterizing criminal law as group self-defining, separating those who keep the group's rules from those who do not).

71. *See* Robert J. Boeckmann & Tom R. Tyler, *Commonsense Justice and Inclusion Within the Moral Community: When Do People Receive Procedural Protections from Others?*, 3 PSYCHOL. PUB. POL'Y & L. 362, 367 (1997) (showing that a community is much more likely to give members of its in-group procedural protections than it is to do the same for members of its out-group).

72. O'Brien, *supra* note 69, at 45.

receive immediate condemnation.[73] Their choice to commit a crime changes their identity in society.[74] For all practical purposes, they become the "bad," or the "evil," and cease to merit any human dignity or individualized consideration.[75]

Once the state arrests or indicts an individual, that individual almost always automatically shifts from the "good" law-abiding category to the "bad" law-breaking category.[76] The stigmatization that ensues is real and in many cases permanent.[77] Disturbingly, this dehumanizing societal condemnation often persists even in cases where a court finds the defendant innocent.[78] As Stevenson demonstrates, this was certainly the case for Walter McMillan.

This cultural approach permeates the criminal justice system precisely because it occurs on the level of individual identity. Once one transgresses, that becomes his societal identity, often with no hope of redemption.[79]

John Braithwaite, who has argued for adoption of a restorative-justice approach to criminal behavior, explains that the stigmatization of criminal offenders, which he terms "disintegrative shaming," has the practical effect of increasing the crime rate.[80] Again, this occurs because once society condemns an individual to the "bad" group, it becomes his identity.

Excessive prison sentences reinforce this identity, with prisons becoming crime universities. The high recidivism rate that ensues is

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73. *See* Boeckmann & Tyler, *supra* note 71, at 367 (demonstrating that a community is more willing to deny procedural protections to and presume guilt for out-group members); O'Brien, *supra* note 69, at 43 ("Violations of those boundaries result in symbolic or actual exclusion from the tribe—whether by expulsion, incarceration, ostracism or execution." (internal quotation marks omitted)).

74. O'Brien, *supra* note 69, at 43.

75. *Id.*

76. *See* Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1297–99 (2000) (explaining that since we tend to agree that "most people who are arrested and charged with crimes are guilty of something," merely being arrested and accused of a crime has negative consequences and changes our status within society).

77. Regina Austin, *"The Shame of it All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 174–76 (2004).

78. *See* Leipold, *supra* note 76, at 1299 ("An innocent suspect may have the charges dismissed or may be acquitted, but the sequella of an indictment may leave the defendant's reputation, personal relationships, and ability to earn a living so badly damaged that he may never be able to return to the life he knew before being accused.").

79. Victor Hugo's Jean Valjean, a literary example of this phenomenon, has to change his identity in order to have a chance at redemption. *See generally* VICTOR HUGO, LES MISÉRABLES (Julie Rose trans., Random House 2008) (1862). By contrast, Nathaniel Hawthorne's protagonist, Hester Prynne, cannot change her identity and must suffer the indignity of wearing the scarlet letter that marks her as an adulterer. *See generally* NATHANIEL HAWTHORNE, THE SCARLET LETTER (Chandler Publ'g Co. 1968) (1850).

80. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 101–02 (1989).

likewise unsurprising and serves to feed the dominant in-group/out-group narrative.

To make things worse, certain types of individuals—often racial minorities and the poor—receive the out-group criminal stigmatization before they ever commit a crime.[81] By ascribing such individuals with a criminal identity essentially from birth, communities marginalize such individuals.[82] State and local governments go even further in some cases, criminalizing the innocuous behavior of such individuals through loitering and vagrancy laws.[83] Prosecutors and police also can target such individuals.[84] The presumptive "criminogenic" identity society has already ascribed to these individuals on the bottom end of the community simply reinforces the instinct to arrest and imprison them.[85] Targeting societal pariahs, minority citizens, and the poor becomes a self-fulfilling prophecy, making the premature perception of criminality come true.[86]

Whether labeled as a member of the out-group from indictment or from birth, this really matters, because once clothed with a criminal identity, the offender faces a strong negative bias from a variety of actors in the criminal justice system.[87] In other words, the presumptive criminal identity of an alleged offender colors the perception of those policing, prosecuting, judging, sentencing, and imprisoning that individual. And the condemnation imposed strikes at the humanity and dignity of the accused.

Blindness results from this stigmatization of indicted or accused individuals.[88] The mark of justice ought to be blindness toward bias, not blindness toward truth. As actors in the criminal justice system buy more deeply into this narrative, as is certainly likely with its constant reinforcement in personal experiences, the blindness can become almost

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81. ALEXANDER, *supra* note 54, at 162.

82. *See id.* at 171–72 (explaining how the "stigma of criminality" applied to black youth shames them, alienates them, and produces antisocial behavior).

83. *See, e.g.*, Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 775–76 (1999) (describing a high-profile Chicago loitering ordinance passed in 1992).

84. *See, e.g.*, Julie K. Brown, *In Miami Gardens, Store Video Catches Cops in the Act*, MIAMI HERALD (Nov. 21, 2013), http://www.miamiherald.com/news/local/community/miami-dade/article1957716.html [http://perma.cc/Q2VX-HBWL] (observing that police in Miami Gardens regularly stop and frisk poor black men).

85. *See* Roberts, *supra* note 83, at 817 ("[T]he ordinance permits police to remove and arrest perfectly law-abiding citizens because their race makes them appear lawless.").

86. Conversely, Michelle Alexander also points out that the in-group (white, wealthier) often retains the benefit of the doubt and lessened suspicion despite committing crimes at similar rates, especially drug crimes. *See* ALEXANDER, *supra* note 54, at 130–31.

87. *Id.* at 162–65.

88. Indeed, it is perhaps ironic that mistakes in eyewitness testimony—stemming from an inability to see clearly—play such a significant role in the convictions of innocent individuals. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 48 (2011) ("The role of mistaken eyewitness identifications in these wrongful convictions is now well known. Eyewitnesses misidentified 76% of the exonerees (190 of 250 cases).").

willful, with certain criminal justice actors being unable to see the truth of the situation before them.[89]

Indeed, Stevenson's book dramatizes many of the ways in which this pursuit of justice is often blind to the actual facts and circumstances related to the criminal defendant. Judge Robert E. Lee Key decided that McMillan was not worth representing—that he did not deserve the best available counsel.[90] The ABI chose to focus on McMillan's race and his "indiscretions" (an interracial relationship), willfully ignoring the complete absence of evidence linking McMillan to the murder.[91] The prosecutor exhibited a stubborn refusal to consider the possibility of McMillan's innocence.[92] The Court allowed McMillan to receive a death sentence in a case in which he was clearly innocent.[93] The predominately white jury bought the self-serving lies of witnesses at trial, failing to think critically about the evidence.[94] The appellate courts also presumed McMillan's guilt instead of looking critically at the evidence in the case.[95]

Beyond the McMillan travesty, many of Stevenson's other stories about the criminal justice system reflect the move toward "justice" without humanity. The use of the death penalty certainly has the appearance of justice, but in Herbert's case it seemed to ignore his humanity. Even the individuals participating in the execution realized this incongruity.[96]

Likewise, the juvenile LWOP cases, particularly the mandatory sentences, demonstrate a complete lack of individualized consideration of the criminal offenders, again in the name of justice. The United States remains the only country in the world that allows imposition of juvenile LWOP sentences.[97] The power of the criminal stigma often (and improperly) outweighs any consideration of the age of the offender.

The cruel policing behavior in Atlanta toward Stevenson, a Harvard-educated lawyer treated as a criminal because of the color of his skin, underscores the stigmatization problem even further. The lack of concern about the safety of Charlie, a child who suffered through two days of sexual abuse, similarly demonstrates the dehumanizing consequence of the criminal label awarded by society.

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89. ALEXANDER, *supra* note 54, at 4 (discussing the role of racial bias in the criminal justice system in creating a well-disguised system of racialized social control).

90. *See supra* notes 21–22 and accompanying text.

91. STEVENSON, *supra* note 2, at 25, 29.

92. *Id.* at 58–59.

93. *Id.* at 33, 66.

94. *Id.* at 65–66.

95. *Id.* at 109–12.

96. *Id.* at 90.

97. Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 985 (2008).

III. Achieving Just Mercy—Practical Steps for Reform

> The one thing that doesn't abide by majority rule is a person's conscience.[98]
>
> —Harper Lee, *To Kill a Mockingbird*

What society needs, then, is a cultural shift away from the in-group/out-group paradigm to an approach that accords the accused a significant amount of human dignity. And yet, without a dominant alternative, such reform, at least in a meaningful way, remains unlikely.

Interestingly, Stevenson's book suggests a model—just mercy—that could replace the current destructive and dehumanizing approach. As explained above, this means that mercy becomes a complimentary value to justice, as opposed to an oppositional one. Stevenson explains:

> The power of just mercy is that it belongs to the undeserving. It's when mercy is least expected that it's most potent—strong enough to break the cycle of victimization and victimhood, retribution and suffering. It has the power to heal the psychic harm and injuries that lead to aggression and violence, abuse of power, mass incarceration.[99]

The central point is that by requiring criminal justice actors to pursue mercy as a part of the pursuit of justice, such individuals will be more likely to see, and in some situations embrace, the personhood of the accused.[100] This does not mean that those committing crimes will cease to serve punishments; rather, it will allow the imposition of a punishment that more accurately reflects what the accused deserves in light of the actual facts.[101]

Thus, to achieve justice, actors in the criminal justice system must afford accused individuals (and criminal offenders) some modicum of mercy.[102] This conception of mercy is not an arbitrary sentence reduction in the name of sympathy.[103] Rather, the concept of mercy adopted here takes into account the personal circumstances of the offender, particularly as related to the commission of a crime.[104] In practice, this kind of individualized concern could give rise to lesser sentences, but not in all

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98. LEE, *supra* note 1, at 120.

99. STEVENSON, *supra* note 2, at 294.

100. *Id.* at 290.

101. *Id.* at 291.

102. *Id.* at 18 (explaining that the closer our society gets to "mass incarceration and extreme levels of punishment," the more it is "necessary to recognize that we all need mercy").

103. Indeed, retributive theorists would object to a sentence reduction based on any factors other than culpability and harm. *E.g.*, Markel, *supra* note 3, at 1466–67 (arguing that "factors about someone's background" should not mitigate their sentence).

104. STEVENSON, *supra* note 2, at 17–18.

cases. The sentence reduction in this context does not undermine the proportionality inquiry—it sharpens it.[105]

But it is important to be specific about what mercy means—the kind of individualized consideration it requires.[106] While not limited to the Eighth Amendment, the dignity of man rests at the core of this notion of mercy which one needs to achieve justice.[107] Indeed, denial of mercy often reflects the failures of the character of a government actor or a systemic structural defect that denies personal consideration of the defendant, furthers the instinct toward brutality and dehumanization, or both.

Mercy means policing without racial or socioeconomic bias.[108] Mercy means that prosecutors carefully consider the evidence before charging a crime.[109] Mercy means that prosecutors seek a punishment that foresees the offender rejoining society one day.[110] Mercy means that district attorneys reward prosecutors not for the number of prison sentences or for their length, but for the exercise of wisdom in determining the appropriate punishment for the offender.[111]

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105. I have argued that Eighth Amendment concepts of proportional sentences do not have to rest solely upon retributive purposes of punishment; utilitarian purposes also have a limit with respect to proportionality. William W. Berry III, *Separating Retribution from Proportionality: A Response to Stinneford*, 97 VA. L. REV. IN BRIEF 61, 70 (2011) (responding to John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011)).

106. Interestingly, the Court has explained that the failure to consider individual circumstances in the death penalty and juvenile LWOP contexts violates the Eighth Amendment. *See* Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (holding juvenile LWOP sentences unconstitutional); Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (holding unconstitutional a North Carolina statute for "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death"); Lockett v. Ohio, 438 U.S. 586, 608 (1978) ("The limited range of [individualized] mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments."). According to the Court, the failure to offer this kind of mercy constitutes a cruel and unusual punishment because it ignores the dignity of the offender.

107. Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."); *see* Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Meaning of the Eighth Amendment*, 2015 U. ILL. L. REV. (forthcoming).

108. *See* STEVENSON, *supra* note 2, at 18 (maintaining that the "true measure of our commitment to justice" is "how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned").

109. *See id.* at 17 (noting society's comfort with bias and "tolerance of unfair prosecutions and convictions").

110. *See id.* at 15 (arguing that America needs to move away from "institutionalized policies that reduce people to their worst acts").

111. *See id.* at 290 (noting that "simply punishing the broken . . . only ensures that they remain broken").

Mercy means eliminating mandatory sentences.[112] Mercy means eliminating sentencing premiums for recidivists.[113] Mercy means carefully judging a case from the bench, without preconceived biases or political agendas.[114] Mercy means avoiding blatant, reversible error in criminal trials.[115] Mercy means ensuring that criminal defendants receive competent representation.[116] Mercy means selecting an unbiased, racially mixed jury.[117] Mercy means rethinking the prison model and incorporating concepts of rehabilitation back into incarceration schemes.[118] And mercy means eliminating the death penalty and juvenile life without parole.[119]

In light of the proposed cultural shift to just mercy, a number of obvious possible reforms surface. This Review concludes by sketching out some potential changes.

A. Legal Education Reform

Education lies at the core of any successful reform movement, and the shift toward just mercy is no different. The current model of legal education discourages the development of attorneys to represent indigent criminal defendants. Despite the best efforts of innocence clinics and criminal law faculty to equip students to engage in this kind of practice, the economic realities remain a major impediment in this context.

The average student debt load is, in many cases, adequate to dissuade law students from pursuing this career path.[120] While some schools offer debt-relief programs for students that choose to represent the indigent or

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112. *See id.* at 148–50 (illustrating how mandatory minimum sentencing meant that a court, during sentencing, could not consider evidence of a defendant's age, mental illness, poverty, prior abuse, or absence of intent, or other mitigating circumstances).

113. *See id.* at 258–59 (describing how a thirteen-year-old boy was labeled a "'serial' . . . 'violent recidivist'" and sentenced to life imprisonment without the possibility of parole).

114. *See id.* at 70 (noting that Alabama's partisan judicial elections encourage judges "to be the toughest on crime").

115. *See id.* at 16 (describing America's criminal justice system, in which scores of innocent people have been exonerated after receiving death sentences, as being "defined by error").

116. *See id.* at 7 (recalling a time in the Deep South where "most of the people crowded on death row had no lawyers and no right to counsel" and the "growing fear that people would soon be killed without ever having their cases reviewed by skilled counsel").

117. *See id.* at 60 (noting that the historic use of peremptory strikes to strike all or almost all African-Americans led to "nearly everyone on death row" having been tried by an "all-white or nearly all-white jury").

118. *See id.* at 17 (observing that "deep in the hearts of many condemned and incarcerated people" there are the "scattered traces of hope and humanity—seeds of restoration that come to astonishing life when nurtured by very simple interventions").

119. *See id.* at 15–16 (describing modes of execution and noting that America is the only country in the world that condemns children to life in prison without the possibility of parole).

120. *See* Christopher Gorman, Note, *Undoing Hardship: Applying the Principles of Dodd-Frank to the Law Student Debt Crisis*, 47 U.C. DAVIS L. REV. 1887, 1899 (2014) (highlighting that in 2011 the average law graduate carried more than $92,000 debt).

work as public defenders, these programs are not widespread enough to ensure a sufficient number of law students choose criminal defense work.[121]

The ironic nature of the current situation is that there are an insufficient number of jobs for law school graduates, while there remains an insufficient number of lawyers to represent defendants who cannot afford to pay a lawyer.[122] Solving this economic conundrum, of which law school tuition debt plays an important part, would be an important first step in promoting just mercy for criminal defendants.

B. State Bar Reform

The state bar likewise can play a role in helping to provide support for individuals willing to represent indigent defendants. Likewise, the bar, through interest on lawyers trust accounts or other similar mechanisms, can continue to help subsidize the cost of representing indigents.

Perhaps more important though, in terms of just mercy, is the ability of the bar to respond to the denial of mercy in the criminal justice system by bad actors, whether prosecutors or judges. Rather than simply focus on issues such as the commingling of funds, state bar disciplinary branches can more stringently regulate the kind of willful blindness and overt racism exhibited in many of the cases described by Stevenson.

Passivity has often been the hallmark of such organizations, particularly with reference to conduct by prosecutors and judges. Rather than simply deferring to such actors, the state bars can create standards to promote a more coherent and humane approach to prosecuting criminal defendants.

Recent anecdotal and empirical evidence both suggest that some prosecutors are responsible for many of the problems that plague the criminal justice system. Alex Kozinski, a conservative judge on the Ninth Circuit Court of Appeals, and two other judges have condemned the

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121. *See* Kaela Raedel Munster, *A Double-Edged Sword: Student Loan Debt Provides Access to a Law Degree but May Ultimately Deny a Bar License*, 40 J.C. & U.L. 285, 303–04 (2014) (noting that, as of 2012, only approximately 100 law schools offer loan repayment assistance programs and that "these programs are only a starting point to aiding graduates to pursue careers in public service").

122. *See* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 22 (2009) (finding that there is one legal aid attorney per 6,415 poor people and one private attorney for every 429 people in the general population); Jules Lobel & Matthew Chapman, *Bridging the Gap Between Unmet Legal Needs and an Oversupply of Lawyers: Creating Neighborhood Law Offices—The Philadelphia Experiment*, 22 VA. J. SOC. POL'Y & L. 71, 81–82 (2015) ("[I]t is clear that an already overburdened legal job market will not have room for the 100,000 newly minted attorneys that are produced over the next decade.").

epidemic of prosecutorial misconduct in California.[123] Even worse, "they are going to keep doing it because they have state judges who are willing to look the other way," Kozinski said.[124]

Professor John Pfaff's research likewise suggests that prosecutors have played an important role in the mass incarceration epidemic that Stevenson denounces.[125] Prior to the early 1990s, according to Pfaff, prosecutors filed felony charges against one in three arrestees.[126] Since the advent of penal populism, prosecutors have begun filing felony charges against two in three arrestees, effectively doubling the prison population.[127]

For prosecutors, the problem remains the same—there is no mechanism for transparency, much less accountability. Most prosecutors are not political appointees that have to worry about reelection, meaning that some increased level of transparency may not be difficult to establish.[128] In the end, finding ways to hold prosecutors and judges accountable, particularly for acting in bad faith, is essential to advancing the cause of just mercy.

C. State and Federal Statutory Reform

State and federal criminal statutes similarly contribute to the absence of mercy in the criminal justice system. In the legislative context, this happens in several ways related to criminal sentencing.

First, mandatory sentences, particularly mandatory minimums, remove individual consideration from the sentencing determination. As such, the prosecutor becomes the only actor with the power to consider the character and circumstances of the accused. Eliminating all mandatory sentences,

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123. Maura Dolan, *U.S. Judges See 'Epidemic' of Prosecutorial Misconduct in State*, L.A. TIMES (Jan. 31, 2015, 7:20 PM), http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html#page=1 [http://perma.cc/743A-Q4YB].

124. *Id.*

125. Leon Neyfakh, *Why Are So Many Americans in Prison: A Provocative New Theory*, SLATE (Feb. 6, 2015, 6:30 PM), http://www.slate.com/articles/news_and_politics/crime/2015/02/mass_incarceration_a_provocative_new_theory_for_why_so_many_americans_are.html [http://perma.cc/743A-Q4YB].

126. *Id.*

127. *Id.*

128. *See, e.g.*, Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 983, 1000–01 (2009) ("While federal prosecutors are appointed, most chief prosecutors are elected at the county, judicial circuit, or district level. . . . In Alaska, Delaware, and Rhode Island, the attorney general has primary responsibility for prosecutions throughout the state. In Connecticut, the attorney general appoints state's attorneys, while in New Jersey, the governor appoints county prosecutors. The statewide hierarchies enabled Alaska's attorney general to ban plea bargaining for a time and New Jersey's attorney general to regulate charging decisions. As Dan Richman suggests, these unusual structures can create direct control and political accountability, promoting consistent enforcement of statewide laws. The Department of Justice plays the same role in regulating federal prosecutors across the country." (citations omitted)).

particularly ones involving long sentence terms, would make a significant difference in the attempt to cultivate just mercy.

Further, many such sentences impose a recidivist premium—an aggravated sentence resulting from the presence of the prior conviction.[129] These increases presume that the individual has not really paid the penalty for the initial crime and ignore the personal characteristics of the offender.

Another problem is the careless and overbroad drafting of criminal statutes. This is particularly true of many federal criminal statutes that seem to encompass wide ranges of unrelated types of behavior.[130] The theory behind such statutes is to provide flexibility to allow prosecutors to address unforeseen malfeasance that should fall under the statute but that the legislature did not specifically contemplate.[131]

The unintended consequences of such statutes, though, outweigh their prosecutorial convenience. They reward prosecutors with wide charging power, as broad language can give rise to a number of situations and cast a wider criminal net. But the uncertainty of the statutory meaning can raise due process problems based on the vagueness of such language in violation of the rule of legality. Such unfettered discretion coupled with the lack of linguistic clarity can give rise to situations in which the pursuit of justice denies the accused any modicum of mercy.

D. Reallocation of Resources

Finally, the just mercy paradigm shift would likely require a reallocation of resources. Currently, state and federal governments spend an exorbitant amount of money on prisons.[132] Many states similarly spend

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129. Youngjae Lee, *Repeat Offenders and the Question of Desert*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 49, 49–50 (Julian V. Roberts & Andrew von Hirsch eds., 2014).

130. *See* Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 1, 4–6 (1997) (discussing the vagueness of criminal statutes and the "void-for-vagueness" challenges and statutory construction issues that these statutes create).

131. *See* Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 646 n.20 (2002) (stating that one of the policy justifications for prosecutorial discretion is that it gives prosecutors flexibility to take into account individual circumstances when enforcing criminal codes that deal with general categories of conduct).

132. *See* TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, STATE CORRECTIONS EXPENDITURES, FY 1982–2010, at 1 (2014), http://www.bjs.gov/content/pub/pdf/scefy8210.pdf [http://perma.cc/APP7-YT6E] (tracking the increase in states' corrections expenditures since 1982); NANCY LA VIGNE & JULIE SAMUELS, URBAN INST., THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 2 (2012), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412693-The-Growth-amp-Increasing-Cost-of-the-Federal-Prison-System-Drivers-and-Potential-Solutions.PDF [http://perma.cc/HX9E-HA98] (noting that President Obama's 2013 fiscal year budget requested $6.9 billion for the Federal Bureau of Prisons); Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, 25 FED. SENT'G REP. 68, 71 (2012) (calculating the taxpayer costs of state prisons in 2010 for forty states).

significant funds to defend death penalty appeals and to administer the death penalty.[133]

As shown, though, these expenditures fall far short of achieving justice. Making better initial decisions could have a significant impact on reducing the population of offenders in prison and on death row. To do this, however, requires financial resources, as looking at the entire character of the offender to make an individualized sentencing determination becomes a far more involved process than simply applying a mandatory sentence.

The shift in resources should be from carceral institutions to judicial and mental-health ones. Instead of locking up the poor, minorities, and mentally ill people and throwing away the key, the just mercy approach seeks to make a better initial sentencing decision, considering the individual characteristics of the accused. Given the severe overpunishment and mass incarceration, more careful sentencing decisions will likely result in shorter sentences, creating savings from prison budgets for reallocation.

A related area for reallocating funds would be for the education of prisoners and societal reentry programs. As Walter McMillan's case demonstrates, reintegration into society after spending time in prison can be quite difficult. Focusing more energy on rehabilitation and reentry would reduce the overall prison population by decreasing the high recidivism rate. Perhaps even more important, such an approach would make mercy a more relevant part of justice.

Conclusion

Bryan Stevenson's book, *Just Mercy*, provides an important narrative contribution in revealing the extent to which racism and injustice continue to define the American criminal justice system. As discussed, he makes the important rhetorical move of shifting the concept of mercy from one oppositional to justice into one compatible with justice.

This Review has argued that reimagining mercy in the form of individualized consideration with an emphasis on human dignity is necessary to remedy the injustices that Stevenson describes, many of which continue to persist. Specifically, the Review has demonstrated how mercy, when conceived through Stevenson's lens, provides an important means by which to achieve justice, and without which injustice is likely to flourish.

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133. *Costs of the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/costs-death-penalty#financialfacts [http://perma.cc/72FX-29F8].

It is only by according those accused of crime a level of dignity and humanity that state and federal governments can achieve more reasonable, accurate, and positive criminal justice outcomes for society. In the epilogue of his book, Stevenson explains why such reforms are so important:

> Walter made me understand why we have to reform a system of criminal justice that continues to treat people better if they are rich and guilty than if they are poor and innocent. A system that denies the poor the legal help they need, that makes wealth and status more important than culpability, must be changed. Walter's case taught me that fear and anger are a threat to justice; they can infect a community, a state, or a nation and make us blind, irrational, and dangerous.[134]

One can only hope that Stevenson's powerful narrative can serve as a catalyst for criminal justice reform.

134. STEVENSON, *supra* note 2, at 313.

Invisible Women: Mass Incarceration's Forgotten Casualties

ON THE RUN: FUGUTIVE LIFE IN AN AMERICAN CITY. By Alice Goffman. Chicago, Illinois: The University of Chicago Press, 2014. 288 pages. $25.00.

THE ETERNAL CRIMINAL RECORD. By James B. Jacobs. Cambridge, Massachusetts: Harvard University Press, 2015. 416 pages. $39.95.

Michele Goodwin*

> I know why the caged bird beats his wing
> Till its blood is red on the cruel bars;
> For he must fly back to his perch and cling
> When he fain would be on the bough a-swing;
> And a pain still throbs in the old, old scars
> And they pulse again with a keener sting —
> I know why he beats his wing![1]
>
> —Paul Laurence Dunbar (1899)

In 2013, Eric Holder, the former United States Attorney General, issued an urgent call for drug-law reform.[2] Indeed, drug reform, decreasing mass incarceration, and reducing overcrowded conditions in jails and prisons can no longer be ignored, even by ardent tough-on-crime proponents, without acknowledging the economic and human costs of such policies.[3] As Holder

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1. PAUL LAURENCE DUNBAR, THE COLLECTED POETRY OF PAUL LAURENCE DUNBAR 102 (Joanne M. Braxton ed., Univ. Press of Va. 1993) (1913).

2. Eric Holder, Att'y Gen., U.S. Dep't of Justice, Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013) [hereinafter Holder, Remarks at ABA Meeting], http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations [http://perma.cc/2VX5-DPH3].

3. *See* Douglas A. Blackmon, *An Interview with Eric Holder on Mass Incarceration*, WASH. MONTHLY: TEN MILES SQUARE (Feb. 11, 2014, 12:01 PM), http://www.washingtonmonthly.com/ten-miles-square/2014/02/an_interview_with_eric_holder049026.php [http://perma.cc/3XE6-762S] (reporting that even conservatives and libertarians have become concerned with addressing mass incarceration due to the staggering cost it presents).

explained to an audience of lawyers, judges, and academics at the 2013 American Bar Association (ABA) Annual Meeting, American jails are overcrowded and unsustainable,[4] packed with nonviolent drug offenders who frequently serve disparate sentences based on a strange admixture of race, class, and privilege.[5] With more than 1.5 million people incarcerated in the United States, which accounts for 25% of all prisoners in the world, the failure of the U.S. drug war and sentencing policies is apparent, particularly as the United States "has only 5% of the world's population."[6]

One year later, at the national meeting of the National Association for the Advancement of Colored People (NAACP), President Barack Obama made similar claims about the urgency of penal reform.[7] He too decried the conditions of prisons and jails in the United States (following up his speech by visiting a prison).[8] President Obama acknowledged the disparate impacts of policing and jailing.[9] He urged that it was time to act. Like Mr. Holder, President Obama made a plea for men of color locked behind bars.[10] They forgot about women.

The President and his former Attorney General rooted their concern about the broader terms of criminal justice through a male-focused lens. This could have much to do with the fact that the United States incarcerates so many men. To further explicate the human and economic costs, the United States experiences the highest rate of incarceration of any country in the world—more than England (153 in 100,000), France (96 in 100,000), Germany (85 in 100,000), Italy (111 in 100,000), and Spain (159 in 100,000) combined, because the United States incarcerates about 743 per 100,000.[11]

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4. Holder, Remarks at ABA Meeting, *supra* note 2.

5. *See, e.g.*, Charles J. Ogletree Jr., Opinion, *Condemned to Die Because He's Black*, N.Y. TIMES (July 31, 2013), http://www.nytimes.com/2013/08/01/opinion/condemned-to-die-because-hes-black.html?smid=pl-share [http://perma.cc/KKV6-NYQC] (noting that race, specifically being Black, as a predictive status for "future" violence has been unconstitutionally introduced in Texas trials).

6. Dan Roberts & Karen McVeigh, *Eric Holder Unveils New Reforms Aimed at Curbing US Prison Population*, GUARDIAN (Aug. 12, 2013), http://www.theguardian.com/world/2013/aug/12/eric-holder-smart-crime-reform-us-prisons [http://perma.cc/MQ3U-GRJA].

7. President Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015), https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference [https://perma.cc/L6A7-DVES].

8. *Id.*

9. *Id.*

10. *Id.*

11. ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3, 5 (9th ed. 2011). A recent Pew Center on the States Report adds another layer to this data. It reports that 1 in 31 Americans is under the supervision of the U.S. criminal justice system (through incarceration, probation, or parole). *See* JENIFER WARREN, PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 5 (2009).

More than half of U.S. incarcerations relate to drug offenses.[12] In 2010, the U.S. federal government planned to expend $15 billion in its War on Drugs, at a rate of $30,000 per minute and $1,800,000 per hour.[13] By 2012, the White House revised its drug budget structure, increasing its National Drug Control Budget to $26.2 billion—a significant increase from two years prior.[14] Expenditures to fight the drug war dramatically increase each year; the most recent federal data reports that President Obama requested an additional $415.3 million over the 2012 enacted level of spending, expanding federal efforts by establishing "two new bureaus to the National Drug Control Budget."[15]

However, as with any war, collateral damages accumulate, expanding the risks of battle and the suffering of those intimately involved and at the periphery. In this context, the price of war extends to "lost productivity, healthcare, and criminal justice costs,"[16] burdening the federal government to the tune of $193 billion in 2007 alone.[17] The drug war exacts a toll on state and local governments as well, costing them an estimated $25 billion in 2010.[18] What accounts for such significant spending in light of illicit drug use remaining constant and prescription drug abuse on the rise? As Holder reflected to a reporter in 2014, Congress "put in place some pretty draconian sentencing measures . . . [w]here people who were not engaged in the violent distribution of drugs ended up with ten, twenty, thirty [years]—lifetime sentences."[19] Ironically, many of those serving stiff prison and jail sentences are nonviolent offenders.

Importantly, the drug war drafts police, prosecutors, and judges to carry out its mission and metaphorically casts some of America's most vulnerable

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12. *See* E. ANN CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013, at 16 (2014) (reporting that "more than half of priosners serving sentences of more than a year in federal facilities were convicted of drug offenses").

13. EXEC. OFFICE OF THE PRESIDENT OF THE U.S., NATIONAL DRUG CONTROL STRATEGY: FY 2010 BUDGET SUMMARY 1 (2009) ("In Fiscal Year 2010, the President requests $15.1 billion in support of these key [drug] policy areas, which is an increase of $224.3 million or 1.5 percent over the FY 2009 enacted level of $14.8 billion."). In reality, President Barack Obama allocated $25.9 billion in the fiscal year 2010 for fighting the Drug War. EXEC. OFFICE OF THE PRESIDENT OF THE U.S., FY 2012 BUDGET AND PERFORMANCE SUMMARY: COMPANION TO THE NATIONAL DRUG CONTROL STRATEGY 5 (2011) [hereinafter FY 2012 BUDGET AND PERFORMANCE SUMMARY].

14. FY 2012 BUDGET AND PERFORMANCE SUMMARY, *supra* note 13, at 5.

15. EXEC. OFFICE OF THE PRESIDENT OF THE U.S., FY 2013 BUDGET AND PERFORMANCE SUMMARY: COMPANION TO THE NATIONAL DRUG CONTROL STRATEGY 1 (2012).

16. *A Drug Policy for the 21st Century*, WHITE HOUSE, https://www.whitehouse.gov/ondcp/drugpolicyreform [http://perma.cc/HW89-U35V].

17. *Id.*

18. *See* JEFFREY A. MIRON & KATHERINE WALDCOCK, CATO INST., THE BUDGETARY IMPACT OF ENDING DRUG PROHIBITION 1 (2010) (suggesting that legalization of drugs would result in $25.1 billion in savings for state and local governments).

19. Blackmon, *supra* note 3 (second alteration in original).

as enemy combatants to be tracked, policed, and—if caught—jailed. Recent reports of U.S. military equipment populating the artillery in America's police departments further underscore the salience of the war metaphor.[20] According to the New York Times, "[a]s the nation's wars abroad wind down, many of the military's surplus tools of combat have ended up in the hands of state and local law enforcement," including armored vehicles, aircrafts, machine guns, and even mine-resistant, ambush-protected armored vehicles.[21] The militarization of U.S. police captured the nation's attention in the wake of law enforcement responses to community outrage to the police killings of unarmed African-American men in Ferguson, Missouri, in 2014 and Baltimore, Maryland, in 2015.

This metaphor of poor African-American communities at war and under siege comes to vivid life in Alice Goffman's *On The Run: Fugitive Life In An American City*,[22] an ethnography documenting her time embedded in field research in a low-income, predominantly African-American Philadelphia neighborhood between 2002 and 2007. Professor Goffman dramatically illustrates harrowing daily experiences of young men (and herself) habitually "on the run" from law enforcement.[23] Despite the fact that these young men are hunted for a range of offenses from failure to pay tickets and fines to more disturbing crimes, such as armed robberies and attempted murder, illicit drug use and trafficking account for the majority of Goffman's research subjects' arrests and convictions. In elucidating a compelling story about mass incarceration, she exposes the fears and anxieties of African-American men constantly caught in the powerful gaze and grip of law enforcement. She details incessant policing of African-American males on streets, in their cars, in their homes, and even in hospitals.[24]

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20. *See* Matt Apuzzo, *War Gear Flows To Police Departments*, N.Y. TIMES (June 8, 2014), http://www.nytimes.com/2014/06/09/us/war-gear-flows-to-police-departments.html?_r=0 [http://perma.cc/4PC8-2CKE] (describing thirty-ton combat vehicles "showing up across the country, in police departments big and small").

21. *Id.*

22. ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY (2014).

23. Professor Steven Lubet critiques Alice Goffman's methods in a pointed article published in the *New Republic*. In the article, he asks whether she breached research ethics and established protocols by—among other things—driving a getaway car when a young man wanted to avenge the death of a dear friend. Steven Lubet, *Did This Acclaimed Sociologist Drive the Getaway Car in a Murder Plot?: The Questionable Ethics of Alice Goffman's "On The Run,"* NEW REPUBLIC (May 27, 2015), http://www.newrepublic.com/article/121909/did-sociologist-alice-goffman-drive-getaway-car-murder-plot [http://perma.cc/YYT2-SYDA] (explaining that Goffman's book leaves him "with vexing questions about the author's accuracy and reliability"). *But see* Alice Goffman, *A Reply To Professor Lubet's Critique* (June 6, 2015), http://www.ssc.wisc.edu/soc/faculty/docs/goffman/A%20Reply%20to%20Professor%20Lubet.pdf [http://perma.cc/VJ2U-YHFU] (asserting that the type of research she performs involves participating to some extent in the lives of those whom she observes).

24. One point of critique by several pundits is the veracity of Goffman's claims about police patrolling maternity wards and hospital corridors to locate young men with warrants for their arrests.

For example, despite claims of postracialism in the United States, the nation's war on drugs exposes how significantly race matters: 1 in 106 white males (eighteen or older) is incarcerated in the United States, compared to 1 in 36 Latino males and 1 in 15 Black males.[25] Such stark figures may explain why the war on drugs and mass incarceration are almost exclusively framed as attacks on African-American men; women are invisible—or, in Goffman's research—they are reduced to "snitches."[26] Goffman's account of policing and mass incarceration fails to notice, account for, or discuss the dramatic rise in the incarceration rate of African-American women, particularly during the time of her embedded ethnographic fieldwork. Her study falls within a common, historically incomplete analysis of the vast nature in which Black women are policed in the criminal justice system and the collateral consequences to families and neighborhoods.

Goffman's omissions reflect a broader problem; in the Attorney General's elegant speech to the ABA during the summer of 2013, he too cast the drug war and mass incarceration as male problems.[27] In my reading of dozens of articles featuring the Attorney General's remarks, no commentator observed that women were virtually absent from Holder's powerful commentary. In fact, Holder mentioned women only once[28]—as middle-class, educated victims of sexual violence,[29] but not as the drug war's casualties.[30] Equally, politicians and pundits proclaimed the Justice Department's effort

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Their critiques suggest that police would not extend their patrol that far or that health-privacy laws would prevent this level of law enforcement surveillance. *See* Dwayne Betts, *The Stoop Isn't the Jungle*, SLATE (July 10, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/alice_goffman_s_on_the_run_she_is_wrong_about_black_urban_life.single.html [http://perma.cc/6TX2-EVJX] (calling into question the accuracy of Goffman's claims, asserting: "Goffman doesn't name the hospital or the police officer she quotes. When I called the Philadelphia Police Department for a response to her claim, Lt. John Stanford said the department doesn't have the manpower to run random names from a hospital's visiting list"); Lubet, *supra* note 23 (noting that Goffman's subjects avoided emergency rooms and children's schools for fear of being arrested); Joan Donovan, *Is He Dead, Alice*, OCCUPY SOC. (May 28, 2015), http://occupythesocial.com/post/120142584663/is-he-dead-alice [http://perma.cc/T4PK-DXZA] (questioning the merit behind Goffman's praise and awards).

25. JENIFER WARREN, PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 6 (2008).

26. GOFFMAN, *supra* note 22, at 37, 55 (casting African-American women as sometimes vindictive and ready to punish boyfriends, sons, and other males by cooperating with police).

27. Holder, Remarks at ABA Meeting, *supra* note 2.

28. *Id.*

29. *See id.* (explaining that "nearly one in four college women experience some form of sexual assault by their senior year").

30. *But see generally* Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. GENDER RACE & JUST. 277 (2002) (analyzing the drug war's impact on female lives).

as long overdue, emphasizing the staggering expansions of U.S. prisons to accommodate drug offenders and the racial impacts on African-American men.[31]

To emphasize what Goffman, other scholars, policymakers, and media pundits overlook, consider the stunning data collected by the Women's Prison Association, the leading national policy center quantitatively and qualitatively researching women in prison.[32] The population of women in prison grew by 832% in the period from 1977 to 2007—twice the rate as that of men during that same period.[33] More conservative estimates suggest that the rate of incarceration of women grew by over 750% during the past three decades.[34] This staggering increase now results in more than one million women incarcerated in prison, jail, or tethered to the criminal justice system as a parolee or probationer in the United States.[35] The Bureau of Justice Statistics underscores the problem, explaining in a special report that "[s]ince 1991, the number of children with a mother in prison has more than doubled, up 131%," while "[t]he number of children with a father in prison has grown [only] by 77%."[36]

This Review Essay fills an important gap in social and legal policy literature, addressing the intersection of sex and mass incarceration as a serious blind spot in legal analysis. It considers two works, James B. Jacobs' *The Eternal Criminal Record*[37] and Alice Goffman's *On The Run*. In Part I, this Review Essay offers a brief overview and critique of Goffman's acclaimed new work, critiquing not only her reductive account of African-American women's lives but also the ethics of her study. Readers never learn whether advisors required that she obtain Institutional Review Board (IRB) approval before engaging in her study of boys and men in jails and prisons as well as the lives of families on "6th Street." This is particularly relevant in light of Goffman's hunger for one of her primary research subject's "killer to die."[38] Because Goffman researched this particular community, ostensibly

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31. James Braxton Peterson, *America's Mass Incarceration System: Freedom's Next Frontier*, REUTERS: GREAT DEBATE (July 24, 2015), http://blogs.reuters.com/great-debate/2015/07/23/americas-mass-incarceration-system-freedoms-next-frontier/ [http://perma.cc/WSN4-F8KB] (questioning why it took President Obama so long to make the "mass incarceration" speech and considering how to account for losses in the system for the past thirty years).

32. WOMEN'S PRISON ASS'N, QUICK FACTS: WOMEN & CRIMINAL JUSTICE – 2009 (2009) [hereinafter QUICK FACTS 2009], http://www.wpaonline.org/wpaassets/Quick_Facts_Women_and_CJ_2009_rebrand.pdf [http://perma.cc/XW5Y-HX8F].

33. *Id.*

34. *Why It Matters*, WOMEN'S PRISON ASS'N, http://www.wpaonline.org/about/why-it-matters [http://perma.cc/V27P-MUGS].

35. QUICK FACTS 2009, *supra* note 32.

36. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1–2 (2008).

37. JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015).

38. GOFFMAN, *supra* note 22, at 260.

the man she desired dead was also her research subject. Part II turns to the missing narrative of women and mass incarceration in the United States. It sheds light on and analyzes the complex patterns that frame women's subjugation to law enforcement. Part III analyzes the extralegal and collateral consequences of policing women, including felony disenfranchisement, loss of housing, and the chilling impacts on their children. It unpacks what Professor James Jacobs terms "the eternal criminal record" and teases out findings in his compelling new book of the same name.[39]

I. Black Lives Matter

Goffman introduces readers to a drug-riddled, poverty-stricken, downtrodden area of Philadelphia, which she names 6th Street. Despite referring to this area as mixed income, the dramatic descriptions of crack infestation throughout the community, unemployment, layoffs, welfare dependency, housing subsidization, unpaid tickets, and warrants illustrate a level of economic and social poverty increasingly common in the United States, but not shared amongst middle-income African-Americans.

It is an area that Professor Goffman comes to know through undergraduate, ethnographic[40] coursework at the University of Pennsylvania, where her parents—both distinguished linguists—teach.[41]

By her own account, Goffman's parents' affiliations may explain the unusual latitude accorded her as an undergraduate researcher.[42] Goffman immerses herself in the "6th Street" community. At one point she shares an apartment with three African-American males who carry guns, deal drugs, and become involved in shootouts.[43] She writes, "[w]hen Mike got taken into custody, I lost all three roommates, since Chuck and Steve had been staying at the apartment at Mike's invitation."[44] Indeed, Goffman becomes so embedded in her research that she recounts missing meetings with her

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39. *See generally* JACOBS, *supra* note 37 (examining the U.S. criminal-record infrastructure and questioning if criminal-record jurisprudence should be restructured).

40. According to James Spradley, "[t]he essential core of ethnography is this concern with the meaning of actions and events to the people we seek to understand. . . . Ethnography always implies a theory of culture." JAMES P. SPRADLEY, PARTICIPANT OBSERVATION 5 (1980).

41. Goffman's parents, Gillian Sankoff and William Labov, are noted professors at the University of Pennsylvania. However, Goffman's biological father, the much acclaimed sociologist Erving Goffman, broke boundaries with his research, branching out beyond "prevailing paradigms and promot[ing] an ethnographic style all his own." *See* Donovan, *supra* note 24. The style of his human research did not always seek to provide transparency, sometimes strategically withholding information from his subjects in order to fulfill his aims. *Id.*

42. GOFFMAN, *supra* note 22, at 229 (acknowledging that "[p]erhaps [her] background, and the extra knowledge and confidence it gave [her], also contributed to professors encouraging the work and devoting their time so freely to [her] education" but denying that her privilege afforded her "situational dominance, . . . at least not very often").

43. *Id.* at 246.

44. *Id.*

undergraduate advisors, Professors Elijah Anderson and Michael Katz,[45] and surrendering to being her own research subject. She writes, "memory itself was changing," and "cops circling the apartment and the feds looking into Mike's case, the threats they had been making to arrest me—for harboring fugitives, or interfering with an arrest, or holding drugs in the apartment—were becoming more and more real."[46]

Subpart I(A) briefly substantiates the concerns raised by Goffman, such as racialized law enforcement surveillance and police violence against the civilians they serve. However, subpart I(B) turns to this Review Essay's critiques of the book.

A. The Surveillance State: Policing in the United States

Given the spate of surveillance and violence committed by law enforcement against African-American men, 6th Street could ostensibly be anywhere in the United States.[47] In March 2015, the *New York Times* reported that, according to local government records, in Ferguson, Missouri, African-Americans "accounted for 85 percent of traffic stops, 90 percent of tickets and 93 percent of arrests."[48] A six-month investigation by the Justice Department revealed a pernicious pattern of racial targeting and discrimination in law enforcement in that city, which ultimately "[led] up to an officer's shooting of a black teenager" in the community.[49] However, the intensity of police violence against the African-Americans the police patrol and the spate of shootings of unarmed African-Americans caught on camera is hardly confined to one region of the country.[50]

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45. *Id.* at 245.

46. *Id.*

47. *See, e.g.*, Matt Apuzzo, *Ferguson Police Routinely Violate Rights of Blacks, Justice Dept. Finds*, N.Y. TIMES (Mar. 3, 2015), http://www.nytimes.com/2015/03/04/us/justice-department-finds-pattern-of-police-bias-and-excessive-force-in-ferguson.html [http://perma.cc/ZY2B-MEEM] (reporting disparities in police stops, ticketing, and arrests in Ferguson, Missouri).

48. *Id.*

49. Matt Apuzzo, *Justice Department to Fault Ferguson Police, Seeing Racial Bias in Traffic Stops*, N.Y. TIMES (Mar. 1, 2015), http://www.nytimes.com/2015/03/02/us/justice-department-report-to-fault-police-in-ferguson.html [http://perma.cc/QG6R-CEWU]; *see also* Conor Friedersdorf, *The Brutality of Police Culture in Baltimore*, ATLANTIC (Apr. 22, 2015), http://www.theatlantic.com/politics/archive/2015/04/the-brutality-of-police-culture-in-baltimore/391158/ [http://perma.cc/99XW-RCDX] (warning that "[y]ears of abuses are every bit as egregious as what the Department of Justice documented in Ferguson, Missouri, and as deserving of a national response").

50. Friedersdorf, *supra* note 45; *see also* Jaeah Lee, *Exactly How Often Do Police Shoot Unarmed Black Men?*, MOTHER JONES (Aug. 15, 2014, 5:00 AM), http://www.motherjones.com/politics/2014/08/police-shootings-michael-brown-ferguson-black-men [http://perma.cc/V5TW-8UQH] ("The killing of Michael Brown by police in Ferguson, Missouri, was no anomaly: As we reported yesterday, Brown is one of at least four unarmed black men who died at the hands of police in the last month alone.").

Despite the fact that "[f]ederal databases that track police use of force or arrest-related deaths . . . . [are] scattered and fragmented,"[51] investigations by prominent news and civil society organizations illuminate a disturbing level of brutality and misconduct toward African-American communities in the United States. In one report, between 2004 and 2008 in Oakland, California, 37 of 45 officer-involved shootings occurred against African-Americans (none were white).[52] Another report highlights that Black male teens are twenty-one times more likely to be killed by law enforcement than their white counterparts.[53] In Chicago, law enforcement operates "an off-the-books interrogation compound, rendering Americans unable to be found by family or attorneys," where African-Americans and Latinos were beaten, shackled for prolonged periods, and denied access to legal counsel.[54] What scant data the Federal Bureau of Investigations (FBI) does collect disturbingly flags that between 1980 and 2012 over 12,000 police shooting deaths were self-reported.[55] The question is, how many deaths caused by police were unreported during that period?

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51. Lee, *supra* note 50. For example, "[n]o agency appears to track the number of police shootings or killings of unarmed victims in a systematic, comprehensive way." *Id.*

52. Demian Bulwa, *NAACP Focuses on Officer-Involved Shootings*, S.F. GATE (Dec. 17, 2010, 4:00 AM), http://www.sfgate.com/bayarea/article/NAACP-focuses-on-officer-involved-shootings-2453109.php [http://perma.cc/C2X7-F9WL].

53. Ryan Gabrielson et al., *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014, 10:07 AM), http://www.propublica.org/article/deadly-force-in-black-and-white?utm_source=et&utm_medium=email&utm_campaign=dailynewsletter [http://perma.cc/B96J-D6TR] ("The 1,217 deadly police shootings from 2010 to 2012 captured in the federal data show that blacks, age 15 to 19, were killed at a rate of 31.17 per million, while just 1.47 per million white males in that age range died at the hands of police.").

54. Spencer Ackerman, *The Disappeared: Chicago Police Detain Americans at Abuse-Laden 'Black Site,'* GUARDIAN (Feb. 24, 2015, 4:43 PM), http://www.theguardian.com/us-news/2015/feb/24/chicago-police-detain-americans-black-site [http://perma.cc/X7JL-N3JK] (commenting that at this facility, law enforcement "trains its focus on Americans, most often poor, black and brown"); Lizzie Johnson, *Men Sue Chicago Over Alleged Detainment at Homan Square*, CHI. TRIB. (Mar. 20, 2015, 5:17 PM), http://www.chicagotribune.com/news/local/breaking/ct-homan-square-police-lawsuit-met-20150320-story.html [http://perma.cc/PLQ2-2W63] (detailing allegations of threats, interrogation without access to legal counsel, and harassment in a pending lawsuit against law enforcement); Frank Main, *Chicago Police Deny Report of Secret Interrogation Compound at Homan Square Site*, CHI. SUN-TIMES (Feb. 24, 2015, 5:57 PM), http://chicago.suntimes.com/news/7/71/393084/homan-square-site-chicago-police-deny-report-secret-interrogation-compound [http://perma.cc/9W2P-2W63].

55. This calculation is based on roughly 400 "justifiable homicides" reported each year. *Compare* ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 32 fig.51 (2011), http://bjs.gov/content/pub/pdf/htus8008.pdf [http://perma.cc/LH3T-9KQZ] (depicting an average of approximately 400 "justifiable homicides" by law enforcement from 1980 to 2008), *with Uniform Crime Reports: Expanded Homicide Data Table 14*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_14_justifiable_homicide_by_weapon_law_enforcement_2008-2012.xls [http://perma.cc/ZR54-SX6H] (reporting an average of approximately 400 "justifiable homicides" by law enforcement from 2008 and 2012).

These are not the types of statistics offered in *On The Run*; the book is very thin on statistics and research data of that kind. Rather, the provocative prose of Goffman's subjects—their fights with girlfriends, ex-lovers, and their mothers; stints in juvenile detention, jail, and prison; and flights from police—undergird the work. Many scholars praise the book as an eye-opening view inside "the ghetto."[56] However, such responses, particularly from the academic community, deserve scrutiny and examination, because it may reflect the novelty to them of what Goffman describes rather than the book's originality or rigor. That is, Professor Goffman surviving what she describes as a harrowing time *on the run* with human research subjects who became her friends seems its own miracle to many in the academy. After all, as she explains, by the time her experiment of living on 6th Street concluded, "it didn't feel like I was leaving the 6th Street Boys as much as the 6th Street Boys had left me—or rather, that the group as we had known it had ceased to exist," because one of its members was murdered, another committed suicide, others were in prison or jail, and one was killed by police.[57]

B. Black Lives Should Also Matter to Human Research

> Sociologists refrain from undertaking an activity when their personal circumstances may . . . lead to harm for a . . . human subject, client, colleague, or other person to whom they have a scientific, teaching, consulting, or other professional obligation.[58]

Goffman's intuition that more is to be said about mass incarceration, police violence, and police–civilian interactions is well-founded and not disputed in this Review Essay. Rather, this Review Essay's critiques are animated by other concerns, including the apparent transgression of ethical norms and standards, weak citations (that perhaps suffice for an undergraduate paper or thesis but cause alarm for a dissertation, let alone professorial work),[59] reductive analysis of the lives of women in the community she

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Problematically, the federal government has not required police departments to provide more robust data to track police–civilian interactions, despite long-standing complaints by civil and human rights organizations alleging police misconduct and serious civil liberties violations against African-Americans carried out by law enforcement.

56. *E.g.*, Jennifer Schuessler, *Fieldwork of Total Immersion: Alice Goffman's 'On the Run' Studies Policing in a Poor Urban Neighborhood*, N.Y. TIMES (Apr. 29, 2014), http://www.nytimes.com/2014/04/30/books/alice-goffman-researches-poor-black-men-in-on-the-run.html [http://perma.cc/Y7FJ-38FE] (quoting Goffman's dissertation supervisor praising Goffman's access to the "ghetto").

57. GOFFMAN, *supra* note 22, at 205.

58. ASA COMM. ON PROF'L ETHICS, AM. SOCIOLOGICAL ASS'N, CODE OF ETHICS: ETHICAL STANDARDS § 2(d) (1999).

59. For example, Goffman does not identify dates, times, or precincts associated with her interviews with police. *E.g.*, GOFFMAN, *supra* note 22, at 269 n.7. Neither is the work substantiated with formal studies. *See id.* at 211–61 (discussing methodology through anecdotes). There is reference to a household study conducted with Chuck, presumably when she was an undergraduate.

studies,[60] and the evident lapse in discernment that distances even the embedded, participant researcher from her human research subjects. This subpart briefly analyzes why, despite the book's gripping descriptions and enthralling narratives, content and research ethics matter. That is, in abandoning what social science researchers call naïve realism, an appreciation for the vulnerability of Goffman's research subjects and even the life of an alleged murderer may also have been disregarded.[61]

1. Chasing Down a Murderer: The Limits of Observational Research.— If the point that the book makes—"the US ghetto [i]s one of the last repressive regimes of the age . . . [that] visit[s] an intensely punitive regime upon poor Black men and women living in our cities' segregated neighborhoods"[62]—is factually accurate, should ethics matter? In other words, while gaining cultural knowledge and documenting social behavior, two fundamental aspects of the human experience and ethnographic field study, what were Goffman's responsibilities to the participants, beyond safeguarding

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Id. at 238–39. There is no reference to the study being duplicated as a graduate student under a more rigorous process. *Id.* Readers are not informed about the questions asked, how many questions were presented to participants, or other information that would be important for a graduate study or a professor's manuscript. *Id.* at 55, 265 n.13.

60. African-American women feature in limited tropes in the book: betrayers (snitches), addicts, and church women. Goffman also identifies loyal women, "riders," but they ultimately betray African-American men, too. *Id.* at 74 ("[T]hey cut off ties to the man they had promised to protect, or they work with the police to get him arrested and convicted."). Through Goffman and the 6th Street Boys' eyes, we see African-American women as disloyal snitches. *Id.* at 55 ("Most help the police locate and convict the young men in their lives, and so must find a way to cope publicly and privately with their betrayals."). In another passage she writes, "Out of frustration and anger at his failures as a father, spouse, brother, or son, his partner or family members may freely call the police on him, taking advantage of his wanted status to get back at him or punish him." *Id.* at 37. In another passage, Mike (whom she later drives around in his attempt to kill someone) says "Black chicks ain't like [loyal Latinas]. They love the cops." *Id.* at 83. Readers never really come to know the mothers of the 6th Street Boys even though Goffman spends nights in their homes, on their porches, and with their sons, including Miss Linda and the challenges in her life that resulted in addiction, despite the amount of time Goffman spends in her home and with each of her three sons. Miss Linda is often reduced to the thief who stole from her sons and whose home "smelled of piss and vomit and stale cigarettes, and [where] cockroaches roamed freely across the countertops." *Id.* at 14. Miss Linda's only redemption is that she "ride[s] harder than any bitch out here." *Id.* at 79.

61. *See* SPRADLEY, *supra* note 40, at 4 (explaining that naïve realism is the "almost universal belief that all people define the *real* world of objects, events, and living creatures in pretty much the same way").

62. GOFFMAN, *supra* note 22, at 204.

their identities?[63] Was there an obligation to consider their interests, rights, and sensitivities?

In the most chilling account, Goffman describes her desire to avenge the murder of Chuck, a 6th Street Boy, by driving the getaway car.[64] On one of the nights that Mike (who already had many encounters with law enforcement and incarceration) "had nobody to ride along with him . . . [Goffman] volunteered."[65] They started out at 3 a.m., "with Mike in the passenger seat, his hand on his Glock as he directed [her] around the area. [They] peered into dark houses and looked at license plates and car models" as Mike checked on the killer's whereabouts.[66]

On one such occasion Mike got out of the car with his gun, thinking he spotted the murderer, while Goffman "waited in the car with the engine running, ready to speed off as soon as Mike ran back and got inside."[67] She explains:

> I got into the car because, like Mike and Reggie, I wanted Chuck's killer to die.
>
> . . . I didn't care whether this man had believed his life was threatened when he came upon Chuck outside the Chinese takeout store . . . . I simply wanted him to pay for what he'd done, for what he'd taken away from us.[68]

In Goffman's desire to kill a rival 4th Street Boy, she exposed not only herself to harm, but also Mike (despite his documented criminality, his life mattered, too), and the children, women, and men back on 6th Street, whose lives might likely have come under threat if she and Mike were successful in their plot. In fact, in an earlier gun battle between these two communities, women and girls were placed at serious risk as their homes were riddled with bullets in retaliation.[69]

In hindsight, Goffman admits, "I'm glad that I learned what it feels like to want a man to die . . . to feel it in my bones, at an emotional level eclipsing my own reason or sense of right and wrong."[70] For a memoir, this passage is powerful and disturbing; a chilling account of the desire to retaliate in the wake of a friend's murder. However, as scientific research, hailed for its

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63. *See* SPRADLEY, *supra* note 40, at 21, 51, 57 (speaking to ethnographers about going "beyond merely *considering* the interests" of research subjects; drawing distinctions between spectators and full participants; and emphasizing the importance of introspection, noting that as an ethnographer, "you will need to increase your introspectiveness").

64. GOFFMAN, *supra* note 22, at 260–61.

65. *Id.* at 260.

66. *Id.*

67. *Id.*

68. *Id.* at 260–61.

69. *Id.* at 250.

70. *Id.* at 261.

rawness and rich detail, the book reflects a disconcerting cognitive bias within the academic community that praises the hunting of a Black man with murderous intent. Dr. Kenneth D. Bailey cautioned about this very type of rationalization in social research, warning against "[r]ationalization on the part of the researcher that the study is not unethical because the harm inflicted on the subject is justified . . . because the researcher considers the subject evil and feels justified in harming him."[71] According to Bailey, "[i]t is generally agreed that it is unethical for researchers to harm anyone in the course of research."[72] The harms described by Bailey extend beyond the physical to also include psychological harm, emotional turmoil, guilt, and reminding a subject about "an unpleasant experience."[73]

What if the man Goffman plotted to kill with Mike and his loaded Glock were white or Asian? Might she have considered other options, such as removing herself, imploring Mike to stand down, or calling the police? Might her advisors have recoiled or questioned Goffman's involvement in that type and level of "research"? The point here is that even if the killer belonged to a skinhead, biker, or equally disparaged community where some whites affiliate, rather than being a Black 4th Street Boy, his life might have mattered—if not to Goffman, perhaps to her dissertation committee, the book's reviewers, and the scholars who praise the work.

If Professor Goffman were a Black social scientist out for blood, driving a getaway car, intending to be an accomplice to murder, would the academy celebrate her daring, eye-opening time in the "ghetto"? Quite possibly, Goffman's perceived "vulnerable" status as a white woman and "courage" living in a dangerous Black neighborhood may have blinded scholars from taking a more critical view; after all, her supervisor explained to the New York Times, "[t]he level of immersion is really unusual . . . . She got access to the life of the ghetto and came to understand aspects of it we don't ever get to see."[74]

Disputing the vivid narrative in her own book, Goffman issued a statement one year after its publication, in June 2015, stating, "at no time did I intend to engage in any criminal conduct in the wake of Chuck's death."[75] How should readers reconcile and understand the two very different accounts of the same event? On one hand, the book closes with a powerful story of a night out for death. However, in the aftermath of criticism about the book and its veracity, Goffman offered a narrative that suggests neither she nor

71. KENNETH D. BAILEY, METHODS OF SOCIAL RESEARCH 407 (3d ed. 1987).
72. *Id.* at 406.
73. *Id.* (urging that "researchers want and have every reason to be ethical").
74. Schuessler, *supra* note 56.
75. Goffman, *supra* note 23.

Mike really considered killing anyone that evening and that the ride was more about catharsis than murder.[76] Readers will have to decide.

2. Ethics in Social Science Research.—So far as the book reveals, the extent of Goffman's protection of her research subjects and informed consent process involved asking "Mike what he thought of [her] writing about his life for [her] undergraduate thesis at Penn . . . . [They] agreed that [Goffman would] conceal his name and the neighborhood location, and that [she] wouldn't include any events he wanted [her] to leave out."[77] This was the process also with "Chuck, Steve, Alex, Anthony, and some of the other young men who hung out together on 6th Street" and their other relatives, girlfriends, and mothers.[78] What might suffice as a memoir of Goffman's time attending college at Penn while living on or near 6th Street is quite different than an academic research study.

Under the tutelage of Mitch Duneier and an elite dissertation committee, Goffman honed her project to be framed "as an on-the-ground look at mass incarceration and its accompanying systems of policing and surveillance."[79] However, the project launched during her undergraduate years and continued through graduate study.[80] Never at any point are readers informed about an IRB process or approval[81] at the University of Pennsylvania where the research began, nor informed consent forms signed or assent obtained for the human research conducted with minors such as Tommy, Aisha, Ronny, and Reggie, whose ages ranged from about eleven to fifteen at the time they became her research subjects.[82] Goffman does explain that she talked with people on 6th Street and they verbally consented to the research.[83]

Yet, Proffessor Goffman's African American research subjects deserved the same standard of care afforded white subjects. Ethical concerns associated with Goffman's human research are particularly relevant for three reasons. First, her research involved prisoners, minors (Aisha, Tommy, Ronny, and others), and what ethicists refer to as "vulnerable" populations, requiring additional protections. Second, failure to take into account the po-

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76. *See id.* (explaining that the drives "were a way to mourn a dear friend").

77. GOFFMAN, *supra* note 22, at 223.

78. *Id.*

79. *Id.* at 249. She describes her very worthwhile study as "documenting the massive expansion of criminal justice intervention into the lives of poor Black families in the United States." *Id.*

80. *Id.* at 214–17, 245–47.

81. *See generally Institutional Review Boards (IRBs)*, U.S. DEP'T HEALTH & HUM. SERVS., http://www.hhs.gov/ohrp/assurances/irb [http://perma.cc/PJ2X-CMMX] (noting that "IRBs must approve proposed non-exempt research before involvement of human subjects may begin" and providing resources for the approval process).

82. GOFFMAN, *supra* note 22, at 214, 218, 227 (listing the ages of Tommy, Ronny, and Reggie and characterizing Aisha as a high-school freshman).

83. *Id.* at 223.

tential to endanger or harm the research subjects she came into contact with on 6th Street exposes a broader concern about Black lives mattering in human research. For example, rationalizing a failure to follow ethical protocols because neighborhoods like 6th and 4th Streets are already under siege or presently suffering the conditions of poverty is an unsupportable and weak justification for ignoring research ethics. Third, as an institutional matter, violations in research ethics surfaced at the University of Pennsylvania in a separate study several years before Goffman's project, resulting in a federal investigation and settlement in a case involving the death of a teenage human research subject, Jesse Gelsinger.[84]

Simply stated, the federal government urges, "IRBs must approve proposed non-exempt research before involvement of human subjects may begin."[85] This may be misinterpreted to suggest that only when federal dollars support the research do ethical protocols matter. Not so.[86] Ironically, such requirements are to protect communities like 6th Street—not simply research subjects in clinical drug trials but also individuals who may experience psychological or physical harm in studies. With regard to prisoners, the National Institutes of Health (NIH) warns: "Because prisoners may not be free to make a truly voluntary and uncoerced decision whether or not to participate as subjects in research, the regulations require additional safeguards for the protection of prisoners in research" and that the safeguards "appl[y] to all research that includes any individual who is or becomes a prisoner while participating in a research study."[87] Bioethicists and

84. In this case, the University of Pennsylvania settled with the Justice Department for conducting a study in which fraud, the making of false statements, and the failure to disclose relevant information were alleged in a human research clinical trial that ultimately resulted in the death of a participant. *See U.S. Settles Case of Gene Therapy Study that Ended with Teen Death*, U. PA. ALMANAC (Feb. 15, 2005) [hereinafter *Gene Therapy Study*], http://www.upenn.edu/almanac/volumes/v51/n21/gts.html [http://perma.cc/VU24-JYS6] (describing the university's study as well as the resulting investigation and settlement); Sheryl Gay Stolberg, *The Biotech Death of Jesse Gelsinger*, N.Y. TIMES (Nov. 28, 1999) http://www.nytimes.com/1999/11/28/magazine/the-biotech-death-of-jesse-gelsinger.html?pagewanted=3 [http://perma.cc/3ZM5-UA4H] (cataloging the events that led to both the clinical trial and the participant's death). As part of the settlement, one of the researchers, "Dr. Wilson[,] must meet imposed training/educational requirements applicable to human research participant protections and clinical research." *Gene Therapy Study*, *supra*.

85. *Institutional Review Boards (IRBs)*, *supra* note 81.

86. "*Human subject* means a living individual about whom an investigator (whether professional or student) conducting research obtains" data through interactions and interpersonal contact with the individual. 45 C.F.R. § 46.102(f) (2015).

87. *Research Involving Vulnerable Populations*, NAT'L INSTITUTES HEALTH, http://grants.nih.gov/grants/policy/hs/prisoners.htm [http://perma.cc/K9AD-KCMP] (defining a prisoner as "any individual involuntarily confined or detained in a penal institution").

government agencies voice similar concerns about human research involving children under the age of eighteen.[88]

Baked into bioethics and law are robust concerns for participant safety, autonomy, informed consent, respect for persons, beneficence, and social justice, among other long-standing priorities, dating back to Nuremberg and the infamous Tuskegee Syphilis Study, which exploited the vulnerabilities of poor African-American farmers in the South for forty years.[89] These lines are particularly vulnerable to blurring in the type of ethnographic fieldwork conducted by Goffman: A cafeteria worker who supervised her, a girl she tutored, and a man she went on a date with became her first research subjects on 6th Street. She recalls:

> I'm not sure if people's behavior toward me changed, but I imagined that this date with Mike helped something click for Aisha's neighbors and relatives. If I had been something of a puzzle before, now my presence in the neighborhood made sense: I was one of those white girls who liked Black guys.[90]

Valuable lessons can be gleaned from research conducted using African-American subjects, including cautionary tales. Professor Sudhir Venkatesh attracted strident criticism for his embedded research on gangs (as a graduate student).[91] While studying Chicago gangs and their economies, he acquired accounting notebooks by T-Bone for the purpose of writing an article; T-Bone was later murdered in prison, presumably for revealing the information that was later featured in Venkatesh's articles.[92] However, that work ultimately secured a book contract, prestigious speaking engagements,

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88. *See, e.g.*, *Special Protections for Children as Research Subjects*, U.S. DEP'T HEALTH & HUM. SERVS., http://www.hhs.gov/ohrp/policy/populations/children.html [http://perma.cc/T2NN-7WFH] (outlining protections for research subjects under eighteen years old).

89. *See* Jean Heller, *Syphilis Victims in U.S. Study Went Untreated for 40 Years*, N.Y. TIMES, July 25, 1972, at 1 (detailing how the Tuskegee Syphilis Study was a morally dubious clinical trial because it denied available treatment to participants). *See generally* FRED D. GRAY, THE TUSKEGEE SYPHILIS STUDY: THE REAL STORY AND BEYOND (1998) (telling the story of the Tuskegee Syphilis study from an insider's point of view).

90. GOFFMAN, *supra* note 22, at 221.

91. SUDHIR VENKATESH, GANG LEADER FOR A DAY: A ROGUE SOCIOLOGIST TAKES TO THE STREETS 113–14 (2008) (giving examples of professors' criticisms about Venkatesh being too involved with the subjects of his research); *see also* Ariel Kaminer, *Columbia's Gang Scholar Lives on the Edge*, N.Y. TIMES (Nov. 30, 2012), http://www.nytimes.com/2012/12/02/nyregion/sudhir-venkatesh-columbias-gang-scholar-lives-on-the-edge.html?_r=0 [http://perma.cc/P78K-DSV2] (explaining that Venkatesh's research techniques have "brought controversy," including a large-scale investigation of his research expenditures); Claire Potter, *Puff the Magic Sociologist: Sudhir Venkatesh, Gang Leader for a Day, A Rogue Sociologist Takes to the Streets*, CHRON. HIGHER EDUC.: TENURED RADICAL (Apr. 7, 2009, 2:32 PM), http://chronicle.com/blognetwork/tenuredradical/2009/04/puff-magic-sociologist-review-of-sudhir/ [http://perma.cc/M39P-692N] (characterizing Venkatesh's research methods as "disturbing").

92. Potter, *supra* note 92.

and praise from within the academic community.[93] Not until later were important ethical questions regarding his research raised by academics. In one review, a historian wrote: "[I]f this book is taught at all it should be taught as a perfect example of an academic exploiting a community to advance his career."[94]

However, concerns about human research and exploitation in African-American communities are not new. Researchers conducting the syphilis study in Tuskegee, Alabama, denied available treatments and information to the African-American research participants despite their debilitating disease.[95] Other disputed studies include the irradiation of African-American cancer patients for over ten years by Dr. Eugene Saenger at the University of Cincinnati;[96] at the University of Pennsylvania, Dr. Albert Kligman conducted skin experiments on Black inmates at Holmesburg Prison;[97] HIV drug experimentation on African-American children in foster care in New York proceeded despite complaints by the children's guardians;[98] and lead studies conducted in African-American neighborhoods by Johns Hopkins researchers purposefully withheld information about the harmful impacts and potentially significant risks to Black children,[99] to name a few. Importantly, in each study researchers and often their universities believed these studies would benefit society, even if not their African-American subjects.[100]

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93. *See* VENKATESH, *supra* note 92, at 244–45 (describing how Venkatesh began "present[ing] [his] research at various academic conferences" and noting that his "academic career probably started the day [he] met J.T.").

94. Potter, *supra* note 92.

95. GRAY, *supra* note 90, at 48–49, 52–55; HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 157 (2006); Heller, *supra* note 85, at 1; Carol Kaesuk Yoon, *Families Emerge as Silent Victims of Tuskegee Syphilis Experiment*, N.Y. TIMES (May 12, 1997), http://www.nytimes.com/1997/05/12/us/families-emerge-as-silent-victims-of-tuskegee-syphilis-experiment.html [http://perma.cc/62XL-VFBZ]; *U.S. Public Health Service Syphilis Study at Tuskegee: The Tuskegee Timeline*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tuskegee/timeline.htm [http://perma.cc/L5DF-8P5M].

96. *See* Keith Schneider, *Cold War Radiation Tests on Humans to Undergo a Congressional Review*, N.Y. TIMES (Apr. 11, 1994), http://www.nytimes.com/1994/04/11/us/cold-war-radiation-test-on-humans-to-undergo-a-congressional-review.html?pagewanted=all [http://perma.cc/8SGA-PE9U] (noting that most subjects were poor and sixty percent were Black).

97. WASHINGTON, *supra* note 96, at 248–49.

98. Jamie Doran, *New York's HIV Experiment*, BBC (Nov. 30, 2004), http://news.bbc.co.uk/2/hi/programmes/this_world/4038375.stm [http://perma.cc/4H7R-3F3L].

99. Grimes v. Kennedy Krieger Inst., 782 A.2d 807, 812–14 (Md. 2001).

100. *See id.* at 811–13 (noting the belief by researchers associated with Johns Hopkins that it was acceptable to conduct nontherapeutic research on children to determine the effectiveness of various lead-paint abatement procedures); WASHINGTON, *supra* note 96, at 252 (citing Kligman's defense of his research that it resulted in advancing "knowledge of the pathogenesis of skin disease"); *id.* at 233–34 (describing Saenger's rationalization for using dangerous, experimental doses of total body irradiation on cancer patients); *id.* at 333–34 (describing how researchers at the Incarnation Children's Center stated that the testing of experimental drugs on foster children in New

Finally, the fact that Goffman does not disclose a formal review process at the University of Pennsylvania in *On The Run* reasonably leads readers to believe there was not any.

3. Does Researching Race Require Citation?—Goffman's methodological notes further explain her introduction to the 6th Street Boys and her participant observations in their community.[101] In this section, she reveals the plot to kill the 4th Street Boy as well as her intimacy with the community in which she lived for six years.[102] Yet for all the spectacular accounts she details in the book and the rich descriptions in its methodological notes, at least two traditional hallmarks of academic books are absent: a bibliography and an index.

These core features of an academic book articulate the breadth of research and knowledge gained by the researcher studying a particular topic. Bibliographies typically add greater academic strength and rigor to the work, and in this case may have highlighted newspaper articles, research studies, articles, books, legislation, dates of interviews, identification of interviewees (even with altered names), and questions used in her 2007 household survey conducted with Chuck. Bibliographies highlight the scope of a researcher's investigation and demonstrate the breadth of her investment in the topic. Indexes serve similar purposes, particularly for other researchers who may wish to consult particular sections of the book or assess whether certain topics come under discussion in the book. However, these references are simply absent, which again might be more consistent with a memoir, an undergraduate thesis, or a journalist's account of an in-depth investigative report, but these are conspicuous oversights for an academic book.[103]

Finally, in Alex Kotlowitz's review of *On The Run* for the New York Times, he writes, "The level of detail in this book and Goffman's ability to understand her subjects' motivations are astonishing—and riveting."[104] Kotlowitz explains "a power of 'On the Run' [is] that her insights and conclu-

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York was therapeutic and agreed that pediatric drugs require testing in children); Michele Goodwin & Allison M Whelan, *Law, Bioethics, and Biotechnology*, *in* 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 557, 560 (Neil J. Smelser & Paul B. Baltes eds., 2d ed. 2015) (noting that in many instances of medical ethics breaches, researchers and field scientists ardently defend their controversial studies).

101. GOFFMAN, *supra* note 22, at 211–61.

102. *Id.*

103. Contrast with similar ethnographies or imbedded field research on the lives of low-income people of color. *E.g.*, KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION (2011).

104. Alex Kotlowitz, *Deep Cover: Alice Goffman's 'On the Run,'* N.Y. TIMES (June 26, 2014), http://www.nytimes.com/2014/06/29/books/review/alice-goffmans-on-the-run.html?_r=0 [http://perma.cc/LZ73-UC4T].

sions feel so honest to what she's seen and heard."[105] Yet, he also notes, this is what makes the book troublesome.[106] Goffman dispenses with citations—when they might be most relevant.

> At one point, she asserts that "the police typically take whatever cash they find" during drug raids. On another occasion, she writes of an F.B.I. agent who, in an effort to track people with warrants, supposedly developed a computer program inspired by the Stasi, the East German secret police. Nowhere does she tell us where she got such information.[107]

Goffman has since destroyed her field notes; what remains of her 6th Street research are chilling accounts in the book, some with cited sources and others without.[108] We learn about the fate of the few 6th Street Boys she continues to follow, but not much about the women who were an integral part of the community she observed.

II. Mass Incarceration and the Invisible Sex

The shocking toll of male incarceration crowds out research and more nuanced understandings of women's engagement with the penal system. After all, 1 in every 106 white males (eighteen or older) is incarcerated compared to 1 in every 15 Black males,[109] and "[i]f current trends continue, one of every three black American males born today can expect to go to prison in his lifetime."[110]

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105. *Id.*

106. *Id.*

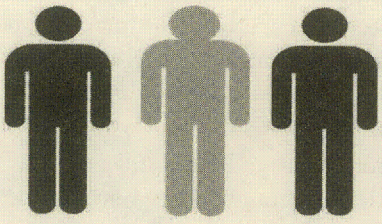
107. *Id.*

108. Leon Neyfakh, *The Ethics of Ethnography*, SLATE (June 18, 2015, 5:58 PM), http://www.slate.com/articles/news_and_politics/crime/2015/06/alice_goffman_s_on_the_run_is_the_sociologist_to_blame_for_the_inconsistencies.html [http://perma.cc/H9B9-S2NS]. *See generally* GOFFMAN, *supra* note 22, at 211–61 (detailing her research methods and excluding citations).

109. Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, CTR. FOR AM. PROGRESS (Mar. 13, 2012), https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states [https://perma.cc/4QG7-P7RJ].

110. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013).

Figure 1: One-in-Three Black Males Will Be Incarcerated in His Lifetime



On one hand, researchers and policymakers tend to view incarceration through a male lens—arguably an approach adopted by Goffman. On the other hand, race matters when concerns about sex inequality arise—often featuring white women at the center of that discourse.[111] Marginalized and invisible then are women of color, despite their experiences with mass incarceration,[112] police brutality,[113] sexual violence within their communi-

111. *See* Mary Berry, *Foreword*, *in* ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE (Gloria T. Hull et al. eds, 1993) ("The women's movement and its scholars have been concerned, in the main, with white women, their needs and concerns."). *See generally* BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1981) (discussing the focus on white women during the women's rights movement).

112. QUICK FACTS 2009, *supra* note 32.

113. *See* Kate Abbey-Lambertz, *These 15 Black Women Were Killed During Police Encounters. Their Lives Matter, Too*, HUFFINGTON POST (Feb. 13, 2015, 4:59 PM), http://www.huffingtonpost.com/2015/02/13/black-womens-lives-matter-police-shootings_n_6644276.html [http://perma.cc/2JQR-FMQD] (lamenting that "as thousands march for justice, the names of the women killed by police—particularly women of color killed by police—continue to be less known"); Stephen A. Crockett Jr., *Officer Charged With Raping 8 Black Women Finds Support Online*, ROOT (Sept. 2, 2014, 7:41 AM), http://www.theroot.com/articles/culture/2014/09/officer_charged_with_raping_8_black_women_finds_support_online.html [http://perma.cc/RW4V-V56P] (discussing financial support provided by online donors for a male police officer charged with sexually assaulting eight black women); Tasha Fierce, *Black Women Are Beaten, Sexually Assaulted and Killed by Police. Why Don't We Talk About It?*, ALTERNET (Feb. 26, 2015), http://www.alternet.org/activism/black-women-are-beaten-sexually-assaulted-and-killed-police-why-dont-we-talk-about-it [http://perma.cc/27M6-Y72C] ("While media attention has focused on the tragic loss of Black cisgender men, it seems like we've forgotten that Black women are subjected to the same state-sponsored violence.").

ties,[114] shackling while pregnant (if in the penal system),[115] birthing behind bars,[116] restrictions on housing access, and other pernicious encroachments on their daily lives.[117] According to her field notes, Goffman originally starts off interested in the "lives of . . . women struggling on welfare," but abandons this project because "Mike and his friends . . . were a mystery,"[118] unlike the women of 6th Street whose lives already seemed accounted for in other scholarship.

Male accounts about mass incarceration, while troubling and certainly not inaccurate, fail to problematize and offer a detailed reading of U.S. prisons and penal systems. More importantly, these depictions fall short of informing the American public about women and children as the casualties of the nation's overpriced and unsuccessful drug war, neglect to account for children raised in prison alongside their mothers,[119] ignore how and why states target women, particularly during their pregnancies, and fail to notice

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114. MATTHEW J. BREIDING ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION 5 (2014), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm [http://perma.cc/36Q3-GX9X] ("38.2% of non-Hispanic black women experienced sexual violence other than rape during their lifetimes.").

115. *See* Nelson v. Corr. Med. Servs., 583 F.3d 522, 524–25 (8th Cir. 2009) (en banc) (affirming denial of summary judgment to a correctional officer accused of violating an inmate's Eighth Amendment rights by requiring the inmate to be shackled during childbirth); Elizabeth Alexander, *Unshackling Shawanna: The Battle Over Chaining Women Prisoners During Labor and Delivery*, 32 U. ARK. LITTLE ROCK L. REV. 435, 446 (2010) (discussing the Eighth Circuit analysis used to determine if shackling an inmate with a serious medical condition, such as pregnancy, violates constitutional rights); Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1241–42 (2012) (recounting the experience of an inmate forced to remain in shackles during a cesarean delivery).

116. Michele Bratcher Goodwin, *Precarious Moorings: Tying Fetal Drug Law Policy to Social Profiling*, 42 RUTGERS L.J. 659, 666 (2011); *see also* Lynn Paltrow, *South Carolina First in the Nation for Arresting African-American Pregnant Women - Last in the Nation for Funding Drug and Alcohol Treatment*, NAT'L ADVOCATES FOR PREGNANT WOMEN (Jan. 8, 2003), http://advocatesforpregnantwomen.org/issues/briefingpaper.htm [http://perma.cc/T6PL-Y224] (commenting on the need for drug treatment programs as an alternative to the incarceration of pregnant women).

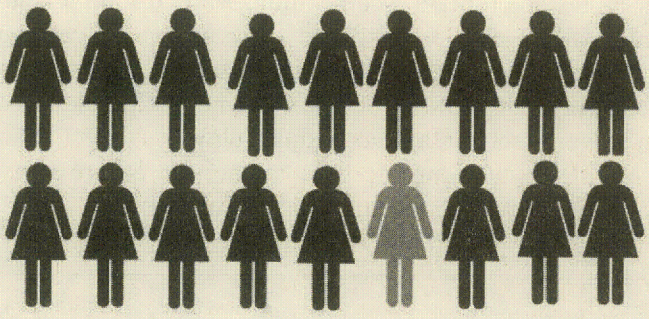
117. *See, e.g.*, Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781, 783 (2014) (examining the constitutionality of prosecuting women for smoking tobacco during pregnancy).

118. GOFFMAN, *supra* note 22, at 223.

119. *See* Melissa Luck, *Born Behind Bars: Inmates Raising Children in Prison*, KXLY (Sept. 9, 2011, 5:25 PM), http://www.kxly.com/news/Born-Behind-Bars-Inmates-Raising-Children-in-Prison/-/101270/682766/-/115bxpxz/-/index.html [http://perma.cc/3HVK-P69Q] ("Right now, at Washington's largest corrections center for women, 871 inmates are serving their sentences. Among them are 8 babies being raised right in the middle of it all."); Paula Nelson, *Raised Behind Bars*, BOS. GLOBE (Dec. 14, 2012), http://www.boston.com/bigpicture/2012/12/raised_behind_bars.html [http://perma.cc/32U3-BXV8] (noting the international institutionalization of children with their mothers); Suzanne Smalley, *Should Female Inmates Raise Their Babies in Prison?*, NEWSWEEK (May 13, 2009, 8:00 PM), http://www.newsweek.com/should-female-inmates-raise-their-babies-prison-80247 [http://perma.cc/F8H6-6AE2] (reviewing the dire conditions of U.S. prisons).

racial disparities in women's mass incarceration. However, for Black women, 1 in 18 will experience incarceration in her lifetime.[120]

Figure 2: One-in-Eighteen Black Women Will Be Incarcerated in Her Lifetime



A. An Empirical Account: The Scale and Scope of Women's Mass Incarceration

To better comprehend the scale and scope of U.S. incarceration, consider that it incarcerates more women than any other country in the world.[121] To place this in context, the U.S. jails more women than Russia, China, Thailand, and India combined.[122] Nearly a third of the world's women inmates are incarcerated in the United States.[123]

Predictably, in the United States, mass incarceration of women suffers from similar features of male criminal institutionalization, namely race and class disparities. One in 118 white women stands a likelihood of imprisonment in her lifetime.[124] However, Latinas can expect that within their demographic, 1 in 45 will be imprisoned at some point in her lifetime;[125] for

120. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 8 (2003).

121. ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD FEMALE IMPRISONMENT LIST 1 (2d ed. 2013).

122. *Id.*

123. *Id.*

124. BONCZAR, *supra* note 120, at 8 fig.5.

125. *Id.*

African-American women the numbers are worse: 1 in 18 will likely experience incarceration.[126]

These stark figures frame the raw numbers of mass incarceration, but do little to explain and account for its broader social implications, which extend to children, family, and communities. Much of the nation's current incarcerated population, including women, are drug offenders—many of them first-time offenders—caught in the powerful, punitive grip of the war on drugs policy.[127] Significantly, what accounts for the 800% increase in the rate of female incarceration over the past three decades is drug offenses.[128] Importantly, women's drug use has not increased in the last thirty years—only their rate of incarceration.[129] In fact, the proportion of incarcerated women who are in prison for drug offenses now surpasses that of men.[130] At the state level, 25% of women prisoners were serving time for drug offenses in 2012 compared to 15% of male prisoners.[131]

Women suffer the collateral damage of federal and state drug war policy; they and their children are the drug war's casualties.[132] According to the Women's Prison Association, "[o]ver 2.5 million women were arrested in 2008."[133] This accounted for nearly a quarter of arrests that year and nearly a 12% increase from ten years prior.[134] To compare the increase in women's incarceration, consider that the "female prison population grew by 832% from 1977 to 2007"; male prison incarceration grew by "416% during the same time period."[135] Equally disproportionate during that period were women's arrests for drug violations: up 19% compared to 10% for men.[136]

Further disaggregation of this data reveals significant racial disparities. For example, the U.S. Department of Justice reports that the rate of imprisonment for Black women is 113 per 100,000, more than twice that of white females (51 per 100,000).[137] Even more troubling are the new trends

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126. *Id.*

127. *See* QUICK FACTS 2009, *supra* note 32 (listing facts about the rate of incarceration and noting that "[i]n the ten-year period from 1999 to 2008, arrests of women for drug violations increased 19%").

128. *Id.*

129. *See* 2 LLOYD D. JOHNSTON ET AL., MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE 1975–2014, COLLEGE STUDENTS & ADULTS AGES 19–55, at 176 (2015) (showing the percentage of females between ages nineteen and twenty-eight who have used any illicit drug is relatively similar in 2014 compared with the late 1980s).

130. CARSON, *supra* note 12, at 15 tbl.13.

131. *Id.*

132. Goldfarb, *supra* note 30, at 295–96.

133. QUICK FACTS 2009, *supra* note 32.

134. *Id.*

135. *Id.*

136. *Id.*

137. CARSON, *supra* note 12, at 1.

in mass incarceration among young women. Black women caught in the last gasps of teenage life are almost five times more likely to be imprisoned than their white counterparts: 33 inmates per 100,000 versus 7 inmates per 100,000.[138] And despite comprising roughly 6% of the U.S. population, Black women make up 22% of the prisoner population in the United States, and Latinas are 17% of the prison population.[139] At every phase within their life span, Black women's incarceration dramatically outpaces that of white and Latina women, as demonstrated in the chart below. Sadly, federal data-keeping neglects to further disentangle certain racial categories (as seen below), lumping ethnic populations such as Native American women with Asians and Pacific Islanders.

Table 1: Imprisonment Rate of Sentenced State and Federal Prisoners per 100,000 U.S. Residents by Age and Race December 31, 2013[140]

Age	Total Female	White	Black	Latina	Other*
Total	65	51	113	66	90
18-19	14	7	33	17	24
20-24	95	73	154	100	131
25-29	168	140	260	173	232
30-34	180	156	277	169	235
35-39	151	133	240	133	178
40-44	131	113	224	107	144
45-49	112	90	202	99	135
50-54	70	54	128	72	94
55-59	36	26	72	44	52
60-64	19	14	34	25	27
65 or older	5	4	7	8	8

Despite the power of these statistics to highlight women's incarceration, missing are narratives that help us to understand who these women are, why they are behind bars, who benefits from their incarceration, and who is harmed. Missing is an account that informs scholars, policymakers, and an

138. *Id.* at 8.

139. *Id.* at 9 tbl.8.

140. CARSON, *supra* note 12, at 9 tbl.8 (noting that the "other" and "total female" categories "include[] American Indians, Alaska Natives, Asians, Native Hawaiians, Pacific Islanders, persons of two or more races, or additional racial categories in the reporting information system").

interested lay public about why women's incarceration rate outpaces that of men—even if the raw numbers are much lower.

In *The Eternal Criminal Record*, Professor James B. Jacobs argues that "[o]ne reason that the United States has such an immense population of persons with criminal records is the overuse of criminal law."[141] He lists drug offenses as one such area, where in 2012 alone, 1,552,432 arrests were made for drug offenses.[142] Of the drug arrests, Jacobs casts particular attention on the 42.4% involving marijuana possession.[143] Jacobs further emphasizes this point, explaining that in the past few decades, "millions of people have been convicted of selling and possessing illicit mood and mind-altering drugs, especially marijuana."[144] Jacobs urges that we imagine if the possession of cannabis were not illegal or criminal; in such a scenario, "all those people . . . would not have a criminal record."[145] Jacobs does not unpack how such laws and criminal policing particularly impact women. However, federal data gives some indication. Nearly 60% of the "most serious offense[s]" committed by "women in federal prisons and 25.1% of women in state prisons [are] violations of drug laws."[146]

A considerable percentage of women arrested, convicted, and serving prison sentences suffer either from drug addiction or from the causes of their addiction, which motivated the crimes that ultimately resulted in their arrests.[147] For example, without further detail in its *Prisoners Report*, the Bureau of Justice Statistics calculates that nearly 10% of women's prison sentences relate to "commercialized vice, morals, and decency offenses" and liquor-law violations.[148] Vice crimes, along with petty property thefts, fraud (writing "bad checks"), and stealing cars, account for over a third of women's prison sentences.[149] Importantly, these crimes often relate to and mask drug addiction. Unlike their male counterparts, where over half serve time for violent offences, two-thirds of women's offenses were nonviolent. Among these women, incredibly high percentages are mothers, especially women serving time for drug-related offenses.

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141. JACOBS, *supra* note 32, at 94.

142. *Id.*

143. *Id.* at 94–95.

144. *Id.* at 95.

145. *Id.*

146. *Women & The Drug War*, DRUGWARFACTS.ORG, http://www.drugwarfacts.org/cms/Women#sthash.0Rmwnfob.dpbs [http://perma.cc/3CFE-3MGK] (citing *Federal Criminal Case Processing Statistics*, BUREAU JUST. STAT., http://www.bjs.gov/fjsrc/index.cfm [http://perma.cc/2LJN-2PE8]); E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, at 1, 9 tbl.9 (2012).

147. NATASHA A. FROST ET AL., INST. ON WOMEN & CRIMINAL JUSTICE, HARD HIT: THE GROWTH IN THE IMPRISONMENT OF WOMEN, 1977–2004, at 25 fig.15 (2006).

148. CARSON & SABOL, *supra* note 146, at 9 tbl.9.

149. *Id.*

Moreover, while the Bureau of Justice Statistics clarifies some racial disparities and highlights room for more research regarding others, it does not include women caught within the revolving door of criminal justice—out on probation or parole, living in a halfway house, suspended in the limbo of confinement before or after adjudication, or in a court-ordered rehabilitation program. Nor does it offer a better sense about motherhood and incarceration.

B. Motherhood and the Criminal Justice System

The problem of mass incarceration is also the problem of parents behind bars and children suffering the loss of the support and relationships with their mothers and fathers. Indeed, the rate of parental incarceration raises important public policy concerns, particularly as a third of children who have parents in prison will reach adulthood while that parent is behind bars.[150] Between the early 1990s and 2007, mothers and fathers detained in state and federal prisons increased by 79%.[151] The number and rate of children whose parents are incarcerated increased too.[152] From 1991 to 2007, the number of children whose parents are incarcerated nearly doubled from 860,300 to 1,427,500.[153] And while the number of incarcerated fathers increased by 77%, it more than doubled with mothers—up by 131%.[154] To further disentangle this data, this subpart analyzes what accounts for this and what the mothers were convicted for.

According to federal research data published in 2008, 63% of women held in state prison for drug-related offenses report being a mother; equally, more than half of women in federal prison for drug-related crimes acknowledged being mothers.[155] Thus, drug offenses not only significantly account for women's incarceration, but also drug policies, and particularly the "drug war," directly impact the lives of children in the United States. This latter point deserves further explanation, because illicit drug use can often be perceived as a "bad choice" made by "bad mothers" and thus the convictions and punishment of these women are not only justified through this rationalization, but also are deemed necessary.

By default, illicit drug users are perceived as uncaring, selfish mothers who risk not only their own health, but also the well-being of their families. Frequently and erroneously, policy makers and the general public perceive female drug abusers as Black and Latina, despite the fact that white and

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150. GLAZE & MARUSCHAK, *supra* note 36, at 3.
151. *Id.* at 1.
152. *Id.*
153. *Id.* at 2 tbl.1.
154. *Id.* at 2.
155. *Id.* at 4.

African-American women use illicit drugs at about the same rate (white women a scant higher).[156] However, African-American women are ten times more likely to be reported to Child Protective Services (arguably another branch of law enforcement) than white women.[157] Equally, when accounting for legal but potentially addicting drugs, such as alcohol and prescription medications, white women's use outpaces that of their African-American counterparts.[158] However, illicit drugs often carry the stigma and shame of poverty, dereliction, irresponsibility, disorderliness, and violence. Arguably, these perceptions significantly shaped federal drug policies that erroneously designated crystallized cocaine as substantially distinct from powder cocaine (the former viewed as dangerous and the latter recreational).[159]

The trope of the bad mother perversely extends to the criminal justice system. In part, this pattern continues due to erroneous distinctions between illicit drugs and prescription medications. A longitudinal study conducted by Dr. Allen A. Mitchell, Director of the Slone Epidemiology Center at Boston University, debunks misperceptions about drug use, particularly during

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156. Kellie E. M. Barr et al., *Race, Class, and Gender Differences in Substance Abuse: Evidence of Middle Class/Underclass Polarization Among Black Males*, 40 SOC. PROBS. 314, 318 tbl.2 (1993) (showing little statistical variation in illicit drug use for African-American and white women); *cf.* Sean Esteban McCabe et al., *Race/Ethnicity and Gender Differences in Drug Use and Abuse Among College Students*, 6 J. ETHNICITY SUBSTANCE ABUSE, no. 2, 2008, at 75, 82 tbl.1 (showing higher rates of illicit drug use among white undergraduate women as compared with African-American undergraduate women).

157. *See* Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas Country, Florida*, 322 NEW ENG. J. MED. 1202, 1204 (1990) ("[A] black woman was 9.6 times more likely than a white woman to be reported for substance abuse during pregnancy.").

158. *See* NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., DRUG ABUSE AMONG RACIAL/ETHNIC MINORITIES 43 (rev. ed. 2003) ("Estimates for lifetime history of illegal drug use indicate that use is highest among White women (51.2 percent), followed by African-American women (36.0 percent) . . . ."); Denise Kandel et al., *Prevalence and Demographic Correlates of Symptoms of Last Year Dependence on Alcohol, Nicotine, Marijuana and Cocaine in the U.S. Population*, 44 DRUG & ALCOHOL DEPENDENCE 11, 24 (1997) (noting that when accounting for those who smoke cigarettes, "blacks and Hispanics are significantly less likely than whites to be dependent; however, among those who used cocaine/crack within the last year, blacks are significantly more likely than any other group to be dependent"); Stephanie J. Ventura et al., *Trends and Variations in Smoking During Pregnancy and Low Birth Weight: Evidence from the Birth Certificate, 1990–2000*, 111 PEDIATRICS 1176, 1177 (2003) ("Prenatal smoking rates varied substantially among racial and Hispanic-origin populations . . . ranging in 2000 from . . . 9.2% of non-Hispanic black women, [and] 15.6% of non-Hispanic white women."); John M. Wallace, Jr, *The Social Ecology of Addiction: Race, Risk, and Resilience*, 103 PEDIATRICS 1122, 1123 (1999) ("Among adults, recent national data indicate that annual and current alcohol prevalences generally are highest among whites.").

159. *See* Elizabeth Tison, *Amending the Sentencing Guidelines for Cocaine Offenses: The 100-to-1 Ratio Is Not As "Cracked" Up As Some Suggest*, 27 S. ILL. U. L.J. 413, 416 (2003) (noting how the federal Anti-Drug Abuse Act of 1986 established a "100-to-1 quantity ratio between the two forms of cocaine").

pregnancy.[160] The study revealed that educated white women were more likely to rely on prescription medications during pregnancy, and their reliance increased by age.[161] Importantly, the prescription drugs most likely to be relied upon during pregnancy include powerful narcotics such as Demerol, Tylenol with codeine, Xanax, Oxycontin, and Ritalin.[162] My point here is to suggest that drug policies and trends in mass incarceration disparately and erroneously police women and mothers by stereotype and bias.

More than two-thirds of women in prison are mothers,[163] and the collateral impacts of their incarceration reach beyond the criminal justice system into the lives of their children. For example, these women are more likely to be the primary caretakers of their children—three times more likely than fathers (77%).[164] A relatively small percentage of incarcerated mothers had any support in caring for their kids prior to incarceration, unlike dads who overwhelmingly acknowledge that mothers were the primary caregivers to their children.[165] According to research conducted by the Bureau of Justice Statistics:

> Mothers were more likely than fathers to report living with at least one child. More than half of mothers held in state prison reported living with at least one of their children in the month before arrest, compared to 36% of fathers. More than 6 in 10 mothers reported living with their children just prior to incarceration or at either time, compared to less than half of fathers.[166]

For example, the collateral costs of the drug war and mass incarceration include burdens on parental rights. When lawmakers enacted the Adoption and Safe Families Act of 1997, which requires states to file petitions to terminate parental rights on behalf of any child who has been in foster care for fifteen of the most recent twenty-two months, they did not provide any special provisions for incarceration.[167] Importantly, the typical amount of time served for a drug-related offense far exceeds fifteen months,[168] meaning

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160. Allen A. Mitchell et al., *Medication Use During Pregnancy, with Particular Focus on Prescription Drugs: 1976-2008*, 205 AM. J. OBSTETRICS & GYNECOLOGY 51.e1, 51.e1 (2011).

161. *Id.* at 51.e4–.e5.

162. *Abusing Prescription Drugs During Pregnancy*, AM. PREGNANCY ASS'N, http://www.americanpregnancy.org/pregnancyhealth/abusingprescriptiondrugs.html [http://perma.cc/JVV7-LMAZ].

163. FROST ET AL., *supra* note 147, at 26; QUICK FACTS 2009, *supra* note 32.

164. QUICK FACTS 2009, *supra* note 32.

165. FROST ET AL., *supra* note 147, at 22.

166. GLAZE & MARUSCHAK, *supra* note 36, at 4.

167. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, 2118 (codified as amended at 42 U.S.C.A. § 675(5)(E) (West 2015)).

168. *See* U.S. SENTENCING COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES (2011), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mandatory_Minimum_Penalties.pdf [http://perma.cc/4D8X-P6G7] (reporting that the

that after being convicted of a drug-related offense, most women risk the permanent loss of parental rights.

No group is more impacted by this than African-American children. Black children are more than seven times more likely to experience a parent in prison compared to white children.[169] For Latino children, they are more than twice as likely as white children to experience a parent's incarceration.[170] And at least when interviewed, incarcerated women claim more children than men.[171] Often, these women are the primary caregivers prior to entering the criminal justice system. Furthermore, the psychological impacts of parental incarceration can be quite severe. Professor Kristin Turney's research argues that the impacts of incarceration on children are worse than experiencing a parent's death or suffering through divorce.[172]

The growing impact of mothers behind bars now results in babies born behind bars and children incarcerated alongside their mothers as a policy solution, highlighting mass incarceration's deeply contentious and fraught impacts. In their report *Mothers, Infants, and Imprisonment*, the Women's Prison Association's Institute on Women and Criminal Justice emphasizes that because "the number of women in prison has skyrocketed over the past 30 years, states have had to consider what it means to lock up women, many of whom are pregnant or parenting."[173] In most cases, children of incarcerated mothers, whether their births occur behind bars or not, move into various forms of "other" care, which may include relatives, foster homes, shelters, group homes, and other arrangements.

For the babies and children who have the benefit of residing alongside their mothers in prison nursery programs, the outcomes for both mothers and their babies show significant promise: recidivism rates are lower, and so far, "children show no adverse affects" of their lives behind bars.[174] Nevertheless, these options are fraught too. For example, the conditions of prisons and jails are sometimes horrific. As one reporter explains, the conditions of

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"average sentence for drug offenders subject to the mandatory minimum penalty was 132 months" and was sixty-one months for offenders subject to relief from mandatory minimum sentences).

169. GLAZE & MARUSCHAK, *supra* note 32, at 2.

170. *Id.*

171. *Id.*

172. Kristin Turney, *Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 55 J. HEALTH & SOC. BEHAV. 302, 311–14 (2014).

173. CHANDRA KRING VILLANUEVA, INST. ON WOMEN & CRIMINAL JUSTICE, WOMEN'S PRISON ASSOCIATION, MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES 4 (Sarah B. From & Georgia Lerner eds., 2009).

174. *Id.* at 5 ("By keeping mothers and infants together, these programs prevent foster care placement and allow for the formation of maternal/child bonds during a critical period of infant development.").

U.S. prisons where nurseries are found are so dire that "you walk through a metal detector and a locked steel door to a courtyard surrounded by razor wire and two 20-foot fences."[175]

Male-centered accounts about mass incarceration fail to paint a more vivid and illuminating tapestry about children forced into foster care due to their mother's incarceration[176] or the dramatic increase in the number of women incarcerated for drug-related offenses.[177] Pregnant women who are nonviolent, low-level drug addicts are subjected to similar penalties as black market drug traffickers with ties to cartels, large-scale organizations, and gangs.

III. Women and the Criminal Justice System: Their Eternal Record

In this Part, I briefly analyze the extra-legal and collateral consequences of policing women, including felony disenfranchisement, loss of housing, and the chilling impacts on their children. It unpacks what Professor James Jacobs terms "the eternal criminal record" and teases out findings in his compelling new book of the same name.[178] Unlike Goffman's *On The Run*, Jacobs' book is not an ethnography. He does not take to the trenches in New York to study crime on the ground and amongst those most policed. Nor does he specifically give attention to women.

However, Jacobs uncovers critical blind spots in criminal justice, specifically related to the criminal record. Some of these issues are featured in Goffman's descriptions about the challenges of 6th Street Boys' attempts to obtain drivers licenses and jobs. Yet, Jacobs offers much more by way of content and analysis about the general impacts of being labeled a criminal in American society. Part III draws from this and places women at the center of that analysis.

Women's invisibility to lawmakers, activists, and scholars studying the drug war may account for their misreading of the drug war as a problem in society for and about men generally and Black men especially. This misreading of the drug war and who it impacts neglects the unique ways in which women and children endure mass incarceration and the drug war

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175. Smalley, *supra* note 119.

176. *See* PARENTS IN PRISON, THE SENTENCING PROJECT 1–3 (2012) (showing that children with incarcerated parents are at a higher risk for particularly damaging social problems and that federal policies pose barriers that make it difficult for incarcerated parents to provide for their children's needs); Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1494 (2012) (depicting the "devaluation of incarcerated mothers" through the immediate placement of a pregnant mother's newborn in foster care).

177. Tammerlin Drummond, *Mothers in Prison*, TIME (Oct. 29, 2000), http://www.time.com/time/magazine/article/0,9171,58996,00.html [http://perma.cc/YPA4-TDN9] ("Florida is attempting to address a disturbing national phenomenon: the explosion in the number of mothers in prison.").

178. *See generally* JACOBS, *supra* note 37 (analyzing what it means for a person to have an "eternal criminal record").

especially. Rendering women invisible disserves lawmaking because it ignores the potentially harmful impacts of some policies, obfuscating how to better shape law to address poverty, drug abuse, and other social concerns. Misreading women and mass incarceration also ignores the long-term impact and consequences of a woman's criminal record.

According to James Jacobs, "[t]he criminal record is a kind of negative curriculum vitae or resumé."[179] It contains only "disreputable" information, and the longer the "rap sheet," the more a woman will endure the stigma of a career criminal.[180] The longer a woman's criminal record, the more difficult for her to plea bargain within the criminal justice system or to persuade judges of her contrition. It likely also impacts relationships with defense attorneys (the longer the criminal record, the more pressure to plea bargain even when a woman may be innocent of the charges alleged). Jacobs warns that what was originally a bookkeeping mechanism, the criminal record, has morphed to "drive decision making at every step of the criminal justice process."[181]

As a practical matter, the criminal record also impacts every step and opportunity that a woman may seek outside of the criminal justice system, rendering civilian life a different form of incarceration. Criminal records are traded like any commodity, commercially sold and acquired for tenant screening, employment, eligibility to serve as a volunteer, or even to become a student.[182] The criminal record now creates what Jacobs refers to as an enhanced pathway into the public domain.[183] These enhanced pathways no longer serve the criminal justice system alone, but now link to the commercialized reach of private information vendors.[184]

Criminal record vendors promote and sell criminal background checks to anyone willing to pay a fee, including for non-criminal justice purposes. These policy choices coincided with drug war policies of the 1970s.[185] According to Jacobs, Congress chipped away the FBI's policy that prevented criminal records from being shared with non-law enforcement agencies, including "certain industries, businesses, and voluntary associations."[186] Congress has now extended the privilege of obtaining criminal background

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179. *Id.* at 2.

180. *Id.*

181. *Id.*

182. *Id.* at 70.

183. *See id.* at 10 (explaining that court records' "enhanced accessibility has put into the public domain information that heretofore had existed in practical obscurity").

184. *Id.* at 70.

185. *See id.* at xiii (explaining "how the expansion of criminal law and the intensification of law enforcement since the 1970s have resulted in the proliferation of criminal intelligence and investigative databases").

186. *Id.* at 43.

information from the FBI to the securities industry, banks, child and eldercare organizations, housing authorities, and many more.[187] Even if obtaining some criminal background information could be justified for some industries, what has been less thought out is the use of this information by commercial enterprises that "download court and other publicly accessible criminal record information to their own proprietary databases,"[188] essentially privatizing public information, claiming the same types of rights to this information as government.

Thus, the very pathways to a restored and rehabilitated life may be cut off to women and men when they leave government incarceration because this seemingly private (and certainly personal) record not only becomes public but also follows them. And the impacts are corrosive. Further, for those who fall back into the clutches of criminal conduct, such as drug use, they are "subject to heavy sentence enhancements" because "the defendant's prior record has a significant impact on the sentence."[189] Jacobs argues that these policies are deliberate but unexamined.

Consider the Housing Opportunity Program Extension Act of 1996.[190] This law provides that the housing authority may request criminal conviction information as a screening device for housing applicants to filter out those who have been convicted.[191] Even when low-income women stay clear of law enforcement, the convictions of the men in their lives also become their problems, because "[u]nder HUD's one-strike policy, any drug offense may lead to eviction from public housing, even offenses of which the tenants themselves are unaware and even if the offenses were committed off-site."[192] This policy came under significant scrutiny in the wake of Shelly Anderson's eviction from low-income housing.[193] Anderson, a mother of three only weeks away from a kidney transplant, was found to be in violation of the one-strike policy because her boyfriend pleaded guilty to cocaine possession charges and in turn Anderson's house was searched.[194] The search did not turn up drugs, but it surfaced paraphernalia inside her mother's purse.[195] Despite no drug use of her own, Anderson now has a record within the

187. *Id.*

188. *Id.* at 10–11.

189. *Id.* at 3.

190. Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C.).

191. 42 U.S.C. § 1437d(q)(1)(A) (2012).

192. Arin Greenwood, *'One Strike' Public Housing Policy Hits Virginia Woman Who Needs Kidney Transplant*, HUFFINGTON POST (Dec. 22, 2011, 11:45 AM), http://www.huffingtonpost.com/2011/12/22/one-strike-policy-housing-alexandria-virginia-kidney-transplant_n_1151639.html [http://perma.cc/W9BD-X4CL].

193. *Id.*

194. *Id.*

195. *Id.*

government's housing system. And for many women, this is a powerful form of disenfranchisement, especially as primary caretakers.

Housing aside, the criminal record now serves as a gatekeeping function for many other purposes. In 1998, Congress passed a law that bars any student with a drug conviction from obtaining federal loans to fund her education.[196] Prospective students most impacted by this law will not be wealthy young adults from educated families, but low-income persons. Journalist Clarence Page refers to such laws as creating a "[w]ar on our children."[197] However, this too may be a war on mothers who seek to return to school as a new pathway in their lives, because such policies cut off the pathway.

For lawmakers, activists, and scholars who care about mass incarceration, education reform, safe housing, and related social issues, urging policy solutions that filter out women and concentrate primarily on the lives of men ignores women's interactions within the broader criminal justice system. In such circumstances, not only are women invisible, but their sometimes abusive interactions with police who exploit their drug dependence, selective prosecutions of women for drug offenses—particularly pregnant women—and long-term problems associated with their criminal records are also imperceptible.

Conclusion

There are many reasons one could choose not to study the lives of low-income or working-class women and girls impacted by mass incarceration. However, dismissing the value of that research based on the belief that prior studies exhaust whatever there was to say about that population is shortsighted. In *On The Run*, Alice Goffman passed aside observing the lives of women living in the trenches of poverty and police violence because she believed it was covered by less than a handful of books on welfare. That betrays an understanding about the complexity of Black women's lives in criminal and civil justice systems. In describing why she abandons researching about women and girls on 6th Street, Goffman explains that she had "learned a lot about . . . women struggling on welfare," referencing three books and doubting that she "could add to what these books had already said."[198]

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196. 20 U.S.C. § 1091(r)(1) (2012).

197. Clarence Page, *College Loans Are Casualties in Drug War*, CHI. TRIB. (Apr. 29, 2001), http://articles.chicagotribune.com/2001-04-29/news/0104290396_1_student-loans-wording-applicants [http://perma.cc/3Z76-FATT].

198. GOFFMAN, *supra* note 22, at 223.

This Review Essay considers where Goffman left off and fills in critical gaps by exploring James Jacobs' important new work, *The Eternal Criminal Record*. By wedding the stories of mass incarceration, the drug war, and the collateral impacts of the criminal record, a more nuanced understanding of women in the criminal justice system emerges. Essentially, women are rendered visible.

Marriage Markets and the Price of Masculinity

MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY. By June Carbone & Naomi Cahn. New York, N.Y.: Oxford University Press, 2014. 272 Pages. $27.50.

Camille Gear Rich*

Introduction

Obergefell v. Hodges,[1] the recent Supreme Court decision recognizing gay Americans' right to marry, demonstrates that the United States continues to promote marriage in both direct and subtle ways. *Obergefell* is one of the government's less subtle recent efforts to market marriage. The decision makes it clear that from the State's perspective, marriage remains a near ideal form of social union. As *Obergefell* explains, marriage in the United States is an institution of "transcendent importance"; it is "essential . . . to the human condition."[2] Marriage is special because it "allows two people to find a life that could not be found alone."[3] The Supreme Court's romantic musings in *Obergefell* about the centrality of marriage will seem particularly ironic to readers of the book *Marriage Markets: How Inequality is Remaking the American Family*,[4] for the Court's words stand in stark contrast to the account the book's authors provide of the marriage market in the United States. Specifically, June Carbone and Naomi Cahn reveal that we live in an era of plummeting marriage rates, a time when increasing numbers of children are born out of wedlock[5] and increasing numbers of men and women never enter into what

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1. 135 S. Ct. 2584 (2015).

2. *Id.* at 2594.

3. *Id.*

4. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014).

5. *See* Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 277 (2009) (finding that, as of 2000, families headed by single mothers grew to represent 31% of all American families, 26% of white families, and 61% of black families).

the Supreme Court describes as America's most "sacred" union.[6] If marriage is the central institution that the Supreme Court claims, and if the government still regards marriage promotion as a key activity,[7] the time has come for policy makers to take stock and determine why the American marriage market is failing.

Although presented as a law and economics inquiry, *Marriage Markets* is not a typical market analysis, as market studies tend to move rapidly from the descriptive to the prescriptive.[8] The goal of a market analysis is to determine whether and how government might fix a particular supply and demand problem.[9] Cahn and Carbone's descriptive account is extraordinarily compelling. *Marriage Markets* offers a comprehensive, detailed explanation for why increasing numbers of Americans fail to marry. The book's key contribution is that it shatters the myth of a single marriage market and reveals the operation of discrete, class-specific marriage markets.[10] Also, the authors reveal in striking terms how these class-specific markets feed on one another and work together to spur greater income inequality.[11]

Specifically, Carbone and Cahn show that marriage rates are high and divorce rates are low in wealthy communities, where relatively wealthy women choose to marry wealthier men and form stable unions.[12] For the working class and poor, the converse is true. Marriage rates are low, divorce rates are high, and in the poorest sectors marriage is so rare that it seems a largely irrelevant social institution. The authors fault a postindustrial economy that leaves working-class men under or unemployed and therefore makes them less attractive marriage partners to their working-class and poor female peers.[13] Poor and working-class women face powerful economic disincentives to marry, as coupling with economically vulnerable men does not seem a rational economic choice.[14]

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6. *Obergefell*, 135 S. Ct. at 2594. In 1982, 4% of white high school graduates and 48% of black high school graduates had children out of wedlock; by 2008, those figures had increased to 34% and 74%, respectively. CARBONE & CAHN, *supra* note 4, at 18.

7. *See* Gustafson, *supra* note 5, at 287–90 (discussing the range of state and federal programs designed to promote marriage); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1650–52 (2005) (same).

8. *See, e.g.*, Peter McDonald, *An Assessment of Policies that Support Having Children from the Perspectives of Equity, Efficiency and Efficacy*, *in* VIENNA YEARBOOK OF POPULATION RESEARCH 232–33 (2006) (discussing the spectrum of fertility rates in different societies and proposing policies to promote safe societal fertility rates).

9. *See id.* at 215 (stressing the need for governmental institutions to be structured in a way that allows people to fulfill their desire to have children).

10. CARBONE & CAHN, *supra* note 4, at 15–16, 62–63.

11. *Id.*

12. *Id.* at 62–63.

13. *Id.* at 4.

14. *Id.* at 3–4.

Cahn and Carbone also reveal the strong role that assortative mating plays in today's marriage market, a dynamic which makes men and women less likely to marry outside of their class group.[15] This dynamic locks poor and working-class women into a pool of men unlikely to become economically viable partner or husbands.[16] Class-segmented marriage markets spur inequality, the authors explain, because poor individuals remain single and get poorer, while wealthier individuals marry one another and are better situated to accumulate wealth.[17] Cahn and Carbone warn that there is no easy way to disrupt the inequality being produced by assortive mating trends.

The conditions Cahn and Carbone describe suggest that we are at a moment of market failure. Marriage produces public goods, but poor and working-class people no longer marry in sufficient numbers to produce the optimal level of these social goods from the State's perspective. Having diagnosed the causes of marriage-market failure, one would expect the authors to offer a solution designed to save the marriage market. However, Carbone and Cahn take a strikingly different turn with the prescriptive element of their project. They offer *no* suggestions for reforming *marriage* in ways that might revive the marriage market and make it a more alluring vehicle for coupling in poor communities. Instead, the authors seem content to abandon the marriage market for the working class and poor and instead produce the public goods that marriage would have produced from these couples through alternative legal structures.[18] The authors' decision not to reexamine and reform marriage is one of the most controversial aspects of the book, and their silence on this issue reveals their deep, unexplored ambivalence about marriage as an institution.

Gender studies scholars also will notice certain silences in *Marriage Markets*'s analysis, particularly scholars working in masculinity theory.[19] For these scholars, the book reads as a missed opportunity. Specifically, the authors' descriptive account, properly framed, reveals that the antiquated

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15. *Id.* at 4–5.

16. *Id.*

17. *Id.* at 62–63.

18. *Id.* at 145–46, 158–59.

19. Masculinity studies explore the ways in which dominant or hegemonic versions of masculinity shape men's lives by affecting intimate bargains, self-concept, and social behavior. *E.g.*, Lynne Segal, *Changing Men: Masculinities in Context*, 22 THEORY & SOC'Y 625, 628 (1993) (discussing masculinity as being always under threat and therefore requiring continuous gender performance); *see also* Camille Gear Rich, *Angela Harris and the Racial Politics of Masculinity: Trayvon Martin, George Zimmerman, and the Dilemmas of Desiring Whiteness*, 102 CALIF. L. REV. 1027, 1048 (2014) (arguing that hierarchical racialized concepts of masculinity spur conflict and violence between men of different races); Camille Gear Rich, *Innocence Interrupted: Reconstructing Fatherhood in the Shadow of Child Molestation Law*, 101 CALIF. L. REV. 609, 613–14 (2013) (explaining how masculinity constructs cause men who provide care to feel suspect and insecure).

male "breadwinner" construct plays a central, destructive role in the American marriage market as it renders under and unemployed working-class and poor men unmarriageable.[20] Breadwinner masculinity—or what I call "economic masculinity"—casts these men as failed men that cannot secure living-wage jobs.[21] Yet economists know that jobs for poor and working-class men are typically scarce in the postmanufacturing economy.[22] Additionally, properly framed, the data in *Marriage Markets* reveals the rise of the female marriage-market consumer. Women are now the primary drivers of large segments of the marriage market. For the first time, marriage markets are failing because *women* are not interested in buying into the particular long-term commitment marriage offers.[23]

When these shifts in gender relations are revealed, we learn that American marriage markets have evolved into masculinity markets. Female consumers of all wage classes are shopping for economic masculinity, but economic masculinity is a commodity that increasingly only wealthy women can secure. The gender frame also shows that the marriage-market crisis cannot be solved without considering the cost (or tax) that the traditional, economic model of masculinity currently imposes on men in the United States. The centrality of the male-breadwinner construct is now compromising men's ability to secure marriage partners. The gender frame additionally suggests that policy makers should target marriage-market changes to appeal to the newly emerged female marriage-market consumer. However, in making this appeal, policy makers should bear in mind that marriage and masculinity are symbiotic and conjoined. If we change marriage, we will likely see changes in masculinity. If masculinity changes in response to legal incentives or contemporary cultural conditions, marriage will change as well. One thing is clear: at present, marriage's association with economic masculinity is dysfunctional and must be resolved. If the relationship remains the same, poor women will continue to avoid long-term formal marriage commitments.

This Review reframes *Marriage Markets* using tools from economics and masculinity studies to surface the gender-market theory hidden within the class-based account provided in the book. Part I, subpart I(A) begins by documenting the emergence of the female marriage-market consumer and the consequences of this development. Subpart I(B) explores why the poor, female marriage-market consumer concludes that traditional marriage no longer serves her economic interests, namely because her desire for economic masculinity in a marriage causes her to reject most male suitors.

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20. CARBONE & CAHN, *supra* note 4, at 98–99.

21. *Id.*

22. *Id.* at 98 (mentioning the sizable gap in employment between working-class men and college-graduate men in the modern economy).

23. *Id.* at 98–102.

Subpart I(C) explores the complicated ways traditional masculinity has negotiated the economic downturn and continues to play a key role in working-class and poor women's coupling preferences. This subpart uses Rick Bank's concept of "swag," or traditional masculinity, to show that traditional masculinity has value even in the absence of earning power and that it may play a powerful sociocultural role in coupling markets by allowing economically marginal men to attract female partners.[24] Subpart I(C) also considers the dangerous path that men committed to economic masculinity can take when they are stripped of earning capacity by market conditions. Subpart I(D) explores the race and gender equality impact of the strong, female marriage consumer. Specifically, the assortative mating Carbone and Cahn complain of may merely be a side effect of marriage's evolution from an economically coercive institution for women to an economically and socially empowering one. Class-matched marriages (particularly for the wealthy) eliminate the severe forms of economic coercion that historically made marriage an exploitative arrangement for poor and working-class women. Class-matched marriages also can have racial-integration effects, as wealthy women of color are more likely to pair with men outside of their racial group when they determine that class or wealth are more privileged considerations rather than racial background.

Part II then considers whether marriage must change or masculinity must change in order to spur contemporary long-term coupling in working-class and poor communities. Subpart II(A) makes the case for why marriage should be saved, rather than pursuing some alternate vehicle for coupling. It argues that marriage's long, symbiotic relationship with traditional masculinity and femininity makes it a uniquely useful vehicle for responding to changes in the politics of heterosexual coupling. Subpart II(B) focuses on how we might change marriage to make it more attractive to a key pool of marriage-market consumers: poor women. I argue that poor women would be more likely to marry if we develop marriage models that minimize women's economic risk and maximize their access to economic resources in extended-kinship networks. Subpart II(C) explores how masculinity might change if marriage norms and rules remain in their traditional form. I show that female primary breadwinners are likely to domesticate masculinity in ways that track earlier versions of femininity: either as status signaling—sexually attractive but with little instrumental function—or as caretaking, desexualized masculinity associated with the domestic sphere. Part III concludes.

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24. RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 134–35 (2011) (discussing the strong appeal of a variant of traditional masculinity called "swag").

I. Understanding the American Marriage Market

A. The Rise of the Female Consumer

Cahn and Carbone have long been respected for their scholarship exploring the ways class, region, and politics shape American families.[25] *Marriage Markets* is a nuanced account of the ways coupling and family formation spur wealth inequality and therefore is a welcome addition to the family law corpus. The authors begin their analysis by noting that the American marriage market is experiencing market failure, at least for key segments of the market where marriage has all but disappeared.[26] Market failure occurs when parties refuse to engage in behavior that produces a social good or positive externality because the immediate private costs of the practice are higher than the private benefits produced.[27] As applied to marriage, this construct suggests that for the American working and nonworking poor, the immediate economic and social cost of being married is far higher than the benefits of the institution.[28] Working-class and poor couples, however, are agnostic as to the social goods produced by their marriages that are of benefit to the State.[29] As a consequence, the State must find ways to ensure that poor and working-class individuals find enough immediate and apparent private benefits from marriage to outweigh its perceived private costs. Carbone and Cahn leave this more extended description of marriage market failure out of their analysis, but this background is key to identifying the analytic problems in their approach.

As Carbone and Cahn explain, the original discussion of marriage markets, offered by Gary Becker, described something called the gender bargain—the division of familial roles into domestic sphere "labor" for

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25. *See generally, e.g.*, NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010) (identifying distinct family orders in red and blue states, characterized by different marriage and childbearing behavior that tracks the states' dissimilar demographics, culture, and family law).

26. Carbone and Cahn do not use these terms, but argue that people are no longer marrying in sufficient numbers to provide the optimal amount of social good produced by this activity. CARBONE & CAHN, *supra* note 4, at 2.

27. Richard O. Zerbe Jr. & Howard McCurdy, *The End of Market Failure*, 23 REGULATION, no. 2, 2000, at 10, 11; *see also* Peter McDonald, *supra* note 8, at 215 (explaining that in the context of birth rates, "very low fertility is often seen as the cumulated outcome of individuals acting in their own interest"); Joseph E. Stiglitz, *Markets, Market Failures, and Development*, 79 AM. ECON. REV. (PAPERS & PROC.) 197, 202 (1989) (urging policy makers to identify the causes and consequences of market failure, the failure of private institutions to address the problems, and the role government can take to remedy these problems).

28. *See* Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, FUTURE CHILD., Autumn 2005, at 117, 122 (explaining how the class-based concerns of the poor encourage skepticism to commitment).

29. *See id.* at 129 (detailing different theories about why childbearing increasingly happens outside of marriage, including positing that poor couples place a lower value on marriage than does the middle class).

women and public sphere "earning" for men.[30] This division of labor made coupling wise from a rational-actor perspective, as both activities were necessary to support families. However, as Carbone and Cahn explain, the gender bargain has broken down for many women in postindustrial America.[31] Plentiful female-gendered service economy jobs, coupled with women's greater labor-market participation, have made women newly economically self-sufficient.[32] By contrast, the scarcity of male-gendered living wage jobs in postindustrial America means poor and working-class men are under or unemployed and therefore, for independent women, represent a risk of economic dependency.[33] These men are not only incapable of finding a job sufficient to support a family, but they also may not be able to support themselves.[34] As a result, the newly empowered female marriage-market consumer often will reject poor and working-class men—even when she is pregnant and even when a man wants to marry her—because she is convinced she can support herself and a child but has no desire to support a man as well.[35]

The newly empowered female marriage-market consumer faces a second challenge—the unavailability of wealthy and middle-class men from the pool of eligible marriage partners, unless she is highly educated herself.[36] As Carbone and Cahn explain, marriage markets are now class sensitive.[37] Half a century ago, professional men often married their secretaries.[38] Today, these men are more likely to marry the female executive down the hall.[39] This trend is called "assortative mating": high-earning men are primarily interested in marrying high-earning women.[40] This dynamic makes rich men and women richer by marrying each other

30. CARBONE & CAHN, *supra* note 4, at 42.

31. *Id.* at 43–44.

32. *Id.* This self-sufficiency is in some ways a myth, as poor women draw on resources from extended family networks and often go without necessities in order to remain economically afloat when they raise children without a marital partner. *See* Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 28, 48 (1995) (discussing the difficulties of supporting a family as a single mother and the frequent need to rely on private sources of support such as extended families and friends).

33. CARBONE & CAHN, *supra* note 4, at 98–99.

34. *Id.*

35. *Id.* at 12.

36. *Id.* at 62–63.

37. *Id.* at 4–5.

38. *See* Donald M. Marvin, *Occupational Propinquity as a Factor in Marriage Selection*, 16 PUBLICATIONS. AM. STAT. ASS'N 131, 131 (1918) ("[M]en are now marrying the women whom they meet in their work.").

39. *See* Michael Kallenbach, *Bosses Are No Longer Marrying Their Secretaries*, HUFFINGTON POST (Apr. 19, 2014, 10:59 AM), http://www.huffingtonpost.co.uk/michael-kallenbach/bosses-are-no-longer-marr_b_4802769.html [http://perma.cc/C76G-LF7T] (quoting John Goldthorpe, who noted that in the 1960s "you would have a big sex difference—the nurse marrying the surgeon, the businessman marrying the secretary").

40. CARBONE & CAHN, *supra* note 4, at 62.

and leaves poor and unemployed women with increasingly scant marriage prospects, as they view the men in their own class as economically unstable.[41]

When the research in *Marriage Markets* is framed in this way, the rise of the female consumer seems clear to readers. However, Cahn and Carbone bury this story in service of an account that tries to devote equal time to the decision-making calculus of both male and female decision makers in the marriage-market equation.[42] This decision seems consistent with a liberal feminist impulse to always treat men's and women's concerns equally, as a way of modeling the equality desired in cross-gender relationships. While this is an admirable impulse, in this analysis it detracts from the precision of their work and muddles their findings. Carbone and Cahn would have provided a clearer analysis and clearer prescription for the marriage market's current problems if they conceded that, at least in the lowest economic tiers, women are the decision makers that control the terms of long-term coupling.

Moreover, rather than muting the story of the rise of the female marriage-market consumer, feminists should be celebrating this development. Women historically faced strong incentives to marry, but they no longer feel herded by these pressures.[43] Pregnancy and the stigma of single motherhood used to drive women into marriage; economic vulnerability and a lack of female-gendered, living-wage jobs kept them locked in unhappy marriages. However, changed social norms about nonmarital births, increased access to contraception, and economic opportunity made women less afraid to be single, even if they have children.[44] With these changes, women's marriage rates have slowed.[45] By contrast, economically marginal men stand to *benefit* from pairing with an employed poor or working-class woman.[46] These women provide a steady income and, for the most part, still provide all the private-sphere benefits of care and domestic labor.[47] Yet men find themselves moving from relationship to relationship, cast out and advised to move on whenever they have no income.[48]

Marriage Markets's failure to emphasize the rise of the female marriage-market consumer has huge consequences for the authors' analysis. First, they fail to recognize that the marriage market must adapt to appeal to

41. *Id.* at 97–101.

42. *Id.* at 42–43.

43. *Id.* at 43.

44. *Id.* at 17.

45. *Id.* at 17, 122 (noting statistics that show women of a lower socioeconomic status are increasingly less likely to commit to marriage).

46. *Id.* at 120–22.

47. *Id.* at 119–20.

48. *Id.* at 2–3.

this newly emerged, working-class female marriage-market consumer or the market will stagnate. Importantly, men historically have held primary buying power in the marriage market.[49] Locked out of the employment market or forced into low wage jobs, economically vulnerable women offered themselves in the gender bargain–exchange as lovers, mothers, and homemakers.[50] By contrast, the women who now hold buying power in the marriage market relative to working-class men typically do not see masculinity as providing any of the aforementioned private-sphere goods.[51] As a result, poor and working-class women are loath to invest in economically insecure male partners.[52] If the State is interested in marriage promotion, it must find ways to make it economically attractive for women to invest in economically marginal men or carry them through expected periods of unemployment in the postindustrial economy.[53]

Second, the authors fail to take stock of the costs traditional masculinity imposes on both female and male marriage-market consumers. As explained above, poor and working-class men are burdened by economic masculinity because economic masculinity is a key marriage-market qualification they cannot secure. However, at a broader level, men today are paying the price for a historical and legal context that encouraged the creation of male-gendered, manufacturing living-wage jobs and unstable, low-wage female-gendered service jobs for which men did not compete. Men currently are culturally predisposed to avoid these traditionally female-gendered service economy jobs, making men even more marginal in today's economy.[54] Also, women that now rely on these service economy jobs find these jobs do not truly produce a family wage; consequently, these women do not have sufficient additional income to support a male partner as well as their children.[55] By reframing the discussion in *Marriage Markets* as an inquiry into the needs of female marriage-market consumers, we gain interesting insights about how to reframe marriage and reframe masculinity, as well as new ways to move marriage markets in working-class and poor communities beyond stagnation.

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49. *Id.* at 43.

50. *Id.*

51. *Id.* at 120–21.

52. *See id.* at 59 (analyzing marriage prospects when the number of marriageable men declines in comparison with the number of available women).

53. Robin L. Jarrett, *Living Poor: Family Life Among Single Parent, African-American Women*, 41 SOC. PROBS. 30, 38 (1994). As one respondent explained, "I could do bad by myself." *Id.*

54. *See* CARBONE & CAHN, *supra* note 4, at 142 (discussing how women's labor-force participation has fueled the growth of the service section).

55. Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 235 (2014) (noting that a majority of fast-food workers are enrolled in one or more public assistance programs).

B. Market Failure and the Role of Poor Women's Market Preferences

When policy problems are described in market terms, analysts typically have identified a particular social practice or activity individuals engage in that produces a public good that accrues to society more generally.[56] Government's goal is to ensure that the "market," or social context, properly incentivizes individuals to engage in the practice to the near-optimal level so the State can reap the greatest amount of social good possible.[57] When the market—standing alone—fails to incentivize citizens to engage in the practice that produces social value for the State, the State devises incentives for parties to engage in the practice at a greater level.[58] In order to devise these incentives, the State must understand the private good that the practice produces for families and whether that good can be supplemented in a way that might encourage more of the desired practice.[59] Applied here, the market-failure framework requires us to ask: What do poor women like about marriage, and how can we shore up the private benefits they receive from marriage so more women enter this institution?

Curiously, Cahn and Carbone seem preoccupied with what the *State* gains from marriage and with identifying legal mechanisms they can create, other than marriage, to secure the public goods that are in the State's interest.[60] Specifically, Carbone and Cahn explain that the primary social good or function marriage provides to the State is that it facilitates poor parents' economic and emotional resource distribution to their children, as well as wealth transmission to the next generation.[61] This analytic misstep causes multiple problems in the book. First, the authors fail to engage with what poor women want for themselves from marriage: *immediate and long-term economic contribution for themselves and their children, as well as emotional support.* Second, because the authors fail to identify other existing social institutions that are providing the emotional and economic resources women receive in the absence of a marriage, they fail to determine whether these alternative sources should be built into marriage or become an effective replacement for marriage itself.

When we focus on the interest as stated by poor mothers, two issues become clear. First, poor women have lost interest in marriage because they still hew to the idea that a male breadwinner (or contributor) should be providing substantial resources to support his family. They will not couple

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56. *E.g.*, McDonald, *supra* note 8, at 214.

57. *See* Zerbe & McCurdy, *supra* note 27, at 10.

58. *Id.*

59. *See id.* (explaining that a market failure can be resolved by creating incentives that will allow the market failure to correct itself).

60. *See* CARBONE & CAHN, *supra* note 4, at 133–40 (discussing the marital presumption).

61. *See id.* at 189–92 (discussing the marital presumption's impact on parenting and child support).

with a man that does not possess economic masculinity, even though they recognize that marriage provides multiple other values. Second, the replacement for marriage—the place where poor women draw economic and emotional resources—is the kinship network.[62] Poor women have, for practical reasons, been forced to reject the nuclear-family model.[63] If Carbone and Cahn think there are special benefits from marriage, they should find ways to link this interest in kinship back together with marriage. With these two propositions in view, policy makers can determine whether marriage can be altered in ways that both disrupt the male-breadwinner construct and enable poor women to access their currently preferred kinship networks of economic support in a postindustrial economy. Each issue merits further discussion.

Historically, the State has constructed marriage and the nuclear family as a way for women to domesticate a male breadwinner to support a wife and children.[64] As Carbone and Cahn explain, in the postmanufacturing economy, women realize that this arrangement is extremely unlikely and have modified their gender scripts to accept a modified form of economic masculinity: men that can support themselves and occasionally contribute to household expenses.[65] However, this modified form of masculinity is not a meaningful change for most working-class and poor men, as it is still economic masculinity—a construct that defines men, first and foremost, by their earning capacity. Cahn and Carbone provide evidence that waiting for true economic masculinity causes poor women to enter a holding pattern with economically insecure male partners while the two wait for their economic fortunes to stabilize, rather than marrying earlier.[66] However, rather than disrupt this construct, Carbone and Cahn seem to double down on it in their analysis. First, their discussion of sex-role ratios, which judges the number of women in relation to marriageable men, is based on economic masculinity. Men who are unemployed, have been imprisoned, or suffer other obstacles that prevent them from being earners are largely written off and rendered invisible in their analysis. Second, Carbone and Cahn urge the government to create more living-wage jobs for men to assist men in assuming the modified breadwinner role.[67]

When we remove the masculine-breadwinner construct from poor women's economic calculations, we can see that their true interest is to

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62. Naomi Gerstel, *Rethinking Families and Community: The Color, Class, and Centrality of Extended Kin Ties*, 26 SOC. F. 1, 13–15 (2011) (explaining that the focus on the nuclear family renders invisible the very kinship-network resources necessary for poor people's survival).

63. *Id.*

64. *See* Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 854 (2004) (discussing the author's specialization thesis).

65. CARBONE & CAHN, *supra* note 4, at 110–11.

66. *Id.* at 111.

67. *Id.* at 142–43, 152–53.

secure additional economic contribution to support themselves and their children, regardless of its source.[68] Consequently, they may cycle through men employed on a short-term basis, retaining them only as long as they can perform economic masculinity.[69] However, the primary adaptive strategy single, poor women have turned to in the absence of a marital partner is tapping their kinship networks for economic and emotional support.[70] When framed in this manner, one realizes that the key to incentivizing marriage is to demonstrate that it enhances kinship networks.

The discussion of the benefits that poor women derive from marriage, as well as their adaptive responses to marriage-market failure, prioritizes their interest in private benefits—concerns about immediate economic value and support. This analysis does not prioritize the concerns Carbone and Cahn raise as public or social benefits that are in the State's interest, including intergenerational wealth transmission and the distribution of economic and emotional resources between immediate parents and their children. However, the State can devise marriage models that still produce these benefits while emphasizing kinship benefits. The key point is that if the goal is to incentivize women, we must respond to their current preferences, not simply legally enforce obligations through alternative vehicles.[71]

If marriage is reformed to respond to women's current adaptive behaviors and private-benefit considerations, policy makers will have to effect a serious change in the cultural understanding of marriage. They will have to encourage women to see marriage as kinship building rather than as a vehicle for hoarding resources within the nuclear family.[72] This shift is key, as old understandings of marriage no longer hold true for the poor. In a postmanufacturing, service-based economy, women typically cannot use

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68. *See* Cherlin, *supra* note 64, at 855–56 (discussing how low-income individuals view marriage). By "regardless of their source," I am referring to legal, altruistic, or trading opportunities for emotional and economic contribution. *See* Jarrett, *supra* note 53, at 41–44 (discussing alternatives to conventional marriage that some poor mothers seek in order to achieve economic stability for their families).

69. *See* Cherlin, *supra* note 64, at 855 (explaining that poor women may express an end goal of marriage but will not marry until they find someone with economic stability).

70. *See* Jarrett, *supra* note 53, at 41–43 (discussing "single" mothers' reliance on grandmothers, sisters, and daughters for advice and childcare and describing poor women's ability to call on a network of male relatives to provide paternal support in the absence of a child's father).

71. Again, a traditional market analysis counsels that the first response should be to assess and shape existing incentive structures rather than create new institutions. *E.g.*, McDonald, *supra* note 8, at 216.

72. Young-Il Kim & Jeffrey Dew, *Marital Investments and Community Involvement: A Test of Coser's Greedy Marriage Thesis*, 58 SOC. PERSP. (ONLINE FIRST), Aug. 22, 2015, at 1 (discussing research suggesting that certain understandings of the nuclear family discourage resource sharing outside of the nuclear unit).

marriage to domesticate and secure a male breadwinner or life partner.[73] What they can do through marriage is seal themselves and their children to a larger biological and nonbiological social network that can provide economic, emotional, and social resources. This approach returns marriage to its preindustrial foundation.[74] Indeed, in the preindustrial era, marriage was the mechanism that tied nonbiologically linked kin networks to other networks, helping extended families function as a collective and thereby build a strong economic foundation. In the industrial era, marriage shifted to support the hoarding of resources within a nuclear family unit, but this model is no longer economically sustainable for many families.[75] What today's economy requires is a vehicle that encourages poor and working-class women to invest in economically marginal male partners who present an economic risk; they are more likely to do so if they see greater potential gain by accessing the husband's family network. The rational female consumer realizes that this family network can continue to support her even if her husband fails to secure employment. Also, her economic investments in the male partner are more likely to be recognized, rewarded, and repaid by the husband's kin and therefore incentivize her investment.

Additionally, a marriage model that focuses on kinship networks deemphasizes the understanding of marriage as a childrearing institution, recognizing that resource redistribution can benefit vulnerable adults as well. This approach to marriage as kinship resolves a fundamental and unnecessary split within the family law literature that has tended to either stress the importance of networked family arrangements or, alternatively, the need to strengthen the nuclear family. For marriage does not by definition render networked families and kinship invisible; this is simply marriage's modern form.[76] If the State reframed marriage as a device that extends kinship rather than a device that creates a nuclear family, it would

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73. *See* Gustafson, *supra* note 5, at 296 (explaining that women already receiving welfare are likely to marry men who are also low wage earners, and therefore marriage alone will not move women out of poverty).

74. EVELYN NAKANO GLENN, FORCED TO CARE: COERCION AND CAREGIVING IN AMERICA 12 (2010) (describing preindustrial gender relations as more fluid, with women participating in economic activity as well as providing family care).

75. *Id.* at 17–19 (arguing that men advocated for a family wage as industrialization increased and that they ultimately came to be seen as the only family laborer, thus rendering women's continuing economic contributions invisible). As Glenn explains, after the mid 1800s, "[i]ncreasingly a living wage was seen as enabling men and their families to enjoy an 'American Standard of Living.' This living standard included not only consumer goods but also an idealized family form with clearly differentiated gender roles." *Id.* at 22–23.

76. *But see* Gerstel, *supra* note 62, at 10–12 (arguing that marriage is a greedy institution and that research shows married persons are *less* likely to maintain kin relations). Kinship may in fact encourage unions to become more stable. *See, e.g.*, Susan G. Timmer & Joseph Veroff, *Family Ties and the Discontinuity of Divorce in Black and White Newlywed Couples*, 62 J. MARRIAGE & FAM. 349 (2000) (explaining that when a wife's parents were divorced or separated, the couple's closeness with the husband's family reduced their risk of divorce).

fundamentally change female marriage consumers' economic calculations. Rather than waiting for a male partner to gain true economic strength,[77] his female partner would make her decision about marriage by considering whether his family could and would be willing to provide assistance with her costs and the costs of her children.

C. Law's Role in Constructing Masculinity

The second problem occluded by the discussion in *Marriage Markets* is the central role breadwinning, or economic masculinity, plays in depressing marriage rates among the working class and poor. Cahn and Carbone rightly note that gender scripts have changed in light of economic realities that make it impossible for most working-class and poor men to assume the traditional male breadwinner role.[78] Yet their research suggests that women have simply modified the original breadwinner construct into a new iteration of economic masculinity; they will only consider a man who can financially contribute to the household and independently support himself.[79] Additionally, women understand economic masculinity to include certain values and understandings, including: maturity, fiscal responsibility, and goal setting.[80] Economic power and agency, however, remain key to mate selection.[81] Poor women refuse to marry men that are in their class group and will avoid men that threaten their already vulnerable position.[82]

Carbone and Cahn believe they should stop here in outlining the new gender dynamics of contemporary marriage markets. They argue that masculinity fights are too fraught for them to offer any prognosis or advice beyond these observations in how gender might change.[83] In this way,

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77. *See, e.g.*, Kevin M. Roy et al., *Together but Not "Together": Trajectories of Relationship Suspension for Low-Income Unmarried Parents*, 57 FAM. REL. 198, 207 (2008) (noting that, at present, "the period of waiting for men's economic potential to emerge is seen as the first steps to marriage").

78. CARBONE & CAHN, *supra* note 4, at 75–81.

79. *See, e.g.*, *id.* at 100–01 (emphasizing how men's financial contributions to the family unit, or lack thereof, factor into the calculus of working-class women's marriage decisions).

80. *See* Pamela C. Regan et al., *Partner Preferences: What Characteristics Do Men and Women Desire in Their Short-Term Sexual and Long-Term Romantic Partners?*, 12 J. PSYCHOL. & HUM. SEXUALITY, no. 3, 2000, at 1, 9, 11, 15 (finding that in long-term mate selection, women emphasize social status more than men do, but that mate criteria such as ambition and higher education were more important than wealth).

81. *Id.*

82. This desire for economically strong masculinity is particularly pronounced in poor, African-American communities. Richard A. Bulcroft & Kris A. Bulcroft, *Race Differences in Attitudinal and Motivational Factors in the Decision to Marry*, 55 J. MARRIAGE & FAM. 338, 345 (1993).

83. *See* CARBONE & CAHN, *supra* note 4, at 73 (rejecting the argument made by some scholars that changes in marriage rates must be addressed through cultural changes as opposed to economics or employment).

however, their analysis is somewhat naïve about their project, and this desire to stay out of the fray makes them offer proposals with conflicting visions of masculinity. Both of the key reforms they offer readers are tied to visions of masculinity—one refuting the need for men to define themselves through economic power, the other holding true to the traditional definition. They first offer a kinder, gentler version of masculinity that emphasizes the ethics of care.[84] Under this model, fathers' emotional support is seen as a true contribution, equally important as financial resources.[85] This change primarily will affect child-support enforcement regulations, as fathers' investments in child care would be valued.[86] The authors also want to encourage men to claim male children that are not biologically their own.[87] Asking men to abandon biology-based property relationships to their children and those of other men is a major departure from traditional masculine understandings.[88] Finally, they propose to rewrite gender scripts in ways that stress values of interdependence, care, and collaboration—all values that are associated with female-gendered norms.[89]

Their second set of proposals seems to double down on economic masculinity in something close to its original form. Urging government to engage in job creation to ensure that poor and working-class men have adequate jobs still assumes that these men must offer economic value to be considered attractive marriage partners.[90] It does little to disrupt the gender scripts currently in place, except to forecast economic arrangements that allow for more egalitarian economic relationships in marriage.[91] For the masculinities scholar, however, the authors' shallow and sometimes accidental engagements with changing male gender constructs merely tease

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84. *See id.* at 110–11 (describing a new model of marriage that emphasizes spousal interdependence, joint responsibility, and a lack of gender-assigned roles). To the extent their model rests on a version of masculinity that can perform functions traditionally gendered as female, the authors are deeply challenging traditional masculinity norms.

85. *See* Cherlin, *supra* note 64, at 856 (noting that among lower income women a family-first commitment is as important as a reliable income, and noting further that most young adult women view marriage as centered more on love than on practical matters). Despite these views about the importance of love, many still are unwilling to enter into formal marriages in the absence of perceived financial security.

86. *See* CARBONE & CAHN, *supra* note 4, at 117 (noting the inverse relationship between a father's time spent with the child and his financial child-support obligations).

87. *See id.* at 191–93 (arguing for recognition of "functional" or "potential" parents in family law systems).

88. There is some evidence that working-class women value men that can achieve this new masculine ideal. Jarrett, *supra* note 53, at 43.

89. *See* CARBONE & CAHN, *supra* note 4, at 110 (noting that their understanding of equitable marriage "implicitly rests on the new social script that replaces specialized marital roles . . . with spousal interdependence").

90. *Id.* at 150–53.

91. *Id.* at 110–11.

at what their powerful analytic minds might have generated had they embraced the full challenges of engaging with masculinity in a more forthright manner.

Gender studies scholars have long argued that traditional masculinity constructs impose costs on men, requiring compliance with often unattainable ideals and in this way breeding anxiety and conflict.[92] These concerns have become more acute in a postindustrial economy that compromises men's ability to achieve breadwinner status. Indeed, some have characterized the current era as a period of "masculinity crisis" or alternatively as "the end of men."[93] Yet evidence suggests that rather than being in crisis, traditional masculinity will survive postindustrial economic changes, but in modified form.[94] Traditional masculinity continues to carry high value in the dating market, despite its low instrumental function.[95] In his book *Is Marriage for White People?*, Richard Banks provides an account that suggests one version of masculinity, characterized by its prominent display of traditional masculinity markers, is so powerful that it disrupts the current assortative mating trend in some racial communities.[96] Specifically, he notes that wealthy and middle-class black women are partnering with working-class black men, defying the assortative-mating trend, in part because there are too few middle-class black men to match their numbers, but also because they are attracted to working-class men's display of "swag"— a particular affected version of traditional masculinity that is common in working-class communities.[97]

Banks describes swag as "confidence, brashness, bravado, charisma."[98] He notes that swag is projected through "appearance," and "style and demeanor as well."[99] The man with swag "leads rather than follows. And he's not afraid to let others know it."[100] Banks's interview subjects characterized the man with swag as "part leader and part outlaw"; he "sets his own agenda and refuses to abide by anyone else's."[101] For his African-

92. *See, e.g.*, TODD W. REESER, MASCULINITIES IN THEORY: AN INTRODUCTION 27 (2010) (describing the idealized versions of masculinity currently circulated in American culture and the inability of most men to realize or approximate these versions of masculinity in their own lives).

93. *See generally id.* at 51–53 (describing the crisis of masculinity as a tension between men's subjective experiences and pervasive cultural ideologies); Hanna Rosin, *The End of Men*, ATLANTIC (July/Aug. 2010), http://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/308135/ [http://perma.cc/B3TV-KJZC].

94. *See* Reeser, *supra* note 92, at 78–85 (describing masculinity as a continuum, with certain masculine characteristics increasing and decreasing in importance according to time period and cultural context).

95. *See* BANKS, *supra* note 24, at 134–36.

96. *Id.*

97. *Id.* at 44, 47–48.

98. *Id.* at 134.

99. *Id.* at 135.

100. *Id.*

101. *Id.*

American women interview subjects, this gender performance retains great appeal.[102] Still, while Banks introduces the concept of swag in his discussion of African-Americans, his research also suggests it is common in all working-class ethnic communities, including Italian, Irish, and Latino communities.[103]

Swag is intriguing because it suggests that this uber performance of traditional masculinity has value even when it is coupled with economic dependency. Also, swag is interesting because it is a cultural artifact reflective of a period of male power in the 1970s and 1980s when labor market conditions still to some degree allowed men to valorize physical labor, factory work, and law enforcement functions.[104] Also, swag masculinity retains its allure in part because it is valorized in public media. Popular culture is filled with examples of higher earning or more successful female marriage partners falling for swag and returning to abandoned, economically weaker husbands after the husband engages in some heroic display of swag.[105] Banks is dubious about mixed-class marriages based on the allure of swag, and perhaps with good reason.[106] His account suggests, however, that certain stylized performances of traditional masculinity can function as the grease that eases economically marginal men back into the dating mainstream. Swag provides men with no resources something of value to high-earning and working-class women, making them take on an economically risky partner they would otherwise avoid.

Recent psychological data indicates that women, when exercising short-term preferences in dating markets, tend to prefer traditionally masculine men rather than the men with qualities that might make them more suitable for family life, including an interest in and talent for care and emotional support of children.[107] Again, this group of traditionally

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102. *Id.*

103. *Id.* at 142 (linking the concept of intraracial relationships to the need to sustain group identity, which "is often felt most acutely by those who have been historically marginalized or stigmatized").

104. *See* THE TOWN (Warner Bros. Pictures 2010) (depicting men in these various roles).

105. *See, e.g.*, DIE HARD (Twentieth Century Fox 1988) (showcasing a police officer using masculine prowess to win back his estranged corporate-executive wife); INDEPENDENCE DAY (Twentieth Century Fox 1996) (following a failed scientist trying to reclaim his masculinity in order to win back an estranged wife serving in the President's cabinet).

106. BANKS, *supra* note 24, at 87–95.

107. *See* Daniel J. Kruger, *Male Facial Masculinity Influences Attributions of Personality and Reproductive Strategy*, 13 PERS. RELATIONSHIPS 451, 453 (2006) ("[P]otential genetic investment [as displayed by masculine physical features] may be more highly valued for a short-term relationship, whereas potential paternal investment may be more highly valued for a long-term relationship."). This preference for evidence of masculinity when choosing short-term relationships is demonstrated by a preference for physical characteristics *as well as performative behaviors*. *See generally* Nadine Hugill et al., *The Role of Human Body Movements in Mate Selection*, 18 EVOLUTIONARY PSYCHOL. 66 (2010) (explaining that women judge physical displays to assess masculinity and relatedly genetic potential including dancing ability, voice, gait, body movements, and other actions).

masculine men (men with swag) are likely the ones disadvantaged in today's female-gendered service economy.[108] If women remain focused on short-term unions with men of this ilk, they may find themselves pairing off short-term with men that cannot function well in long-term unions.

The discussion of traditional masculinity's role in marriage markets, however, should not be regarded as an uncritical celebration. Rather, sociologists and psychologists have also documented that some men do not fare well when stripped of the economic component of traditional masculinity.[109] Men that are frustrated by their inability to serve as breadwinners are at great risk for criminal activity, substance abuse, and domestic abuse.[110] Notably, Carbone and Cahn think that men who engage in this kind of behavior are unmarriageable, and they understand poor women's desire to avoid them.[111] However, these problems again are dysfunctional male reactions to the breadwinner construct and are deeply tied to traditional masculinity. Men that fall prey to this behavior are not, and indeed cannot, be cordoned off from the general pool of eligible men because men float in and out of destructive states based on the stresses they experience and the options available to them. Indeed, the high risk economically marginal men face for engaging in destructive behavior suggests that, simply for public health reasons, the law has a role to play in helping men address the loss of economic masculinity. All of these observations suggest that policy makers should, rather than avoid consideration of masculinity, actively consider how law incentivizes certain approaches to masculinity and which masculinity forms benefit state interests the most.

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108. *See* Douglas Schrock & Michael Schwalbe, *Men, Masculinity, and Manhood Acts*, 35 ANN. REV. SOC. 277, 286 (2009) (recognizing that compensatory manhood acts by marginalized men often create a style that can "undermine employment relationships").

109. *Id.*; *see also* Kevin M. Roy & Omari Dyson, *Making Daddies into Fathers: Community-Based Fatherhood Programs and the Construction of Masculinities for Low-Income African American Men*, 45 AM. J. COMMUNITY PSYCHOL. 139, 147 (2010) (explaining that men in low-income communities with little sense of control or mastery over their own lives develop "street masculinities" as a form of resistance to the stigma of past economic failure).

110. *See* Schrock & Schwalbe, *supra* note 108, at 286 ("[I]t is impossible, however, for all men to meet the hegemonic [masculine] ideal, [and] adjustments must be made, not only individually, but also subculturally."). Schrock and Schwalbe further explain: "We thus find some working-class men creating bar and music cultures in which they signify masculine selves through heavy drinking and aggressive posturing; economically marginalized men of color relying on sports, fighting, and sexual conquests . . . ." *Id.* (citations omitted).

111. CARBONE & CAHN, *supra* note 4, at 59.

D. Assortative Mating and the Rise of the Female Marriage-Market Consumer

Finally, Carbone and Cahn are largely critical of the assortative mating trend because it serves as a driver of economic inequality.[112] However, when we shift our attention to the female marriage-market consumer, we see that some women's interests are improved by assortative trends. Specifically, as the authors note, because people are marrying within their class group, some of the most economically coercive marital unions between poor women and much wealthier men have been eliminated.[113] Newly educated and wealthy women can make greater demands for equal treatment within marriages in a way their less wealthy peers in the past could not have.[114] Much of the divorce and alimony law that feminists struggled for was based on addressing this imbalance.[115]

Additionally, the assortative mating trend may have strong positive effects for female marriage-market consumers that previously would have faced substantial racial bias.[116] Cahn and Carbone note how strong racial barriers historically have been in marriage markets.[117] As they explain, in the golden era of mixed-class marriages—when daughters of carpenters did marry engineers—race was the big divide.[118] However, Rick Banks urges that African-American women in particular should not assume these racial barriers are a given and would be better served by cross-racial dating.[119] Angela Onwuachi-Willig, in her discussion of interracial marriage, documents what sociologists have long observed: persons with higher income and more education are more likely to date outside of their racial category.[120] Consequently, assortative mating may have racial integration

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112. *Id.* at 33–35.

113. *Id.* at 33–35, 112.

114. *Id.* at 112.

115. *See id.* at 114–15 (explaining the history behind alimony and no-fault divorce and their function of giving women economic independence).

116. The authors offer some additional reading of race in their work, but they tend to focus on the working-class market. They identify numerous structural variables that upset gender ratios in poor African-American communities, including mass incarceration. Also, they note that assortative mating happens within racial groups as well. *Id.* at 70–72.

117. *Id.* at 58.

118. *Id.*

119. *See* BANKS, *supra* note 24, at 106–07 (explaining that the disparity in education level is generally much greater between African-American men and women than it is in other racial or ethnic groups).

120. *E.g.*, ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS 9 (2013) (describing studies that indicate that partners in interracial and multiracial couples are generally well educated, regardless of race); *see also* WENDY WANG, PEW RESEARCH CTR., THE RISE OF INTERMARRIAGE: RATES, CHARACTERISTICS VARY BY RACE AND GENDER 14 (2012), http://www.pewsocialtrends.org/files/2012/02/SDT-Intermarriage-II.pdf [http://perma.cc/EUL2-RATW] (noting slightly higher income levels and similar educational levels for married interracial couples in general, but higher income and educational levels for specific racial dyads).

benefits in intimacy markets that thus far have not been appreciated. Importantly, all of these issues come into focus when we are willing to analyze markets from the perspective of the newly empowered female marriage-market consumer. Having made her interests the priority in understanding market dynamics and market demand, the discussion now turns to whether and how we should respect the preferences of this consumer. For if poor and working-class women are no longer interested in marrying, putting aside the State's independent interest in marriage, the case needs to be made for why marriage is an institution worth saving.

II. Remaking Marriage Markets

Cahn and Carbone's disinterest in saving marriage for the poor forces the question: Why should we value marriage? If the goods we seek can be produced outside of marriage using alternate legal mechanisms, then perhaps marriage is not worth saving. Part II explores the question of why we should value marriage and then considers how we might change marriage or masculinity to better address the postindustrial economy and the needs of the female marriage-market consumer.

A. Whither Marriage: The Case for Marriage in the Postindustrial Economy

Cahn and Carbone's less-than-passionate defense of marriage may be a product of the recent series of critiques of marriage from prominent family law scholars.[121] These scholars' work reveals marriage's dark history—including its role in disciplining sexual relations and regulating the grounds on which minorities felt legitimated in the eyes of the State.[122] Some would argue that it is misguided to try to encourage marriage, as the historical origins of the institution and its strong gender-role norms make it an

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121. *See, e.g.*, NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008) (arguing for alternatives to marriage with respect to determining whether key interpersonal relationships should be recognized); ROBIN WEST, MARRIAGE, SEXUALITY, AND GENDER 205–11 (2007) (advocating for universal civil union framework); Gustafson, *supra* note 5, at 296–97 (questioning whether marriage qua marriage actually is sufficient to lift people out of poverty); R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317, 1335–42 (arguing that "marriage-related laws and policies have married African America to second-class citizenship"); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 433 (2012) (discussing how marriage causes certain family forms to be seen as legitimate and others to be seen as deviant).

122. Lenhardt, *supra* note 121, at 1343 (arguing that marriage "constitutes the primary normative frame for affective relationships" and therefore "shapes not just the lives of those who formally enter into it, but also the lives of those who do not"); *id.* at 1324 ("Nonmarriage and nonmarital parenting are on the rise in the United States. In some communities, these options for configuring intimate relationships and family have become increasingly accepted as legitimate, viable alternatives; but for African America, they remain a mark of pathology and familial dysfunction.").

institution stubbornly resistant to reform.[123] They argue we should move on to consider new models.[124] They point to the stalled revolution in marriage. Specifically, they note that men have not fully responded to feminists' urging that they take up caretaking obligations; as a consequence, the traditional gender split in marriage arrangements has ossified in ways that are challenging.[125] Others have argued that we should celebrate the new array of marriage alternatives, as these approaches let us imagine new ways of understanding family formation and coupling.[126] Additionally, some scholars argue that the centrality of marriage threatens to deprioritize and delegitimize other worthwhile relationships and enforce an overly restrictive understanding of the nuclear family as the cultural norm.[127] These dangers are all real. These concerns about marriage and the striving towards something new seem quite understandable. There is, however, another way of understanding marriage's fraught history.

Marriage should be understood as a battleground where hard-fought struggles for gender and racial equality have created space for new opportunities. Critics' work sometimes seems to ignore or minimize the seismic changes that have been effected in marriage since its origins; however, the reality is, when viewed over a long time horizon, marriage is malleable and responsive to change.[128] Marriage struggles have shifted from discussions about issues related to "coverture" to ones that challenge the cultural default of gendered-family caretaking norms. The changed nature of marriage debates, when compared from era to era, suggest that marriage does change, and that marriage as an institution bears the markers

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123. POLIKOFF, *supra* note 121, at 84 (arguing that marriage "is not a sensible approach toward achieving just outcomes for the wide range of family structures in which LGBT people, as well as many others, live").

124. *See* Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 551–54 (2007) (envisioning a world in which civil unions replace marriage); Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 LAW & INEQ. 345, 349 (2010) (surveying three alternative approaches for full recognition of nonmarital relationships). *But see* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1772–73 (2005) (arguing that marriage actually provides couples interested in partnership far more flexibility than newer forms of legally recognized partnerships).

125. *See* Scott, *supra* note 124, at 546 ("Marriage has been a source of oppression to women who continue to be disadvantaged by gendered marital roles that shape the behavior of contemporary spouses.").

126. *See, e.g.*, *id.* at 557 (noting that civil unions, which do not have the same "patriarchal influences" of traditional marriage, are mainly "an innovation of the past decade" and have "been offered primarily to gay and lesbian couples").

127. *Id.* at 558.

128. Case, *supra* note 124, at 1766 (tracing the implications of marriage's evolution as an institution, noting that marriage was initially a private transaction under early English law that evolved into a religious bond sanctified by the church, before shifting in the early modern era back towards private contract); Oriel Sullivan, *Changing Gender Practices Within The Household: A Theoretical Perspective*, 18 GENDER & SOC'Y 207, 208–09 (2004) (arguing that these gender relations are subject to slow, gradual change in response to political pressures, discursive conditions, and microlevel interactions).

of each historical epoch and antidiscrimination concern that has faced us.[129] In short, our views about marriage require some updating. Marriage is not the coercive institution associated with coverture, marital rape, and economic subordination that it was for the first century and a half of its operation in the history of coupling in the United States. Instead, marriage is the product of multiple feminist incursions and assaults; civil rights protests on behalf of feminists, blacks, gays of all races, Asians, and immigrants; and, even now, those who would extend its bounds beyond the two-person dyad that has long characterized this form of union. It would seem senseless to abandon marriage now or decry its operation without recognizing that these changes have occurred.

Some argue that, even after recognizing the changes in marriage, there is still a strong need to consider new forms.[130] They argue a blank slate works best for imagining new coupling possibilities.[131] There is some value to this approach, but marriage should remain an important part of the conversation about heterosexual coupling. It must remain a source of concern because marriage is the actualization of traditional gender roles and changes, and complaints about marriage allow us to create a genealogy of social expectations regarding heterosexual coupling.[132] Indeed, Andrew

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129. *See* Scott, *supra* note 124, at 546–47 (detailing the progression of our society's understanding of marriage). Cases such as *Loving v. Virginia*, 388 U.S. 1 (1967), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which expanded the right to marry to mixed-race and same-sex couples, respectively, are prime examples of the way marriage bears the mark of civil rights struggles. Additional struggles include granting women stronger custody rights over their children, as well as the connection between marriage and sexual expression. *See* Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL'Y & L. 87, 97–98 (2006) (discussing the role a parent's immigration status plays in child custody cases); Ariela R. Dubler, *Sexing* Skinner*: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1370 (2010) (arguing that in striking down state eugenics laws on the basis that marriage and procreation is a fundamental civil right, the Supreme Court intertwined the origin of marriage rights with sexual expression); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights To Earnings*, 1860–1930, 82 GEO. L.J. 2127, 2130–32 (1994) (describing how statutory reform modernized common law marriage to fit industrial-era gender roles); Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1888–95 (1998) (explaining how common law marriage became a majority position in the nineteenth century).

130. Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 619–21 (2013) (advocating for the recognition of an administrative alternative to marriage that permits greater flexibility but worrying about the reinforcement of gender inequality).

131. Stein, *supra* note 124, at 360–61 (suggesting that marriage could be but one item on a so-called "menu" of regulatory options from which couples can choose when seeking governmental recognition of their relationship).

132. This comment should not be read to erase the role that gay couples now play in shaping marriage. However, the primary concern that family law scholars have about gay marriage is that marriage's strict gender-role rules, produced in the context of heterosexual relationships, will come to shape gay marriage. These scholars suggest that the norms of gay couples will not come to shape marriage, but rather that they will be surrendered by couples in the rush toward marital legitimacy. For discussion of a pop-culture examination of this phenomenon, see Camille Gear Rich, *Making the Modern Family: Interracial Intimacy and the Social Production of Whiteness*,

Cherlin's concerns about the deinstitutionalization of marriage and the unraveling of gender scripts in marriage show this genealogy is currently developing.[133] Complaints in feminist literature about the "second shift" and women's continuing large share of housework, despite their labor market participation, represent masculinity's resistance to emotional and domestic labor.[134] There will be additional complaints and pressures on marriage. These pressures allow us to determine how far we have come and how far we need to travel to create equitable forms of heterosexual coupling. Concerns about the residual oppressive dynamics in marriage must be seriously analyzed lest they reappear in the new marriage vehicles we create to replace traditional marriage, as well as other coupling arrangements that might be folded into the traditional marriage form.[135]

From the State's perspective, also, there is something special about marriage that produces value. Studies suggest parties that cohabitate unfortunately do not produce the social goods produced in traditional marriages.[136] For example, they do not buy property or engage in other consumption patterns associated with married couples and instead act more like single individuals.[137] They do not produce the same stable environment for children because there is low trust, low investment, and consequently low commitment to each other.[138] Alternative long-term commitment models may replicate the same benefits, but they would be gesturing towards marriage. Until some meaningful alternative takes hold, it is worthwhile to continue to reform and rework marriage—to view marriage as a constantly evolving work in progress as we determine what is necessary to build stable social unions.

My argument for this forward-looking evolutionary understanding of marriage should not be read to suggest that marriage's historical role must

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127 HARV. L. REV. 1341, 1349 & n.9 (2014) (reviewing ANGELA ONWAUCHI-WILLIG, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY (2013)).

133. Cherlin, *supra* note 64, at 849; *see also* CARBONE & CAHN, *supra* note 4, at 33–34 (discussing Cherlin).

134. *See* CARBONE & CAHN, *supra* note 4, at 33–34, 99–100 (discussing Cherlin, the deinstitutionalization of marriage, and eroding marital scripts).

135. *See* Case, *supra* note 124, at 1772–79 (arguing marriage could be reformed in ways to provide for more options and greater flexibility). Case suggests that without an understanding of how marriage has operated, we might simply end up creating new models that are equally oppressive as marriage in its original form. *See id.*

136. *See* Cherlin, *supra* note 64, at 854–55 (describing how marriage creates "enforceable trust," which lowers the transaction costs of enforcing agreements between partners and contributes to various social goods produced by marriage).

137. *Id.*

138. *See* CARBONE & CAHN, *supra* note 4, at 125 ("These relationships are built on short-term, transactional exchanges about parenting . . . . The partners have made no long-term commitment to each other, and their continued mutual involvement with the child depends on successfully negotiating the relationship with the other adult.").

be forgotten. Rather, the steps taken to modify the institution and end its role in the economic erasure and disempowerment of women are important parts of its history.[139] Also, we must understand that the desire for marriage is not some trick or illusion produced by hegemony or false consciousness; marriage is a source of pleasure for instrumental reasons, because it provides for a unique promise of economic and emotional stability between two partners. It also produces status-based pleasures because it is a vehicle for social recognition of what one views as a primary, essential relationship. We must recognize that if we eliminated marriage tomorrow, some similar marriage-like institution would rise in its place. Consequently, instead of representing that we intend to wholly scrap marriage and begin anew, we should also look back at marriage's history to try to reclaim some of its earlier productive value.[140]

Additionally, much of the discussion provided here invites us to return back to a kinship understanding of marriage and decentralize the account of the nuclear family in family relations. The focus on kinship networks attempts to tap into the positive aspect of marriage's early history in a way that is attendant to contemporary political and economic realities in the United States. The sociological literature reveals that in poor and working-class communities, families sustain themselves through hard times by exchanging financial resources through extended kinship networks. In the absence of effective state financial assistance, the least policy makers can do is facilitate—rather than hinder—this exchange of benefits. Some will argue that these voluntary kinship relationships develop between families that are not "married" to one another when an unmarried couple has a child. While this may be true, disputes about connection, paternity, and other matters often hinder these relationships from forming.[141]

Finally, scholarly debate about marriage stands in marked contrast to the poor and working class's actual views about marriage. Marriage still has great appeal for the marriage-market consumer.[142] Women are not entering marriage because they *idealize* marriage, but because they want

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139. *See supra* notes 130–32 and accompanying text.

140. *See, e.g.*, Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 223 (2015) (stating that the goal of state involvement in relationships should be to strengthen the relationship of coparents and that while this valuable purpose is sometimes served by marriage, it could also be accomplished through other means).

141. *See* CARBONE & CAHN, *supra* note 4, at 128–31 (discussing how unmarried fathers' relationships with their children are dependent on the relationships with their mothers); Laura M. Argys & H. Elizabeth Peters, *Interactions Between Unmarried Fathers and Their Children: The Role of Paternity Establishment and Child-Support Policies*, 91 AM. ECON. REV. (PAPERS & PROC.) 125, 126 (2001) (comparing fathers' involvement in their children's lives with whether paternity has been established).

142. *See* Cherlin, *supra* note 64, at 855–56 (describing marriage among low-income individuals as a "sought-after but elusive goal").

their partners to be fully economically prepared for the union.[143] Most still want to get married at some point in their lives, but marriage has become an aspiration—a dream deferred. Although these women have a profound desire for long-term unions, norms regarding out-of-wedlock births have substantially evolved, and therefore women will not tie themselves to marriage blindly in a desperate desire to attain social legitimacy.[144] Rather, female marriage-market consumers are more concerned for their personal economic and emotional welfare—as well as the welfare of their children—and will not commit to men that may not be able to hold up their end of the marital bargain.[145] Rather than framing this hesitancy about marriage as a problem, it should be understood as a positive feature of American coupling. The problem is that despite marriage's symbolic appeal, the institution is not an attractive economic option for financially marginal women in the *short term*. If we can address these economic concerns, we may find that marriage markets become quite attractive markets after all. The next section explores some of these options and prioritizes the economic, kinship, and gender-construction issues that have made the current marriage market falter.

1. Affective Marriage.—The marriage market may improve if we introduce forms of *initial* marriage, models that minimize women's economic risk but facilitate the building of emotional ties that will make women willing to take on the economic burden posed by a potential marital partner. This form of marriage, which I have termed "affective marriage," offers one option. Affective marriages are marriages based on romantic, sexual, or coparenting arrangements. Heterosexual persons and gay persons can use this vehicle to express their desire to be emotionally tied to a partner, even though both partners know they cannot support one another financially. Affective marriages need not be state recognized. They can take the form of religious or cultural ceremonies.[146] States, however, may want to allow these couples to legally register affective marriage to avoid multiple affective marriages, as well as to formalize when these voluntary collaborative relationships are at an end. Administrative recognition is particularly important if state governments intend to grant economic support or social services to couples that are in affective marriages. The

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143. CARBONE & CAHN, *supra* note 4, at 122–23; Jarrett, *supra* note 53, at 34–36.

144. Kathryn Edin et al., *A Peek Inside the Black Box: What Marriage Means for Poor Unmarried Parents*, 66 J. MARRIAGE & FAM. 1007, 1012 (2004) ("For the typical low-income unmarried parent we studied, a prerequisite for marriage is a set of financial assets that demonstrate that the couple has 'arrived' economically.").

145. *Id.*

146. *See, e.g.*, Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1163 (2006) (arguing for the abolishment of civil marriage and a shift to a religious and cultural institution with no legal status).

affective marriage model has multiple benefits. It harnesses the contemporary cultural understanding that marriage is an opportunity for self-realization, personal expression, status, and symbolic commitment.[147] Additionally, it disrupts the most troubling masculinity construct that informs contemporary marriage by denying that breadwinner status or economic masculinity is required in a marital partner.

Last, affective marriage returns marriage to its cultural or religious roots to emphasize that marriage is about kinship—building relationships of community between two nonbiological families to allow for the exchange of care and resources in times of need. Couples that enter into affective marriage may see it as a transition point to a more traditional marriage; however, it can provide for long-term commitment as well.

Affective marriage also responds to what some feminists have called the "disciplinary power" of traditional marriage on poor women.[148] Cohabitating, unmarried women sometimes feel illegitimate, yet affective marriage represents their hopes and aspirations for a long-term commitment. By providing women with a less economically risky entry point into marriage, women get to enjoy the symbolic benefits and emotional resources provided by marriage. Also, the economic norms of affective marriage are designed to ensure that women feel secure continuing to make investments in their own education and social capital, rather than surrendering all resources to the control of a husband or to being pooled for the common good. For these reasons, affective marriage is likely to be quite popular in some quarters, as studies show a significant number of poor couples are caught in an informal, extended limbo stage in which they long for more permanent commitment but are prohibited from entering into a more formal arrangement because of the economic barriers to marriage.[149] The paradigm shift offered by affective marriage could have a dramatic effect on marriage perceptions in poor communities. Instead of treating marriage as an ideal status available only to economically stable persons, these communities are encouraged to see marriage forms as vehicles that can assist them in achieving emotional and social stability, while maintaining a commitment to individual economic stability as a first step and a reasonable and worthwhile goal. Yet by offering a path to kinship networks, it encourages them to have less fear about economic interconnectedness.

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147. *See* Cherlin, *supra* note 64, at 853 (observing that marital decisions have become based on an individual's personal choice and self-development rather than a desire to fulfill more traditional spousal and parental roles).

148. *See, e.g.*, Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 56–60 (2012) (arguing that marriage has also been seen as a disciplinary measure to ensure fidelity among participants).

149. *See* Cherlin, *supra* note 64, at 855–56 (describing the attitude of low-income individuals toward marriage as an "elusive goal" obstructed by financial and commitment barriers).

Importantly, affective marriage is by design intended to subtract legally enforceable economic obligation from the marriage equation. States that allow for these arrangements to be recorded as an administrative matter should be warned not to use them to enforce legal support obligations between the parties involved. Child support law has already had deleterious effects on family formation in poor communities for men without resources, and affective marriage should not create similar pressures.[150] If the government wants to build positive supports into affective marriage, it can provide tax deductions or credits to facilitate this result rather than assigning penalties. For example, men and women could receive something akin to an Earned Income Tax Credit that increases in value over a series of years if they remain in an affective marriage that exchanges resources. Alternatively, state and federal authorities could credit members of a legally recognized kinship network with tax credits for money they donate to other family members and give exemptions to relatives for income from other family members when it is distributed in this fashion. These kinship financial transfers should not be considered in the determination of the public-assistance benefits that the State awards to poor families, or kinship resources will become a liability rather than a net positive. Numerous policy options will emerge if lawmakers adopt the understanding that affective marriage is designed to create a context for growing trust between husband and wife that may lead to economic interdependence and a way for extended family members to exchange resources without compulsion.

2. The Defeasible or Expiring Marriage.—Economically gun-shy, working-class, and poor women also might be more inclined to marry if they believed that a marriage would automatically expire or presumptively dissolve after a given period. Therefore, the State could offer what I have termed "defeasible," or presumptively expiring, marriages with a set five-year term. During that five-year term, however, parties are responsible to one another for basic economic support but are not obligated to assume responsibility for consumer debt or other long-term financial obligations. Five years is chosen as a default because children born at the start of such marriages would be beyond their tender years and better able to cope emotionally with potential estrangement from their parents. This five-year term, however, could be fashioned in a flexible manner. For example, parties could restart the five-year term with the birth of each child. They could also renew this five-year term as many times as they like, or they could graduate into a marriage with a presumed lifetime term.

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150. *See* Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1016–22 (2006) (proposing a child support system that does not just focus on financial contributions that "deadbroke" fathers are unable to make, but also nonfinancial contributions that reward these fathers for participating in their children's lives, thereby benefitting each member of the family).

During the five-year term of the defeasible marriage, parties could assume mutual credit or debt obligations with mutual consent, and all other debts would be individually assumed. The parties' only obligations to each other are basic support and living expenses, with the hope that a context develops in which each party learns whether they could become financially stable in a shared living arrangement. They have an opportunity to consider whether they both share the same economic values or whether one partner is willing to acculturate the values of the more economically stable partner. Defeasible marriage, similar to affective marriage, is designed to address economic uncertainties in a postindustrial economy, but it does so differently. This model instead provides for a limited test bubble in which the parties can try out economic obligations of support before committing long-term. Importantly it allows members in the collective to keep their economic resources separate and to avoid imposing debt on the other, even as it requires them to temporarily support one another. This model addresses men's concern or distrust of relationships because they fear being discarded in times of economic peril. Last, the defeasible marriage prioritizes the establishment of long-term kinship obligations, designed to continue past the five-year term. This issue merits further discussion.

Often marriage to an economically marginal man will compromise a woman's economic interest in the short term if she views financial matters through the frame of the nuclear family; however, the access to the spouse's larger kin network—relationships that survive the expiration of the marriage—may make this short-term setback seem worthwhile. Consequently, defeasible marriages should also include mechanisms to incentivize kin to establish and maintain emotional and economic ties with the marital partner.[151] Finally, the emphasis on a larger kin network, which is recognized as a legally constituted relationship, takes the emphasis off the nuclear family and the breadwinner construct to place emphasis on a more extended, broader understanding of family that inures to both men and women.

While the defeasible, limited-term marriage seems to contradict the traditional notion of becoming one household, this economic separation may actually be the hidden reality of most "successful marriages" in wealthier groups. Some sociologists have noted that, even in successful marriages, the symbolic function of marriage takes precedence over the concrete sharing of economic resources between the two members of the marriage at a given point in time.[152] A limited-duration marriage gives the marrying partners breathing room to try to negotiate fair terms within the marriage but also allows for an expected escape mechanism if the

151. *E.g.*, Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 256–60.

152. Cherlin, *supra* note 64, at 855, 858.

parties determine they are emotionally or economically ill-suited for one another. The set time period of five years encourages them to make some limited economic investments in their partners and to work on strengthening the partner's economic standing during that period. However, the partner also has strong incentives to productively use these investments because he recognizes the relationship can automatically end.

The automatic expiration or defeasibility option is designed to facilitate the exit of partners trapped with abusive partners.[153] The party that desires to exit can simply disappear or become noncommunicative and unavailable during this period, and the relationship will end. The end period also signals the State for the partners' potential need for support or protection from an abusive mate during this period, and procedural and social-service protections could be built into the framework to protect women from being coerced into agreeing to a second term. Also, women and men could also file an administrative motion to accelerate termination of a defeasible marriage upon certain conditions including: domestic violence, nonresidence of a certain duration, and in some cases imprisonment.[154]

This suggestion will seem particularly unpalatable to those that view marriage as primarily an emotional bond, as traditional femininity counsels that women fear "abandonment" by a man and being displaced by another woman. However, poor and working-class women increasingly face harsh economic realities that poison emotional connections with a partner. Economic realities force them to terminate relationships or compel them to tolerate male partners that periodically exit the relationship in favor of another, more economically stable partner that does not pressure him for economic contribution. Defeasible marriages therefore render visible

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153. Gustafson, *supra* note 5, at 294 (arguing that promoting marriage without addressing domestic violence is deeply problematic).

154. Mere imprisonment should not be a basis for terminating a marriage given the seismic impact that mass incarceration has had on poor and black communities. It has been estimated that 1 in 3 African-American men will spend some time in prison at some point during his lifetime. Christopher J. Lyons & Becky Pettit, *Compounded Disadvantage: Race, Incarceration, and Wage Growth*, 58 SOC. PROBS. 257, 257 (2011). Recent initiatives stress the need to bring men touched by the criminal justice system back into the social mainstream, rather than cordoning them off as a special class to be avoided. *See, e.g.*, Ian B. Petersen, Note, *Toward True Fair-Chance Hiring: Balancing Stakeholder Interests and Reality in Regulating Criminal Background Checks*, 94 TEXAS L. REV. 175, 180 (2015) (urging for reform of the use of criminal background checks for ex-offenders seeking employment, in part because employment reduces recidivism); Press Release, The White House, Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated (Nov. 2, 2015), https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation [https://perma.cc/8EGK-9ZS7] (announcing several programs intended to help reintegrate ex-offenders into society, including increasing access to education and reducing obstacles to employment). Ex-offender reintegration and inclusion should be a social goal. However, in my view imprisonment for committing a violent crime should always provide the other marital partner with a basis for automatically dissolving a defeasible marriage.

dynamics that already exist, while simultaneously attempting to bring temporary stability. The five-year term also disincentives destructive short-term relationship churning spurred by economic pressures.

3. Companion Marriage: Same-Sex Marriage Redux.—Some women may determine that marriage should be based on shared economic vision, economic values, and earning power, rather than romance or sexual attraction. Women of this view will find companion marriage attractive; namely, coupling with a female or male friend in an economic and intimate union.[155] For these women, companion marriage provides the most stable ground for resource acquisition and accumulation, as well as a steady supply of emotional and caregiving resources.[156] Companion marriage simply outsources sex, romance, and physical attraction to other temporary or ancillary relationships, with the understanding that marriage is based on deep friendship and economic union.[157]

The concept of companion marriage initially may seem strange; however, contemporary marriage—which treats romance, physical attraction, and sexual chemistry as the primary basis for a long-term union—seems particularly strange given that marriage originally was understood as a primarily economic arrangement. Parents in certain classes historically selected men for their daughters based on the prospective male partner's ability to earn a family wage and provide useful social connections. When viewed in this manner, poor women's current reluctance to marry their romantic and sexual partners is not dysfunctional; rather, it is an expression of rational-actor skepticism. They rightly reject the notion that romantic and sexual attraction would be the main criteria for beginning a long-term economic partnership with another person. Often, a cohabitating poor woman in a dating relationship with her child's father understands that the masculinity performance she desires romantically and sexually is not dispositionally suited to the employment prospects available in postindustrial America.[158] These same women typically live in a

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155. *See* Cherlin, *supra* note 64, at 851–52 (discussing the original understanding of companion marriage and describing the shift to individualist marriage in the United States).

156. *See id.* at 856 ("[T]he demands low-income women place on men include not just a reliable income, as important as that is, but also a commitment to put family first, provide companionship, be faithful, and avoid abusive behavior.").

157. Companion marriage should of course strive to be an egalitarian form of union. However, companion marriage between women has a mixed history in other countries, sometimes offering a refuge from the male violence women faced in traditional marriage and, at other times, forcing one woman to be dominated by another economically powerful woman. *See, e.g.*, *Woman to Woman Marriage in Nigeria (Customary Marriage)*, ONLINE NIGERIA, http://www.onlinenigeria.com/marriages-in-nigeria/Other-Types-Of-Customary-Marriage/woman-to-woman-marriage.asp#ixzz3mPuj2z3a [http://perma.cc/TPE4-RGXG].

158. Schrock & Schwalbe, *supra* note 108, at 289 (noting that compensatory masculine behavior compromises employment prospects).

community of friends (or potential companion marriage partners) that share their economic values but do not have romantic or sexual appeal.

My concept of companion marriage is inspired by the work of family law scholars that expressed concern about the same-sex marriage movement, arguing that the drive to fold gay relationships into traditional marriage structures squandered the radical opportunity that queer couples and families offered for us to rethink the current heteronormative and gendered family norms in nuclear families.[159] *Obergefell*, they worry, will escalate the rate at which gay marriages replicate the marital norms of traditional heterosexual married couples or, as Melissa Murray argues, make all nonmarital relationships appear less significant or valued.[160] The companion marriage concept is also inspired by the work of progressive family law scholars, such as Robin Lenhardt, as they have asked us to consider how poor families and families of color hold radical potential for rethinking family law norms.[161] Poor women, both gay and straight, could reconstruct the cultural meaning of marriage if they chose marital partners based on friendship and economic trust. Companion marriage allows these women to render legally visible certain informal non-kin network relationships that consistently provide economic support. Companion marriage also responds to the so-called sex-ratio problem in many poor communities, where there is a shortage of "marriageable" men relative to women.[162]

Companion marriage solves many of these problems by stressing that economic strength and stability are key virtues of coupling, but that economic coupling is different than romantic marriage. The institution allows poor women and men to leverage and redistribute economic assets within newly designed, functional family units. Also, companion marriages may, over time, serve some of the symbolic or identity needs Martha Nussbaum notes that traditional marriage provides.[163] Companion marriage

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159. *E.g.*, Gustafson, *supra* note 5, at 300; Murray, *supra* note 121, at 436; *see also* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW 162–63 (2010) (questioning whether government, in light of the same-sex marriage movement, should perpetuate marriage as it currently exists or instead disaggregate the benefits associated with it).

160. Murray, *supra* note 121, at 436.

161. Lenhardt, *supra* note 123, at 1354–57 (arguing for an analysis of and attempt to leverage the special capacities Black families have developed in the absence of marriage); *see also* Jarrett, *supra* note 53, at 45 (arguing that instead of labeling poor African-American families as deviant for not complying with the nuclear family model, we should try to identify the precise family dynamics that allow these families to survive).

162. June Carbone & Naomi Cahn, *The End of Men or the Rebirth of Class?*, 93 B.U. L. REV. 871, 873 (2013).

163. MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 201 (1999) ("Emotionally and morally, being able to enter a legally recognized form of marriage means the opportunity to declare publicly an intent to live in commitment and partnership.").

still allows a person to publicly declare her commitment to construct a life in concert with another person—a key event in self-realization.

Certainly, companion marriage may create some problems. Scholars such as Laura Rosenbury discuss the arguments against legally recognizing friendships and using them as a basis for government recognition and support. As she explains, one admittedly gives up a certain amount of flexibility by allowing state intervention in friendship; yet, as government engages with these newly formed companion families, it will be forced to rethink certain family norms.[164] Critics may conversely argue that the construction of companion marriage offered here is too traditional, as it essentially mimics the nuclear family by providing two earnings and two caregivers.[165] This, however, oversimplifies the structure of the family, as it will naturalize the idea that procreation leads to greater connection with other networked families, rather than simply hoarding resources within a traditionally three- or four-person family unit.[166] Indeed, states that invest in companion marriage should recognize that this marriage model is intended to facilitate the development of larger kin networks for emotional and economic support. We may find that once marriage is relieved of its obligation to provide for primary sexual and romantic fulfillment, we have more stable, long-term, wealth-producing, and care-providing marriages than we enjoyed when traditional marriage was common.

B. Changing Masculinity to Preserve Marriage

The marriage proposals described in subpart II(A) change marriage by attempting to build intimate relationships between couples that are not based on breadwinner or economic masculinity. By minimizing or mitigating the effects of the economic masculinity construct, marriage can evolve in ways that allow couples to prioritize other values in marital relationships such as friendship, intimacy, and shared economic goals and values. Some may believe, however, that it is more realistic to assume that marriage will remain the same and that law should use other mechanisms to guide traditional economic masculinity into forms better suited for the postindustrial economy. This subpart considers various paths masculinity

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164. Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 216–17 (2007) (critiquing family law's refusal to treat friendship as a significant basis for recognizing family structure and caregiving relationships); *see also* Sasha Roseneil, *Why We Should Care About Friends: An Argument for Queering the Care Imaginary in Social Policy*, 3 SOC. POL'Y & SOC'Y 409, 411 (2004) (making similar arguments).

165. Aloni, *supra* note 130, at 612.

166. Gerstel, *supra* note 62, at 5. The primary challenge companion marriage faces is how to manage the support of children produced through extramarital sexual relations. However, family law has already managed ways to ensure that nonmarital fathers and mothers share in the cost of raising and caring for their children. Moreover, if one marriage partner produces an inordinately large number of children without the consent or acquiescence of a partner, this issue could stand as grounds for divorce, and the partner might be able to contest any obligation to provide support.

might take if we continue to operate under a traditional, breadwinner marriage model, but we assume that women take the place of men as primary breadwinners in marital relationships. I suggest we will still find that marriage domesticates masculinity by bringing men into stable family relationships that produce greater caretaking resources and social wealth. However, there is also cause for great concern as traditional marriage could merely reproduce the coercive power of the single-breadwinner framework. Also, it may reinstantiate the gendered separate-spheres approach that distinguishes public earning and private care. In short, traditional marriage may domesticate men in disturbing and familiar ways, pushing them down the same course that effectively marginalized and disempowered women.

To some readers, the mere idea that *law* should be used to incentivize and structure certain masculinities will be off-putting, as they will claim that gender identity is not an appropriate space for government intervention. This position proves untenable when one considers that we have lived in a culture shaped by state-sponsored gender constructs for generations. Evelyn Nanko Glenn and other legal scholars have documented how property laws, voting laws, census laws, criminal law, and huge silences in family law rendered women legally invisible and economically dependent on their husbands.[167] These conditions fostered the male breadwinner construct that now threatens marriage markets.[168] We cannot now claim innocence in these matters and allow the state-created version of economic masculinity to control. Indeed, even though they do not intend to engage in these debates, both of Carbone and Cahn's proposals give the State a role in subsidizing a modified version of masculinity—both caregiving and economic masculinity constructs.[169]

If marriage remains premised on one person with economic power participating in the world of work and the weaker economic partner

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167. *E.g.*, GLENN, *supra* note 74 *passim* (collecting scholars' work and describing various legal structures that codified women's economic dependence, private-sphere caregiving obligations, and general invisibility before the law); *see also* Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* FEMINIST LEGAL THEORY: FOUNDATIONS 9, 13 (D. Kelly Weisberg ed., 1993) ("The law has operated directly and explicitly to prevent women from attaining self-support and influence in the public sphere, thereby reinforcing their dependence on men. At the same time, its continued absence from the private sphere to which women are relegated not only leaves individual women without formal remedies but also devalues and discredits them as a group.").

168. *See* GLENN, *supra* note 74, at 21–22, 91 (illustrating how the census reified the dual spheres of the breadwinner and the housewife by "severely undercounting women's labor and economic contributions" and contending that marriage and family law codified wives' duty to provide domestic services).

169. Sectors of the religious community have already recognized these pressures and taken steps to promote what is described as a "soft" patriarchy, in which men do more emotional-care work of children, previously coded as female work, to strengthen the family. *See* Gustafson, *supra* note 5, at 284–85 (explaining that "soft" patriarchy involves men engaging in "emotional work" with and for their families and that this may encourage men to become more engaged with their children).

attempting to negotiate new space in the gender bargain, masculinity has two established courses and one uncharted domain. In some couples, we will see the emergence of "caretaker masculinity"; men with less economic power will attempt to satisfy the gender bargain by providing care to women and their children.[170] Feminists have discussed the emergence of caretaker masculinity with some degree of optimism, yet there is also cause for concern. The second track that masculinity may take is what I call "status masculinity," a form of masculinity with little instrumental function but greater aesthetic appeal and desirability. Status masculinity's primary value to women comes from signaling their ability to secure a hypermasculine partner and in the form of aesthetic and sexual desirability. The third version of masculinity is a partner that is treated as an economic equal, even though he may not have significant earning power. This version of masculinity represents the uncharted course for masculinity and, hopefully, can emerge through some of the alternative marriage forms offered in subpart II(A). It represents the most promise given the pitfalls of the two other courses for masculinity.

1. Caretaker Masculinity.—One of the biggest hurdles to men taking on caretaker masculinity is the diminished status they enjoy in many people's eyes for taking on private-sphere obligations. To be sure, there is a double standard here. Economically powerful men are often celebrated for leaving the world of work to provide care.[171] By contrast, economically vulnerable men are often regarded as freeloaders unwilling and unable to perform their primary intended role as breadwinners.[172] Poor and working-class women still strongly embrace economic masculinity and therefore are likely to express frustration and even anger at caregiving men, making this path more difficult, particularly in poor and working-class communities. Still, research suggests that many fathers, recognizing that they cannot provide economic resources, are interested in and willing to provide care.[173]

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170. This can only occur if current efforts to improve wages paid for service-industry jobs continues, as most service jobs at present do not pay a family wage.

171. *E.g.*, Jodi Kantor & Jessica Silver-Greenberg, *Wall Street Mothers, Stay-Home Fathers*, N.Y. TIMES (Dec. 7, 2013), http://www.nytimes.com/2013/12/08/us/wall-street-mothers-stay-home-fathers.html?pagewanted=all [http://perma.cc/TAS2-F46C] (describing how a successful architect's decision to become a full-time father enabled his wife to succeed as an investment banker).

172. *See, e.g.*, Reginald Mombrun, *An End to the Deadbeat Dad Dilemma?—Puncturing the Paradigm by Allowing a Deduction for Child Support Payments*, 13 FORDHAM J. CORP. & FIN. L. 211, 226–31 (2008) (describing the use of "deadbeat dad" imagery to describe fathers that do not contribute financially to family units); *Why Do Women Go Out with Deadbeat Losers?*, FIN. SAMURAI (Apr. 22, 2015), http://www.financialsamurai.com/why-do-women-go-out-with-deadbeat-losers/ [http://perma.cc/ATE5-EYTR] (describing men who "never hold[] on to a job for more than a year" as "deadbeat losers").

173. *See* Jarrett, *supra* note 53, at 42–43 (discussing the expansion of poor fathers' view of proper paternal behavior to cover care as a key part of the role); Roy & Dyson, *supra* note 109, at

Men that can get past the status problems associated with entering the private sphere may still face challenges from women's maternal gatekeeping instincts. Some women may disqualify men from providing care because these men do not meet the ideal motherhood standards they hold for themselves.

As I have explained in my other work, masculine caretaking has great feminist potential. Although some feminists suggest it will ideally replicate feminine caretaking, the more positive alternative is that men will renegotiate understandings of what is required to provide domestic care. These renegotiated understandings of care may allow us to disrupt the currently intensely high labor demands made on mothers to achieve ideal motherhood or maintain an ideal household. Indeed, part of Cherlin's concerns about the deinstitutionalization of marriage stem from men's reluctance to embrace fully domestic responsibilities in a marriage, and this reluctance stems from gender stereotypes as well as a recognition of the intense labor demands of ideal mothering.[174] Additionally, men's entrance into the caretaking realm promises to destabilize the desexualization process that shapes our understanding of women that provide care. This demand of desexualization has had pernicious effects on women and men who provide care, resulting in fears of child molestation whenever a parent's sexual persona becomes visible, as that sexual persona is seen as a threat to care. Caretaking fathers' will struggle with this desexualization phenomenon as well, hopefully to a more progressive end than women have historically faced in this area. However, at present, ideal motherhood remains a desexualized status, making mothers that display any interest in prioritizing adult, sexual relationships code as dysfunctional and distracted from their primary role as caretakers. At least initially, caretaking fathers will face the same desexualization phenomenon as they try to gain credibility as proficient caretakers.

2. Status Masculinity.—Rick Banks's discussion of swag gives us a preview of another form of masculinity that may emerge: status masculinity. Banks shows that economically successful women often opt to partner with men that cannot actually perform economic masculinity, and instead these men draw on women's economic resources to feed entrepreneurial projects of their own. The emergence of status masculinity is apparent when we see wealthy women, from Cher to Jennifer Lopez, partner with economically weak men who exhibit a particular masculine

142 (describing impoverished fathers attempting "a different model of fatherhood, based less on biological status than social commitment to children and extended families").

174. *See* Cherlin, *supra* note 64, at 857–58 (suggesting future directions for the deinstitutionalization of marriage, concluding that the direction requiring a return to more "gender-typed family roles" is very unlikely and noting that even the most likely direction for deinstitutionalization is not suited for everyone, as it best fits childless adults).

aesthetic or perform masculinity in traditional ways that are deemed alluring.[175] Wealthy women's treatment of status masculinity is very similar to that of wealthy men who historically partnered with highly attractive women with few caretaking or employment-related skills. Status masculinity, analogous to status femininity, creates economic risk as both forms have high consumption demands and may drain resources.

The role of status masculinity in working-class communities has been less discussed, but it seems to play a role here as well. Working-class women may be willing to support men that display uber markers of masculinity for a short period and trade these men off to other temporarily economically stable women when they can no longer afford to partner with these men. Importantly, both status masculinity and caretaker masculinity will experience the same economic vulnerability that corollary versions of femininity experienced when men were the primary marriage-market consumers. Ironically, many of the family law structures, in particular divorce law and alimony obligations, may come to serve the interests of these men if the traditional family model continues to endure.

The last option for masculinity, a true equality-based masculinity, provides space for men to provide value outside of the breadwinner construct entirely. It would reject the dependency created by the masculinity models described above by remaining meaningfully involved in the economic sphere, but perhaps not in a manner that will ever be described as economic independence or breadwinning. This path represents a new exciting option, but it can only be explored if we open up marriage in ways that allow couples to consider how to construct new gender relations. By restructuring marriage in ways that eliminate breadwinning pressures, we allow parties to find their own solutions and their own norms that will make marriage meaningful in the decades to come.

Conclusion

Although family law researchers and theorists have documented that marriage rates in the United States are on the decline, these accounts largely ignore the role that traditional breadwinner masculinity has played in this cultural shift. Carbone and Cahn enter into this debate to provide a finely tuned, nuanced, class-sensitive account of the marriage market, but their analysis will appear to some scholars as needlessly thin. Class concerns undoubtedly play a key role in the marriage market, but it is really gender

175. *See, e.g.*, Jessica Chandra, *Celebrating Jennifer Lopez's Birthday with a Look at the Men She Has Loved*, POPSUGAR (July 24, 2013), http://www.popsugar.com.au/celebrity/Jennifer-Lopez-Dating-History-Past-Boyfriends-Husbands-24127128#photo-24127127 [http://perma.cc/J5VV-KK6U]; Claudia Connell, *The Many Loves of Cher: As the Pop Star, 66, Prepares to Marry a Hell's Angel 24 Years Her Junior, Is There Anyone She Hasn't Bedded?*, DAILY MAIL (Aug. 24, 2012), http://www.dailymail.co.uk/tvshowbiz/article-2193266/As-Cher-66-prepares-marry-Hells-Angel-24-years-junior-bedded.html [http://perma.cc/QF8V-N8QA].

constructs *shaped by class constructs* that drive the marriage market, leaving accounts that focus primarily on class with limited analytic weight. Yet Carbone and Cahn's book, along with the sociological literature that informs their analyses, suggests that women's cultural embrace of traditional masculinity has played a key factor in marriage's demise, at least in poor and working-class marriage pools.

If we are to save marriage and masculinity, we must shift to models that free men from being regarded merely as economic contributors to broader contributors of emotional and social support. We can also decenter the nuclear family in our account of marriage and return marriage to its preferred status as a facilitation device for the expansion of kinship networks. Carbone and Cahn do some of the work to free men from limiting gender constructs, but supplementation is required to realize fully the promise produced by understanding women's economic interests and the parallel interests of the State. However, their book is a necessary addition to any gender-studies scholar's library and the library of anyone interested in addressing patterns of equality in the postindustrial United States. The detailed, nuanced account they provide of marriage markets is unparalleled, and it is a testament to their extraordinary analysis that *Marriage Markets* invites new areas of inquiry and new questions. For this reason, this Review may be the first of many lodged of their unquestionably admirable work. However, each new claim scholars make about what should be added to their analysis is merely evidence of the deep engagement and critical thinking their work inspires on this extremely important topic.

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Note

Go, Fly a Kite: The Promises (and Perils) of Airborne Wind-Energy Systems*

Introduction

Commercial wind power generation is still, in many ways, an emerging technology. This may sound surprising for a technology that currently generates 4.4% of all energy produced in the United States,[1] but the first commercial wind farm in the United States was built only thirty-five years ago—a fraction of the history of oil and gas, not to mention coal.[2] These few decades have provided little time to develop the laws, regulations, and judicial decisions that define other sectors of the energy industry. We still lack definitive answers to questions of property rights associated with wind generation[3] and its environmental impacts.[4] Already, those questions are evolving, and advances in technology may radically alter the landscape. This Note discusses some of the legal issues that may be implicated by the introduction of a new technology: airborne wind energy.

Airborne wind-energy systems (AWES),[5] though still in their technological infancy, may one day change the commercial wind-energy sector. Scientists estimate that high-altitude winds contain several times the amount of energy needed to meet current global demand.[6] Airborne systems hold the promise of access to that energy. Access to high-altitude wind would be both tremendously valuable and disruptive. As is often the case, though, in the uncertain legal environment that accompanies disruptive technologies, it is unclear just who will benefit from this valuable resource and how.

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* I would like to dedicate this Note to my wife, Jenn Langley, for her love, patience, and support. I would like to thank Rod E. Wetsel for introducing me to the world of wind law. Anything of value in this Note is a credit to his instruction. The failings are mine alone.

1. *Frequently Asked Questions: What is U.S. Electricity Generation by Energy Source?*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/tools/faqs/faq.cfm?id=427&t=3 [http://perma.cc/F8QV-CCW3]. This is more than ten times the percentage produced by solar energy. *See id.* (reporting that solar energy produces 0.4% of the total U.S. energy).

2. DAVID E. NEWTON, WIND ENERGY: A REFERENCE HANDBOOK 327 (2015).

3. *See infra* Part III.

4. *See infra* Part IV.

5. These go by several names, including high-altitude wind-energy systems (HAWES).

6. *See, e.g.*, Cristina L. Archer & Ken Caldeira, *Global Assessment of High-Altitude Wind Power*, 2 ENERGIES 307, 307–08 (2009) (estimating the total wind energy in the jet streams at "100 times the global energy demand"). *But see* L. M. Miller et al., *Jet Stream Wind Power As a Renewable Energy Resource: Little Power, Big Impacts*, 2 EARTH SYST. DYNAMICS 201, 211 (2011) (estimating the "maximum sustainable extraction of kinetic energy" to be 7.5 terawatts (TW)).

Like other modern energy sources, high-altitude wind raises a number of novel and complex legal issues. Taking wind power into the skies raises new issues for this developing industry—sometimes simplifying and sometimes complicating existing challenges. If wind energy is to become a pillar of global energy production, these questions must be addressed, and there is no time like the present.

This Note will sketch out a number of the more significant legal issues airborne systems raise and propose some ways to begin thinking about how to address those issues. Part I contains a concise history of major developments in wind energy and a summary of the current landscape of land-based wind turbines. In Part II, I discuss the reasons for attempting to harness high-altitude wind along with some of the designs available from aspiring commercial AWES providers. Part III introduces the legal landscape, compares and contrasts AWES with existing wind installations, and presents legal frameworks that might be adapted to deal with AWES. Finally, in Part IV I recommend some measures for facilitating the development of high-altitude wind farming.

I. Historical Development of Wind Energy

Wind energy is an abundant and versatile resource. The earliest known human application of wind power was for sailing vessels at around 5,000 B.C.E.[7] Several millennia later, around 200 B.C.E., the Chinese began converting wind energy into mechanical energy to pump water.[8] The Dutch landscape was famously dotted with windmills in the eighteenth century C.E.[9] Within a few decades of harnessing electricity, wind energy was tapped for electrical power generation. As early as 1887, a Scottish professor experimented with wind-turbine designs to power his home.[10]

Less than a century after that early personal experiment, the world's first wind farm was constructed in New Hampshire in 1980. The twenty-turbine farm was tiny by today's standards and a failure by most measures,[11] but despite that failure, wind-turbine technology rapidly accelerated over the following decades.[12] From 1980 to 2003, the capital cost of wind energy was

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7. *History of Wind Energy*, WIND ENERGY FOUND., http://www.windenergyfoundation.org/about-wind-energy/history [http://perma.cc/HLE5-U788].

8. *Id.*

9. *See* RICHARD C. DORF, TECHNOLOGY, HUMANS, AND SOCIETY: TOWARD A SUSTAINABLE WORLD 287 (2001) ("In 1750, the Netherlands had 8,000 windmills in operation.").

10. Niki Nixon, *Timeline: The History of Wind Power*, GUARDIAN (Oct. 17, 2008, 10:39 AM), http://www.theguardian.com/environment/2008/oct/17/wind-power-renewable-energy [http://perma.cc/N4V2-6PEK].

11. *Id.*

12. *See* ERIC LANTZ ET AL., NAT'L RENEWABLE ENERGY LAB., IEA WIND TASK 26: THE PAST AND FUTURE OF WIND ENERGY 3–4, 4 fig.1 (2012), http://www.ieawind.org/index_page_postings/WP2_task26.pdf [http://perma.cc/MQP5-2BGW] (depicting the rapid decrease in the capital costs

cut by approximately two-thirds,[13] and by the second quarter of 2014, the United States alone had nearly sixty-two gigawatts (GW) of installed wind-energy capacity—enough to power more than 15 million homes.[14] Global installed capacity by the end of 2014 was nearly 370 GW,[15] with projections of up to 2,000 GW installed by 2030.[16] The United States will be contributing more than its fair share of that capacity if it reaches the goal of obtaining 20% of all energy from wind by 2030.[17]

Modern wind turbines function much like their predecessors, albeit with far greater efficiency. A typical wind turbine using current technology sits on a mostly tubular tower made of steel, with blades of fiberglass-reinforced polyester or wood epoxy.[18] Utility-scale wind turbines for surface-based wind farms range from about 50 meters to about 90 meters and sit on top of towers of roughly the same size.[19] Larger towers have a total height from the tower base to rotor tip of approximately 135 meters (442 feet).[20] A 5 MW turbine, operating at full capacity, can produce enough to power more than 1,400 households.[21]

Traditional wind turbines have advanced significantly in recent decades as their economic potential has developed.[22] Despite concerns about the long-term status of federal tax incentives,[23] the future of wind energy looks

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associated with wind energy from 1980 to 2005 and explaining some of the technological innovations that occurred during that period).

13. *Id.* at 3.

14. *See U.S. Wind Industry Fast Facts*, WIND ENERGY FOUND., http://www.windenergyfoundation.org/about-wind-energy/us-wind-industry-fast-facts [http://perma.cc/NYG2-Z6C4] (indicating that 60 GW would power 14.7 million American homes).

15. GLOB. WIND ENERGY COUNCIL, GLOBAL WIND REPORT: ANNUAL MARKET UPDATE 6 (2014), http://www.gwec.net/wp-content/uploads/2015/03/GWEC_Global_Wind_2014_Report_LR.pdf [http://perma.cc/V2TE-RVR2].

16. GLOB. WIND ENERGY COUNCIL, GLOBAL WIND ENERGY OUTLOOK 10 (2014), http://www.gwec.net/wp-content/uploads/2014/10/GWEO2014_WEB.pdf [http://perma.cc/JT43-P9QM].

17. *See* U.S. DEP'T OF ENERGY, WIND VISION: A NEW ERA FOR WIND POWER IN THE UNITED STATES 1–2 (2015) [hereinafter WIND VISION] (assessing the viability of and updating a 2008 report calling for 20% wind energy by 2030).

18. *Wind Web Tutorial: Wind Energy Basics*, AM. WIND ENERGY ASS'N., http://web.archive.org/web/20100923194211/http://www.awea.org/faq/wwt_basics.html [http://perma.cc/7R4R-4Y2S].

19. *Id.*

20. *Id.*

21. *Id.*

22. *See generally* LANTZ ET AL., *supra* note 12, at 4 (detailing technological innovations that enabled the creation of larger wind turbines at lower costs).

23. *See* WIND VISION, *supra* note 17, at 38–39 (explaining that wind development cycles are demonstrably influenced by extensions and expirations of federal tax incentives).

bright.[24] The Obama administration recently announced its goal to have 35% of all energy supplied by wind by 2050.[25]

Nevertheless, there are some significant limitations to the potential of traditional wind farms. First, surface wind is heavily dependent on location. Geographic features, or even manmade obstructions, can interfere with wind, and as with most resources, some areas are wind rich while others are wind poor.[26] This often means that existing grids must be adapted to collect wind energy from sites where that energy is abundant enough to be economically feasible. Energy transmisson from wind-rich areas to the rest of the country depends on an ailing, ever-shrinking, and rapidly obsolescing national electrical grid.[27]

A second, oft-cited limitation on traditional wind energy is intermittency. Just as solar panels are useless at night, wind turbines do not always produce energy. Surface wind has peak hours and off hours.[28] While these may, in many cases, coincide with peak energy consumption, intermittency inherently limits the viability of wind energy as a primary energy source.[29]

A third problem facing traditional wind farms is what I will broadly call interference with other surface activity. This can be in the form of nuisance or environmental impact. Modern wind turbines have a significant footprint.[30] Turbines are up to 450 feet tall and can have blades with a nearly equivalent diameter.[31]

Airborne wind systems offer several advantages over traditional wind turbines in terms of the limitations discussed above. Wind energy has rapidly transitioned in recent years, but the difference between a Dutch windmill circa 1750 and a modern wind turbine pales in comparison to the difference between a land-based wind turbine and an airborne wind-energy system. Airborne systems untether wind power from the ground, allowing energy providers to harness steadier, more robust winds at altitudes of 1,000 meters

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24. *See supra* notes 15–16 and accompanying text.

25. David Jackson, *Report: Wind Power Could Be 35% of Supply by 2050*, USA TODAY (Mar. 12, 2015, 10:10 AM), http://www.usatoday.com/story/news/nation/2015/03/12/obama-wind-power-report-energy-department/70160824/ [http://perma.cc/G7KN-7EQA].

26. *See* ERICH HAU, WIND TURBINES: FUNDAMENTALS, TECHNOLOGIES, APPLICATION, ECONOMICS 508 (Horst von Renouard trans., 3d ed. 2013) (describing the factors that cause wind variability globally and explaining why certain areas have more wind than others).

27. *See generally* Chris Martin et al., *Why the U.S. Power Grid's Days Are Numbered*, BLOOMBERG BUSINESSWEEK (Aug. 22, 2013), http://www.businessweek.com/articles/2013-08-22/homegrown-green-energy-is-making-power-utilities-irrelevant [http://perma.cc/KER7-9ZQ6].

28. *See* Cristina L. Archer & Mark Z. Jacobson, *Evaluation of Global Wind Power*, 110 J. GEOPHYSICAL RES., no. D12110, at 10 (2005) (noting a difference in average wind speeds between day and night). However, at an altitude of 80 m, the variations have been described as "sligh[t]." *Id.*

29. *Id.* at 1.

30. *See Wind Web Tutorial: Wind Energy Basics*, *supra* note 18 (explaining that modern wind turbines have "rotor diameters ranging from about 50 meters to about 90 meters").

31. *Id.*

or higher.[32] The next Part of this Note sketches some of the more popular designs for airborne wind and lists some of the advantages and drawbacks of each.

II. Airborne Wind Energy

AWES come in a variety of forms, from kites to balloons to free-floating aircraft. The common element may be what each system lacks. AWES are not mounted on a fixed structure. Instead, as the name suggests, an airborne system, or at least some part of it, is suspended in the air and attached to the ground—in most cases—with one or more tethers. Airborne systems capture wind energy from higher altitudes, taking advantage of the accompanying increase in wind power.

For those unfamiliar with this technology, a brief description of some popular airborne-turbine designs may provide some useful background. Airborne wind systems come in many varieties, but for simplicity, they can be placed into two broad categories: those that carry turbines onboard and those that utilize high-altitude winds to power ground-based turbines.[33] Onboard energy systems can be further subdivided into helium-filled and winged varieties.[34] This is not meant to be an exhaustive list. As with any nascent technology, the future may hold thus far unimagined variants in store. For present purposes, however, these categories will suffice. Examples of each type are given below, accompanied by some of the relevant advantages and drawbacks of each.

Altaeros Energies' Buoyant Airborne Turbine (BAT) may be the most recognizable of the onboard, helium-filled systems, especially after its recent feature in the magazine *Popular Science*.[35] The BAT is essentially a tube-shaped blimp with a fan inside.[36] Since the generator is onboard, the BAT's tethers both secure the inflatable and transmit electricity to the ground.[37] The

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32. Archer & Caldeira, *supra* note 6, at 308.

33. Brian MacCleery, *The Advent of Airborne Wind Power*, WIND SYSTEMS, Jan. 2011, at 24, 30.

34. *See Airborne Wind Energy Devices*, ALTERNATIVE ENERGY TUTORIALS, http://www.alternative-energy-tutorials.com/energy-articles/airborne-wind-energy.html [http://perma.cc/YR4U-AWD4] (discussing the general types of airborne onboard energy generators and noting that there are types that resemble planes and others that are helium filled).

35. Erik Sofge, *The Quest to Harness Wind Energy at 2,000 Feet*, POPULAR SCI. (Oct. 6, 2014), http://www.popsci.com/article/science/quest-harness-wind-energy-2000-feet [http://perma.cc/7K4X-MBW8].

36. Press Release, Altaeros Energies, Altaeros Energies Achieves Breakthrough in High Altitude Wind Power (Mar. 27, 2012), http://www.altaerosenergies.com/pressrelease_2012_03.html [http://perma.cc/4TN9-Q4Z5] ("The lifting technology is adapted from aerostats, industrial cousins of passenger blimps that for decades have lifted heavy communications and radar equipment into the air for long periods of time. Aerostats are rated to survive hurricane-level winds and have safety features that ensure a slow descent to the ground.").

37. *Id.*

BAT can take advantage of winds at heights of 500 feet and higher.[38] The company initially intends to target the $17 billion remote power and micro-grid market with customers including "remote and island communities; oil & gas, mining, agriculture, and telecommunication firms; disaster relief organizations; and military bases."[39]

Technology powerhouse Google recently acquired a company named Makani,[40] which is developing a kite-based onboard system.[41] Like the BAT, Makani's energy kite generates electricity onboard and transmits it to a ground station via tether.[42] Unlike the BAT, Makani's kite does not hover passively; instead it "simulates the tip of a wind turbine blade" by flying in wide circles.[43] The 600 kilowatt version of the energy kite operates at altitudes ranging from 140 to 310 meters.[44]

KiteGen's "tethered airfoil" system is an example of a kite-style ground-based system.[45] The airfoil attaches a giant wing to a rotating arm (or track-mounted steering unit in the case of the Carousel design) connected to a generator on the ground.[46] As the kite pulls the arm or steering unit in a circle, the mechanical energy of rotation is converted to electrical energy in the generator.[47] The airfoil in KiteGen's system maintains a consistently higher altitude, has no onboard rotors, and does not use a conductive tether, all of which cut down on wind noise.[48] Mechanical noise is also likely to be

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38. Press Release, Altaeros Energies, Altaeros Energies Poised to Break World Record with Alaska High Altitude Wind Turbine (Mar. 21, 2014), http://www.altaerosenergies.com/pressrelease_2014_03.html [http://perma.cc/YA5W-3DHF] ("Altaeros successfully tested a BAT prototype in 45 mph winds and at a height of 500 feet at its test site in Maine.").

39. *Id.*

40. *About Us*, MAKANI, http://www.google.com/makani/about/ [http://perma.cc/7HNR-72Y5].

41. *The Technology*, MAKANI, http://www.google.com/makani/technology/ [http://perma.cc/G4QT-453T].

42. *Id.*

43. *Id.*

44. *Id.*

45. *Details*, KITEGEN RES., http://www.kitegen.com/en/technology/details/ [http://perma.cc/5B76-AEJL].

46. *KiteGen STEM*, KITEGEN RES., http://www.kitegen.com/en/products/stem/ [http://perma.cc/9UFS-AC5L] (describing the rotating arm system); *KiteGen Carousel*, KITEGEN RES., http://www.kitegen.com/en/products/kite-gen-carousel/ [http://perma.cc/7HT4-PJGE] (describing the Carousel design).

47. Massimo Canale et al., *Power Kites for Wind Energy Generation: Fast Predictive Control of Tethered Airfoils*, IEEE CONTROL SYSTEMS MAGAZINE, Dec. 2007, at 25, 26.

48. *See* HAU, *supra* note 26, at 616 ("In many wind turbines . . . the aerodynamic noise is drowned out by mechanical noise sources."); Mike Barnard, *Airborne Wind Energy: It's All Platypuses Instead of Cheetahs*, CLEANTECHNICA (Mar. 3, 2014), http://cleantechnica.com/2014/03/03/airborne-wind-energy-platypuses-instead-cheetahs/ [http://perma.cc/32ZY-XHPN] (listing increased "tether noise" as one of the downsides to using a conductive tether in an airborne wind-energy system).

reduced with a generator on the ground rather than suspended on top of a tower.[49]

The recent proliferation and future plans of wind farms will require relatively rapid developments in regulation.[50] Ground-based wind farms raise a number of environmental and legal issues with which courts are beginning to grapple.[51] These issues involve both state and federal law, especially when it comes to offshore wind farms.[52] Much has been written, and continues to be written, about the developing regulatory framework of the wind-energy industry.[53] Airborne wind is among the newest and perhaps least developed areas of the wind industry, but development in this area, including the involvement of massive corporations like Google, shows "the huge stimulus for creative engineering which has arisen from . . . the establishment of wind energy technology in the power industry."[54]

Unfortunately, this may not leave legislatures or courts the luxury of time to address a number of the more intricate questions facing them before this new development alters the energy landscape. This Note addresses some of the challenges unique to AWES. For example, whereas ground-based systems have just begun to reach into navigable airspace, AWES can encroach well into portions of the sky typically reserved for air traffic.[55] Additionally, as landowners discover the potential for harvesting wind energy high above their property, they might well assert the priority of their right to use that airspace in connection with the land.[56] This is to say nothing of environmental questions.

The remainder of this Note lays out some of the more pressing issues that will face stakeholders when the first commercially viable AWES take flight in the (very) near future.[57] It is also intended to encourage lawmakers

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49. *See* HAU, *supra* note 26, at 616 (noting that "[a] hollow steel tower or the steel walls of the nacelle are just about the ideal resonating bodies").

50. *See generally* Elizabeth Burleson, *Wind Power, National Security, and Sound Energy Policy*, 17 PENN ST. ENVTL. L. REV. 137 (2009) (discussing the relationship between wind-generated electricity and energy policy, including the need for national renewable-energy standards).

51. *See, e.g.*, Stephen Harland Butler, *Headwinds to a Clean Energy Future: Nuisance Suits Against Wind Energy Projects in the United States*, 97 CALIF. L. REV. 1337, 1341–42 (2009) (discussing recent nuisance suits against wind-energy projects).

52. Adam M. Dinnell & Adam J. Russ, *The Legal Hurdles to Developing Wind Power as an Alternative Energy Source in the United States: Creative and Comparative Solutions*, 27 NW. J. INT'L L. & BUS. 535, 545–47 (2007).

53. *See, e.g.*, Burleson, *supra* note 50, at 137–38 (describing the interrelationships and challenges "between wind-generated electricity, national security, and sound energy policy").

54. *See* EUROPEAN WIND ENERGY ASS'N, WIND ENERGY—THE FACTS 91–92 (2009) (describing innovative new system concepts for wind power generation).

55. *See infra* Part III.

56. *See infra* subpart III(A).

57. *See* Katherine Tweed, *World's Highest Wind Turbine Will Hover Above Alaska*, IEEE SPECTRUM (Mar. 25, 2014, 7:48 PM), http://spectrum.ieee.org/energywise/energy/renewables/first-

to address these issues proactively. While AWES designers have faced numerous technical and other challenges on the road to viability, their continued progress, when combined with the untapped potential of high-altitude winds, suggests that full-scale, commercial AWES deployment will be upon us in years rather than decades. The public would be well served by having a thoughtful regulatory framework in place when that time arrives.

III. To the Heavens: AWES and Property

Who owns the sky? Ownership is a fraught concept. First-year law students are often taught to think of property ownership as a bundle of rights.[58] Ownership of land or chattel, while not without its complications and idiosyncrasies, is largely familiar. Most aspects of one's ordinary understanding of ownership can be imported into legal studies. Ownership of intangibles like ideas can be more difficult to grasp. Ownership of wind energy may lie somewhere in-between. While wind can be felt and its effects can be seen, it is not something that can easily be captured or counted. Wind is often associated with freedom, but when wind is harnessed its value ensures that potential beneficiaries will want to establish their rights to it.

Wind may be thought of as transient energy merely passing through the sky. Thus, the question of who owns the wind is tied to who owns the sky. One preliminary complication to any discussion of ownership of the sky is that the sky is a different thing to different people. To a builder, it may represent the space that a building will occupy; to a homebuyer, the scenic backdrop to a dream home; to a pilot, a flight path; and to a wind-farm developer, a vast untapped resource. The obvious problem is that a single portion of sky cannot be all of those things at once. A skyscraper will interfere with flights. A wind turbine will mar the view. The question then is: who can claim which rights when it comes to the sky? The fact that most encounters with this question have arisen in the context of infringement from aviation upon rights associated with the land[59] complicates any attempt to answer this question.

A. Ad Coelum *and the* Causby *Decision*

We begin with the basics: the right to physically occupy the space above the ground. The issue of who owns the sky above (and the earth below) the surface of a piece of property is not a new one. The classic doctrine in this

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commercial-floating-wind-turbine-hovers-above-alaska [http://perma.cc/3H3U-N6EF] (reporting on a scheduled Altaeros eighteen-month Alaskan test).

58. *See, e.g.*, *Property*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("It is common to describe property as a 'bundle of rights.'").

59. *See, e.g.*, United States v. Causby, 328 U.S. 256, 266 (1946) (holding that flights over private land do not constitute a taking unless they "interfere with the enjoyment and use of the land"); Andrews v. United States, 108 Fed. Cl. 150, 158–61 (Fed. Cl. 2012) (dismissing plaintiff's claim that Navy Fighter Jets flying directly over plaintiff's property constituted a taking).

area takes its name from a Latin phrase, "*Cujus est solum, ejus est usque ad coelum*," which means "whoever has the land possesses all the space upwards to an indefinite extent."[60] The *ad coelum* doctrine,[61] as it is commonly called, is believed to have originated in either Roman or Hebraic law.[62] It theoretically affirms a cone of ownership that would extend from the center of the earth to the edge of the universe.[63] The *ad coelum* doctrine recognizes the common sense notion that an ownership right that approximates a two-dimensional plane would be of little use. It is difficult to imagine a use for property that does not extend either above or below the soil. The virtually infinite vertical extension of property rights must have seemed a prudent way to preempt disputes about the boundaries of ownership, although it was not literally enforced.[64] Of course, before the advent of flight, perhaps no one imagined the scenario in which one would need to test the upper boundary of ownership.

The ubiquity of flight in the mid-twentieth century put the *ad coelum* doctrine to the test. As mankind's mechanical birds descended from the heavens, they brought with them the upper boundary of property rights. The paradigm case of planes versus property owners is *United States v. Causby*.[65] First-year property students likely remember this case more for its kamikaze chickens than its legal analysis. The landowners in *Causby* brought suit against the federal government because of the alleged taking of airspace over their farm.[66] Planes from a neighboring airbase regularly flew over the farm at low altitudes.[67] The sound of aircraft skimming just over the treetops near the farm and the bright lights from the planes frightened the Causbys' chickens so much that they flew into the walls of their coops in a fatal, failed attempt at escape.[68] The landowners fared better, but the lack of sleep and the deaths of around 150 chickens took their toll.[69] In fact, the frequent flights were so disruptive, they argued, that the farm no longer served its original

60. 2 WILLIAM BLACKSTONE, COMMENTARIES *18.

61. "*Ad coelum*," as the Latin suggests, applies to questions of ownership regarding airspace, whereas "*ad inferos*" would apply to areas such as subsurface mineral rights. *Ad coelum doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014); *ad inferos*, BLACK'S LAW DICTIONARY (10th ed. 2014).

62. Michael M. Bernard, *Transformation of Property Rights in the "Space Age,"* AIR & SPACE L., Spring 1993, at 6, 6.

63. K.K. DuVivier, *Animal, Vegetable, Mineral—Wind? The Severed Wind Power Rights Conundrum*, 49 WASHBURN L.J. 69, 76 (2009).

64. Troy A. Rule, *Property Rights and Modern Energy*, 20 GEO. MASON L. REV. 803, 806 (2013).

65. 328 U.S. 256 (1946).

66. *Id.* at 258.

67. *Id.*

68. *Id.* at 259.

69. *Id.*

purpose.[70] They claimed that the government's activity thus constituted a taking.[71]

For present purposes, the holding of *Causby* is less important than the reasoning—and lack thereof—provided in the case. The Supreme Court eventually held that the government's activity imposed a servitude on the land below and remanded the case for a determination of the extent of the taking.[72] Both the majority and the dissent, despite not espousing a particular theory of airspace ownership,[73] set the stage for future conflicts between pilots and property owners.

The Supreme Court began its analysis by declaring that the ancient *ad coelum* doctrine "ha[d] no place in the modern world."[74] The Court noted, without question, that Congress had declared the air to be a "public highway."[75] To recognize trespass claims on the basis of overflight "would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim."[76]

The Court qualified those statements by recognizing that "it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere."[77] Without that exclusive control, the land would be of little use to its owner. Hinting at a more extensive right, the Court stated that "[t]he landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."[78]

In his dissenting opinion, Justice Black disagreed with even this minor concession.[79] Justice Black found it "inconceivable . . . that the Constitution guarantees that the airspace of this Nation needed for air navigation is owned by the particular persons who happen to own the land beneath to the same degree as they own the surface below."[80] He contended, saying that "the Constitution entrusts Congress with full power to control all navigable airspace" under the Commerce Clause.[81] And Justice Black noted that

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70. *Id.*

71. *Id.* at 258.

72. *Id.* at 267–68.

73. *See id.* at 266 (explaining why the court declined to impose precise limitations on airspace); *id.* at 271–72 (Black, J., dissenting) (discussing at length the power of Congress to control airspace without defining a theory of airspace ownership).

74. *Id.* at 260–61 (majority opinion).

75. *Id.* at 261.

76. *Id.*

77. *Id.* at 264.

78. *Id.*

79. *Id.* at 268–71 (Black, J., dissenting).

80. *Id.* at 271.

81. *Id.* at 271–72.

Congress had laid claim to that power.[82] From his perspective, the fact that "Congress thus declared that the air is free, not subject to private ownership, and not subject to delimitation by the courts" was a settled matter.[83]

It is perhaps unsurprising that a mid-twentieth century Supreme Court took the opportunity presented in *Causby* to reconsider the ancient *ad coelum* principle. Historically, most activity associated with land took place on the surface, whether it be farming or travel or merely going about one's day-to-day business. However, since nothing takes place on a true two-dimensional plane, the use of the land requires the use of space above the land.[84] Then once people began to use airspace regularly, the value of the air above a piece of property arguably became more valuable to those who traveled through it than to those who lived under it. The *ad coelum* doctrine no longer made sense in its strictest form.

Both before the decision in *Causby* and since, courts have introduced but not settled upon various principles of superadjacent-airspace ownership. This may be because few outside of major cities have been able to "occupy or use" enough airspace to interfere with most air traffic, but that may be about to change. So, what happens when landowners can benefit from the use of the wind thousands of feet above their properties?

At least one commentator has recognized six distinct approaches courts have applied to cases in this area.[85] While each of those principles has been applied at least once, none has been adopted as a definitive approach. The first principle is just the classic *ad coelum* principle.[86] The next theory also recognizes the surface owner's property rights to her airspace but subjects that right to a public easement.[87] A third, tort-based approach provides a cause of action only when a presupposed privilege for overflight has been abused or exceeded.[88] Two more theories fall under what may be termed "zone" approaches. The first of these zone theories, the "fixed height" theory, divides airspace into private and public zones, typically marked by the Congressional definition of "navigable airspace."[89] The second zone theory fixes the height of a landowner's airspace on a case-by-case basis depending on the property's use.[90] Finally, at least one decision limited the landowner's airspace to that which was actually occupied, thereby limiting

82. *Id.* at 272.

83. *Id.*

84. And below the land (e.g., planting crops).

85. Colin Cahoon, *Low Altitude Airspace: A Property Rights No-Man's Land*, 56 J. AIR L. & COM. 157, 163–66 (1990).

86. *Id.* at 163.

87. *Id.* at 164.

88. *Id.* at 164–65.

89. *Id.* at 165.

90. *Id.* at 165–66.

claims to those involving actual physical damage.[91] Several of these theories were in play prior to the Court's decision in *Causby*, leaving landowners and aviators in a state of confusion.[92]

Unfortunately, *Causby* did not eliminate the confusion entirely. The Court left several theories in play. In fact, it seemed to draw from virtually all theories in its analysis.[93] One possible interpretation of the decision is a partial restoration of the *ad coelum* principle. If navigable airspace is suddenly valuable to surface owners, perhaps their presumed right to that airspace should be restored. This might not apply exclusively to landowners who actually intend to install an AWES. The issue on this theory is what the landowner *can* put to valuable use, not what she actually uses. After all, one should not be allowed to build a bridge just a few feet over a neighbor's property on the theory that the neighbor has not yet made use of the space directly above the land.[94]

Another possibility is to focus on the phrase "in connection with the land."[95] This might entail something like a zone theory. Perhaps an analogy would help here. The relationship between one's land and the airspace above one's land can be likened to the relationship between the ocean and a beachfront property. Ownership of land adjacent to the ocean comes with certain rights to use the water in connection with the land. Those rights do not, however, extend indefinitely. International shipping traffic in the Pacific does not have to seek permission to cross in front of the beachfront property of wealthy Angeleños. In the same way, airspace that can be used in connection with the land might extend only a certain distance.

So, what happens to the remaining airspace? Extending the analogy a bit, the airspace above but not "connected" to the land might be treated as a public trust resource.[96] That approach would resemble the approach currently taken with deep offshore wind projects.[97] Many of the same concerns arise with high-altitude wind projects. The similarities and differences between offshore and airborne wind systems are the subjects of the next subpart.

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91. *Id.* at 166.

92. *Id.* at 166–67.

93. *Id.* at 170.

94. *See* United States v. Causby, 328 U.S. 256, 264–65 (1946) (explaining that encroachment into the airspace directly above land may constitute an invasion because landowners have incidental property rights to the airspace over their property).

95. *Id.* at 264.

96. For a discussion of the relationship between the public trust doctrine and renewable energy, see Alexandra B. Klass, *Renewable Energy and the Public Trust Doctrine*, 45 U.C. DAVIS L. REV. 1021, 1023–24 (2012) (contrasting renewable-energy projects with other development projects based on the fact that the former are intended to favorably impact public trust resources).

97. *See id.* at 1051–58 (noting that offshore wind projects can increase public trust resources and analyzing the Massachusetts Supreme Court's opinions regarding an offshore wind project in Massachusetts).

While both systems are in their infancy, some of the progress that has been made in offshore wind as well as the resistance encountered by those projects can provide insight into the potential future of AWES.

B. Navigable Waterways and Flight Paths

The federal government, as the dissent noted in *Causby*, has long held near absolute sway over navigable waterways.[98] This power stems from the Commerce Clause, which gives Congress the power to regulate "[c]ommerce . . . among the several States."[99] As early as 1824, the Supreme Court held that this power extended to navigable waterways insofar as these were the original interstate highways, essential to early commerce.[100] In several decisions over the years, the Court has held that this power trumps the riparian owner's limited title to land beyond the high-water mark.

Of course, such a sweeping grant of authority was bound to run up against the rights of riparian owners who also depended on navigable waterways. In *Scranton v. Wheeler*,[101] a government-constructed pier cut off a riparian owner's access to deep water.[102] The owner sued under the Fifth Amendment, arguing that the government's action constituted a "taking."[103] The Court responded with the following reasoning:

> Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.[104]

In terms of federal preemption over navigable waterways, the Court has addressed the renewable-energy context more than once. In *United States v. Chandler-Dunbar Water Power Co.*,[105] a more tangential ruling, the Court held that the potential value of hydroelectric power generation did not warrant more money for property acquired via eminent domain in an outlet of Lake Superior.[106]

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98. *See Causby*, 328 U.S. at 272 (Black, J., dissenting) (mentioning Congress's plenary power over navigable waters).

99. U.S. CONST. art. I, § 8, cl. 3.

100. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824).

101. 179 U.S. 141 (1900).

102. *Id.* at 143.

103. *Id.* at 147.

104. *Id.* at 163.

105. 229 U.S. 53 (1913).

106. *Id.* at 75–76.

> This title of the owner of fast land upon the shore of a navigable river to the bed of the river, is at best a qualified one. It is a title which inheres in the ownership of the shore and, unless reserved or excluded by implication, passed with it as a shadow follows a substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. . . . If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation. . . . So, also, it may permit the construction and maintenance of tunnels under or bridges over the river, and may require the removal of every such structure placed there with or without its license, the element of contract out of the way, which it shall require to be removed or altered as an obstruction to navigation.[107]

Navigable airspace may seem comparable to navigable waterways in several respects. First, title to navigable airspace is, at best, a qualified title. The ordinary uses to which land is put do not impinge on navigable airspace. Second, navigable airspace is essential to interstate commerce in much the same way as navigable waterways have been and continue to be. People and packages constantly crisscross the skies. However, navigable airspace is different from navigable waterways in some important respects as well.

First, navigable airspace does not have a clear demarcation analogous to the high-water mark used to define the boundaries of waterways. *Causby* and cases like it have dealt with low-flying planes in the vicinity of airports, but the average cruising altitude of a commercial jetliner is over 30,000 feet above sea level.[108] The typical standard used for demarcating navigable airspace is the Minimum Safe Altitude (MSA) set by the Federal Aviation Administration (FAA).[109] Of course, the MSA guidelines reference distance from "any person, vessel, vehicle, or structure."[110]

Another important difference is the sheer size of navigable airspace. The United States contains approximately 12,000 miles of commercially navigable channels.[111] In contrast, the navigable airspace includes everything

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107. *Id.* at 62–63.

108. Monica Wachman, *What is the Altitude of a Plane in Flight?*, USA TODAY, http://traveltips.usatoday.com/altitude-plane-flight-100359.html [http://perma.cc/5Z6A-458C].

109. *See* United States v. Causby, 328 U.S. 256, 260 (1946) (referring to the standards set by the Civil Aeronautics Board, the predecessor to the FAA).

110. 14 C.F.R. § 91.119(c) (2015).

111. U.S. MAR. ADMIN. ET AL., WATERWAYS: WORKING FOR AMERICA 1, http://www.marad.dot.gov/documents/water_works_REV.pdf [http://perma.cc/8CHT-78CQ].

above the approximately 3.7 million square miles of total land area.[112] It is not clear exactly what the legal or policy implications of this difference might be. Certainly, regularly traveled flight paths would take precedent. In addition, the continued expansion of the country's aviation network in the form of new airports would necessitate future invasion of airspace at and below the heights of airborne systems. Finally, airborne systems run the risk of interfering with outmoded military radar installations.[113] Traditional wind farms, too, have encountered resistance from the military.[114] Airborne systems, with their incursion into navigable airspace, may pose a greater threat of interference. That threat may counterbalance the wider range of viable locations for high-altitude wind systems.

In light of the relevant differences between airspace and navigable waterways, a modified zone theory seems like a reasonable compromise. A fully developed theory of this sort is beyond the scope of this Note. The basic idea, though, would be to open up some portion of the airspace between 500 feet and the cruising altitude of commercial aircraft. Of course, approach paths for existing commercial air traffic would need to be protected. Since most busy commercial airports are in or near cities, plenty of rural space would be left for AWES deployment. The FAA's ubiquitous involvement in the regulation of navigable airspace may make the agency uniquely suited to creating and instituting a national plan.

The extensive space available to air traffic would mitigate any cost associated with recognizing a landowner's rights to a portion of the airspace between 500 feet and the cruising altitude of commercial aircraft. Acknowledging the value associated with that airspace would encourage investment in and use of this valuable resource. Of course, not everyone would likely be thrilled with an increase in investment in wind energy.

IV. Interference: Environmental and Other Impacts

The development of commercial wind energy, often in the form of wind farms, has resulted in an uneasy tension within the environmentalist community. Increased investment in renewable energy may be motivated in large part by environmental concerns associated with the burning of fossil fuels and other nonrenewable resources.[115] Yet renewable projects are not without

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112. *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU, https://www.census.gov/geo/reference/state-area.html [https://perma.cc/NF6N-46MG].

113. *See* Rule, *supra* note 64, at 829–30 (discussing the FAA's decision to exercise its regulatory power to prevent wind-energy development out of concern for potential interference with outmoded military radar systems).

114. *Id.*

115. *See, e.g.*, U.S. ENVTL. PROT. AGENCY, ASSESSING THE MULTIPLE BENEFITS OF CLEAN ENERGY: A RESOURCE FOR STATES § 1.1.3, at 5–6 (2011), http://epa.gov/statelocalclimate/documents/pdf/epa_assessing_benefits.pdf [http://perma.cc/B4DG-4TSB] (addressing the environmental and health concerns associated with fossil-fuel-based electricity).

environmental impact. Traditional wind projects often face resistance from environmentalists and may even run afoul of federal environmental regulation.[116] AWES may have less of a negative environmental impact than traditional wind farms.[117] The three most prevalent impacts of existing wind farms are noise pollution, visual interference, and impact on wildlife.[118]

A. Noise Pollution

Noise pollution and visual interference have given rise to frequent, if typically unsuccessful, nuisance suits from the neighbors of wind projects of all sizes.[119] The noise from a neighboring wind turbine 300 meters away may average between thirty and forty decibels.[120] This means that a nearby wind turbine may typically be as loud as a refrigerator or window air-conditioning unit and occasionally as loud as a vacuum cleaner if it is closer.[121]

Airborne turbines can reduce some of the environmental impacts of wind power generation. First, consider turbine noise. Each of the several types of AWES lessens the noise pollution associated with existing surface turbines.

First, and perhaps most significant, are the kite-based systems. Consider, for example, the Makani kite system.[122] There, a large kite "simulates the tip of a wind turbine blade."[123] The kite is launched from the ground via the rotors like a helicopter.[124] Once in the air, the kite flies in circles while "air moving across the rotors forces them to rotate, driving a generator to produce electricity," which is transmitted to the ground station by a conductive tether.[125] In the Makani case, the movement of the kite

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116. *See* Dinnell & Russ, *supra* note 52, at 535 (discussing "how parties have used current domestic environmental laws to curb the development of . . . wind power").

117. This Part contains only a sample of the wide range of potential environmental impacts of wind-power development for the purpose of illustrating some of the possible advantages of AWES. Depending on the project, both ground-based and airborne projects may interact with other laws or regulations not discussed here. For example, if federal funding is involved, the National Environmental Policy Act would require environmental impact studies. 42 U.S.C. § 4332 (2012).

118. R. Saidur et al., *Environmental Impact of Wind Energy*, 15 RENEWABLE & SUSTAINABLE ENERGY REV. 2423, 2426 (2011).

119. *See, e.g.*, Dinnell & Russ, *supra* note 52, at 545–55 (recounting the challenges of the Cape Wind project); Dwight H. Merriam, *Regulating Backyard Wind Turbines*, 10 VT. J. ENVTL. L. 291, 302–03 (2009) (discussing the pros and cons of residential wind-turbine installation).

120. Saidur et al., *supra* note 118, at 2428.

121. Tomas Kellner, *How Loud is a Wind Turbine?*, GE REPORTS (Aug. 2, 2014), http://www.gereports.com/post/92442325225/how-loud-is-a-wind-turbine [http://perma.cc/P3BS-F6FZ].

122. *Energy Kites*, MAKANI, http://www.google.com/makani [http://perma.cc/2UN2-3R5F].

123. *The Technology*, *supra* note 41.

124. *Id.*

125. *Id.*

substitutes for large rotors, thereby potentially reducing mechanical noise.[126] In addition, the rotors and generators are rarely below 100 meters and spend most of their arc above 200 meters,[127] increasing the distance between the source of the noise and the potential hearer.

Perhaps better still is a model like that of KiteGen Research.[128] KiteGen's "tethered airfoil" system, recall, attaches a giant wing to a rotating arm on a ground-based generator.[129] The airfoil in KiteGen's system maintains a consistently higher altitude, has no onboard rotors, and does not use a conductive tether,[130] all of which could cut down on wind-related noise. Mechanical noise is also likely to be reduced with a generator on the ground rather than suspended on top of a tower.[131]

Other AWES designs, such as Altaeros's BAT, may reduce noise pollution as well.[132] The BAT is designed to capture wind at altitudes of over 300 meters.[133] The BAT, like the Makani kite, has an airborne turbine and conductive tethers, but its turbine maintains a more consistent altitude.[134] Thus, the BAT keeps potential rotor and mechanical noise farther away than do existing surface turbines. The BAT also uses a smaller turbine than those on conventional wind towers, and the turbine is located within the inflatable, which also blocks some of the rotor noise.[135]

The variety of airborne system designs makes it difficult to consistently compare noise pollution across the board, but the above options demonstrate that airborne systems are not likely to increase noise pollution and may even reduce it in many cases. The one extra consideration to account for with most airborne systems is the tether. The larger, conductive tethers may generate some wind noise. However, that noise is likely to be substantially less than standard rotor noise.

B. Visual Interference

The next challenge facing today's standard large wind turbines is visual interference. The visual impact of a large wind farm can be even more dramatic and far-reaching than noise pollution. Visual interference can take

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126. *Cf.* Saidur et al., *supra* note 118, at 2428 (describing mechanical noise generated from conventional turbines).

127. *See The Technology*, *supra* note 41 (indicating that the operational altitude range is between 140 meters and 310 meters).

128. *See supra* notes 45–49 and accompanying text.

129. *Details*, *supra* note 45.

130. *Id.*

131. *KiteGen STEM*, *supra* note 46.

132. *See supra* notes 35–36 and accompanying text.

133. Press Release, Altaeros Energies, *supra* note 36.

134. *BAT: The Buoyant Airborne Turbine*, ALTAEROS ENERGIES, http://www.altaerosenergies.com/bat.html [http://perma.cc/M8P3-2PAB].

135. Press Release, Altaeros Energies, *supra* note 36.

several forms. Large wind turbines are visible against the skyline for several kilometers.[136] Worse for some than this static visual impact, though, is the effect of the blades in motion. Large wind turbines can create what is known as a "flicker effect," where moving shadows can cause a pulsating effect similar to flicking a light switch on and off.[137]

A frequent complaint against large wind farms is the loss of scenic vistas.[138] For instance, one Texas landowner organized his neighbors and sought a temporary injunction against and damages for nuisance from a wind developer and neighboring landowners for the loss of property value and decreased enjoyment of his "dream home" in Taylor County.[139] They worried that the once-pristine land that had drawn them to the area would soon be filled with large, industrial turbines.[140] The claimants lost an "emotionally charged trial" and subsequent appeal.[141]

Another oft-cited impact of wind turbines is the flicker effect.[142] In larger installations, at certain times of the day there can be a "visually disturbing" shadow flicker when the blades are turning.[143] Despite being limited to certain seasons and times of the day, neighbors have found this effect disturbing.[144] While there are no comprehensive standards regarding flicker effects,[145] the likelihood of flicker "is very low once you get beyond ten rotor diameters from the turbine, so it is unlikely to be a serious problem with the small rotors in typical homeowner installations."[146]

Again, the variety of AWES designs precludes a blanket statement on the comparison of typical turbines to airborne systems. However, there are reasons to think that airborne systems may have an advantage here as well. First, airborne systems can be made smaller due to the increased efficiency

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136. Saidur et al., *supra* note 118, at 2428–29.

137. *Id.* at 2429. For a video showing the flicker effect, see betterplanWI, *Industrial Wind Turbine Shadow Flicker in Wisconsin 2008*, YOUTUBE (Dec. 21, 2008) https://www.youtube.com/watch?v=MbIe0iUtelQ [https://perma.cc/73XQ-AKPZ].

138. For some examples, see ERNEST E. SMITH ET AL., WIND LAW § 6.01 (5th ed. 2015) (explaining common law nuisance and providing samples of nuisance suits). A website devoted to combating wind development in the Texas Hill Country can be found at SAVE OUR SCENIC HILL COUNTRY ENV'T, http://www.soshillcountry.org/ [https://perma.cc/6699-PBNX?type=source].

139. Rod E. Wetsel & Steven K. DeWolf, *Ride Like the Wind: Selected Issues in Multi-Party Wind Lease Negotiations*, 1 TEX. A&M J. REAL PROP. L., 447, 463 (2014).

140. *Id.*

141. *Id.*

142. Dwight H. Merriam, *Regulating Backyard Wind Turbines*, 10 VT. J. ENVTL. L. 291, 302–03 (2009).

143. *Id.* at 302.

144. *See id.*

145. *See id.* at 302–03 (asserting the importance of local standards that account for varying conditions in the absence of generally acceptable standards).

146. *Id.* at 303.

produced by stronger, steadier winds.[147] Thus, the visual interference is less to begin with for a comparable amount of power generation. Also, airborne systems do not fill the horizon with large towers. They do not need large structural supports, and since they tend to remain at altitude they appear smaller. Their size and design also virtually eliminates the flicker effect, one of the more maddening effects of a neighboring wind turbine.[148] Finally, as a minor point, airborne systems could easily be designed to be more aesthetically pleasing. If instead of a sterile line of stark, white towers neighbors were treated to an array of colorful dancing kites or balloons—think of New Mexico's annual hot air balloon festival—wind installations might not be such an eyesore. They might even make for desirable neighbors. They might even *increase* property values.[149]

Of course, airborne systems are not likely to please everyone aesthetically. Some neighbors will probably find them ugly or distracting despite designers' best efforts. While airborne systems would seem to be an improvement over the visual interference of existing turbines and towers, some points may yet count against them. First, although smaller turbines and greater distances makes for less visual impact, the height of an AWES would likely make it visible over greater distances. For example, a high-altitude wind farm would affect not only the neighbors with views of the adjacent ridgeline but all neighbors within a certain radius. Another factor to consider is motion. Spinning wind turbines might catch the eye at first, but familiarity with the constant, uniform motion of a wind farm may allow them to fade into the background to some degree. Not so with Makani's rotor-driven kite or KiteGen's airfoil.[150] The aerial acrobatics of these devices may well distract drivers or other passersby. Airborne wind farms would likely be an improvement over existing wind farms in terms of visual interference, but they would still be visible.

C. Wildlife Impact

The final environmental impact to consider is the effect of wind farms on wildlife. This impact can largely be divided into two categories: birds and bats, and endangered species. Given the nature of wind turbines, the former is the more obvious category, but the installation of large towers and transmission lines can have a serious impact on surface wildlife as well.[151] In the

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147. *See* Archer & Caldeira, *supra* note 6, at 308 (explaining how an aircraft can be lofted to a high altitude to achieve greater electricity generation).

148. *See* Saidur et al., *supra* note 118, at 2429 (explaining that shadow flickering intensity is diminished by increased distance from residents).

149. This may seem like farfetched wishful thinking, but it is not beyond the realm of possibility.

150. *See supra* Part II.

151. In this subpart, I focus on land-based versus airborne wind-energy systems. The environmental impacts on wildlife of offshore wind is a contentious subject, and there is little in the

following sections, I briefly outline the relevant federal laws concerning wildlife and then compare the impacts of traditional wind farms to those of airborne systems.

1. The Endangered Species Act.—The Endangered Species Act (ESA), which protects fish, wildlife, and plants,[152] is among the broadest of federal wildlife laws. The ESA prohibits the unauthorized taking of designated species.[153] To "take" is defined broadly as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[154] Takings, in the form of harm, can also include habitat destruction.[155] In addition to standard enforcement mechanisms, the ESA also provides for a private cause of action that can be brought by vigilant environmentalist citizens.[156] With such a broad range of potential violations—both during installation and operation—developers often undertake extended, expensive impact studies to avoid penalties for unauthorized takings later.[157] If these impact studies indicate a possible taking, developers can apply for incidental take permits, which will protect them from enforcement actions for the taking of specified species.[158]

2. The Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act.—Whereas the ESA applies to a wide variety of species, the Bald and Golden Eagle Protection Act (BGEPA) is specifically targeted at "pursu[ing], shoot[ing], shoot[ing] at, poison[ing], wound[ing], kill[ing], captur[ing], trap[ping], collect[ing], molest[ing], or disturb[ing]" Bald or Golden Eagles.[159] The BGEPA differs from ESA in some ways. First, the BGEPA does not include habitat damage.[160] Second, it provides civil and criminal penalties but restricts criminal penalties to causing the death of an eagle "knowingly" or with "wanton disregard" for the consequences of some

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way of consensus on the topic; for an in-depth discussion of the advantages and criticisms of offshore wind power, see Brian Snyder & Mark Kaiser, *Ecological and Economic Cost-Benefit Analysis of Offshore Wind Energy*, 34 RENEWABLE ENERGY 1567, 1567–68 (2009).

152. 16 U.S.C. §§ 1531–1543 (2012).

153. *Id.* § 1538.

154. *Id.* § 1532.

155. San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 873–74 (D. Ariz. 2003), *aff'd*, 417 F.3d 1091 (9th Cir. 2005).

156. Defs. of Wildlife v. EPA, 882 F.2d 1294, 1298 (8th Cir. 1989) (citing 16 U.S.C. § 540(g)(1) (1982)).

157. John Arnold McKinsey, *Regulating Avian Impacts Under the Migratory Bird Treaty Act and Other Laws: The Wind Industry Collides with One of Its Own, the Environmental Protection Movement*, 28 ENERGY L.J. 71, 82–83 (2007).

158. *Id.* at 76.

159. 16 U.S.C. § 668c (2012).

160. McKinsey, *supra* note 157, at 77.

activity.[161] However, like the ESA, the BGEPA allows for the acquisition of take permits for projects that may harm Bald or Golden Eagles.[162]

The Migratory Bird Treaty Act (MBTA), enacted in 1918, in very broad language, makes it "unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, [or] kill . . . any migratory bird."[163] The MBTA is distinct from the previous laws in two important respects. First, it makes no mention of intent and even provides penalties for unknowing violations.[164] Second, the MBTA does not authorize permits for incidental takings.[165] This means that developers who risk violating the MBTA by taking any of the more than 800 covered species[166] have no way to mitigate that risk. Thus, widespread enforcement of the MBTA against wind-farm developers could be fatal to the wind industry. Fortunately for developers, the United States Fish and Wildlife Services, the agency responsible for enforcing the MBTA, has typically enforced it selectively.[167]

3. Airborne vs. Conventional Wind Systems.—Airborne systems may offer some benefits to wind-farm developers when it comes to wildlife impacts. The most direct benefit of an AWES is that it is out of the flight path of most birds and bats.[168] When not in migration, most birds tend to stay below 500 feet above mean sea level (AMSL).[169] This puts them in the path of conventional industrial turbines.[170] Airborne systems are well above this height. Yet, they remain well below the average altitude of migratory species, which tend to maintain heights of 5,000 feet AMSL or above.[171]

While other state and federal laws may also impact wind-farm development,[172] the laws discussed above provide some examples of the uncertainty and potential expense associated with the wildlife impacts of wind farms. In the area of avian protection laws, at least, developers can hope for

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161. 16 U.S.C. § 668(a)–(b).

162. *Id.* § 668a. *But see* McKinsey, *supra* note 157, at 77 (noting that the BGEPA does not, however, allow for incidental take permits).

163. 16 U.S.C. § 703(a) (2012).

164. *Id.*

165. *Id.* § 705.

166. *See* McKinsey, *supra* note 157, at 77 (citing 50 C.F.R. § 10.13 (2005)) (noting that the incidental, unauthorized killing of any one of over 800 species of birds would constitute a violation of the MBTA).

167. *Id.* at 78.

168. *See* Paul R. Ehrlich et al., *How Fast and High Do Birds Fly?*, (1988), https://web.stanford.edu/group/stanfordbirds/text/essays/How_Fast.html [https://perma.cc/W4XK-QWLE] (stating that the typical flight altitudes of most birds is below 500 feet).

169. *Id.*

170. *See supra* note 20 and accompanying text (noting that towers can have a total height of 442 feet).

171. Ehrlich et al., *supra* note 168.

172. *See, e.g.*, 42 U.S.C. §§ 4321–4347 (2012) (requiring the government to follow certain procedures when its actions may affect the environment).

clarification in the form of proposed legislation to harmonize these laws with current energy policy.[173]

Even if such legislation passes, developers face plenty of other environmental challenges, as discussed above. For example, the embattled Cape Wind project has become a cautionary tale for would-be offshore wind developers.[174] And even failed nuisance suits can tie up developments.[175] There is a certain irony to environmental complaints against wind farms. While many, if not most, environmentalists would prefer wind power generation to fossil-fuel-based options, they may oppose particular developments in light of the aforementioned impacts.

D. Other Impacts

Although environmental impacts have generated resistance, some of the most substantial obstacles to wind-farm development have come in the form of airports and military bases.[176] In Part II, I discussed this conflict from the perspective of the property rights of landowners and the potential taking of airspace as a result of air traffic. Here, I address the impact from the perspective of airports and airbases and the potential interference with not only flight paths but radar and other activities essential to modern aviation. Both the mechanical and electromagnetic properties of wind turbines can adversely affect military installations and activities.[177]

The federal government commissioned a study, completed in 2006,[178] which ultimately contributed to legislation instructing the Department of Defense "to ensure that the robust development of renewable energy sources and the increased resiliency of the commercial electrical grid may move forward in the United States, while minimizing or mitigating any adverse impacts on military operations and readiness."[179] This led to the creation of a special office, the Office of the Deputy Under Secretary of Defense for Installations and Environment, to help carry out this mandate.[180]

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173. *See, e.g.*, Clarification of Legal Enforcement Against Non-Criminal Energy Producers Act of 2015, H.R. 493, 114th Cong. (2015) (amending the BGEPA to incorporate incidental take permits and the MBTA to require intent).

174. For an extended discussion of the resistance to the Cape Wind project, see Dinnell & Russ, *supra* note 52, at 547–53.

175. *See* SMITH ET AL., *supra* note 138, at § 6.01 (discussing nuisance claims against wind-farm developers).

176. *See, e.g.*, H. Brendan Burke, *Dynamic Federalism and Wind Farm Siting*, 16 N.C. J.L. & TECH. 1, 30–36 (2014) (explaining the formal and informal processes of reviewing wind-farm projects, including project comments, recommendations, and, if necessary, discussions to mitigate adverse impacts on the Department of Defense's activities).

177. *Id.* at 6.

178. *Id.* at 6 n.24.

179. *Id.* at 30.

180. *Id.*

The federal government is evidently concerned with the potential effects of wind turbines siting on airports and airbases, but what exactly are the potential effects? The first is direct physical interference. Turbines take up space, and there is the potential, however unlikely, for low-altitude maneuvers to result in a deadly collision between plane and turbine.[181] Another potential dangerous effect is interference with radar detection.[182] While not the same level of immediate threat, radar interference can lead to a number of dangers and distractions.[183] A third threat is electromagnetic interference with surveillance systems.[184] Unfettered communication between air traffic controllers and pilots is vital as well. Finally, the radar noise created by airborne systems could be a threat to national security if it interferes with the detection of real threats.

Technological advances may mitigate some of the risks created by airborne wind systems, but the physical interference is another matter. The best approach in the case of physical interference with air traffic may be to avoid heavily trafficked areas and to make airborne systems highly visible to pilots. While this could initially limit the deployment of airborne systems, their use in off-grid and micro-grid applications could sustain them while this conflict is sorted out. Some of the reasons to hope that the process will continue to move forward are discussed in the next Part.

IV. Present and Near-Future Prospects

As noted above, private actors have begun to recognize the potential of high-altitude wind farming.[185] With large investments, airborne wind system technology is likely to advance rapidly. If this trend continues, it will be vital to have laws in place to ensure that potential developers can bring airborne wind systems to whatever markets can ultimately benefit from them. Some projects are already in process, but more will be needed.

One such experiment in the works is the Altaeros launch scheduled for later this year in Alaska.[186] Altaeros, the MIT-based wind-energy company founded in 2010, is in the process of launching its Buoyant Air Turbine south of Fairbanks, Alaska.[187] This $1.3 million project will extend for eighteen months and involve the deployment of Altaeros' helium-filled turbine at a

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181. *Id.* at 18–19, 18 n.111.

182. *Id.* at 6.

183. *See id.* at 8–20 (examining the physical characteristics of wind turbines and explaining how they affect air traffic control and military activities).

184. *Id.* at 18.

185. *See supra* Part II.

186. Katie Fehrenbacher, *SoftBank Backs High-Altitude Wind Startup Altaeros*, GIGAOM (Dec. 4, 2014, 9:00 AM), https://gigaom.com/2014/12/04/softbank-backs-high-altitude-wind-startup-altaeros/ [http://perma.cc/YL4E-Z8FQ].

187. Press Release, Altaeros Energies, *supra* note 38.

height of 1,000 feet above the ground.[188] If successful, the project will break the world record for the highest wind turbine by over 275 feet[189] and mark the first long-term demonstration of airborne wind-turbine technology.[190] Instead of connecting to the grid, Altaeros' BAT is designed for remote power and micro grids like those typically found on remote construction projects.[191] Altaeros estimates the total market for this sort of power generation at $17 billion.[192] Many of those projects currently run on diesel generators, so the environmental benefit could be significant.[193] While the remote power market could benefit from airborne wind and represents a legitimate market, the role of such projects as a proof of concept for on-grid production is potentially much larger. It will be important to fast-track projects like Altaeros' moving forward to get the fledgling airborne wind sector going.

Small experiments like the one outside of Fairbanks provide valuable data for future projects, but as the above discussion illustrates, if airborne wind is to become a major contributor on a national level, the federal government will play a central role. The FAA has already taken a step in the right direction for high-altitude wind generation. In December of 2011, the FAA sent out a "Notification for Airborne Wind Energy Systems (AWES)."[194] The notification served several purposes. First, the notice expressed the agency's interest in "allow[ing] for the continued development" of airborne wind-energy systems.[195] It also identified some of the holes in the existing regulatory framework.[196] Finally, it called for input from stakeholders regarding outstanding issues.[197] The FAA ultimately published only nineteen responses submitted within the time allotted for comments—eleven in favor of regulations promoting AWES testing and

188. Tweed, *supra* note 57.

189. *See* Press Release, Altaeros Energies, *supra* note 38.

190. *Id.*

191. Tweed, *supra* note 57.

192. *Id.*

193. *Id.*

194. Notification for Airborne Wind Energy Systems (AWES), 76 Fed. Reg. 76,333 (Dec. 7, 2011) (to be codified at 14 C.F.R. pt. 77).

195. *Id.* at 76,334.

196. *Id.*

197. *See id.* (articulating the issues as "(1) Impact(s) to various surveillance systems (radars); (2) Conspicuity to aircraft (marking and lighting); (3) Overall safety—safety to other airspace users, safety to persons and property on the ground, safety to the efficient and effective use of NAS facilities, safety to airports, safety to air commerce, and safety to the efficient operations and managing of the NAS; (4) AWES fly-away protection (mooring cable is severed); (5) AWES physical dimensions per unit and per farm; (6) AWES operating dimensions per unit and per farm (amt. of airspace it may require); (7) AWES mobility (potential for AWES to relocate from physical ground location to a different ground location); and (8) Wake turbulence or vortices of wind capturing component(s)").

development and eight against.[198] As of the time of this writing, the FAA has yet to publish any official policy revisions or to incorporate AWES into § 77 of Title 14 of the Code of Federal Regulations concerning the "Safe, Efficient Use, and Preservation of the Navigable Airspace."[199] Perhaps the most important step taken by the FAA, though, has been allowing for single-turbine airborne projects for research purposes on a case-by-case basis.[200] This is exactly the sort of encouragement that is needed from the federal government, and the language of the notification bodes well for the future of airborne wind energy. Of course, the FAA also noted the difficulties of classifying airborne systems as a result of the design variety.[201] This could indicate an obstacle on the path to widespread approval for larger projects. Overall, though, the FAA, under the direction of the current administration, seems committed to exploring a variety of paths to renewable energy development. This is exactly the sort of commitment that will be needed to take high-altitude wind systems into the mainstream.

Conclusion

As we have seen, the relatively young sector of commercial wind power generation is poised to add a transformative new technology. High-altitude wind systems may reach previously inaccessible resources. However, by their very nature, they challenge our existing legal framework. If these systems are put to widespread use, they will challenge our present understanding of property laws and implicate current environmental regulations. In light of the rapid technological advancements in airborne wind technology and the climate impacts from conventional energy sources, any delay in regulation or legislation may be quite costly.

Prospective legislators would be well served by the existence of an ongoing conversation in the academic literature regarding the legal issues unique to airborne wind-energy systems. Previous commentators have taken

198. *Notification for Airborne Wind Energy Systems: Docket Folder Summary*, REGULATIONS.GOV, http://www.regulations.gov/#!docketDetail;D=FAA-2011-1279 [http://perma.cc/T8FW-Z3RW].

199. 14 C.F.R. §§ 77.1–.41 (2015).

200. *See* Notification for Airborne Wind Energy Systems (AWES), 76 Fed. Reg. at 76,334 ("Given the altitudes that these structures can operate and their operating characteristics, the FAA concludes that they should be studied and the potential impacts to the navigable airspace must be identified and addressed.").

201. *See id.* at 76,333 ("[S]ome conceptual designs include hybrid concepts or utilize new innovative techniques that are not as easily classifiable.").

note of AWES but most of them only tangentially. It is the goal of this Note to spark further dialogue directed specifically at airborne wind and to offer some preliminary talking points to that effect. High-altitude wind is a powerful resource, and with the right support, it may become a central part of our energy portfolio. It is my hope that this Note will help to generate that support.

—William R. Langley

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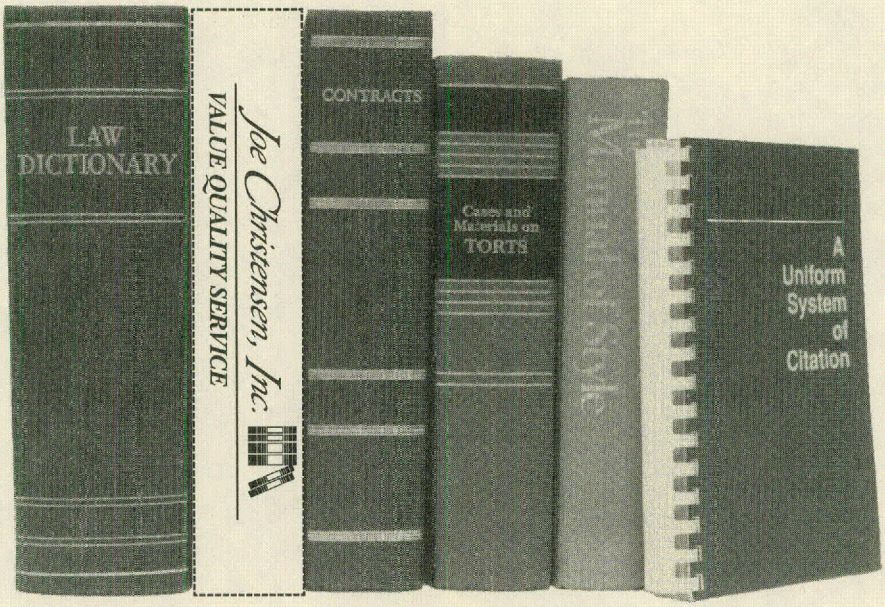

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