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Public-Private Cybersecurity

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Calls for public-private partnerships to address U.S. cybersecurity failures have become ubiquitous. But the academic literature and public debate have not fully appreciated the extent to which the United States has already backed into a de facto system of 'public-private cybersecurity. This system is characterized by the surprisingly important, quasi-governmental role of the private sector on key cybersecurity issues, and correspondingly by instances in which the federal government acts more like a market participant than a traditional regulator. The public-private cybersecurity system challenges scholarly approaches to privatization, which focus on maintaining public law values when government functions are contracted out to private parties. The informal and complicated structure of public-private relationships in cybersecurity renders concerns about public law values at once more serious and more difficult to remedy.

This Article first explores the line between public and private functions and provides a descriptive account of the public-private cybersecurity system. It highlights the relative roles of the U.S. government and private sector in four important contexts related to international cybersecurity threats: (1) disrupting networks of infected computers used by transnational-criminal groups ("botnet takedowns"), (2) remediating software vulnerabilities that can be used for crime, espionage, and offensive operations ("zero-day vulnerabilities"), (3) attributing cyber intrusions to state-sponsored attackers, and (4) defending privately-owned systems and networks from sophisticated, nation-state-sponsored attackers.

The Article then uses the public-private cybersecurity system to challenge and complicate existing scholarship on privatization. Procedurally, the public-

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private cybersecurity system differs from traditional privatization because private actors—not the government—decide what functions they should perform, and private actors operate outside of the contractual frameworks that have traditionally restrained private contractors. Substantively, the cybersecurity context implicates public law values addressed in prior work—including accountability, transparency, and due process or fairness—but it also raises additional concerns about security and privacy.

Evaluating how the public-private cybersecurity system attains and falls short of public law values yields broader lessons for cybersecurity governance and for privatization. The public-private cybersecurity system shows that concerns about public law values are not unidirectional—sometimes threats to public values come from the government, not the private sector. On the other hand, while empowered private parties play a crucial role in cybersecurity and in many ways currently support public values, this alignment is a present fortuity, not a structural feature, and so may shift in the future, posing new threats to public law values. These complexities require new kinds of context-dependent solutions to safeguard public law values. The Article concludes by suggesting several such remedies for the public law failings it identifies.

Introduction

[N]either government, nor the private sector can defend the nation alone. It's going to have to be a shared mission—government and industry working hand in hand, as partners.

—Barack Obama, Remarks at the National Cybersecurity Communications Integration Center, January 13, 2015[1]

Calls to establish public-private partnerships in cybersecurity have become ubiquitous.[2] From government officials[3] to private sector

1. President Barack Obama, Remarks by the President at the National Cybersecurity Communications Integration Center (Jan. 13, 2015), https://www.whitehouse.gov/the-press-office/2015/01/13/remarks-president-national-cybersecurity-communications-integration-cent [https://perma.cc/ENG2-GG4G].

2. BENJAMIN WITTES & GABRIELLA BLUM, THE FUTURE OF VIOLENCE: ROBOTS AND GERMS, HACKERS AND DRONES 74 (2015) ("[S]o pervasive is the understanding that the private sector has a key role to play in cybersecurity that the term 'public-private partnership' has become a cliché in the cybersecurity world.").

3. *See, e.g.*, President Barack Obama, Remarks by the President at the Cybersecurity and Consumer Protection Summit (Feb. 13, 2015), https://www.whitehouse.gov/the-press-office/2015/02/13/remarks-president-cybersecurity-and-consumer-protection-summit [https://perma.cc/5LZC-95MA] ("There's only one way to defend America from these cyber threats, and that is through government and industry working together, sharing appropriate information as true partners."); Press Release, U.S. Dep't of Homeland Sec., Statement by Secretary Jeh C. Johnson Regarding PPD-41, Cyber Incident Coordination (July 26, 2016), https://www.dhs.gov/news/2016/07/26/statement-secretary-jeh-c-johnson-regarding-ppd-41-cyber-incident-coordination [https://perma.cc/P8D6-DG7C] (explaining that Presidential Policy Directive 41 "re-enforces the reality that cybersecurity must be a partnership between the government and the private sector").

representatives,[4] think tanks,[5] expert commissions,[6] and the media,[7] 'partnership' has become the watchword for remedying cybersecurity failures in the United States.[8]

But the academic literature and public debate have not fully appreciated the extent to which the United States has already backed into a de facto system of "public-private cybersecurity."[9] The public-private cybersecurity system is characterized by the surprisingly important, quasi-governmental

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4. *See, e.g.*, SCOTT CHARNEY ET AL., MICROSOFT, FROM ARTICULATION TO IMPLEMENTATION: ENABLING PROGRESS ON CYBERSECURITY NORMS 13 (2016), https://mscorpmedia.azureedge.net/mscorpmedia/2016/06/Microsoft-Cybersecurity-Norms_vFinal.pdf [https://perma.cc/8PF2-VBX5] ("Public/private partnerships will be the anvil on which we forge the cybersecurity norms to protect the foundations of the 21st century in cyberspace.").

5. *See, e.g.*, CSIS COMM'N ON CYBERSECURITY FOR THE 44TH PRESIDENCY, SECURING CYBERSPACE FOR THE 44TH PRESIDENCY 2 (2008), http://csis.org/files/media/csis/pubs/081208_securingcyberspace_44.pdf [https://perma.cc/43GL-ENB6] ("Government must recast its relationship with the private sector as well as redesign the public-private partnership to promote better cybersecurity.").

6. *See* COMM'N ON ENHANCING NAT'L CYBERSECURITY, REPORT ON SECURING AND GROWING THE DIGITAL ECONOMY 13 (2016), https://www.nist.gov/sites/default/files/documents/2016/12/02/cybersecurity-commission-report-final-post.pdf [https://perma.cc/VM98-5RHN] ("[N]either the government nor the private sector can capably protect systems and networks without extensive and close cooperation.").

7. *See, e.g.*, Editorial, *Better Cybersecurity Defenses Require a Concerted Public-Private Effort*, WASH. POST (Jan. 15, 2015), https://www.washingtonpost.com/opinions/better-cybersecurity-defenses-require-a-concerted-public-private-effort/2015/01/15/ba585cb8-9c2d-11e4-96cc-e858eba91ced_story.html [https://perma.cc/E4FP-7PXV].

8. *See, e.g.*, Alejandro Mayorkas, Deputy Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec. Remarks by Deputy Secretary Alejandro Mayorkas at the 6th Annual International Cybersecurity Conference (June 20, 2016), https://www.dhs.gov/news/2016/06/22/remarks-deputy-secretary-alejandro-mayorkas-6th-annual-international-cybersecurity [https://perma.cc/3A4A-SGFR] (discussing the Department of Homeland Security's role in building a "public-private partnership" for cybersecurity information sharing); *Microsoft, Financial Services and Others Join Forces to Combat Massive Cybercrime Ring*, MICROSOFT (June 5, 2013), http://news.microsoft.com/2013/06/05/microsoft-financial-services-and-others-join-forces-to-combat-massive-cybercrime-ring/ [https://perma.cc/SBA3-AZ3Z] (quoting Federal Bureau of Investigation (FBI) Executive Assistant Director Richard McFeely, stating that '[c]reating successful public-private relationships is the ultimate key to success in addressing cyber threats and is among the highest priorities of the FBI").

9. Commentators are increasingly acknowledging the convergence of governmental and private roles in cybersecurity. *See, e.g.*, ADAM SEGAL, THE HACKED WORLD ORDER: HOW NATIONS FIGHT, TRADE, MANEUVER, AND MANIPULATE IN THE DIGITAL AGE 17 (2016) ("[T]he battle over cyberspace is remaking the division between the public and the private."); WITTES & BLUM, *supra* note 2, at 79 (noting the "migration in law, practice, and custom of important security functions—surveillance, analysis, interception . . . —from government to private actors"); Samuel J. Rascoff, *The Norm Against Economic Espionage for the Benefit of Private Firms: Some Theoretical Reflections*, 83 U. CHI. L. REV. 249, 266 (2016) ("[C]ybersecurity tends to require ever-greater blurring of the boundaries between public and private actors in the provision of national security."). This Article is the first to propose conceptualizing the U.S. approach to cybersecurity governance as a public-private system and the first to analyze how existing literature on privatization and public law values can be adapted to the new, complex public-private cybersecurity context.

role of the private sector on many important cybersecurity issues, and correspondingly, by instances in which the federal government acts more like a market participant than a traditional regulator. For example, private companies investigate networks of malware-infected computers that are used by transnational criminal groups for financial fraud, obtain judicial orders allowing them to seize control of the networks, and work with Internet service providers to eliminate malware infections on individuals' computers.[10] The federal government, on the other hand, has become a literal market participant by purchasing software vulnerabilities on the black market and sometimes failing to disclose them to software makers that could remedy the flaws.[11]

Although the public-private cybersecurity system includes government-like roles for the private sector, it differs from privatization in the traditional sense. Privatization is often understood to be synonymous with the government contracting out governmental functions.[12] Under that model, the government formally signs up a private company as an agent to carry out functions that the government itself previously performed and then supervises the private party's performance of the actions.[13] By contrast, the public-private system that this Article addresses occurs informally. In some circumstances, private companies have stepped in independently to remedy cybersecurity problems out of frustration with the government's failure to act.[14] In other circumstances, private companies act as a force multiplier, cooperating with the government to undertake cybersecurity operations.[15] In still other circumstances, the government seems to have informally encouraged and even assisted private parties in doing things that the government does not want to do itself, but which it nevertheless finds useful. For example, the federal government has reportedly provided information on cyber intrusions to companies that then attribute breaches to foreign countries, even when the government refuses to identify the perpetrator officially.[16]

The public-private cybersecurity system has accreted over time as a jury-rigged response to perceived security failures and market opportunities,

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10. *See infra* section I(B)(1).

11. *See infra* section I(B)(2).

12. *See infra* notes 183–84 and accompanying text.

13. Of course, lack of government supervision in practice has caused serious concerns in some cases. For just one example, see James Risen, *Before Shooting in Iraq, a Warning on Blackwater*, N.Y. TIMES (June 29, 2014), http://www.nytimes.com/2014/06/30/us/before-shooting-in-iraq-warning-on-blackwater.html?_r=0 [https://perma.cc/5RBB-4HSW] (detailing lack of oversight of the security contractor, Blackwater, in Iraq prior to the shooting of seventeen civilians in Nisour Square in 2007).

14. *See infra* section I(B)(4).

15. *See infra* notes 165–69 and accompanying text.

16. *See, e.g.*, *infra* note 120 and accompanying text.

and it has developed without democratic deliberation or even much public awareness. The system evolved without going through the usual processes of public, governmental decision making, and because of its informality, it has also remained largely outside the scope of after-the-fact mechanisms for checking governmental actions, including, for example, congressional hearings.[17] These features of the de facto public-private cybersecurity system create risks that it may not effectuate the public law values, such as accountability and fairness, that the normal, formal processes of government functioning are designed to foster.

This Article contributes to debates about cybersecurity and privatization more broadly in three ways.

Part I explores the line between public and private functions and argues that transnational crime control, foreign policy, and national security are quintessentially 'public, or governmental, functions that implicate public law values. Part I then provides a descriptive account of the public-private cybersecurity system, exploring some of the most important and contested cybersecurity issues to show how governmental and private roles are blurring and in some instances reversing. In particular, Part I examines four case studies related to significant international cybersecurity threats that implicate arguably public functions: (1) disrupting networks of infected computers used by transnational criminal groups for malicious purposes ("botnet takedowns"), (2) remediating software security vulnerabilities that can be used for crime, espionage, and offensive governmental operations ("zero-day vulnerabilities"), (3) attributing cyber intrusions to state-sponsored attackers, and (4) defending privately owned systems and networks against sophisticated, nation-state-sponsored attackers. Examples within each case study show the diversity of private sector–government relationships, ranging from declared partnerships to largely independent, but mutually beneficial, actions to overtly adversarial clashes.

Part II uses the public-private cybersecurity system to challenge and complicate existing scholarship on privatization. Despite the similarity of private parties performing arguably governmental functions, the public-private cybersecurity system differs from existing understandings of privatization in ways that suggest different safeguards may be needed in the cybersecurity context.

As a procedural matter, the public-private cybersecurity system differs from traditional contracting out because the private actors—not the government—decide at the outset what functions they should perform, and the private actors operate outside of the contractual frameworks that

17. *See* Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901, 924–25 (2008) (describing similar oversight gaps for informal intelligence partnerships).

governments have used to restrain private contractors in other circumstances. As a substantive matter, the cybersecurity context raises concerns about public law values that have been the focus of prior work—including accountability, transparency, and due process or fairness—but it also engages additional concerns about optimal provision of security and protection of privacy.

Finally, Part III uses a preliminary evaluation of how the public-private cybersecurity system attains and falls short of public law values to draw broader lessons for cybersecurity and privatization going forward. In particular, the public-private cybersecurity system shows that concerns about public law values are not unidirectional. This is not a simple story of a public values-minded government reining in wayward private contractors. Sometimes the government is absent, and sometimes it is the source of threats to public law values. On the other hand, although empowered private parties are crucial to how the public-private cybersecurity system functions and in many ways currently support public law values, this alignment is a present fortuity, not a structural feature, and may change in the future, posing additional challenges to public law values. Moreover, these complexities of the public-private cybersecurity system require changes to the nature of remedies for public law-values concerns and will require highly context-dependent solutions going forward. Part III suggests several such solutions to the specific public law failings it identifies.

The Article's discussion of public-private collaborations and role reversals is designed to be exemplary, rather than exhaustive. Comprehensiveness would be impossible in this area where secrecy is prevalent and transparency is lacking due to national security concerns and to the very informality of the system that the Article identifies. Rather, the Article builds out examples of government–private sector relationships on cybersecurity issues with an international component to show how cybersecurity is remaking those relationships and to demonstrate the insufficiency of existing theories about the role of private actors in public, governmental functions. By complicating existing understandings of privatization, the Article develops a more robust intellectual framework for conceptualizing unconventional public-private relationships and for ensuring that, despite new complexities, public law values can be protected going forward.

From the perspective of public values, the de facto, informal public-private cybersecurity system is neither wholly good nor wholly bad. Neither are the actors within it. Sometimes surprising patrons protect public law values in unexpected ways. But the system is complicated and will require context-dependent solutions to novel relationships that will continue to evolve as both the government and the private sector attempt to improve cybersecurity.

I. De Facto Public-Private Cybersecurity

Cybersecurity has sparked numerous examples of surprising relationships and collaboration between the government and the private sector, as well as role reversals.[18] This Article focuses on four manifestations of the public-private cybersecurity system that relate to international threats, either from transnational criminal groups, foreign government-sponsored private actors, or foreign governments themselves. The case studies focus on significant cybersecurity concerns that implicate at least arguably public functions. The selected case studies are also particularly useful illustrations of the complicated public-private interactions that are currently occurring. Focusing on this subset of public-private relationships helps to isolate what is public about what the private sector is doing and to illustrate the blurring of public and private functions in the cybersecurity context.

Subpart I(A) explores the nature of public and private functions as they relate to transnational crime, national defense, and foreign policy. Subpart I(B) uses four case studies to argue that the United States currently has a de facto system of public-private cybersecurity, although one more nuanced and complicated than traditional understandings of privatization or formal public-private partnerships. Subpart I(C) explores the incentives that drive both the U.S. government and the private sector to undertake their respective roles in the public-private cybersecurity system.

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18. "Cybersecurity" is a capacious concept, susceptible to varying definitions. *See, e.g.*, *Global Cyber Definitions Database*, NEW AMERICA CYBER SECURITY INITIATIVE, http://cyberdefinitions.newamerica.org/ [https://perma.cc/H3K9-YC9S] (collecting governmental and nongovernmental definitions of "cyber security" and related terms). For purposes of this Article, I understand "cybersecurity" as the process of protecting the confidentiality, integrity, and availability of information by preventing, detecting, and responding to attacks. This definition is a combination of definitions used by the U.S. National Institute of Standards and Technology and the International Organization for Standardization (ISO). *See* NAT'L INST. OF STANDARDS & TECH., FRAMEWORK FOR IMPROVING CRITICAL INFRASTRUCTURE CYBERSECURITY 37 (2014), https://www.nist.gov/sites/default/files/documents/cyberframework/cybersecurity-framework-021214.pdf [https://perma.cc/CR46-RC6S] (defining "cybersecurity" as "[t]he process of protecting information by preventing, detecting, and responding to attacks"); *ISO/IEC 27032:2012*, INT'L ORG. FOR STANDARDIZATION, at 4.20, https://www.iso.org/obp/ui/#iso:std:iso-iec:27032:ed-1:v1:en [https://perma.cc/BD3R-FM9Z] (defining "cybersecurity" as "preservation of confidentiality, integrity and availability of information in the Cyberspace"). By focusing on security threats *to* information, this definition brackets, for purposes of this Article, security threats *from* information. The respective roles of governments and nongovernmental entities with regard to content-related security threats, such as use of the Internet by extremist groups, raise interesting and potentially different issues from their roles in cybersecurity as I have defined it here. *See, e.g.*, David P. Fidler, *Countering Islamic State Exploitation of the Internet*, COUNCIL ON FOREIGN REL. (2015), http://www.cfr.org/cybersecurity/countering-islamic-state-exploitation-internet/p36644?cid=otr-marketing-use-Islamic_State_cyber_brief [https://perma.cc/J4JG-XBQU] (discussing First Amendment issues related to countering the Islamic State's use of the Internet).

A. The Public-Private Divide

The public-private cybersecurity system described in this Part involves the blurring of public and private roles and even instances of role reversals in which private parties act quasi-governmentally and federal government actors appear more like private parties. These characterizations assume that certain activities are public and others are private.

At a conceptual level, the manifestations of public-private cybersecurity discussed in the following subpart involve, individually or in combination, transnational crime control, conduct of foreign policy, and provision of national defense. Botnets are often operated by transnational criminal groups, and botnet operators have been criminally charged in connection with botnet takedown operations.[19] Zero-day software vulnerabilities are used by governments to conduct espionage[20] and even offensive operations. The Stuxnet operation against Iranian nuclear facilities, for example, used five zero-day exploits.[21] Accusing foreign governments of hacking into U.S. companies has clear foreign-relations implications and also possible criminal consequences.[22] Defending targets within U.S. territory against nation-state or nation-state-sponsored attacks sounds like traditional national defense.

Each of these activities—crime control, foreign policy, and national defense—closely relates to the modern understanding that the state's function is to monopolize the legitimate use of force within a territory and to protect its citizens from both internal and external threats.[23] National defense and

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19. *See, e.g.*, Indictment, United States v. Bogachev, No. 14-127 (W.D. Pa. May 19, 2014), http://www.justice.gov/sites/default/files/opa/legacy/2014/06/02/pittsburgh-indictment.pdf [https://perma.cc/3293-66RF] (listing charges against defendant for administering a botnet); Press Release, U.S. Dep't of Justice, U.S. Leads Multi-National Action Against "Gameover Zeus" Botnet and "Cryptolocker" Ransomware, Charges Botnet Administrator (June 2, 2014), http://www.justice.gov/opa/pr/us-leads-multi-national-action-against-gameover-zeus-botnet-and-cryptolocker-ransomware [https://perma.cc/WKP7-HNFP] (discussing the criminal indictment of Russian citizen Evgeniy Bogachev for his role as a botnet administrator).

20. *See, e.g.*, Adam Entous & Danny Yadron, *Spy Virus Linked to Israel Targeted Hotels Used for Iran Nuclear Talks*, WALL STREET J. (June 10, 2015), http://www.wsj.com/articles/spy-virus-linked-to-israel-targeted-hotels-used-for-iran-nuclear-talks-1433937601 [https://perma.cc/49KA-RQ9W] (reporting on an improved version of the Duqu virus that used zero-day exploits to compromise hotels where Iranian nuclear negotiations were held).

21. Kim Zetter, *US Used Zero-Day Exploits Before It Had Policies for Them*, WIRED (Mar. 30, 2015), http://www.wired.com/2015/03/us-used-zero-day-exploits-policies/ [https://perma.cc/TU9S-JL9B].

22. *See infra* note 296 and accompanying text.

23. *See* Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H. H. Gerth & C. Wright Mills eds. 1946) ("[A] state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory. Specifically, the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it."); *see also* United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 312 (1972) (noting that '[i]t has been said that '[t]he most basic function of any government is to provide for the security of the individual and of his property, and arguing that

foreign policy are frequently cited as the quintessential examples of governmental, or public, functions.[24] Crime control and law enforcement are often placed in the same category of activities that are historically or necessarily public.[25]

Scholars argue that functions like national defense and foreign policy are so core to the purpose or nature of government that they cannot legitimately be performed by private parties.[26] Such activities 'go to the heart of the state's inherent responsibilities in a liberal democratic society,'[27] and 'the duty to be accountable for public decisions is not a function performable by those outside government.'[28] Allowing private actors to perform such functions "challenges the role of government and the rule of law that sustains it.'[29]

"unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered' (citation omitted)); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1188 (1999) (noting the view that "the very point of government is to monopolize the coercive use of force, in order to ensure public peace, personal security, and the use and enjoyment of property").

24. *See, e.g.*, JOHN D. DONAHUE & RICHARD J. ZECKHAUSER, COLLABORATIVE GOVERNANCE: PRIVATE ROLES FOR PUBLIC GOALS IN TURBULENT TIMES 20 (2011) (arguing, within the context of advocating "collaborative governance" in general, that "[s]ome public functions—imposing taxes, engaging in diplomacy, and conducting military operations—are best left as exclusively governmental activities"); Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 390 (2006) ("Probably no function of government is deemed more quintessentially a 'state' function than the military protection of the state itself "); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1300 (2003) (noting that ideological opposition to privatization for some is "limited to activities where privatization seems unfathomable (such as foreign policy or national defense)").

25. Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 585 (noting that after the establishment of public policing, "the activity of policing became identified primarily as a government function"); Sklansky, *supra* note 23, at 1168 ("[M]aintaining order and controlling crime are paradigmatic government functions "); David Alan Sklansky, Essay, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89, 89 (2006) ("For most people, the police are government incarnate: the street-level embodiment of the state's monopolization of legitimate force.").

26. *See, e.g.*, Dickinson, *supra* note 24, at 390 ("[S]ome scholars of privatization in the domestic sphere have assumed that the military is one area where privatization does not, or should not, occur."); Oliver Hart et al. *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q.J. ECON. 1127, 1155, 1158 (1997) (citing foreign policy and the armed forces as examples in which privatization would be problematic); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 417–18 (2003) (citing foreign affairs as an area that cannot be privatized); Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1444 (2003) (citing "the formulation and implementation of a country's foreign or defense policy" as examples of instances in which the "complexity of objectives and unforeseeable contingencies render delegations of these functions to private actors highly problematic").

27. Freeman, *supra* note 24, at 1295 (characterizing the views of some privatization opponents).

28. Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 425–26 (2006).

29. *Id.* at 419.

The U.S. federal government ostensibly protects against this concern through a process formalized in Office of Management and Budget Circular No. A-76.[30] The circular instructs federal agencies to identify each of their activities as 'either commercial or inherently governmental' and to '[p]erform inherently governmental activities with government personnel.'[31] Commercial activities, on the other hand, may be outsourced to private actors pursuant to specific procedures.[32] Circular A-76 defines 'inherently governmental activity' as 'an activity that is so intimately related to the public interest as to mandate performance by government personnel.'[33] It further explains that such activities 'require the exercise of substantial discretion in applying government authority and/or in making decisions for the government.'[34]

Despite Circular No. A-76's apparent limitation on privatization, the circular's efficacy is highly questionable. Its on-paper restrictions have proven pliable in practice. For example, during the recent conflicts in Iraq and Afghanistan, private military contractors often outnumbered U.S. military personnel,[35] and some commentators have inferred from "the extensive use of private contractors in Iraq and Afghanistan, for everything from food service to security to interrogation of prisoners, that there are in practice apparently no limits to the important governmental functions that may be contracted out.'[36]

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30. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 REVISED, attachment A, § B(1) (2003), https://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction/ [https://perma.cc/YVE9-QUE5].

31. *Id.* § 4(a)–(b).

32. *Id.* at attachment B.

33. *Id.* at attachment A, § B(1)(a).

34. *Id.* The Circular provides examples, including '[d]etermining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise.' *Id.* at attachment A, § B(1)(a)(2). The Federal Activities Inventory Reform Act (FAIR Act) codifies a similar definition of "inherently governmental function. 31 U.S.C. § 501 note § 5(2)(A) (2012).

35. MOSHE SCHWARTZ & JOYPRADA SWAIN, CONG. RESEARCH SERV. DEPARTMENT OF DEFENSE CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND AND ANALYSIS 1–2 (2011), https://www.fas.org/sgp/crs/natsec/R40764.pdf [https://perma.cc/A2HY-YJEU] (providing data to show that in U.S. operations in Iraq, Afghanistan, and the Balkans, "contractors have comprised approximately 50% of DOD's workforce in country"); Micah Zenko, *The New Unknown Soldiers of Afghanistan and Iraq*, FOREIGN POL'Y (May 29, 2015), http://foreignpolicy.com /2015/05/29/the-new-unknown-soldiers-of-afghanistan-and-iraq/ [https://perma.cc/SA3S-4JUN] (reporting on data showing that since 2008, contractors outnumbered U.S. military forces in Iraq and Afghanistan).

36. Dominique Custos & John Reitz, *Public-Private Partnerships*, 58 AM. J. COMP. L. (SUPP.) 555, 582 (2010).

Even supposedly quintessential governmental activities have not proven to be necessarily or immutably public.[37] For example, the nature of policing has shifted over time from private to public,[38] to the public-private mixture in the United States today, where 'private guards greatly outnumber sworn law enforcement officers.'[39] The use of private military contractors has followed a similar trajectory. In cybersecurity, as in other contexts, the roles and responsibilities of governmental and private actors may shift over time across a permeable public-private divide.[40]

Nonetheless, consistent with the notion that crime control, foreign policy, and national defense have public aspects, the performance of these functions by private actors in the cybersecurity context triggers a need for scholarly investigations similar to those that have occurred for private performance of other traditionally public functions. Better understanding the public nature of functions performed by private parties and the potentially nonpublicized nature of some governmental actions can enable more thoughtful, deliberate decisions about who should undertake particular functions and how.

B. Manifestations of Public-Private Cybersecurity

Using four case studies, this subpart argues as a descriptive matter that a mixed public-private cybersecurity system currently operates in the United States. The case studies illustrate the blurring of the public-private divide, providing examples where private parties act to support public values, and government actors behave less like public authorities than like private actors.

This Article speaks of a public-private cybersecurity *system*, rather than a public-private partnership, because the case studies show that the private sector and government do not always act as partners. Sometimes they are antagonists, and sometimes their relationship is ambiguous at best. Specific

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37. *Cf.* Sklansky, *supra* note 25, at 89 (explaining that "there was nothing natural or inevitable about the displacement of private guards and detectives by public police" and that "[s]tarting in the 1970s, growth in public law enforcement slackened, and the private security industry exploded").

38. For a history of the evolution of private and public policing, see Sklansky, *supra* note 23, at 1193–221.

39. Sklansky, *supra* note 25, at 89.

40. *Cf.* SEGAL, *supra* note 9, at 110 ("The current division of responsibility for cybersecurity between the government and the private sector is not firmly set . . . A destructive attack could easily result in a shift toward greater government intervention . . . Or in response to future revelations about NSA surveillance, the technology companies may chart an even more independent path . . . "); MATT OLSON ET AL., BERKMAN CTR. FOR INTERNET & SOC'Y, DON'T PANIC: MAKING PROGRESS ON THE 'GOING DARK' DEBATE 9 (2016), https://cyber.law.harvard.edu/pubrelease/dont-panic/Dont_Panic_Making_Progress_on_Going_Dark_Debate.pdf [https://perma.cc/MA5Y-UBHY] (noting that U.S. companies 'are increasingly playing a quasi-sovereign role as they face difficult decisions when foreign government agencies pressure them to produce data about citizens abroad").

examples within the case studies show how even within a particular issue area, the private sector's relationship with the government can vary from declared partnership to largely independent but mutually beneficial pursuit of each party's interests to overtly adversarial clashes.

1. Botnet Takedowns.—In the past few years, the private sector and law enforcement agencies have collaborated to engage in 'botnet takedowns. 'Botnets' (short for 'robot networks") are networks of computers that are infected with malicious software that allows 'bot herders' to control the computers remotely.[41] Botnets can be used for a variety of malicious activity, such as sending spam, launching denial-of-service attacks that disable websites, and stealing credit card or other information that bot herders use to commit financial fraud.[42] Actions to eliminate bot herders' control of botnets are called 'takedowns. '[43]

Although the crimes perpetrated using botnets may seem like a law enforcement concern, a private company undertook the first botnet takedown in the United States. In February 2010, Microsoft 'launched a novel legal assault' to take down the Waledac botnet, which distributed spam.[44] Microsoft filed a civil suit under seal in federal district court against the unidentified individuals who controlled the botnet, arguing that the botnet, which targeted Microsoft's Windows operating system and Hotmail email service, harmed Microsoft and its customers.[45] Among other claims, Microsoft alleged that the botnet operators accessed computers belonging to Microsoft and its customers without authorization in violation of the Computer Fraud and Abuse Act and infringed Microsoft's trademark in violation of the Lanham Act.[46] The district court granted an ex parte temporary restraining order permitting Microsoft to initiate the deactivation

41. For an overview of botnets and how they work, see, for example, *Bots and Botnets—A Growing Threat*, NORTON, http://us.norton.com/botnet/ [https://perma.cc/L9FN-VRSA], and *Botnets 101: What They Are and How to Avoid Them*, FED. BUREAU OF INVESTIGATION (June 5, 2013), http://wayback.archive.org/web/20160629113903/https://www.fbi.gov/news/news_blog /botnets-101/botnets-101-what-they-are-and-how-to-avoid-them/ [https://perma.cc/U7HM-VST9].

42. *See, e.g.*, Zach Lerner, Note, *Microsoft the Botnet Hunter: The Role of Public-Private Partnerships in Mitigating Botnets*, 28 HARV. J.L. & TECH. 237, 238–42 (2014) (providing an overview of malicious activities conducted by botnets); Sam Zeitlin, Note, *Botnet Takedowns and the Fourth Amendment*, 90 N.Y.U. L. REV. 746, 748–51 (2015) (same).

43. *See, e.g.*, Tim Cranton, *Cracking Down on Botnets*, MICROSOFT (Feb. 24, 2010), http://blogs.microsoft.com/blog/2010/02/24/cracking-down-on-botnets/ [https://perma.cc/HZU7-R72E] (discussing botnet takedown operations).

44. *Id.*; Nick Wingfield & Ben Worthen, *Microsoft Battles Cyber Criminals*, WALL STREET J. (Feb. 26, 2010), http://www.wsj.com/articles /SB10001424052748704240004575086523786147014 [https://perma.cc/AYD8-NTTP].

45. Complaint at paras. 34–39, Microsoft Corp. v. John Doe, No. 1:10-cv-00156 (E.D. Va. Feb. 22, 2010).

46. *Id.* at paras. 40–45, 63–74.

of Internet addresses linked to the botnet, and thereby 'sever[] the connection between the command and control centers of the botnet' and the infected computers.[47] A few months later, the court issued a final default judgment, ordering the permanent transfer of the Internet addresses to Microsoft.[48]

More than a year later, the U.S. government undertook its first botnet takedown, using tactics similar to Microsoft's and employing what Deputy Attorney General James M. Cole later called 'creative lawyering.'[49] The United States filed a civil suit in federal district court against the operators of the 'Coreflood" botnet, alleging violations of wire fraud and bank fraud statutes.[50] The Coreflood botnet recorded usernames and passwords on infected computers and used them to steal money from the victims' bank accounts.[51] In an 'extraordinary intervention,'[52] the United States received an ex parte temporary restraining order, allowing it to seize the botnet command and control servers, replace them with a server run by an Internet hosting provider, and issue a command to infected computers to cease running the malicious software.[53]

More recently, private companies and law enforcement have collaborated on botnet takedowns. In at least some of these collaborative cases, it appears that the impetus for the takedowns came from the private sector, rather than from the government. For example, in June 2013, Microsoft and financial institutions worked with the FBI to disrupt botnets that infected computers with 'Citadel" malware and, according to the FBI, caused over $500 million in financial fraud by stealing and using banking credentials.[54] According to reports, 'Microsoft and the banks had spied on

47. Cranton, *supra* note 43; *see also* Wingfield & Worthen, *supra* note 44.

48. *R.I.P. Waledac: Undoing the Damage of a Botnet*, MICROSOFT (Sept. 8, 2010), http://blogs.microsoft.com/blog/2010/09/08/r-i-p-waledac-undoing-the-damage-of-a-botnet/ [https://perma.cc/7LMH-7CLZ] (highlighting the issuance of a final judgment in the editor's note).

49. James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, Address at the Georgetown Cybersecurity Law Institute (May 23, 2013), https://www.justice.gov/opa/speech/deputy-attorney-general-james-m-cole-addresses-georgetown-cybersecurity-law-institute [https://perma.cc/VEF8-7CKY] (explaining that the Department of Justice "did some creative lawyering to seize control of" the Coreflood botnet command and control servers).

50. Temporary Restraining Order at 1, United States v. John Doe, No. 3:11-cv-00561 (D. Conn. Apr. 12, 2011).

51. Kim Zetter, *With Court Order, FBI Hijacks 'Coreflood' Botnet, Sends Kill Signal*, WIRED (Apr. 13, 2011), http://www.wired.com/2011/04/coreflood/ [https://perma.cc/Q93T-MXY4].

52. *Id.*

53. Temporary Restraining Order, *supra* note 50, at 2–8. For an analysis of the Fourth Amendment implications of the Coreflood takedown, see generally Zeitlin, *supra* note 42.

54. *Taking Down Botnets: Public and Private Efforts to Disrupt and Dismantle Cybercriminal Networks Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 113th Cong. (2014) (statement of Joseph Demarest, Assistant Director, Cyber Division, Federal Bureau of Investigation), https://www.fbi.gov/news/testimony/taking-down-botnets [https://perma.cc/274Z-6DQF]; *FBI and Microsoft Take Down $500m-Theft Botnet Citadel*, BBC (June 6, 2013), http://www.bbc.com/news/technology-22795074 [https://perma.cc/9864-4SDE].

Citadel for six months before talking to the FBI.'[55] After Microsoft reached out to the FBI, federal marshals accompanied Microsoft employees to 'two Internet hosting facilities' where 'they gathered forensic evidence to attack Citadel's network of botnets.'[56] Citadel was the first takedown on which Microsoft 'teamed up with the FBI, but it was Microsoft's seventh botnet takedown overall.'[57]

Both the companies and the government have publicly embraced their collaboration on botnet takedowns. For example, in December 2013, the FBI, Europol, Microsoft, and other private-industry partners worked together to disrupt the ZeroAccess botnet.[58] A Microsoft press release noted that the takedown 'demonstrates the value coordinated operations have against cybercriminal enterprises.'[59] FBI Executive Assistant Director Richard McFeely declared that the 'disruption of the ZeroAccess botnet is another example of the power of public-private partnerships.'[60] In discussing another botnet takedown, Assistant Attorney General Leslie Caldwell explained that the operation's success 'was achieved only due to the invaluable technical assistance of Dell SecureWorks and CrowdStrike and help from numerous other companies like Microsoft and Shadowserver.'[61] Moreover, she declared that 'the sort of collaboration that we achieved in the Gameover Zeus operation was not an aberration. It is the new normal.'[62]

As these examples illustrate, the work of pursuing cybercriminals who deploy botnets is done sometimes by the private sector, sometimes by the government, and sometimes by the two acting together.[63] The private sector

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55. SHANE HARRIS, @WAR, at 119 (2014).

56. *Id.*

57. *Id.*

58. Press Release, Microsoft, Microsoft, the FBI, Europol, and Industry Partners Disrupt the Notorious ZeroAccess Botnet (Dec. 5, 2013), http://news.microsoft.com/2013 /12/05/microsoft-the-fbi-europol-and-industry-partners-disrupt-the-notorious-zeroaccess-botnet/ [https://perma.cc/3BLH-4ZNW]. The botnet generated revenue by, among other things, 'search hijacking'—'redirect[ing] people to sites they had not intended or requested to go to in order to steal the money generated by their ad clicks.' *Id.*

59. *Id.*

60. *Id.*

61. Leslie R. Caldwell, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the Georgetown Cybersecurity Law Institute (May 20, 2015), http://www.justice.gov/opa/speech /assistant-attorney-general-leslie-r-caldwell-delivers-remarks-georgetown-cybersecurity [https://perma.cc/W4XA-9QR8].

62. *Id.*

63. Other companies have begun to engage in takedowns as well. *See, e.g.*, Michael Mimoso, *Facebook Carries Out Lecpetex Botnet Takedown*, THREATPOST (July 9, 2014), http://threatpost .com/facebook-carries-out-lecpetex-botnet-takedown/107096 [https://perma.cc/45FE-7UE9] (describing Facebook's takedown of a botnet operating in Greece that used Facebook 'to spread spam and malware'). Takedowns are also not a purely U.S. phenomenon. *See Dutch Team Up with Armenia for Bredolab Botnet Take Down*, N.Y. TIMES (Oct. 26, 2010), http://www.nytimes.com/external/idg/2010/10/26/26idg-dutch-team-up-with-armenia-for-

pioneered the legal tactics underpinning the takedown operations and has continued to drive at least some of the takedowns, like the Citadel operation described above. The 'new normal' of public-private collaboration in takedowns preserves a large role for the private sector in setting the agenda for and operationalizing takedown operations.[64]

2. Securing Software.—The roles of the public and private sectors have also blurred, through both collaboration and at least partial role reversals, with respect to securing software. Software flaws or 'bugs' are frequent vectors for cybersecurity compromises, and software makers issue patches to fix known bugs.[65] Questions about public and private roles and collaboration arise most often with respect to so-called zero-day exploits. Zero-day vulnerabilities are 'exploitable vulnerabilities that a software vendor is not aware of and for which no patch has been created.'[66] They are called 'zero days' because 'the developers or system owners have had zero days to address or patch the vulnerability,'[67] and thus 'everyone is vulnerable to exploitation.'[68]

Zero-day vulnerabilities are bought and sold in black and gray markets.[69] But the markets are not merely for criminals looking to exploit vulnerabilities. Reports indicate that 'governments are increasingly showing up as buyers,'[70] as are companies, like major defense contractors, that act as

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bredolab-botnet-take-53590.html [https://perma.cc/SM4F-3NDA] [hereinafter *Dutch Team Up*] (describing a takedown operation by Dutch law enforcement).

64. Takedown operations carry a risk of collateral damage, including inadvertent disruption of legitimate websites or interference with the work of security researchers who are tracking the bot herders. *See, e.g.*, Gary Davis, *Microsoft Knocks Botnet, and Four Million Legitimate Users, Offline*, INTEL SECURITY: BLOGS (July 3, 2014), https://securingtomorrow.mcafee.com/consumer/consumer-threat-notices/microsoft-knocks-botnet-offline/ [https://perma.cc/6PXU-7VRD].

65. For examples of security updates, see *Apple Security Updates*, APPLE, https://support.apple.com/en-us/HT201222 [https://perma.cc/PLM6-85F3]; *Chrome Releases: Release Updates from the Chrome Team*, GOOGLE, https://googlechromereleases.blogspot.com/ [https://perma.cc/9WWB-BZWV]; *Microsoft Security Bulletins*, MICROSOFT: TECHNET, https://technet.microsoft.com/en-us/security/bulletins [https://perma.cc/28S4-QBZS].

66. LILLIAN ABLON ET AL., NAT'L SECURITY RESEARCH DIV., RAND CORP., MARKETS FOR CYBERCRIME TOOLS AND STOLEN DATA: HACKERS' BAZAAR 25 (2014), http://www.rand.org/content/dam/rand/pubs/research_reports/RR600/RR610/RAND_RR610.pdf [https://perma.cc/JX7T-6VXX].

67. RICHARD A. CLARK ET AL., LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES 219–20 (2013), https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf [https://perma.cc/3WGX-YKJN] [hereinafter PRESIDENT'S REVIEW GROUP].

68. ABLON ET AL., *supra* note 66, at 25.

69. For a description of zero-day markets, see *id.* at 25–28.

70. *Id.* at 25; *see also* Nicole Perlroth & David E. Sanger, *Nations Buying as Hackers Sell Flaws in Computer Code*, N.Y. TIMES (July 13, 2013), http://www.nytimes.com/2013/07/14/world/europe/nations-buying-as-hackers-sell-computer-flaws.html [https://perma.cc/6HJ2-6FVH]

intermediaries for governments.[71] The 'gray market' is 'gray' only because the buyers and sellers are presumed to be the good guys, acting in the interest of public safety and national security, though government purchasers may misuse vulnerabilities or 'pass them to another government that will.'[72] Shane Harris explains the 'gray market' process in his book *@War*:

> [S]ecurity researchers—another term for hackers—find vulnerabilities. The researchers then design exploits, or methods for attacking the vulnerability, that only they know about at this point. Next, they sell the exploits to middlemen, which are mostly large defense contractors. Raytheon and Harris Corporation are two major players in the zero day market. Also collecting and selling zero days are smaller boutique firms, a number of which are run by former military officials or intelligence officials. Once the middlemen have the zero days, they sell them to their customer—the [National Security Agency].[73]

Other companies have built business models selling not just to the U.S. government but also to other companies and governments around the world, including governments with poor human rights records.[74]

The sales prices for zero days vary. A recent RAND Corporation report suggests that the prices 'range from a few thousand dollars to $200,000–$300,000, depending on the severity of the vulnerability, complexity of the exploit, how long the vulnerability remains undisclosed, the vendor product involved, and the buyer.'[75] Others have suggested that 'weaponized' exploits—those that are 'ready to use against a system'—'start at around $50,000 and run to more than $100,000 apiece, though prices for exploits targeting particularly valuable or difficult to crack systems may be higher.[76] For example, in 2015, a company paid a million dollars to hackers who

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(identifying governmental buyers, including, among others, the United States, Israel, the United Kingdom, Russia, India, North Korea, Malaysia, and Singapore).

71. *See* ABLON ET AL., *supra* note 66, at 26 (providing examples of companies that act as intermediaries).

72. KIM ZETTER, COUNTDOWN TO ZERO DAY: STUXNET AND THE LAUNCH OF THE WORLD'S FIRST DIGITAL WEAPON 101 (2014); *see also* Jay P. Kesan & Carol M. Hayes, *Bugs in the Market: Creating a Legitimate, Transparent, and Vendor-Focused Market for Software Vulnerabilities*, 58 ARIZ. L. REV. 753, 800–01 (2016) (discussing the white, black, and gray markets for vulnerabilities).

73. HARRIS, *supra* note 55, at 94.

74. *See* Kim Zetter, *Hacking Team Leak Shows How Secretive Zero-Day Exploit Sales Work*, WIRED (July 24, 2015), http://www.wired.com/2015/07/hacking-team-leak-shows-secretive-zero-day-exploit-sales-work/ [https://perma.cc/FS9M-NAYR] (discussing sales of zero days by some companies to the Italian company, Hacking Team, which "has come under attack for selling to repressive regimes, who've used [Hacking Team products] to target political activists and dissidents").

75. ABLON ET AL., *supra* note 66, at 26.

76. HARRIS, *supra* note 55, at 95–96.

developed an exploit for Apple's iOS,[77] and the U.S. government paid at least $1.3 million for a means of accessing the iPhone used by the perpetrators of the mass shooting in San Bernardino in 2015.[78]

For software vendors, the incentive to patch vulnerabilities in their products is clear. If a vulnerability in a company's software is used for cybercrime or other malicious activity, the company can suffer significant reputational harm.[79] For governments, however, the incentive structure is more complex. On the one hand, zero-day vulnerabilities are valuable tools that allow the government to engage in espionage, but on the other hand, the same vulnerability the government uses offensively presents national security risks if a foreign government discovers and exploits it against, for example, U.S. critical infrastructure.[80] The interests of the software vendors and the U.S. government with respect to discovering and fixing vulnerabilities are not necessarily aligned. The government may want to exploit vulnerabilities that software companies want to fix.[81]

Reports indicate that the National Security Agency (NSA) discovers most of the zero-day vulnerabilities it uses, but it also spends significant money purchasing vulnerabilities.[82] The NSA is 'widely believed by security

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77. *See* Andy Greenberg, *Hackers Claim Million-Dollar Bounty for iOS Zero Day Attack*, WIRED (Nov. 2, 2015), http://www.wired.com/2015/11/hackers-claim-million-dollar-bounty-for-ios-attack/ [https://perma.cc/9XHQ-KLAB] (reporting that "security startup" Zerodium, which had issued a public call for such a vulnerability, paid out the $1 million bounty and would not "immediately report the vulnerabilities to Apple, though it may 'later' tell Apple's engineers the details of the technique to help them develop a patch against the attack").

78. Eric Lichtblau & Katie Benner, *F.B.I. Director Suggests Bill for iPhone Hacking Topped $1.3 Million*, N.Y. TIMES (Apr. 21, 2016), http://www.nytimes.com/2016/04/22/us/politics/fbi-director-suggests-bill-for-iphone-hacking-was-1-3-million.html [https://perma.cc/6GA7-Z2A5].

79. *See, e.g.*, Brian Barrett, *Flash. Must. Die.*, WIRED (July 15, 2015), http://www.wired.com/2015/07/adobe-flash-player-die/ [https://perma.cc/BLK9-W4EP] (chronicling efforts by tech-industry leaders to end use of Adobe Flash after the discovery of numerous zero-day vulnerabilities). Software makers, however, do not suffer legal risk. *See* Derek E. Bambauer, *Ghost in the Network*, 162 U. PA. L. REV. 1011, 1034 (2014) (explaining that software vendors are "virtually immune for these failures [to secure software], even if the flaw existed due to the company's negligence" because "[e]nd-user license agreements typically disclaim all liability on the vendor's part, and tort law has failed to impose a duty of care on software manufacturers" (footnote omitted)).

80. *Cf.* PRESIDENT'S REVIEW GROUP, *supra* note 67, at 219 (arguing that to assist in protecting privately owned critical infrastructure "NSA, DHS, and other agencies should identify vulnerabilities in software widely employed in critical infrastructure and then work to eliminate those vulnerabilities as quickly as possible," but recognizing that "[t]hat duty to defend, however, may sometimes come into conflict with the intelligence collection mission, particularly when it comes to 'Zero Days'").

81. *See* ZETTER, *supra* note 72, at 221 ("[W]hen military and intelligence agencies need a zero-day vulnerability for offensive operations, the last thing they want to do is have it patched. Instead, they keep fingers crossed that no one else will discover and disclose it before they've finished exploiting it.").

82. *See, e.g.*, *id.* at 219 ("Although most of the implants used by the NSA are designed in-house by the agency's TAO division, the NSA also budgeted $25.1 million in 2013 for 'covert purchases

experts and government officials to be the single largest procurer of zero day exploits, many purchased 'in a shadowy online bazaar of freelance hackers and corporate middlemen,'[83] and it has been stockpiling vulnerabilities since the 1990s.[84] The NSA has even paid 'software and hardware companies not to disclose vulnerabilities or backdoors in their products, so that the spy agency can exploit them.'[85]

In 2014, the U.S. government provided some information on how it decides whether or not to disclose vulnerabilities to software makers so that they can be fixed. In a post on the White House website, Cybersecurity Coordinator Michael Daniel recognized the tradeoffs between using vulnerabilities for intelligence collection and disclosing them so that systems can be secured.[86] In light of this tradeoff, he explained that '*in the majority of cases*, responsibly disclosing a newly discovered vulnerability is clearly in the national interest.'[87] But he also set out factors that govern when the government will "temporarily withhold[] knowledge of a vulnerability,"[88]

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of software vulnerabilities' from private vendors—that is, the boutique firms and large defense contractors who compose the new industrial war complex that feeds the zero-day gray market.").

83. HARRIS, *supra* note 55, at 94.

84. *Id.*

85. *Id.* at 71.

86. Michael Daniel, *Heartbleed: Understanding When We Disclose Cyber Vulnerabilities*, WHITE HOUSE (Apr. 28, 2014), https://www.whitehouse.gov/blog/2014/04/28/heartbleed-understanding-when-we-disclose-cyber-vulnerabilities [https://perma.cc/K5MZ-Z4DV]; *see also* EFF v. NSA, ODNI – *Vulnerabilities FOIA*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/cases/eff-v-nsa-odni-vulnerabilities-foia [https://perma.cc/5Wg2-CEGH] (collecting government documents on the vulnerability disclosure process released pursuant to a Freedom of Information Act request).

87. Daniel, *supra* note 86 (emphasis added); *see also id.* ("[D]isclosing vulnerabilities *usually* makes sense.' (emphasis added)). Reports differ regarding the percentage of vulnerabilities that the U.S. government discloses, as well as whether the government discloses the vulnerabilities only after exploiting them. *See, e.g.*, Chris Strohm et al., *Thank You for Hacking iPhone, Now Tell Apple How You Did It*, BLOOMBERG (Mar. 22, 2016), http://www.bloomberg.com/news /articles/2016-03-23/thank-you-for-hacking-iphone-now-tell-apple-how-you-did-it [https://perma.cc/835S-JYD4] (reporting, based on statements by a "person familiar with the White House's equities review process," that in a single year the government retained "only about two [vulnerabilities] for offensive purposes out of about 100 the White House reviewed"); *Discovering IT Problems, Developing Solutions, Sharing Expertise*, NAT'L SEC. AGENCY (Oct. 30, 2015), https://www.nsa.gov/news-features/news-stories/2015/discovering-solving-sharing-it-solutions.shtml [https://perma.cc/C3NX-FKS4] (reporting that "[h]istorically, NSA has released more than 91 percent of vulnerabilities discovered in products that have gone through [NSA's] internal review process and that are made or used in the United States," while the other "9 percent were either fixed by vendors before [NSA] notified them or not disclosed for national security reasons").

88. Daniel, *supra* note 86 (setting out factors, including the extent to which the "vulnerable system [is] used in the core internet infrastructure, in other critical infrastructure systems, in the U.S. economy, and/or in national security systems," and "[h]ow badly" the United States needs the intelligence it can obtain by using the vulnerability). Daniel's post suggests that the government withholds vulnerabilities in a broader range of circumstances than recommended by the President's Review Group on Intelligence and Communications Technologies. *See* PRESIDENT'S REVIEW

thereby admitting that in fact the U.S. government chooses not to disclose some vulnerabilities of which it is aware.[89]

In an attempt to better secure their software and compete with the vulnerability markets, some companies, particularly in the technology sector,[90] have created 'bug bounty' programs through which they pay security researchers (hackers) to disclose vulnerabilities to the software company so that the vulnerabilities can be patched.[91] Google, for example, paid out more than $2 million in bounties in 2015.[92] However, the companies have difficulty competing with the black and gray markets, where 'a researcher could earn 10–100 times what a software vendor with a bug bounty would pay.'[93] Moreover, some reports indicate that governments

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GROUP, *supra* note 67, at 219 ("In rare instances, [U.S.] policy may briefly authorize using a Zero Day for high priority intelligence collection, following senior, interagency review involving all appropriate departments."); Jack Goldsmith, *Thoughts on the White House Statement on Cyber Vulnerabilities*, LAWFARE (Apr. 28, 2014), http://www.lawfareblog.com/thoughts-white-house-statement-cyber-vulnerabilities [https://perma.cc/A987-LW54] (suggesting that Daniel's post "implies that the government will store and possibly use vulnerabilities in a wider array of circumstances than" the President's Review Group recommended).

89. ZETTER, *supra* note 72, at 391–92 (discussing "loopholes' in the U.S. government's vulnerability disclosure policy).

90. Technology companies' bug bounty programs are the exception, not the rule, among major companies. According to a recent study, 94% of companies included in the Forbes Global 2000 "did not advertise a way for so-called ethical hackers to report bugs, much less pay hackers to report them. Danny Yadron, *If You Find a Software Bug, Don't Try to Report It to These Companies*, WALL STREET J. (Nov. 5, 2015), http://blogs.wsj.com/digits/2015/11/05/if-you-find-a-software-bug-dont-try-to-report-it-to-these-companies/ [https://perma.cc/N5LD-PNCJ].

91. *See, e.g.*, *Chrome Reward Program Rules*, GOOGLE, https://www.google.com/about/appsecurity/chrome-rewards/index.html [https://perma.cc/L92G-EDVJ]; *Information*, FACEBOOK, https://www.facebook.com/whitehat/bounty/ [https://perma.cc/26UF-GXUQ]; *see also* Nicole Perlroth, *HackerOne Connects Hackers With Companies, and Hopes for a Win-Win*, N.Y. TIMES (June 7, 2015), http://www.nytimes.com/2015/06/08/technology/hackerone-connects-hackers-with-companies-and-hopes-for-a-win-win.html [https://perma.cc/NN7T-NP6X] (profiling HackerOne, a company that interfaces between companies and white-hat hackers and handles bug bounty payouts in exchange for a percentage of the bounty). For lists of companies that have bounty programs, see, for example, *The Bug Bounty List*, BUGCROWD, https://bugcrowd.com/list-of-bug-bounty-programs [https://perma.cc/9BKQ-JYES]; *Bug Bounties & Disclosure Programs*, BUGSHEET, http://bugsheet.com/directory [https://perma.cc/WNA2-L57B].

92. Eduardo Vela Nava, *Google Security Rewards – 2015 Year in Review*, GOOGLE SECURITY BLOG (Jan. 28, 2016), https://security.googleblog.com/2016/01/google-security-rewards-2015-year-in.html [https://perma.cc/H8GG-NH9G]; *see also* Reginaldo Silva, *2015 Highlights: Less Low-Hanging Fruit*, FACEBOOK (Feb. 9, 2016), https://www.facebook.com/notes/facebook-bug-bounty/2015-highlights-less-low-hanging-fruit/1225168744164016 [https://perma.cc/9WBN-UP5B] (noting that Facebook paid out $936,000 in bounties in 2015). For an overview of the current bug bounty market, see BUGCROWD, THE STATE OF BUG BOUNTY (2016), https://pages.bugcrowd.com/hubfs/PDFs/state-of-bug-bounty-2016.pdf [https://perma.cc/F4PZ-7WWC].

93. ABLON ET AL., *supra* note 66, at 26; *see* ZETTER, *supra* note 72, at 102–03 (explaining that bug bounty programs are "still no match, in most cases, for the price some governments will pay on the gray market").

have driven up market prices, making it more difficult for companies to compete.[94]

The recent fight between Apple and the FBI over access to the San Bernardino shooter's iPhone provides a dramatic example of an adversarial relationship between the private sector and the government over software security. In February 2016, the Department of Justice obtained a court order compelling Apple to assist the government in accessing the shooter's iPhone by writing code to disable security features, including a setting that would erase the data on the phone after entry of erroneous passcodes.[95] Apple challenged the order,[96] and on the eve of a hearing, the government revealed that a third party had provided a way for the government to access the iPhone without Apple's assistance.[97] The government has subsequently indicated that it paid an outside party over $1.3 million for a tool to access the iPhone.[98] The FBI rejected calls to disclose the iPhone vulnerability for patching and instead declared that the FBI would not even submit the access tool's underlying vulnerability to the 'vulnerability equities process' because the government did not 'purchase the rights to technical details about how the method functions, or the nature and extent of any vulnerability upon which the method may rely in order to operate.'[99] This incident raises the specter not only of the government strategically manipulating what exactly it acquires and thus what enters the vulnerability equities process but also of private hackers potentially limiting the government's options by imposing contractual nondisclosure obligations as part of the government's purchase of hacking tools.

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94. *See* HARRIS, *supra* note 55, at 102 (reporting Google employees' statements that the company's "biggest competition on the zero day gray market is the NSA," which is "buying up zero days faster than anyone else, and paying top dollar"); Joseph Menn, *Special Report: U.S. Cyberwar Strategy Stokes Fear of Blowback*, REUTERS (May 10, 2013), http://www.reuters.com/article/us-usa-cyberweapons-specialreport-idUSBRE9490EL20130510 [https://perma.cc/6LZM-G9WQ] (noting that the U.S. government is the "biggest buyer in a burgeoning gray market" for zero-day vulnerabilities).

95. In the Matter of the Search of an Apple Iphone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203, No. ED 15-0451M, 2016 WL 618401, at *2 (C.D. Cal. Feb. 16, 2016).

96. Apple, Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Apple's Assistance at 2, In the Matter of the Search of an Apple Iphone Seized During the Execution of a Search Warrant on a Black Lexus IS300, No. CM 16-10 (C.D. Cal. Feb. 25, 2016).

97. Government's *Ex Parte* Application for a Continuance at 3, In the Matter of the Search of an Apple Iphone Seized During the Execution of a Search Warrant on a Black Lexus IS300, No. CM 16-10 (C.D. Cal. Mar. 21, 2016).

98. *See supra* note 78 and accompanying text.

99. Eric Tucker, *FBI Says It Won't Disclose How It Accessed Locked iPhone*, ASSOCIATED PRESS (Apr. 27, 2016), http://bigstory.ap.org/article/3ed26fcb4eb0453ea8de7f0cbbebf2bc/fbi-says-it-wont-disclose-how-it-accessed-locked-iphone [https://perma.cc/8AD5-EAEJ] (quoting a statement by FBI official Amy Hess).

On the other hand, more recently, the Defense Department has taken a page from the private sector's playbook and established a bug bounty program of its own—a first for the federal government.[100] Called 'Hack the Pentagon," the program allowed white-hat hackers—after registering and completing a background check—to submit vulnerabilities in the Department's public-facing websites, like defense.gov.[101] The Defense Department ultimately paid out $150,000 for more than 100 vulnerabilities.[102]

As these examples make clear, the relationship between the government and the private sector with respect to vulnerabilities is complex. Sometimes the government partners with the private sector to secure companies' software, such as when the government purchases and discloses a vulnerability to the software vendor so the vendor can patch it. Sometimes the government seeks nongovernmental help to secure *the government's* systems and networks, as in the Defense Department bug bounty program. On other occasions, the government and the private sector reportedly partner *not* to secure software, such as when the NSA pays companies not to fix software vulnerabilities,[103] presumably in the service of broader intelligence and national security goals. But the picture is not all rosy: sometimes the government and software companies are adversaries. This occurs when the government discovers and fails to disclose a vulnerability that the software company would otherwise fix; when the government exploits a vulnerability in a company's product; or when the government purchases a vulnerability in a company's software on the gray market (and fails to disclose it).[104] In

100. Press Release, U.S. Dep't of Def., Statement by Pentagon Press Secretary Peter Cook on DoD's "Hack the Pentagon" Cybersecurity Initiative, U.S. Dep't of Defense (Mar. 2, 2016), http://www.defense.gov/News/News-Releases/News-Release-View/Article/684106/statement-by-pentagon-press-secretary-peter-cook-on-dods-hack-the-pentagon-cybe [https://perma.cc/X76B-BVHA].

101. *Id.* Lisa Ferdinando, *Carter Announces 'Hack the Pentagon' Program Results*, DOD NEWS (June 17, 2016), http://www.defense.gov/News/Article/Article/802828/carter-announces-hack-the-pentagon-program-results [https://perma.cc/AP9V-3HCT].

102. Ferdinando, *supra* note 101. Although the "Hack the Pentagon" program was time-limited, the Defense Department recently announced a separate "Vulnerability Disclosure Policy" that is designed to allow researchers to report vulnerabilities to the Defense Department without fear of criminal prosecution or civil lawsuits. *DoD Vulnerability Disclosure Policy*, HACKERONE, https://hackerone.com/deptofdefense [https://perma.cc/652R-69ZF]; Ellen Nakashima, *Hackers Can Now Report Bugs in Defense Dept. Websites Without Fear of Prosecution*, WASH. POST (Nov. 21, 2016), https://www.washingtonpost.com/world/national-security/hackers-can-now-report-bugs-in-defense-dept-websites-without-fear-of-prosecution/2016/11/21/2605901a-b019-11e6-840f-e3ebab6bcdd3_story.html?utm_term=.89964c35e148 [https://perma.cc/Y5ZX-7S62].

103. HARRIS, *supra* note 55, at 71 ("[T]he NSA pays software and hardware companies not to disclose vulnerabilities or backdoors in their products, so that the spy agency and TAO hackers can exploit them.").

104. The plasticity of roles is also evident for those who discover vulnerabilities. *See* WITTES & BLUM, *supra* note 2, at 86 ("Those who look for and discover zero-day flaws can thus function

these latter situations, the software companies that seek to secure their software (where the government does not) are arguably acting in a government-like fashion: they are trying to protect individual, corporate, and other systems against cybercrime and other exploitation. At the same time, the government acts as a participant in the zero-day market, rather than a regulator,[105] potentially sacrificing individual-level security (what the software makers aim to address) in the service of broader national security goals.

3. Publicly Attributing State-Sponsored Intrusions.—For the last several years, private companies have begun to publicly accuse foreign governments and government-sponsored actors of hacking targets in the United States and elsewhere. In notable instances like the 2015 hack of the Office of Personnel Management (OPM)[106] and the recent breaches of the Democratic National Committee,[107] private cybersecurity companies have taken the lead in public attribution of hacks to foreign governments when the U.S. government was reluctant to make similar accusations.

This phenomenon of private attribution of state-sponsored hacking has created an informal, but mutually beneficial, partnership between the cybersecurity companies and the U.S. government. On the one hand, the companies use public attribution reports for marketing purposes and to generate business. On the other hand, the government uses the reports to talk around classified information and to distance itself from accusations.[108]

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as outlaws (if they mean to exploit them for criminal purposes), as a crucial line of defense (if they mean to help software vendors secure them before an attack), or as a component of aggressive state or nonstate offense (if they mean to help attack someone else).").

105. The U.S. government may begin regulating some cross-border aspects of trade in hacking-related software pursuant to the Wassenaar Arrangement. Changes to the Arrangement in 2013 required countries to regulate cross-border trade in "intrusion software," but after protests from the technology and cybersecurity communities, the White House announced in March 2016 that it would attempt to renegotiate the 2013 changes. Sean Gallagher, *US to Renegotiate Rules on Exporting "Intrusion Software"*, ARS TECHNICA (Mar. 2, 2016), http://arstechnica.com/tech-policy/2016/03/us-to-renegotiate-rules-on-exporting-intrusion-software-under-wassenaar-arrangement/ [https://perma.cc/2BCG-64S9]. That effort largely failed in December 2016, *see* Tami Abdollah, *US Fails to Renegotiate Arms Control Rule for Hacking Tools*, ASSOCIATED PRESS (Dec. 19, 2016), http://bigstory.ap.org/article/c0e437b2e24c4b68bb7063f03ce892b5/us-fails-renegotiate-arms-control-rule-hacking-tools [https://perma.cc/8JM8-EPSZ], and it is not clear whether the Trump Administration will renew efforts to renegotiate the 2013 requirements.

106. *See infra* note 120 and accompanying text.

107. *See infra* notes 288–89 and accompanying text.

108. For example, in January 2010, Google publicly announced that it had discovered a sophisticated attack on its systems that originated in China. David Drummond, *A New Approach to China*, GOOGLE (Jan. 12, 2010), http://googleblog.blogspot.com/2010/01/new-approach-to-china.html [https://perma.cc/AJQ9-U8BJ]. After the post, then-Secretary of State Hillary Clinton issued a statement that "look[ed] to the Chinese government for an explanation. Hillary Rodham Clinton, U.S. Sec'y of State, U.S. Dep't of State, Statement on Google Operations in China (Jan. 12, 2010), http://www.state.gov/secretary/20092013clinton/rm/2010/01/135105.htm

Several examples illustrate the mutually beneficial relationship that companies and the U.S. government have developed.

In an extensive report published in February 2013, the cybersecurity firm Mandiant described the evidence it had amassed against a group, designated Advanced Persistent Threat 1 (APT1), that had compromised 141 companies in seven years.[109] Mandiant traced the attacks to a particular building in Shanghai and concluded that APT1 is Unit 61398 of the Chinese People's Liberation Army.[110] Based on its research, Mandiant alleged that 'the Communist Party of China is tasking the Chinese People's Liberation Army to commit systematic cyber espionage and data theft against organizations around the world.'[111] The report provided not only information about APT1's methods of attack, but also details and photos of several 'APT1 personas' who 'made poor operational security choices' that allowed Mandiant to identify them.[112]

Mandiant apparently coordinated in some manner with the U.S. government before releasing its report.[113] According to subsequent reports, '[s]ources close to the drafting of the report say that the government gave Mandiant some intelligence it used in the report,'[114] and the Department of Homeland Security may have waited until Mandiant's announcement to issue a security bulletin that included some of the same Internet addresses and websites that Mandiant identified.[115]

The Mandiant report triggered a sea change in U.S. policy toward China on cybersecurity issues. It prompted the Obama administration to begin openly calling out the Chinese government for intellectual property theft. Less than a month after the report's release, National Security Advisor Tom Donilon gave a speech to The Asia Society and called on the Chinese government to 'take serious steps to investigate and put a stop to these activities.'[116] The Mandiant report provided a way for the U.S. government

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[https://perma.cc/8PKL-Y4XA]. In a later interview, former Deputy Secretary of State Jim Steinberg explained the utility to the government of Google's post, noting that it gave the government "'an opportunity to discuss the issues without having to rely on classified sources or sensitive methods' of intelligence gathering." HARRIS, *supra* note 55, at 174 (quoting Harris's interview with Steinberg).

109. MANDIANT, APT1: EXPOSING ONE OF CHINA'S CYBER ESPIONAGE UNITS 20 (2013), https://www.fireeye.com/content/dam/fireeye-www/services/pdfs/mandiant-apt1-report.pdf [https://perma.cc/58QK-2JJ5].

110. *Id.* at 3.

111. *Id.* at 7.

112. *Id.* at 51–58.

113. HARRIS, *supra* note 55, at 207.

114. *Id.* at 209.

115. *Id.*

116. Tom Donilon, Nat'l Sec. Advisor, Exec. Office of the President, The United States and the Asia-Pacific in 2013 (Mar. 11, 2013), https://www.whitehouse.gov/the-pressoffice/2013/03/11/remarks-tom-donilon-national-security-advisor-president-united-states-an

to address Chinese cyber intrusions without revealing classified intelligence information or making the accusation itself.[117]

The Mandiant APT1 report started a trend of companies attributing intrusions to governments.[118] And the U.S. government has taken notice. In an April 2015 speech, Secretary of Defense Ash Carter explained that attribution of cyber attacks has improved "because of private-sector security researchers like FireEye, CrowdStrike, HP—when they out a group of malicious cyber attackers, we take notice and share that information."[119]

Carter's statement may undersell the utility of private attribution to the government. A strikingly direct example of outsourcing attribution occurred with the Office of Personnel Management hack. The U.S. government has declined to identify the perpetrators of the intrusions, but cybersecurity firm CrowdStrike—based in part on "technical information provided by the U.S. government" to the company—has alleged that the "intruders were affiliated with the Chinese government."[120]

[https://perma.cc/232W-UXJB]; *see* FRED KAPLAN, DARK TERRITORY: THE SECRET HISTORY OF CYBER WAR 221 (2016) (noting that Donilon's comments on China "broke new diplomatic ground").

117. HARRIS, *supra* note 55, at 208–09 (noting that "Obama administration officials were generally pleased with Mandiant's decision" to issue the report for this reason).

118. Companies, including FireEye, which acquired Mandiant in 2014, and CrowdStrike, have issued numerous reports accusing both the Chinese and Russian governments of intrusions. *See, e.g.*, CROWDSTRIKE, CROWDSTRIKE INTELLIGENCE REPORT: PUTTER PANDA 5 (2014), https://cdn0.vox-cdn.com/assets/4589853/crowdstrike-intelligence-report-putter-panda.original.pdf [https://perma.cc/M7HD-M82H] (accusing Chinese People's Liberation Army (PLA) Unit 61486 of intrusions aimed at, *inter alia*, space and communications); FIREEYE, APT28: A WINDOW INTO RUSSIA'S CYBER ESPIONAGE OPERATIONS? 28 (2014), https://www2.fireeye.com/apt28.html [https://perma.cc/F4Q7-Q99T] (alleging that APT28 is "sponsored by the Russian government"); Dmitri Alperovitch, *Bears in the Midst: Intrusion into the Democratic National Committee*, CROWDSTRIKE BLOG (June 15, 2016), https://www.crowdstrike.com/blog/bears-midst-intrusion-democratic-national-committee/ [https://perma.cc/B7LU-68NJ] (revealing that two groups linked to Russian intelligence agencies compromised the Democratic National Committee). Another category of private sector attributions to state-sponsored actors involves companies providing notices to their customers when they believe the customers' accounts have been targeted by state-sponsored actors. Google pioneered such notifications in 2012, and in late 2015, Facebook, Twitter, Yahoo, and Microsoft followed suit. *See* Kristen Eichensehr, *'Your Account May Have Been Targeted by State-Sponsored Actors' Attribution and Evidence of State-Sponsored Cyberattacks*, JUST SECURITY (Jan. 11, 2016, 9:17 AM), https://www.justsecurity.org/28731/your-account-targeted-state-sponsored-actors-attribution-evidence-state-sponsored-cyberattacks/ [https://perma.cc/D6MW-PVVG] (discussing state-sponsored-attacker notifications and their implications for evolving standards of evidence regarding attribution).

119. Ash Carter, Sec'y of Def., U.S. Dep't of Def., Drell Lecture: Rewiring the Pentagon: Charting a New Path on Innovation and Cybersecurity (Apr. 23, 2015), http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1935 [https://perma.cc/86HM-AV5M].

120. Shane Harris, *Security Firm: China Is Behind the OPM Hack*, DAILY BEAST (July 9, 2015), http://www.thedailybeast.com/articles/2015/07/09/security-firm-china-is-behind-the-opm-hack.html [https://perma.cc/MAF3-3HTK].

In other instances, companies' independent actions have proven beneficial to government goals. For example, in September 2015, the United States and China agreed that 'neither country's government will conduct or knowingly support cyber-enabled theft of intellectual property, including trade secrets or other confidential business information, with the intent of providing competitive advantages to companies or commercial sectors.'[121] Commentators immediately questioned how the United States would verify China's compliance with the agreement.[122] Cybersecurity companies were quick to volunteer that they would assist, through their work in monitoring their clients' networks, in verifying China's compliance with the deal.[123]

Despite the U.S. government's apparent enthusiasm for private attribution by U.S. companies, U.S. cybersecurity firms are not the only ones in the attribution business.[124] The United States has been on the receiving

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121. Office of the Press Sec'y, *Fact Sheet: President Xi Jinping's State Visit to the United States*, WHITE HOUSE (Sept. 25, 2015), https://www.whitehouse.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states [https://perma.cc/Q3KQ-H6ME].

122. *See, e.g.*, *The Obama-Xi Cyber Mirage: A Digital Arms Deal that Is Full of Promises but No Enforcement*, WALL STREET J. (Sept. 27, 2015), http://www.wsj.com/articles/the-obama-xi-cyber-mirage-1443387248 [https://perma.cc/2VBA-AQJJ]; Benjamin Wittes, *China's Cyber-Commitments and Congressional Oversight: A Suggestion*, LAWFARE (Sept. 28, 2015), https://lawfareblog.com/chinas-cyber-commitments-and-congressional-oversight-suggestion [https://perma.cc/Q8C2-ZKJK].

123. *See* Dmitri Alperovitch, *U.S.-China Agreement on Cyber Intrusions: An Inflection Point*, CROWDSTRIKE BLOG (Sept. 25, 2015), http://blog.crowdstrike.com/cyber-agreement/ [https://perma.cc/7NGR-BL2S] (discussing "how [the] private sector can be of help" in "validating this agreement" and noting that CrowdStrike's products will provide "visibility into whether China abides by the commitment[s]" expressed in the agreement); Richard Bejtlich, *To Hack, or Not to Hack?*, BROOKINGS UP FRONT (Sept. 28, 2015), http://www.brookings.edu/blogs/up-front/posts/2015/09/28-us-china-hacking-agreement-bejtlich [https://perma.cc/L3DZ-4CD8] ("I expect U.S. private sector security companies to bear the brunt of the public verification process. They will be subjected to repeated questions such as 'are the Chinese still hacking?' while the U.S. administration is likely to remain fairly quiet."); Kristen Eichensehr, *The US-China Cyber Agreement: What's In and What's Out*, JUST SECURITY (Sept. 28, 2015, 10:10 AM), https://www.justsecurity.org/26412/u-s-china-cyber-agreement-whats-whats/ [https://perma.cc/QL8C-9TYE] (discussing the role of private cybersecurity firms in verification of the intellectual property theft provision). At least one company was also quick to accuse China of noncompliance. *See* Paul Mozur, *Cybersecurity Firm Says Chinese Hackers Keep Attacking U.S. Companies*, N.Y. TIMES (Oct. 19, 2015), http://www.nytimes.com/2015/10/20/technology/cybersecurity-firm-says-chinese-hackers-keep-attacking-us-companies.html [https://perma.cc/JYS9-X2R9] (reporting on allegations by CrowdStrike that actors affiliated with the Chinese government attempted to hack U.S. commercial targets in the wake of the U.S.–China cybersecurity deal).

124. One prominent foreign cybersecurity firm is Russian company Kaspersky Lab, whose founder Eugene Kaspersky "studied cryptography at a high school co-sponsored by the K.G.B. and once worked for the Russian military." Nicole Perlroth & David E. Sanger, *U.S. Embedded Spyware Overseas, Report Claims*, N.Y. TIMES (Feb. 16, 2015), http://www.nytimes.com/2015/02/17/technology/spyware-embedded-by-us-in-foreign-networks-security-firm-says.html [https://perma.cc/9U3H-GL4F]. Kaspersky Lab has been said to have "a front-row seat to America's digital espionage operations" because its security software "is not used by many

end of private attribution, though not to the same extent as other countries.[125] The government connections of cybersecurity-firm personnel, both in the United States and abroad, have prompted controversy[126] and charges of pulling punches for national governments.[127] Cybersecurity companies generally deny such allegations,[128] but FireEye CEO David DeWalt has 'said he would think twice before publicizing a hacking campaign by Americans' like the campaigns that FireEye has attributed to states like China and Iran.[129] Such nationalism in the cybersecurity market raises interesting dilemmas for governments and companies, but it also suggests that even if a company is not willing to call out its national government, some other company from abroad might. This may become increasingly likely as new companies enter the attribution business. For example, in May 2015, a Chinese company entered the field. Chinese Internet security company Qihoo 360 released a report on a state-based hacking group, 'OceanLotus, though the report did not identify the country responsible.[130]

The private attribution of government attacks is a striking development. Mandiant, CrowdStrike, and the other companies that have accused foreign

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American government agencies" and is therefore "more trusted by other governments, like those of Iran and Russia, whose systems are closely watched by United States intelligence agencies. *Id.* *see* WITTES & BLUM, *supra* note 2, at 73–74 (citing Kaspersky Lab as an example and arguing that '[t]he [U.S.] intelligence community is not the only official body seeking the assistance of the private sector").

125. *See, e.g.*, Kim Zetter, *Suite of Sophisticated Nation-State Attack Tools Found with Connection to Stuxnet*, WIRED (Feb. 16, 2015), http://www.wired.com/2015/02/kapersky-discovers-equation-group [https://perma.cc/9B8P-44ZG] (detailing a report by Kaspersky Lab on "Equation Group").

126. *See, e.g.*, Stephanie Mlot, *Kaspersky, Bloomberg Spar over KGB Allegations*, PC MAG. (Mar. 23, 2015), http://www.pcmag.com/article2/0,2817,2478613,00.asp [https://perma.cc/B9PX-JY2Q]; *see also* Corey Flintoff, *Kaspersky Lab: Based in Russia, Doing Cybersecurity in the West*, NPR (Aug. 10, 2015, 1:59 PM), http://www.npr.org/sections/alltechconsidered/2015/08/10/431247980/kaspersky-lab-a-cybersecurity-leader-with-ties-to-russian-govt [https://perma.cc/32TU-KEWC] (noting controversy over Kaspersky's ties to Russian intelligence officials); Danny Yadron, *Cybersecurity Firm's Strategy Raises Eyebrows: FireEye's Plan to Reverse Losses Includes Getting Close to Federal Agencies*, WALL STREET J. (Sept. 8, 2015), http://www.wsj.com/articles/cybersecurity-firms-strategy-raises-eyebrows-1441766359 [https://perma.cc/8QVG-MTNU] (noting that U.S. cybersecurity companies "increasingly stake their reputations on ties to Washington").

127. Danny Yadron, *When Cybersecurity Meets Geopolitics*, WALL STREET J. (Mar. 23, 2015), http://blogs.wsj.com/digits/2015/03/23/when-cybersecurity-meets-geopolitics [https://perma.cc/4CAT-38GZ].

128. *See, e.g.*, Flintoff, *supra* note 126 (citing Kaspersky's denial that it avoids going after "Russian viruses" and instead targets "malware it says comes from Western governments").

129. Yadron, *supra* note 127.

130. *See* Adam Segal, *OceanLotus: China Hits Back With Its Own Cybersecurity Report*, NET POLITICS (June 3, 2015), http://blogs.cfr.org/cyber/2015/06/03/oceanlotus-china-fights-back-with-its-own-cybersecurity-report/ [https://perma.cc/RVE5-3A3Y]; *see also id.* ("Qihoo clearly is co-opting the language and techniques of the APT reports done by Mandiant, CrowdStrike, and other U.S. cybersecurity companies.").

governments of intrusions are engaged in private intelligence-gathering at a sophisticated level.[131] They are in many ways doing what one would expect intelligence agencies to do, but they make their research public and use it to build business.[132] U.S. companies may coordinate in some way with the U.S. government before releasing a report,[133] but it appears that the companies are generally in the driver's seat, deciding which clients to take on, which hackers to investigate, whether to build a case against foreign governments, and whether and when to publicly accuse foreign states of wrongdoing. Although the U.S. government appears to have appreciated and even benefited from Mandiant's release of its APT1 report, the report 'set off a bomb in one of the most delicate and thorny areas of [U.S.] foreign policy.'[134] And the decision to launch the bomb came from a private company marketing its services,[135] not from the government agencies charged with diplomacy, national defense, or intelligence.

The U.S. government, in line with Carter's speech, has encouraged the attribution of state-sponsored attacks and fostered an informal partnership of sorts with cybersecurity companies. But this may be a tenuous and even dangerous alliance. It is not clear that the incentives of U.S. companies, which have commercial reasons for attributing state-sponsored hacks, will always align with the public values the U.S. government is supposed to serve.[136]

4. Defending Private Networks.—Private parties own roughly 85% of the critical infrastructure in the United States,[137] and the issue of who should

131. Kristen Eichensehr, *The Private Frontline in Cybersecurity Offense and Defense*, JUST SECURITY (Oct. 30, 2014, 12:37 PM), http://justsecurity.org/16907/private-frontline-cybersecurity-offense-defense/ [https://perma.cc/DB4V-DL8A]; *see also* WITTES & BLUM, *supra* note 2, at 69–70 (noting that the Mandiant APT1 report takes "DIY signals counterintelligence to a whole new level").

132. HARRIS, *supra* note 55, at 206 ("The details in the Mandiant report were of a kind one normally expects to find in a classified government intelligence document. The report showed that private investigators could collect and analyze information as effectively as a government spy agency, if not more so."); SEGAL, *supra* note 9, at 8 (noting with respect to Mandiant's APT1 report that '[i]n attributing the digital assault, a private company had acted like a national intelligence agency").

133. *See, e.g.*, Yadron, *supra* note 127 ("Before American computer-security company FireEye releases a report on new hacker activity, it sometimes gives the U.S. government an advance copy.").

134. HARRIS, *supra* note 55, at 205.

135. *See* KAPLAN, *supra* note 116, at 223 (reporting that Mandiant gave *The New York Times* an advance copy of the APT1 report, and '[t]he *Times* ran a long front-page story summarizing its contents"); *see also infra* note 174.

136. On the other hand, if the U.S. government ceases making public attributions, private companies' attribution reports may play an increasingly important role. *See infra* note 308.

137. *Critical Infrastructure and Key Resources*, INFO. SHARING ENV'T, http://www.ise.gov/mission-partner/critical-infrastructure-and-key-resources [https://perma.cc/D9JX-D4LT]; *cf.*

defend such networks from cybersecurity threats has provoked uncertainty and disagreement.[138] Is securing critical infrastructure networks a public good that should be provided by the government, like traditional national defense,[139] or is it the responsibility of individual companies?[140] In the last few years, the federal government and the private sector have exhibited contradictory views about who should defend the networks, and their views contradict not just each other but their own positions over time.

In some circumstances, the private sector has wanted the federal government to provide defense. For example, after Google was hacked by China in 2010, a 'former White House official' recounted to a journalist that Google 'called the N.S.A. in and said, 'You were supposed to protect us from this!' The N.S.A. guys just about fell out of their chairs. They could not believe how naïve the Google guys had been.'[141]

More recently, however, the NSA has reportedly sought greater access to private networks to provide defense and has been rebuffed. Shane Harris recounts a 2011 meeting between then-NSA director Keith Alexander and financial industry leaders. Alexander told the executives that the NSA wanted to expand to banks a pilot program, whereby the NSA had been sharing cyber threat indicators with defense contractors, but 'this time with a twist.'[142] Alexander suggested that

> [it] would be much easier to protect the companies if they let the NSA install surveillance equipment on their networks. Cut out the

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Carter, *supra* note 119 ("American businesses own, operate, and see approximately ninety percent of our national networks ").

138. *See* Robert Knake, *Private Sector and Government Collaboration on Cybersecurity: The Home Depot Model*, COUNCIL ON FOREIGN REL. NET POLITICS (Mar. 31, 2015), http://blogs.cfr.org/cyber/2015/03/31/private-sector-and-government-collaboration-on-cybersecurity-the-home-depot-model/ [https://perma.cc/9B9D-DGF9] (noting continued uncertainty among companies' chief information security officers about the relative roles of the government and private sector in addressing cybersecurity incidents).

139. *See, e.g.*, Nathan Alexander Sales, *Regulating Cyber-Security*, 107 NW. U. L. REV. 1503, 1518 (2013) (suggesting that "private firms might be asked to provide a baseline level of cyber-security defenses that are capable of thwarting intrusions by adversaries of low to medium sophistication' while the government 'assume[s] responsibility for defending public utilities and other sensitive enterprises against catastrophic attacks by foreign militaries and other highly sophisticated adversaries"); Alan Charles Raul, *Cyberdefense Is a Government Responsibility*, WALL STREET J. (Jan. 5, 2015), http://www.wsj.com/articles/alan-charles-raul-cyberdefense-is-a-government-responsibility-1420502942 [https://perma.cc/TP3Q-PD6W].

140. *See* Madeline Carr, *Public–Private Partnerships in National Cyber-Security Strategies*, 92 INT'L AFF. 43, 56–57 (2016) (discussing the divergent perspectives of governments and private actors regarding whether protecting private networks is a "public good' and should be the government's responsibility).

141. Michael Joseph Gross, *Enter the Cyber-Dragon*, VANITY FAIR (Aug. 2, 2011), http://www.vanityfair.com/news/2011/09/chinese-hacking-201109 [https://perma.cc/9CZY-UL4K].

142. HARRIS, *supra* note 55, at 166.

> middlemen. Let the analysts at Fort Meade have a direct line into Wall Street.
>
> A silence fell over the room. The executives looked at one another, incredulous. *Is this guy serious?*
>
> 'They thought he was an idiot, says a senior financial services executive who was at the meeting 'These are all private networks he was talking about. '[143]

The ramifications for companies of allowing direct NSA access to their networks are even greater in the wake of the Snowden revelations, as a result of which '[t]here is now business value in championing privacy and fighting the NSA, and business harm in cooperation. '[144]

The basic system that has evolved for securing critical infrastructure systems from cybersecurity breaches casts the private sector as the main actor—either companies defend their own networks, or they hire other companies to do so—and the government plays only a supporting role. As Robert Knake, the former National Security Council director for cybersecurity policy, pithily deemed it, the current system (at least from the government's perspective) is 'the 'Home Depot' model: You can do it; we can help!"[145] In other words, 'the current strategy makes private companies responsible for their own network defense, while the federal government supports them by 'doing the things that only the federal government can do, including prosecuting cybercrime, applying diplomatic pressure, issuing sanctions, providing cyber-threat information to companies, and '[d]efend[ing] the United States from significant, national events. '[146]

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143. *Id.* This was not the first time that government officials had considered—or the NSA had suggested—putting the NSA in charge of securing critical infrastructure computers. *See* KAPLAN, *supra* note 116, at 19–20, 34 (recounting an incident in the Reagan administration); *id.* at 57, 72 (reporting statements then-NSA director Kenneth Minihan made in 1997 to a presidential commission on critical infrastructure protection in which he appeared to suggest the NSA take over cybersecurity for critical infrastructure, stating, in particular, "[c]hange the law, give me the power, I'll protect the nation."); *cf. id.* at 100–01 (noting that an early draft of President Clinton's "*National Plan for Information Systems Protection: Defending America's Cyberspace* proposed hooking up all civilian government agencies—and perhaps, eventually critical infrastructure companies—to a Federal Intrusion Detection Network a parallel Internet, with sensors wired to some government agency's monitor (which agency was left unclear), ' though protests from Congress and civil liberties groups ultimately prompted revisions).

144. BRUCE SCHNEIER, DATA AND GOLIATH: THE HIDDEN BATTLES TO COLLECT YOUR DATA AND CONTROL YOUR WORLD 207 (2015); *see also* Kristen E. Eichensehr, *The Cyber-Law of Nations*, 103 GEO. L.J. 317, 351 & n.188 (2015) (discussing harms U.S. businesses suffered internationally in the wake of the Snowden revelations).

145. Knake, *supra* note 138. The private sector's take on the model may be somewhat different. Knake notes that a chief information security officer he spoke with "summed up the approach as 'private sector, drop dead. *Id.*; *Robert K. Knake*, COUNCIL ON FOREIGN REL. http://www.cfr.org/experts/cybersecurity-homeland-security-digital-infrastructure/robert-k-knake/b15502 [https://perma.cc/6A57-AK89].

146. Knake, *supra* note 138.

Cyber-threat information sharing is the dominant example of partnership between the government and the private sector on cybersecurity.[147] In 2011, the Defense Department launched a pilot program to provide classified, cybersecurity-threat information to a few defense industrial-base companies, and the program has subsequently expanded.[148] The FBI has undertaken similar information sharing with a broader range of industries.[149] For example, the FBI 'has broken in to the computers of Chinese hackers and stolen the lists of specific companies they're targeting, as well as 'the e-mail addresses of employees whom Chinese hackers intend to spear phish, sending them legitimate-looking e-mails that actually contain spyware.'[150] The FBI then provides the information directly to the targeted companies for use in the companies' defensive measures.[151] More recently, the Department of Homeland Security has also begun sharing classified threat information with prequalified private sector entities.[152]

The private sector has come a long way since the Google executives asked why the NSA had failed to protect the company, and private, defensive capacities have strengthened so much that the importance of the government's role in companies' defense is now less clear. In one instance, for example, the FBI shared with banks 'the rundown of cases it was tracking, so the banks could see for themselves the breadth of the bureau's knowledge, but '[i]t turned out that the banks had been tracking every case on the list, except one, even without the government's assistance.[153]

147. Information sharing is not treated as a separate case study here because it is not an end in itself but rather a means of securing both governmental and private sector networks.

148. For the initial incarnation of the program, see David Ignatius, Opinion, *Department of Internet Defense*, WASH. POST (Aug. 12, 2011), https://www.washingtonpost.com/opinions/department-of-internet-defense/2011/08/12/gIQAPQcxBJ_story.html [https://perma.cc/NBR6-VGD9] (describing the Defense Industrial Base, or "DIB, ' Cyber Pilot program); Ellen Nakashima, *Cyber Defense Effort Is Mixed, Study Finds*, WASH. POST (Jan. 12, 2012), https://www.washingtonpost.com/world/national-security/cyber-defense-effort-is-mixed-study-finds/2012/01/11/gIQAAu0YtP_story.html [https://perma.cc/7ED8-WJV6] (discussing early evaluations of the DIB Cyber Pilot program). For the current program, see 32 C.F.R. §§ 236.1–236.7 (2016) (outlining the purpose of and requirements for the DoD–DIB cybersecurity information-sharing program).

149. HARRIS, *supra* note 55, at 130–31.

150. *Id.* at 128–29.

151. *Id.*; *see also id.* at 129 (quoting a former FBI official explaining '[w]e knew what luring words and phrases the e-mails used before they were sent. We told companies what to be on the lookout for. What e-mails not to open. We could tell them 'You're next on the list. ").

152. *Enhanced Cybersecurity Services (ECS)*, DEP'T OF HOMELAND SECURITY, https://www.dhs.gov/enhanced-cybersecurity-services [https://perma.cc/H9E8-Y3US].

153. HARRIS, *supra* note 55, at 168; *see also* Interview by Terry Gross with Shane Harris, Senior Correspondent, The Daily Beast (Nov. 17, 2014), http://www.npr.org/2014/11/17/364718523/an-in-depth-look-at-the-u-s-cyber-war-the-military-alliance-and-its-pitfalls [https://perma.cc/5L4U-KELX] ("Today Lockheed Martin will say that they are tracking as many

The private sector has also begun to act in a coordinated manner to address cybersecurity threats. In October 2014, a coalition of companies, including Cisco, FireEye, iSight Partners, Microsoft, and Novetta, released a report on 'Operation SMN.'[154] The report explained that the coalition had identified a sophisticated group dubbed 'Axiom' that had spied on companies, governments, journalists, and others for over six years, and it alleged that the Axiom group is 'part of [the] Chinese Intelligence Apparatus.'[155]

What makes the Novetta report different from the Mandiant report and others discussed above is what the companies did about it. The report chronicles the 'first industry-led interdiction effort against a sophisticated advanced threat actor group.'[156] It explains that, initially, Novetta and Microsoft collaborated to address one of the malware families that Axiom used for its espionage activities, but in order to address a broader swath of Axiom-related malware, they expanded the partnership to 'distribute highly sensitive information to 64 trusted industry partners in 22 separate countries for their own use, and to protect their customers.'[157] As a result, 'over 43,000 separate installations of Axiom-related' malware were removed from computers protected by the partner companies.[158] 'Operation SMN' was the first time that 'computer security players bond[ed] without using federal or international law enforcement agencies as glue.'[159] The senior director of one of the coalition partners declared, '[t]his is the beginning of what will hopefully be a long line of industry-coordinated efforts to expose these threat groups, and to do so without having to use law enforcement, to help corporations and governments around the world combat' hackers.'[160]

Private parties may also be acting independently of the government in undertaking 'hacking back,' or more euphemistically, 'active defense.'

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different hacker groups as the NSA is. They've become almost like an intelligence organization in their own right.").

154. NOVETTA, OPERATION SMN: AXIOM THREAT ACTOR GROUP REPORT (2014), http://www.novetta.com/wp-content/uploads/2014/11/Executive_Summary-Final_1.pdf [https://perma.cc/U33U-JSLC]; *see also* Eichensehr, *supra* note 131 (analyzing the report); DJ Summers, *As Cyber Attacks Swell, A Move Toward Improved Industry Collaboration*, FORTUNE (Jan. 7, 2015), http://fortune.com/2015/01/07/cybersecurity-collaboration/ [https://perma.cc/DB3Q-PVCK] (detailing the collaboration that preceded "Operation SMN").

155. Novetta, *supra* note 154, at 4.

156. *Id.* at 5.

157. *Id.*

158. *Id.* at 6.

159. Summers, *supra* note 154.

160. Ellen Nakashima, *Researchers Identify Sophisticated Chinese Cyberespionage Group*, WASH. POST (Oct. 28, 2014), https://www.washingtonpost.com/world/national-security/researchers-identify-sophisticated-chinese-cyberespionage-group/2014/10/27/de30bc9a-5e00-11e4-8b9e-2ccdac31a031_story.html [https://perma.cc/22WN-RRGX] (quoting Stephen Ward, senior director of iSight Partners).

Although the Computer Fraud and Abuse Act prohibits unauthorized access to computers,[161] companies have at times been frustrated with the government's lack of response—or at least lack of direct response—to theft of intellectual property and disruption of corporate networks. Google reportedly hacked a server in 2010 while investigating a compromise by China,[162] and numerous other sources suggest that companies engage in under-the-radar hacking back.[163]

The relationship between the private sector and the government on defense of private networks is complicated. From the government's perspective, the plan is partnership: the Home Depot model where the government gives the private sector information to defend itself, and the government acts as a backstop with criminal prosecutions and sanctions. But at times private sector entities (or at least some of them) have wanted the government to do more, and the government has refused; in other circumstances, the government has wanted to do more, and the private sector has refused. Private networks are now defended by the private sector, with some assistance from the government in the form of information sharing, but as the anecdotes about private intelligence matching the FBI and Operation SMN show, private parties are acting independently of the government and with each other to provide network defense. Network defense now has some elements of partnership, but also elements of role reversal with the private sector deliberately striking out on its own to provide security in a way that looks very governmental.

C. Incentives for Participation in Public-Private Cybersecurity

What drives governmental and private sector participation in the public-private cybersecurity system?

Neither 'the government' nor 'the private sector' is monolithic. Government agencies have divergent missions and institutional cultures.[164]

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161. 18 U.S.C. § 1030(a)(2) (2012).

162. *See* HARRIS, *supra* note 55, at 171–72 (relating that Google "traced the intrusion back to what they believe was its source—a server in Taiwan where data was sent after it was siphoned off Google's systems, and that was presumably under the control of hackers in mainland China. 'Google broke in to the server, says a former senior intelligence official who's familiar with the company's response.").

163. *See, e.g.*, *id.* at 117–18 ("[F]ormer intelligence officials say hack-backs are occurring, even if they're not advertised. 'It is illegal. It is going on, says a former senior NSA official, now a corporate consultant."); Craig Timberg et al., *Cyberattacks Trigger Talk of 'Hacking Back,'* WASH. POST (Oct. 9, 2014), http://www.washingtonpost.com/business/technology/cyberattacks-trigger-talk-of-hacking-back/2014/10/09/6f0b7a24-4f02-11e4-8c24-487e92bc997b_story.html [https://perma.cc/U94X-YEGJ] (quoting experts noting that hacking back is occurring and alleging "a quiet acceptance on the part of federal agents").

164. *See, e.g.*, AMY B. ZEGART, FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 20–44 (1999) (discussing divergences between national security and domestic policy agencies

The 'private sector' is even more heterogeneous. The companies involved in the case studies in the last subpart include major U.S. technology and software companies, cybersecurity companies, and critical infrastructure institutions, such as banks. These companies are differently situated in many ways. Technology and software companies target worldwide consumer markets and compete partly based on the security of their products. Critical infrastructure companies seek to secure their systems and networks, but unlike cybersecurity companies, they are not primarily in the cybersecurity business.

Although recognizing these distinctions, this subpart identifies some high-level incentives that bridge divisions between different government agencies, on the one hand, and differently situated private sector entities on the other hand.

1. Governmental Incentives.—From the government's perspective, several general reasons support partnering with the private sector or encouraging the private sector to take on government-like responsibilities.

First, in some circumstances, private sector entities can be force multipliers for governmental efforts.[165] Private companies can supply resources and manpower that substitute for resources the government would otherwise have to provide.[166] Botnet takedowns are a good example. When the government engages in a botnet takedown, it has to use its own investigative and legal resources to pursue the case.[167] When Microsoft files a botnet takedown lawsuit, even in conjunction with the United States, Microsoft personnel investigate the botnet,[168] perhaps with government assistance, and then Microsoft's lawyers draft the litigation documents,

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and among national security agencies); ZETTER, *supra* note 72, at 223 ("[W]ithholding information about vulnerabilities in [U.S.] systems so that they can be exploited in foreign ones creates a schism . . . pit[ting] agencies that hoard and exploit zero days against those, like the Department of Homeland Security, that are supposed to help secure and protect [U.S.] critical infrastructure and government systems."); *supra* note 80.

165. WITTES & BLUM, *supra* note 2, at 71 (arguing that the "distribution of defensive capacity" is "a force multiplier for governments that suddenly have to police a proliferation of ultracapable attackers"); *cf.* DONAHUE & ZECKHAUSER, *supra* note 24, at 32 ("The rationale for involving private players in public work . . . is to amplify government's ability to accomplish its missions.").

166. WITTES & BLUM, *supra* note 2, at 228 (arguing that the government "wants more cybersecurity powerhouses like Mandiant . . . and more online bodyguards hirable by its citizens, and it wants the cadre of highly trained people who are all, or mostly, working in the interests of its own security policies").

167. *See supra* notes 49–53 and accompanying text (discussing the Coreflood botnet takedown).

168. *See supra* note 55 and accompanying text.

supported by affidavits from other Microsoft personnel.[169] Private defense of private networks is another example of the force multiplier effect. General Alexander's request for access to financial institutions' networks notwithstanding, the government does not have the resources to defend all private networks, and therefore relies on private sector entities to defend themselves, perhaps with the assistance of other companies.

Second, in other circumstances, the government may quietly support (or at least not discourage) private action where companies do things that benefit the government while also enabling government deniability. The best examples are the private companies attributing state-sponsored intrusions. The companies' reports bring to light malicious actions by foreign actors, without requiring the government to declassify its own investigations. Whether the attributions occur with minimal coordination with the government or quiet government support, as apparently occurred with Mandiant and with CrowdStrike's attribution of the OPM hack to China, they provide the government with some deniability and may lessen the foreign-relations friction that would occur if the U.S. government made the accusations directly.

The deniability rationale may also undergird the government's approach to securing software, though the rationale is somewhat less direct. Although the government discloses vulnerabilities to companies some of the time,[170] it has generally left software companies responsible for securing their own products. The government does not appear to have assumed a broader software security role by, for example, purchasing large numbers of zero-day vulnerabilities for the purpose of disclosing them.[171] The creation of bug bounty programs—public efforts by private companies to address security flaws—fosters the government's ability to deny that software security is a national security issue for which it should be responsible. Thus, private parties' efforts to better secure software serve the government's interest in preserving a narrow role for itself. This narrative would also support conceiving of the bug bounty programs as another example of a force multiplier: private parties' efforts to secure software are an important

169. For example, Microsoft filed the Citadel botnet takedown documents. *See* Microsoft Corp. v. John Does 1–82, No. 3:13-cv-319 (W.D.N.C. June 5, 2013), http://www.botnetlegalnotice.com/citadel/ [https://perma.cc/5UWS-WBJT] (compiling filings).

170. How much of the time it does and should disclose is a separate issue. *See supra* notes 86–88 and accompanying text.

171. *Cf.* Kim Zetter, *U.S. Gov Insists It Doesn't Stockpile Zero-Day Exploits to Hack Enemies*, WIRED (Nov. 17, 2014), http://www.wired.com/2014/11/michael-daniel-no-zero-day-stockpile/ [https://perma.cc/YBV4-5SBG] (reporting White House Cybersecurity Coordinator Michael Daniel suggesting limited circumstances in which the U.S. government might "purchase some vulnerabilities to disclose" including "if, for example, the government learned that someone was peddling a vulnerability that affected a lot of critical infrastructure networks and the government wanted to take it off the market and get it fixed").

supplement to the government's own efforts to do so (although of course the bounty programs may also plug vulnerabilities that the government would prefer remain open).

Finally, the government has an incentive to cooperate, or at least maintain open lines of communication, with the private sector in order to minimize the risk of companies' actions interfering with government operations and priorities. From the government's perspective, force multiplication by the private sector may be generally positive, but not if the private sector acts without notice to the government and, for example, takes down a botnet that the government is observing for intelligence purposes. Similarly, private attribution of state-sponsored hacks may be helpful in general, but not if a report accusing a foreign country of hacking U.S. businesses were released at a delicate moment, such as, for example, in the middle of negotiations over nuclear weapons. Avoiding operational and diplomatic risk therefore incentivizes the government to keep lines of communication open to the private sector in order to be 'in the loop' on what companies may plan to do.

2. Private Incentives.—From the private sector's perspective, the incentives for engaging in government-like actions (with or without partnership with the government) are somewhat different from the government's. Although all companies from small businesses to the top of the Fortune 500 now have cybersecurity concerns, this Article focuses on sophisticated technology and cybersecurity companies because they are the ones engaged in government-like actions. There are differences even among this group—software companies are more consumer-focused, for example—but their sophistication on cybersecurity issues creates some overlap in their motivations, as discussed below.

At the organizational level, business imperatives are the overwhelming impetus for companies' actions. Companies want to defend their networks to avoid theft of intellectual property or other types of corporate espionage, including, for example, the release of potentially embarrassing internal emails.[172] Software companies want to secure their products because a reputation for buggy software can hurt sales and upset existing customers. Botnet takedowns have rested on a legal theory of trademark infringement—harm to a company's intellectual property—as well as harm to customers from malware infections due to flaws in the company's software.[173]

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172. *See, e.g.*, Amy Kaufman, *The Embarrassing Emails that Preceded Amy Pascal's Resignation*, L.A. TIMES (Feb. 5, 2015), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-amy-pascal-email-rogen-hirai-20150205-story.html [https://perma.cc/Z2XY-SWF7] (reporting on emails from Sony Pictures Entertainment's co-chair that were leaked as part of the 2014 Sony hack).

173. *See supra* notes 45–46 and accompanying text.

Relatedly, the public-relations benefits of some of the actions are substantial. For example, attributing cyber intrusions to state-sponsored attackers is excellent advertising.[174] Accusing foreign governments of hacking generates media attention, and companies benefit from subsequent references to their reports by government officials, seemingly corroborating the companies' accusations and bolstering their credibility.[175] Botnet takedowns have also received positive press coverage, giving companies an opportunity to tout their dedication to consumer protection.[176] Bug bounty programs have a public-relations component as well. They can help a company to preserve or improve relationships with computer-security researchers who want to use their skills to secure software, rather than profiting on the black or gray markets (i.e. 'white-hat' hackers). Companies that do *not* have bounty programs have faced criticism for failing to reward researchers who help the company.[177]

Setting aside the organizational-level incentives, at the individual level, at least some employees within the companies are likely motivated by personal incentives, including community attachments.[178] For example, personal ties to security researchers could make employees more willing to reward the researchers' work. Identification with the community of Internet

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174. *See, e.g.*, Jim Finkle, *Mandiant Goes Viral After China Hacking Report*, REUTERS (Feb. 22, 2013), http://www.reuters.com/article/net-us-hackers-virus-china-mandiant-idUSBRE91M02P20130223 [https://perma.cc/EQ57-862F] (noting that "Mandiant was largely unknown outside the computer security industry" until the APT1 report); *FireEye Acquires Mandiant in $1bn Deal*, BBC (Jan. 3, 2014), http://www.bbc.com/news/business-25584644 [https://perma.cc/EG3C-7X9D] (noting that Mandiant "rose to prominence" due to the APT1 report); *see also supra* note 135.

175. Reports accusing foreign governments of wrongdoing are not without risk. For example, Norse, a "cyber intelligence firm," claimed that it had evidence that a disgruntled employee, not North Korea, was responsible for the Sony hack, but the FBI publicly rejected Norse's claim. Tal Kopan, *FBI Rejects Alternate Sony Hack Theory*, POLITICO (Dec. 30, 2014), http://www.politico.com/story/2014/12/fbi-rejects-alternate-sony-hack-theory-113893.html [https://perma.cc/H3C3-MD7Y].

176. For positive press coverage of takedown operations, see, for example, *FBI and Microsoft Take Down $500m-Theft Botnet Citadel*, BBC (June 6, 2013), http://www.bbc.com/news/technology-22795074 [https://perma.cc/B8MJ-RGH6]; Nick Wingfield & Nicole Perlroth, *Microsoft Raids Tackle Internet Crime*, N.Y. TIMES (Mar. 26, 2012), http://www.nytimes.com/2012/03/26/technology/microsoft-raids-tackle-online-crime.html [https://perma.cc/GDU6-ZW46].

177. *See, e.g.*, Dennis Fisher, *No More Free Bugs for Software Vendors*, THREATPOST (Mar. 23, 2009), https://threatpost.com/no-more-free-bugs-software-vendors-032309/72484 [https://perma.cc/DWX6-WERB] (highlighting "no more free bugs" movement among security researchers and arguing that companies "shouldn't expect the bug finder to just hand over the details gratis" rather than selling the vulnerability).

178. *See* Martha Finnemore & Duncan B. Hollis, *Constructing Norms for Global Cybersecurity*, 110 AM. J. INT'L L. 425, 442–43 (2016) (discussing the "culture of Silicon Valley—with its emphasis on security and privacy"); *see also id.* at 461 (discussing 'cultural norms' that "dispose technologists toward particular views of the role that digital technology can or should play in society").

users could make employees want to protect other users by eliminating malware infections and botnets that exploit individuals. Personal and professional ties to the U.S. government may also have a significant incentivizing effect. Many cybersecurity companies are staffed by former government officials.[179] Their ties to the government may make cooperation easier; for example, cooperation and coordination may involve meeting with former colleagues. Similarly, former government officials may be motivated by a continuing patriotic impulse to 'do their part' for the United States in investigating particular intrusions, timing the release of reports, or sharing information with the government.[180]

* * *

The interests of the government and private sector often align, fostering coordination, cooperation, and even de facto outsourcing to the private sector. Both the government and companies benefit from their alignment, though of course their interests are not always in sync.[181] The next Part turns from governmental and private interests to public values.

II. Privatization & Public Law Values

The increasing transfer of government functions to private actors in recent decades has sparked academic and popular debate about privatization.[182] Although 'privatization' can describe a variety of situations,[183] many legal scholars focus on privatization through 'contracting

179. *See, e.g.*, Ellen Nakashima, *The Latest Hot Job in the Washington Revolving Door? Cybersecurity*, WASH. POST (Mar. 17, 2015), http://www.washingtonpost.com/blogs/in-the-loop/wp/2015/03/17/the-latest-hot-job-in-the-washington-revolving-door-cybersecurity/ [https://perma.cc/7F8R-42BF]; Tim Shorrock, *How Private Contractors Have Created a Shadow NSA*, NATION (May 27, 2015), http://www.thenation.com/article/how-private-contractors-have-created-shadow-nsa/ [https://perma.cc/6GZH-SYCG].

180. *Cf.* Michaels, *supra* note 17, at 927–28 (describing how intelligence agencies "make appeals to CEOs' personal vanities, friendship, or sense of patriotism' to convince them to assist the government informally).

181. *See, e.g.*, *supra* notes 142–44 and accompanying text.

182. *See, e.g.*, Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1229 (2003) (exploring "[w]hat happens to the scope and content of public values when public commitments proceed through private agents").

183. As a general matter, "privatization' "denotes a broad spectrum of adjustments to the interaction between government and various private actors, Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1508 (2001), particularly "the range of efforts by governments to move public functions into private hands and to use market-style competition." Minow, *supra* note 182, at 1230; *see also* Freeman, *supra* note 24, at 1287 (arguing that "privatization' "describes nothing in particular so much as it suggests a host of arrangements," including "(1) the complete or partial sell-off of major public enterprises; (2) the deregulation of a particular industry; (3) the commercialization of a government department; (4) the removal of subsidies to producers; and (5) the assumption by private operators of what were formerly exclusively public services, ' such as through "contracting out").

out' of government services to private entities.[184] They address situations like private prisons and military contractors where private parties sign a contract with the federal government to deliver a service that the government had previously performed.[185]

In these privatization scenarios, scholars have focused on what tasks may be outsourced and whether transferring governmental functions to private actors undermines public law values, such as accountability, transparency, and fairness.[186] These concerns stem from structural differences between the government and private actors. Governmental actors operate in a system of structural checks that, although imperfect, constrains their actions. Government officials may be held accountable through congressional oversight and elections either of themselves or of higher level

184. *See, e.g.*, Nina A. Mendelson, *Six Simple Steps to Increase Contractor Accountability*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 241, 241 (Jody Freeman & Martha Minow eds., 2009) (focusing on "services contracts"); Freeman, *supra* note 24, at 1286–87 (focusing exclusively on "contracting out" because it is the "most common" form of privatization in the United States); Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 717 n.1 (2010) (recognizing that privatization can describe other practices, but equating privatization and contracting out); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 997–98 (2005) (explaining that privatization often means contracting out—"reliance on nongovernmental actors who are paid under publicly-funded contracts"). *But see* Joh, *supra* note 25, at 586–87 ("[O]nly some private policing is contracted out by cost-conscious public agencies. [P]rivate police often operate wholly outside of direct public management." (footnote omitted)). Scholarly interest in the role of private parties is not limited to legal scholars. *See, e.g.*, DONAHUE & ZECKHAUSER, *supra* note 24, at 6–8 (highlighting relevant literature from political science, economics, business, and public management). Legal scholars, however, address privatization and related issues "in a language all their own. *Id.* at 6. This Article, too, speaks primarily that legal language.

185. *See, e.g.*, Dickinson, *supra* note 24, at 390 (discussing privatization in foreign relations, including military contractors); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005) (assessing the legitimacy of private prisons).

186. *See, e.g.*, Custos & Reitz, *supra* note 36, at 556 (identifying as one of the "most important deficiencies in current law" the failure "to extend the public values of administrative law" to public-private partnerships); Laura A. Dickinson, *Outsourcing Covert Activities*, 5 J. NAT'L SECURITY L. & POL'Y 521, 522 (2012) (arguing that "[t]he ever-expanding use of contractors threatens core public values because the mechanisms of accountability and oversight that the United States has generally used to curb abuses by government employees do not translate well to contractors"); Dolovich, *supra* note 185, at 442–43 (discussing the idea that "incarceration is an inherently public function and thus that recourse to private prisons is inappropriate regardless of the relative efficiency of this penal form"); Michaels, *supra* note 184, at 729 (identifying as "dominant worries about government contracting whether the responsibilities being outsourced are inherently governmental (and thus unsuitable for delegation to private actors), whether contractors are more efficient than their government counterparts, and whether contractors are accountable agents" (footnote omitted)); Minow, *supra* note 182, at 1229 (exploring "[w]hat happens to the scope and content of public values when public commitments proceed through private agents").

officials who are responsible for the actions of the bureaucracy.[187] They are constrained by legal obligations, such as requirements of due process and equal protection.[188] Government actions are also subject to scrutiny through mechanisms such as freedom-of-information requests and investigations by Congress or agency inspectors general.[189]

Private actors, on the other hand, are not subject to these constraints, even when undertaking government-like functions. The absence of such restrictions sparks fears that private parties are more likely to abuse the power they exercise and that government officials may contract out particular functions precisely because private contractors have more freedom to act.[190] Even apart from concerns about abuse of power, some commentators also question the legitimacy of private parties performing government-like actions, particularly when they involve discretionary policy choices.[191]

Pushing back against the concerns that private contractors necessarily undermine public law values, Jody Freeman has proposed that private contracting might actually advance public law norms through a process she terms 'publicization.'[192] Through publicization, private contractors would 'increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities to deliver goods and services that might otherwise be provided directly by the state.'[193] As a result, publicization would '*enhance* public law norms by extending them to realms where they typically do not play a significant role.'[194] Other scholars have in effect adapted Freeman's publicization concept to particular contexts, such as military contractors and private-intelligence partnerships, and similarly

187. *See, e.g.*, Minow, *supra* note 182, at 1263 (describing accountability mechanisms that constrain democratic governments including transparency, public debate, and "the electoral sanction").

188. U.S. CONST. amends. V, XIV.

189. *See, e.g.*, Mendelson, *supra* note 184, at 244–53 (comparing legal constraints on government agencies versus on contractors); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1031 (2013) (highlighting the role of agency inspectors general in monitoring even national security agencies).

190. *See, e.g.*, Custos & Reitz, *supra* note 36, at 577 (arguing that '[c]ontracting out is all too susceptible to being abused as a way to evade the complex of public values imposed by public law"); Freeman, *supra* note 24, at 1304 ("Public law scholars worry that privatization may enable government to avoid its traditional legal obligations, leading to an erosion of public law norms and a systematic failure of public accountability.").

191. Freeman, *supra* note 24, at 1343 (describing the public law perspective as 'concerned about the political legitimacy of conferring policymaking discretion on nongovernmental actors").

192. *Id.* at 1314–15.

193. *Id.* at 1285.

194. *Id.* at 1314.

argued that private parties can be co-opted to support and enhance, rather than undermine, public law values.[195]

The public-private cybersecurity system shares some features with traditional privatization scenarios. In particular, it involves private actors performing government-like roles, and it therefore triggers similar questions about whether private actors are serving or can be made to serve public law values. But the public-private role reversals and informality of the public-private cybersecurity system pose both procedural and substantive challenges to conventional accounts of privatization and to their prescriptions for protecting public law values. The structure of the public-private relationships in cybersecurity renders the usual concerns at once more serious and more difficult to remedy.

Subpart II(A) identifies several procedural challenges that public-private cybersecurity raises for the extant legal literature on privatization. Subpart II(B) highlights the substantive public values that cybersecurity implicates, drawing from and broadening the list of values addressed in most studies of privatization.

A. The Procedural Challenges of Public-Private Cybersecurity

The public-private cybersecurity system challenges existing scholarly accounts of privatization on at least three procedural grounds, that is, grounds related to how government-private sector relations function.

First, in traditional privatization, the government decides whether private actors should perform a particular function; in public-private cybersecurity, however, private actors decide for themselves which functions they should perform.

In a typical privatization context, the government performs a certain function, decides that the function can or should be outsourced, and contracts with a private actor, who then takes up performance. Office of Management and Budget Circular No. A-76, discussed above,[196] illustrates the normal situation in which the government holds powers *ab initio* and decides

195. *See, e.g.*, Dickinson, *supra* note 186, at 536 (observing that "privatization may actually create some interesting and surprising spaces where public law values may be protected, and perhaps even expanded"); Dickinson, *supra* note 24, at 385 n.18 (arguing that "[i]nstead of seeing privatization solely as a threat to public values[,] we should focus on the negotiated contractual relationships between the public and the private" as a way to "harness[] private capacity to serve public goals") (quoting Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549 (2000)); Mendelson, *supra* note 184, at 243 (arguing that well-designed contracts and "[c]lose agency supervision of a contractor could, in theory, provide a functional substitute for other forms of public and legal accountability"); *cf.* Michaels, *supra* note 17, at 947–48 (arguing that "privatization in the intelligence-gathering context can be accountability enhancing" precisely because private companies do not share the government's counterterrorism agenda and may therefore be "less likely to disregard the law in the name of national security").

196. *See supra* notes 30–34 and accompanying text.

whether and how much to delegate to private actors. In other words, the government acts as a gatekeeper in making the initial decision of what activities are 'inherently governmental'—and therefore inappropriate for private actors.

The same is true even in informal partnerships, such as those described by Jon Michaels in the counterterrorism context. Michaels's work focuses on private 'actors who have been invited or solicited in their capacities as corporate executives or employees to provide counterterrorism assistance to the government'—and excludes 'those operating pursuant to government contracts to assist in homeland security programs, or those compelled to support investigations through legal instruments such as court orders, subpoenas, or regulatory directives.'[197] Although Michaels addresses noncontractual collaborations,[198] the relationships he describes still have the government in a gatekeeping role: the government solicits assistance from the private sector, and that assistance allows the *government* to engage in quintessentially governmental activity.

Public-private cybersecurity does not abide by this government-directed structure. In the cybersecurity context, the metaquestion of who decides who will perform various functions often rests with private actors.[199] In many cybersecurity contexts, there was no 'time zero' at which the government did all of the things that the private sector now undertakes. Empowered private sector actors have determined for themselves what actions they can and should perform, and in doing so, they implicitly assert that certain functions are not inherently governmental.

The absence of government gatekeeping in public-private cybersecurity resembles some instances of private policing. As Elizabeth Joh has noted, '[m]uch private policing arises from the private sector to meet private demands,' rather than coming through direct delegations and contracting relationships from public police agencies.[200] Examples include contract guards and corporate police who protect the hiring company's property and

197. Jon D. Michaels, *Deputizing Homeland Security*, 88 TEXAS L. REV. 1435, 1442 (2010).

198. Michaels, *supra* note 17, at 901 (noting that the collaborations are 'orchestrated around handshakes rather than legal formalities").

199. This feature distinguishes public-private cybersecurity not just from formal contracting, but also from less formal instances of "collaborative governance," which still assume ultimate government control. *See* DONAHUE & ZECKHAUSER, *supra* note 24, at 31 ("Collaborative governance can be thought of as a form of agency relationship between government as principal and private players as agents. The same is true of simple contracting, but in those sorts of arrangements the governmental principal aims to impose firm control. In collaborative governance, the governmental principal willingly grants its agent a certain amount of discretion.").

200. Joh, *supra* note 25, at 587; *see also id.* at 611–15 (proposing a four-part typology for private policing, only one type of which is "publicly contracted policing," wherein "a private police agency replaces a *specific* service formerly performed by the government").

guard the safety of those on it.[201] These instances of private policing are generated and controlled by private actors, like the private sector's cybersecurity endeavors.

Yet private actions in cybersecurity differ from private policing. Private companies' cybersecurity-related actions are typically geographically and jurisdictionally broader than the scope of corporate policing. As the examples in Part I show, many of the private sector's actions in cybersecurity are outward-facing, stretching well beyond a company's own property, carrying national and cross-border effect, and in some cases running the risk of sparking international incidents. Moreover, the nature of the correspondence between the private parties' role and the government's also differs. In private policing, the private actors are duplicating and making more particular the protective functions the government performs—corporate police supplement local, state, and federal law enforcement. In the cybersecurity context, on the other hand, private actors have innovated some of the functions they perform—the government did not perform them first, or perhaps at all.

The second procedural challenge the public-private cybersecurity system poses for existing theories of privatization similarly stems from the government's absence from its traditional gatekeeping role. The existing legal literature—responding no doubt to the scenarios that motivated it—focuses overwhelmingly on formal outsourcing via contract.[202] And it relies on the existence of formal contracts to remedy concerns about whether private actors comply with public law values, like accountability and fairness, that apply to governmental actors.[203] For example, in considering military and intelligence contractors, Laura Dickinson has proposed that 'contracts

201. *Id.* at 610–11, 615 (describing "protective policing" and "corporate policing"). Joh discusses an additional category of "intelligence policing," which includes, for example, the work of private investigators. *See id.* at 611–13. The work of cybersecurity-forensics firms in investigating intrusions at the behest of client companies may be a cybersecurity analogue.

202. *See supra* note 184 and accompanying text. A major exception is Jon Michaels's work on informal partnerships in the intelligence context. *See supra* notes 197–98 and accompanying text.

203. *See, e.g.*, Custos & Reitz, *supra* note 36, at 579 (arguing that while "contract law is a large part of the problem because it does not adequately protect public values, it could also be the solution" if contracts are used to impose public law requirements on contractors); Dickinson, *supra* note 24, at 388, 402 (focusing on government contracting and proposing nine ways that contracts can be used as a vehicle for remedying concerns with privatization); Freeman, *supra* note 24, at 1334 ("While some species of private decisionmaking may not easily submit to judicial review, as long as there are contracts, regulations, and grant conditions to enforce, courts will be a possible venue for those seeking to protect public law norms. (footnote omitted)); Mendelson, *supra* note 184, at 254 (suggesting contracts can improve transparency by requiring greater disclosures regarding contractors' actions); Sklansky, *supra* note 25, at 93 ("[A]s long as government is paying for law enforcement it retains control of fundamental questions of allocation, and the outsourcing contract may provide a particularly promising vehicle for applying 'public law norms' to private policing."). *But see* Dolovich, *supra* note 185, at 477–80 (expressing skepticism about the efficacy of contractual restrictions as a check on private prison operators).

should explicitly require that contractors obey norms and rules that implement public law values.'[204] In particular, she argues, contracts could improve accountability by 'explicitly extend[ing] the norms of public international law to contractors , provid[ing] more specific terms (such as training requirements and performance benchmarks), assur[ing] better monitoring and oversight, requir[ing] contractors to submit to outside accreditation by third-party organizations, and offer[ing] better enforcement mechanisms, such as third-party beneficiary suits.'[205]

The public-private collaborations in the cybersecurity context are not susceptible to similar remedies. As described in Part I, the public-private collaborations in cybersecurity are informal, de facto partnerships, operating outside a contracting framework. The informality in the cybersecurity context renders the privatization literature's specific prescriptions about incorporating public law values into private contracts inapplicable.

Moreover, not only are the cybersecurity relationships *currently* informal but in many instances neither the government nor the private actors would want to formalize their relationships into contracts going forward. Both the government and the private sector benefit from the lack of formal relationship. The private actors do not necessarily want to operate as agents of the government, with the supervision, potential public-relations consequences, and possible legal liabilities that would trigger. The government, on the other hand, would not want to pay for actions that the private sector currently undertakes for free and may prefer to maintain deniability for some private actions.

The final procedural challenge that public-private cybersecurity poses for traditional privatization literature also relates to the absence of formal contractual relations, but focuses on the back end of the government–private sector relationship: the absence of a contractual relationship limits the government's ability to pull power away from the private sector and back to the government. In traditional contracting out, the government delegates power to a private actor for the duration of the contract, and at the contract's expiration, the government has a decision point where it determines whether to renew the contract or not. The moment of contract renewal or nonrenewal presents an opportunity for the government to reel back in power that it has delegated. The absence of contractual relationships in public-private cybersecurity removes this decisional moment and the opportunity for the government to reconsider and readjust the balance of public-private power.

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204. Dickinson, *supra* note 186, at 529.

205. *Id.* at 525–26; *see also* Dickinson, *supra* note 24, at 403 (providing similar suggestions); Sklansky, *supra* note 25, at 91 (explaining that for private policing, '[i]n the not uncommon situation where government itself is the purchaser, 'public norms' can be imposed by contract").

In sum, in public-private cybersecurity, unlike traditional contracting out or even prior instances of informal public-private partnerships, the government does not determine what functions private actors may undertake. Because the government does not play an initial gatekeeping role, it also lacks the ability to control private actors via contracts—the mechanism that privatization scholars have endorsed as a means of 'publicizing' private actors performing governmental functions. And it does not have a routinized, periodic process to reconsider delegations of power to private actors. The absence of the government as an initial check on what actions the private sector may perform in the cybersecurity context makes evaluation of whether private actors are serving public law values more important, but it also renders remedial steps more complex because such measures cannot simply be baked into a governing contract. As a result, private sector actors in cybersecurity now decide what functions they should perform, how they should do them, whether and how much to consider public law values, and how to adjudicate tradeoffs between competing values.

B. Expanding Public Law Values for Cybersecurity

The existing privatization literature has identified a number of public law values that scholars believe may be put at risk when the government transfers responsibilities to the private sector. Privatization scholars focus primarily on accountability and secondarily on transparency and fairness or due process.[206] The public-private cybersecurity system implicates these values, but it also brings to the fore additional concepts that are arguably public law values or at least public goods. To conceptualize the full range of values at play in public-private cybersecurity therefore requires broadening the scope of the existing privatization literature.

This subpart explores five key values at issue in cybersecurity: accountability, transparency, due process or fairness, security, and privacy.[207] The values overlap in some instances. For example, transparency can foster accountability, which in turn may ensure fairness and protect privacy. In

206. *See, e.g.*, Laura A. Dickinson, *Regulating the Privatized Security Industry: The Promise of Public/Private Governance*, 63 EMORY L.J. 417, 419 (2013) (identifying "core public values" as "substantively, the values of human dignity embedded in human rights and humanitarian law, as well as the procedural values of global administrative law: public participation, transparency, and accountability"); Freeman, *supra* note 24, at 1285 (identifying "democratic norms of accountability, due process, equality, and rationality").

207. Literature on privatization often discusses efficiency as an additional value, and typically as an argument in favor of privatization. Likely due to efficiency's preexisting association with the private sector, it does not appear in discussions of *public* values with respect to privatization. *Cf.* INS v. Chadha, 462 U.S. 919, 958–59 (1983) ("[I]t is crystal clear that the Framers ranked other values higher than efficiency."); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 572 (2015) ("For better or worse, efficiency is not considered a preeminent constitutional value ").

other instances, the values may conflict. For example, full, public transparency in accusations about the source of particular cyberattacks could endanger security by compromising intelligence sources and methods. Differing conceptions of a single value may even be in tension, such as when companies seek to patch software to protect the security of individual users, while governments seek to use the same vulnerabilities for criminal investigations, espionage, or offensive operations in the service of national security.[208] Nonetheless, addressing the values separately helps to clarify the core contribution of each one and provides analytical clarity to evaluate whether and how the public-private cybersecurity system puts the values at risk.

Moreover, the exploration of each value is necessarily brief. In keeping with the Article's aim to identify the range of values implicated, rather than to provide an exhaustive treatment of each one, this subpart focuses on how the role of empowered private parties complicates the nature and operation of the public law values.

1. Accountability.—Accountability in the privatization literature is a broad concept.[209] Martha Minow defines 'accountability' as 'being answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations.'[210] In a democratic system, 'the ultimate authority should be the general population.'[211] Accountability has both ongoing and retrospective components. On an ongoing basis, accountability 'entails some form of ongoing scrutiny over those carrying out an activity to ensure that those actors fulfill the purposes as specified.'[212] Retrospective accountability, or 'accountability as redress,' by contrast, means that an authority 'imposes a penalty if a person or organization has

208. The Apple–FBI controversy provides an example of such a security–security tradeoff. *See supra* notes 95–99; *cf.* David E. Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. 221, 222 (2016) (discussing "privacy-privacy tradeoffs" where "privacy clashes with itself").

209. Some definitions of accountability use it as an umbrella concept to include arguably separate values, such as transparency and public participation. *See, e.g.*, Beermann, *supra* note 183, at 1509 ("Political accountability should be understood to include the democratic character of decision-making, the clarity of responsibility for an action or policy within the political system, and the ability of the body politic to obtain accurate information about a governmental policy or action."); Minow, *supra* note 182, at 1259 (identifying "public values of fairness, equality, and neutrality," preserved through maintaining accountability, and identifying the "urgent question posed by a shifting mix of public and private providers of" formerly governmental services as "how to ensure genuine and ongoing accountability to the public").

210. Minow, *supra* note 182, at 1260; *see also* Beermann, *supra* note 183, at 1507 ("Political accountability is to be understood as the amenability of a government policy or activity to monitoring through the political process.").

211. Minow, *supra* note 182, at 1260.

212. Dickinson, *supra* note 206, at 435–36 (discussing "accountability as managerial oversight").

failed to comply with a particular rule or standard.'[213] In other words, retrospective accountability is the idea that when something goes wrong, 'there is somewhere to go after the fact to punish wrongdoers.'[214] Governments are subject (at least in theory) to both types of accountability. For example, voters review government officials' performance on an ongoing basis in elections, and aggrieved individuals can file lawsuits to challenge government actions after the fact.

Privatizing government functions, however, can undermine both types of accountability. Private actors are not subject to requirements like the Administrative Procedure Act,[215] due process, and equal protection that could form the grounds for an after-the-fact lawsuit challenging governmental action. Privatization can also impair ongoing accountability by obfuscating who is responsible for certain actions, creating confusion about whether an action is attributable to the government at all and, if so, which government entity has authority to remedy the perceived harm.[216] This is a particular concern when collaborations are informal. Not only are informal collaborations difficult for the public to discover and understand, but they also impair ongoing oversight by Congress, potentially creating an "accountability gap.'[217] In other words, 'Congress cannot effectively monitor—let alone interfere with—that which is not disclosed to it.'[218]

To be sure, private actors do face some accountability mechanisms. They are subject to market competition, scrutiny from investors, legal and regulatory curbs on their behavior, and (at least for publicly traded companies) disclosure requirements.[219] They may also be subject to tort claims from which the government has immunity.[220] Proponents of privatization argue that these accountability mechanisms are *more* effective and more important than the accountability mechanisms that apply to public

213. *Id.* at 435.

214. *Id.*

215. 5 U.S.C. § 553 (2012).

216. *See, e.g.*. Beermann, *supra* note 183, at 1519 ("[I]f a private entity were entrusted with carrying out a government activity, it might be difficult for the public to know whom in the political system to blame when things go wrong.").

217. Michaels, *supra* note 17, at 932 (arguing that informal intelligence-gathering partnerships produce an "accountability gap" because they are "masked from Congress and the courts").

218. *Id.* at 924; *see also id.* (explaining that because of the informality of intelligence partnerships, "Congress is not well-positioned to investigate intelligence operations, interrogate corporate executives about their involvement in the partnerships, demand some showing of success, withhold funding, or insist that the parties take specific measures to safeguard against, among other things, unnecessary or excessive privacy intrusions").

219. *See* Minow, *supra* note 182, at 1263 (detailing these and other accountability mechanisms operative on private actors).

220. *See, e.g.*, Freeman, *supra* note 24, at 1321 ("[P]rivate actors are generally more vulnerable to tort liability than public entities.").

actors.[221] The presence of private accountability mechanisms, however, does not change the fact that private actors largely escape public accountability mechanisms.

2. Transparency.—Transparency is another core public law value.[222] Transparency 'refers to the availability of information about government policies, structures, and actions.'[223] Transparency about government operations ensures that citizens can be informed about actions undertaken by their democratic representatives, and it therefore permits 'a feedback loop between government actors and those affected by government policy.'[224] Such feedback is particularly important for bureaucratic officials who do not stand for election. In this way, transparency fosters accountability by providing the information necessary to supervise officials.[225] Correspondingly, a lack of transparency impairs public deliberation and oversight.[226]

Transparency may have benefits beyond accountability. It is a long-standing tenet of legal theory in the United States that, in Justice Brandeis's famous phrase, 'sunlight is the best of disinfectants.'[227] Transparency may substantively alter and improve the quality of decisions taken in the shadow of disclosure requirements[228] as well as strengthen public confidence

221. *See* Trebilcock & Iacobucci, *supra* note 26, at 1447–49 (describing and arguing in favor of the efficacy of private-accountability mechanisms).

222. *See, e.g.*, Dickinson, *supra* note 206, at 434 (listing transparency as a 'core value in the global administrative space"); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1164 (2000) (declaring transparency 'a well-developed norm of democratic government"); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1716 (2006) (listing transparency as one of the core values 'fundamental to our society").

223. O'Connell, *supra* note 222, at 1717.

224. Dickinson, *supra* note 206, at 434.

225. O'Connell, *supra* note 222, at 1717 (arguing that availability of information about government actions 'helps citizens (and others) assess and attempt to change their government's performance").

226. *See, e.g.*, Minow, *supra* note 184, at 1000 (noting that lack of transparency about the role of military contractors inhibits assessment of "how well the contractors are performing, how well they are achieving goals of military purposes, and how well they are achieving goals of a constitutional democracy").

227. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

228. *See, e.g.*, Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 900 (2006) (arguing that transparency "enables the free flow of information among public agencies and private individuals, allowing input, review, and criticism of government action, and thereby increases the quality of governance"); Luna, *supra* note 222, at 1164 (arguing in favor of transparency because '[s]uperior judgments can only be reached through the free circulation of knowledge between the government and the governed").

in decisions that result from the process.[229] The knowledge that a decision will be disclosed may also insulate it from corrupt influences and deter rights violations.

The transparency mechanisms that operate on the federal government do not apply to private parties performing governmental functions, whether under formal contracts or in the informal situations at issue in cybersecurity. For example, much government-agency policymaking is subject to notice-and-comment rulemaking, requiring the disclosure of proposed policies and an opportunity for public feedback.[230] Agencies are also required to make materials available pursuant to the Freedom of Information Act (FOIA).[231] These statutes, however, do not reach government contractors,[232] much less informal partners or private parties acting independently of the government but in a government-like fashion.

In addition to the specific problems of transparency regarding the actions of private parties, transparency poses particular challenges in areas like foreign policy. national security, and military operations. This is true even when the government itself acts. The Administrative Procedure Act specifically exempts 'military' and 'foreign affairs function[s]' from the requirements of notice-and-comment rulemaking,[233] and FOIA includes an exemption for classified information related to 'national defense or foreign policy. '[234] Secrecy may be crucial to effective action in these areas, but it is also in some tension with the ideal of an informed and engaged public.

Nonetheless, as discussed in Part III, in at least some circumstances, a balance can be struck to capture some of the benefits of transparency without sacrificing security. For example, disclosure may include general outlines of a policy, but not operational details.[235] Or public disclosure may be delayed to preserve operational effectiveness, but still permit after-the-fact review.[236]

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229. *See, e.g.*. Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981) (noting that the "very legitimacy" of agency policymaking "depends in no small part upon the openness, accessibility, and amenability of these [agency] officials to the needs and ideas of the public"); Luna, *supra* note 222, at 1165 (noting that the Administrative Procedure Act "mandate[s] specific rulemaking procedures and rules of disclosure as a means of instilling public confidence through rational process and accessibility").

230. Administrative Procedure Act § 4, 5 U.S.C. § 553 (2012).

231. Freedom of Information Act, 5 U.S.C.A. § 552 (West 2016).

232. *See, e.g.*. Mendelson, *supra* note 184, at 249–50 (explaining the limits of the Administrative Procedure Act and the Freedom of Information Act and why the statutes do not cover government contractors).

233. 5 U.S.C. § 553(a)(1).

234. 5 U.S.C.A. § 552(b)(1).

235. *See supra* notes 86–88 and accompanying text; *infra* notes 280–85 and accompanying text.

236. *See infra* notes 265–67 and accompanying text.

3. Due Process & Fairness.—A third public law value is the concept of due process or fairness. At the most micro-level, due process addresses whether individuals are treated fairly and in accordance with applicable procedural requirements.[237] For example, when an individual is deprived of liberty or property, due process requires certain procedures, such as notice and an opportunity to challenge the deprivation.[238]

Broadening the lens slightly, the idea of fairness may also apply to citizens at an aggregate level. Governments routinely make decisions about the allocation of resources to different areas and about the prioritization of competing imperatives in the face of scarce resources. Such decisions can spur more macro-level fairness questions, even if they do not violate individual-level due process rights.[239] For example, in a noncybersecurity context, a government may decide to allocate additional police patrols to a particular neighborhood, with the effect that the neighborhood with the additional patrols benefits from a lower crime rate than surrounding areas. Transposed to the cybersecurity context, macro-level fairness questions can arise when the government decides to provide more cybersecurity threat information to one industry than to another, although both are suffering major losses from cyber intrusions. Or fairness questions may arise from the decision to focus on taking down one botnet to the exclusion of another.

While governments are routinely trusted with discretionary decisions about public resource allocation, private parties are not. Private parties typically make decisions about allocating *their own* resources. When private parties are providing public goods or public services, however, their actions should arguably account for the same values, like fairness or due process, that governments are expected to deploy in allocating public resources. How exactly to implement such value determinations in the cybersecurity context is complex. The accountability mechanisms that operate on governments, from elections to legal limits on governmental action, do not restrain private actors in the same way, even when the private actors are acting like governments in deciding how to allocate security.

4. Security.—In addition to the public law values already discussed, citizens expect their government to provide security. National security is a

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237. Beermann, *supra* note 183, at 1528 (conceiving of due process as "accountability writ small' because "it is concerned with correctness and fairness in individual decisions, not with accountability to the body politic generally"); Sklansky, *supra* note 23, at 1280 (describing due process as "fairness writ small").

238. Hamdi v. Rumsfeld, 542 U.S. 507, 528–29 (2004) (plurality opinion) (describing the *Mathews v. Eldridge*, 424 U.S. 319 (1976), test for due process protections).

239. *See* Sklansky, *supra* note 23, at 1280–83 (discussing the "equitable allocation of criminal justice resources" as a question of fairness, despite the Supreme Court's refusal to "recognize a right to minimally adequate protection under the Due Process Clauses").

public good,[240] and is often cited as the quintessential public good.[241] Although security is a 'public good' and not precisely a 'public value, like accountability and transparency, it merits consideration here because it falls in the broader category of things government is expected to provide to citizens. And the provision of security may clash with the public law values, like accountability and transparency, that the government is also expected to satisfy.

The government often engages in public-private partnerships or contracts with the private sector in order to fulfill its duty to provide national security. It outsources or engages partners in security functions when, at least in theory, doing so improves security or provides security more efficiently than government acting alone. Partnering with the private sector should ideally improve security, such as when private entities act as force multipliers for the government.[242]

However, privatization and public-private partnerships in the national security arena may also challenge the conventional understanding that the state is responsible for providing the public good of national security. The basic logic of the Westphalian-state system rests on *states'* responsibility for securing their borders and their citizens within those borders.[243] Having private actors undertake government-like activities in partnership with, or

240. Public goods are ones that are nonrivalrous and nonexcludable. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 14 (20th prtg. 2002) ("The basic and most elementary goods or services provided by government, like defense and police protection, and the system of law and order generally, are such that they go to everyone or practically everyone in the nation. It would obviously not be feasible, if indeed it were possible, to deny the protection provided by the military services, the police, and the courts to those who did not voluntarily pay their share of the costs of government. "); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1139 (2000) (defining a "public good" as "one that exhibits nonrivalrous consumption and for which the costs to suppliers of excluding nonpaying beneficiaries are prohibitively high").

241. *See, e.g.*, Daphne Barak-Erez, *Distributive Justice in National Security Law*, 3 HARV. NAT'L SECURITY J. 283, 285 (2012) (noting the "conventional wisdom that views national security policies as the ultimate example of a 'public good' "); Aziz Z. Huq, *The Social Production of National Security*, 98 CORNELL L. REV. 637, 644 (2013) ("National security has long been understood to be a quintessential public good, one that is uniquely tailored to state monopolization."); Ann R. Markusen, *The Case Against Privatizing National Security*, 16 GOVERNANCE 471, 473 (2003) ("The nature of national security as a public good has been understood for decades and is noncontroversial.").

242. *See supra* notes 165–69 and accompanying text; *see also* WITTES & BLUM, *supra* note 2, at 71 ("[T]he distribution of defensive capacity is a counterweight and a force multiplier for governments that suddenly have to police a proliferation of ultracapable attackers. It offers individuals and companies a potential alternative to government as an address for protection.").

243. *See* Weber, *supra* note 23, at 78 ("[A] state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory. Specifically, the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it.").

especially independent, of the government 'raises big questions about the role and primacy of the state in matters of both national and individual security.'[244] Moreover, undermining '[t]he notion that government has a monopoly over security policy . . . erode[s] a part of the conceptual basis for modern government itself.'[245] In essence, the impulse to rely on private entities to perform governmental security functions may increase security in the short-term, but undermine security in the long-term by weakening the state, which has long been the locus of national security in the international system.[246]

In other circumstances, however, the government's focus on national security writ large may cause individual insecurity. For example, when the government purchases, but does not disclose, zero-day vulnerabilities in widely used software, it may advance national security writ large (e.g., by using the zero day for espionage), but at the cost of leaving individual and enterprise users vulnerable to exploitation by others who discover the same vulnerability.

As these examples illustrate, in the cybersecurity context, different conceptions of security may be in tension with one another, and security may be very much at odds with other public values.

5. Privacy.—Although not a major focus of existing privatization scholarship, privacy is another value that is especially salient in the cybersecurity realm, particularly in the wake of the disclosures by Edward Snowden.[247] Privacy has inherent importance, but it is also valuable as a

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244. WITTES & BLUM, *supra* note 2, at 71; *see* Minow, *supra* note 184, at 1026 ("[T]he expanded governmental use of private military companies erodes the control of force represented by the ascendancy of the nation-state" and "is a symptom of a larger, dangerous challenge to the aspirations of order in the world represented by the system of nation-states and the rule of law.").

245. WITTES & BLUM, *supra* note 2, at 81.

246. *See id.* at 96 ("Today, the modern state appears to be losing its monopoly over violence, if not in principle at least in practice—returning us to a pre-Weberian understanding of the exclusivity of the state as the legitimate purveyor of violence.").

247. Despite its recognized importance, privacy is famously difficult to define. *See, e.g.*, JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 108 (2012) ("There is widespread (though not unanimous) scholarly consensus on the continuing importance of privacy . . . but little consensus about what privacy is or should be."); DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 103 (2008) ("Privacy is too complicated a concept to be boiled down to a single essence."); *id.* at 12–13 (cataloging six conceptions of privacy: (1) "the right to be let alone" (2) "limited access to the self" (3) "secrecy—the concealment of certain matters from others" (4) "control over personal information' (5) "personhood' and (6) "intimacy"); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1202 (1998) ("Privacy is a chameleon that shifts meaning depending on context."); Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2087 (2001) ("Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all."). Embracing a "more pluralistic understanding of privacy,' Daniel Solove has proposed a typology of sixteen

means of preserving other rights, such as freedom of expression and association.[248] The lack of privacy or fear of surveillance can chill expressive activities.[249]

The importance of both governmental and private actors in the cybersecurity realm brings into sharp relief the question of privacy *from whom*? Individuals—the holders of privacy rights—are typically more concerned about the government accessing their private information than about corporations accessing it.[250] However, concern has grown in recent years about the amount of personal information that corporations aggregate.[251]

Not all cybersecurity efforts implicate individual privacy, but some do. For example, recent legislative debates about the private sector sharing cybersecurity-threat information with the government focused on the risk that individual users' personal information would be shared with government agencies and used for both cybersecurity and criminal-investigation purposes. Privacy advocates strongly opposed information-sharing legislation due to the risks they perceive for individual privacy.[252] The

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socially recognized privacy problems, grouped under four headings of "information collection, "information processing," "information dissemination, and "invasion. SOLOVE, *supra*, at 10–11, 101; *see also id.* at 101–70 (explaining the typology in detail). Cybersecurity issues may implicate a number of the privacy problems in Solove's typology, including, for example, surveillance, aggregation, identification, insecurity, breach of confidentiality, and disclosure. *See id.* at 106–12, 117–29, 136–46. Moreover, different types of privacy concerns are "not sharply separate," but rather "are functionally interconnected and often simultaneously implicated by the same event or practice." Kang, *supra*, at 1203.

248. *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) ("Awareness that the Government may be watching chills associational and expressive freedoms.").

249. *See* SOLOVE, *supra* note 247, at 108–09 (discussing chilling effects of surveillance); Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1905 (2013) ("[F]reedom from surveillance, whether public or private, is foundational to the practice of informed and reflective citizenship.").

250. This characterization has historically been true of Americans at least. *See* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1211 (2004) ("Suspicion of the state has always stood at the foundation of American privacy thinking "); *see also id.* at 1160–64 (contrasting American privacy law's focus on liberty with Europe's focus on dignity).

251. *See, e.g.*, Mary Madden, *Few Feel that the Government or Advertisers Can be Trusted*, PEW RES. CTR. (Nov. 12, 2014), http://www.pewinternet.org/2014/11/12/few-feel-that-the-government-or-advertisers-can-be-trusted/ [https://perma.cc/Y2LB-RLHZ] (noting data showing low levels of public trust in both governments and advertisers and increasing levels of concern about information-collection by businesses); Mary Madden, *Public Perceptions of Privacy and Security in the Post-Snowden Era*, PEW RES. CTR. (Nov. 12, 2014), http://www.pewinternet.org/2014/11/12/public-privacy-perceptions/ [https://perma.cc/8U7Z-AKGJ] (reporting on survey data showing "[w]idespread concern about surveillance by government and businesses"); *cf.* SCHNEIER, *supra* note 144, at 47 ("The overwhelming bulk of surveillance is corporate, and it occurs because we ostensibly agree to it.").

252. *See, e.g.*, Letter from Civil Society Organizations & Security Experts and Academics to Richard Burr, Chairman, Senate Select Comm. on Intelligence, and Diane Feinstein, Vice

privacy concerns would be even more severe if the federal government were to take over private-network defense directly, as General Alexander proposed to U.S. banks.[253]

Consideration of privacy as a public value raises profound questions about the relationship of individuals and their information to both the government and the private sector. In the wake of the Snowden disclosures, many companies have taken a more pro-privacy and thus more adversarial stance vis-à-vis the government.[254] Apple's resistance to government requests for assistance in accessing iPhones is one example.[255] Others include a 2013 lawsuit by Facebook, Microsoft, Google, Yahoo, and LinkedIn that sought the right to disclose information about the number of Foreign Intelligence Surveillance Court orders and National Security Letters the companies receive requesting customer information.[256] More recently, Microsoft challenged and defeated government demands for the content of emails stored in Ireland[257] and sued the Department of Justice to protest gag orders preventing the company from disclosing to customers that the government has sought access to their email.[258]

Despite these recent privacy-protective moves, the private sector is far from a perfect steward of individual privacy rights.[259] At present, there is

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Chairman, Senate Select Comm. on Intelligence (Mar. 2, 2015), https://www.aclu.org/sites/default/files/field_document/cisa-2015-sign-on-letter.pdf [https://perma.cc/PP2C-4EEH] (objecting to the Cybersecurity Information Sharing Act of 2015 on the grounds that it, among other things, fails to "effectively require private entities to strip out information that identifies a specific person prior to sharing cyber threat indicators with the government").

253. *See supra* notes 142–144 and accompanying text.

254. *See supra* note 144 and accompanying text.

255. *See supra* notes 95–99 and accompanying text.

256. The case triggered a settlement that permits the companies to disclose additional general information about the orders and letters they receive. *See* Devlin Barrett & Danny Yadron, *Government Reaches Deal with Tech Firms on Data Requests*, WALL STREET J. (Jan. 27, 2014), http://www.wsj.com/articles/SB10001424052702303277704579347130452335684 [https://perma.cc/Q8CQ-WMQ8] (explaining that the agreement permits companies to report government requests using numerical ranges of 1,000 or, with additional restrictions, 250); Letter from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to Colin Stretch, Vice President and Gen. Counsel, Facebook, et al. (Jan. 27, 2014), https://www.justice.gov/iso/opa/resources/366201412716018407143.pdf [https://perma.cc/H474-HB6C] (providing details on new ways in which companies are permitted to report data about requests for customer information).

257. Microsoft Corp. v. United States (In the Matter of Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.), 829 F.3d 197, 200–02 (2d Cir. 2016); *see also* Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326, 328–34 (2015) (discussing the Microsoft case and broader issues related to the application of Fourth Amendment rights to data).

258. Complaint for Declaratory Judgment, Microsoft Corp. v. U.S. Dep't of Justice, No. 2:16-cv-00538 (W.D. Wash. Apr. 14, 2016).

259. Megan Graham, *Reminder: Tech Firms Aren't Always the Privacy Advocates We'd Like to Think They Are*, JUST SECURITY (Nov. 1, 2015, 10:32 AM), https://www.justsecurity.org/27257/tech-firms-privacy-advocates/ [https://perma.cc/A4QM-

business value in championing privacy, but in the future, the calculus of business opportunity could shift in a less privacy-protective direction. Determining how to and who can preserve privacy as a public value in the long-term will pose continuing challenges across a range of cybersecurity contexts.

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With the omission of the government's initial gatekeeping role over privatization and the impossibility of using contractual means to restrain private actors, the public-private cybersecurity system poses a more difficult problem than traditional contracting out. And it also implicates a broader range of public law values, making evaluations and tradeoffs to protect such values more complex.

III. Public Law Values in Public-Private Cybersecurity

Although its contours may change, the public-private cybersecurity system will endure in some form for the foreseeable future.[260] Evaluating the extent to which the current public-private cybersecurity system attains or falls short of protecting public law values can suggest ways to 'publicize' the system in the short run, as well as illuminate broader lessons for public-private governance of international cybersecurity threats going forward.

Subpart III(A) provides a preliminary assessment of the extent to which the four manifestations of public-private cybersecurity discussed in Part I serve public law values and proposes several remedies for specific public law deficiencies it identifies. Building on this assessment, subpart III(B) then offers more generalizable lessons to shape public-private governance of cybersecurity going forward. In particular, it argues that attempts to protect public law values must not assume that threats to such values are unidirectional. Sometimes the threats to public law values in the cybersecurity context come from the government, not the private sector, which suggests that remedies cannot simply focus, as they have in other contexts, on diffusing government values and processes to private actors. On the other hand, although private parties are now, and will likely remain, crucial to the functioning of the public-private cybersecurity system, their present support of public law values in many contexts may be a fortuity, not a structural feature. Their position may shift over time, creating new challenges to public law values. Finally, the complexities of the public-

NU2E] (arguing that when companies stand up for their customers' rights, "companies aren't fighting in *our* best interests, they are fighting to protect theirs").

260. *Cf.* Dickinson, *supra* note 24, at 387 (arguing that "the trend toward outsourcing of foreign affairs functions previously performed by state bureaucracies is probably irreversible. The privatization train has not only already left the station, but has gone far down the track").

private cybersecurity system suggest that the nature of the remedies for public law problems will differ from those in traditional privatization and that remedies in the cybersecurity realm will be highly context dependent.

A. How 'Publicized' Is the Current System?

The four manifestations of public-private cybersecurity differ dramatically in the extent to which they support public law values and in the nature and origin of breakdowns when they do not.

1. Botnet Takedowns: Publicly Beneficial Partnerships.—Botnet takedowns present the most positive public law-values story among the cybersecurity scenarios discussed in this Article.[261]

Regardless of whether they are carried out by private actors, the FBI, or private companies and the FBI acting together, the takedowns at least arguably improve security for individual users by disrupting criminal operations. The takedowns have been criticized as engaging in whack-a-mole with cybercriminals who establish new botnets to replace those that are disrupted.[262] But at the same time, reports indicate that at least in the short-term, takedown operations do cause a decrease in criminal activity, thereby improving security.[263]

The fact that botnet takedowns in the United States occur pursuant to federal court orders helps to ensure that they serve additional public law values as well.[264] Court supervision helps to hold those engaging in

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261. This is not to dismiss interesting questions arising from the substantive merits of the legal theories deployed by both governmental and private actors in support of botnet takedowns. Deputy Attorney General James M. Cole called the government's arguments, at least, "creative lawyering." *See* Cole, *supra* note 49; *infra* notes 268–69 and accompanying text; *cf.* Zeitlin, *supra* note 42 (exploring Fourth Amendment implications of law enforcement botnet takedowns).

262. *See, e.g.*, Fahmida Y. Rashid, *Botnet Takedowns: A Game of Whack-a-Mole?*, PC MAG. (Apr. 3, 2012), http://securitywatch.pcmag.com/security/296250-botnets-takedowns-a-game-of-whack-a-mole [https://perma.cc/N7TB-HED2] (discussing the whack-a-mole argument).

263. *See, e.g.*, Gregg Keizer, *Rustock Take-Down Proves Botnets Can Be Crippled, Says Microsoft*, COMPUTERWORLD (July 5, 2011), http://www.computerworld.com/article/2509934/security0/rustock-take-down-proves-botnets-can-be-crippled—says-microsoft.html?page=2 [https://perma.cc/WC9R-6MYG] (reporting on a significant worldwide drop in spam following the takedown of the Rustock spamming-malware botnet).

264. As implemented in the United States so far, botnet takedowns do not appear to pose a substantial risk to individual privacy, although different implementation mechanisms might raise privacy concerns. The FBI has been careful to note that in taking over botnet command and control infrastructure, it does not "access any information that may be stored on an infected computer." *See* Press Release, U.S. Dep't of Justice, Department of Justice Takes Action to Disable International Botnet (Apr. 13, 2011), https://www.fbi.gov/newhaven/press-releases/2011/nh041311.htm [https://perma.cc/VUN8-ATSZ]. Rather than communicating directly with individual users whose computers are infected, the government and private companies that undertake takedown operations have worked with Internet service providers who communicate with their customers whose computers are infected with the botnet malware. If the government instead were to engage in direct

takedown operations accountable. Before a takedown operation occurs, the government or private actors file legal arguments and factual allegations with a neutral federal judge who independently adjudicates the strength of the claims. The claims are initially judged ex parte and under seal—without notice to the accused bot herders—to avoid giving the bot herders the opportunity to change their operations to avoid the takedown operation. After the takedown, however, the court filings and order are unsealed and posted publicly,[265] resulting in almost complete, if slightly delayed, transparency.

The public posting of the litigation documents reveals not just that a takedown operation has occurred but also who is responsible for the actions. This, in turn, creates the possibility for after-the-fact accountability. At the temporary-restraining-order stage—before botnet operators have been notified and before the takedown occurs—district courts have required Microsoft to post bonds of hundreds of thousands of dollars.[266] Posting of the litigation documents also creates the possibility that if a takedown operation goes awry and harms, for example, a legitimate business, the business could file a lawsuit after the fact.

The litigation-based, court-supervised format of takedown operations also preserves a measure of due process, even for bot herders. The botnet takedowns occur pursuant to temporary restraining orders or preliminary injunctions, and then several months pass between public posting of litigation documents and the courts' entry of final judgment, permanently transferring control of the botnet domains to the government or private company that

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remediation efforts with respect to infected personal computers, privacy could become a much more significant concern. The Dutch government in the first botnet takedown operation engaged in such action, creating some precedent for direct governmental involvement in remediation. *See Dutch Team Up*, *supra* note 63 (reporting that, with the assistance of a cybersecurity company, the Dutch police "upload[ed] a 'good' bot developed by police" to infected computers, an action that "represents a bold move, as infecting anyone's computer—whether it's with a 'good' bot or a malicious one—is likely against the law in many countries").

265. *See, e.g.*, CITADEL BOTNET, http://www.botnetlegalnotice.com/citadel/# [https://perma.cc/9K5B-S4JX] (providing filings and court orders related to the Citadel botnet takedown); Press Release, U.S. Dep't of Justice, *supra* note 264 (providing links to court documents related to the Coreflood botnet takedown).

266. *See, e.g.*, *Ex Parte* Temporary Restraining Order and Order to Show Cause re Preliminary Injunction at 13, Microsoft Corp. v. John Does 1-8 Controlling a Computer Botnet Thereby Injuring Microsoft and Its Customers, No. A13-cv-1014 (W.D. Tex. Nov. 25, 2013) http://botnetlegalnotice.com/zeroaccess/files/Ex_Parte_TRO.pdf [https://perma.cc/4MTG-MJKH] (ordering Microsoft to post bond of $250,000 with the court as part of the ZeroAccess botnet takedown); *Ex Parte* Temporary Restraining Order and Order to Show Cause re Preliminary Injunction at 19, Microsoft Corp. v. John Does 1-82, No. 3:13-cv-319 (W.D.N.C. May 29, 2013) http://botnetlegalnotice.com/citadel/files/Ex_Parte_TRO.PDF [https://perma.cc/7FGZ-WQA7] (ordering Microsoft to post bond of $300,000 with the court as part of the Citadel botnet takedown).

undertook the takedown.[267] In that time, bot herders (or those erroneously accused of operating botnets) could challenge the takedown.

In addition, recent botnet takedowns show the upside of public-private coordination with respect to fairness in the allocation of resources. Private companies have incentives to target only the botnets that exploit their software. If private companies alone undertook takedown operations, then botnets that lack a clear nexus to a company—or a clear nexus to a *well-resourced* company—might go unaddressed. The government can serve as a helpful backstop, targeting botnets that involve flaws in open-source software or in software not developed by a major company. The private sector in this circumstance serves as a force multiplier, extending botnet fighting resources beyond what the government acting alone might devote.

Among the cybersecurity contexts addressed in this Article, botnet takedowns are the anomalous case because they involve judicial review with opportunities for contestation by those adversely affected and with transparency about what has occurred and who is responsible. Given these circumstances, the fact that botnet takedowns tend to support public values is perhaps not surprising: they occur in the context of a court and litigation system that the United States entrusts with adjudicating contested claims fairly, impartially, and in the service of larger goals of justice. Turning to Article III courts and litigation is not necessarily an option for the other cybersecurity contexts.

Even botnet takedowns, however, raise some concerns. Although there is an opportunity for bot herders to challenge the takedown operations, none have so far done so. Judges have issued final injunctions approving takedowns without the benefit of adversarial testing of either the evidence or legal theories used to justify the takedowns.[268] The takedowns have not resulted in published opinions or review by appellate courts. To remedy some of the procedural oddities of the takedown suits, district court judges might consider appointing an amicus to argue the side of the absent defendants, providing adversarial testing of the government's and private companies' positions.[269]

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267. For an example, see *supra* notes 45–53 and accompanying text.

268. Moreover, the Obama Administration proposed legislation to more clearly ground its authority to seek botnet-takedown injunctions. *See* Kristen Eichensehr, *White House Cybersecurity Bill: Botnets and "Creative Lawyering"*, JUST SECURITY (Jan. 14, 2015, 11:27 AM), https://www.justsecurity.org/19102/white-house-cybersecurity-bill-botnets-creative-lawyering/ [https://perma.cc/LPU2-LU2U] (discussing the White House's legislative proposal's section on "*Ensuring* Authority for Courts to Shut Down Botnets").

269. Other courts routinely turn to appointed amici to ensure full and adversarial presentation of legal issues. For example, the Supreme Court has a longstanding practice of appointing amici when parties decline to address a particular argument or to defend a case. *See* Neal Devins & Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859, 889 (2013) (endorsing appointment of amici in limited circumstances); Amanda Frost, *The Limits of Advocacy*, 59 DUKE

2. Securing Software: Persistent Insecurities & Conflicting Incentives.—No software is perfectly secure, and most software is far from secure. Widespread networking has fostered persistent insecurities that in turn put personal and business information at risk of disclosure.

Insecurity continues at least partly due to competing conceptions of security. Software companies focus on individual or enterprise-level security, seeking to patch vulnerabilities to prevent unauthorized access to systems and networks or unintended functions.[270] On the other hand, the U.S. government is responsible for national security, which can include exploiting individual security vulnerabilities, for example, for foreign espionage.[271] The patching of software that protects individual security can directly impede actions that the government believes serve national security interests. But these differing conceptions are not always in tension. If individual-level vulnerabilities are present in U.S. government or critical infrastructure systems, then individual and national security concerns align in favor of patching vulnerabilities.

Nonetheless, the tension between individual and national security has fostered situations, like the Apple–FBI controversy, in which the private sector—which wants to patch vulnerabilities—is opposed to the U.S. government—which sometimes wants to remedy vulnerabilities but sometimes wants to exploit them. It is therefore useful to consider their approaches to remedying software vulnerabilities separately.

As described in Part I, private companies test their products for vulnerabilities, but in recent years they have increasingly turned to bug bounty programs, wherein they pay researchers who discover flaws in the companies' software.[272] From the perspective of public law values, the bug bounty programs are a positive step. They increase the number of bugs that

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L.J. 447, 466–67 (2009) (noting examples of the Supreme Court appointing amici); Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 912–18 (2011) (providing a history of Supreme Court appointments of amici). The Foreign Intelligence Surveillance Court, which operates ex parte and in secret, now has a system where the court can request amicus service from several preapproved counsel. *See* 50 U.S.C.A. § 1803(i) (West 2015) (authorizing the court to designate individuals to serve as amicus curiae); *Amici Curiae*, U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT, http://www.fisc.uscourts.gov/amici-curiae [https://perma.cc/F9UK-YZV2] (listing "Individuals Designated as Eligible to Serve as an Amicus Curiae Pursuant to 50 U.S.C. § 1803(i)(1)"). Although the federal district court rules of procedure "do not expressly provide for amicus participation . . . district courts enjoy wide discretion to invite such participation. Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 22 (2011).

270. *See supra* note 65 and accompanying text.

271. *See* Daniel, *supra* note 86 (discussing the tradeoff between disclosure and exploitation of vulnerabilities).

272. *See supra* notes 90–94 and accompanying text.

are remedied (improving security) and thereby decrease the risks of compromises that infringe users' privacy.

The problem with bug bounty programs is that they are insufficient. Not all companies offer bounty programs.[273] Even companies that do cannot necessarily compete with prices that bugs can fetch on the black market, where governments, including the United States, have reportedly driven up prices.[274]

The role of the U.S. government with respect to software vulnerabilities is more problematic from a public law-values perspective. The government's decisions to purchase vulnerabilities on the black market, stockpile them, and exploit flaws in software of U.S. companies all challenge public law values. Government purchases of black-market vulnerabilities bid up prices and hamper companies' ability to compete monetarily with their bug bounty programs.[275] Government exploitation of vulnerabilities in U.S. companies' software—when the exploitation is revealed—fosters the perception not just that the companies' products are insecure but also that the company may be complicit in the U.S. government's actions, and thus untrustworthy for purchasers in foreign markets.[276] To its credit, the White House has released some information about the vulnerability equities process that it uses to decide whether and when to disclose vulnerabilities to software makers.[277] But the extent of the information that can be released is necessarily limited by the demands of national security, including, for example, the need to avoid alerting espionage targets of how the United States is spying. The lack of transparency about operations also limits the government's accountability for the decisions it makes and prevents informed public debate about whether the government is striking the appropriate balance between individual and national security.

Within the limits of necessary secrecy and consistent with national security, the government could take several actions to shift the balance in

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273. Until recently, Apple was the most prominent example of a company that lacked a bounty program. *See* Nicole Perlroth & Katie Benner, *Apple Policy on Bugs May Explain Why Hackers Would Help F.B.I.* N.Y. TIMES (Mar. 22, 2016), http://www.nytimes.com/2016/03/23/technology/apple-policy-on-bugs-may-explain-why-hackers-might-help-fbi.html [https://perma.cc/HFF2-FYZL] (reporting speculation that Apple's lack of a bounty program may have made hackers more willing to assist the FBI in the San Bernardino case). Apple announced that it would commence a bounty program in September 2016 with potential payouts up to $200,000. Lily Hay Newman, *Apple's Finally Offering Bug Bounties—with the Highest Rewards Ever*, WIRED (Aug. 4, 2016), https://www.wired.com/2016/08/apples-finally-offering-bug-bounties-highest-rewards-ever/ [https://perma.cc/8VFJ-3YRA].

274. *See supra* note 94 and accompanying text.

275. *See supra* note 94 and accompanying text.

276. *See infra* note 281 and accompanying text.

277. *See supra* notes 86–88 and accompanying text.

favor of individual security, supporting or complementing private sector efforts to better secure software.

First, the government could provide some public funding for certain bug bounty programs. Public funding could help to stimulate bug hunters to target software that is particularly important, for example, to critical infrastructure. It might also be used to support bounties for bugs in open-source software, which is not the responsibility of any particular company. Private companies have taken some steps to support bounty programs for open-source software,[278] but public funding could substantially increase incentives for bug hunters to address open-source-software flaws, which, as recent examples have shown, can be important and pervasive.[279]

Second, to address due process or fairness concerns with the U.S. government deciding to impose a risk of harm on U.S. companies by exploiting flaws in the companies' software, the government could publicly pledge not to exploit flaws in U.S. companies' software in offensive operations.[280] The ubiquity of some U.S. companies' software around the world suggests that such a pledge might be costly to the U.S. government, which would have a more limited range of options for exploitable software. Such a pledge, however, could help to repair the relationships between the U.S. government and U.S. technology companies that suffered serious damage as a result of the Snowden disclosures and more recently lined up with Apple against the government's demand that the company bypass

278. *See, e.g.*, Nicole Perlroth, *Hacking for Security, and Getting Paid For It*, N.Y. TIMES (Oct. 14, 2015), http://bits.blogs.nytimes.com/2015/10/14/hacking-for-security-and-getting-paid-for-it/?_r=0 [https://perma.cc/P8V4-WPUE] (reporting that after the discovery of the Heartbleed bug, "the nonprofit Linux Foundation and more than a dozen major tech companies started an initiative to pay for security audits in widely used open-source software"); Michal Zalewski, *Going Beyond Vulnerability Rewards*, GOOGLE (Oct. 9, 2013), https://googleonlinesecurity.blogspot.com/2013/10/going-beyond-vulnerability-rewards.html [https://perma.cc/5TX8-YA69] (announcing that Google will pay for "down-to-earth, proactive improvements" to open-source software).

279. *See* Nicole Perlroth, *Security Experts Expect 'Shellshock' Software Bug in Bash to Be Significant*, N.Y. TIMES (Sept. 25, 2014), http://www.nytimes.com/2014/09/26/technology/security-experts-expect-shellshock-software-bug-to-be-significant.html?_r=0 [https://perma.cc/CUR3-BZF6] (noting that the Shellshock bug in open-source software "can be used to take over the entire machine" and "was not discovered for 22 years"); Bruce Schneier, *Heartbleed*, SCHNEIER ON SECURITY (Apr. 9, 2014, 5:03 AM), https://www.schneier.com/blog/archives/2014/04/heartbleed.html [https://perma.cc/S36A-QV6P] (describing Heartbleed as "a catastrophic bug in Open SSL").

280. *See, e.g.*, ZETTER, *supra* note 72, at 393 (discussing the doctrine of "operational use," whereby "[U.S.] intelligence agencies can't do things that might put [U.S.] businesses at risk unless they have high-level legal authorities sign off on the operation and the company consents"). For example, intelligence agencies cannot "make IBM an unwitting CIA accomplice by having an agent pose as an IBM employee without informing someone at the company who has fiduciary responsibilities. *Id.*

iPhone security features.[281] Relatedly, the cost of the pledge could decrease over time. The Snowden disclosures prompted a number of countries to focus on developing domestic software and technologies and turning away from U.S. products,[282] a move that could increase the targets that would be breachable without exploiting vulnerabilities in U.S. companies' software.

Finally, the U.S. government could increase the extent to which it purchases vulnerabilities and discloses them to software makers for patching. The government does this in some circumstances, as evidenced by White House Cybersecurity Coordinator Michael Daniel's explanation of the vulnerability equities process,[283] but the relative frequency with which it purchases and discloses is unclear.[284] It is also unclear whether or how often the government purchases vulnerabilities for the sole purpose of disclosing and patching, as opposed to exploiting and then disclosing.[285] Publicly announcing a policy of increased disclosure could improve relations with U.S. technology companies and improve the security of products used by many individuals in the United States, making U.S. companies both more competitive and perhaps more willing to assist the government in future cases.

3. Publicly Attributing State-Sponsored Intrusions: Increased Transparency, but Accountability Confusion.—The reports prepared by cybersecurity companies attributing intrusions to state-sponsored threat

281. *See, e.g.*, Ellen Nakashima, *Google, Facebook and Other Powerful Tech Firms Filing Briefs to Support Apple*, WASH. POST (Feb. 28, 2016), https://www.washingtonpost.com/world/national-security/google-facebook-and-other-powerful-tech-firms-filing-briefs-to-support-apple/2016/02/28/beb05460-de48-11e5-846c-10191d1fc4ec_story.html [https://perma.cc/ETC6-RVLG] (detailing technology companies' support for Apple's position in the San Bernardino case); Gerry Smith, *'Snowden Effect' Threatens U.S. Tech Industry's Global Ambitions*, WORLD POST (Jan. 24, 2014), http://www.huffingtonpost.com/2014/01/24/edward-snowden-tech-industry_n_4596162.html [https://perma.cc/7NJ8-JU2S] (reporting that U.S. cloud-services providers may "lose as much as $35 billion over the next three years as fears over U.S. government surveillance prompt foreign customers to transfer their data to cloud companies in other countries").

282. *See, e.g.*, Arne Delfs & Tony Czuczka, *Merkel Urges European Internet Push to Blunt U.S. Surveillance*, BLOOMBERG (July 19, 2013), http://www.bloomberg.com/news/articles/2013-07-19/merkel-urges-european-internet-push-to-blunt-u-s-surveillance [https://perma.cc/WP3V-VFBE] (reporting on German Chancellor Angela Merkel's suggestion that "Europe should promote home-grown Internet companies to avoid U.S. surveillance" and other German lawmakers' advocating for development of European rivals to Google and Facebook).

283. *See supra* notes 86–88 and accompanying text.

284. *See supra* note 87. To increase the legitimacy of the vulnerability equities process, the White House could also release reports detailing the number of vulnerabilities considered each year and the number disclosed to software vendors. Alex Grigsby, *Making Sense of the U.S. Policy on Disclosing Computer Vulnerabilities*, COUNCIL ON FOREIGN REL. (Sept. 22, 2015), http://blogs.cfr.org/cyber/2015/09/22/making-sense-of-the-u-s-policy-on-disclosing-computer-vulnerabilities/ [https://perma.cc/M4C8-LJJE].

285. *See supra* note 171.

actors improve transparency and security, but create accountability confusion and possibly due process and fairness concerns.

As discussed in Part I, the Mandiant report identifying PLA Unit 61398 provided a publicly citable source attributing intrusions to the Chinese government and thereby increased transparency regarding the threats to U.S. businesses and other entities. Subsequent reports have done the same with respect to other government actors.[286] The reports often include some threat indicators that can be used to better secure systems and networks against intrusions, which improves security.[287]

On the other hand, the reports foster confusion about accountability for decisions with potentially significant foreign-relations consequences. The companies making the accusations against foreign governments are not formally accountable for the foreign-relations fallout from the substance and timing of their accusations. A company could decide to release a report at a politically sensitive time, causing harm to the government's foreign-relations priorities. The company does not bear the cost of foreign-relations harms, but the federal government, which would bear such costs, is not responsible for the company's decision to launch the accusation. In other circumstances, the government may support or condone private actors' accusations precisely to avoid accountability for making the accusation itself.

The relationship between the private company's accusation and the federal government is often murky. How is a foreign country to know whether the U.S. government was blindsided by the report or instead fed information to the company? Foreign governments may assume that private attributions are driven by the federal government and hold the government accountable for private actors' conduct.

While accountability for the consequences of reports attributing state-sponsored attacks is unclear, there may be somewhat more accountability with respect to the substance and accuracy of accusations. Public release of the reports opens the attribution determination and the evidence to challenge by the U.S. government, foreign governments (including the accused government), or competitor cybersecurity firms. Consider the Russian government-sponsored hack of the Democratic National Committee.[288] After CrowdStrike accused the Russian government of involvement, other cybersecurity firms reviewed the evidence and confirmed CrowdStrike's

286. *See supra* note 118.

287. *See, e.g.*, MANDIANT, *supra* note 109, at apps. C–G.

288. *See* Ellen Nakashima, *Russian Government Hackers Penetrated DNC, Stole Opposition Research on Trump*, WASH. POST (June 14, 2016), https://www.washingtonpost.com/world/national-security/russian-government-hackers-penetrated-dnc-stole-opposition-research-on-trump/2016/06/14/cf006cb4-316e-11e6-8ff7-7b6c1998b7a0_story.html [https://perma.cc/6PMU-HTGG].

conclusions.[289] Moreover, the existence of sophisticated private sector attribution capabilities may hold the U.S. government more accountable for accusations it makes against foreign governments as well.[290] Private actors challenged the FBI's attribution of the Sony hack to North Korea,[291] and the government should expect similar questioning from the private sector with respect to future allegations against foreign governments.

The private cybersecurity reports may also create due process and privacy concerns. Some of the reports have included highly specific attribution to individuals.[292] Links to particular individuals are, on the one hand, impressive and key to tying intrusions to state actors. In some reports, individuals' interactions with, for example, email and social media sites reveal links between the individual and an intrusion, and the individual is then identified as an employee of a state organization—transitively linking the foreign government to the intrusion.[293] On the other hand, the highly personal nature of some of the attributions is itself intrusive from the perspective of the individual, who suddenly finds his or her photos, home address, family details, license plate, and social media information publicly

289. *See, e.g.*, Patrick Tucker, *How Putin Weaponized Wikileaks to Influence the Election of an American President*, DEFENSE ONE (July 24, 2016), http://www.defenseone.com/technology/2016/07/how-putin-weaponized-wikileaks-influence-election-american-president/130163/ [https://perma.cc/HV74-H28W] (discussing confirmation of CrowdStrike's conclusion by other companies).

290. Microsoft recently proposed the establishment of an international organization, modeled on the International Atomic Energy Agency, that would review evidence and make attribution determinations for attacks carried out by nation-states. CHARNEY ET AL. *supra* note 4, at 11–12. Microsoft suggests that the organization, which would draw technical experts from government, the private sector, academia, and civil society, could provide "peer review" of reports attributing attacks to governments, thereby "improving the quality of the results. *Id.*; *see* Herb Lin, *Microsoft Proposes an Independent Body for Making Attribution Judgments*, LAWFARE (June 24, 2016), https://www.lawfareblog.com/microsoft-proposes-independent-body-making-attribution-judgments [https://perma.cc/6WVB-JKHE] (noting that if the proposed organization were feasible, "it would help to a considerable extent address the politicization of many attribution judgments today").

291. *See, e.g.*, Kim Zetter, *Critics Say New Evidence Linking North Korea to the Sony Hack Is Still Flimsy*, WIRED (Jan. 8, 2015), http://www.wired.com/2015/01/critics-say-new-north-korea-evidence-sony-still-flimsy/ [https://perma.cc/Y22G-CRC8] (discussing questioning of U.S. government attribution of the Sony hack to North Korea).

292. *See, e.g.*, MANDIANT, *supra* note 109, at 52–55 (profiling Wang Dong); THREATCONNECT & DEFENSE GROUP INC. CAMERASHY: CLOSING THE APERTURE ON CHINA'S UNIT 78020, at 5, 35–53 (2015), http://cdn2.hubspot.net/hubfs/454298/Project_CAMERASHY_ThreatConnect_Copyright_2015.pdf?t=1443030820943&submissionGuid=8b242912-4426-45ef-ba7f-2441ab220cb5 [https://perma.cc/DH2H-D8BG] (identifying Chinese PLA Unit 78020 as responsible for espionage against Southeast Asian targets, particularly related to the South China Sea, and profiling PLA officer Ge Xing).

293. *See, e.g.*, THREATCONNECT & DEFENSE GROUP INC., *supra* note 292, at 35–53 (identifying PLA officer Ge Xing based in part on, for example, his QQ Weibo account).

revealed,[294] and covered in the international media.[295] Such individuals have no clear recourse against companies that choose to publicize the individuals' names and information. One hopes that the companies act responsibly and accuse individuals only with very strong and corroborated evidence, but the fact remains that private companies, not government officials, are making decisions to target particular individuals. Unlike botnet takedowns, these accusations do not proceed in court; they are adjudicated, if at all, in the court of public opinion and with little or no regard for possible harm to the individuals involved.

Accusations may effectively be transferred into court if the government becomes involved. In May 2014, the United States indicted an individual initially named in the Mandiant report for breaches of U.S. companies.[296] The indictment brings the possibility of severe criminal penalties, but it also provides an opportunity to contest the accusations and assurance that the decision to target the individual proceeded through government channels that are structurally designed to balance public law values (though many would argue that they do not always succeed in striking a proper balance).

Naming of individuals as intrusion perpetrators may help to deter not just the named individual but others in his or her country from engaging in behavior that might spark a future report. But that deterrence comes at the possible cost of due process and privacy protections for individuals whose rights are weighed, if at all, by private actors that have incentives to demonstrate their attribution prowess by naming names and posting photos.

4. Defending Private Networks: Security & Public Values Compromises.—Private systems and networks in the United States are not secure.[297] Frequent headlines make plain the persistent lack of security

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294. *See, e.g., id.* (detailing identifying information about PLA officer Ge Xing, including his home address, car license plate, bike riding routes, and (partially redacted) photos of his child).

295. *See, e.g.*, Josh Chin, *Cyber Sleuths Track Hacker to China's Military*, WALL STREET J. (Sept. 23, 2015), http://www.wsj.com/articles/cyber-sleuths-track-hacker-to-chinas-military-1443042030 [https://perma.cc/7JU8-3NPC] (covering the ThreatConnect report and discussing Ge Xing); Josh Harkinson, *Meet the 3 Chinese Hackers Pwned by Mandiant*, MOTHER JONES (Feb. 19, 2013), http://www.motherjones.com/mojo/2013/02/chinese-hackers-pwned-mandiant-cyber-attack-new-york-times [https://perma.cc/U8YP-BHDE] (reporting on the Mandiant report).

296. *Compare* Indictment, United States v. Wang Dong et al., No. 14-118 (W.D. Pa. May 1, 2014), http://www.justice.gov/iso/opa/resources/5122014519132358461949.pdf [https://perma.cc/4YSD-ZJYM] (charging Wang Dong with violating, inter alia, the Computer Fraud and Abuse Act), *with* MANDIANT, *supra* note 109, at 52–55 (profiling Wang Dong).

297. Neither, of course, are government networks. *See, e.g.*, David Alexander, *The OPM Hack Was a Lot Worse than Previously Disclosed*, HUFFINGTON POST (Sept. 23, 2015), http://www.huffingtonpost.com/entry/opm-hack_5602f64be4b08820d91b59c2 [https://perma.cc/DB3A-D2YR] (reporting that the hack of the Office of Personnel Management compromised the personal information of 21.5 million people, including the fingerprints of 5.6 million people); Cory Bennett, *Pentagon Restores Hacked Network*, THE HILL (Aug. 10, 2015),

among private sector systems and risks to personal privacy due to compromised personal information, such as health records.[298] Currently the private sector is somewhat transparent about some security problems. Regulations applicable to some sectors require companies to disclose compromises to government officials,[299] state data-breach laws require businesses to notify individuals' whose personal information is compromised,[300] and Securities and Exchange Commission guidance instructs public companies to disclose material breaches.[301] Private actors are also somewhat accountable for some security breaches, and perhaps increasingly so. Companies routinely settle cases stemming from breaches of personal information and brought pursuant to state data-breach-notification laws, and one court of appeals has allowed class actions to proceed based on the likelihood of harm to individuals from retailers' data breaches.[302] In another case stemming from a breach of personal information, a different circuit court recently upheld the Federal Trade Commission's authority to bring cases against companies for unfair and deceptive consumer

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http://thehill.com/policy/cybersecurity/250730-pentagon-restores-hacked-email-system [https://perma.cc/W38V-D9LT] (discussing Russian hackers' compromise of the Joint Chiefs of Staff's unclassified email system); Michael S. Schmidt & David E. Sanger, *Russian Hackers Read Obama's Unclassified Emails, Officials Say*, N.Y. TIMES (Apr. 25, 2015), http://www.nytimes.com/2015/04/26/us/russian-hackers-read-obamas-unclassified-emails-officials-say.html [https://perma.cc/2S7U-K34J] (discussing Russian hackers' intrusions into the White House, State Department, and Defense Department).

298. *See, e.g.*, Jim Finkle, *Premera Blue Cross Hacked, Medical Information of 11 Million Customers Exposed*, HUFFINGTON POST (Mar. 17, 2015), http://www.huffingtonpost.com/2015/03/17/premera-blue-cross-cybera_n_6890194.html [https://perma.cc/98LZ-EHFZ] (reporting on compromise of data, including claims data and "clinical information," for 11 million customers of Premera Blue Cross, a health insurance company).

299. *See* NRC Cyber Security Event Notifications, 10 C.F.R. § 73.77(a)(3) (2016) (requiring licensees who operate nuclear power plants to notify the Nuclear Regulatory Commission of suspected or actual cyber attacks and of activities that "may indicate intelligence gathering or pre-operational planning related to a cyber attack"); DoD Mandatory Cyber Incident Reporting Procedures, 32 C.F.R. § 236.4(b) (2016) (requiring Defense Department contractors to report certain "cyber incidents" that affect the contractors' systems or defense information in their possession or that "affect[] the contractor's ability to provide operationally critical support").

300. *See, e.g.*, *Security Breach Notification Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 4, 2016), http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx [https://perma.cc/4MK5-2BT3] (compiling data-breach laws from forty-seven states and several U.S. territories).

301. *CF Disclosure Guidance: Topic No. 2: Cybersecurity*, U.S. SEC. & EXCHANGE COMM'N (Oct. 13, 2011), https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm [https://perma.cc/Y3C5-Y9ZJ].

302. Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 693 (7th Cir. 2015) (finding standing for data-breach victims based on an "objectively reasonable likelihood" of injury such as identity theft or credit-card fraud); *see also* Lewert v. P.F. Chang's China Bistro, Inc., 819 F.3d 963, 966–70 (7th Cir. 2016) (concluding that data-breach plaintiffs "have alleged enough to support Article III standing").

practices, including failure to take reasonable measures to secure customers' personal data.[303]

These developments suggest a shift toward greater accountability for companies that fail to secure personal information, and relatedly, increased due process for victims of data breaches. They do little, however, to settle broader debates about the responsibility for protecting against other types of threats—including theft of intellectual property and compromises of critical infrastructure systems—and other types of actors, especially foreign government or government-affiliated attackers. In fact, in ruling against companies that suffered customer data breaches, the courts of appeals have implicitly relied on the fact that the companies were compromised by cybercriminals, not nation-states.[304]

Should the rules be different for nation-state threats? In the physical world, companies are expected to take reasonable measures to protect themselves against ordinary crime—locks on doors, surveillance cameras, alarm systems, security guards, etc. They are not, however, expected to defend against missiles launched by foreign militaries; that is the responsibility of the government. Yet, in the cybersecurity sphere, the government has disclaimed primary responsibility for defending the private sector against even foreign-government intrusions, placing that duty solidly on private entities, with assistance in the form of some information sharing. So far, this system is failing to provide adequate security. Although some companies may be sufficiently sophisticated to grapple with nation-state-based threats,[305] most—including many critical-infrastructure entities—are not.

The obvious alternative to making private entities responsible for defending themselves against even foreign government attacks is to make the U.S. government responsible for defending them. Even if that were possible—a dubious assumption given the government's apparent inability to secure its own systems—the government protection model would raise different public law-values issues, chiefly privacy concerns. Take the suggestion that the NSA should have direct access to banks' networks,[306] or consider direct intelligence community access to telecommunications

303. Fed. Trade Comm'n v. Wyndham Worldwide Corp., 799 F.3d 236, 359 (3rd Cir. 2015).

304. In upholding the Federal Trade Commission's authority to bring an enforcement action against Wyndham Hotels for unfair or deceptive practices, the Third Circuit rejected the hotel's argument that it should not be held liable for failing to secure customers' information "when the business *itself* is victimized by criminals. *Id.* at 246 (quoting Wyndham's Brief); *see also Remijas*, 794 F.3d at 693 (holding that plaintiffs have shown a "substantial risk of harm" from breach of a customer data because "[w]hy else would hackers break into a store's database and steal consumers' private information? Presumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities").

305. *See supra* notes 153–60 and accompanying text.

306. *See supra* note 143 and accompanying text.

companies' networks. Making the government directly responsible for defending such private networks would subject vast amounts of individual and corporate data to government scrutiny and the possibility of use for purposes far afield of the cybersecurity rationale for which access was granted.

The current system of private defense against foreign government threats seems worryingly insufficient. Private actors—and potentially important ones—will lose against attacks by foreign states, but the alternative of turning private-network defense over to the U.S. government—even if doing so were feasible—comes with different problems. The lack of an obviously preferable alternative suggests that the current system is likely to endure until an external shock changes the balance of concerns. For example, imagine that a foreign government or nonstate terrorist group eventually takes down the electricity grid in a major city,[307] or disables a U.S. stock exchange. In the wake of such an incident and attribution to a foreign actor, governmental attempts to blame the private sector victim for failing to defend itself may ring hollow and force more creative approaches to solving persistent security problems.

B. Promoting Public Law Values in Public-Private Cybersecurity

This preliminary evaluation of how public law values are faring with respect to botnet takedowns, securing software, attribution of state-sponsored intrusions, and defense of private networks reveals several important lessons for cybersecurity in particular and for theories of privatization more broadly.

First, public-private cybersecurity shows that, in the context of complicated public and private roles, concerns about public law values are not unidirectional. Both public law concerns and solutions can come from multiple and sometimes surprising directions. Unlike traditional privatization, this is not a circumstance where the challenge is simply how to transfer governmental values to the private sector and rein in wayward contractors. In cybersecurity, sometimes the government itself threatens public law values. Other times, the government is simply absent. In those circumstances, the private sector may step in, acting in ways that bolster public values.[308]

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307. *Cf.* Ellen Nakashima, *Russian Hackers Suspected in Attack that Blacked Out Parts of Ukraine*, WASH. POST (Jan. 5, 2016), https://www.washingtonpost.com/world/national-security/russian-hackers-suspected-in-attack-that-blacked-out-parts-of-ukraine/2016/01/05/4056a4dc-b3de-11e5-a842-0feb51d1d124_story.html [https://perma.cc/SW8R-QXDA].

308. For example, private companies' public attributions of state-sponsored cyberattacks may become increasingly important during the Trump Administration. President Trump repeatedly declined to accept the intelligence community's and private companies' attribution of the DNC hack to Russia. *Compare* Press Release, Office of the Dir. of Nat'l Intelligence, Joint Statement from the Dep't of Homeland Sec. & Office of the Dir. of Nat'l Intelligence on Election Sec. (Oct. 7,

Second, empowered private parties are crucial to how the public-private cybersecurity system is currently functioning. So far, the role of private parties is in many ways a positive story. In the absence of government action, private companies have used innovative legal strategies to address the problem of botnets, and they created bug bounty programs to better secure their software. When the government's hands were tied by limitations on disclosing classified information, companies published detailed reports that increased transparency about the source of state-sponsored intrusions into U.S. companies. But in each of these circumstances and in others where private parties have played a so far constructive role, they have had business reasons for taking action—for example, avoiding public relations harms from misuse or exploitation of their products, or advertising their capabilities to attract new clients.

As a general matter, private interests are often at odds with public law values—the concern that has spurred traditional privatization literature—and the fortuitous alignment in the cybersecurity sphere is unlikely to be permanent or total. The first step to guarding against possible future shifts in the alignment between private interests and public law values may be, as this Article aims to do, increasing understanding and awareness of the quasi-governmental role that private parties are playing in cybersecurity. In addition, representatives of technology and cybersecurity companies routinely testify before Congress on cybersecurity-policy issues.[309] Such hearings often focus on the companies' views about the actions of the government, but they should also address the role of the companies

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2016), https://www.dni.gov/index.php/newsroom/press-releases/215-press-releases-2016/1423-joint-dhs-odni-election-security-statement [https://perma.cc/9XX2-NRYD] ("The U.S. Intelligence Community is confident that the Russian Government directed the recent compromises of e-mails from [U.S.] persons and institutions, including [U.S.] political organizations."), *and* Alperovitch, *supra* note 118 (identifying two Russian-government linked hacking groups as responsible for the intrusions at the DNC), *with Donald Trump on Russia, Advice from Barack Obama and How He Will Lead*, TIME (Dec. 7, 2016), http://time.com/4591183/time-person-of-the-year-2016-donald-trump-interview/ [https://perma.cc/3JEJ-ZAMD] (reporting that when asked about Russia's interference in the U.S. election, Trump said, "It could be Russia. And it could be China. And it could be some guy in his home in New Jersey."). If the Trump Administration does not attribute cyberattacks to foreign governments, private companies' attribution reports—though they raise some concerns, as discussed above—could help to fill a transparency gap and potentially serve security interests by naming and shaming attackers.

309. *See, e.g.*. *Outside Perspectives on the Department of Defense Cyber Strategy: Hearing Before Subcomm. on Emerging Threats & Capabilities of the H. Armed Servs. Comm.* 114th Cong. (2015), http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=103985 [https://perma.cc/2846-VYKJ] (listing witnesses from, inter alia, FireEye and VMWare); *Protecting America from Cyber Attacks: The Importance of Information Sharing: Hearing Before S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015), http://www.hsgac.senate.gov/hearings/protecting-america-from-cyber-attacks-the-importance-of-information-sharing [https://perma.cc/UV2A-J2LC] (listing witnesses from, inter alia, American Express, Microsoft, and FireEye).

themselves. Congress could ask company representatives questions about, for example, how the companies consider foreign-relations consequences of their actions or what measures the companies take to protect against possible negative consequences of actions like botnet takedowns. Increasing discussion would bring additional attention to and understanding about the actions that companies are currently undertaking and about their role vis-à-vis the U.S. government.

Third, as discussed in subpart II(A), the nature of the public-private cybersecurity system changes the nature of possible remedies to public law-values concerns. The conventional solution of baking public law values into the contractual requirements for government contractors is not available in the cybersecurity context and, moreover, would not necessarily be responsive to the nature of the dangers to public law values. Remedies for concerns about public law values in cybersecurity will be highly context dependent. Although the purpose of this Article is not to resolve every possible public law-values threat, the preceding Parts provide a few examples of context-specific solutions, including court-appointed amici in botnet takedown cases,[310] publicly funded bug bounties for open-source software,[311] and a pledge by the U.S. government not to exploit vulnerabilities in the software of U.S. companies for offensive operations.[312]

The public-private cybersecurity system does not work like the government-driven, top-down models of privatization that have dominated the last few decades. It raises some of the same concerns for public law values, but at the same time, its complexity demands greater vigilance directed at a broader range of actors and greater creativity in remedying problems that do arise.

Conclusion

This Article diagnoses the underappreciated system of public-private governance that has emerged to address U.S. cybersecurity problems in recent years.[313] In the contexts described in Part I, the private sector has come to play a very government-like role, sometimes in conjunction with a less government-like role for the U.S. government. These role inversions are made possible in part by informal partnerships between the private sector and the government and by even less direct, mutually beneficial pursuit of interests by both the private sector and the government with minimal

310. *See supra* notes 268–69 and accompanying text.

311. *See supra* section III(A)(2).

312. *See supra* section III(A)(2).

313. This project focuses nearly exclusively on the United States. There may be valuable insights to be gleaned from comparative study of how other countries are organizing to address cybersecurity.

coordination, but perhaps with some mutual encouragement. As the operation of government-like power becomes more diffuse and more complicated, the actions of private sector actors can implicate the public law values that traditionally apply to governmental actions, and governmental actions may come into increasing tension with public law values.

The public-private cybersecurity system challenges and complicates existing scholarly accounts of privatization. As a procedural matter, in the cybersecurity space, the government does not decide which functions private actors may or should perform; private actors decide for themselves what actions to undertake. The public-private relationships do not operate via contract, thereby eliminating the procedural vehicle scholars have favored for imposing substantive restrictions on privatized activities and the mechanism by which the government reconsiders the allocation of responsibilities to the private sector. As a substantive matter, the cybersecurity context requires a fuller account of public values. The traditional focus on accountability, and secondarily transparency and due process, should be expanded to include provision of security and preservation of privacy. The salience of these values for individuals—the 'public' in 'public law' values—increases in the cybersecurity context where lack of security is not just a national-level metric, but also a personal experience of insecurity that can lead to identity theft, fraud, extortion, and data loss.

Taken as a whole, the case studies set out above show that the de facto public-private cybersecurity system poses public law challenges that are different from and harder than traditional privatization of government functions. Traditional privatization sparked questions about how to 'publicize' private actors—how to make private actors subject to the public law-values requirements that the government abided by when delivering the service at issue prior to contracting out. In other words, traditional privatization raised questions about how to make the private sector more like the government with respect to the values applied to it. In public-private cybersecurity, by contrast, a persistent theme in the contexts described in this Article is that the private sector is already playing a helpful role in protecting public values. The private sector is starting out 'publicized. The role of the government, however, is sometimes more questionable, such as when it withholds knowledge of software vulnerabilities, preventing them from being patched, or when it outsources attribution of state-sponsored intrusions to private actors, potentially to avoid accountability for making an accusation. However, while the private sector has played and continues to play a useful role in fostering public values in the contexts discussed in Part I, the private

sector is a fickle guardian of public values, and business imperatives will not always align with public values.[314]

There is no silver-bullet solution to concerns about public law values in cybersecurity. The government and private sector roles and relationships are complicated and shift in different contexts. In this circumstance, the best approach is to focus, as Part III does, on proposals that preserve or strengthen particular public law values in specific circumstances. Such corrections will be necessary in instances where either the private sector or the government has incentives that point away from serving public law values, and they will be particularly crucial in instances where *neither* the private sector nor the government are properly incentivized to protect public values.

Protecting public law values first requires understanding that they may be at risk. This Article has taken a first step by describing the public-private cybersecurity system, identifying relevant public law values, diagnosing risks to public law values in cybersecurity, and proposing lessons for approaching public law-values concerns in cybersecurity going forward. New roles and contexts will continue to evolve and so too must the tools for protecting public values.

314. *Cf.* SCHNEIER, *supra* note 144, at 209 ("Corporate interests may temporarily overlap with their users' privacy interests, but they're not permanently aligned.").

Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors

Oona A. Hathaway, Emily Chertoff, Lara Domínguez, Zachary Manfredi, and Peter Tzeng*

In Syria, the United States is 'training and equipping' non-state groups to battle ISIS. In Eastern Ukraine, Russia has provided weapons, training, and support to separatists. In China, 'private' computer hackers operating with state support create codes designed to infiltrate sensitive computer systems. These are just a few examples of the many ways in which states work with non-state actors to accomplish their military and political objectives. While state/non-state collaboration can be benign, it can be malignant where a state uses a non-state actor as a proxy to violate international law. This is no mere academic hypothetical: consider the Former Republic of Yugoslavia's support of the Free Serbian Army, which committed the genocide at Srebrenica.

Recognizing this problem, international courts have developed a doctrine of state responsibility designed to hold states accountable for internationally wrongful acts of their non-state-actor partners. Unfortunately, existing doctrine leaves an accountability gap and fails to correct the perverse incentive to use non-state actors as proxies for illegal acts. Moreover, it creates a second perverse incentive: states with good intentions might avoid training non-state actors in international law compliance to avoid crossing the 'bright line' for attribution.

This Article proposes a fix to these problems, building on an interpretation of the Geneva Conventions released by the International Committee of the Red Cross (ICRC) in March 2016. It argues that the duty 'to ensure respect' in Common Article 1 can fill the legal gap. In addition, it argues that Common Article 1 will be more widely embraced, and therefore more effective, if states that have exercised due diligence to prevent violations are allowed an affirmative defense against liability for any ultra vires violations. The Article concludes with recommendations for states that wish to fulfill their Common Article 1 obligations in good faith while working with non-state actors.

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Introduction

States frequently work with and through non-state actors, sometimes in cases where direct state action would have been politically or legally suspect. During the past few years, for example, the United States has financed,

armed, and trained opposition forces in Syria.[1] Russia has assisted and supplied separatist forces in eastern Ukraine.[2] Iran continues to arm and fund Hezbollah in Lebanon.[3] Across the globe, states fund, arm, train, and assist non-state actors engaged in armed conflict.[4] Moreover, in many of these cases, non-state actors take actions that would violate international law if undertaken directly by a state or its organs.[5]

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1. Michael D. Shear, Helene Cooper & Eric Schmitt, *Obama Administration Ends Effort to Train Syrians to Combat ISIS*, N.Y. TIMES (Oct. 9, 2015), http://www.nytimes.com/2015/10/10/world/middleeast/pentagon-program-islamic-state-syria.html [https://perma.cc/NHP4-22CM].

2. David M. Herszenhorn & Peter Baker, *Russia Steps Up Help for Rebels in Ukraine War*, N.Y. TIMES (July 25, 2014), http://www.nytimes.com/2014/07/26/world/europe/russian-artillery-fires-into-ukraine-kiev-says.html [https://perma.cc/EE9M-YAD2].

3. Anthony H. Cordesman, *Iran's Support of the Hezbollah in Lebanon*, CTR. FOR STRATEGIC & INT'L STUD. 2–3 (July 15, 2006), http://csis.org/files/media/csis/pubs/060715_hezbollah.pdf [https://perma.cc/P5DT-B5GE].

4. The question of state responsibility for non-state-actor conduct certainly exceeds the context of armed conflict. Our inquiry here, however, focuses primarily on attempting to resolve the accountability gap in the armed-conflict context. We focus our attention here for at least three reasons: first, while it is ambiguous what aspects of international law apply to non-state actors generally, in the armed-conflict context it is clear that non-state groups, at a minimum, have obligations under Common Article 3 of the Geneva Conventions; second, the control tests for attribution of state responsibility themselves have been developed through assessment of non-state actors' roles in armed conflict; third, our proposed solution to the accountability gap relies on international obligations that apply in the context of armed conflict. We do not claim that the solution we offer here would suffice to close the accountability gap for all state engagement with non-state actors, but nevertheless hope that it may gesture toward future avenues of research for closing the gap entirely.

5. There is substantial literature dealing with the issue of what law binds non-state actors in the context of armed conflict. While norms in this area are continuing to develop, for the purposes of this Article we accept the consensus view that Common Article 3 of the Geneva Conventions applies to organized non-state groups that are party to an armed conflict. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 3518–20. Additionally, while not weighing in here on the complex debates about the scope of international law obligations that regulate non-state actors, we nevertheless argue that, at a minimum, it is quite clear that international law obligates state conduct in the context of armed conflict more extensively than it does the conduct of non-state actors. *See* Andrew Clapham, *Human Rights Obligations for Non-State-Actors: Where Are We Now?*, *in* DOING PEACE THE RIGHTS WAY: ESSAYS IN INTERNATIONAL LAW AND RELATIONS IN HONOUR OF LOUISE ARBOUR (Fannie Lafontaine & François Larocque eds., forthcoming 2017) (manuscript at 4–5) (suggesting non-state actors already have international obligations, just not as many as states); Hans-Joachim Heintze & Charlotte Lülf, *Non-State Actors Under International Humanitarian Law*, *in* NON-STATE ACTORS IN INTERNATIONAL LAW 97, 97–111 (Math Noortmann, August Reinisch & Cedric Ryngaert eds. 2015) (discussing the status of humanitarian non-state actors in the context of international humanitarian law); Christian Henderson, *Non-State Actors and the Use of Force*, *in* NON-STATE ACTORS IN INTERNATIONAL LAW 77, 77–96 (Math Noortmann, August Reinisch & Cedric Ryngaert eds. 2015) (arguing that international law governing the use of force by states *against* non-state actors is significantly more developed than the law governing the use of force *by* non-state actors); Tim Rutherford, *Everyone's Accountable: How Non-State Armed Groups Interact with International Humanitarian Law*, 198 AUSTL. DEF. FORCE J. 76, 76 (2015) ("[I]f the notion that international law is derived from the consent of those it governs remains true, there is a disconnect in whether international law can bind the non-state actor.").

This raises a pressing issue: When is a state responsible for the actions of a non-state actor? This question leads, in turn, to a host of additional questions: What degree of control does a state need to exercise over a non-state actor to be held liable for that actor's conduct? What actions should states take to ensure their non-state partners comply with their international law obligations? When states train and advise groups not to commit violations of international law, should they be held responsible when those actors do commit violations?

This problem is not new. The use of non-state actors as proxies was a prominent feature of the Cold War, perhaps most famously in the Bay of Pigs Invasion in 1961[6] and the proxy war in Afghanistan throughout the 1980s.[7] But the problem has risen to new prominence in recent years. Faced by stringent legal limits on their own direct action, states have exploited what has become a large and growing loophole in the international legal framework: States that work through non-state actors operate in a zone of legal uncertainty. As long as the doctrine of state responsibility for the actions of non-state actors remains unclear, states can exploit that uncertainty to make an end-run around their own legal obligations. This allows states to appear to abide by the law, while achieving all their illegal aims indirectly through non-state actors that would be unable to act without their support. The potential damage to the international legal framework is enormous.

In this Article, we argue that existing state-responsibility doctrine is insufficient to meet the current challenges. The International Law Commission's Draft Articles on state responsibility and the jurisprudence of the international courts have continued to rely on a variety of "control tests' to determine the scope of state responsibility for non-state-actor conduct. The current law of state responsibility focuses on whether the actions of a non-state actor can be 'attributed' to a state. Under the framework for attribution, states must be shown to exercise a sufficient degree of control over the act or the actor in order to be held liable for non-state actors' commission of internationally wrongful acts. Yet, despite states' pervasive engagement with non-state actors, courts have rarely found states liable under these control tests. The resulting framework has led to a critical accountability gap in state-responsibility doctrine: States too often

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6. *See, e.g.*, Chris Loveman, *Assessing the Phenomenon of Proxy Intervention*, 2 CONFLICT SECURITY & DEV. 29, 30–31 (2002) (discussing Bay of Pigs as a proxy intervention using a group of exiles). *See generally* POLITICS OF ILLUSION: THE BAY OF PIGS INVASION REEXAMINED (James G. Blight & Peter Kornbluh eds. 1998) (documenting an oral history of the invasion, including testimony from former CIA officials).

7. *See generally*, STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001 (2004) (discussing U.S., Iranian, and Soviet use of proxies in Afghanistan from the late 1970s to the early 1990s).

effectively escape responsibility for violations of the laws of armed conflict if they act through non-state partners. It has also created dangerous incentives for states. They not only have little reason to police the actions of non-state actors that fall below the threshold for attribution, they may even be actively discouraged from taking actions to mitigate the danger of international humanitarian law (IHL) violations by non-state actors: They may worry that taking measures to prevent violations could cause them to exercise control that might subject them to liability even for ultra vires acts.

In March 2016, the International Committee of the Red Cross issued new commentaries on the Geneva Convention—the first in more than six decades.[8] Contained within them is a possible answer to the problem created by modern state-responsibility doctrine: Common Article 1 of the Geneva Conventions obligates states to 'undertake to respect and to ensure respect' for the Conventions in all circumstances.[9] The ICRC Commentaries[10] conclude that Common Article 1 imposes not only negative obligations on states not to encourage violations of the law of armed conflict, but also *positive* third-party obligations on a state that closely coordinates its activities with non-state actors.[11]

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8. The ICRC released a new set of commentaries in March 2016. This was the most extensive ICRC Commentary since the Pictet Commentaries, which were released in English in four volumes between 1952 and 1960. *See, e.g.*, INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet ed., A.P. de Heney trans. 1960).

9. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter First Additional Protocol].

10. INT'L COMMITTEE OF THE RED CROSS, COMMENTARY OF 2016, art. 1, ¶ 154 (2d ed. Mar. 22, 2016), https://ihl-databases.icrc.org/ihl/full/GCI-commentary [https://perma.cc/DS59-WWLZ] [hereinafter ICRC] ("This duty to ensure respect by others comprises both a negative and a positive obligation. Under the negative obligation, High Contracting Parties may neither encourage, nor aid or assist in violations of the Conventions by Parties to a conflict. Under the positive obligation, they must do everything reasonably in their power to prevent and bring such violations to an end.").

11. It is also important to note that Common Article 1 places affirmative responsibilities on states in both a non-international armed conflict (a conflict between a state and one or more non-state actors), and an international armed conflict (where two or more states are parties). *Id.* at art. 1, ¶ 125 ("The High Contracting Parties undertake to respect and to ensure respect for 'the present Convention' in all circumstances. Thus, the High Contracting Parties must also ensure respect for the rules applicable in non-international armed conflict, including by non-State armed

The precise scope of Common Article 1 obligations—in particular, whether Common Article 1 places any affirmative responsibility on states to ensure respect by actors it does not work with directly—has yet to be clarified by the ICRC. Nonetheless, this little-noticed provision carries immense possibility: It could close much of the gap in state responsibility for non-state actors in armed-conflict situations. Some states might worry that Common Article 1 places them in a no-win situation: If they do not take steps to meet positive Common Article 1 obligations, they are in violation of their Geneva Convention obligations. But if they do take actions necessary to meet positive Common Article 1 obligations, they may end up exercising sufficient 'control' to trigger state responsibility—even for ultra vires actions. Indeed, it is precisely this danger that may be leading some states to resist the broader interpretation of Common Article 1 advocated by the ICRC. To address this concern, we propose an affirmative defense for actions taken by states in furtherance of their Common Article 1 duties. Doing so would be consistent with the intent of the applicable legal framework and would create the right incentives for state and non-state actor compliance with the laws of armed conflict. States would be obligated to ensure their non-state partners abide by their IHL obligations, without worrying that actions taken to assure such compliance would increase the state's risk of liability for the non-state groups' ultra vires actions.

The remainder of this Article is organized into five sections. Part I offers an overview of the current framework for attribution and the problems associated with the high evidentiary burdens that exist under its control tests for state responsibility. This Part aims not only to provide background for the argument that follows, but also to bring clarity to an important body of law that is frequently misunderstood. Part II provides an analysis of the perverse incentives that the modern attribution framework creates for state actors that wish to collaborate with non-state actors in the context of armed conflict. Part III examines state obligations under Common Article 1 of the Geneva Conventions and shows how the ICRC's new proposed positive 'due diligence' standard could ameliorate the gap in state-responsibility doctrine. Part IV proposes a new affirmative defense for actions taken in furtherance of compliance with Common Article 1 duties. Finally, Part V offers a set of *ex ante* and *ex post* recommendations to states seeking to fulfill their obligations to ensure non-state partners comply with international law in the context of armed conflict.

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groups "). While not all of the Articles of the Geneva Convention apply in an armed conflict, the "duty to ensure respect" that this Article discusses does.

I. The Current Legal Framework

The International Law Commission (ILC), International Court of Justice (ICJ), and International Criminal Tribunal for the Former Yugoslavia (ICTY) have all considered the problem of state responsibility for the actions of non-state actors in the context of armed conflict. Though these efforts have addressed elements of the accountability gap for the actions of non-state actors, they have thus far failed to resolve the problem.

There are several reasons for this failure. The first, and most obvious, is that each has taken a different—and sometimes even contradictory—approach to the dilemma of state responsibility. This has led to widespread confusion among those seeking to make sense of the legal obligations on states. Even putting the confusion and contradiction to one side, each of the approaches to the doctrine of state responsibility shares an additional, more troubling shortcoming: Each treats state responsibility as a bright-line test—a state is responsible, or it is not. There is nothing in between. This is because the doctrine of state responsibility has been centered around the question of attribution: Is the conduct of this non-state actor attributable to a state? In other words, should the conduct of the non-state actor be treated as if the state itself were the actor?

As we shall show in the sections that follow, this approach to state responsibility is at once too lenient and too strict. On the one hand, until a state passes the bright line and triggers state responsibility, it will not be held accountable for the actions of non-state actors. This is true even if the state has enabled a non-state actor to engage in behavior that violates international law and even if the state provided the enabling support with the intention that the non-state actor take actions that the state is itself legally prohibited from taking (for instance, an illegal use of force or extrajudicial killing). On the other hand, the bright-line approach to state responsibility also means that once states cross over the line for triggering state responsibility, they may be held responsible for the actions of non-state actors, even if they specifically directed those actors *not* to engage in the actions in question. Indeed, it is likely that this over- and under-inclusiveness has bred much of the disagreement in the doctrine of state responsibility. Faced with the bright line, international judicial bodies are forced to pick a poison—holding a state accountable for nothing or for everything, when the truth likely lies in between. The two bodies that have addressed this issue have found different poisons more palatable.

In the sections that follow, we seek, first, to outline the current approach to state responsibility by the international organizations that have addressed it most prominently. We begin with the ILC's Draft Articles on State Responsibility, which is the most widely embraced description of state responsibility, and yet the most ambiguous. We then turn to the case law of two international judicial bodies, each of which has adopted a different test

for state responsibility. The ICJ has embraced the 'effective control' test, which draws a very high bar for triggering state responsibility. By contrast, the Appeals Chamber of the ICTY has embraced the 'overall control test, which relies on different elements of control to establish state responsibility. We show that it may be possible to reconcile these apparently contradictory approaches by viewing them as providing two different tests based on whether the state is being held responsible for a non-state actor or for just a single operation by the non-state actor. Yet even accepting this (admittedly minority) approach to making the best sense of existing doctrine, the problem remains that the bright-line approach is ill-suited to the project of encouraging states to act in ways that ensure the non-state actors that they support abide by international law.

A. The ILC's Draft Articles on State Responsibility

The ILC's 2001 Draft Articles on State Responsibility are currently the most authoritative statement on state responsibility in international law.[12] Through the Draft Articles, the ILC sought to clarify and codify the different standards international courts have elaborated for attributing non-state actors' conduct to states.[13] In 2007, in *Bosnian Genocide*, the ICJ also declared that both Articles 4 and 8 of the Draft Articles reflect customary international law.[14]

Articles 4 and 8 of the Draft Articles are the most significant articles for assessing state responsibility for non-state-actor conduct during armed conflict. Under the Draft Articles, a non-state actor's act is attributable to a state if the state has sufficient connections with the actor (Article 4) or with the operation during which the act takes place (Article 8). Article 4 concerns responsibility for the conduct of non-state actors that can be considered de jure or de facto state organs. Article 8 concerns responsibility for violations committed by non-state actors during an operation that is imputed to a state.

Article 4 of the Draft Articles provides:

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds

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12. *Report of the International Law Commission on the Work of Its Fifty-Third Session*, [2001] 2 Y.B. Int'l L. Comm'n 26–30, U.N. Doc. A/56/10 [hereinafter *Draft Articles*]. The *Draft Articles* "are considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of state responsibility." JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 43 (2013).

13. *See* CRAWFORD, *supra* note 12, at 43–44 (contending that the Draft Articles "are an active and useful part of the process of international law" that codify customary state responsibility).

14. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 385, 398 (Feb. 26) [hereinafter *Bosnian Genocide*].

> in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[15]

In its commentary to Article 4, the ILC clarifies that 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.'[16] Therefore, absent evidence that the non-state actor is a de jure organ of the state, the question under Article 4 boils down to whether the non-state actor is a de facto organ of the state. The Article thus precludes states from avoiding responsibility for a non-state actor that functions as a state organ by simply failing to acknowledge it as such. For instance, a state could not create, fund, and direct a militia, and then use it to evade legal limits on the state's own actions—for instance, killing civilians in violation of the Geneva Convention's principle of distinction. Under Article 4, the actions of the militia would be attributed to the state.

Article 8 of the Draft Articles provides:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[17]

The ILC's commentary to Article 8 notes that 'the three terms 'instructions', 'direction' and 'control' are disjunctive; it is sufficient to establish any one of them.'[18] Therefore, absent express instructions or direction from the state to the non-state actor to commit the act, the question boils down to whether the state exercised a sufficient degree of "control' over the act. The focus of the inquiries under Article 4 and Article 8 is therefore different. Under Article 4, the question is the level of control the state exercises over the *actor* that undertakes the act, whereas under Article 8, it is the level of control the state exercises over the *operation* during which the act occurs.

While some commentators have suggested that 'the ILC sought to allow for greater state responsibility under the Articles as adopted,'[19] most

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15. *Draft Articles*, *supra* note 12, at art. 4.

16. *Id.* at art. 4 cmt. 11.

17. *Id.* at art. 8.

18. *Id.* at art. 8 cmt. 7.

19. *See* Dayna L. Kaufman, *Don't Do What I Say, Do What I Mean!: Assessing a State's Responsibility for the Exploits of Individuals Acting in Conformity with a Statement from a Head of State*, 70 FORDHAM L. REV. 2603, 2653 (2002) ("[C]hanges in the Articles on State Responsibility from their original draft form to their form as adopted suggest that perhaps the ILC sought to allow for greater state responsibility under the Articles as adopted. Additionally, there is greater interest

recognize the Draft Articles as codifying and clarifying the applicability of pre-existing judicial tests for state responsibility.[20] The most prominent judicial tests for state responsibility are the 'effective control' test of the ICJ and the 'overall control' test of the ICTY It is therefore to those that we turn next.

B. The ICJ's Effective Control Test

The ICJ was the first to confront the problem of state responsibility for non-state actors. It responded by creating a new legal standard for finding state responsibility: If an applicant could prove that a state had sufficiently close ties to, and had furnished sufficient support for, a non-state actor, courts would attribute the non-state actor's actions to the state—essentially 'piercing the veil' of the proxy relationship.

In 1984, in *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua*),[21] Nicaragua instituted proceedings against the United States for its use of the Contras—a non-state armed group operating in and around Nicaragua—to fight the socialist Sandinista government. Nicaragua alleged, and the ICJ found, that the United States was directly responsible for the internationally wrongful act of mining Nicaraguan ports.[22] However, Nicaragua also alleged indirect U.S. involvement—via training, financing, and direction provided to paramilitaries—in other internationally wrongful acts carried out by the Contras.[23]

The ICJ found that the United States had supported the Contras in the following ways:

The United States financed, organized, trained, supplied, equipped, and armed the Contras, and provided them with reconnaissance aircraft, intelligence, and surveillance.[24]

The United States decided and planned—or at least closely collaborated in deciding and planning—a number of military and paramilitary operations

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internationally in holding States responsible for their conduct with respect to private individuals, as evinced by recent General Assembly resolutions regarding terrorism." (citations omitted)).

20. *See* CRAWFORD, *supra* note 12, at 43–44. The ILC adopted the most recent version of the *Draft Articles* in August 2001—after the ICJ's 1986 Judgment in *Nicaragua* and the ICTY's *Tadić* Appeals Chamber decision, but before the ICJ's repudiation of the ICTY's overall control test in *Bosnian Genocide*. *See Draft Articles*, *supra* note 12, at 25; *cf. Bosnian Genocide*, Judgment, 2007 I.C.J. 43 (Feb. 26); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua*]; Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 327 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) [hereinafter *Tadić*].

21. *Nicaragua*, 1986 I.C.J. 14.

22. *Id.* ¶ 292(4).

23. *Id.* ¶¶ 100–08, 112, 115, 118–19, 122.

24. *Id.* ¶¶ 100–01, 108, 115.

by the Contras,[25] and devised and directed specific strategies and tactics on when to seize and hold territory.[26] In addition, the United States selected some of the Contras' military and paramilitary targets and provided operational support.[27]

The United States prepared and distributed a manual suggesting that the Contras shoot civilians attempting to leave a town, neutralize local judges and officials, hire professional criminals to carry out 'jobs, and provoke violence at mass demonstrations to create 'martyrs.'[28] In other words, the United States 'encouraged' the commission of unlawful acts.[29]

But in deciding what legal consequences should follow from these actions, the Court faced more than simply a legal challenge. After it found that it had jurisdiction, the United States not only withdrew from the case, but it also withdrew its optional declaration accepting the compulsory jurisdiction of the Court.[30] As a result, the Court was under significant pressure to deliver a judgment that, on the one hand, asserted its jurisdiction despite the withdrawal of the United States, and, on the other, was limited enough in scope that it would not undermine the legitimacy of the Court in the event the United States decided to flout the final ruling.

Likely as a result of this politically sensitive situation, the Court drew a bright line that established a high bar for state responsibility. It concluded that in order for a state to be held responsible for the actions of a non-state actor, '[I]t would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.'[31] Under this 'effective control' standard, a later case clarified, private conduct that is merely supported, financed, planned, or otherwise carried out on behalf of the state is not attributable unless the state also exercises a high level of control 'in respect of *each operation* in which the alleged violations occurred.'[32]

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25. *Id.* ¶ 106.

26. *Id.* ¶ 104. It is not clear whether the alleged violations of human rights and humanitarian law occurred in the course of these operations.

27. *Id.* ¶¶ 112, 115.

28. *Id.* ¶¶ 118–19, 122.

29. *Id.* ¶ 292(9).

30. Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, 24 I.L.M. 246; United States: Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, Oct. 7, 1985, 24 I.L.M. 1742; *see also Text of the U.S. Statement on Withdrawal from Case Before the World Court*, N.Y. TIMES (Jan. 19, 1985), http://www.nytimes.com/1985/01/19/world/text-of-us-statement-on-withdrawal-from-case-before-the-world-court.html [https://perma.cc/5FR2-KKKJ].

31. *Nicaragua*, 1986 I.C.J. ¶ 115 (emphasis added).

32. *Bosnian Genocide*, Judgment, 2007 I.C.J. 43, ¶ 400 (Feb. 26) (emphasis added).

Applying this standard, the ICJ found that the combination of funding, training, public support, strategic guidance, and tactical directives cited above was insufficient for a finding of state responsibility.[33] The opinion implied that this was because Nicaragua had failed to prove a direct link between these forms of support and the execution of any particular operation, i.e., the United States had not specifically *instructed* the commission of unlawful acts.[34] The ICJ took pains to note that proof of control over a *specific operation* was required for a finding of attribution.[35]

Practically, this meant that unless the plaintiff could provide evidence directly connecting a state's funding, training, and tactical or strategic guidance to the execution of a discrete internationally wrongful act, there could be no finding of attribution. In other words, the test set a high evidentiary bar, particularly in the context of a contentious case, where evidence indicative of the kind of control required over a specific operation would generally be classified and in exclusive control of the state.[36]

In its 2007 judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnian Genocide*), the ICJ confirmed the effective control test and again applied it in a way that indicated that it established a high evidentiary burden to find attribution.[37] The case raised the question of whether the acts of military and paramilitary groups operating on the territory of the Socialist Federal Republic of Yugoslavia (SFRY)[38] could be attributed to the government in the period

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33. *Nicaragua*, 1986 I.C.J. ¶¶ 103–07, 115.

34. *See Nicaragua*, 1986 I.C.J. ¶ 115 ("For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary *operations* in the course of which the alleged violations were committed. (emphasis added)).

35. The ICJ later explicitly affirmed the requirement of control over a specific operation in *Bosnian Genocide*. *Bosnian Genocide*, 2007 I.C.J. ¶ 400 ("It must . . . be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of *each operation* in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations. (emphasis added)). The requirement of control over a specific operation is the major factor that distinguishes the ICJ's effective control test from the ICTY's overall control test. The evidentiary threshold of the ICTY's test is easier to clear—once it is proved that material support has flowed to an actor, this may provide the basis for a finding of control over the actor.

36. Although the ICJ has the authority to compel states to produce documents under Article 49 of its statute, in *Bosnian Genocide* the Court declined to order Serbia to produce unredacted versions of state documents that incriminated Belgrade in the Srebrenica genocide. *See Bosnian Genocide*, 2007 I.C.J. 241, ¶ 35 (dissenting opinion by Al-Khasawneh, V.P.).

37. *Bosnian Genocide*, 2007 I.C.J. 43, ¶¶ 208–09, 400–01.

38. The Socialist Federal Republic of Yugoslavia, often referred to by the acronym SFRY, existed until from the end of World War II until 1991, when it broke into pieces. Its army is the Yugoslav National Army, often referred to by the acronym JNA. The Federal Republic of Yugoslavia, often referred to by the acronym FRY, existed from 1992–2003, and primarily consisted of a federation between the republics of Serbia and Montenegro. Its army was created

before its disintegration in the early 1990s.[39] Specifically, the suit alleged that the murder of Bosnian Muslim men at Srebrenica by members of the Republika Srpska's official military wing, the Bosnian Serb Army (VRS), should be attributed to the Federal Republic of Yugoslavia (FRY), as the legal successor to the SFRY.[40] (At the time, Republika Srpska was an unrecognized breakaway republic and therefore did not yet bear its own legal responsibilities as a state.)

The ICJ found that the FRY was 'making considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options' of the breakaway republic's authorities.[41] The ICJ furthermore determined that there were 'close ties' between the government of the FRY and officials of the Republika Srpska; there had been a major transfer of personnel, arms, and equipment from the army of the FRY to the VRS, as well as financial support from FRY authorities to VRS officers; and, furthermore, there was substantial economic integration between the Republika Srpska and the FRY (among other things, loans from the FRY underwrote most of the budget of the breakaway republic).[42]

Despite these ties, the ICJ held that while Bosnia and Herzegovina had proven that FRY had supported the VRS and the Republika Srpska, and that the VRS's acts at Srebrenica had been acts of genocide, it had failed to prove that the acts of the VRS were attributable to the FRY under the effective control test.[43] Explaining its decision, it wrote:

> The Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY to commit the massacres, still less that any such instructions were given with the specific intent *(dolus specialis)* characterizing the crime of genocide All indications are to the contrary: that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.[44]

Here, the ICJ appeared to require evidence of explicit instructions to commit the massacre—and even evidence of genocidal intent[45]—in order to

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from the remains of the JNA and was called "Vojska Jugoslavije," often referred to by the acronym VJ.

39. *Id.* ¶¶ 64–65, 236–37.

40. *Id.* ¶ 278.

41. *Id.* ¶ 241.

42. *Id.* ¶¶ 237–40.

43. Nor could any of the acts alleged that did not amount to genocide be attributed to the FRY.

44. *Bosnian Genocide*, 2007 I.C.J. ¶ 413.

45. Although the necessity of finding intent likely also was exacerbated by the *dolus specialis* requirements of the crime of genocide. *See, e.g.* Kai Ambos, *What Does 'Intent to Destroy' in*

meet the effective control standard. By requiring evidence of specific instructions tied to a particular operation, the ICJ set an extremely high bar for attribution.

Because the ICJ did not find effective control in either *Nicaragua* or *Bosnian Genocide*, it is unclear exactly what set of facts would satisfy the 'effective control' test. However, it is clear that it sets a high threshold.[46] Hypothetically, a state's use of a non-state actor to carry out a targeted killing would constitute an exercise of effective control over a non-state actor.[47] Yet, the state's involvement would likely have to entail significant control over the military operation—at the very least, it would have to exceed that exercised by the United States over the Contras or the FRY over the VRS. The ICJ's reasoning in *Nicaragua* and *Bosnian Genocide* might be read to suggest that a state could arm, fund, support, train, and facilitate the operations of an armed, non-state group, and even encourage the non-state group to carry out ethnic cleansing as a means of defeating the enemy, and nevertheless evade responsibility because there is no evidence state agents directly instructed the commission of the specific massacre.

However, the ICJ has ultimately left the question of state liability for ultra vires actions underspecified. 'Effective control' appears to contemplate state responsibility for an ultra vires act by a non-state actor in limited circumstances. In both *Nicaragua* and *Bosnian Genocide*, the ICJ held that the state needs to have 'effective control' over the *operation* during which the violations occur in order to trigger a finding of attribution under this standard—mentioning nothing about control over the acts (or violations) themselves.[48] The choice to focus the inquiry on control over the *operation*,

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Genocide Mean?, 91 INT'L REV. RED CROSS 833, 834–35 (2009) (describing the two separate mental elements of the genocide offense).

46. The *Bosnian Genocide* opinion suggests that to satisfy the effective control test there must be evidence a state directly instructed a non-state group to carry out the specific operation during which the violation took place. *Bosnian Genocide*, 2007 I.C.J. ¶¶ 408, 410–12. This appears to set a higher evidentiary standard than the ILC proposes in the Draft Article Commentaries for Article 8. In its formulation of the factors required to establish effective control, the ILC treats the terms "instructions," "directions," and "control" as disjunctive. *Id.* ¶ 398. The commentaries thus suggest that directions, instructions, or control are independently sufficient for a finding of state responsibility under Article 8. In the ICJ's formulation of the same factors, however, the court reads "instructions" back into the control test, so that instructions are *always* necessary for a finding of effective control. *Id.* ¶ 413. Under this standard, courts may even have the flexibility to construe the term operation so narrowly as to foreclose the possibility of holding a state responsible for the ultra vires actions of its non-state partners.

47. A similar analysis might apply in a case involving an unorganized group of individuals carrying out specific operations on behalf of a state. If the non-state actor does not meet the *Tadić* threshold of organization, non-state actors must meet the effective or strict control test for state attribution.

48. *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 115 (June 27) ("For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had

rather than the *act*, suggests that a state could be held responsible for ultra vires acts that take place in the course of an operation over which that state exercises effective control.

By contrast, the ILC, which endorses the ICJ's 'effective control' standard (as articulated in *Nicaragua*),[49] limits liability for ultra vires acts during operations over which a state exercises 'effective control' to those that are 'an integral part' of the operation.[50] It does not extend responsibility to ultra vires acts that are only 'incidentally or peripherally' associated with an operation.[51] It explains that '[s]uch conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation.'[52] It further explains, 'The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.'[53]

Indeed, some language in *Bosnian Genocide* and *Nicaragua* suggests that a state by definition does not have 'effective control' over an ultra vires act.[54] In other words, to attribute an act of a non-state actor to a state under the 'effective control' standard, the state must have instructed or directed the specific act that constitutes the violation in question.[55]

In sum, the ICJ's application of effective control risks narrowing the scope of accountability to the point of rendering state-responsibility doctrine ineffective. In *Nicaragua* and *Bosnian Genocide*, 'effective control'

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effective control of the military or paramilitary operations in the course of which the alleged violations were committed."); *Bosnian Genocide*, 2007 I.C.J. ¶ 400.

49. *Draft Articles*, *supra* note 12, at art. 8 cmts. 3–4.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See Bosnian Genocide*, 2007 I.C.J. ¶ 400 ("It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred . "). One could interpret the "or" in this sentence as an explanatory word. *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 115 (June 27) ("All the forms of United States participation [and control] mentioned above would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State."). One could interpret this sentence to mean that "direction' and "enforcement" are necessary to find the state responsible.

55. This depends on how one defines "operation. If the term "operation" is narrowly construed to mean that each act that makes up an operation must be directed by the state (*Tadić*'s reading), then the state cannot be held responsible for acts that were not expressly instructed by the state. However, if "operation" is construed so that several acts are steps in one operation, then it is possible to be responsible for an ultra vires act under the ILC reading as long as the act in question is integral to the operation ordered by the state. The Appeals Chamber of the ICTY in *Tadić* appears to have interpreted *Nicaragua* and *Bosnian Genocide* in this manner. *See Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 106 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) ("This [effective control] test hinged on the issuance of specific directives or instructions concerning the breaches allegedly committed by the *contras*.").

requires such a high degree of control and specificity of instructions that states can—merely by issuing instructions at a relative level of generality—easily avoid attribution for crimes as egregious as genocide.

The ICJ's approach to state responsibility thus leaves many unanswered questions. It does permit the actions of non-state actors to be attributed to states—and in this respect partially addressed the legal loophole created by the possibility of states acting through non-state actors. But it adopted a strict-liability rule that sets a very high evidentiary bar for triggering state attribution. In doing so, the Court left a substantial accountability gap that, taken alone, would permit states to escape legal limits on their own actions by encouraging and enabling non-state actors to take action on their behest.

C. The ICTY's Overall Control Test

Eleven years after the ICJ's ruling in *Nicaragua*, the Appeals Chamber of the ICTY also confronted the question of state attribution in *Prosecutor v. Dusko Tadić*.[56] In the case, the prosecutor brought a criminal suit against Dusko Tadić, a Bosnian Serb politician and member of a paramilitary group, for 'grave breaches' of international humanitarian law.[57]

Because it was a criminal case, the stakes of a finding of attribution in *Tadić* were somewhat different than in *Nicaragua*. In particular, finding Tadić guilty hinged on whether international humanitarian law applied to the parties to the conflict. After all, Tadić was charged with violating international humanitarian law that applies during international armed conflict—a charge that could only hold if the law was applicable to the conflict. The ICTY's ability to find criminal liability thus hinged on the attribution of paramilitary conduct against the state of Bosnia and Herzegovina to a second state, the FRY—an attribution that would make the conflict an international armed conflict (IAC) and would thereby trigger the full panoply of international humanitarian laws applicable to such conflicts.

The threshold question was whether the acts of the VRS could be attributed to the FRY Since, as noted earlier, Republika Srpska was not a recognized state, the conflict between Republika Srpska and Bosnia Herzegovina—in which Tadić committed his offenses—was not an international armed conflict. However, if the acts of the VRS could be attributed to the Federal Republic of Yugoslavia (a recognized state), then the conflict would be an international armed conflict between two states (the FRY and Bosnia and Herzegovina). Members of the VRS could thus be held accountable for the atrocities committed during the war under the stricter

56. *Id.* ¶ 131.
57. *Id.* ¶ 68.

standards of conduct that international humanitarian law imposes on participants in international armed conflicts.[58]

The Appeals Chamber explicitly rejected the application of the *Nicaragua* 'effective control' test to the facts of the case.[59] It noted that the purpose of Article 8 of the Draft Articles—an earlier version of which had been adopted by the ILC drafting committee in 1998—was 'to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials.'[60] As a result, it declared that '[t]he *degree of control* [required for attribution] may vary according to the factual circumstances of each case.'[61] In particular, it observed that for organized groups, 'it is sufficient to require that the group as a whole be under the *overall control* of the State.'[62]

In explaining this new 'overall control' test, the Appeals Chamber clarified that the State must not only 'equip[] and financ[e]' the group, but also 'coordinat[e] or help[] in the general planning of its military activity.'[63] Distinguishing the ICJ's effective control standard, the Appeals Chamber

58. This question came before the ICTY in 1994. Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Judgment, ¶ 7 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997). Article 2 of the ICTY Statute empowers the Tribunal to "prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions, including crimes that only arise in the course of an IAC. *Id.* ¶ 577. Since the prosecution indicted Dusko Tadić for conduct that only constitutes a breach of the Geneva Conventions under IAC–IHL rules, the ICTY had to determine whether there was an IAC. In order to satisfy the elements required to establish grave breaches of the Geneva Conventions—for Bosnian Muslims to be considered "protected persons" within the meaning of the Geneva Conventions—the prosecution had to show that the victims were in the hands of a party to the conflict of which they were not nationals (i.e., that the VRS perpetrators were agents or organs of the Former Republic of Yugoslavia). In *Tadić*, the Trial Chamber recognized that there was an IAC before May 19, 1992. *Id.* ¶ 569. It held, however, with the presiding judge dissenting, that although "the JNA [the armed forces of the SFRY] played a role of vital importance in the establishment, equipping, supplying, maintenance and staffing of the VRS units,' the VRS was not an organ or agent of the FRY [as successor to the SFRY]. *Id.* ¶¶ 595, 607. As a result, the Trial Chamber concluded that there was not an IAC, and so Tadić could not be found guilty of any of the counts postdating May 19, 1992 that relied on Article 2 of the ICTY Statute. *Id.* ¶ 608. The Prosecutor appealed this part of the judgment, claiming that even after May 19 there was an IAC between the FRY and Bosnia and Herzegovina. *Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 85. The Prosecutor argued that only international humanitarian law (and not the law of state responsibility) should be used to determine whether Article 2 of the statute applies. *Id.* ¶¶ 89, 103. Nevertheless, the Appeals Chamber held that international humanitarian law needed to be supplemented by general international rules on control under the doctrine of state responsibility. *Id.* ¶¶ 98, 103–05. The Appeals Chamber therefore turned to an analysis of the law of state responsibility. *Id.* ¶¶ 102–45.

59. *Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 115.

60. *Id.* ¶ 117.

61. *Id.*

62. *Id.* ¶ 120 (emphasis added).

63. *Id.* ¶ 131; *see also id.* ¶ 137 ("The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.").

emphasized that the overall control test does not go so far as to require 'the issuing of specific orders by the State, or its direction of each individual operation.'[64]

In applying the test to the facts, the Appeals Chamber found that the FRY exercised overall control over the VRS.[65] It emphasized that:

> The Yugoslav People's Army (the Army of the SFRY which ceased to exist with the creation of the Yugoslav Army (VJ) in April 1992) officers were directly transferred into their equivalent postings in the VRS;[66]
>
> The FRY/VJ paid the salaries of these officers;[67]
>
> The VJ had the same military objectives as the VRS;[68]
>
> The FRY/VJ provided 'extensive financial, logistical and other assistance and support' to the VRS;[69] and
>
> The FRY/VJ 'directed and supervised the activities and operations of the VRS.'[70]
>
> The VJ and the VRS 'did not, after May 1992, comprise two separate armies in any genuine sense.'[71]

The Appeals Chamber held that there was an IAC and that Tadić was therefore liable for grave breaches of the Geneva Conventions under Common Article 2 and Article 2 of the ICTY Statute.[72]

By using the overall control standard, the ICTY Appeals Chamber was able to apply international humanitarian law applicable to international armed conflicts to the facts of *Tadić* and reject efforts to evade international criminal responsibility. Ultimately, the Appeals Chamber held that in cases involving organized, armed military groups, evidence the state exercised a more general level of control over the non-state group is sufficient to attribute the groups' conduct to a state.

Moreover, the overall control test, as articulated by the ICTY, is a strict-liability standard: Once a non-state actor is considered to be under the overall control of a state, the state is responsible for all acts, including ultra vires acts carried out by the non-state actor.[73] If the test is regarded as a test for whether a group is functionally an organ of the state, this standard makes intuitive

64. *Id.* ¶ 137.
65. *Id.* ¶ 147.
66. *Id.* ¶ 150.
67. *Id.*
68. *Id.* ¶ 151.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* ¶¶ 162, 171.
73. *Id.* ¶¶ 120–22.

sense. There is little question that a state is responsible for an ultra vires act committed by its de facto organ. Article 7 of the Draft Articles provides: 'The conduct of an organ of a State shall be considered an act of the State under international law even if [the organ] exceeds its authority or contravenes instructions.'[74] The ILC Commentary also points to an abundance of state practice and judicial decisions supporting this notion.[75] In fact, both the ICJ[76] and the Appeals Chamber of the ICTY[77] have come to a similar conclusion.

Indeed, many scholars have praised the overall control test precisely because it adopts a more capacious test for establishing state responsibility for the actions of non-state actors. The ICRC has expressly endorsed the overall control test as the appropriate standard in armed conflict, not only for purposes of classifying the conflict, but also for attributing state responsibility for the conduct of non-state actors.[78] Commentators have also noted the utility of the lower standard of attribution in the context of state-

74. *Draft Articles*, *supra* note 12, at art. 7.

75. *Id.* at art. 7 cmts. 3–7.

76. *Bosnian Genocide*, Judgment, 2007 I.C.J. 43, ¶¶ 385–86 (Feb. 26); *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 109 (June 27).

77. *Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 121.

78. Acknowledging that the ICTY's overall control test is the minority position, the ICRC nevertheless contends that it is the appropriate test in armed conflicts for several reasons:

> In order to classify a situation under humanitarian law involving a close relationship, if not a relationship of subordination, between a non-State armed group and a third State, the overall control test is appropriate because the notion of overall control better reflects the real relationship between the armed group and the third State, including for the purpose of attribution. It implies that the armed group may be subordinate to the State even if there are no specific instructions given for every act of belligerency. Additionally, recourse to the overall control test enables the assessment of the level of control over the *de facto* entity or non-State armed group as a whole and thus allows for the attribution of several actions to the third State. Relying on the effective control test, on the other hand, might require reclassifying the conflict with every operation, which would be unworkable. Furthermore, the test that is used must avoid a situation where some acts are governed by the law of international armed conflict but cannot be attributed to a State.

ICRC, *supra* note 10, at art. 3, ¶ 409 (citations omitted).

sponsored terrorism,[79] private military and security contractors,[80] and non-state paramilitary groups.[81]

Despite these advantages, the ICTY's overall control test has not been widely embraced. Instead, the effective control standard is regarded by many observers as the governing standard.[82] In updating the Draft Articles, the ILC expressly supported the ICJ's effective control standard in the final text and commentary, leaving its assessment of the overall control test's viability ambiguous.[83] In the 2007 *Bosnian Genocide* case, moreover, the ICJ rejected the overall control standard and reaffirmed the effective control standard it

79. KIMBERLEY N. TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM: PROBLEMS AND PROSPECTS 44 (2011); Antonio Cassese, *The* Nicaragua *and* Tadić *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649, 666 (2007); Alison Elizabeth Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, 45 VA. J. INT'L L. 41, 120, 123 (2004); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 37, 39 (1999); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 20 (2002); Scott M. Malzahn, Note, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HASTINGS INT'L & COMP. L. REV. 83, 100–01 (2002). For more commentators making similar remarks, see TRAPP, *supra*, at 42 n.111.

80. EVGENI MOYAKINE, THE PRIVATIZED ART OF WAR: PRIVATE MILITARY AND SECURITY COMPANIES AND STATE RESPONSIBILITY FOR THEIR UNLAWFUL CONDUCT IN CONFLICT AREAS 275 (2015); Oliver R. Jones, *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, 24 CONN. J. INT'L L. 239, 271, 289 (2009); Amanda Tarzwell, Note, *In Search of Accountability: Attributing the Conduct of Private Security Contractors to the United States Under the Doctrine of State Responsibility*, 11 OR. REV. INT'L L. 179, 204 (2009).

81. MOYAKINE, *supra* note 80, at 274; *see id.* at 281–82 ("[T]he 'overall control' test appears to be the most suitable one, while States, especially those hiring PMSCs [which can be equated with paramilitary units], are likely to easily satisfy the set of criteria for the application of this test. It will automatically lead to the attribution of their unlawful conduct to the States concerned if the reasoning of the ICTY positioning its control theory as realistic is followed. (citations omitted)); Cassese, *supra* note 79, at 665–67.

82. *See* CRAWFORD, *supra* note 12, at 156 ("[The ICJ's determination in *Bosnian Genocide*] effectively ends the debate as to the correct standard of control to be applied under Article 8. Moreover it does so in a manner that reflects the ILC's thinking on the subject from the time the term 'control' was introduced into then-Draft Article 8."); MOYAKINE, *supra* note 80, at 269 ("[O]ne can draw the conclusion that the 'effective control' test is the leading theory according to the World Court "); Christian J. Tams, *Law-making in Complex Processes: The World Court and the Modern Law of State Responsibility*, *in* SOVEREIGNTY, STATEHOOD AND STATE RESPONSIBILITY: ESSAYS IN HONOUR OF JAMES CRAWFORD 287, 301 (Christine Chinkin & Freya Baetens eds. 2015) ("As a result, it would seem far-fetched today to suggest that overall control is sufficient to justify attribution of private conduct–faced with dissent the ILC-ICJ has struck back.").

83. *Draft Articles*, *supra* note 12, at art. 8 cmts. 3–5.

had first established in *Nicaragua*.[84] Unbowed, the ICTY has since reaffirmed the overall control standard on at least two occasions.[85]

Commentators generally present the ICJ's 'effective control' and the ICTY's 'overall control' standards as alternatives.[86] And in many ways, they are: The ICJ and the ICTY each explicitly rejected the other court's approach after characterizing the tests as standards of attribution under Article 8 of the Draft Articles. In *Tadić*, the ICTY criticized the ICJ's 'effective control' standard from *Nicaragua* and proposed the 'overall control' standard to replace it in cases where the non-state actor is an organized group.[87] Responding in *Bosnian Genocide* to the ICTY's appraisal, the ICJ criticized the ICTY's 'overall control' standard and reaffirmed the 'effective control' standard it had first established in *Nicaragua* (notwithstanding the non-state actor's level of organization).[88] In the commentary on Article 8, meanwhile, the ILC itself took note of the dispute between the ICJ and ICTY [89] But the ILC leaves room for reconciliation. The Draft Articles favorably cite the effective control test and note that the ICTY's mandate was directed toward

84. While the ICJ acknowledged that "overall control' may well be the appropriate standard for determining whether or not an armed conflict is international or not, the Court rejected its application in the context of state-responsibility doctrine. *Bosnian Genocide*, Judgment, 2007 I.C.J. 43, ¶¶ 403–07 (Feb. 26). *But see id.* ¶ 39 ("The inherent danger in [the effective control test] is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore.") (dissenting opinion by Al-Khasawneh, V.P.).

85. *See, e.g.*, Prosecutor v. Delalic, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (confirming that the "overall control' standard articulated in *Tadić* was the applicable criteria in ascertaining the existence of an international armed conflict); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Chamber Judgment, ¶ 134 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000) (holding that the question of Yugoslavia's responsibility for the acts of Bosnian Serb forces was subject to an "overall control" test).

86. *See, e.g.*, CRAWFORD, *supra* note 12, at 156 (noting critiques that the effective control test sets the bar too high and the test of overall control "would better meet the needs of the international community in dealing with the threat of terrorism"); Tams, *supra* note 82, at 301 (describing the ICJ and ILC's defense of the effective control test against the ICTY's overall control test).

87. *See Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 123 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) ("In the case under discussion here, that of organised groups, State responsibility is instead the objective corollary of the overall control exercised by the State over the group. [T]he fact nevertheless remains that international law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*), or (ii) by individuals who make up organised groups subject to the State's control. International law does so regardless of whether or not the State has issued *specific instructions* to those individuals. Clearly, the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.").

88. *Bosnian Genocide*, 2007 I.C.J. ¶¶ 403–07.

89. *Draft Articles*, *supra* note 12, at art. 8 cmts. 4–5.

'issues of individual criminal responsibility. not state responsibility, but the ILC does not expressly reject the overall control test.[90]

In sum, in the context of armed conflict, the ICJ and the ICTY have relied primarily on two[91] standards for evaluating the level of control required to attribute an act of a non-state actor to a state under the Draft Articles: effective control and overall control. These two tests have traditionally been understood as mutually inconsistent. Yet it is possible to see them as reconcilable. According to the ICJ in *Nicaragua*, an act of a non-state actor is attributable to a state if the state exercises 'effective control' over the operation during which the act occurred.[92] Under the effective control standard, private conduct that is merely supported, financed, planned, or otherwise carried out on behalf of the state is not attributable unless the state also exercises a high level of control 'in respect of *each operation* in which the alleged violations occurred.'[93] According to the ICTY in its *Tadić* appeals judgment, however, in cases where the non-state actor is an organized military group, the state only needs to exercise overall control over the *actor* for the act to be attributable to the state.[94] As long as the non-state actor is organized, evidence that the state financed and equipped a 'military organization' and participated in the general planning of the group's

90. *Id.* at art. 8 cmt. 5. The ILC's commentary has itself been the subject of significant scholarly debate. The ILC concludes its assessment of the ICJ and ICTY's disagreement by noting that "it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it." *Id.*

91. The ICJ also articulated the additional 'strict control' standard, which establishes that all of the acts of a non-state actor are attributable to a state if that non-state actor is in a relationship of "complete dependence" on the state. *Bosnian Genocide*, 2007 I.C.J. ¶ 391 (asking "whether it is possible in principle to attribute to a State conduct of persons—or groups of persons—who, while they do not have the legal status of State organs, in fact act under such *strict control* by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act" (emphasis added)). In *Nicaragua*, the court uses the phrase "complete dependence" to refer to the same control standard. *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 110 (June 27). The "strict control" standard is, on our view, the most stringent (i.e., the most difficult for establishing attribution). Under strict control the accountability gap is therefore also widest. Given our critique of the limitations of the arguably lower evidentiary burdens of effective and overall control, we do not discuss strict control in detail in this paper.

92. *Nicaragua*, 1986 I.C.J. ¶ 115 ("For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.").

93. *Bosnian Genocide*, 2007 I.C.J. ¶ 400 (emphasis added). Admittedly, it is difficult to ascertain the exact content of the effective control standard—thus far no court or tribunal has found sufficient evidence of effective control to trigger state responsibility.

94. *Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 131 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) ("In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group ").

operations is sufficient to establish state responsibility, even if the state did not issue specific instructions.[95]

These two approaches, moreover, might be seen as reflected in the ILC Draft Articles, the overall control test addressing attribution under Article 4 and the effective control test addressing attribution under Article 8. Indeed, a handful of commentators have suggested that the 'overall control' standard is best understood in terms of the legal theory of attribution underlying the ICJ's control standard under Article 4, rather than under Article 8.[96] Indeed, this understanding of the relationship between the standards adopted by the ICJ and the ICTY on the one hand, and the Draft Articles on the other, might even make the best sense of current state-responsibility doctrine.[97]

Regardless of the standard, however, all these approaches share a common vice: By drawing a bright line, they force a difficult—if not impossible—decision as to how much control over a non-state actor is enough to hold a state responsible for its actions. On the one hand, drawing the line for triggering state responsibility too high allows states easily to evade legal limits on their own actions. On the other hand, drawing it too low can threaten to place states in an unfair position of being held liable for actions they could not reasonably prevent. Both approaches, moreover, allow

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95. *Id.* ¶ 145 ("In the case at issue, given that the Bosnian Serb armed forces constituted a 'military organization' the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.").

96. *E.g.*, Elena Laura Álvarez Ortega, *The Attribution of International Responsibility to a State for Conduct of Private Individuals Within the Territory of Another State*, REVISTA PARA EL ANÁLISIS DEL DERECHO, January 2015, at 1, 22–23 (2015), http://www.indret.com/pdf/1116_es.pdf [https://perma.cc/FWU4-72D9]; Claus Kress, *L'Organe* de Facto *en Droit International Public: Réflexions sur l'Imputation à l'Etat de l'Acte d'un Particulier à la Lumière des Développements Récents*, 105 REVUE GÉNÉRALE DE DROIT INT'L PUB. 93, 131 (2001); Marko Milanović, *State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken*, 22 LEIDEN J. INT'L L. 307, 312–14, 316–19 (2009); Stefan Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INT'L & COMP. L.Q. 493, 506–07 (2009).

97. The Draft Articles Commentary discusses overall control as a standard of attribution under Article 8. *Draft Articles*, *supra* note 12, at art. 8 cmt. 5. Nevertheless, a close reading of *Tadić* reveals that the overall control standard assesses whether the conduct of the non-state actor can be attributed to the state by virtue of the control it exercises over the group (Article 4), rather than the specific operation (Article 8). In *Tadić*, because the Appeals Chamber found the non-state armed group to be a de facto state organ, it classified the conflict as an international armed conflict (effectively between two states) rather than a non-international armed conflict (between a state and a non-state group). Like standards of attribution under Article 4, once the conduct of the state in this case met the overall control threshold, all of the conduct of the non-state actor could be attributed to it, regardless of whether the state had exercised a high level of control over particular operations. In this sense, the overall control inquiry asks whether the non-state armed group in question can be attributed to the state, and with it, all of the group's conduct.

states to avoid responsibility for taking actions that enable non-state actors to violate international law, as long as they stay far below the bar.

In the next Part, we examine more fully the incentives that modern attribution doctrine creates for states, before turning in Part III to elaborating a possible solution presented by Common Article 1 to the Geneva Conventions.

II. Perverse Incentives

The bright-line approach to state responsibility that characterizes modern attribution doctrine creates perverse incentives for states. First, the high bar established by state-responsibility doctrine may encourage states to use non-state partners to undertake actions that are prohibited to the states themselves. This may be true even under the more capacious overall control standard, for even that standard requires a significant level of state control over the non-state actor before triggering responsibility. Second, the doctrine may encourage states to hold non-state actors at arm's length—for instance, providing them weapons but little training or instructions on compliance with international humanitarian law—for fear that closer involvement might trigger attribution. This is particularly true for those concerned about how the overall control test may be applied, for that test creates a greater likelihood that the state could be held responsible even for ultra vires actions.

A. The Incentive to Use Non-State Actors to Violate International Law

Consider the following possibility: Suppose a state supports a non-state group seeking to overthrow its government. (This is no mere hypothetical: Think, for example, of the many states supporting various non-state groups at war in Syria.) The state would like to assure the victory of the side it supports, but it would also like to avoid any responsibility for violations of international law. It also knows that it would be prevented from sending in its own troops unless the government of Syria were to give its permission—unlikely if the non-state group it supports is seeking to topple the government. Due to *jus ad bellum* concerns and domestic legal and political limits on sending in the troops, the state may already prefer to send non-state actors instead of its own armed forces.[98] Because of the high bar established

98. States working through non-state actors are not immune from *jus ad bellum* constraints. The *Nicaragua* Court found that "the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force." *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 228 (June 27). It nonetheless indicated that "'organizing or encouraging the organization of irregular forces or armed bands for incursion into the territory of another State', and 'participating in acts of civil strife . . . in another State' could, in some circumstances, violate the customary law prohibition on use of force. *Id.* The potential violation of Article 2(4) of the U.N. Charter was not before the Court, but the same

by modern attribution doctrine, states in this circumstance may believe that they can work through non-state actors and thereby avoid legal responsibility that would be triggered if they employed their own forces.

It is undisputed that any and all acts of the state's armed forces would be attributable to the state. Under Article 4 of the Articles on State Responsibility, the armed forces of a state are widely considered 'organs' of the state.[99] Therefore, any and all acts committed by the armed forces, even if ultra vires, could be attributed to the state. So if a state's soldier goes rogue and commits war crimes, the state would be directly responsible (a responsibility it could discharge by court-martialing the offender).

Moreover, the rules of international law governing the conduct of the state's armed forces impose substantial risks and burdens on the state. If a state sends its own armed forces, their conduct is more likely to be governed by the law that applies to international armed conflict. Those rules are, on the whole, more comprehensive than the rules governing the behavior of non-state actors in a non-international armed conflict. (For instance, non-state actors do not need to treat captured government forces as POWs, entitled to the full protections of the Geneva Conventions, though they are bound by the humane-treatment obligations of Common Article 3.)

For a state in this position, working through a non-state actor may seem an appealing alternative. Instead of sending the state's armed forces into the conflict, the state might instead provide material support to the non-state group fighting on its side of the conflict. Because of the accountability gap left by modern attribution doctrine, the chances that the conduct of the non-state actor will be attributed to the state are slim. Even the less generous overall control standard allows states to provide significant support to non-state actors without triggering legal responsibility.

States thus have ample incentives to capitalize on modern attribution doctrine by using non-state actors as proxies to accomplish what international law otherwise forbids. As a result, states may hope to act with impunity through their non-state partners in situations where international law bars states from acting themselves. This, in turn, renders some of the most important international legal limits on states deeply vulnerable.

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logic would suggest that this prohibition applies to the overlapping Charter provision on the use of force. *Id.*

99. *See Draft Articles*, *supra* note 12, at art. 4 ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions An organ includes any person or entity which has that status in accordance with the internal law of the State.").

B. The Incentive Not to Exercise Control Over Non-State Actors

There is an additional set of perverse incentives created by the bright-line approach of modern attribution doctrine: States may be reluctant to exercise control over their non-state partners in ways that might minimize the risk that they will violate international law. In fact, states might even be said to have an incentive *not* to train and instruct non-state partners to comply with international law. Training and instructing might serve as evidence that the state exercised the level of control required to attribute the wrongful conduct of non-state actors to the state. Again, this is true regardless of the specific test applied, whether effective control or overall control.

Consider again a situation in which a state supports a non-state group seeking to overturn its government. In an ideal world, the state would choose to instruct and train the non-state actor to capture rather than kill enemies who surrender, to refrain from torturing detainees, and to ensure the material and procedural conditions of confinement do not render detention arbitrary—both in order to comply with their Common Article 3 obligations and to avoid mass atrocities and war crimes. However, engaging in such instruction and training might bring the state closer to the strict-liability line. In particular, this additional instruction and training—and the level of control required to implement it—could tip the state over the bright line for attribution. The state's efforts to comply with international humanitarian law could even render it responsible for the non-state actor's ultra vires war crimes.

Under existing doctrine, states cannot mitigate responsibility for a non-state actor's conduct once they have met the requisite threshold of control. Furthermore, any and potentially all actions of the non-state actor—including ultra vires actions—may be attributed to a state as if its own agents or organs had performed them. State actors may therefore understandably be concerned that more oversight over non-state actors (even in the form of *ex ante* and *ex post* measures designed to encourage non-state actors' compliance with the rule of law) will only bring states acting in good faith closer to the attribution line. Once the control threshold has been reached, current doctrine provides states with no explicit mitigation defense that lessens the extent of liability.

Modern attribution doctrine arguably creates precisely the wrong incentives. Where states do work with non-state actors to ensure compliance with international norms, the law should decrease rather than increase the possibility of attribution of internationally wrongful ultra vires acts, encouraging states to take steps to mitigate and avoid violations. Indeed, the common practice of international humanitarian organizations and NGOs—which encourage states partnering with non-state actors to train leaders and secure assurances of lawful conduct, among other recommendations—suggests that an accountability regime that opens a state up to liability for exercising due diligence vis-à-vis non-state partners may be

counterproductive. In the next two Parts, we consider ways in which these incentives might be significantly mitigated.

III. How to Fill the Gap: Common Article 1 Due Diligence Standard

Thus far this Article has examined modern attribution doctrine in isolation. This has long been the approach to state responsibility. Here we change course. We argue that, in the context of armed conflict, attribution doctrine can only be properly understood in concert with other legal frameworks—in particular, with the legal obligations created by international humanitarian law. Indeed, Common Article 1 of the Geneva Conventions provides a source of state responsibility for the actions of non-state actors that cures many of the deficiencies of state attribution doctrine viewed on its own.[100]

This is a unique moment to embrace a broader and more integrated understanding of state-responsibility doctrine, one that incorporates a robust understanding of Common Article 1. On March 22, 2016, the International Committee for the Red Cross issued its first revised commentaries on the Geneva Conventions in more than six decades.[101] These revised commentaries adopt a broader vision of Common Article 1—a vision that, if embraced by states, could cure many of the infirmities of state-responsibility doctrine in the context of armed conflict. In particular, the Commentary of 2016 argues for a more robust reading of Common Article 1's 'to ensure respect' provision.[102] On the ICRC's view, this clause entails both negative duties 'neither [to] encourage, nor aid or assist in violations of the Conventions' and positive duties that High Contracting parties 'must do

100. The obligations established in Common Article 1 operate in addition to, not in lieu of, the rules on attribution in the Draft Articles. Article 55 of the Draft Articles provides that a more specific rule on state responsibility may replace general rules on state responsibility codified in the Draft Articles. *Draft Articles*, *supra* note 12, at art. 55. However, the ILC notes in its commentary that this principle of *lex specialis* applies only when there is "some actual inconsistency between [the rules]. *Id.* at art. 55 cmt. 4. Since there is no inconsistency between the obligations of Common Article 1 and the rules on attribution in the Draft Articles, both are applicable. Indeed, the ICJ in *Nicaragua* applied both Common Article 1 and the general rules on attribution. *Nicaragua*, 1986 I.C.J. ¶¶ 109, 115, 220.

101. ICRC, *supra* note 10.

102. *Id.* at art. 1. For the most directly relevant and significant contributions to the literature on "to ensure respect" duties, see generally Fateh Azzam, *The Duty of Third States to Implement and Enforce International Humanitarian Law*, 66 NORDIC J. INT'L L. 55 (1997); Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82 INT'L REV. RED CROSS 67 (2000); Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*. 21 EUR. J. INT'L L. 125 (2010); Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 2 Y.B. INT'L HUMANITARIAN L. 3 (1999). For the articulation of ICRC staff that most clearly anticipated the Commentary of 2016, see generally Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INT'L REV. RED CROSS 707 (2014).

everything reasonably in their power to prevent and bring such violations to an end.'[103]

This Part of the Article makes the case in three steps: First, it outlines Common Article 1 obligations and explains the case law supporting the extension of the duty to 'ensure respect' to states' interactions with non-state partners. Second, it explains the new 2016 ICRC Commentaries and their decision to embrace an expansive vision of Common Article 1 obligations that include a positive due diligence obligation on states working with non-state actors. Third, it explains why Common Article 1, as interpreted in the 2016 Commentaries, promises to close the accountability gap left by modern attribution doctrine and address the perverse incentives described in Part III.

A. Common Article 1 Duties Prior to the 2016 Commentaries

Common Article 1 provides: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.'[104] The ICJ recognized that Common Article 1's 'to ensure respect' provision obligates state parties in both its *Nicaragua* judgment and *Wall* advisory opinion. Despite this, Common Article 1 is often forgotten as a source of legal obligation in discussions of state responsibility. However, thanks to recent efforts by the International Committee for the Red Cross advocating a more robust reading of Common Article 1's 'to ensure respect' provision, viewing attribution doctrine in isolation is no longer possible.

A state's obligations under Common Article 1 are both broader and narrower than its obligations under the Draft Articles. Common Article 1 obligations are broader because states' duties to 'ensure respect" for the rules set forth in the Geneva Conventions are distinct from—and arguably much more extensive than—duties 'to respect' the Conventions.[105] But Common Article 1 obligations are narrower in that they only pertain to violations of parties' duties under international humanitarian law. By contrast, the Draft Articles address state responsibility for any 'internationally wrongful act. In the context of armed conflict, Common Article 1's obligation on states 'to ensure respect' implies that states have a responsibility to make sure their partner non-state actors abide by their IHL obligations,[106] even when the

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103. ICRC, *supra* note 10, at art. 1, ¶ 154.

104. Geneva Convention I, *supra* note 9; Geneva Convention II, *supra* note 9; Geneva Convention III, *supra* note 9; Geneva Convention IV, *supra* note 9; *see also* First Additional Protocol, *supra* note 9.

105. For overview and discussion, see generally Boisson de Chazournes & Condorelli, *supra* note 102; Birgit Kessler, *The Duty to 'Ensure Respect' Under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts*, 44 GERMAN Y.B. INT'L L. 498 (2001).

106. In the 2016 Commentaries, the ICRC also explicitly adopts the view that non-state parties to an armed conflict are bound by Common Article 3 of the Geneva Conventions. ICRC, *supra*

state's relationship with the non-state actor falls short of standards of attribution under the Draft Articles.

It is widely accepted that compliance with international humanitarian law is the responsibility of parties to any international or non-international armed conflict and that Common Article 1 is customary international law.[107] Duties 'to respect' international humanitarian law apply directly to states and their organs.[108] The relevant inquiry for determining whether a state is responsible for a non-state actor's violations of 'to respect' duties of Common Article 1 thus concerns the degree to which actors or acts can be seen as attributable to the state. The tests for state responsibility codified in the Draft Articles and articulated in the jurisprudence of the ICJ and ICTY also apply to liability for non-state actor violations of 'to respect' duties under Common Article 1.

1. The ICJ's 'Not to Encourage' Standard.—In *Nicaragua*, the ICJ refused to attribute the action of the Contras to the United States. But it then went on to consider the applicability of an alternate source of legal obligation—Common Article 1. It determined that the Common Article 1 duty to 'ensure respect' also creates an obligation for the state not to assist or 'encourage' others (whether states or non-state actors) to violate their obligations under the Geneva Conventions.[109] It explained:

> The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances' The United States is thus under an obligation *not to encourage* persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions [110]

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note 10, at art. 1, ¶ 125. Additionally, the ICRC argues that non-state actors also incur duties "to ensure respect" for Common Article 3 as it pertains to their members and those acting on their behalf. *Id.* at art. 1, ¶ 132 ("[I]t follows from common Article 3, which is binding on all Parties to a conflict, that non-State armed groups are obliged to 'respect' the guarantees contained therein. Furthermore, such groups have to 'ensure respect' for common Article 3 by their members and by individuals or groups acting on their behalf. This follows from the requirement for armed groups to be organized and to have a responsible command which must ensure respect for humanitarian law. It is also part of customary international law." (citations omitted)).

107. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 509–13 (2005).

108. *See* CRAWFORD, *supra* note 12, at 43 (providing, as an example, a ruling by the International Court which stated that "[an act] will be considered as attributable to a State if and to the extent that the [acts] that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control").

109. *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 220 (June 27).

110. *Id.* (emphasis added).

The ICJ held that the United States had violated this obligation by publishing and distributing a manual on psychological operations that encouraged the commission of IHL violations.[111] In applying this principle, the ICJ noted that it evaluated whether the 'encouragement' in question pertained only to violations of Common Article 3 of the Geneva Conventions,[112] which creates obligations for both non-state actors and state parties to armed conflict. With regard to the handbook, the ICJ found that the United States encouraged the extrajudicial killing of noncombatants in violation of Common Article 3.[113] The ICJ thus explicitly distinguished duties under Common Article 1 not to 'incite' or 'encourage' violations of Common Article 3 from state responsibility for the actions of the paramilitary groups.[114]

The ruling indicates that the standard for finding responsibility for violating the Common Article 1 duty to 'ensure respect' is less stringent than that of state responsibility for attribution of a non-state actor's acts. This section of the opinion focuses on state 'encouragement' rather than state control.[115] The ICJ found that the United States knew of allegations that the Contras were violating international humanitarian law and held that knowledge of these allegations was sufficient to show the foreseeability of future IHL violations by the non-state actor.[116] Significantly, the ICJ found a breach of customary international law duties even though the CIA framed the manual as an attempt to moderate the IHL violations of the Contras.

In its compendium on the 'rules of customary international humanitarian law,' the ICRC argues that state practice supports the ICJ's ruling in *Nicaragua*. According to Rule 144 of the compendium, 'States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to

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111. *Id.* ¶ 256.

112. *Id.* ¶¶ 255–56.

113. *Id.*

114. *See id.* ¶ 255 ("The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement.").

115. *Id.* ¶ 256 ("[I]t is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable.").

116. *Id.* ("When considering whether the publication of such a manual, encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found (paragraph 121) that at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law; it was in fact even claimed by the CIA that the purpose of the manual was to 'moderate' such behaviour. The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties.").

stop violations of international humanitarian law.'[117] In commentaries on this rule, the ICRC argues that years of state practice also support a customary international law obligation 'not to encourage' violations of international humanitarian law. While *Nicaragua* remains the clearest and most compelling articulation of this standard, the ICRC and other scholars make a strong case that state practice, ICTY cases, U.N. resolutions, and U.N. committee reports support its judgment.[118]

In sum, under *Nicaragua*, state encouragement of a non-state actor's actions may be unlawful and trigger state liability under Common Article 1 when it is 'likely or foreseeable' that that the non-state actor will commit the suggested violations. Even providing advice geared towards moderating a non-state actor's violations of international humanitarian law could render a state responsible for a violation of Common Article 1.[119]

2. Positive 'Third-State' Obligations.—In its 2004 *Wall* Advisory Opinion,[120] the ICJ adopted an even more generous reading of Common Article 1 than it had in *Nicaragua*. The ICJ found that the Article not only imposed negative duties 'not to encourage' abuses, but that the Article also imposed some *positive* third-state obligations.[121] Moreover, unlike negative

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117. HENCKAERTS & DOSWALD-BECK, *supra* note 107, at 509.

118. *Id.* at 512 ("The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia stated in its judgments that the norms of international humanitarian law were norms *erga omnes* and therefore all States had a 'legal interest' in their observance and consequently a legal entitlement to demand their respect. State practice shows an overwhelming use of (i) diplomatic protest and (ii) collective measures through which States exert their influence, to the degree possible, to try and stop violations of international humanitarian law."). For additional support that Common Article 1 and customary international law require states not to encourage other states and non-state actors to violate international humanitarian law, see Azzam, *supra* note 102, at 69 (explaining that the scope of the duty of third states includes a duty not to encourage offending states in further violations); Boisson de Chazournes & Condorelli, *supra* note 102, at 68 ("Some fifty years ago, the drafting of [the Geneva Conventions] led to the inclusion in their common Article 1 of a provision that provides the nucleus for a system of collective responsibility."); Kessler, *supra* note 105, at 498–99 (arguing that states' duties are more extensive than a cursory interpretation of "ensure respect" might imply).

119. It remains unclear whether states that make a good faith effort to encourage non-state actors to abide by international humanitarian law will still be held to violate their Common Article 1 duties. In *Nicaragua*, the ICJ found the United States liable for violating Common Article 1 because of a CIA manual that the United States claimed was intended to discourage the Contras from violating international humanitarian law. *Nicaragua*, 1986 I.C.J. ¶¶ 255–56. The ICJ took the manual's recommendations geared towards "mitigating" the violations of the Contras as evidence that the United States knew future violations were "likely or foreseeable." The ICJ, however, also found that the manual included additional recommendations that encouraged violations of international humanitarian law. It remains unclear whether future courts will find good faith instructions intended to mitigate non-state actors' IHL violations sufficient to violate Common Article 1 duties absent additional "encouragements" to violate international humanitarian law.

120. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *Wall* Advisory Opinion].

121. *Id.* ¶¶ 156–60.

duties 'not to encourage' that are owed to specific actors, the ICJ explained that third-state obligations are *erga omnes* obligations owed to the international community as a whole.[122] Such obligations typically have been construed as a general grant of authority for third states to act to ameliorate grave breaches of the Conventions or other *jus cogens* violations[123] (including breaches of the 1949 Genocide Convention).[124] The ICJ interpreted Common Article 1 to imply that 'every state party' to the Fourth Geneva Convention had an obligation to 'ensure that the requirements' of the Convention are upheld: '[E]very State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.'[125]

In its application of this principle, the ICJ held that 'all the States parties to the Geneva Convention are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.'[126] The ICJ thus explicitly found that Common Article 1 imposed third-state obligations on all High Contracting Parties to halt Israel's violation of the Fourth Convention. Given that many state parties do not have direct ties to Israel's military action in Palestine, the ICJ opinion implies that this duty exists regardless of whether a state had provided support to Israel or 'encouraged' its violations.

In a separate opinion, Judge Kooijmans clarified that he disagreed with the majority precisely because it interprets Common Article 1 as entailing positive duties:

> I simply do not know whether the scope given by the Court to [Common Article 1] in the present Opinion is correct as a statement of positive law. I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic démarches.[127]

The separate opinion helps elucidate two points: first, that the ruling *does* impose some positive third-party obligations on states; and second, that the scope of these obligations remains underspecified.

ICJ case law on Common Article 1 thus supports the conclusion that Common Article 1 imposes not only negative duties 'not to encourage' violations of international humanitarian law, but also some minimal positive

122. *Id.* ¶ 157.

123. CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW 139–40 (2005).

124. *Bosnian Genocide*, Judgment, 2007 I.C.J. 43, ¶¶ 161–62 (Feb. 26).

125. *Wall* Advisory Opinion, 2004 I.C.J. ¶ 158.

126. *Id.* ¶ 159.

127. *Id.* ¶ 50 (separate opinion by Kooijmans, J.) (emphasis added).

third-state obligations. Considering the *Nicaragua* and *Wall* cases together, it may be that *Nicaragua* indicates the 'floor' or minimal conditions that would suffice to establish a violation of the Common Article 1 duties 'to ensure respect. The *Wall* Advisory Opinion takes this a step further, suggesting that third states might even be liable for their failure to take preventative action against foreseeable IHL violations by other states.[128]

B. The 2016 ICRC Commentaries: Embracing a Positive Due Diligence Obligation

On March 22, 2016, the ICRC released the first major new commentaries on the Geneva Conventions since the famous 1952 Pictet Commentaries.[129] The release followed several years of preparations. In the period preceding the release, the legal staff of the ICRC published interpretations of the legal obligations under Common Article 1 under their own names, providing a preview of the commentaries to come.[130] These initial releases provoked controversy and push-back by states, which caused the release to be delayed by more than half a year.[131] The final release promises to be a signal moment in the development of international humanitarian law—and an important touchstone for understanding the legal obligations of states under the Geneva Conventions for decades to come.

Building on *Nicaragua* and *Wall*, the ICRC legal staff argued in its precommentary writings that duties 'to ensure respect' should include 'positive' third-state obligations to prevent and halt other states and non-state actors' violations of the Conventions.[132] This proposed expansion suggests only that states are required to take 'all possible steps, as well as any lawful means at their disposal' to 'ensure' all other parties to armed conflict respect the Geneva Conventions.[133] In contrasting its interpretation of Common Article 1 with a narrower view, the ICRC's Commentary of 2016 also makes clear that states' duties 'to ensure respect' extend to their interactions with both states *and* non-state actors.[134]

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128. *See supra* notes 125–127.

129. *Launch of the Updated Commentary on the First Geneva Convention*, ICRC (Apr. 6, 2016), https://www.icrc.org/en/document/launch-updated-commentary-first-geneva-convention [https://perma.cc/XV52-K5BS].

130. Dörmann & Serralvo, *supra* note 102.

131. Revisiting the Role of International Law in National Security: A "Papers' Workshop, Cardozo Law School (May 19, 2016) (on file with author).

132. Dörmann & Serralvo, *supra* note 102, at 707–09.

133. *Id.* at 724.

134. ICRC, *supra* note 10, at art. 1, ¶ 120 ("The interpretation of common Article 1, and in particular the expression 'ensure respect', has raised a variety of questions over the last decades. In general, two approaches have been taken. One approach advocates that under Article 1 States have undertaken to adopt all measures necessary to ensure respect for the Conventions only by their organs and private individuals within their own jurisdictions. The other, reflecting the prevailing

Additionally, the ICRC legal staff and Commentary of 2016 argue that a 'due diligence' standard should apply when determining whether states have discharged positive 'to ensure respect' obligations.[135] This standard would impose obligations on the conduct of states, but does not require them to attain specific outcomes.[136] States are not to be held responsible for failures to prevent other states from violating the Conventions as long as they can show that they 'ma[d]e every effort' [137] to prevent the violation.[138] The

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view today and supported by the ICRC, is that Article 1 requires in addition that States ensure respect for the Conventions by other States and non-State Parties.").

135. Dörmann & Serralvo, *supra* note 102, at 724; ICRC, *supra* note 10, at art. 1, ¶ 165. Due diligence is not a novel standard; international courts and commentators have relied on similar standards under various international human rights frameworks. The Inter-American Court and the European Court of Human Rights have interpreted similar "to ensure respect clauses' in their respective human rights treaties as imposing positive due diligence obligations on states. *See infra* note 149. Commentators have also argued states and corporations have positive due diligence obligations in the context of corporate social responsibility. The Guiding Principles on Business and Human Rights provide that positive obligations include, but are not limited to "human rights due diligence," which requires business enterprises "to identify, prevent, mitigate and . [assess responses to] adverse human rights impacts. U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, at 17, U.N. Sales No. HR/PUB/11/04 (2011). The Guiding Principles also provide that states should take steps to prevent human rights abuses by enterprises that are owned or controlled by the state, "or that receive substantial support and services from State agencies. *Id.* at 6. Interestingly, in the context of corporate social responsibility, some corporate counsel have raised concerns that exercising due diligence could increase exposure to liability by making the company aware of potential risks, imposing positive duties to mitigate. These concerns are not unlike some of the objections that detractors of a more expansive reading of Common Article 1 might raise. In the context of corporate social responsibility, the short response seems to be that these concerns are overstated. Due diligence allows companies to "identify potential human rights risks and address them before they occur, which should reduce the company's exposure to litigation of all kinds, and help the company defend against human rights claims that might be filed. John F. Sherman III & Amy Lehr, *Human Rights Due Diligence: Is It Too Risky?* 4 (Corp. Soc. Responsibility Initiative, Working Paper No. 55, 2010).

136. Dörmann & Serralvo, *supra* note 102, at 723–25; *see also* ICRC, *supra* note 10, at art. 1, ¶ 165.

137. Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN Y.B. INT'L L. 9, 47–48 (1992).

138. ICRC legal commentators have been clear, however, that the general prohibition on the use of force of Article 2(4) of the U.N. Charter provides the upper limit on actions states may take to discharge their Common Article 1 obligations. Third-state obligations under Common Article 1 could not be used as a means to justify unilateral humanitarian interventions. *See* Dörmann & Serralvo, *supra* note 102, at 725–26 ("CA 1 should not be used to justify a so-called '*droit d'ingérence humanitaire*' In principle, permitted measures must be limited to 'protest, criticism, retorsions or even non-military reprisals' Armed intervention may only be decided within the context of the UN, and in full respect of the UN Charter. The rules on the resort to armed force (*jus ad bellum*) govern the legality of any use of force, even if it is meant to end serious violations of international humanitarian law. The content of CA 1 is not part of *jus ad bellum* and thus cannot serve as a legal basis for the use of force."). For an extended and speculative discussion of possible options a state may take to discharge "to ensure" Common Article 1 duties, see generally Umesh Palwankar, *Measures Available to States for Fulfilling Their Obligation to Ensure Respect for International Humanitarian Law*, 34 INT'L REV. RED CROSS 9 (1994).

ICRC publications foreshadowed the new commentaries on the Geneva Conventions that also embrace these positive obligations of third states to 'ensure respect' of the Conventions by other states and non-state actors.[139]

Importantly, the ICRC embraces an interpretation of Common Article 1 obligations that, unlike attribution doctrine, does not establish a bright-line rule. Indeed, the Commentary of 2016 makes it clear that duties to ensure respect extend to state interactions with private persons, even when such persons' conduct *is 'not attributable to the state.'*[140] Instead, there is a sliding scale that adjusts state legal obligations based on their degree of connection and control.[141] The Commentary of 2016 makes clear that duties to ensure respect extend to any efforts to finance, equip, arm, or train the armed forces of parties to a conflict.[142] Prior to the release of the commentaries, the ICRC legal staff additionally characterized third-state duties as context-dependent obligations, which increase in scope according to a state's engagement with a party to a conflict.[143] Accordingly, significant ties (whether diplomatic, geographic, social, or economic) between states increase the due diligence responsibility that arises vis-à-vis other states and non-state actors under the Common Article 1 obligation to ensure respect for the Conventions.[144]

Even in the new commentaries, however, it is unclear whether and how obligations based on 'context' are derived from the third-party state's capacity for influence in a given situation. On one reading, a state might incur greater Common Article 1 obligations in any given conflict simply by virtue of its pervasive worldwide military, economic, and diplomatic influence.[145] In alternative construction, a state might be required to take voluntary steps to engage another state or non-state actor in order to comply

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139. For the most directly relevant and significant contributions to the literature on "to ensure respect" duties, see *supra* note 102.

140. ICRC, *supra* note 10, at art. 1, ¶ 150 (emphasis added). ("The duty to ensure respect covers not only the armed forces and other persons or groups acting on behalf of the High Contracting Parties but extends to the whole of the population over which they exercise authority, i.e. also to private persons whose conduct is not attributable to the State. This constitutes a general duty of due diligence to prevent and repress breaches of the Conventions by private persons over which a State exercises authority " (citations omitted)).

141. *See id.* at art. 1, ¶ 167 ("The duty to ensure respect for the Geneva Conventions is particularly strong in the case of a partner in a joint operation, even more so as this case is closely related to the negative duty neither to encourage nor to aid or assist in violations of the Conventions. The fact, for example, that a High Contracting Party participates in the financing, equipping, arming or training of the armed forces of a Party to a conflict, or even plans, carries out and debriefs operations jointly with such forces, places it in a unique position to influence the behaviour of those forces, and thus to ensure respect for the Conventions.").

142. *Id.*

143. Dörmann & Serralvo, *supra* note 102, at 723–25 (citing *Bosnian Genocide*, Judgment, 2007 I.C.J. 43, ¶ 430 (Feb. 26)).

144. *Id.* at 725.

145. *Id.* at 724.

with its Common Article 1 due diligence obligations. At the very least, direct support for another state's involvement in an armed conflict would increase a third state's responsibility under Common Article 1. The lack of clarity on the scope of the obligation has been part of the reason states have been slow to embrace the new commentaries on this point.

C. *Closing the Gap*

The Commentary of 2016 supports a reading of Common Article 1 as entailing positive obligations for states regarding the conduct of non-state actors. There is good reason to embrace this reading. First, the text, commentary, and case law support it. Second, applying due diligence obligations to states working with non-state actors would close much of the accountability gap otherwise left by state-responsibility doctrine.

The text of Common Article 1 itself offers no basis for distinguishing between state actors and non-state actors.[146] The Article simply provides that '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.'[147] This entails duties to ensure respect by other State Parties. But non-state actors also have both legal rights and legal responsibilities under Common Article 3. Hence, the best reading of Common Article 1 is that offered by the ICRC: the duty to 'ensure respect' ought to be read to require states to ensure respect by state and non-state actors engaged in armed conflict.

Existing case law supports this reading of Common Article 1. The ICJ in *Nicaragua* concluded that states have some Common Article 1 duties toward non-state actors.[148] This reading finds support, moreover, in related case law by the European Court of Human Rights and the Inter-American Court of Human Rights. Both have interpreted their respective conventions, which contain similar duty 'to ensure' language, to impose affirmative 'due

146. For the idea that third-state obligations apply to states and non-state parties alike, see Dieter Fleck, *International Accountability for Violations of the* Ius in Bello*: The Impact of the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 179, 182 (2006) ("[The obligation to ensure respect] extends to acts of third states, not directly involved in an armed conflict, in their relations to state and non-state parties to the conflict."); *see also* Hannah Tonkin, *Common Article 1: A Minimum Yardstick for Regulating Private Military and Security Companies*, 22 LEIDEN J. INT'L L. 779, 783 (2009) ("According to the ICRC, [the obligation to ensure respect] imposes a legal obligation not only on the parties to the armed conflict, but also on third states not involved in the conflict.").

147. Geneva Convention I, *supra* note 9, at art. 1.

148. *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 220 (June 27) ("The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances' ").

diligence' obligations on state parties for the conduct of non-state actors within their territory.[149]

Commentators have similarly argued that there are 'due diligence' obligations under Common Article 1,[150] in particular with regard to the use of private military and security contractors by states.[151] Additionally, other scholars have suggested affirmative due diligence obligations extend to the context of U.S. support for paramilitary groups in Syria.[152] Hannah Tonkin argues that a state's due diligence obligations towards the conduct of private military and security contractors will vary with context.[153] In her analysis, three factors are relevant for determining a state's due diligence requirements: the level of control a state exercises over the non-state actor, the risk the non-state actor will violate international humanitarian law, and the state's actual or constructive knowledge of this risk.[154] Arguably, a state dealing with a non-state actor will need to take additional measures to ensure compliance with international humanitarian law when any one of these factors is present to a significant degree.

Applying the ICRC reading of the 'to ensure respect' provision of Common Article 1 significantly ameliorates the gap in current state-responsibility doctrine. Unlike the attribution framework of the Draft Articles, Common Article 1 creates obligations for states to ensure compliance even when they do not exercise effective or overall control over a non-state actor. As *erga omnes* obligations, states owe Common Article 1 duties not only to the particular parties to an armed conflict but also towards the international community as a whole.[155] Moreover, Common Article 1's

149. Keenan v. United Kingdom, 2001-III Eur. Ct. H.R. 93, 128, ¶ 89; Alonso Eugénio da Silva v. Brazil, Case 11.598, Inter-Am. Comm'n H.R., Report No. 9/00, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 40 (2000).

150. Dörmann & Serralvo, *supra* note 102, at 708–10.

151. HANNAH TONKIN, STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT 136 (2011) ("If the host state does not take adequate measures to control a PMSC and the company violates IHL in state territory, the state could incur international responsibility for its failure to ensure respect for IHL. Although no court to date has found a state responsible under Common Article 1 merely on the basis of such inaction, the above analysis has shown that this pathway to responsibility is certainly possible in principle.").

152. Nathalie Weizmann, *What Happens If American-Trained Rebels Commit War Crimes?*, JUST SECURITY (Aug. 18, 2015, 1:00 PM), https://www.justsecurity.org/25469/responsible-american-trained-rebels-commit-war-crimes/ [https://perma.cc/6UXW-82M9].

153. Tonkin, *supra* note 146, at 794–95.

154. *Id.* at 794 ("Just as the measures necessary to discharge the due diligence obligation may vary between states, so too may the measures required of a particular state vary with the circumstances. Three factors are particularly pertinent to this assessment: first, the level of influence or control that the hiring state in fact exercises over the PMSC in question; second, the risk that the company's activities will give rise to a violation of IHL; and third, the state's actual or constructive knowledge of that risk.").

155. ICRC, *supra* note 10, at art. 1, ¶ 119 ("Moreover, the proper functioning of the system of protection provided by the Conventions demands that States Parties not only apply the provisions

text stipulates that the High Contracting Parties must ensure respect for the Conventions "in all circumstances.'[156] As a result, these obligations do not have a geographic or temporal threshold: Common Article 1 duties apply to any and all state interactions with a non-state actor whenever the Geneva Conventions are applicable.

A breach of Common Article 1 duties differs from a finding of attribution liability. The Commentaries of 2016 rightly characterize Common Article 1 duties and state-responsibility doctrine as 'operat[ing] at different levels.'[157] States failing to discharge their duties to ensure respect by partner non-state actors would be found responsible for violating their *own* international legal obligations. Instead of imputing the actions of the non-state actor to the state, Common Article 1 creates a direct duty on the part of a state to ensure respect by non-state actors. For example, when a state's non-state partner commits war crimes in violation of its Common Article 3 obligations, a state would be held responsible for breach of its Common Article 1 duties, not for the war crimes themselves. To take a simple analogy, the difference between attribution doctrine and Common Article 1 is akin to the difference between holding a company responsible for the actions of an employee because those actions can be attributed, or imputed, to the company and holding a company responsible for failing to take steps to prevent its employees from taking certain actions.

Because Common Article 1 places direct duties on states, it establishes 'more stringent conditions than those required for the secondary rules on State responsibility for aiding or assisting.'[158] State support that facilitates non-state groups' ability to commit violations of international humanitarian law constitutes an independent violation of the state's Common Article 1 duties, even if such actions may not pass the attribution bar under state-responsibility doctrine.[159]

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themselves, but also do everything reasonably in their power to ensure that the provisions are respected universally. The Conventions thus create obligations *erga omnes partes*, i.e. obligations towards all of the other High Contracting Parties.' (citations omitted)).

156. *Id.* ¶ 145 ("The novelty of the provision lies in the addition of the duty to 'ensure respect' which must be done 'in all circumstances' This sets a clear standard, as 'ensuring' means 'to make certain that something will occur or be so' or inversely 'make sure that (a problem) does not occur' States are thus required to take appropriate measures to prevent violations from happening in the first place. Accordingly, the High Contracting Parties must—starting in peacetime—take all measures necessary to ensure respect for the Conventions.' (citations omitted)).

157. *Id.* ¶ 160.

158. *Id.* ("Common Article 1 and the rules on State responsibility thus operate at different levels. The obligation to ensure respect for the Conventions is an autonomous primary obligation that imposes more stringent conditions than those required for the secondary rules on State responsibility for aiding or assisting.").

159. *Id.* ("Financial, material or other support in the knowledge that such support will be used to commit violations of humanitarian law would therefore violate common Article 1, even though

This broad application of Common Article 1 duties would require states to make respect of international law a major focus of their interactions with non-state actors in armed conflicts. In fulfilling their Common Article 1 'to ensure respect' obligations, states would be required to take affirmative steps to ensure their non-state partners complied with relevant law. Failures to properly instruct and train non-state partners in their international law obligations could thus be construed as a violation of a state's Common Article 1 duties.

Under the proposed framework of the 2016 Commentaries, states have obligations to take significant action towards insuring international law compliance in at least two ways. First, following *Nicaragua*, states must adequately assess whether assisting a non-state actor is likely or foreseeable to lead to violations of the Geneva Conventions; if a state's assistance to a non-state actor will enable violations of the Conventions, Common Article 1 requires that they forgo offering such assistance.[160] Second, when states do engage in partnerships with non-state actors in armed conflicts, Common Article 1 requires that, even in relatively low-level engagements (supplying equipment, providing arms, or sharing intelligence), states must exercise due diligence and take affirmative steps to ensure the non-state actors comply with the Geneva Conventions.[161]

Common Article 1 has the potential to eliminate the perverse incentive for states to avoid fully engaging with non-state partners as a means of skirting responsibility for violations of the laws of armed conflict: the very failure to ensure non-state-actor compliance with international law could—even absent a finding of state control—still be the basis of state liability. Moreover, any deliberate effort to use a non-state actor to engage in conduct that violates the Conventions would clearly violate Common Article 1. Common Article 1 duties thus encourage states to make compliance with the Geneva Conventions a central feature of their broader foreign policy agendas.

In sum, Common Article 1, as interpreted by the ICRC in its new commentaries, promises to close much of the state-responsibility gap identified in Part III. Common Article 1 requires states to exercise due diligence to ensure that their non-state-actor partners respect international law, even if the level of control they exercise falls short of what would be necessary to trigger modern attribution doctrine. These Common Article 1 duties are not only important as a set of stand-alone obligations. They help

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it may not amount to aiding or assisting in the commission of a wrongful act by the receiving States for the purposes of State responsibility.").

160. See *supra* section III(A)(1) for a discussion of a state's responsibility not to encourage or assist a non-state actor in the commission of acts that violate international humanitarian law.

161. See *infra* Part VI for a discussion of steps we recommend states take to discharge these duties.

alleviate the perverse incentives that can otherwise be created by modern attribution doctrine's bright-line rule.

IV Getting the Incentives Right: An Affirmative Defense

There is just one problem: States seeking to comply with their Common Article 1 duties might fear triggering liability under attribution doctrine. While Common Article 1 duties may be discharged under a due diligence framework—in which adequate effort to discharge a duty would shield a state from liability—overall control and potentially effective control function as a regime of strict liability under which even ultra vires acts may be attributed.[162] In other words, a state seeking to meet its due diligence obligations under the ICRC's reading of Common Article 1 might trip over the bright line drawn by attribution doctrine.

As a result, even states that do not intend to use non-state actors to skirt their international responsibilities may be reticent to embrace a reading of Common Article 1 that imposes positive due diligence obligations to curb potential violations of international humanitarian law by non-state partners. States are likely to be concerned that measures taken to discharge Common Article 1 obligations may contribute to breaching the attribution threshold. Under the strict and overall control standards, once the state meets the requisite level of control, all of the conduct of non-state actors—including ultra vires actions—can be imputed to the state regardless of the kinds of measures the state took to prevent violations. Under the effective control standard, at least some of the ultra vires conduct of non-state partners may be imputed to the state. The ILC has clarified that under Article 8, a state may be held responsible for ultra vires acts during operations over which a state exercises 'effective control, as long as those acts are 'an integral part' of the operation.[163] However, it does not extend responsibility to ultra vires acts that are only 'incidentally or peripherally' associated with an operation.[164] This example illustrates yet again how the strict-liability regime of attribution doctrine can create incentives for states *not* to provide IHL training and instructions to non-state actors.

The perverse incentives for good faith actors become particularly apparent when we consider the types of factors that courts and commentators examine to establish attribution: support, training, instructions, and strategic guidance. All four overlap with the kinds of activities states are expected to use to discharge their Common Article 1 due diligence duties when they partner with non-state armed groups. This raises the distinct possibility that

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162. For a discussion of liability for ultra vires action under effective control, see *supra* notes 46–55 and accompanying text.

163. *Draft Articles*, *supra* note 12, at art. 8 cmt. 3.

164. *Id.*

measures taken by a state to encourage non-state actors to comply with international humanitarian law will render the state responsible for any violations non-state actors commit in the course of an operation. This potential for liability means states are likely to oppose a reading of Common Article 1 that risks making them responsible for the ultra vires actions of non-state groups without any possibility of mitigation.

To address this problem, states ought to be permitted to offer an affirmative defense in cases where actions taken to address Common Article 1 due diligence obligations push them over the bright line for state attribution. Practically speaking, states should be able to invoke such a defense if they are ever brought before an international or domestic court, a human rights body, a special rapporteur, or even if their conduct is simply being assessed by the court of public opinion. The concern is that key evidence of control over a non-state actor could rely on measures taken by a state to prevent violations of international humanitarian law by the non-state actor. In a case where a state has taken measures to avoid certain IHL violations by the non-state actor, the state should not be held legally responsible for those ultra vires violations. Here we explain how such a legal innovation would work.

A. An Affirmative Defense to Liability for Ultra Vires Actions

In order to resolve the perverse incentive problem, we propose an affirmative defense to state liability. In particular, measures taken to fulfill Common Article 1 obligations may be offered as an *affirmative defense* when determining whether ultra vires conduct is attributable to the State, whether under the effective control or overall control standard. States would have more incentive to embrace positive obligations under Common Article 1 and to take action to encourage non-state actors to comply with their IHL obligations (for example, offering IHL training to non-state actors).

We are not proposing a change to the law on state responsibility. Instead of modifying the legal standard of effective control, international courts would recognize an affirmative defense in line with the spirit of the current attribution framework. This has the advantage of leaving the attribution framework intact, but allows states to embrace the positive obligations under Common Article 1 without thereby triggering liability for ultra vires actions under attribution doctrine.

A comparison to domestic law in the context of Title VII vicarious liability for supervisor harassment offers insight into how this would work.[165]

165. We are only offering a loose analogy to illustrate our argument; vicarious liability in the context of domestic employment obviously features a number of elements that differ widely from the context of accountability for non-state-actor conduct in the context of armed conflict.

In *Burlington Industries v. Ellerth*[166] and *Faragher v. City of Boca Raton*,[167] the Supreme Court found that employers could be subject to vicarious liability under Title VII to a harassed employee for actionable discrimination caused by a supervisor.[168] In *Ellerth*, however, the Court allowed employers to raise an affirmative defense to vicarious liability. The defense requires two necessary elements: (1) that 'the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that 'the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. '[169] The first prong of the *Ellerth* test is directly analogous to the state responsibility context: States that can show they adequately exercised reasonable care to prevent and correct non-state-actor violations of the Geneva Conventions should be able to avoid liability for some non-state-actor ultra vires actions.

Adopting this affirmative defense strikes the right balance between accountability and states' concerns about liability risk from positive Common Article 1 obligations. The affirmative defense would only allow states to avoid liability for a narrow set of actions committed by non-state actors: ultra vires actions that violate international humanitarian law and are taken against states' efforts to ensure non-state-actor compliance with international law. Because it is framed as an affirmative defense, the burden would fall on states to prove that they had adequately discharged their Common Article 1 duties in an effort to avoid the violations. The test thus parallels the domestic example above: a defense to employer liability for supervisory actions requires employers to take adequate steps to ensure supervisors were aware of what actions would constitute harassment.

Moreover, when a state is found to exercise control over a non-state group, the state would *not* be able to use the affirmative defense to escape liability for the group's violations of international humanitarian law if the state: (1) directly instructed the group to commit the violations, or (2) failed to take reasonable steps to insure against the violations. Thus, even with the option of raising an affirmative defense, states could still be held liable for some ultra vires actions taken by a non-state actor. Additionally, as discussed in detail below, the affirmative defense would ameliorate states' concern about liability for actions done against their instructions; even when a state exercises effective or overall control over a non-state group, proper discharge of its Common Article 1 duties offers a shield against ultra vires liability.

166. 524 U.S. 742 (1998).

167. 524 U.S. 775 (1998).

168. *See Ellerth*, 524 U.S. at 765 (holding that an "employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor"); *Faragher*, 524 U.S. at 807 (same).

169. *Ellerth*, 524 U.S. at 745.

Ultimately, this affirmative defense would encourage states to freely sponsor and implement such IHL training programs, without any fear that such programs would be used against them when trying to establish attribution.[170]

How would this play out in practice? Consider again the not-so-hypothetical case, described above, in which a state supports a non-state group seeking to overthrow its government. Imagine that the state engages in a substantial training program intended to ensure that the members of the non-state group not engage in IHL violations. The training program brings all members of the non-state group together to a camp run by the state's armed forces. There, the state's armed forces integrate international humanitarian law into their training in ways that are meaningfully intended to inform the non-state actors about international humanitarian law. They also require members of the non-state group that seek to receive the state's support to sign declarations in which they commit to abide by international humanitarian law (declarations that are meaningfully calculated to be understood by those signing them—written in their own language and read out loud to those who are illiterate). To take these actions, the state will have provided extra financing to the armed group (by financing the training program) and exercised more managerial control over the non-state actor (by bringing all members of the group to one location and running the program). Moreover, the state will probably also have given more specific directions to the non-state actor (e.g., 'Do not attack this village because there are too many innocent civilians.').

After this training program, imagine that the non-state actor still commits ultra vires IHL violations, and an international court, rapporteur, investigative body, or other authority must decide whether the ultra vires conduct of the non-state actor is attributable to the state. In this case, the applicable legal standard for state attribution would apply—overall control or effective control. However, if the state could offer a good faith demonstration that the training program was undertaken to discharge its Common Article 1 duties, it could argue that this provides an affirmative

170. It is important to note that in the ICJ's *Bosnian Genocide* judgment, the court appears to suggest that ultra vires actions may not be attributable to states under the effective control test. This, however, is an evidentiary issue: the opinion implies that only evidence of direct instructions from the officers of a state to the non-state actor in the prelude to an internationally wrongful act will suffice as the basis for attribution. The effect of this evidentiary rule, however, is to effectively foreclose the possibility of a finding of attribution for an ultra vires act. Only acts for which there is evidence that the state ordered them are potentially ripe for attribution. An affirmative defense would be unnecessary in this context. The Commentary to the Articles on State Responsibility, on the other hand, leaves open the possibility of attribution of ultra vires acts to the state under effective control. It is difficult to weigh the relative authority of the ICJ and the ILC against each other, with the result that one could plausibly apply either articulation of the standard. The applicability of the affirmative defense, however, avoids the question of relative authority entirely: states can offer the affirmative defense of discharging Common Article 1 duties even if a court had made a determination that effective control already existed.

defense to attribution of the ultra vires conduct—particularly where the training program constitutes a significant source of the evidence that the state exercises the level of control required to trigger attribution.

B. A Solution for Good Faith Actors

The affirmative defense is an ideal solution for 'good faith actors' (i.e., states that engage with non-state actors for reasons beyond just trying to avoid responsibility). The affirmative defense would allow them to take reasonable steps to ensure that armed non-state groups with whom they work abide by their IHL obligations. Because any good faith measure they take to fulfill their Common Article 1 obligations would support an affirmative defense against attribution of ultra vires actions, they would have less reason for concern that taking such measures would push them across the attribution threshold.

Not only would the affirmative defense encourage states to fulfill their Common Article 1 obligations, but it would also encourage states to recognize the applicability of the Common Article 1 obligation 'to ensure respect' to their relationships with non-state actors. One of the reasons States may resist the ICRC interpretation of the positive obligation 'to ensure respect' is a fear that taking action to satisfy these obligations could trigger additional responsibilities. Since the affirmative defense would ameliorate this problem, it would reduce states' objections to the ICRC interpretation on this ground. The net consequence is that there would be greater recognition of and compliance with the 'to ensure respect' obligation under Common Article 1.

C. A Solution for Bad Faith Actors

The affirmative defense does not close the accountability gap that under existing state-responsibility doctrine advantages what we could call 'bad faith actors' states that deliberately use non-state actors to commit acts they themselves could not legally do, in order to evade legal responsibility. Because of the high substantive and evidentiary bars for a finding of attribution under the effective and overall control standards, bad faith actors can provide significant support to a non-state actor engaged in internationally wrongful acts without triggering a finding of attribution. These states would, however, be liable for violating their Common Article 1 duties to ensure respect for the Geneva Conventions.

According to the ICRC, the duty to ensure respect under Common Article 1 also imposes due diligence obligations on states to prevent violations of international humanitarian law.[171] This interpretation of

171. ICRC, *supra* note 10, at art. 1, ¶¶ 164–73.

Common Article 1 may provide even bad faith actors with an incentive to take prophylactic measures with their non-state proxies, since a state that fails to take measures to avoid violations of law by its proxies will have failed to meet its due diligence obligations. Liability for the failure to uphold Common Article 1 obligations may not be a moral equivalent to a finding of state responsibility where a state has used proxies to evade international law deliberately. However, it can go a significant way toward providing accountability for states that fail to take reasonable measures to prevent IHL violations and thus toward creating the proper incentives for states.

V Recommendations to States in an Era of Uncertainty

The legal landscape we have outlined in this Article is one in which the law of state responsibility remains in flux. There is limited case law on the doctrine of state responsibility, and there is even less on the legal obligations that attend to states under Common Article 1. Nonetheless, the danger for states is a real one: States working with non-state actors must be concerned about legal liability for those non-state actors' behavior.

Here we propose concrete, IHL-protective measures that states can take to alleviate this danger. These measures would fulfill states' Common Article 1 duty to ensure respect. Moreover, even absent an affirmative defense for purposes of a finding of attribution, as we recommend in Part IV, the attribution bar is high enough that these measures, taken alone, are unlikely to trigger attribution. These measures also have the important feature of decreasing the likelihood of significant IHL violations. That should be reason enough for states to take the steps recommended here.

The literature on Common Article 1 does not provide a clear list of what measures a state can take with regard to non-state actors to discharge its Common Article 1 obligations.[172] However, a number of international NGOs that engage with non-state actors, such as the ICRC and the humanitarian organization Geneva Call, have recorded best practices for encouraging these

172. Writings by ICRC legal staff have suggested, however, that under Common Article 1, third-state obligations are not obligations "of result." Accordingly, the ICRC argues that due diligence imposes obligations on the conduct of states, but does not require them to attain specific outcomes. States will not be held responsible for failures to prevent other states from violating the Conventions as long as they can show that they "ma[d]e every effort" to prevent the violation. Dörmann & Serralvo, *supra* note 1022, at 724 ("[T]he obligation of result is an obligation to 'succeed' while the obligation of diligent conduct is an obligation to 'make every effort' [T]hird States can only be under an obligation to exercise due diligence in choosing appropriate measures to induce belligerents to comply with the law. This does not turn the duty to ensure respect into a vacuous norm, since States are under the obligation, depending on the influence they may exert, to take all possible steps, as well as any lawful means at their disposal, to safeguard respect for IHL rules by all other States. If they fail to do so, they might incur international responsibility.") (internal quotation marks omitted).

actors to respect international humanitarian law.[173] Drawing on their work, as well as recent regulatory and policy developments in the parallel area of promoting international humanitarian law among private military security contractors (PMSCs),[174] this Article sets forth some actions that a state should (and perhaps must) take with respect to a non-state actor in order to discharge its duties to 'ensure respect. These steps are divided into those taken *ex ante* and *ex post*. This is not meant as an exhaustive list of steps states may take to meet their obligations under Common Article 1 when working with non-state actors, but it is meant to be instructive.

Some scholars have argued that the knowledge factor for assessing due diligence requirements under Common Article 1 is more exacting than that under the Draft Articles.[175] In exercising due diligence, states may be held responsible not only if they were 'aware' of the risk of a non-state actor's violation of international humanitarian law, but also if they 'ought to have been aware' of the likelihood of such violations.[176] In light of this

173. *See infra* notes 179, 186 and accompanying text.

174. Many commentators have elaborated on the positive obligations states have under international law with respect to PMSCs. *See, e.g.*. LINDSEY CAMERON & VINCENT CHETAIL, PRIVATIZING WAR: PRIVATE MILITARY AND SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL LAW 579 (2013); MOYAKINE, *supra* note 80, at 303–05; Laura A. Dickinson, *Contract as a Tool for Regulating Private Military Companies*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 217, 223–25 (Simon Chesterman & Chia Lehnardt eds., 2007); *Expert Meeting on Private Military Security Contractors: Status and State Responsibility for Their Actions*, U. CTR. FOR INT'L HUMANITARIAN L. 34–35 (2005), http://www.geneva-academy.ch/docs/expert-meetings/2005/2rapport_compagnies_privees.pdf [https://perma.cc/6679-QT7Z]. One strand of international negotiations culminated in the Montreux Document of 2008, which the United States and fifty-two other states supported. *See* Montreux Document on Pertinent International Legal Obligations and Good Practices for States Relating to Private Military and Security Companies Operating in Armed Conflict, Annex to the Letter dated October 2, 2008 from the Permanent Rep. of Switzerland addressed to the Secretary-General, U.N. Doc A/63/467-S/2008/636 (Oct. 6, 2008) [hereinafter Montreux Document]; *see also Participating States of the Montreux Document*, SWISS FED. DEP'T OF FOREIGN AFF. (July 21, 2016), https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html [https://perma.cc/RM79-PCRP]. The most relevant part of the Montreux Document provides that Contracting States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs they contract, in particular to educate and train PMSCs and their personnel in international humanitarian law; to take measures to prevent PMSCs from violating international humanitarian law; and to take measures to correct violations of international humanitarian law by PMSCs' personnel through appropriate regulatory measures and sanctions. *See* Montreux Document, *supra*, ¶ 3.

175. *See* Dörmann & Serralvo, *supra* note 102, at 734 (noting that under Articles 6 and 7, respectively, of the 2013 U.N. Arms Trade Treaty, a state may not transfer arms to non-state actors if it has knowledge that the recipients will use the weapons to violate the Geneva Conventions or if there is an "overriding risk" of a violation); Tonkin, *supra* note 144, at 794–95 (suggesting that a hiring state could be liable for an IHL violation if, in hiring a PMSC, it knows or should know of an increased risk that the PMSC will violate international humanitarian law).

176. Tonkin, *supra* note 146, at 795 ("The third key consideration is whether the hiring state was aware, or ought to have been aware, of the enhanced risk of violation by the PMSC. Although

consideration, policies adopted by states to ensure IHL compliance should be established and made clear to all actors in advance, and a non-state actor's acceptance and understanding of a state's IHL policies should be a condition precedent to engagement.[177]

A. Ex Ante *Recommendations*

1. Vetting.—The state should vet any non-state actor with which it plans to work, along with its members. Depending on the context, this process may require national or international records from the host state, possibly including criminal records and civil complaints alleging human rights violations;[178] psychological testing;[179] mental health checks;[180] and information collection on the ground, from social media, and from other public sources to the greatest extent practicable. If the non-state actor—or its members—has a history of violating international law, such that a

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the law of state responsibility contains no general requirement of fault, obligations of prevention frequently require some degree of knowledge or constructive knowledge on the part of the state in order to establish breach. For example, in assessing responsibility for a failure to protect life, the European Court of Human Rights employs a test of 'foreseeability of the event' the state is responsible if the authorities knew or ought to have known of the risk to life and failed to take measures which, judged reasonably, might have prevented the occurrence of the fatal event. In [a] similar vein, in the *Genocide* case the ICJ held that the obligation to prevent and punish genocide applies wherever a state *is aware, or should normally be aware*, of a serious risk that genocide will occur.' (citations omitted)).

177. *See* Olivier Bangerter, *The ICRC and Non-State Armed Groups*, *in* GENEVA CALL: EXPLORING CRITERIA & CONDITIONS FOR ENGAGING ARMED NON-STATE ACTORS TO RESPECT HUMANITARIAN LAW & HUMAN RIGHTS LAW 74, 81 (2007) (arguing top-level commanders must insist that international humanitarian law be incorporated in all planning, organization, and execution of operations).

178. *Cf.* ANNE-MARIE BUZATU, GENEVA CTR. FOR THE DEMOCRATIC CONTROL OF ARMED FORCES, EUROPEAN PRACTICES OF REGULATION OF PMSCS AND RECOMMENDATIONS FOR REGULATION OF PMSCS THROUGH INTERNATIONAL LEGAL INSTRUMENTS 42–43 (2008) (suggesting such vetting for PMSCs).

179. DynCorp (a PMSC) and the French Foreign Legion engage in psychological testing as part of their vetting processes. *Id.* at 43.

180. *Cf. First Armed Guard ISO Vetting Scheduled for March*, INTERMANAGER (Dec. 11, 2012), http://www.intermanager.org/2012/12/first-armed-guard-iso-vetting-scheduled-for-march/ [https://perma.cc/PY4R-R8ZN] (noting that mental health checks are part of vetting maritime PMSCs).

violation in the future is reasonably foreseeable,[181] the state should refrain from working with it.

2. Training.—Given that non-state actors often commit international law violations in part because they are unaware of them,[182] a state should ensure that a non-state actor is aware of the applicable international humanitarian law.[183] In some cases, this will require that the state assist in training the non-state actor. The Geneva Conventions require, moreover, that states disseminate the texts of the Conventions to relevant belligerents.[184]

In implementing training programs, NGOs have emphasized the following best practices: (1) providing training that is not overly academic or theoretical, but rather, relevant to the given context;[185] (2) focusing on particular norms rather than all norms generally (although there is disagreement among NGOs on this issue);[186] (3) conducting training at the highest levels of command;[187] (4) engaging former members of the non-state actor in developing the training;[188] (5) engaging local populations in

181. For evidence of the "foreseeability of the event" standard used to determine state responsibility for failure to fulfill "to ensure respect" duties under the European Convention on Human Rights, see Keenan v. United Kingdom, 2001-III Eur. Ct. H.R. 93, 128, ¶ 89; Kiliç v. Turkey, 2000-III Eur. Ct. H.R. 75, 96–98, ¶¶ 65–68.

182. ANNYSSA BELLAL & STUART CASEY-MASLEN, GENEVA ACAD. INT'L HUMANITARIAN LAW & HUMAN RIGHTS, RULES OF ENGAGEMENT: PROTECTING CIVILIANS THROUGH DIALOGUE WITH ARMED NON-STATE ACTORS 6 (2011), http://www.geneva-academy.ch/docs/publications/Policy%20studies/Rules%20of%20Engagement.pdf [https://perma.cc/D5P4-3ELH] [hereinafter *ADH Report*]; INT'L COMM. OF THE RED CROSS, INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS 12 (2008), https://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf [https://perma.cc/62CF-GHDW] [hereinafter ICRC REPORT].

183. *See* Tonkin, *supra* note 146, at 796 ("The hiring state should also take steps to ensure that PMSC personnel are adequately trained and instructed in IHL. The obligation to ensure respect for IHL is commonly taken to include an obligation to ensure that national troops are trained and instructed in accordance with IHL standards. This would also require that a state ensure the training and instruction of any PMSCs it hires to perform military and security activities in armed conflict or occupation.").

184. Geneva Convention I, *supra* note 9, at art. 47; Geneva Convention II, *supra* note 9, at art. 48; Geneva Convention III, *supra* note 9, at art. 127; Geneva Convention IV, *supra* note 9, at art. 144; *see also* First Additional Protocol, *supra* note 9, at art. 83 (affirming these provisions and obligations). These provisions should be interpreted to impose the requirement for states to disseminate the texts of the Geneva Conventions to non-state actors they are supporting. *See* MOYAKINE, *supra* note 80, at 314 (identifying and explaining the dissemination provisions cited above); TONKIN, *supra* note 151, at 197–98 (noting the application of the dissemination provisions to PMSCs).

185. ICRC REPORT, *supra* note 182, at 13.

186. *ADH Report*, *supra* note 182, at 26.

187. *Id.* at 19; Bangerter, *supra* note 177, at 82.

188. *ADH Report*, *supra* note 182, at 35.

developing the training;[189] and (6) emphasizing the legitimacy benefits of abiding by international humanitarian law.[190]

3. Written Agreements.—The state should have the non-state actor sign written agreements that the non-state actor will respect its international legal obligations. This recommendation addresses the fact that non-state actors often assert that they are not bound by international humanitarian law because they are not (and in most cases cannot be) parties to the relevant treaties.[191] Having non-state actors sign written agreements provides another means to hold them accountable. It puts them on notice, moreover, that any support that is provided is contingent on continued compliance with IHL obligations.

NGOs have noted that these agreements can take different forms: (1) special agreements between parties to a conflict,[192] (2) unilateral declarations that are made generally or to an NGO,[193] and (3) codes of non-state actor conduct that incorporate international humanitarian law.[194] These agreements may also be analogized to contracts undertaken between states and PMSCs. When hiring PMSCs, scholars have suggested that exercising due diligence requires including contract provisions that stipulate PMSC personnel will follow international humanitarian law.[195]

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189. GENEVA CALL, ENGAGING WITH ARMED NON-STATE ACTORS IN THE BROADER MIDDLE EAST ON THE PROTECTION OF CIVILIANS 13 (2012), http://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/11/20120331_engaging_with_armed_non-state_actors.pdf [https://perma.cc/9253-QFFW] [hereinafter GENEVA CALL REPORT].

190. *ADH Report*, *supra* note 182, at 23 (noting that most non-state actors desire to be recognized as legitimate, including among local populations); Olivier Bangerter, *Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not*, 93 INT'L REV. RED CROSS 353, 358 (2011), https://www.icrc.org/eng/assets/files/review/2011/irrc-882-bangerter.pdf [https://perma.cc/SX2D-HH4A] ("Self-image is one of the most powerful generators of respect for IHL.").

191. *ADH Report*, *supra* note 182, at 6–7, 7 n.13; ICRC REPORT, *supra* note 182, at 11.

192. *ADH Report*, *supra* note 182, at 34; ICRC REPORT, *supra* note 182, at 16–18; Bangerter, *supra* note 177, at 82.

193. Bangerter, *supra* note 177, at 82–83; ICRC REPORT, *supra* note 182, at 19–21; *ADH Report*, *supra* note 182, at 34. As an example, Geneva Call has used this strategy, encouraging non-state actors to sign Deeds of Commitment renouncing the use of land mines and other tactics that violate international humanitarian law. GENEVA CALL REPORT, *supra* note 189, at 10.

194. ICRC REPORT, *supra* note 182, at 22–23.

195. *See* Tonkin, *supra* note 146, at 797 ("Another requirement of Common Article 1 is the inclusion of clear and appropriate rules of IHL in the contract of employment. Indeed, this represents the most direct way of imposing conditions on PMSC employees. Such contractual clauses should be accompanied by adequate procedures for supervising contractors in the field.").

B. Ex Post *Recommendations*

1. Punishment Framework.—The state should ensure that the non-state actor has an adequate punishment framework in place to deal with individuals who violate international humanitarian law.[196] A similar concept is found in diplomatic protection law: The ILC has noted that in that context the due diligence obligation does not require successfully preventing a private actor from taking an action, but it does require taking 'adequate protective measures' to prevent the action, and punishing the private actor if the action is taken.[197]

Many questions arise regarding what would constitute an 'adequate' punishment framework. Although answering such questions in detail goes beyond the scope of this Article, the punishment framework should, at a minimum, include: (1) oversight and monitoring;[198] (2) investigation of alleged violations;[199] (3) prosecution of alleged violators;[200] and (4) punishment of convicted violators. This recommendation is a response to the concern that non-state actors often feel unconstrained by the law since they are already acting unlawfully by taking up arms against a state.

Implementing punitive frameworks with regard to non-state actors does, however, pose a number of challenges largely unaddressed in the literature. Presumably, punishment mechanisms must be compliant with international humanitarian law. There is little guidance or clarity to help determine whether non-Western forms of adjudication would be sufficient to meet the due process requirements under Common Article 3. Nevertheless, providing for some mechanism of accountability for non-state-actor conduct may be essential for a state to exercise due diligence under Common Article 1.[201]

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196. *See, e.g.*, MOYAKINE, *supra* note 80, at 360 (suggesting that countries employing PMSCs have a duty to create frameworks to address human rights violations arising out of their operations).

197. *See* Int'l Law Comm'n, Rep. on the Work of Its Twenty-Seventh Session, U.N. Doc. A/10010/Rev.1, at 71 (1975) (noting that, although the acts of private actors are not directly attributable to the state, the state has a duty to reasonably protect against and deal with harm caused by its contractors); *see also* MOYAKINE, *supra* note 80, at 324 ("That the duty to punish might be understood as a broad international obligation to legislate, investigate, prosecute, punish, and provide redress appears to be quite clear.").

198. *See* MOYAKINE, *supra* note 80, at 324 (stating that the duty imposed upon states to take measures to prevent abuses by non-state actors applies to PMSCs).

199. *See id.* (stating that the duty imposed upon states to investigate abuses by non-state actors applies to PMSCs).

200. In the context of Common Article 1 obligations for PMSCs, Tonkin suggests that this may also entail extradition. *See* Tonkin, *supra* note 146, at 798 ("[I]f the violation constitutes a criminal offence over which the hiring state has jurisdiction, the state should take steps to arrest and prosecute or extradite the perpetrator.").

201. The ICJ considered punishment a requirement of international obligations in *Bosnian Genocide*. *Bosnian Genocide*, Judgment, 2007 I.C.J. 43, ¶ 439 (Feb. 26).

2. Cessation of Support.—The state should withdraw some or all of its support to the non-state actor if it is found to have breached a certain threshold of international law violations. A state is more likely to incur responsibility for breach of its Common Article 1 obligations for supporting a non-state actor that it knows is violating international humanitarian law.

A single violation would not necessarily require a cessation of support. If the primary obligations owed by the state are due diligence obligations, Article 14(3) of the Draft Articles arguably comes into play. Article 14(3) provides: 'The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation. '[202] The state might decide that it is appropriate to give the non-state actor an opportunity to respond to the violation to prevent it from recurring.

Conclusion

Today, states are increasingly working with and through non-state actors in a range of contexts. As a result, there is a real and growing danger that states will use non-state actors to avoid their international legal obligations. The leading legal framework for addressing this danger—modern attribution doctrine—adopts a bright-line rule: A state is responsible, or it is not. This, in turn, has generated a set of perverse incentives for states that collaborate with non-state actors in armed conflict situations, granting them virtually free reign below the attribution threshold while discouraging them from exercising responsible control that might push them over the threshold. If the purpose of state-responsibility doctrine is to encourage states to engage responsibly with non-state partners and hold states accountable by punishing bad actors, the existing framework falls dangerously short.

The more robust interpretation of Common Article 1 of the Geneva Conventions recently endorsed by the ICRC in its landmark new commentaries could help address this shortcoming, closing much of the accountability gap left by modern attribution doctrine in armed conflict situations. Rightly understood, Common Article 1's 'to ensure respect' provision requires states to take steps to prevent non-state actors from violating international humanitarian law. even when they do not exercise effective or overall control over them. Failure to exercise due diligence to prevent non-state partners' IHL violations constitutes an independent source of state responsibility.

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202. *Draft Articles*, *supra* note 12, at art. 14, ¶ 3; *see* MOYAKINE, *supra* note 80, 325–26 ("The positive measures to be taken by States may include the duty to intervene when a violation of international law is likely to occur and to regulate the activities of private actors in order to prevent breaches of international humanitarian and human rights law.").

Although Common Article 1 goes a long way toward closing the accountability gap, it does not fully resolve the incentives problem. States that instruct, train, and equip their non-state partners in an effort to fulfill their Common Article 1 duties are more likely to cross the threshold for attribution liability than states that eschew such prophylactic measures.[203] In part as a result, states have already expressed reluctance to accept the positive obligations entailed in the new commentaries.[204] To address this concern, states that take actions to meet their due diligence obligations under Common Article 1 should be permitted to plead an affirmative defense: If a state has exercised due diligence to ensure non-state actors abide by the Geneva Conventions, and those actors nevertheless do commit ultra vires violations, the state should not be held responsible. This innovation would not only comport with common sense, but would also encourage states to embrace the ICRC's more robust reading of Common Article 1 and take reasonable measures to ensure that their partner non-state actors comply with international law.

203. *See supra* Part IV.

204. For a discussion of U.S. State Department Legal Advisor Brian Egan's early reaction to the publication of the new commentaries, see Oona Hathaway & Zachary Manfredi, *The State Department Adviser Signals a Middle Road on Common Article 1*, JUST SECURITY (Apr. 12, 2016, 10:42 AM), https://www.justsecurity.org/30560/state-department-adviser-signals-middle-road-common-article-1/ [https://perma.cc/RVT5-LLXC].

Book Reviews

Helpful History and Poetic Mischief

PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT. By Wendell Bird. New York, NY: Oxford University Press, 2016. 568 pages. $74.00.

MADISON'S MUSIC: ON READING THE FIRST AMENDMENT. By Burt Neuborne. New York, NY: The New Press, 2015. 272 pages. $25.95.

David A. Anderson*

Some constitutional scholars uncover new historical information that forces us to revise our understanding of the Constitution. Some just suggest a different way of looking at well-known history. Among the many notable examples of the first category is Leonard Levy, whose historical research convinced him that the framers understood freedom of speech to permit punishment of seditious libel.[1] Another example is David Rabban, who showed that we were wrong to think there was no significant free speech jurisprudence between the Sedition Act crisis of 1798–1801 and the Espionage Act of 1917.[2] Levy's work cramped our understanding of the First Amendment for a generation, and Rabban's expanded it.

Our understanding has also been shaped by scholars who offered new ways of thinking about the First Amendment rather than new historical information. One example is Zechariah Chafee, the first important scholarly interpreter of the First Amendment, who influenced the Supreme Court's development of First Amendment law in person as well as through his scholarship.[3] Another is Thomas Emerson, who helped us see that there are

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1. *See* LEONARD W. LEVY, LEGACY OF SUPPRESSION 236–38 (1960) [hereinafter LEGACY] (contending that the framers did not consider seditious libel to be protected speech).

2. *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 132–39 (1997) (discussing and evaluating Supreme Court free speech jurisprudence).

3. *See generally* ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) (discussing contemporary free speech jurisprudence and the conditions of speech in the United States and extolling the virtue of a robust, protective interpretation of the First Amendment).

distinct strands of First Amendment law serving different free speech purposes.[4]

Bird's book is transformative historical research. It aims to debunk a myth that has hobbled First Amendment jurisprudence for generations.[5] The myth is that the framers could not have understood freedom of speech and press to mean anything more than freedom from licensing because that's all it meant on both sides of the Atlantic in 1789.[6] Two principal 'facts' are cited in support of that thesis. The first is that William Blackstone, an accepted authority in both England and America, said it was so in 1769; Blackstone's view of freedom of the press was that one who 'publishes what is improper, mischievous, or illegal must take the consequences of his own temerity.'[7] The second is that less than a decade after Congress proposed the First Amendment, it enacted the Sedition Act,[8] which would have been unconstitutional under any robust reading of the Amendment.[9] Bird argues that neither of these claims supports the myth,[10] and even if his proof isn't quite conclusive, the book requires a substantial rethinking of received wisdom about the framers' intentions.

Neuborne's book is what in journalism is called a 'think piece,'[11] a rumination that aims to shed new light on old information. His theme is that we should read the Bill of Rights, and the First Amendment in particular, not as 'a set of isolated, self-contained commands,' but as a harmonious whole.[12] '[E]ach amendment is carefully structured to tell a story of individual

4. *See generally* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) (describing the various strands of the First Amendment).

5. WENDELL BIRD, PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT at xxi–ii (2016).

6. *See id.* at xxi (arguing that scholars have incorrectly concluded that the Framers shared Blackstone's understanding of free speech rights, which did not include the protection of antigovernment speech).

7. 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52; *see, e.g.*, S.F.C. MILSOM, STUDIES IN THE HISTORY OF THE COMMON LAW 198 (1985) (describing Blackstone's *Commentaries* as influencing a century of legal thought in Britain after its publication and as being treated as a "classic venerated by professional tradition"). *See generally* Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976) (discussing the impact of Blackstone's *Commentaries* on American law and politics).

8. Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798) (expired 1801).

9. *See id.* § 2 (criminalizing "false, scandalous and malicious writing against the government"). Nevertheless, the Sedition Act's criminalization of writing against the government is slightly less repressive than Blackstone's 'improper, mischievous, or illegal' standard because the latter was not confined to false speech. BLACKSTONE, *supra* note 7, at *152.

10. *See* BIRD, *supra* note 5, at 11, 89–91 (contending that the framers did not follow Blackstone's understanding of free speech). Succeeding chapters provide detailed evidence that that the Sedition Act did not reflect the framers' views. *See generally* BIRD, *supra* note 5.

11. Or more irreverently, 'a thumb-sucker.'

12. BURT NEUBORNE, MADISON'S MUSIC 1 (2015).

freedom and democratic order. Not an idea or word is out of place. In short, Madison's poem to individual freedom and democratic self-government is as carefully wrought as a Wallace Stevens poem. '[13]

Perhaps we should read Neuborne's book as poetry; it certainly takes a good deal of license with history, as I shall show shortly.

I. Blackstone's Authority Impugned

The modern iteration of the claim that the framers could not have intended more than freedom from prior restraint traces principally to Leonard Levy, who shocked the First Amendment world in 1960 by asserting that Blackstone's crabbed definition of freedom of the press[14] had to be the meaning that the framers intended to ensconce in the First Amendment because it was 'the only definition known in Anglo-American thought and law' at the time.[15] Although he claimed to be a reluctant revisionist,[16] Levy plainly enjoyed tugging the whiskers of Oliver Holmes, Louis Brandeis, Zechariah Chafee, and other icons who in the first half of the twentieth century had succeeded in giving the First Amendment some muscle.[17]

In the face of a great deal of critical scholarship to the contrary in the next twenty-five years,[18] Levy receded, but only grudgingly and incompletely. When he published a revision of *Legacy* in 1985, he changed

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13. *Id.* at 16.

14. Levy focused on freedom of the press because that was the framers' focus. *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 487–88, 487 n.197 (1983) (contending that throughout the framers' generation, freedom of speech was generally subsumed in the term "freedom of the press, ' and that only later did courts and scholars begin to speak of freedom of speech or "freedom of speech and press' as a single right encompassing various modes of communication).

15. LEGACY, *supra* note 1, at 68. Levy insisted on this despite the fact that the Senate had defeated an attempt to specify that freedom of the press was to be protected only "in as ample a manner as hath at any time been secured by the common law.' S. JOURNAL, 1st Cong., 1st Sess. 70 (1789).

16. LEGACY, *supra* note 1, at viii ("[T]he facts have dictated conclusions that violate my predilections ").

17. *See* LEGACY, *supra* note 1, at 1–4, 246–48 (criticizing Holmes, Brandeis, and Chafee's interpretation of the framers' intentions regarding the First Amendment).

18. *See* GEORGE ANASTAPLO, THE CONSTITUTIONALIST 110 (1971) (noting that the "birth" of the United States depended on a broad understanding of free speech); JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 58 (1988) (suggesting that the Sedition Act brought the debate over seditious libel to a head); Anderson, *supra* note 14, at 496–97 (condemning Levy's interpretation, but acknowledging that deciphering the intent behind legislation is a difficult task); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 93 (1984) (challenging Levy's conclusions directly); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 795–96 (1985) (book review) (same); *see also* Merrill Jensen, Book Review, 75 HARV. L. REV. 456, 457 (1961) (arguing that Levy's conclusions overstate the evidence).

the title to *Emergence of a Free Press*,[19] which seemed to signal a change of heart as to what the framers intended. But in fact he backed away from his original thesis only a little. He now claimed only that Blackstone's was 'the standard definition, '[20] not that it was the only definition known, and he no longer insisted that freedom of speech meant only what Blackstone said it meant.[21] He acknowledged what his critics had shown: that the twin scourges of seditious libel and parliamentary privilege, which had suppressed the press in England, had never been widely employed in America,[22] and that the late-eighteenth-century press in America behaved as if freedom of the press was a meaningful reality.[23] But he continued to insist that the First Amendment could not have been intended to mean very much because no libertarian idea of freedom of speech emerged until the Sedition Act controversy[24]—this despite numerous expressions of vigorous free speech ideas in the 1790s and earlier, well before the Sedition Act was passed.[25] Most importantly, he continued to defend the main thrust of *Legacy*: that the First Amendment was not intended to protect freedom of the press (including freedom of speech) from the principal threats known at the time, seditious libel and parliamentary privilege.[26]

Bird challenges even Levy's reduced claim. He says Blackstone's definition was not even an authoritative statement of the English common law; when Blackstone published his *Commentaries* in 1769, the definition had never appeared in any English common law decision,[27] and the idea had been criticized and challenged in scores of extrajudicial writings.[28] Since at least 1731, counsel in seditious libel cases had urged that the crime was inconsistent with freedom of speech, but the courts had not decided that issue.[29] Blackstone's summary was not necessarily wrong; it was just unsupported.

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19. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS vii (1985) [hereinafter EMERGENCE].

20. *Compare id.* at 65 (quoting Massachusetts Chief Justice Hutchinson's Blackstone-inspired definition of freedom of the press and describing it as "the standard definition in Anglo-American thought"), *with* LEGACY, *supra* note 1, at 68 (describing the same quotation as "the only definition known in Anglo-American thought and law").

21. EMERGENCE, *supra* note 19, at xi.

22. *Id.* at 17.

23. *Id.* at x.

24. *Id.* at 297–301.

25. *See* Rabban, *supra* note 18, at 841–47 (discussing the 1794 Whiskey Rebellion and the growth of Democratic Societies and connecting both to a change in American free speech thought).

26. EMERGENCE, *supra* note 19, at xii.

27. BIRD, *supra* note 5, at 66.

28. *Id.* at 10–11.

29. *See, e.g.*, R v. Francklin (1731), 17 St. Tr. 625, 655 (K.B.) (rejecting defendant's argument that the prosecution for seditious libel threatened "suppression of the liberty of the press").

That difference was ignored by Lord Mansfield, the English Chief Justice. The year after Blackstone's *Commentaries* were published, Mansfield claimed that Blackstone's definition reflected 'uniform judicial practice since the Revolution [of 1688].'[30] It was Mansfield who insisted that Blackstone's definition was unquestioned. He claimed that 'every lawyer for near hundred years has so far acquiesced' in Blackstone's definition and '[n]o counsel ever complained' of that definition.[31] Blackstone was just extravagant; Mansfield was disingenuous.[32]

Thanks to Mansfield, Blackstone's inaccurate description of the common law was accurate as to England by 1789, but that would hardly have commended it to the draftsmen of the First Amendment. It led to numerous repressive decisions by the Crown courts and was widely criticized.[33] And in any event, America was quite different; numerous scholars have shown that Blackstone's definition was not what freedom of the press meant in eighteenth-century America.[34] Neither the courts nor the press accepted that view.[35] By showing the questionable legitimacy of Blackstone's definition even as to England, Bird further erodes the first myth that the framers could not have intended a meaning of freedom of press and speech more extensive than Blackstone's.[36]

II. The Sedition Act Argument

The second myth is facially plausible. The Sedition Act made it a crime to 'write, print, utter, or publish any false scandalous and malicious writing' against the government, the Congress, or the President 'with intent

30. R v. Shipley (The Case of the Dean of St. Asaph) (1784) 99 Eng. Rep. 774, 824; 4 Dougl. 73, 170.

31. *Id.* at 821, 823; 4 Dougl. at 166, 169.

32. *See* BIRD, *supra* note 5, at 67–69, 69 nn. 284–85 (discussing Mansfield's 'rewriting [of] the English common law of liberties of press and speech' and citing cases in which counsel challenged the Blackstone–Mansfield definition).

33. *See* Wendell Bird, *Liberties of Press and Speech: 'Evidence Does Not Exist To Contradict the Blackstonian Sense' in Late 18th Century England?*, 36 OXFORD J. LEGAL STUD. 1, 8–11 (2016) (describing the Crown judges' decisions and the criticism they occasioned).

34. *See, e.g.*, STEPHEN D. SOLOMON, REVOLUTIONARY DISSENT 4–6 (2016) (emphasizing the diversity of early American opinion regarding the appropriate understanding of freedom of the press while noting that eighteenth-century American newspaper editors nevertheless 'acted as if the law punishing dissent did not exist"); *supra* note 18.

35. There were few seditious libel cases in American courts after the trial of John Peter Zenger in 1735 in which the judge instructed the jury in accordance with Blackstone's view but the jury refused to convict. *See* BIRD, *supra* note 5, at 22. For rejection of Blackstone's view by American newspapers, see generally SMITH, *supra* note 18.

36. Levy's narrow view of the original meaning of the First Amendment dies hard. *See* BIRD, *supra* note 5, at 83 n.63 (citing five opinions by Supreme Court Justices that cite Levy's 1960 book, as recently as 2010).

to defame.'[37] That was certainly inconsistent with any expansive understanding of the First Amendment. The argument that the framers' generation couldn't have held any broader view goes like this: (1) the First Amendment was promulgated in 1789 by 'Federalists', (2) the Sedition Act was the capstone of the Federalist Party's policy in 1798 and was opposed by the Republicans, who were the successors to the Antifederalists; (3) the Federalists unanimously supported the Sedition Act, and since they had been the proponents of the First Amendment, they must have thought the two were compatible.[38]

The argument is built on several fallacies. The Sedition Act was not passed by the same people who proposed the First Amendment. In 1789 'federalist' meant only that the subject was a supporter of a strong national government. By 1798 a Federalist was a member of a highly partisan political party that was determined to hold onto power.[39] None of the sponsors of the Sedition Act had been members of Congress in 1789,[40] and a slight majority of the representatives who had been in Congress in 1789 voted *against* the Act.[41] Passage of the Sedition Act tells us very little about the views of the framers.

Nor is it true that the Sedition Act was supported by all of the federalists or even all of the Federalists. One of the most influential federalists in 1789 was James Madison; by 1798 he was a Republican who emphatically rejected the narrow view of freedom of speech and press and proclaimed the unconstitutionality of the Sedition Act.[42] His Virginia Resolutions, together with the Kentucky Resolution drafted by Jefferson, were eloquent and influential rebuttals of those who claimed the Act was consistent with the First Amendment.[43] The significance of these resolutions has been minimized by the claim that no other state joined Virginia and Kentucky in condemning the Act.[44] But Bird shows that two other states passed similar

37. Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596 (1798) (expired 1801).

38. The most extended exposition of this argument was made by Leonard Levy. *See* LEGACY, *supra* note 1, at 245–48.

39. Anderson, *supra* note 14, at 518–19.

40. BIRD, *supra* note 5, at 395.

41. *Id.*

42. The Republican Party emerged in 1792 when Madison and Jefferson broke with Alexander Hamilton and the Federalists. *See generally* JOHN C. MILLER, THE FEDERALIST ERA: 1789–1801, at 84–125 (Harper & Row 1963) (1960). Madison's expansive view of freedom of speech and press and his conviction that the Sedition Act was unconstitutional were most fully developed in the Virginia Report of 1799–1800. JAMES MADISON, THE VIRGINIA REPORT OF 1799–1800, *reprinted in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 197, 214 (Leonard Levy ed., 1996) (1966).

43. MILLER, *supra* note 43, at 239–41.

44. *See* BIRD, *supra* note 5, at 323 (declaring that the claim that the Virginia and Kentucky Resolutions were not supported by any other state is incorrect).

resolutions; in two others, legislative chambers divided on the question; two other states failed to act; and 'only half of the sixteen states responded negatively to the Virginia and Kentucky Resolutions."[45]

Another tenet of the received wisdom is that the Sedition Act was supported by all the Federalists except John Marshall.[46] Marshall opposed it on nonconstitutional grounds,[47] but as Bird points out he also said it was 'view[e]d by a great many well meaning men, as unwarranted by the Constitution."[48] Levy assured us that '[n]ot a single Federalist in the United States opposed the constitutionality of the Sedition Act. '[49] In fact, four Federalist house members and one senator voted against initial passage of the Act, and despite vilification by party leaders, more joined them in subsequent votes.[50] In all, eighteen Federalist members of Congress cast votes against the Act on various motions to repeal or defend it.[51] The reasons for their opposition were not always recorded, but Bird notes that 'speakers whose remarks were preserved focused on First Amendment reasons and related concerns. '[52]

Bird's book casts new light on other aspects of the Sedition Act crisis. He shows that prosecutions under the Sedition Act were far more numerous than previously recognized. James Morton Smith and John C. Miller, authors of standard works on the Sedition Act, counted fourteen or fifteen Sedition Act cases from its enactment in 1798 to its expiration in 1801.[53] There have been occasional hints of other prosecutions, but most subsequent writers have accepted the fourteen or fifteen figures.[54] Bird found eleven additional Sedition Act prosecutions; eleven more prosecutions for criminal conspiracy in violation of the Sedition Act; three attempted indictments under the Sedition Act (thwarted when grand juries refused to indict); and six other instances in which the Secretary of State or the Secretary of War gave

45. *Id.* at 323, 325.

46. *See id.* at 399 (noting the 'conventional wisdom' that no Federalist questioned the constitutionality of the Sedition Act and that only Marshall did not favor its enforcement). For an exploration of Marshall's views on freedom of the press, see generally Gregg Costa, Note, *John Marshall, The Sedition Act, and Free Speech in the Early Republic*, 77 TEXAS L. REV. 1011 (1999) (analyzing Marshall's views on free speech and the First Amendment).

47. BIRD, *supra* note 5, at 400–01.

48. *Id.* at 404 (alteration in original).

49. EMERGENCE, *supra* note 19, at 280.

50. BIRD, *supra* note 5, at 404, 409.

51. *Id.* at 405.

52. *Id.*

53. JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 185 (1956) (reporting fourteen indictments under the Sedition Act); JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 65–66, 98–130, 194–220 (1952) (discussing fifteen prosecutions).

54. BIRD, *supra* note 5, at 332 nn.16–19.

instructions to prosecute under the Act.[55] These additional instances, like the previously identified Sedition Act prosecutions, all targeted Republicans, mostly newspaper editors.[56] Bird concludes:

> The assault on the First Amendment by the Sedition Act restrictions and prosecutions was even more serious than has been realized before. In that context, the Republican outrage and eruption of First Amendment theory, the public concern and shift to the Republican party, the Jeffersonian revolution of 1800, and the rapid demise of the Federalist Party, become more intelligible.[57]

Bird describes the Act as 'the most widely hated law yet passed in America, except perhaps the tax that provoked the Whiskey Rebellion.'[58] He said it 'propelled more leaders and voters across the divide from the Federalist to the Republican Party, and assisted Jefferson in the close presidential election of 1800.'[59]

Possibly the strongest evidence that the early understanding of the First Amendment was narrow is the fact that the early Justices of the Supreme Court did not directly question the constitutionality of the Sedition Act. The full Court never ruled on the question.[60] In fact, the Court has not done so explicitly to this day, although it has said the Act has been judged unconstitutional 'in the court of history.'[61] But the main job of early Justices was to sit individually on circuit courts, and during the three years the Sedition Act was in effect some of them urged their grand juries to indict seditious libelers, heard Sedition Act cases, and upheld convictions.[62] Five of the Justices presided over Sedition Act cases, and six gave advisory opinions upholding its constitutionality.[63] Relying on the positions of these Justices, Levy, among others, claimed that the early Supreme Court Justices 'unanimously' believed the Sedition Act constitutional.[64] But twelve Justices sat on the Supreme Court from 1789 to 1801, and half of them did not preside over Sedition Act cases or otherwise voice support for the Act—

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55. *Id.* at 336–37 tbl.7.1, 359–61 tbl.7.2, 367 tbl.7.3, 374 tbl.7.4.

56. *See id.* at 336–55 (describing the factual and legal background of the eleven newly discovered prosecutions).

57. *Id.* at 390.

58. *Id.* at 251.

59. *Id.* at 326.

60. New York Times Co. v. Sullivan, 376 U.S. 254, 276 & n.10 (1964) (noting that the Sedition Act was "never tested" in the Supreme Court before it expired by its own terms in 1801).

61. *Id.* at 276.

62. BIRD, *supra* note 5, at 248–50.

63. *See id.* at 268–320 (describing in detail the treatment of specific Sedition Act cases brought before each of the sitting Justices).

64. EMERGENCE, *supra* note 19, at 280.

Bird calls these the 'nonsitting justices.'[65] Bird plausibly suggests that at least three, and possibly five, of those Justices believed the Act was unconstitutional,[66] or at least expressed broader understandings of freedom of speech and press.[67]

None of the nonsitting Justices is known to have expressly challenged the constitutionality of the Act.[68] Bird relies on inferences from their statements and positions on related issues. For example, he cites the following indications that Justice Thomas Johnson viewed the Act as unconstitutional: 'in the Maryland ratification convention, Johnson split from the federalist majority, becoming the only early Justice to publicly call for a bill of rights including protection for freedom of the press' ; he declined one of President Adams's 'midnight appointments' to a circuit court and delayed notifying the President of his decision, thereby enabling Jefferson rather than Adams to fill the post; he went out of his way to avoid being labeled a Federalist (probably, in Bird's opinion, because he disagreed with Federalist policies).[69] The example illustrates the perils of relying on indirect evidence of a judge's views on a specific law: support for freedom of the press doesn't tell us *how much* press freedom he envisioned; preferring Jefferson to Adams would be heresy in the eyes of leaders of the Federalist Party, but it doesn't prove that he was on Jefferson's side in the Sedition Act controversy; and disdaining the Federalist label doesn't necessarily mean he thought the Federalists were wrong about the constitutionality of the Sedition Act.

Bird's evidence as to the views of the other Justices who didn't rule on Sedition Act cases is subject to similar objections. But it does show that the opposite claim—that all of the Justices viewed the Act as constitutional—is equally problematic; no one can be sure of the views of Justices who did not hear Sedition Act cases. They may have refrained from condemning the Act because they believed it was constitutional or because they preferred not to unnecessarily incur the wrath of the Federalist Party.

Bird leaves some intriguing questions unanswered. For example, if some of the early Justices believed the Sedition Act was unconstitutional, was it mere coincidence that none of them presided in Sedition Act cases? At least part of the answer no doubt lies in the role that Justices riding circuit

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65. BIRD, *supra* note 5, at xxxvi tbl.0.1. Bird devotes an entire chapter to these Justices. *Id.* at xxxvi tbl.0.1, 394–458.

66. *Id.* at 454.

67. *Id.* at 458.

68. *See id.* at 398–99 (stating that Justices Jay, Rutledge, Wilson, Johnson, and Moore "left no correspondence and no newspaper articles even intimating support of the Act, and instead left a number of largely unnoticed indications of their opposition").

69. *Id.* at 446–48.

played through the charges they gave to grand juries. One of a Justice's duties upon convening a grand jury was to give it marching orders, and Justices were allowed to tell the grand jury what crimes it should look for.[70] Some of the Justices urged their grand juries to ferret out sedition and return indictments. For example, Justice William Paterson read the Sedition Act to his grand jury and told them 'that the very survival of government and freedom depended on crushing seditio[n].'[71] He went on to say that those who publish false, defamatory, and malicious writings or libels against the government 'destroy confidence, excite distrust, disseminate discord and the elements of disorganization, alienate the affections of the people from their government, disturb the peace of society, and endanger our political union and existence.'[72] It could hardly be a coincidence that Paterson presided over six Sedition Act cases.[73]

On the other hand, Justice Alfred Moore, one of the Justices that Bird believes probably questioned the constitutionality of the Act, gave the Sedition Act only a perfunctory mention in his charge to the grand jury and seemed to suggest that pursuing indictments under the Act would only divert them from their 'proper business.'[74] Moore presided over no Sedition Act cases.[75]

By examining in detail the views of all the early Justices, Bird casts grave doubt on the claim that the Justices sitting on the Supreme Court at the time of the Sedition Act unanimously believed it was constitutional. He can't be said to have conclusively disproved that claim, but he provides a preponderance of evidence to the contrary.

First Amendment history has long suffered from the belief that the framers' conception of freedom of speech was so toothless that it did not preclude prosecution for seditious libel.[76] Advocates of robust freedoms of press and speech have been forced to argue that even though the framers did not intend to protect those freedoms vigorously, courts should do so because it is a good idea.[77] After Bird's book, that back-footed approach should no longer be necessary.

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70. 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 5 (Maeva Marcus et al. eds. 1988).

71. BIRD, *supra* note 5, at 272.

72. *Id.*

73. *Id.* at 271.

74. *Id.* at 449.

75. *Id.*

76. *See supra* notes 5–9 and accompanying text.

77. *See, e.g.*, LEGACY, *supra* note 1, at 309 (advocating for broad freedom of speech, even if that was not the framers' understanding of the First Amendment).

III. It Wasn't Madison's Music

Neuborne's book compels no similar rethinking of First Amendment history. His metaphors are inspiring and imaginative; one only wishes that history supported them. His thesis is that 'a careful study of the order, placement, meaning, and structure of the forty-five words in Madison's First Amendment will trigger a responsive poetic chord in you that will enable us to recapture the music of democracy in our most important political text.'[78]

But Madison didn't compose a poem. He didn't envision a First Amendment at all; he wanted to insert the various guarantees that became the First Amendment into Article I, Section Nine, of the original Constitution, between the clause prohibiting bills of attainder and the clause prohibiting direct taxation.[79] Madison didn't originate the language in his proposal to protect freedom of speech and press; he lifted it almost verbatim from the Virginia Declaration of Rights of 1788.[80]

Neuborne says the amendment begins with the Establishment Clause because that's where 'any poem celebrating individual freedom and self-government must begin.'[81] 'The First Amendment's narrative then moves naturally' to the Free Exercise Clause, turns next to free speech 'as the next logical step in the evolution of a democratic idea,'[82] then 'turns chronologically and logically' to freedom of the press,[83] and then 'turns naturally to the fifth chronological foundational component of democracy—collective action in support of an idea' with the assembly and petition clauses.[84]

It wasn't Madison who conjoined the speech and press clauses with the petition and assembly clauses; that was done by a committee in the House of

78. NEUBORNE, *supra* note 12, at 1.

79. *See* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS app. 1 at 266–67 (2006) (reprinting the amendments Madison proposed on June 8, 1789 as insertions into Article I, Section Nine).

80. Madison was one of five members of a committee that drafted the Virginia Declaration, but George Mason was the primary author. BIRD, *supra* note 5, at 187–88, 187 n.576; 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 764–65 (1971). The Virginia Declaration paraphrased a provision from the 1776 Pennsylvania constitution. *See* Pennsylvania Declaration of Rights No. XII (1776), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 262, 266 (1971) ("That the people have a right to freedom of speech, and of writing, and publishing their sentiments: therefore the freedom of the press ought not to be restrained.").

81. NEUBORNE, *supra* note 12, at 18.

82. *Id.* at 18–19.

83. *Id.* at 19.

84. *Id.* at 19–20.

Representatives.[85] Madison wanted to protect secular as well as religious rights of conscience, but the Senate rejected that.[86] The guarantee that Madison considered most important—an amendment prohibiting the states from infringing on freedom of the press[87]—was also rejected by the Senate.[88] The final language of what became the First Amendment was chosen by a House–Senate conference committee.[89]

Neuborne says Madison's First Amendment 'deploys the six ideas in a rigorous chronological narrative of free citizens governing themselves in an ideal democracy.'[90] But Madison did not present these as part of a single narrative. He articulated the six rights in three separate, more verbose provisions. The religion clauses and the ill-fated right of secular conscience were in one, speech and press were in another, and assembly and petition were in the third.[91] If proximity is enough to make them part of a single narrative, then the right to bear arms must be part of the same narrative as the right to petition because those too are next-door neighbors in his draft.[92] The most that can be said for the 'rigorous chronological narrative' idea is that the six expression-related rights that eventually became the First Amendment were listed there in the same order as Madison had listed them in his separate amendments.[93]

Although Madison gave no indication that he considered that order important, it is entirely plausible that he saw the logical progression that Neuborne identifies. Reading 'Madison's entire First Amendment as a meticulously organized road map of a well-functioning egalitarian democracy'[94] might be a good idea even if it isn't historically commanded. The idea is that self-government begins logically with freedom of mind, and

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85. LABUNSKI, *supra* note 79, at app. 2 at 269–70 (reprinting House Select Committee Amendments from July 28, 1789).

86. *Compare id.* app. 1 at 266 (reprinting Madison's proposed addition of a clause protecting "the full and equal rights of conscience"), *with id.* app. 4 at 275 (showing that the amendment passed but that the Senate rejected Madison's language and replaced it with "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion").

87. 1 ANNALS OF CONG. 783–84 (1789) (Joseph Gales ed., 1834).

88. *See* S. JOURNAL, 1st Cong. 1st Sess. 105, 121 (1789) (reporting that an amendment proposing that "[n]o State shall infringe the freedom of speech" was "passed in the [n]egative" by the Senate).

89. *See* LABUNSKI, *supra* note 79, at 239 (explaining that the language that became part of the First Amendment was chosen by a conference committee appointed by the House that included Representatives Madison, Roger Sherman, and John Vining as well as Senators Oliver Ellsworth, William Paterson, and Charles Carroll).

90. NEUBORNE, *supra* note 12, at 11–12.

91. LABUNSKI, *supra* note 79, app. 1 at 266 (reprinting Madison's proposed amendments).

92. *Id.*

93. *Id.*

94. NEUBORNE, *supra* note 12, at 22.

then requires freedom to speak, freedom to communicate to a larger audience, freedom to assemble with other citizens, and freedom to petition for redress of grievances, in this order.[95] This conception is quite plausible. Neuborne, who believes such a reading offers a way out of the dysfunctional democracy that he says the Supreme Court has created,[96] isn't the first scholar to endow a pet idea with a questionable historical pedigree.[97] But the idea has been around for a long time, and it hasn't prevailed.

The view that the purpose of the First Amendment is to facilitate self-government was espoused famously by Alexander Meiklejohn in his 1948 book, *Free Speech and Its Relation to Self-Government*.[98] Neuborne does not mention Meiklejohn, but many of the democracy-enhancing virtues that Neuborne sees were identified by Meiklejohn. The First Amendment, Meiklejohn asserted, is not intended to protect freedom for all kinds of speech, but only 'to make men free to say what, as citizens, they think, what they believe, about the general welfare.'[99] But that seemed to deny First Amendment protection to art, literature, and other species of expression that many people wished to protect, and that the Supreme Court had in fact protected. Meiklejohn responded thirteen years later by adopting an expansive view of what speech is relevant to self-government. Literature and the arts must be protected by the First Amendment, he said, because '[t]hey lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created'; for similar reasons, education, the sciences, and philosophy must be protected.[100] What this expansion showed was that relevance to self-government is largely in the eye of the beholder.

Neuborne's proposed reading of the First Amendment faces a similar problem, and he resolves it similarly—by arguing that the First Amendment also protects 'a steady flow of unfiltered information, ideas, and opinions about art, philosophy, literature, science, technology, history, ethics,

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95. *Id.* at 18–20.

96. *Id.* at 22.

97. *See, e.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 206–08 (1890) (proposing the modern tort of invasion of privacy and claiming that courts had already recognized it under other names, such as a violation of one's intellectual property or a breach of an implied contract).

98. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (rejecting a narrow interpretation of the First Amendment and instead arguing that a more robust understanding of the First Amendment is necessary in order to secure the self-governance intended by the framers).

99. *Id.* at 104.

100. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257.

economics, psychology, sociology, sex, leisure, and business.'[101] Ascribing to the six clauses of the First Amendment the single, overarching purpose of facilitating democracy might very well have discouraged some of the Court's dubious recent forays, such as extending constitutional protection to snuff videos,[102] games,[103] and lying,[104] but if facilitating democracy includes the additional subjects Neuborne lists, that seems doubtful.

There is also the problem of deciding what the self-government rationale tells us to do in specific cases. Neuborne says it would empower the courts to ask whether the outcome of a decision will be good or bad for democracy.[105] Unfortunately, in constitutional litigation, that question rarely has a self-evident answer. It's clear to Neuborne that corporate funding of politics does not enhance democracy,[106] but that was not clear to Justice Scalia, who thought that 'to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy.'[107] It is clear to Neuborne that the Occupy Wall Street movement was suppressed in violation of the Assembly Clause of the First Amendment,[108] but it is probably equally clear to many motorists that blocking traffic on the Brooklyn Bridge is the kind of 'severe interference[] with public order' that he agrees should trump freedom of assembly.[109]

Neuborne is not so pedestrian as to suggest that his interpretation of the First Amendment can actually tell us which speech deserves protection. His ambition is more subtle. After noting the many instances in which the First Amendment failed to protect the freedoms that it is supposed to guarantee, he acknowledges that, as Madison said, the words of the Bill of Rights are just 'parchment barriers.'[110] Neuborne believes that seeing the First

101. NEUBORNE, *supra* note 12, at 97.

102. *See* United States v. Stevens, 559 U.S. 460, 482 (2010) (holding that a statute criminalizing videos containing certain depictions of animal cruelty was unconstitutionally overbroad and therefore invalid under the First Amendment).

103. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 805 (2011) (holding that a California statute restricting the sale of video games to minors was unconstitutional under the First Amendment).

104. *See* United States v. Alvarez, 132 S. Ct. 2537, 2543, 2547–51 (2012) (holding that a law making it illegal to falsely claim receipt of military decorations or medals constituted a content-based restriction on free speech, making the Act unconstitutional under the First Amendment).

105. NEUBORNE, *supra* note 12, at 74.

106. *See* NEUBORNE, *supra* note 12, at 70–75 (criticizing the extension of First Amendment rights to corporations and deploring corporations spending "unlimited sums on electoral speech").

107. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 393 (2010) (Scalia, J. concurring).

108. *See* NEUBORNE, *supra* note 12, at 127–29 (citing the disruption by police of the Occupy Wall Street movement as an example of the impotence of the Assembly Clause).

109. *Id.* at 128.

110. *Id.* at 185.

Amendment as an integrated poem to democracy would help to forestall such lapses. Ultimately, his mission is not to provide answers to constitutional questions, but to elevate our sensibilities:

> The aesthetic force of Madison's lost poetry could be of incalculable value in rallying the level of public support needed to sustain the practical vitality of the Bill of Rights, especially the First Amendment, in storm-tossed times. It's possible, of course, to attempt to rally popular support for fragments of the Bill of Rights displayed as isolated slogans. But if the isolated slogans were understood by the people as threads in a harmonious tapestry, interacting with and reinforcing each other as the elements of a magnificent poem to human freedom and political democracy, it would be much easier to rally 'We the People' to defend the Bill of Rights, for it would speak to them in the coherent voice of poetry.[111]

IV The 'Music' Is Not Just the First Amendment

Although the subtitle indicates the book is about the First Amendment, Neuborne extends the 'Madison's Music' theme to the Bill of Rights generally. He says Madison's 'poetic voice speaks to us in the harmony of the 462 words, thirty-one ideas, and ten amendments—each in its perfectly chosen place and all interacting to form a coherent whole—that constitute the magnificent poem to democracy and individual freedom called the Bill of Rights.'[112] He says 'what finally came out of Madison's quill pen in the summer of 1789 was a precisely organized textual blueprint for a robust democracy.'[113] By reading the Bill of Rights as a series of unconnected verbal commands, 'we have lost the ability to hear Madison's music.'[114]

This is even less supportable than his claim about the First Amendment poem. Madison was not always enthusiastic about creating a Bill of Rights. As late as 1788, he had argued that it was unnecessary.[115] He drafted his proposed list of rights only after realizing that the required plurality of states would not ratify the Constitution unless Congress acceded to their demand

111. *Id.* at 196.

112. *Id.* at 2.

113. *Id.* at 11.

114. *Id.* at 15.

115. Letter from James Madison to George Washington (Feb. 15, 1788), *in* 10 THE PAPERS OF JAMES MADISON 510, 510 (Robert A. Rutland et al. eds. 1977).

for protection of individual rights,[116] and even then he described it as a 'nauseous project.'[117]

He didn't want to create a separate Bill of Rights; he wanted to insert the various guarantees into the original Constitution at various places where he thought they would counterbalance grants of power.[118] He fought for that throughout the framing process; the Bill of Rights as we know it emerged only because his colleagues rejected Madison's preference.[119] He proposed nineteen amendments, not ten.[120] As mentioned above, the amendment he considered the most important of all his proposals was deleted by the Senate.[121]

As for the claim that Madison's Bill of Rights was carefully structured with not an idea or word out of place, we should consider the first, second, and third of Madison's proposals. The first was a preamble declaring that the people have an indefeasible right to change their government.[122] The second provided that there should be at least one member of the House for every 30,000 of population.[123] The third provided that any pay raise for members of Congress would not take effect until after the next election.[124] For better or worse, the First Congress didn't share Madison's enthusiasm for protecting the right to revolution; his preamble died in the Senate.[125] His second and third proposals survived the framing process and became the first and second amendments in the Bill of Rights as it was submitted to the states.[126] The 30,000-per-district provision mercifully was never ratified; today, that ratio would require a House of 10,760 members.[127] The importance of the pay-raise provision in Madison's carefully wrought poem to democratic self-government apparently wasn't appreciated for 200 years;

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116. *See* Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 303 (noting that James Madison did not support the addition of a Bill of Rights until he realized the political realities at stake).

117. James H. Hutson, *'A Nauseous Project,'* WILSON Q. Winter 1991, at 57, 69.

118. *See* LABUNSKI, *supra* note 79, at 200 (arguing that Madison wanted his amendments to be directly woven into the sections of the Constitution that the amendments modified, as opposed to being appended at the end).

119. *See id.* at 219 (reporting that Madison acquiesced to the placement of the amendments at the end because he could see that he was "losing the battle").

120. *Id.* at 198.

121. *Id.* at 237.

122. *Id.* app. 1 at 265.

123. *Id.*

124. *Id.* app. 1 at 266.

125. *Id.* at 237.

126. *Id.* app. 5 at 278.

127. As of Jan. 1, 2016, the United States' population was 322,761,807. That number divided by 30,000 equals about 10,760. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, http://www.census.gov/popclock/ [https://perma.cc/46CD-GC5Y].

that amendment wasn't ratified until 1992 when it became the Twenty-Seventh Amendment.[128] It is only because of these non-Madisonian events that the Bill of Rights consists of the ten amendments that we know. Inexplicably, Neuborne asks rhetorically, 'Why did Madison and his friends put the First Amendment first ?, '[129] and then acknowledges in an endnote that they put it third.[130]

Neuborne argues that a proper reading of the Bill of Rights would result in 'judicial recognition of a First Amendment right to vote. '[131] His argument relies not just on the First Amendment, but on an expansive interpretation of the Ninth Amendment. That amendment says only that enumeration of certain rights in the Constitution should not be construed to deny others retained by the people, but Neuborne says it should be interpreted to authorize courts to recognize extratextual rights.[132] But wait: if the Bill of Rights was 'a precisely organized textual blueprint for a robust democracy, '[133] wouldn't it explicitly guarantee something as basic to democracy as the right to vote? If the First Amendment 'narrates the odyssey of a democratic idea"[134] from freedom of religion to freedom of speech and press to the right to assemble and the right to petition, shouldn't it take the logical next step and guarantee the right to vote? Would a 'blueprint' rely instead on creative interpretations of two different amendments?

Much of the book is an extended criticism of the Supreme Court's 'fateful strategic blunder"[135] in 1962 when it decided to base the rights to vote and hold office on the Equal Protection clause instead of the First Amendment.[136] Neuborne blames that choice for subsequent decisions that he considers 'judicially imposed democratic disasters, including *Bush v. Gore*[137] and *Citizens United v. FEC*.[138] He notes that extending the franchise to African-Americans, women, eighteen-year-olds, and the poor has required multiple constitutional amendments, numerous Supreme Court decisions,

128. LABUNSKI, *supra* note 79, at 315 n.1.

129. NEUBORNE, *supra* note 12, at 14.

130. *Id.* at 226 n.1.

131. *Id.* at 76.

132. U.S. CONST. amend. IX; *see* NEUBORNE, *supra* note 12, at 29--31 (arguing that the Ninth Amendment encompasses additional rights not explicitly included in the Constitution).

133. NEUBORNE, *supra* note 12, at 11.

134. *Id.* at 76.

135. *Id.* at 42.

136. *See id.* (bemoaning the Supreme Court's use of the "unstable" Fourteenth Amendment "equality jurisprudence" instead of the First Amendment to resolve political rights questions).

137. 531 U.S. 98, 110 (2000) (halting a recount in the 2000 general election that the Supreme Court of Florida had ordered); NEUBORNE, *supra* note 12, at 75.

138. 558 U.S. 310, 372 (2010) (overturning statutory restrictions on corporate-financed, campaign-related speech); NEUBORNE, *supra* note 12, at 75.

and a century or two of waiting.[139] The reality, of course, is that the framers weren't enthusiastic about voting rights for people different from themselves.[140] Whether that casts doubt on the perfection of their blueprint for democracy seems worthy of consideration.

After insisting for nine chapters that the First Amendment and the Bill of Rights is Madison's poetry, Neuborne adds a curious tenth chapter in which he acknowledges many of the contrary facts mentioned above. In this chapter, he actually looks at the processes of framing and ratification, and acknowledges that this history makes many of his preceding claims untenable.[141] 'Too many other important players, including Roger Sherman and Elbridge Gerry, were involved to claim that Madison's intentions controlled everything.'[142] But not to worry:

> What should matter today, though, is not what a group of long-dead, slave-owning white men of substantial property may have been thinking about in 1789. [G]reat poems aren't beautiful because poets have willed them so. The unique beauty of great poetry is found in the text itself, in the imagery, emotions, and meaning produced by the order, cadence, structure, and content of the words.[143]

In other words, it's beautiful music, even if it was the product of legislative sausage making.[144]

It's hard to know what to make of Neuborne's book. He says at the outset that it is not a work of history and he doesn't claim to know Madison's mind.[145] Then he writes two hundred pages telling us how Madison wanted us to understand what the first Congress wrote two centuries ago. Maybe we should see the book as an extended hyperbole, a metaphorical way of seeing history which, though not accurate, might contain truths in the way that

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139. *See* NEUBORNE, *supra* note 12, at 35–36 (describing the process of achieving voting rights for the aforementioned groups).

140. *See* U.S. CONST. amends. XV, XIX (establishing voting rights that were not previously guaranteed because the Constitution as drafted by the framers did not forbid discrimination on the basis of race, color, or sex).

141. NEUBORNE, *supra* note 12, at 197–223. The chapter begins with this sentence: "The story of the textual evolution of the Bill of Rights during that febrile summer of 1789 makes it difficult, if not impossible, to claim that the structure and organization of the Bill of Rights was driven by a single person's vision. *Id.* at 197.

142. *Id.*

143. *Id.*

144. *See News of the Day*, DAILY CLEV. HERALD, Mar. 29, 1869 (quoting lawyer–poet John Godfrey Saxe: "Laws, like sausages, cease to inspire respect in proportion as we know how they are made.").

145. NEUBORNE, *supra* note 12, at 1.

fiction does. Maybe he intends to do for Madison what the musical 'Hamilton' does for Madison's rival, Alexander Hamilton.[146]

The extent to which constitutional history should influence decision-making today is of course debated, but few judges or scholars consider it irrelevant.[147] For that reason, it's helpful to see that history clearly. Bird's book corrects a fundamental misunderstanding about the original understanding of the First Amendment. He looks closely at the twin pillars of the theory that freedom of speech meant little to the framers, and finds that neither is a pillar at all—Blackstone's was *not* the dominant view of free speech in America, and the Sedition Act did *not* prove that the framers shared Blackstone's limited view.

Neuborne's book, on the other hand, has the potential to do mischief. It creates new misunderstandings about the Bill of Rights and the First Amendment in particular. They are not perfect products of Madison's poetic genius; rather, they are proof that long-dead, slave-owning white men, acting through the push and pull of legislative politics, produced good, if imperfect, results.

146. Because of the musical, Hamilton's reputation is "trending" in a way that Madison's fans can only envy. The musical won a Pulitzer Prize, a Grammy, and many other awards; was sold out for 119 performances off-Broadway; sold 200,000 advance tickets when it moved to Broadway; and became one of the most acclaimed critical successes in Broadway history. Erik Piepenburg, *Why 'Hamilton' Has Heat*, N.Y. TIMES (June 12, 2016), http://www.nytimes.com/interactive/2015/08/06/theater/20150806-hamilton-broadway.html?_r=0 [https://perma.cc/6RA4-55UL].

147. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586–87 (2012) (analyzing the Constitution's Commerce Clause in light of historical understandings of commerce); Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1174 (2009) (discussing increased use of historical analysis in recent Supreme Court opinions).

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Adultery: Trust and Children

ADULTERY: INFIDELITY AND THE LAW. By Deborah L. Rhode. Cambridge, Massachusetts: Harvard University Press, 2016. 272 pages.

Margaret F. Brinig*

Deborah Rhode writes that, while adultery is admittedly not good, it should not be criminal.[1] She argues that it should not generate a tort action either, because the original purposes for the torts of alienation of affection and criminal conversation come from a time with quite different views about marriage and gender,[2] while no-fault and speedy divorce today give adequate remedies to the wronged spouse.[3] Further, she argues that adultery should not affect employment—as a politician or in the military—unless it directly impacts job performance.[4]

The materials she uses to make her case for removing all but social punishments for adultery are varied, and the authority with which she wields them is quite convincing. The historical section (Chapter 2) is particularly well done as a scholarly matter; her anecdotes (especially in Chapter 3, which discusses contemporary American law, and in Chapter 4, which deals with adultery in the military) are vivid and ample; and the constitutional law—more her field than family law—is carefully employed. Chapter 5 deals with alternative lifestyles like polygamy ("polyamorous relationships") and suggests decriminalizing them to allow those involved to become less isolated, actually giving more visibility to the possible associated harms like "underage marriage, tax fraud, and domestic violence."[5] Chapter 6, like Chapter 4, deals with politicians—where infidelity may not have any direct

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1. DEBORAH L. RHODE, ADULTERY: INFIDELITY AND THE LAW 23 (2016) (stating that she is against adultery, but "also against making it illegal or a factor in employment, military, custody, immigration, and related contexts").

2. *See id.* at 80–81 (approving of the abolition of tort remedies for adultery because these legal actions are outdated and may be used in a vexatious or extortionate manner and the injuries are "inherently speculative").

3. *See id.* at 10 (noting that the shift from punitive laws to no-fault divorce laws, coupled with the growing independence of women make women less vulnerable and more self-sufficient in cases of adultery and divorce).

4. *See id.* at 104, 127–28 (arguing that in the military and political contexts, adultery itself should not be punished; instead, any sanctions or discipline should consider the context and circumstances that actually affect job performance).

5. *Id.* at 5.

application to job performance, but where context really matters.[6] Chapter 7 discusses the international scene, where some countries tolerate extramarital affairs as completely routine,[7] while others allow 'honor killings' to go unpunished, causing 'serious human rights abuses.'[8] Again, Rhode suggests decriminalizing adultery,[9] and perhaps her point is that the United States should join the more tolerant Western European nations rather than seeming to follow the more repressive societies that outlaw it.[10] At the end though, I was left wondering whether social disapproval, really all that is left after criminal and civil penalties are removed, would be enough to curb what she admits is a troubling practice.

My own reluctance to disengage adultery and law stems from the seriousness of adultery. First, the destruction of trust that adultery both signals and produces does considerable damage. Second, though she certainly notes that the injured spouse has a beef against the adulterous one, and does briefly consider the harms done to children under various adultery scenarios, Rhode underplays the direct (through their own tendencies to trust or be faithful as adults) and indirect (through the likely divorce to follow and its particular nastiness) damage done to the children of adulterous marriages.

I begin with a flash tour through Rhode's very interesting and well-written book. While I present some comments from a family law or law-and-economics viewpoint, these are mostly minor quibbles. The very first page of Chapter 1 presents her argument: '[T]he United States should repeal its civil and criminal penalties for adultery.'[11] She reasons that the penalties are now 'infrequently and inconsistently enforced' and 'ill serve societal values.'[12] Rhode maintains that the criminal law is inappropriate because '[d]isapproval of marital infidelity has increased, obviously revealing societal values, while 'support for criminal prohibitions has declined' (as she later demonstrates by recent state statutory changes), and even 'intermittent enforcement' is out of sync with international trends.[13] Rhode then notes that 'many talented leaders have paid an undue price for conduct [unrelated] to their job performance.'[14] These summary

6. *Id.* at 6.

7. *Id.*

8. *Id.* at 6–7.

9. *Id.*

10. *See* Richard Wike, *French More Accepting of Infidelity than People in Other Countries*, PEW RES. CTR. (Jan. 14, 2014), http://www.pewresearch.org/fact-tank/2014/01/14/french-more-accepting-of-infidelity-than-people-in-other-countries/ [https://perma.cc/7N7C-63FD] (examining attitudes among different countries towards infidelity; finding that France is the most liberal towards adultery of the countries surveyed, while Muslim countries such as Egypt, Jordan, and Turkey are the least accepting of adultery).

11. RHODE, *supra* note 1, at 1.

12. *Id.*

13. *Id.* at 2.

14. *Id.*

paragraphs seem to conflate the criminal penalties twenty-one states still maintain[15] and the much less frequently allowed 'heartbalm' tort actions for 'alienation of affection' or 'criminal conversation.'[16] Allowing injured spouses tort remedies for the suffering caused by adulterous spouses is legally and practically quite different from the societal stance taken by maintaining criminal penalties for adultery.

Chapter 2, the legal history chapter, is one of the more memorable in the book. I learned a great deal from it, enough so that I purchased and read one of the books she frequently cited.[17] This chapter was filled with particularly useful descriptions of the role of adultery in divorce, including some reports of colonial cases, and it inspired me to think systematically about the way the laws have developed, and, particularly, those laws' impact on women.[18]

While Rhode begins with ancient law, she discusses Biblical law extremely briefly[19] despite its later impact on Western rules; I will therefore include a few examples. In the book of 2 *Samuel*, King David's adultery with and impregnation of Bathsheba, attempted deception of Bathsheba's husband, Uriah,[20] and later virtual murder of Uriah,[21] led to David's falling away from God[22] and a whole series of later tragedies. The entire prophetic book of *Hosea* analogizes the religious unfaithfulness of the Jewish people to a husband's experience with an adulterous wife.[23] God, illustrating unconditional love, takes back the Jewish people.[24] Adultery also plays a role in the Christmas story, according to which Mary was discovered pregnant while she and Joseph were betrothed.[25] Mary would have been subject to stoning for adultery—since at the time betrothal legally transferred the interests from Mary's father to her soon-to-be husband—were it not for,

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15. *Id.*

16. "Breach of promise to marry," which has moved into disfavor, was another "heartbalm" action. *See* Margaret F. Brinig, *Rings and Promises*, 6 J. L. ECON. & ORG. 203, 204 (1990) (discussing the demise of the action for the breach of promise to marry and relating it to the growth in sales of diamond engagement rings).

17. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA (2011).

18. For another article that discusses the historical link of adultery to the British kingship, see Erin Sheley, *Adultery, Criminality, and the Myth of English Sovereignty*, L. CULTURE & HUMAN. (forthcoming) http://journals.sagepub.com/doi/pdf/10.1177/1743872115570421 [https://perma.cc/DRP2-YZSD]. This piece was not available at the time of Rhode's writing, but it effectively illustrates this link.

19. RHODE, *supra* note 1, at 25 (mentioning the Ten Commandments and noting that the Biblical definition of adultery influenced English common law).

20. 2 *Samuel* 11:2–11.

21. David had Uriah placed on the front lines in a skirmish and abandoned there to die. *Id.* at 11:15–17.

22. *Id.* at 11:27.

23. *See generally Hosea.*

24. *Id.* at 2:23.

25. *Matthew* 1:18.

initially, Joseph's resolve to 'divorce her quietly"[26] and, subsequently, the angelic intervention directing him to 'take Mary as [his] wife.'[27] In another familiar story, Jesus carries on his most lengthy discussion of redemption and discipleship with an adulterous Samaritan woman.[28]

Many states followed the Biblical traditions condemning adultery[29] and, as Rhode notes, this led to the eventual use of adultery as a divorce ground.[30] In some ways the connection was obvious because adultery is arguably the least likely marital offense to be forgiven,[31] it is more likely than anything else to break up a marriage.[32] Because of its criminal nature, it requires a high degree of proof in divorce cases.[33] Also, as Rhode notes, it frequently triggers domestic violence.[34]

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26. *Id.* at 1:19.

27. *Id.* at 1:20.

28. *John* 4:1–26.

29. *See* RHODE, *supra* note 1, at 25–39 (observing that English common law "followed Biblical definitions of adultery" and that "the Puritans imported English prohibitions on adultery into the colonies").

30. *See id.* at 39 (noting that adultery was recognized as a ground for divorce in all of the colonies).

31. *See, e.g.*, Coe v. Coe, 303 S.E.2d 923, 924, 927 (Va. 1983) (affirming the grant of a divorce to plaintiff and the denial of spousal support to defendant on the basis of defendant's adultery). In *Coe*, the husband was able to prove sexual relations nine months after the separation through the testimony of a private detective. *Id.* at 926. The one-year separation period required for no-fault divorce had not expired at that time and the court reasoned, '[t]he commission of adultery during that period by either party to a marriage in trouble is the one act most likely to frustrate and prevent a reconciliation. *Id.* at 925–26.

32. *See, e.g.*, RHODE, *supra* note 1, at 195 n.96 (citing Alfred DeMaris, *Burning the Candle at Both Ends: Extramarital Sex as a Precursor of Marital Disruption*, 34 J. FAM. ISSUES 1474, 1477–78 (2013)) (indicating that study respondents gave infidelity as the most common reason for divorce).

33. *See* Haskins v. Haskins, 50 S.E.2d 437, 439 (Va. 1948) (requiring more than suspicious circumstantial evidence and reiterating the most frequent test as requiring proof that 'lead[s] the guarded discretion of a reasonable and just man to the conclusion of guilt' for the charge of adultery).

34. RHODE, *supra* note 1, at 18. *See also* Julianna M. Nemeth et al., *Sexual Infidelity as Trigger for Intimate Partner Violence*, 21 J. WOMEN'S HEALTH 942, 947 (2012) (examining concerns of infidelity as a consistent relationship stressor and immediate "trigger for acute violent episode[s]"). For a more recent analysis, see generally Jennifer E. Copp et al., *Gender Mistrust and Intimate Partner Violence during Adolescence and Young Adulthood* (Bowling Green State Univ. Working Paper, 2015), https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/center-for-family-and-demographic-research/documents/working-papers/2015/WP-2015-04-Copp-Gender-Mistrust-and-IPV.pdf [https://perma.cc/P657-8MHJ] (finding that higher levels of mistrust correspond to heightened odds of intimate partner violence). *See also* Peggy C. Giordano et al., *Anger, Control, and Intimate Partner Violence in Young Adulthood*, 31 J. FAM. VIOLENCE 1, 10 (2016) (suggesting that emotional control and processes are a factor in intimate partner violence).

Adultery law has necessarily changed over the last two centuries because of changes in the way property is held,[35] in the technology developed that can identify biological fathers,[36] and in the accompanying developing constitutional law regarding individual privacy and liberty rights.[37] Of course, changes in law are moved by sociological and economic changes.[38] And Rhode takes the not-uncommon approach of focusing primarily on the adult interests involved.[39]

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35. For important examinations of these changes in property law, see generally MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981), and John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988).

36. The problem of "adulterat[ing]' the bloodline is mentioned as the original reason for the sexual double standard disadvantaging women, RHODE, *supra* note 1, at 24; though she notes that in the English ecclesiastical courts, the problem was more the breach of marital vows. *Id.* at 26. *See also Exodus* 20:14 (prohibiting adultery in the Ten Commandments). And for the New Testament position on adultery functioning as the sole ground for divorce because of the Israelites' hardness of heart, see *Matthew* 19:8–9. For academic commentary, see June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1012 (2003) (urging DNA testing at birth). *See also* Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 230–32 (2002) (discussing genetic identity testing and setting out a research agenda suggesting that children's interests be considered as well as the parents').

37. This is very well discussed in RHODE, *supra* note 1, at 67–72.

38. *See, e.g.*, Richard L. Griswold, *Law, Sex, Cruelty, and Divorce in Victorian America, 1840-1900*, 38 AM. Q. 721, 724 (1986) (observing that American courts began to acknowledge husbands' false adultery allegations as a justification for divorce '[a]gainst the backdrop of moral and ideological changes in family life and womanhood"). Most recently, the Supreme Court discussed such changes in the same-sex marriage case of Obergefell v. Hodges, 135 S. Ct. 2584, 2595–98 (2015) (describing the history of marriage as "one of both continuity and change" and subject to developments in law and society). For a discussion of the changes in marriage and divorce, see, for example, the slightly more law-and-economics approach to the topic in Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1988), and June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991). For others' discussions of similar topics, see Rick Geddes et al., *Human Capital Accumulation and the Expansion of Women's Economic Rights*, 55 J.L. & ECON. 839, 862–63 (2012) (finding that changes in women's economic rights are connected to the rates of investment of women's human capital outside of the home), and Rick Geddes & Dean Lueck, *The Gains from Self-Ownership and the Expansion of Women's Rights*, 92 AM. ECON. REV. 1079, 1091 (2002) (finding that men gain from increases in women's rights, and finding a correlation between the increased wealth and growth of cities and the expansion of women's rights). The most recent of these changes in marriage are detailed in Alexandra Killewald, *Money, Work, and Marital Stability: Assessing Change in the Gendered Determinants of Divorce*, 81 AM. SOC. REV. 696, 716–17 (2016) (arguing that men's sociological role of provider has not changed, while women's as homemaker has diminished; finding that men's unemployment predicts divorce, while women's lower provision of household labor does not; and concluding that egalitarianism in household labor division may increase marriage stability). Predicted legal changes might include reforms to spur continued full-time employment.

39. *See also* Jennifer M. Collins et al., *Punishing Family Status*, 88 B.U. L. REV. 1327, 1411–13 (2008) (considering the impact of adultery laws on adult interests, with limited focus on child interests). *But see* GROSSMAN & FRIEDMAN, *supra* note 17, at 289–90 (discussing DNA testing and the impact of the better identification of genetic fathers in connection with changing rights of both the children and the fathers involved). Grossman and Friedman also make note of two Supreme Court cases: *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), in which the Court upheld California's

I will return to Chapter 3, to which I will add an empirical discussion, after considering Rhode's chapters on various employment contexts in which adultery continues to play a negative role, one that Rhode finds inappropriate, unless directly affecting job performance, given other safeguards. Her Chapter 4 on Sex in the Military and Chapter 6 on Sex and Politics were novel to me since they are outside my field and persuaded me that the adulterous nature of the sexual contact is probably unimportant. Most of her exceptions to her argument that adultery alone shouldn't matter include forms of sexual harassment,[40] in which both of us agree that adultery is particularly distasteful.[41] In the cases dealing with military personnel, she also argues that '[e]xisting sanctions for fraternization and conduct unbecoming an officer' pose a conflict of interest or 'a demonstrable threat to morale and

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former irrebuttable presumption that children born to married parents were legitimate (i.e. the children of the husband) unless he timely objected, *id.* at 131–32, and *Stanley v. Illinois*, 405 U.S. 645 (1972), in which the Court held that the Constitution requires hearings on the fitness of fathers before the parental rights of unwed fathers can be terminated. *Id.* at 658. *Michael H.* involved adultery, and Justice Scalia, writing for the plurality, was unwilling to recognize the adulterous relationship plus child as a family unit. 491 U.S. at 123–24. The plurality opinion discounted the possible competing interests of children as less important than those of their parents and their existing marriage. *See id.* at 130–32 (rejecting the argument that a child should be allowed to rebut the presumption of her paternity and upholding the law that allows for only the married parents to contest the legitimacy of the child). The Court mentions considerable legal history, again involving adultery, in the course of the opinion. *Id.* at 125–26. For a detailed discussion of the case as a paradigm for the channeling function of family law, see Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 524–29 (1992) (discussing family law's role in "shaping and promoting the social institutions of family life," and analyzing *Michael H.* within this context). Parenthetically, this focus on adults has been criticized by other members of the Court. *See* Troxel v. Granville, 530 U.S. 57, 86 (2000) (Stevens, J. dissenting) (acknowledging the implication of the child's interests in cases dealing with parental visitation rights). Scholars critical of this country's (lone) stance in failing to ratify the UN Convention on the Rights of the Child echo Justice Stevens's criticisms. *See, e.g.*, Barbara Bennett Woodhouse, *Re-Visioning Rights for Children*, *in* RETHINKING CHILDHOOD 229, 240 (Peter B. Pufall & Richard P. Unsworth eds., 2004) (lamenting the underappreciation of the Children's Rights Convention); Susan Kilbourne, *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 437, 461 (1996) (criticizing opposition to the Convention on the Child as detrimental to children and families).

40. Rhode refers to sexual coercion and damage to the unit as situations in which adultery should be punished in the context of employment in the military. RHODE, *supra* note 1, at 104–05.

41. I'd add here adultery by professionals who are supposed to sort out marital problems but end up sleeping with their patients or clients. The professionals—lawyers, doctors, psychiatrists, clergy—are sometimes reached in tort because of their outrageous and unethical behavior. *See, e.g.*, Corgan v. Muehling, 574 N.E.2d 602, 603 (Ill. 1991) (sexual relations "under the guise of therapy"); Destefano v. Grabrian, 763 P.2d 275, 278–79 (Colo. 1988) (sexual relations between a clergyman acting as marriage counselor and the wife of the couple seeking counseling). More often, and justly so, these professionals are subject to professional discipline as well as public notoriety. *See, e.g.*, Doe v. Zwelling, 620 S.E.2d 750, 751, 753 (Va. 2005) (refusing to revive the tort of alienation of affection in action for social worker's misconduct where an action for professional misconduct would suffice); Jacqueline R. v. Household of Faith Family Church, Inc., 118 Cal. Rptr. 2d 264, 265–66, 271 (Cal. Ct. App. 2002) (affirming summary judgment in favor of pastor who engaged in a sexual relationship with church member and denying the existence of any duty of pastor not to engage in morally inappropriate but consensual relationship).

good order."[42] In cases of politicians, she writes that '[c]ontext is critical in shaping moral behavior, and there is often little correlation between seemingly similar character traits such as lying and cheating."[43] It matters, therefore, whether the affair included other illegal conduct, abuse of office, or other reckless behavior.[44] She also notes that because of the media frenzy, '[s]ociety also suffers when its choices for leadership narrow to those willing to put their entire sexual histories on public display."[45] It also matters when the position necessarily entails moral leadership, but only when balanced against other characteristics that might make an adulterer, say, a great president.[46]

Chapter 5 considers lifestyles such as polygamy and polyamory, which, though they would be banned by criminal statutes, differ from the way we normally conceive adultery because they are, at least theoretically, consensual among all parties. Rhode notes conventional arguments against polygamy[47]—that they tend to involve much older men marrying younger women—but argues that making the behavior legal will allow polygamous families to live outside the current hidden communities, where much more actual damage can be done.[48] She expresses no problems with consensual polyamorous relationships. I find them troubling for reasons similar to those that bother me about adulterous relationships—while they may be rewarding for adults, they probably have negative effects on children.[49] There may be

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42. RHODE, *supra* note 1, at 104.

43. *Id.* at 156.

44. *Id.* at 157.

45. *Id.*

46. *See id.* at 156–57 (arguing that adultery is not an effective indicator of a president's ethics or effectiveness, and comparing President Nixon, who was faithful to his wife but deceitful in office, and presidents who have had affairs but who were honest and ethical leaders).

47. *See id.* at 121–22 (recognizing the arguments against polygamy, including the likelihood of harms such as domestic abuse, abuse and neglect of children, marriage of young girls, and social isolation, among others).

48. *Id.* at 123–24.

49. This is contrary to one of Rhode's other claims: 'Although research on polyamory's impact on children is fragmentary, some studies find that polyamorous parenting increases resources and adds flexibility to parent-child relationships. *Id.* at 117. Her one citation of a study supporting this assertion points to Maura I. Strassberg, *The Challenge of Post-modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 524, 464 n.172 (2003), where the citations seem largely to come from studies done by members of the communities themselves. *See id.* at 497 nn.317–21, 498 nn.323 & 325–27, 499 nn.328–34 & 337 (quoting members of a polyamorous community). Strassberg mentions a 1986 survey to support her claim that the couples were equally stable. *Id.* at 464 n.172 (referring to Arline M. Rubin & James R. Adams, *Outcomes of Sexually Open Marriages*, 22 J. SEX RES. 311, 312–14 (1986) (finding 68% of the sexually open couples stayed together for five years compared to 82% of the sexually exclusive couples; data came from 34 sexually open couples and 39 sexually exclusive couples)). More recent work also has empirical issues (selection problems as well as threats to the integrity of the sample; using 22 children interviewed and observed with polyamorists), but shows resilience among the children despite a high breakup–reformation rate among polyamorous couples. Mark Goldfeder & Elisabeth Sheff, *Children of*

no harm while the polyamorous relationship continues, but evidence involving what is called 'multipartnered fertility' (evidence admittedly not coming from the more affluent and well-educated communities Rhode discusses, but involving some of the same family structures) has been found to harm children in a variety of ways.[50]

Chapter 7 considers international perspectives on adultery. As I noted, Rhode cites examples from European nations, particularly France,[51] that have abolished criminal penalties and generally view adultery as less likely to be wrong than does the United States.[52] As she notes, the harshest treatment of adultery, which sometimes allows punishment by stoning, occurs in nations governed by Sharia law,[53] and prosecutions tend to be of women rather than men.[54] Rhode found only spotty evidence in Latin America and Africa, so I describe those regions here, recognizing that several nations have decriminalized adultery in recent years.[55] There apparently still is a double standard regarding adultery in Caribbean society.[56] Similarly, one African anthropological account suggests that in southeast Nigeria, while both men

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Polyamorous Families: A First Empirical Look, 5 J.L. & SOC. DEVIANCE 150, 190–98, 241–42 (2013).

50. *See, e.g.*, Marcia J. Carlson & Frank F. Furstenberg Jr., *The Prevalence and Correlates of Multipartnered Fertility Among Urban U.S. Parents*, 68 J. MARRIAGE & FAM. 718, 727 (2006) (finding that "in all likelihood," parents raising children across multiple households dilutes the level of parental investment each child will receive); Kristen Harknett & Jean Knab, *More Kin, Less Support: Multipartnered Fertility and Perceived Support Among Mothers*, 69 J. MARRIAGE & FAM. 237, 250 (2007) (suggesting that multipartnered fertility leads to children "losing access to valuable resources from social networks"); Lorraine V. Klerman, *Multipartnered Fertility: Can It Be Reduced?*, 39 PERSP. ON SEXUAL & REPROD. HEALTH 56, 56–57 (2007) (hypothesizing that multipartnered fertility may negatively affect children by decreasing the likelihood of marriage of their parents as well as the amount of financial and other support they receive); Kristin Turney & Marcia J. Carlson, *Multipartnered Fertility and Depression Among Fragile Families*, 73 J. MARRIAGE & FAM. 570, 584–85 (2011) (examining the link between multipartnered fertility and depression in parents and indicating multipartnered fertility may be another way parents "transmit disadvantages to their children"); Cassandra Dorius & Karen Benjamin Guzzo, *The Long Arm of Maternal Multipartnered Fertility and Adolescent Well-being* 29 (Nat'l Ctr. for Family & Marriage Research Working Paper Series, WP-13-04, 2013) (finding that adolescents with half-siblings were more likely to have had sex and used drugs by age fifteen).

51. At François Mitterrand's state funeral, his long-time mistress appeared alongside his wife and their two sons. RHODE, *supra* note 1, at 159.

52. RHODE, *supra* note 1, at 160–61 (noting that among industrialized countries, only the Philippines and Northern Ireland had higher rates than the United States of respondents viewing adultery as always wrong); *see also* Eric D. Widmer et al., *Attitudes Toward Nonmarital Sex in 24 Countries*, 35 J. SEX RES. 349, 351 tbl.1(1998) (same).

53. RHODE, *supra* note 1, at 179.

54. *Id.* at 179–80.

55. *Id.* at 177–79.

56. This was clearly true forty years ago, according to Frances Henry & Pamela Wilson, *The Status of Women in Caribbean Societies: An Overview of their Social, Economic and Sexual Roles*, 24 SOC. & ECON. STUDS. 165, 165 (1975). *See also* Gabriela Sagebin Bordini & Tania Mara Sperb, *Sexual Double Standard: A Review of Literature Between 2001 and 2010*, 17 SEXUALITY & CULTURE 686, 687–88 (2013) (tracing the continued existence of the sexual double standard among men and women).

and women enjoy premarital intercourse, women, but not men, are constrained by marriage to be monogamous.[57] Older married men commonly have 'sugar daddy' relationships with younger, unmarried women;[58] this philandering behavior for material gain is 'tacitly tolerated' by the wives.[59]

Rhode seems to be pointing out that the United States' relative intolerance of adultery (including criminalization and adultery's negative impact on employment) more closely resembles attitudes in less industrialized and more repressive societies than in its more commonly associated Western industrialized peer group.[60] In fact, in addition to the insistence on parental rights discussed later in this Review,[61] the United States stands out from this Western group of nations with liberal attitudes toward adultery for another reason. Despite trends towards less religious attendance, the United States continues to view religious and spiritual matters as important influences on life much more prevalently than, say, does France or other European countries.[62] This suggests that reliance on religious condemnation may still be effective here.

While Rhode's account of current American law in Chapter 3 begins with general effects of the criminalization of adultery and its effects on employment, she notes, correctly, that historically, penalties for adultery have had the effect of penalizing women.[63] Through the doctrine of recrimination, adultery may still keep a plaintiff spouse from obtaining a fault

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57. Daniel Jordan Smith, *Promiscuous Girls, Good Wives, and Cheating Husbands: Gender Inequality, Transitions to Marriage, and Infidelity in Southeastern Nigeria*, 83 ANTHROPOLOGICAL Q. 123, 132, 145–46 (2010).

58. *Id.* at 128.

59. *Id.* at 129. Smith explains how this is reflected in the difference between the revealing clothes of the unmarried women and the far more modest apparel ("minimization of sexuality") worn by married women. *Id.* at 139–40. "For married men, the situation is completely different. Extramarital sex is socially tolerated and, in many respects, even socially rewarded. The prevalence of married men's participation in extramarital sex in Nigeria is well documented. *Id.* at 146. Smith explains that this dichotomy can be explained by the different power and expectations of women during courtship, when they can refuse sex or exit the relationship, and marriage, when sexual availability is expected and divorce still highly stigmatized. *Id.* at 147.

60. *See* RHODE, *supra* note 1, at 160, 183 (noting that adults in the United States are more likely to view adultery as wrong compared to adults in other industrialized countries and suggesting that the United States should join those industrialized countries and decriminalize adultery).

61. *See infra* notes 107–12 and accompanying text.

62. *See, e.g.*, Rick Noack, *Map: These Are the World's Least Religious Countries*, WASH. POST (Apr. 14, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/04/14/map-these-are-the-worlds-least-religious-countries/ [https://perma.cc/VU23-UJDW] (citing *Losing Our Religion? Two Thirds of People Still Claim to Be Religious*, WIN/GALLUP INT'L (Apr. 13, 2015), http://www.wingia.com/web/files/news/290/file/290.pdf [https://perma.cc/U2TF-N43N] (finding the percentage of Americans who consider themselves to be religious is higher than that of Western Europeans)).

63. *See, e.g.*, RHODE, *supra* note 1, at 64 (both the husband and wife were accused of committing adultery, but only the wife was penalized); *id.* at 76 (woman was disciplined for committing adultery because her affair allegedly interfered with her work).

divorce.[64] While uncondoned adultery remains a bar to alimony in only one state,[65] in those states where it is legally considered at all, infidelity will be a factor considered with all others.[66] How does this residue of the old doctrines penalize women? First, though alimony is not often awarded (and perhaps was never awarded as often as attention to it would merit), it is most often awarded to women.[67] Second, while women file for divorces more often than men,[68] they are less apt to do so when concepts of fault are retained in grounds or as factors in alimony or property-division awards.[69] I test this again for adultery in the analysis below,[70] and, again, find that women are less likely to file.[71] Yet in recent studies based on survey data using hypothetical

64. New York disallows divorce on grounds of adultery '[w]here the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce.' N.Y. DOM. REL. LAW § 171 (McKinney 2010). This means that there cannot have been connivance, collusion, or expiration of the five-year statute of limitations. Divorce could still be obtained on another ground, and frequently would be, under the no-fault irretrievable break ground enacted in N.Y. DOM. REL. LAW § 170(7).

65. N.C. GEN. STAT. § 50-16.3A(a) (2015) provides in part:

> If the court finds that the dependent spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, the court shall not award alimony. If the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse. If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances. Any act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court.

N.C. GEN. STAT. § 50-16.3A(a).

66. *See, e.g.*, FLA. STAT. ANN. § 61.08 (West 2016) (listing factors to be considered in addition to adultery when granting alimony). Thus, adultery that was immaterial to the breakup of a marriage would not be considered in granting alimony, according to *Smith v. Smith*, 378 So. 2d 11, 15 (Fla. Dist. Ct. App. 1979). In *Smith*, Mr. Smith had left the home to live with his girlfriend, and, after a period of separation, Mrs. Smith engaged in sexual relations with another man. *Id.* at 13–15. The court held that Mrs. Smith's adultery could not be considered in light of Mr. Smith's conduct, which was the cause of the separation and subsequent divorce. *Id.* at 15. The court reasoned that "it would be manifestly unfair for one spouse to be allowed to defend against an alimony claim by charging the other spouse with adultery when the spouse not seeking alimony may be equally guilty of the same misconduct." *Id.* (quoting Williamson v. Williamson, 367 So. 2d 1016, 1018 (Fla. 1979)).

67. In the empirical section to follow there were no cases awarding support to husbands. *See infra* notes 63–65 and accompanying text.

68. Margaret F. Brinig & Douglas W. Allen, *'These Boots Are Made for Walking' Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 128 tbl.1 (2000).

69. *See id.* at 128, 139, 149–50 (2000) (analyzing why women tend to file for divorce more than men, as well as the effect of no-fault laws on divorce rates).

70. The cases studied for this analysis are on file with the author.

71. In adultery cases, it is much less likely that women will file in Arizona (.469 to .628, $p < .07$). In Indiana, the difference (.600 to .661) is not statistically significant ($p < .628$), though the direction is the same.

spousal-support scenarios, the general population still feels that adultery should be taken into account in property division and child custody.[72]

Nearly all of the studies of adultery dating back to the post-World War II Kinsey Reports, and including those mentioned by Rhode, base their numbers upon survey data.[73] As Rhode (and all the studies themselves) acknowledges,[74] this reporting may not be entirely accurate, and surveys are particularly susceptible to untruthful answers when sexual behavior by married participants is the stated topic.[75] Twenty years ago Douglas Allen and I examined adultery based on 1992 divorce records from Fairfax County, Virginia.[76] There, in about 8% of the cases (39) either husband or wife mentioned adultery somewhere in the file.[77]

For the purposes of this Review, I sought to use a similar sort of data: that appearing in court documents involving divorces with children.[78] This data—which collects all documents filed in divorces with children from two counties in Arizona and five in Indiana that began in the months of January, April, or September 2008[79]—allows adultery to be inferred from two sources (though legally it is not relevant in either state, and every one of the divorces was no-fault).[80] Adultery may be inferred from the pleadings relating to

72. In Sanford L. Braver & Ira Mark Ellman's *Citizen's Views About Fault in Property Division*, lay respondents to vignettes were more apt to award women than men lower shares of property if they committed adultery during the marriage, though most respondents continued to award equal amounts. Sanford L. Braver & Ira Mark Ellman, *Citizen's Views About Fault in Property Division*, 47 FAM. L.Q. 419, 428–30, 429 tbls. 3 & 4 (2013); *see also* Ashley M. Votruba et al., *Moral Intuitions About Fault, Parenting, and Child Custody After Divorce*, 20 PSYCHOL. PUB. POL'Y, & L. 251, 258–60 (2014) (indicating that citizens adjust custody slightly away from adulterous parents, as well as from those who divorced simply because they got tired of their spouses).

73. RHODE, *supra* note 1, at 8–10.

74. *Id.* at 8.

75. The recent book about children of adulterous parents is equally susceptible to untruthful answers. ANA NOGALES, PARENTS WHO CHEAT: HOW CHILDREN AND ADULTS ARE AFFECTED WHEN THEIR PARENTS ARE UNFAITHFUL app. at 239–40 (2009) (stating that the survey does not claim to be scientifically randomized but that it does report conversations of the children studied). A more reliable account, since it collects peer-reviewed papers on the topic, is Sesen Negash & Martha L. Morgan, *A Family Affair: Examining the Impact of Parental Infidelity on Children Using a Structural Family Therapy Framework*, 38 CONTEMP. FAM. THERAPY 198 (2016). Similarly, harm to children from adultery is explicitly the topic of Lynn D. Wardle, *Parental Infidelity and the 'No-Harm' Rule in Custody Litigation*, 52 CATH. U. L. REV. 81 (2002).

76. Douglas W. Allen & Margaret Brinig, *Sex, Property Rights, and Divorce*, 5 EUR. J.L. & ECON. 211, 226–27 (1998). While some adultery would go unnoticed by the "innocent" spouse because it was and continues to be a ground for divorce, and may affect property settlements and alimony, known adultery might be expected to be raised.

77. *Id.* at 227 tbl.6.

78. This data set is on file with author.

79. Data collection methods and descriptive statistics, as well as other results, are reported in Margaret F. Brinig, *Result Inequality in Family Law*, 49 AKRON L. REV. 471, 484–94, 493 tbl.3 (2016) [hereinafter Brinig, *Result Inequality*].

80. While divorce of a covenant marriage can be for adultery in Arizona, ARIZ. REV. STAT. ANN. § 25-903 (2016), all divorces of couples in the dataset were filed on the grounds of

custody and child support. For example, one father in each state wanted genetic testing of one of the children born during the marriage, alleging that it was not his. In another instance, an Indiana mother asked that the temporary order (in other words, one sought while the marriage was still in effect) include a prohibition against overnight visitation by the children while the husband's girlfriend was in residence. More commonly, however, the child support worksheet indicated that a child with a birthdate during the marriage was not owed support by both parents.[81] While there was not much adultery of this kind in either state (thirty-two of 685 Arizona cases involving children and nine of 310 in Indiana), these cases turn out to be very distinctive.[82] While there was very little spousal support of any amount for any length of time in either state (eleven cases in Indiana and less than 15% of the cases in Arizona), there was no difference in the likelihood of an award or in its amount based on whether there was adultery.[83] There was also no effect at all on parenting time (visitation), nor were the averages of the parents' incomes significantly different in the two kinds of cases.[84] There was a difference in each state in the litigiousness of the parties. I present these statistically significant results below.

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irretrievable breakdown of the marriage. *See id.* § 25-312 (listing the requirements for dissolving marriages). Indiana divorces were all alleged and granted on the basis of "irretrievable breakdown" under IND. CODE § 31-15-1-2 (2016) (though additional grounds exist for a post-marriage felony conviction, impotence existing at the time of the marriage, and incurable insanity). *Id.* Alimony in Arizona is awarded "without regard to marital misconduct," under ARIZ. REV. STAT. ANN. § 25-319(B) (2016), though adultery remains a Class 3 misdemeanor under ARIZ. REV. STAT. ANN. § 13-1408 (2016). In Indiana, adultery or other marital misconduct is not listed among the factors for the granting of spousal support under IND. CODE § 31-15-7-2 (2016) or for departing from an equal division of property under IND. CODE § 31-15-7-5 (2016), unless it affects the dissipation or acquisition of the property. *Id.* § 31-15-7-5(4) (listing the "conduct of the parties during the marriage" as a factor).

81. *See* Brinig, *Result Inequality*, *supra* note 73, at 486 (showing the type of information included in complaints and child support worksheets). Other children of only one parent will not be owed support by the payor but will affect the total duty of support owed by each parent. If children are owed money by a court order, this amount will be subtracted from the available income of the parent. If they are living with a parent, some fraction of that income will be unavailable for the new support order.

82. *See infra* Table 1.

83. *See infra* Table 1.

84. *See infra* Table 1. In a general-population-survey study done in one of the two Arizona counties included in this dataset, Ira Ellman and coauthors found that lay people were apt to slightly (though statistically significantly) lower the amount of custody they would award to an adulterous parent. Votruba et al., *supra* note 72, at 253, 258.

Table 1. Significant Comparisons of Means in Divorces Involving Adultery or None

State	Variable	Adultery in file	No adultery in file	F (significance)
Arizona	Pre-decree motion for protective order	.406	.176	10.770 ($p < .001$)
Arizona	Dissolution after trial	.313	.133	8.137 ($p < .004$)
Arizona	Post-decree motion for increased custody	.250	.112	5.681 ($p < .018$)
Arizona	Post-decree motion for less custody	.219	.092	5.593 ($p < .018$)
Arizona	Post-decree motion for less child support	.344	.185	4.944 ($p < .027$)
Indiana	Post-decree motion for increased custody	.467	.153	10.361 ($p < .001$)
Indiana	Pre-decree request for protective order	.333	.108	6.977 ($p < .009$)
Indiana	Post-decree request for protective order	.133	.031	4.444 ($p < .036$)

What do these numbers mean? In Arizona, it is more than twice as likely in the adultery cases that couples will be unable to resolve their marital disputes before resorting to trial and similarly more likely that a spouse will allege domestic violence. As painful and expensive as this litigation might be for parties, it is also twice as likely that there will be subsequent requests by one of the parties to decrease or increase custody and twice as likely that the payor parent will attempt to decrease the amount of child support that parent must pay.[85] In Indiana, post-decree motions for increased custody were three times more likely, and post-divorce protective orders were more than four times as likely in the adultery-indicated cases.

Despite the lack of legal consequences,[86] adultery cases are particularly costly in terms of increased litigation, especially custody litigation, and are

85. While fathers had primary custody some of the time and shared custody equally in about a quarter of the cases, they paid child support about two-thirds of the time.

86. *Cf.* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 81 (arguing that the abolition of fault-divorce grounds shifted hostility and perjury to other parts of the process).

associated with pre-divorce allegations of domestic violence in both states and post-decree allegations of domestic violence in Indiana.[87]

Trust matters. Deep into presidential-election season, American voters were skeptical that they could trust the candidate nominated by either major political party.[88] Perhaps this is not surprising, given that Americans don't trust the government,[89] Congress, banks, or even organized religion these days.[90] If institutions cannot be trusted, how important is it that we maintain trust in individuals, especially those with whom we have committed personal relationships?[91]

Marriage, as opposed to cohabitation, can be characterized by its relative permanence, its unconditional love, and its status as an institution (receiving of public and private support).[92] In addition to the equality that gay and lesbian couples sought and received from the Supreme Court in *Obergefell*,[93]

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87. Not surprisingly, pre- and post-order domestic violence is correlated (.198, $p < .01$).

88. *See, e.g.*, Amy Chozick & Megan Thee-Brenan, *Poll Finds Voters in Both Parties Unhappy with Their Candidates*, N.Y. TIMES (July 14, 2016), http://www.nytimes.com/2016/07/15/us/politics/hillary-clinton-donald-trump-poll.html?_r=1 [https://perma.cc/AW9D-2PKZ] (reporting that large majorities of American voters view neither Hillary Clinton nor Donald Trump as being honest or trustworthy).

89. *See Beyond Distrust: How Americans View their Government*, PEW RES. CTR. 18 (Nov. 23, 2015), http://www.people-press.org/files/2015/11/11-23-2015-Governance-release.pdf [https://perma.cc/SXL8-ZBGZ] (reporting that Americans' trust in the government is at historically low levels, with just 19% of Americans reporting that they trust the federal government "to do what is right 'just about always' or 'most of the time'").

90. *See, e.g.*, Kenneth T. Walsh, *Americans Have Lost Confidence In Everything*, U.S. NEWS & WORLD REP. (June 17, 2015), http://www.usnews.com/news/blogs/ken-walshs-washington/2015/06/17/americans-have-lost-confidence-in-everything [https://perma.cc/3RCJ-8EYC] (citing Jeffrey M. Jones, *Confidence in U.S. Institutions Still Below Historical Norms*, GALLUP (June 15, 2015), http://www.gallup.com/poll/183593/confidence-institutions-below-historical-norms.aspx [https://perma.cc/N2JN-KZCJ]) (reporting that Americans' confidence in Congress is at 8%, in banks is at 28%, and in church or organized religion is at 42%).

91. Jane Larson wrote years ago that:

> [I]t surprised me to learn in researching this Article that higher standards of honesty and fair dealing apply in commercial than in personal relationships. One response to the dilemma of intimate responsibility has been to silence and devalue individuals who make stifling personal claims on the independence and mobility of those who possess privilege and power. Because of the gendered history of romantic and sexual relationships, it has tended to be men in our society who have sought relational freedom, and women whose interests have been compromised by reliance on intimate relationships.

Jane E. Larson, *'Women Understand So Little, They Call My Good Nature 'Deceit' A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 471–72 (1993). For a discussion of the problems with efficient breach in contract, which pose similar threats to trust, see Gregory Klass, *Efficient Breach*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 362, 369 & 367 n.14 (Gregory Klass et al. eds., 2014).

92. MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 6–7 (2000).

93. Obergefell v. Hodges, 135 S. Ct. 2584, 2593, 2608 (2015).

and to the numerous statutory benefits marriage grants,[94] married couples gain the commitment to sexual monogamy and permanence of marriage that, in turn, promotes trust. It is that trust that catalyzes the many fruits of marriage because, in a word, it signifies the production of social capital.

Robert Putnam, most famous for his *Bowling Alone*,[95] bemoans the lack of Americans' involvement in various institutions because of people's need for social capital.[96] And many writers have noted that Western societies have increasingly placed heavy burdens on marriage to supply all the emotional and psychological supports that once also came from extended families and institutions such as religious and social organizations.[97]

Arguably, it is with the failing of trust that marriages begin to crumble.[98] Instead of believing that over very long time horizons all will even out between them,[99] spouses revert to 'doing the minimum' to satisfy their marital obligations and increasingly expect to be rewarded over the short term for whatever effort they put in.[100] Adultery breaches that trust.

The question of how to encourage the kind of trust people want (and need) in marriage is a difficult one. It is far easier to be critical of the faults posed by existing laws—as Rhode does, and does well, in this book—than to figure out how society would best function without those laws. This isn't a

94. *E.g.*, I.R.C. § 24 (2012) (The Child Tax Credit); *see also Obergefell*, 135 S. Ct. at 2601 (listing the benefits of marriage, including tax benefits, property rights, adoption rights, hospital access, and medical authority, among others).

95. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

96. *Id.* at 15–26 (discussing the decline in organizational and institutional involvement and the benefits of social capital that can be gained from such involvement).

97. *See, e.g.*, FRANCES K. GOLDSCHEIDER & LINDA J. WAITE, NEW FAMILIES, NO FAMILIES?: THE TRANSFORMATION OF THE AMERICAN HOME 7–12 (1991) (discussing modern trends and changes in the family structure and traditional gender roles between husbands and wives); JESSICA WEISS, TO HAVE AND TO HOLD: MARRIAGE, THE BABY BOOM, AND SOCIAL CHANGE 127–39 (2000) (discussing the shifting emphasis in middle-class marriages from the married couple themselves, in the several decades leading up to World War II to the family as a whole in the 1950s).

98. Margaret F. Brinig & Steven L. Nock, *'I Only Want Trust' Norms, Trust, and Autonomy*, 32 J. SOCIO-ECON. 471, 473 (2003). *See also* Liana C. Sayer & Susanne M. Bianchi, *Women's Economic Independence and the Probability of Divorce: A Review and Reexamination*, 27 J. FAM. ISSUES 906, 929 tbl.3, 932 (2000) (focusing on women's emotional dissatisfaction with the marriage as a predictior of divorce).

99. Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1981 (2000) (correlating a higher likelihood of divorce with knowledge of how much housework one partner does, because partners that are unable to accurately estimate their respective shares of housework can satisfactorily assume that the distribution will even out in the long run); *see also* Wardle, *supra* note 70, at 122 ("Marriage requires a long view—eternal is the word that lovers like to use—a view that looks beyond the dull daily duties and sometimes-difficult periods of family life.").

100. Shelly Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, 101 J. POL. ECON. 988, 1007–08 (1993) (suggesting that marriage is better thought of as a cooperative game, rather than a noncooperative alternating-offer game).

new problem—the Hart/Devlin debate in the 1960s[101] highlighted contemporaneous competing positions on whether or not homosexual conduct should remain a crime and spurred a tremendous body of literature. One recent articulation of a no-crime-unless-direct-harm-to-another principle is Cass Sunstein's recent paper,[102] finding, as Rhode notes,[103] that of all the 'morals offenses, adultery poses the most difficult problem for continued constitutional viability.[104] With many morals offenses, it is hard to find a victim, though, as in the case of commercial sex, there may be real questions about consent. With uncondoned adultery, there is not only the 'innocent' spouse, but also, many times, children who lose by it.

Adultery harms children. Should their parents divorce, they will fare, as do the majority of children of divorce, less well than children of families whose parents remain together,[105] and almost certainly will suffer greater

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101. *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 22 (1965) (suggesting that criminal law is also for the protection of society, "the institutions and the community of ideas, political and moral, without which people cannot live together"); H.L.A. HART, LAW, LIBERTY AND MORALITY 1–13 (1963) (collecting lectures delivered at Stanford that argued, based on John Stuart Mill's *On Liberty*, only direct harm to others should be criminalized). The debate was discussed in Peter Cane, *Taking Law Seriously: Starting Points of the Hart/Devlin Debate*, 10 J. ETHICS 21 (2006).

102. *See generally* Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27. For an argument that morals-based laws should retain some validity when tied to demonstrable facts, see Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1305 (2004). Goldberg specifically considers the Hart/Devlin debate. *Id.* at 1235 n.9.

103. RHODE, *supra* note 1, at 70.

104. *See* Sunstein, *supra* note 104, at 35 (noting that the court has been unwilling to expand heightened scrutiny to certain groups in the past and that the court ruling to expand the scope of heightened scrutiny in the future would be a seemingly unlikely innovation).

105. *See, e.g.*, Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across Three Generations*, 67 J. MARRIAGE & FAM. 191, 198–99 (2005) (finding lower education, more marital discord, and weaker ties with both mothers and fathers among the grandchildren of divorced couples). For a discussion of the intergenerational impact of divorce, see also Valarie King, *The Legacy of a Grandparent's Divorce: Consequences for Ties Between Grandparents and Grandchildren*, 65 J. MARRIAGE & FAM. 170, 170 (2003). For specific discussions on the impact of divorce on trust, see Stacy Glaser Johnston & Amanda McCombs Thomas, *Divorce Versus Intact Parental Marriage and Perceived Risk and Dyadic Trust in Present Heterosexual Relationships*, 78 PSYCHOL. REP. 387, 389 (1996) (reporting a fear of being rejected and a lack of trust in children of divorce); Valarie King, *Parental Divorce and Interpersonal Trust in Adult Offspring*, 64 J. MARRIAGE & FAM. 642, 648, 650 (2002) (indicating that divorce affects the child's trust of fathers more than mothers once the quality of parent–child relationships is taken into account); Daniel J. Weigel, *Parental Divorce and the Types of Commitment-Related Messages People Gain from Their Families of Origin*, J. DIVORCE & REMARRIAGE, no.1/2, 2007, at 15, 20, 28, 22 tbl.1 (revealing that college students of divorced parents were more likely to show lack of trust and fidelity and less commitment to their current relationships, as messages learned from their parents). Similarly, considering the effect of their parents' divorce on children's commitment are Renée Peltz Dennison & Susan Silverberg Koerner, *A Look at Hopes and Worries About Marriage: The Views of Adolescents Following a Parental Divorce*, J. DIVORCE & REMARRIAGE, no.3/4, 2007–2008, at 91, 103 (describing children's anxiety about their own marital future as mirroring their own parents' marital troubles) and Susan E. Jacquet & Catherine A. Surra, *Parental Divorce and Premarital Couples: Commitment and Other Relationship Characteristics*, 63 J. MARRIAGE &

financial strains because of the division into two households.[106] Additionally, in nearly all cases children of adultery will be disadvantaged by increased money spent by their parents litigating child custody and child support, as seen above.[107] These children will be further harmed in those cases involving abuse,[108] whether directed at them or at the adulterous spouse, and, as seen above, there seems to be more violence involved when there is adultery.[109]

While the evidence is not as conclusive, there are certainly correlations between being a child of adulterous parents and suffering short- and long-term psychological and relationship consequences regardless of what happens to the parental marriage.[110] Therefore, the remedies I suggest would benefit the children, if any, rather than the wronged spouse.[111] Many states allow an adjustment to be made to guidelines-required child support for 'extraordinary' expenses,[112] and I would allow such an adjustment to benefit

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FAM. 627, 632 tbl.2, 63435 (2001) (highlighting the pessimism of women from divorced families about their ability to trust a future spouse's benevolence). For a report that children in stepfamilies are particularly likely to leave home early and not return, see Frances K. Goldscheider & Calvin Goldscheider, *The Effects of Childhood Family Structure on Leaving and Returning Home*, 60 J. MARRIAGE & FAM. 745, 751 (1998).

106. *See generally* Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485 (1985) (examining longitudinal data and concluding that although divorce tends to yield adverse economic consequences for those involved, the economic status of women who remarry is favorable as compared to women who remain married).

107. Litigation itself is painful. '[T]he burden of litigating can itself be, 'so disruptive of the parent–child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated. Troxel v. Granville, 530 U.S. 57, 75 (2000) (quoting 530 U.S. at 101 (Kennedy, J., dissenting)).

108. *See generally* Margaret F. Brinig et al., *Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases*, 52 FAM. CT. REV. 271 (2014) (summarizing the relevant literature on intimate partner violence as it relates to custody proceedings).

109. *See supra* note 87 and accompanying text.

110. *See supra* note 85–87 and accompanying text. *Cf.* William G. Axinn & Arland Thornton, *The Influence of Parents' Martial Dissolutions on Children's Attitudes Toward Family Formation*, 33 DEMOGRAPHY 66, 73–74 & tbl.3 (1996) (suggesting that children of divorce are more likely to prefer cohabitation than marriage); Andrew J. Cherlin et al., *Parental Divorce in Childhood and Demographic Outcomes in Young Adulthood*, 32 DEMOGRAPHY 299, 310 (1995) (same); Judith Treas & Deirdre Giesen, *Sexual Infidelity Among Married and Cohabiting Americans*, 62 J. MARRIAGE & FAM. 48, 51 (2000) (concluding that infidelity is more likely among cohabitating partners than married partners).

111. This adjustment will only work when the adulterous parent has enough income to pay child support. Some research indicates, however, that adultery is positively correlated with income. Adrian J. Blow & Kelley Hartnett, *Infidelity in Committed Relationships II: A Substantive Review*, 31 J. MARITAL & FAM. THERAPY 217, 225 (2005). Some research also suggests that there is more likely to be infidelity in couples with children. Amy M. Burdette et al., *Are There Religious Variations in Marital Infidelity?*, 28 J. FAM. ISSUES 1553, 1565–66 & tbl.2 (2007). Generally about 50% of divorcing couples have minor children. *See, e.g.*, OHIO DEP'T OF HEALTH, MARRIAGE AND DIVORCE STATISTICS (2011), http://www.odh.ohio.gov/healthstats/vitalstats/mrdvstat.aspx [https://perma.cc/Q2Q3-SBM5] (showing that 47.2% of divorces involved minor children).

112. *See, e.g.*, ARIZ. DEP'T OF ECON. SEC., ARIZONA CHILD SUPPORT GUIDELINES 9 (2015), https://des.az.gov/sites/default/files/2015CSGuidelinesRED.pdf [https://perma.cc/E9TZ-GHJ3] (adopted by the Arizona Supreme Court). It is typically made today for camps, disabled children's

the children of adultery to pay for such things as counseling that the adulterous parent's conduct may well necessitate.[113] Further, in those states where tuition for college education may be ordered at divorce to be split between parents and children,[114] I would have the adulterous parent pick up the child's portion, if financially feasible.

Old custody rules favoring innocent spouses[115] might have had a point here. As the Supreme Court has written, parents are presumed to act in the best interests of their children because powerful ties of affection lead them to do so.[116] While their judgments dealing with childrearing are not to be second-guessed lightly,[117] there may be times when parents will put their own self-interested desires first.[118] Historically, fault grounds for divorce have disproportionately penalized women, as Rhode implies,[119] especially since they have been primary custodians the vast majority of the time under the "best interests" standard.[120] But engaging in adultery, almost by definition, puts one's own interests first. In a time when both parents increasingly have

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medical treatment, and sometimes private schools or sports activities for exceptionally talented children. *See, e.g.*, JUDICIAL BRANCH OF IND., INDIANA CHILD SUPPORT RULES AND GUIDELINES § 8 (2016), http://www.in.gov/judiciary/rules/child_support/ [https://perma.cc/KCV5-KUL4].

113. Such adjustment is arguably made by states that require college education to be paid for by divorcing parents when it is not a requirement for parents that remain together. *See, e.g.*, *In re.* Marriage of Crocker, 971 P.2d 469, 476 (Or. Ct. App. 1998), *aff'd*, 22 P.3d 759 (Or. 2001) (upholding such a statute despite an equal protection challenge).

114. *See* JUDICIAL BRANCH OF IND., *supra* note 104, § 8 cmt.b ("The authority of the court to award post-secondary educational expenses is derived from IND. CODE § 31-16-6-2. It is discretionary with the court to award post-secondary educational expenses and in what amount."). *See* IND. CODE § 31-16-6-2(1) (2016) (stating that a support order "may also include" the listed support). In making such a decision, the court should consider postsecondary education to be a group effort, and weigh the ability of each parent to contribute to payment of the expense, as well as the ability of the student to pay a portion of the expense. *See* IOWA CODE § 598.1(8) (2016) (stating that either party may be required to contribute to a child's postsecondary education).

115. RHODE, *supra* note 1, at 44–46.

116. Parham v. J.R., 442 U.S. 584, 602 (1979).

117. Troxel v. Granville, 530 U.S. 57, 72–73 (2000) (recognizing a parent's "fundamental right to make decisions regarding children's care, custody, and control," on which a court may not infringe simply because it believes a better decision could be made).

118. *See* Prince v. Massachusetts, 321 U.S. 158, 165–70 (1944) (discussing the tension between the protection of parents' rights and children's rights to be protected and provided opportunities for growth, and noting the state's right to interfere with parents' rights where necessary to protect such rights of children).

119. *See* RHODE, *supra* note 1, at 41–42, 46 (describing historical manifestations of the so-called double standard between men and women in divorce proceedings).

120. *See, e.g.*, Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 235 (stating that statutes that place parents on "equal footing" tend to yield a "substantial preference" for the mother); Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1632, 1637, 1667 (2007) (stating that female plaintiffs are more likely than male plaintiffs to gain child custody in a no-fault system).

postdivorce claims to equal parenting time,[121] adultery, particularly when the children find out about it during the course of the marriage, may be an indication that parenting isn't the first priority of the adulterer.

Criminalizing conduct is the strongest way of expressing social disapproval for behavior. Of course keeping an offense criminal bears its own costs in terms of enforcement and expenditure on the court and corrections systems.[122] In the case of same-sex relationships, stigmatizing those who engaged in them because it was criminal had lasting and unfortunate effects.[123] But as a society, do we want to continue to stigmatize adulterers? A related question is whether criminal law does deter[124]—the subject of a whole literature in law and economics, and one where academics wonder particularly whether criminal law deters 'crimes of passion.'[125] Like Sunstein, I believe the case is a hard one, though I am not at all a fan of retaining 'heartbalm' actions[126] and I realize that retaining some role for fault in divorce, contrary to what I thought twenty years ago, disadvantages women. I can therefore understand the reluctance of states to abolish their

121. *See, e.g.*, Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 365–66 (2009) (stating that joint custody arrangements, which entail equal legal parenting authority, have increasingly become the norm).

122. It also forces participants underground into black markets, which have additional costs. *See generally* PETER REUTER, U.S. DEP'T OF JUSTICE, THE ORGANIZATION OF ILLEGAL MARKETS: AN ECONOMIC ANALYSIS (1985) (exploring the formation, function, and costs of black markets).

123. In fact, legalization of same-sex marriage has worked to enhance well-being for gays and lesbians regardless of whether they in fact marry. *See generally* Ellen D.B. Riggle et al., *Impact of Civil Marriage Recognition for Long-Term Same-Sex Couples*, SEXUALITY RES. & SOC. POL'Y http://link.springer.com/article/10.1007/s13178-016-0243-z [https://perma.cc/L9SB-FQQB] (discussing a study that indicates an increase in the perceived well-being of gays and lesbians following the legalization of same-sex marriage); *cf.* Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643, 662, 671 (2001) (discussing how the criminalization of sodomy fueled negative social norms regarding homosexuality in South Africa).

124. *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (discussing, among other things, the varying effectiveness of punishment as a means to deter).

125. *See, e.g.*, Brian Forst, *Prosecution and Sentencing*, *in* CRIME 363, 376 (James Q. Wilson & Joan Petersilia eds. 1995) (discussing, generally, the mechanics of deterrence as well as the three purposes underlying deterrence: special deterrence, incapacitation, and retribution); *see also* Xuemei Liu, *An Effective Punishment Scheme to Reduce Extramarital Affairs: An Economic Approach*, 25 EUR. J. L. & ECON. 167, 174 (2008) (suggesting that prohibition of adultery is not a deterrent); Eric Rasmusen, *An Economic Approach to Adultery Law*, *in* THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE 70, 84 (Antony W. Dnes & Robert Rowthorn eds., 2002) (suggesting restoring the legal effect of adultery in divorce settlements and restoring its applications in tort law (citing LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 283–86 (1998))).

126. *See* Brinig, *supra* note 13, at 204–05 (discussing the theory behind breach of promise to marry). I also have noted in passing that the status of lawyers increases as they become less involved with "sordid' affairs, something that helped fuel the no-fault divorce and collaborative divorce movements. BRINIG, *supra* note 92, at 213–14.

criminal statutes,[127] and why, consistent with my argument of the importance of fidelity to religious groups and in religious texts, both religious affiliation and attendance seem to reduce adultery.[128] Arguably, policing should be up to these communities, and for childless couples that would be my solution.

127. Deborah L. Rhode, *Adultery: An Agenda for Legal Reform*, 11 STAN. J.C.R. & C.L. 179, 184–85 (2015) (listing arguments why one would not want to rock the legislative boat by decriminalizing adultery). *See generally* JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127 (2014) (discussing the decriminalization of adultery and the persistence of adultery statutes in some states).

128. *See* Burdette et al., *supra* note 111, at 1555, 1565 tbl.2, 1571–72 (showing correlations using the General Social Survey).

Deference, Power, and Emerging Security Threats

THE AGE OF DEFERENCE. By David Rudenstine. New York, New York: Oxford University Press, 2016. 344 pages. $29.95.

THE FUTURE OF VIOLENCE: ROBOTS AND GERMS, HACKERS AND DRONES. By Benjamin Wittes & Gabriella Blum. New York, New York: Basic Books. 336 pages. $29.99.

Gregory S. McNeal*

Introduction

Discussing tradeoffs between liberty and security in matters of national security, and the proper role of the Court in counterbalancing the Executive Branch are not new territory in legal scholarship. Nevertheless, two recent books on these topics address these issues from very different perspectives, but together provide a launching point for a discussion about how to structure the whole of government in light of new threats. David Rudenstine's work, *The Age of Deference*,[1] is a tour de force of constitutional history. Rudenstine recounts the myriad cases involving surveillance, civil liberties, secret courts, and secret laws that have evolved since World War II. Through this historical overview, Rudenstine finds that the courts have not only deferred to the Executive, but have entrenched their position of deference. Rudenstine's focus is inward, looking at the structure of our balance-of-power system and finding over the span of a seven-decade period of time that the courts have come up largely lacking—his prescription is a more active judiciary.

Benjamin Wittes and Gabriella Blum, on the other hand, cast much of their attention on the emergent threats that the nation faces. In *The Future of Violence: Robots and Germs, Hackers and Drones*,[2] Wittes and Blum paint a picture of a future filled with many threats, and a society replete with many vulnerabilities. Drones, biological weapons, and cybertechnology are advancements that challenge the security of the nation and endanger lives. Their prescription is to embrace governmental surveillance and increase regulation—their view is not one of liberty and security tradeoffs in the

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1. DAVID RUDENSTINE, THE AGE OF DEFERENCE (2016).

2. BENJAMIN WITTES & GABRIELLA BLUM, THE FUTURE OF VIOLENCE: ROBOTS AND GERMS, HACKERS AND DRONES (2015).

calibration of effective security policy but rather one in which democracies should review and revisit their policies from time to time.[3]

This Review attempts to harmonize and draw insights from these two very different but important books. They do not fit neatly together, but the ideas drawn from them can provide a way of thinking about emerging threats and the structure of American government. The Review proceeds in three parts. Part I describes Rudenstine's book, highlighting what he deems to be the 'Age of Deference' and what the consequences of that deference are.[4] This Part also addresses his recommendations for a judiciary that is far more involved in reviewing cases and controversies that arise out of national security-related matters. Part II describes the work of Wittes and Blum, attempting to situate their views on emergent threats and the powers, regulations, and structures that are necessary to counter such emergent threats. Part III attempts to harmonize the themes presented in both works, ultimately arguing that a less deferential judiciary and a more protective national security state both require significant congressional involvement if rights are to be protected.

I. The Age of Deference

Rudenstine paints a compelling picture of a judiciary that for seven decades has slowly given up on engaging with the other branches of government on matters related to national security. From the outset, Rudenstine seeks to convince the reader that the Age of Deference is a 'serious and very harmful distortion in the governing scheme, and the Supreme Court and the judges who preside over the lower federal courts need to strike a new balance in cases implicating national security so the executive is accountable, individuals secure relief, and the rule of law is upheld.'[5] Judicial deference has not, in Rudenstine's mind, come about as a function of the structure of the Constitution, nor has it come about 'as part of a comprehensive jurisprudential plan;" rather, 'judicial voices—one by one—pointed the way, and in time profound judicial deference took root and sprouted across a very broad doctrinal landscape.'[6]

Why has deference come about? In his mind there is no true way to explain it, but to Rudenstine, the consequences are clear.

> [T]he state secrets privilege is supported in large part by the claim that judges lack the competence to decide national security issues. The

3. *See id.* at 127–29 (arguing that functional democracies may fail to optimize their blending of security and liberty interests by missing opportunities that "enhance both liberty and security,' and emphasizing that functional democracies may choose different liberty–security "blends' and revisit that balance from time to time).

4. RUDENSTINE, *supra* note 1, at xiv.

5. *Id.* at 23.

6. *Id.* at xiv–xv.

> demise of the *Bivens* doctrine is mainly supported by the claim that courts should respect Congress's failure to pass a statute that authorizes a remedy and thus refrain from implying a remedy. The quasi-immunity doctrine is mainly upheld on the ground that the nation is better off when senior officials are immunized from liability and thus are more inclined to vigorously discharge their responsibilities. Some judges today argue that the law of standing that closes the courthouse door is warranted by separation-of-powers considerations.[7]

Are there any benefits to judicial deference? Security is not enhanced, Rudenstine argues, as he sees 'little to no evidence that such extreme judicial deference substantially protects this security.'[8] In fact, not only has security not been enhanced, but there is, in Rudenstine's view, very little hope that the preference for deference amongst jurists will ever subside because the national security threats and interests that have prompted deference 'are unrelenting and unending, and as a result, there is no end in sight to the era of judicial abdication.'[9]

Stated more clearly, Rudenstine notes:

> Judicial deference in national security cases rests on a dominating juristic mind driven by an unbending way of thinking that resists serious engagement over the merits of its premises. As a result, the legal doctrines that insulate the executive in cases implicating national security have expanded incrementally over many decades, gathering precedent after precedent in support of the mindset that in turn further insulates the mindset from a reexamination of its premises. This unfortunate dynamic makes it unlikely that the mindset will in fact be reconsidered before many of today's judges leave the bench and are replaced by judges not afraid to reassess accepted premises.[10]

Harms have flowed from judicial deference as well: Rudenstine claims that 'the Court's deferential stance has substantially harmed the nation—and done so needlessly—by compromising individual liberty, the rule of law, and the democratic process.'[11] A functioning democracy requires 'the Supreme Court as a third and coequal branch of government that functions as a meaningful check on the powers of the presidency and the Congress, and as the most important governing body that upholds individual liberty and the national commitment to the rule of law.'[12]

Rudenstine doesn't hold out much hope for a change in the judiciary's deferential mindset either:

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7. *Id.* at 293.
8. *Id.* at 4.
9. *Id.*
10. *Id.* at 307.
11. *Id.* at 12.
12. *Id.*

> The fact that the high court's attitude toward the privilege seems so impenetrable to change, especially given that the privilege is so convincingly criticized, is best understood as a manifestation of a lengthy era of judicial deference. For decades, the Supreme Court has adopted a hands-off attitude toward the executive in national security cases, and although there are notable exceptions to this pattern, those exceptions remain just that—exceptions. The general rule is one of deference, and while the past suggests that now and then a majority of justices will break ranks with tradition, all signals indicate that no one currently on the Court will challenge the general rule of deference in the near future. As a result, there is little reason to expect that the Court will any time soon revise the privilege, and moreover, even if the Court did revise the privilege, absent a substantial shift in the Court's deferential disposition, the balloon effect created by the cluster of doctrines of deference would sharply minimize the importance of the restructuring.[13]

In light of this dim outlook, how then does Rudenstine believe change may come about? The bulk of his book focuses on, chapter by chapter, setting up examples of judicial deference, demonstrating ways the courts have erred, and then suggesting alternate ways in which jurists can chip away at judicial deference in each of its manifestations. His goal is courts that 'can be properly respectful of the executive and the Congress in national security matters'—not of all matters—"while still exercising meaningful judicial review, and not in a way that represents judicial supremacy, but rather by tweaking the 'broad spectrum of doctrinal choices [that exist] between judicial abdication and usurpation.'[14]

Rudenstine writes:

> Arguing for a different perspective on the question of deference is not premised on an idealization of the judiciary. Instead of idealizing the judiciary, the evidence and the analysis set forth herein portray the judiciary in a very sobering and disturbing light. Nonetheless, the Supreme Court should reshape the doctrines of deference to assure more meaningful judicial review, and this can be accomplished without replacing judicial abdication with judicial usurpation. No one should want government by the judiciary. At the same time, no one should want government without meaningful judicial review. Fortunately, these are not the only alternatives. There is a substantial spectrum separating abdication and usurpation that permits the Court to exercise a form of review that is both meaningful and respectful.[15]

Deference, in Rudenstine's view, is so problematic because in many instances it forecloses judgment, which, to him, is a decision just as

13. *Id.* at 106–07.
14. *Id.* at 23.
15. *Id.* at 12–13.

consequential as a decision on the merits. It 'vests the executive with judicially unreviewable discretion on the matter at hand, and that has serious, harmful consequences. As a result, it is more illusion than reality that a judge completely avoids responsibility in cases implicating national security by employing deferential doctrines to dismiss a case.'[16] In light of this view of reality, Rudenstine believes that we should dispense with the fiction of a detached court not making a decision in matters that some might think are best left to the Executive because the decision not to make a judgment on the merits is one that effectively empowers the Executive.[17]

Much of Rudenstine's proposed shift away from judicial deference requires concerted action from disconnected actors. It is a well-thought-out and purposeful argument that could be acted upon by judges who read his work or advocates who try to chip away at deference wherever they may see it. But that is a generation-long slog and does not present a guarantee of change. In this respect, Rudenstine is at his best when he recognizes—albeit in passing—that Congress has an important role to play in the debate over deference.

For example, when Rudenstine speaks of the shared responsibilities across branches of government, he notes that

> [t]here is merit to the claim that the courts are not the only institution that can check executive power, and there is special merit to the claim that Congress has far more potential authority to check the executive than do the courts. But conceding those important points is not the end of the analysis. In the constitutional scheme, courts have primary responsibility that neither of the other branches of government can perform effectively to provide wronged individuals with a remedy.[18]

In fact, where Rudenstine finds courts lacking in their evaluation of the Executive in national security matters, the answer is oftentimes not a clarification or expansion of the role of the courts but greater clarity in the specifics of the law courts analyze. In Rudenstine's view, given the power to interpret a statute, courts tend to interpret them in favor of officials involved in national security decisions and to the detriment of those aggrieved by the government's national security officials.[19] Why? To Rudenstine, the answer is ideological. He writes,

> The fact that the Court did not apply the standard to protect individual rights as it does to the exercise of federal power suggests that the

16. *Id.* at 299.

17. *See id.* at 298–99 (asserting that employing a doctrine of deference is in itself a decision to vest the Executive with judicially unreviewable discretion, and it is therefore "more illusion than reality that a judge completely avoids responsibility" for national security matters).

18. *Id.* at 306.

19. *See id.* at 235–37 (contrasting the divergent legal standards in quasi-immunity doctrine and antiterrorism cases to illustrate the Supreme Court's deference to executive power).

> immunity doctrine rests on more than a balance of federal power versus individual remedies and is driven by a more broadly based ideological commitment to depressing the scope of rights and remedies while immunizing executive power from accountability.[20]

But if we recognize that courts may have some ideological or analytical bent that leads them toward deferring to the Executive when faced with ambiguity, isn't stripping away that ambiguity more likely to yield changes than hoping that judges change their ways? After all, as Rudenstine notes, 'Congress has substantial control over the jurisdiction of the courts"[21] and can use that control for both good and ill. For example,

> In times of stress, the Court is not only vulnerable, to some extent, to the emotions of our people, but also to action by Congress in restricting what that body may consider judicial interference with the needs of security and defense. Following the Civil War, Congress actually exercised its constitutional powers to provide for the rules governing the appellate jurisdiction of the Supreme Court, for this very purpose.[22]

Importantly, Rudenstine doesn't dismiss the role of Congress; in fact, he laments that body's lack of action, noting that

> it is gravely disappointing that Congress so frequently fails to assert its own responsibilities over specific military and foreign affairs as well as more general national security matters. But no matter what Congress may do in the future to rebalance authority and responsibility with the executive over military and foreign affairs matters, it cannot fulfill the special role in the governing scheme the Supreme Court is assigned. Thus, it is the Supreme Court that is ultimately responsible for stating what the law is, and because of that responsibility the Court has ultimate responsibility for assuring that the United States is a 'government of laws, not of men. '[23]

This is all true, but then Rudenstine continues by minimizing the role of Congress by stating, 'No matter how much oversight the legislature exercised over the executive and the functioning of the National Security State, the legislature cannot fulfill this exceptionally important function within the governing scheme. '[24]

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20. *Id.* at 237.

21. *Id.* at 302.

22. *Id.* at 302 n.15 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 192 n.29 (1962)).

23. *Id.* at 315.

24. *Id.*

Congress doesn't just exercise oversight; Congress can create processes and procedures that bind courts and the Executive.[25] Congress can force structure around doctrine and can even force a conversation about what deference doctrines are constitutionally mandated.[26] Courts can set the circumstances for Congress to create such structure, too, as was seen in *Olmstead*;[27] Rudenstine explains: 'The consequence of [*Olmstead*] was to leave the regulation of electronic surveillance to the Congress and the executive. Indeed, the high court all but invited the Congress to enact legislation addressing the matter by making evidence secured from a wiretap inadmissible into evidence in a federal criminal court. '[28]

In other contexts Congress plays an important role. One example is in the national security-surveillance context, where Congress

> impos[es] on the NSA responsible legislative boundaries and exercis[es] meaningful oversight to assure that the NSA activities remain within constitutional and legislative boundaries. But Congress alone cannot assure that NSA activities remain lawful. The courts have an important role to fulfill in keeping executive surveillance consistent with the law of the land.[29]

While Rudenstine is correct that Congress alone can't keep the Executive at bay, in arguing for judges to reject deference he sometimes leaves the reader wondering if he believes that the judiciary alone can solve its problems. For example, he writes about how the Court in *Schweiker v. Chilicky*[30] narrowed the 'special factors' test to include congressional silence, and quotes from the dissent:

> The mere fact that Congress was aware of the prior injustices and failed to provide a form of redress for them, standing alone, is simply not a 'special factor counseling hesitation' in the judicial recognition of a remedy. Inaction, we have repeatedly stated, is a notoriously poor indication of congressional intent, all the more so where Congress is legislating in the face of a massive breakdown calling for prompt and sweeping corrective measures.[31]

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25. *See, e.g.*, Louis Fisher, *Judicial Review of the War Power*, 35 PRESIDENTIAL STUD. Q. 466, 470 (2005) (noting that the language in early Supreme Court cases implied that "any act of war, to be entitled to judicial recognition as such, must be ascribed to congressional authorization").

26. *See* Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 990–92 (1982) (chronicling congressional attempts to limit judicial jurisdiction); *see also* C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT 1957–1960, at 25–27 (1973) (describing the "weapons" available to Congress when it "undertakes to engage in controversy with the Supreme Court").

27. Olmstead v. United States, 277 U.S. 438 (1928).

28. RUDENSTINE, *supra* note 1, at 133.

29. *Id.* at 149–50.

30. 487 U.S. 412 (1988).

31. RUDENSTINE, *supra* note 1, at 216 (quoting Schweiker v. Chilicky, 487 U.S. 412, 440 (1988) (Brennan, J., dissenting)).

Rudenstine's view is that the conservative members of the Court were hostile to the *Bivens* remedy, and that some members of the Court, by adopting a less proactive posture, left 'the future of the *Bivens* doctrine in the hands of those who wanted to relegate the doctrine to the dustbin.'[32] This critique though, seems to have less to do with any particularly deferential stance on the part of the judiciary, and more to do with displeasure about the outcome of the case. After all, had Congress legislated and created some more clear guidelines for the judiciary to follow, the acceptable bounds of judicial action, and by virtue of that, inaction, would be necessarily constrained. Stated differently, if Congress acts to give guidance to the courts, we will likely see fewer opportunities for juridical freelancing into doctrines of deference.

Rudenstine almost admits as much when he writes, quoting the Court in *Malesko*,[33] 'it is the Court's 'primary duty' to 'apply and enforce settled law, not to revise that law to accord with our own notions of sound policy.'[34] Thankfully, Rudenstine rarely makes detours like this, where it seems he is more concerned with the outcome of a case than how doctrines of deference lead to those outcomes. For example, in an illustrative passage where Rudenstine compares the Court's analysis of immunity to the Court's interpretation of the scope of a criminal statute, he makes clear the point that sometimes the Court hedges in favor of the government over defendants. He writes:

> [T]he idea that Congress makes law, not the courts, and that in the absence of a statute authorizing the courts to grant a damage remedy the court should refrain from crafting a remedy. If this analysis were applied to the executive's claim of quasi-immunity, the Supreme Court should have reached the opposite result. Instead of exercising its own common law powers to fashion a quasi-immunity defense, the Court should have stayed its hand on the ground that Congress makes the nation's law.[35]

Taken together, Rudenstine's description of the costs of judicial deference in matters of national security is compelling. However, his prescription seems incomplete. Relying on judges to change their ways when the root of their deferential stance may be grounded in timidity, ideological commitment, or incorrect understandings of legal doctrine seems an unsatisfying and improbable path forward. Rather, to truly effectuate change in doctrines of judicial deference will require a concerted effort not only on the part of judges and advocates before those judges, but also targeted

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32. *Id.*

33. Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001).

34. RUDENSTINE, *supra* note 1, at 217 (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 83 (2001) (Stevens, J. dissenting)).

35. *Id.* at 236.

changes from Congress that at a minimum force moments for issues of deference to be discussed, and better yet, clarify and direct the courts to behave in certain ways when dealing with matters of national security.

II. The Future of Violence

Where Rudenstine's work is a comprehensive examination of how judicial deference has empowered the Executive Branch, Wittes and Blum's work is a comprehensive examination of how new and emergent threats will challenge the Executive Branch's capacity to deal with them. Wittes and Blum see a world filled with threats; to counter these threats will require more creative and nuanced powers of regulation and investigation. They do not shy from their view, explicitly stating, '[t]he development of technologies of mass empowerment, as we have seen, creates vast new arenas for human activity. One does not necessarily maximize freedom in such circumstances by minimizing governance and governmental power.'[36]

Wittes and Blum largely reject the metaphor that assumes a balance between liberty and security:

> The idea of balance described reality badly even centuries before technologies of mass empowerment began lessening the governability of individuals worldwide.
>
> While the balance metaphor is misleading under the best of circumstances, it is particularly so as applied to technologies of mass empowerment in an environment in which threats and defenses are widely distributed.[37]

Rather than thinking in terms of balance, Wittes and Blum offer up ideas that are intended to pull multiple underused levers of government, incrementally increasing the government's power to combat threats.[38] Where Rudenstine seeks to chip away, bit by bit, at judicial deference, Wittes and Blum seek to ratchet up governmental power, bit by bit, thus decreasing the universe of security threats. Where Rudenstine critiqued the Jacksonian view of executive overreach,[39] Wittes and Blum embrace it, favorably quoting his views on liberty and order:

> This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds, and that all local attempts to maintain order are impairments of the liberty of the

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36. WITTES & BLUM, *supra* note 2, at 134.

37. *Id.* at 133.

38. *Id.* at 133–34; *see also id.* at 140–45 (rejecting a balance-based understanding of privacy rights in the security context).

39. *See* RUDENSTINE, *supra* note 1, at xv–xvi (critically describing Justice Jackson's opinion in Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp. 333 U.S. 103 (1948), which espoused judicial deference to national security decisions in the political branches, as "a new and profoundly troubling era in American judicial history").

> citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.[40]

Building around this juridical launching point, Wittes and Blum contend that there are a few concrete steps that can be taken to counter a world of multiple complex threats. Each suggestion offered by the duo revolves around either more laws, greater powers, or broader distribution of responsibility for countering those threats.[41]

They offer up the power of direct regulation as one of the most straightforward ways of countering threats, writing:

> The magnitude of the problem posed by a world of many-to-many threats, when one faces it squarely, is so overwhelming that it is tempting to simply ignore the most direct and simple tool governments have in influencing their citizens: the ability to compel people to do things and forbid them from doing other things through what one might call direct regulation.[42]

Explaining why direct regulation works, they note that direct regulation includes "the power not only to forbid and require conduct but also to investigate conduct that might not comply with rules, to define the conditions under which conduct is tolerated, to license people to engage in certain behaviors, and to punish noncompliance with the rules."[43] Direct regulation brings with it the benefit of establishing strong behavioral norms, and oftentimes those norms are 'far stronger than government's power actually to enforce those norms."[44] Direct regulation also empowers the Executive Branch by creating 'the legal basis for investigation and enforcement action that can play an important role in deterring abuse of highly empowering technologies, stopping and incapacitating those who misuse them, and letting potential bad actors know that authorities are watching."[45]

These arguments have an air of overregulation and overcriminalization to them that should concern civil libertarians. Direct regulation that is so comprehensive that citizens are in constant fear that they are in violation of rules that the government can't enforce except by choosing whom to enforce against may be perfectly acceptable in a traffic context, but when dealing with security-related offenses where the punishment may be years in prison,

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40. WITTES & BLUM, *supra* note 2, at 147 (quoting Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J. dissenting)).

41. *See id.* at 133, 206–18 (proposing various options for domestic governance that aim to protect liberty and security without relying on a balance-based rationale for justification).

42. *Id.* at 206.

43. *Id.*

44. *Id.* at 207.

45. *Id.* at 208.

the analogy tends to fall apart. Thus, while Wittes and Blum's argument that 'having a complex set of civil and criminal regulations [can provide] a hook [to support an investigation]"[46] is compelling, that hook is one that likely requires more carefully calibrated procedures to protect against abuse. Wittes and Blum focus heavily on countering threats, but don't spend much time on articulating how to protect against overreach.

They write: 'In the world of many-to-many threats and defenses, the power of direct regulation will continue to serve as a frontline lever for deterring, punishing, and smoking out abuses—and policy makers should not underestimate it. '[47] Indeed, policymakers should not underestimate the power of direct regulation, but they similarly should consider how that power might be structured and organized to prevent its abuse. Wittes and Blum hint at this by stating '[t]he trick here is to regulate well, mindfully of the realistic benefits of new rules, of their costs for innovation and benign use, and of their likely effectiveness, '[48] but more insight into how to structure a policymaker's thinking, and ultimately a court's thinking, about the costs of innovation, or the potentially benign uses of a technology would have been a welcome addition to the text.

Wittes and Blum's arguments that 'in the world of many-to-many threats, the user of a platform cannot bear all the risk associated with that platform' and 'those who introduce new vulnerabilities to a shared global system on which we all depend need to bear some of the risk too"[49] is an interesting call to policymakers to develop and force into complex systems incentives to balance risk and growth. They come to this conclusion after summarizing the work of Steven Bucci, Paul Rosenzweig, and David Inserra. Those authors believe that shifting responsibility onto platform developers may very well lead to the creation of a liability system, and to 'the development of an insurance system against liability. The insurance function allows a further spreading of risk in a way that fosters broad private-sector responsiveness. '[50]

Wittes and Blum hope to encourage policy makers to write laws that 'extend liability from a primary wrongdoer to some other party—a 'gatekeeper' or 'an enabler'—who is in a position to disrupt the wrongdoing by withholding her services or cooperation, or by taking some preventive

46. *Id.* at 209.

47. *Id.*

48. *Id.*

49. *Id.* at 218.

50. *Id.* (quoting Steven P. Bucci et al., *A Congressional Guide: Seven Steps to U.S. Security, Prosperity, and Freedom in Cyberspace*, HERITAGE FOUND. (Apr. 1, 2013), http://www.heritage.org/research/reports/2013/04/a-congressional-guide-seven-steps-to-us-security-prosperity-and-freedom-in-cyberspace [https://perma.cc/XY94-RQHB]).

measure.'[51] Drawing an analogy to the world of health and safety, Wittes and Blum note how intermediary regulation is in fact 'one of the principle tools' in those spheres.[52] Shifting away from direct regulation and instead thinking about protecting national security by attempting to influence mass behavior is, in their mind, a necessary change in thinking to counter 'the world of many-to-many threats.'[53] Stated simply, they write 'we are going to have to learn to think about national security as an area not all that different from the many others in which government seeks to push all people toward a safer, healthier environment.'[54] Their view is that it is necessary to create a

> legal system to distribute risk so as to incentivize the expenditure of resources—however marginal they may turn out to be—so as to encourage the design and implementation of safer systems and to discourage the headlong technological drift toward enhanced vulnerability. At the most fundamental level, this means ensuring that parties who negligently or recklessly introduce vulnerabilities into platforms will be liable for the damages those actions inflict on others.[55]

While pulling the multiple levers of government in this way can create a distributed and incremental increase in security, Wittes and Blum recognize that the condition precedent for such changes is a series of decisions about whether potential threats are actually threats that require governmental attention. In other words, '[b]efore government can decide how to protect you from a particular threat, it has to decide whether to protect you from that threat. It has to decide whether even to define the conduct at issue as a threat at all. These are values questions, and they do not answer themselves.'[56] While the values questions will require greater discussion and evaluation, and I would argue, greater analysis of the checks to be placed on greater governmental powers, Wittes and Blum attempt to offer a message of hope. They state:

> While there is no magic policy solution to the security problems of the world we are entering, neither is society without power—in the form of government, in the form of industry, and in the form of loose collections of individuals—to make the environment safer. There are a lot of levers, and cumulatively they are highly significant.[57]

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51. *Id.* at 211 (citing Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 365 (2003)).

52. *Id.* at 213.

53. *See id.* at 90 (arguing that security is not only dependent on "how big and strong a grizzly bear one can deploy," but also on "whether one can incentivize one's own swarm of bees").

54. *Id.* at 213–14.

55. *Id.* at 215–16.

56. *Id.* at 219.

57. *Id.* at 232.

III. The Role of Congress

Is it possible to harmonize the views offered by Rudenstine, Wittes, and Blum? On the one hand, we see an argument that policy makers should ramp up the nation's defenses by pulling multiple levers of governance, increasing the effective reach of the Executive Branch. On the other hand, we see a judiciary that has been heretofore unwilling to do anything other than defer to the Executive Branch as its powers expand. One possible way to reconcile these competing interests is to assume that each new power, law, or regulation that Wittes and Blum think is required, should bring with it enhanced powers of judicial review. Drawing from Rudenstine, we may find that

> a judiciary that holds the executive more accountable than it has in the past will enhance the nation's security because the possibility of such judicial review might cause the executive to proceed with greater deliberateness than it might otherwise do and that such deliberateness may in turn result in wiser decisions.[58]

In Rudenstine's view,

> if the governing scheme is to be righted so that the executive is not above the law, so that an unlawful executive is not exempted from judicial accountability, so that allegedly wronged individuals have legal remedies and are not sacrificed because of a judicial utilitarian calibration in the name of national security, so that the rule of law is not only an ideal but a reality, then the courts will need to abandon a posture of acquiescence in favor of shaping legal doctrines that make the executive toe the legal line and respect the rule of law.[59]

Mapping that worldview onto Wittes and Blum's recommendations would lead us to increased powers, coupled with increased processes for legal remedies and judicial review. The difference between what Rudenstine proposes and what I propose is that we need not wait for courts to 'abandon a posture of acquiescence"[60] instead, we need only tie new governmental powers to new powers of judicial review.

For example, if greater surveillance powers are necessary to capture suspected national security threats, then Congress could by statute make it clear that judges will play an important part in reviewing those surveillance powers. We have seen this in the case of the FISA Court and in the Wiretap Act.[61] While both statutes may require reforms, they have given clear guidance about the role of the judiciary in reviewing these executive

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58. RUDENSTINE, *supra* note 1, at 20–21.

59. *Id.* at 19.

60. *Id.*

61. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act), 18 U.S.C. §§ 2510–22 (2012); Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

actions.[62] Pulling the levers of governance in this way ensures that jurists don't have the opportunity to engage in their deferential dance. When a statute calls for specific procedures and judicial review, it is difficult for the court to accept an argument that 'judges are not competent to assess matters implicating national security. '[63] My argument here is that to counter the view advanced by Supreme Court Justice Robert Jackson that certain matters

> are 'political, not judicial' in nature; they are 'delicate, complex, and involve large elements of prophecy' and they are decisions for which the 'judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry"[64]

requires direct action to remove those matters from the realm of politics and place them in the realm of judicial inquiry.

Rudenstine almost admits as much when he notes how the literature has focused more 'on Congress than on the courts because Congress has substantially more power than the courts to balance off the executive, but also because it is generally thought that Congress has over time abdicated its power."[65] But he then retreats from the position when he writes, 'as much constitutional room as may exist for Congress to change its ways and to assert control over executive conduct, Congress alone cannot solve the distortions in the governing scheme that have developed in the postwar decades. '[66] Of course, Congress can't do it alone, but neither can the judiciary.

Consider how such an approach might work in the context of targeted killings, an area that Rudenstine critiqued. Rather than assuming that judges are capable of exercising judicial review at any stage of a complex military process, instead Congress could mandate points at which the judiciary could play an important role and should be entitled to greater information. It may be the case that there are multiple problems with *ex ante* review of targeting decisions. For example, if the process were to prove itself as too burdensome,

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62. 18 U.S.C. § 2518 (stating that a judge may issue a warrant authorizing the interception of communication upon a showing of probable cause to believe "that an individual is committing, has committed, or is about to commit" an enumerated crime; probable cause to believe "that particular communications concerning that offense will be obtained through such interception' probable cause to believe "that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person' and that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous'' to obtain a court order to intercept wire, oral, and electronic communications); Foreign Intelligence Surveillance Act §§ 103–05 (creating the Foreign Intelligence Surveillance Court and establishing the standard of judicial review for various types of foreign intelligence surveillance).

63. RUDENSTINE, *supra* note 1, at 294.

64. *Id.* (quoting Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp. 333 U.S. 103, 111 (1948)).

65. *Id.* at 18.

66. *Id.* at 19.

the Executive Branch may decide to shift its tactics to less accurate but more opaque forms of strikes, potentially increasing harm to civilians.[67] There may also be political-accountability problems. For example, the Executive Branch could shield itself from blame by noting that a target was approved by a judge:

> [I]f a judge failed to approve a target, and that individual later attacked the United States or its interests, the Executive Branch could claim that it sought to target the individual, but the Judiciary would not allow it—laying blame for the attack at the feet of a judge with life tenure. "[68]

Finally. there is the possibility that Executive Branch expertise combined with politically aware judges may make for very deferential *ex ante* review process—something akin to a rubber stamp.[69]

On the other hand, *ex post* review may be justifiable if carefully calibrated. How to carefully calibrate the role of the courts in such circumstances is so complex that it is unlikely to be adequately decided by judges alone. In fact, judges not inclined to take a deferential stance would nevertheless face a host of politically charged questions that would likely lead them to defer judgment. Consider the following questions raised by *ex post* review of drone strikes.

It certainly seems more judicially manageable for a court to review a strike and the details associated with that strike after it occurs. However, many of the same questions of expertise will arise, particularly those related to the process the government follows for creating kill lists and determining whether a strike will successfully impact an enemy organization.[70] Assuming

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67. *See* Jens David Ohlin, *Would a Federal District Court for Drones Increase Collateral Damage?*. LIEBER CODE (Feb. 13, 2013), http://www.liebercode.org/2013/02/would-federal-district-court-for-drones.html [https://perma.cc/4U32-LGPP] (discussing how the Executive Branch's "targeted killings program" could add a "willful[ly] blind[]" system of "signature strikes, putting citizens in danger because "ignorance would maintain the legality of the strike").

68. Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 791 (2014).

69. *See* RUDENSTINE, *supra* note 1, at 132 (describing the FISA court as "fairly characterized as little more than a 'rubber stamp'"); Robert Chesney, *A FISC for Drone Strikes? A Few Points to Consider*. LAWFARE (Feb. 7, 2013), https://www.lawfareblog.com/fisc-drone-strikes-few-points-consider [https://perma.cc/5YXC-LTUC] (describing how some judges do not want any involvement in targeted-killings decisions, and noting that '[a] core benefit to judicial review, presumably, is that judges might detect and reject weak *evidentiary* arguments for targeting particular persons. I wouldn't bet on that occurring often, however. Judges famously tend to defer to the executive branch when it comes to factual judgments on matters of military or national-security significance."). For discussion on the Executive Branch's national security expertise, see generally Gregory S. McNeal, *The Pre-NSC Origins of National Security Expertise*, 44 CONN. L. REV. 1585 (2012) (explaining 'America's contemporary security state,' detailing its historical origins, and describing its current place in national security-policy debates and decisions).

70. *But see Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 66 (2013) (statement of Stephen I. Vladeck, Professor of Law, American University Washington College of Law) (arguing that judges have sufficient expertise in national security litigation). Professor Vladeck argues:

that a court could properly conduct such a review, who should be entitled to sue the government after the fact? Should lawsuits be limited to Americans killed or wounded in strikes? If so, why should the line be drawn based on citizenship? What about persons whose property is damaged, as it was in *El-Shifa Pharmaceuticals*?[71] What about foreign governments whose property is damaged? As these questions indicate, how the lines are drawn for *ex post* review of targeting decisions presents a host of questions that raise serious separation-of-powers and diplomatic concerns—the exact foreign-relations interests that have prompted courts to stay out of these types of decisions in the past. Those foreign-relations concerns would not be remedied by even the best statutory framework for governing the review. Furthermore, what is to stop judicial review in other conflicts involving far more air strikes and far greater casualties? For example, it is estimated that a potential conflict on the Korean peninsula might cause 'hundreds of thousands of civilian deaths.'[72] Even assuming that only a small percentage of those deaths would be caused by American air strikes, this nonetheless demonstrates the impracticability of *ex post* judicial review in anything but a small category of U.S. airstrikes. Limiting the right of judicial review, based merely on potential caseload, raises questions as to the propriety of the right in the first place.

Narrowly and carefully defining the acceptable scope of judicial engagement here is a necessity if courts are to play a greater role in targeting decisions, or in any of the other levers that Wittes and Blum might want to activate in favor of greater national security powers.[73]

Outside of targeting, Rudenstine critiqued the FISA Court for its secrecy,[74] while Wittes and Blum called for greater surveillance powers,

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> [I]f the Guantánamo litigation of the past five years has shown nothing else, it demonstrates that judges are also more than competent to resolve not just whether individual terrorism suspects are who the government says they are (and thus members of al Qaeda or one of its affiliates), but to do so using highly classified information in a manner that balances the government's interest in secrecy with the detainee's ability to contest the evidence against him.

Id.

71. El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 838–39 (D.C. Cir. 2010) (describing a 1998 missile strike that destroyed a Sudanese pharmaceutical plant that the Clinton administration believed to be manufacturing chemical weapons). For a discussion of the *El-Shifa Pharmaceuticals* case and judicial review, see McNeal, *supra* note 68, at 764–68 (recounting the various claims asserted by the *El-Shifa* plaintiffs and the courts' response that their claims were nonjusticiable).

72. Scott Stossel, *North Korea: The War Game*, ATLANTIC (July 2005), http://www.theatlantic.com/magazine/archive/2005/07/north-korea-the-war-game/304029/ [https://perma.cc/YN9N-ZU46].

73. *See* RUDENSTINE, *supra* note 1, at 300 ("The idea that it would be unacceptable for courts to participate in a process that injured national security might be plausible if the concept of national security was very narrowly and carefully defined, and if there was broad agreement on the concept. But these conditions do not exist.").

74. *Id.* at 131–32.

albeit with limits on how the data gathered could be used.[75] How might we reconcile the desire for chipping away at deference with the need for enhanced powers? On this front, it seems that Congress must also play a role. In fact, Congress has on multiple occasions updated the FISA Court's governing rules, and with each change, Congress alters the way the FISA Court functions.[76] For example, in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA),[77] Congress required the Attorney General to provide a 'summary of significant legal interpretations' of FISA 'involving matters before' the FISC or the Court of Review.[78] The summary must include 'interpretations presented in applications or pleadings filed with the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review by the Department of Justice.'[79] The law requires disclosure of opinions or orders if they 'include significant construction or interpretation' of FISA.[80] Congress engages in this type of shaping of judicial review in enough instances that we shouldn't shy away from demanding it in the national security context. For example, under the Administrative Procedure Act 'final agency action' is a prerequisite to most causes of action.[81]

When it comes to concerns that courts may be forced to make judgments in secret, here too, Congress can play a role. Congress can mandate, for example, that in national security-related cases handled by the FISA Court, 'opinions are to be published, subject to appropriate redactions.'[82] Such careful calibrations of incentives and mechanisms of judicial review are entirely possible, as even Rudenstine notes that the original FISA has evolved over the years: 'Since the passage of the original statute, FISA has been amended to address the use of pen registers and trap devices for conducting telephone or email surveillance'[83] In fact, Rudenstine himself reconciles his views on the judiciary with a more congressionally centric set of reform proposals when he writes,

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75. WITTES & BLUM, *supra* note 2, at 144–45.

76. The following passages are drawn from Gregory S. McNeal, *Reforming the Foreign Intelligence Surveillance Court's Interpretive Secrecy Problem*, 2 HARV. J.L. & PUB. POL'Y: FEDERALIST EDITION 77 (2015), http://www.harvard-jlpp.com/wp-content/uploads/2015/02/McNeal_Final.pdf [https://perma.cc/43GG-4TZG].

77. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 18 Stat. 3638, 3743 (codified as amended in scattered sections of U.S.C.).

78. 50 U.S.C. § 1871(a)(4) (2012).

79. *Id.*

80. *Id.* § 1871(a)(5).

81. 5 U.S.C. § 704 (2012); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990); *see also* Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (describing an agency action as final if it "mark[s] the 'consummation' of the agency's decisionmaking process" and is one "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow[]'").

82. McNeal, *supra* note 76, at 98.

83. RUDENSTINE, *supra* note 1, at 139 (citation omitted).

> To restore public confidence in the FISC requires the enactment of proposed legislative changes.
>
> Unfortunately, the courts have severely undermined their own legitimacy, and whether the FISC, or some reformed version of the FISC, can redeem itself and regain the public's trust cannot be answered in the absence of meaningful reform legislation and sufficient disclosures by the FISC that establish that it is in fact insisting upon meaningful judicial accountability.[84]

Finally, how else might we find ways of calibrating and enhancing the powers of the government, as Wittes and Blum suggest, while also protecting from executive overreach? One approach might be to require careful risk-based decisions, the analysis of which is subject to judicial review. For example, Wittes and Blum discuss how '[i]n [a] world of many-to-many threats, drones and other robotic systems may become a security threat.[85] Well, what is the magnitude of that threat? And what is the likelihood that the threat will manifest itself?

Congress could mandate that any new powers related to countering national security threats be tied to risk assessments that analyze not only the possibility of a threat but also the probability of a threat. By focusing on probabilities, Congress can force discussions away from a universe of potential national security threats to a constrained discussion about those risks that actually warrant a response.[86] As security analyst Bruce Schneier has written, focusing on the worst possible outcome 'substitutes imagination for thinking, speculation for risk analysis, and fear for reason.'[87] It substitutes ill-informed, possibilistic thinking for careful, well-reasoned, probabilistic thinking, forcing us to focus on what we don't know and what we can imagine, rather than what we do know. 'By speculating about what can possibly go wrong, and then acting as if that is likely to happen, worst-case thinking focuses only on the extreme but improbable risks and does a poor job at assessing outcomes.'[88] While public attention to national security threats may create a sense of urgency amongst members of the public and some agency officials, this 'does not relieve those in charge of the requirement, even the duty, to make decisions about the expenditures of vast

84. *Id.* at 149–50.

85. WITTES & BLUM, *supra* note 2, at 12, 209.

86. *See* Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 122 (2003) (asserting that government should not only respond to terrorism, but also attempt to assuage fear when the costs of said fear outweigh the benefits of not responding).

87. Bruce Schneier, *Worst-Case Thinking*, SCHNEIER ON SECURITY (May 13, 2010, 6:53 AM), https://www.schneier.com/blog/archives/2010/05/worst-case_thin.html [https://perma.cc/AC7H-MKLM].

88. *Id.*

quantities of public monies in a responsible manner' that is disconnected from emotions and focused on probabilities.[89]

In addition to looking at probabilities and accepting that not all threats can be countered, Congress can also mandate that every agency action taken to address national security threats be preceded by a formal risk assessment.[90] Assessing risks is the first managerial step in decision making about potential threats, and it is one that is readily subject to congressional oversight, and perhaps even judicial review in the event a party is aggrieved by government action. Forcing agencies to conduct a risk assessment is the first step toward ensuring that agencies efficiently and effectively use taxpayer funds and control costs. A risk assessment is also the first step toward ensuring that agencies make hard choices with limited resources—every possible threat cannot be guarded against, therefore agencies must focus on the riskiest threats. By limiting the number of actions an agency can take, we force, as Rudenstine suggests in the case of judicial review, a focus on 'deliberateness [, which] may in turn result in wiser decisions.'[91]

Conclusion

From Rudenstine, we are presented with a compelling view of the costs of judicial deference. But it's a circumstance that is unlikely to change given factors such as timidity, ideological commitment, or incorrect understandings of legal doctrine. To truly effectuate change in doctrines of judicial deference, it seems, will require a concerted effort not only on the part of judges and advocates before those judges but also targeted changes from Congress. Congress must force judicial moments and create circumstances whereby the courts may review certain matters dealing with national security. This is, perhaps, where Wittes and Blum's lever pulls come into play. By crafting a future in which policy changes create distributed and incremental increases in security, Wittes and Blum suggest forcing functions that may compel judicial review. As Congress creates enhanced powers for the Executive, Congress can simultaneously consider what role courts should take in reviewing such powers. After all, Rudenstine admits the FISA Court

89. JOHN MUELLER & MARK G. STEWART, TERROR, SECURITY, AND MONEY: BALANCING THE RISKS, BENEFITS, AND COSTS OF HOMELAND SECURITY 17 (2011).

90. The analysis to follow draws from Mueller and Stewart's excellent book, TERROR, SECURITY, AND MONEY, *supra* note 89, which explains in detail the benefits of following the methodology set forth here. *See id.* at 16 (discussing the relative benefits of risk assessment); *see also Unmanned Aerial System Threats: Exploring Security Implications and Mitigation Technologies: Hearing Before the Subcomm. on Oversight and Mgmt. Efficiency of the H. Comm. on Homeland Sec.*. 114th Cong. (2015) (statement of Dr. Gregory S. McNeal, Associate Professor of Law and Public Policy, Pepperdine University), http://docs.house.gov/meetings/HM/HM09/20150318/103136/HHRG-114-HM09-Wstate-McNealG-20150318.pdf [https://perma.cc/XTQ3-UWNG] (recommending that the Department of Homeland Security engage in risk assessment to evaluate the use of unmanned aerial systems).

91. RUDENSTINE, *supra* note 1, at 21.

is a creation of Congress, and other similar review bodies and mechanisms could be created by Congress that will force judges into the conversation around the new powers Wittes and Blum suggest are necessary. Whatever path the nation chooses, the futures that these three authors hope for all require Congress to assert itself—to cabin existing national security excesses and to create new, carefully calibrated national security powers.

Review Essay

Beyond the Carceral State

CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS. By Marie Gottschalk. Princeton, New Jersey: Princeton University Press, 2015. 502 Pages. $35.00.

Allegra M. McLeod*

The vast expansion of carceral control in the United States is the subject of a compelling body of scholarship, but efforts to decarcerate have received relatively little attention. One of the few studies to focus in depth on the prospects of carceral reform, political scientist Marie Gottschalk's brilliant and unsettling book, Caught: The Prison State and the Lockdown of American Politics, *ultimately concludes that contemporary reform efforts are woefully inadequate to their task. Though certain constituencies have been motivated to pursue reform by budget deficits, decarceration efforts compelled by cost-cutting pressures alone are unlikely to bring meaningful change. Bipartisan attempts to reduce sentences for minor drug offenses, Gottschalk argues, will also fail to transform U.S. carceral practices, because the vast majority of people incarcerated are not convicted of low-level drug crimes. As such, Gottschalk contends, the carceral state is well on its way to becoming our new normal. A significant part of the problem, according to Gottschalk, is the absence of any inspiring, long-term vision for reform against which near-term efforts and compromises may be assessed. In an attempt to imagine a way beyond our carceral state, taking Gottschalk's important critical analysis as a starting point, this Review Essay explores potential openings in contemporary criminal law reform efforts. Disaggregating various ongoing reform projects, this Essay argues that one contemporary reform effort motivated primarily by cost-cutting threatens to disguise and further embed current penal practices in ways even more destructive than Gottschalk describes; yet other ongoing reform initiatives could enable a more substantial reckoning with our carceral state over the long term. Taking seriously Gottschalk's claim that contemporary reform efforts are limited by the absence of a long-term vision, this Essay explores more aspirational accounts of decarceration that could orient near-term reform, including Finland's dramatic decarceration and the Black Lives Matter movement in the United States.*

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* Professor of Law, Georgetown University Law Center. For thoughtful comments, I am grateful to Paul Butler, Bill Buzbee, David Cole, Anne Fleming, Betsy Kuhn, Derin McLeod, Sherally Munshi, Mike Seidman, Amanda Shanor, Robin West, and workshop participants at Georgetown University Law Center and the University of Virginia School of Law.

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Introduction

> One might have hoped that, by this hour, the very sight of chains on black flesh, or the very sight of chains, would be so intolerable a sight for the American people, and so unbearable a memory, that they would themselves spontaneously rise up and strike off the manacles. But, no, they appear to glory in their chains; now, more than ever, they appear to measure their safety in chains and corpses.
>
> —James Baldwin, 'An Open Letter to My Sister, Miss Angela Davis"[1]

What is the future of our carceral state? Over two million men, women, and children are imprisoned in the United States—more than any other country in the world, at any time in history.[2] Carceral control extends not only to those 1 in 36 U.S. citizens under criminal supervision of some form, but to countless others, disproportionately African-Americans and Latinos, subject to aggressive policing and the civil consequences of conviction.[3] During the 1990s, as a new prison opened in a rural location in the United States every fifteen days—245 new prisons that decade—a

1. James Baldwin, *An Open Letter to My Sister, Miss Angela Davis*, N.Y. REV. BOOKS, Jan. 7, 1971, at 15, 15.

2. MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 1 (2015).

3. *Id.* at 1–2 (examining the number of people under criminal supervision and the civil consequences of conviction); DANIELLE KAEBLE ET AL., U.S. DEP'T JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, at 1 (2016), http://www.bjs.gov/content/pub/pdf/cpus14.pdf [https://perma.cc/YD4N-5MSS]; Paul Butler, *Stop and Frisk: Sex, Torture, Control*, *in* LAW AS PUNISHMENT/LAW AS REGULATION 155, 155–58 (Austin Sarat et al. eds., 2011) (discussing aggressive racialized policing tactics).

particular form of governance also took shape.[4] Our carceral state is now marked by the central role of criminal law's processes and logics across numerous domains of public life.[5] And while the carceral state privileges penal intervention as a favored sphere of governmental action—trading heavily on fear-mongering and punitiveness to legitimate governmental authority—the market and economic spheres have been imagined to be spaces where government is less welcome.[6] Containment, policing, and punishment serve as responses to concentrated poverty, instability, and interpersonal harm. It appears that we continue to measure our 'safety in chains and corpses, as James Baldwin observed of Americans years ago.[7]

While this vast expansion of carceral control in the United States is the subject of a compelling body of scholarship, more recent efforts to decarcerate have received far less scholarly attention.[8] One of the few

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4. Tracy Huling, *Building a Prison Economy in Rural America*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 197, 198 (Marc Mauer & Meda Chesney-Lind eds., 2002); *see also* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 16–17 (2007) (discussing crime as a governmental rationality).

5. Elections, education, immigration, and public housing are all informed by criminalization. *See generally* INVISIBLE PUNISHMENT, *supra* note 4. Approximately 2.5% of the U.S. voting age population has been disenfranchised by policies that strip people with criminal convictions of the right to vote. *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 76 (2006). Police are a routine presence in public schools, and immigration regulation relies heavily on criminal law enforcement—as does the allocation of government-subsidized housing and other forms of basic welfare assistance. *See* KIMBERLÉ WILLIAMS CRENSHAW ET AL., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED 4–5 (2015) (examining how the school-to-prison pipeline harms African-American girls); KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 52–56 (2011) (discussing the effect of criminal convictions on eligibility to receive government assistance); Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 233 (2012) (discussing the relationship between immigration and criminal law enforcement).

6. *See, e.g.*, BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 41 (2011) (quoting President Ronald Reagan, stating that 'government does not belong in the economic sphere, which has its own orderliness, but it has a legitimate role to play outside that sphere, especially in law enforcement"); SIMON, *supra* note 4, at 29–31 (comparing the notion that the government has the power to criminalize conduct as "unquestioned" to the constitutional constraints on the federal government's regulatory power).

7. Baldwin, *supra* note 1, at 15.

8. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60 (2010) (exploring the most significant causes of increased incarceration rates); KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 60 (2010) (concluding that the increase in social-control tools "enhances the reach and power of the criminal justice system"); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 144 (1999) (discussing the racial disparities and increase in drug convictions associated with the war on drugs); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 1–2 (2006) (discussing U.S. incarceration rates and increases in prison populations); HARCOURT, *supra* note 6, at 41 (exploring the relationship between mass incarceration and

studies to focus in depth on the prospects of decarceration, Marie Gottschalk's brilliant and unsettling book, *Caught: The Prison State and the Lockdown of American Politics*, published in 2014, ultimately concludes that contemporary penal reform efforts are woefully inadequate to their task.[9] Budget deficits are insufficient to motivate substantial change, Gottschalk explains, given that most criminal law enforcement costs are relatively fixed and protected by entrenched interests.[10] In fact, state expenditures on corrections amount to less than 3% of total state budgets, not even half of what states spend on highways.[11] Furthermore, drug law reform, Gottschalk argues, will not substantially reduce incarceration or transform carceral practices because the significant majority of people are not subject to imprisonment for drug offenses.[12] Whereas approximately 53% of individuals sentenced to state prison are incarcerated for offenses classified as violent, only 1% have been convicted of unambiguously low-level drug offenses.[13] Expressive of an increasingly pervasive scholarly gloom, Gottschalk contends that our carceral state, with its "huge penal system, is "well on its way to becoming the new normal, subject only to modest periodic contractions.[14] A significant part of the problem, according

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"tough-on-crime political strategies"); SIMON, *supra* note 4, at 158–59 (arguing that mass incarceration is as a policy solution to "governing through crime").

9. GOTTSCHALK, *supra* note 2, at 3, 17–19.

10. *Id.* at 9.

11. *Id.*

12. *Id.* at 5.

13. *Id.* at 169; E. ANN CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014, at 16 (2015), https://www.bjs.gov/content/pub/pdf/p14.pdf [https://perma.cc/QV7Y-WREK].

14. GOTTSCHALK, *supra* note 2, at 22. In his review in the *Financial Times*, Gary Silverman remarks of Gottschalk's *Caught* that "as a pessimistic person, he finds "it encouraging to encounter even gloomier souls." Gary Silverman, *Caught: The Prison State and the Lockdown of American Politics*, FIN. TIMES (Feb. 1, 2015) (book review), https://www.ft.com/content/dd1ff6dc-a7ce-11e4-97a6-00144feab7de [https://perma.cc/6C72-A3CH]. Gottschalk's account is consistent in this respect with an overwhelmingly pessimistic scholarly resignation regarding the future of U.S. carceral practices. *See, e.g.*, BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 198 (2006) ("The self-sustaining character of mass imprisonment as an engine of social inequality makes it likely that the penal system will remain as it has become, a significant feature on the new landscape of American poverty and race relations."); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 207 (2005) ("[R]eal change would mean change, not just in punishment practices but in much grander American cultural traditions. It would be foolish to think that such change is coming soon."); John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. LEGIS. 173, 175 (2015) (explaining that because the war on drugs accounts for less of U.S. imprisonment than is commonly believed, there is even less hope for legislative measures to reduce large-scale incarceration than is often supposed); Louis Michael Seidman, *Hyper-Incarceration and Strategies of Disruption: Is There a Way Out?*, 9 OHIO ST. J. CRIM. L. 109, 110 (2011) ("There is little reason, then, to be very hopeful about the possibilities of change."). *But see* HADAR AVIRAM, CHEAP ON CRIME: RECESSION ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2015) (examining the ameliorating influence of the post-2008 economic recession on American penal policies); JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN

to Gottschalk, is the absence of any inspiring, long-term vision for reform against which near-term efforts and compromises may be assessed.[15]

In an attempt to imagine a way beyond our carceral state, taking Gottschalk's important critical analysis as a starting point, this Review Essay explores both more perilous paths and potential openings in contemporary criminal law reform efforts. The sense of inevitability suggested by Gottschalk's scathing critique may be misplaced, not because of any lack of good reasons for despair, but because there are at least conceivable means of engaging the contemporary popular commitment to criminal law reform toward more transformative ends over the long term.

Though Gottschalk's work makes a vital contribution to our understanding of the shortcomings of proposed reform, she treats quite disparate reform projects as largely of a piece, particularly in their anticipated impotence. As such, Gottschalk undervalues the potential of mounting public outcry to propel change and particularly the significance of the emergent social movement focused on criminal law reform and racial and social justice that has taken shape in recent years.[16]

In the aftermath of the tragic killings of African-American citizens in Florida, Missouri, New York, Maryland, South Carolina, Ohio, and elsewhere, following years of unredressed racial violence, this new social movement has called for an end to U.S. carceral practices, proclaiming that Black Lives Matter.[17] Over the past several years, thousands of citizens have taken to the streets in solidarity in cities across the country.[18] Partly in

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AMERICA 133–35 (2014) (exploring the recent history of prison litigation in California and arguing that the Supreme Court's opinion in *Brown v. Plata*, 563 U.S. 493 (2011), represents a major breakthrough in American jurisprudence that fundamentally challenges mass incarceration); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 50–51 (2011) (exploring in a modestly less pessimistic register recent reductions in rates of incarceration in the United States and obstacles to more significant reform, including a failure of empathetic identification with incarcerated people on the part of middle-class and wealthy white Americans).

15. GOTTSCHALK, *supra* note 2, at 260.

16. *See, e.g.*, *A Vision for Black Lives: Policy Demands for Black Power, Freedom and Justice*, MOVEMENT FOR BLACK LIVES, https://policy.m4bl.org [https://perma.cc/XLF5-ASHV].

17. *See* Justin Hansford, *The Whole System Is Guilty as Hell*, 21 HARV. J. AFR. AM. PUB. POL'Y 13, 14 (2015) ("[A] new Black political discourse emerged The moment had become a movement, the spontaneous chants had coalesced into mantras, and these mantras struck with force of an obvious idea that stunningly wasn't obvious: 'Black lives matter' as an assertion of value 'I can't breathe' as a summation of an entire community's state of being."); *infra* subpart II(B).

18. *See generally* Associated Press, *Chanting 'Black Lives Matter,' Protestors Shut Down Part of Mall of America*, N.Y. TIMES (Dec. 20, 2014), http://www.nytimes.com/2014/12/21/us/chanting-black-lives-matter-protesters-shut-down-part-of-mall-of-america.html [http://perma.cc/G83B-76MS]; Benjamin Mueller & Ashley Southhall, *25,000 March in New York to Protest Police Violence*, N.Y. TIMES (Dec. 13, 2014), http://www.nytimes.com/2014/12/14/nyregion/in-new-york-thousands-march-in-continuing-protests-over-garner-case.html?_r=0 [http://perma.cc/D3NZ-HFHG]; Jennifer Steinhauer & Elena Schneider, *Thousands March in Washington to Protest Police Violence*, N.Y. TIMES (Dec. 13, 2014),

response to public outcry, the Department of Justice launched investigations into numerous police departments' and criminal courts' practices.[19] In the months following the publication of Gottschalk's book, the Movement for Black Lives has become a powerful voice in contemporary political discourse, reshaping national conversations about race and criminal law enforcement.[20]

Gottschalk makes plain that so far these various criminal law reform initiatives have produced minimal change. Yet, in this Essay, I attempt to identify among ongoing reform efforts discrete commitments or currents that threaten particularly pernicious unintended consequences and those that have the potential to bring about more far-reaching transformation. One predominant approach, most notable in Texas, promotes decarceration as a component of a regressive fiscal program, which I will call 'neoliberal penal reform'—extending Gottschalk's critical discussion of neoliberalism and criminal law reform. These initiatives disguise but do not abandon current carceral practices, while potentially entrenching overcriminalization and hyperincarceration—in a manner that may be even more destructive than Gottschalk identifies. In fact, meaningful decarceration will cost money as resources must be directed to address social dislocation, unemployment, and violence by means other than criminal law enforcement, and to support individuals and communities devastated by incarceration. Additionally, decarceration efforts rooted primarily in cost-

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http://www.nytimes.com/2014/12/14/us/thousands-march-in-washington-to-protest-deaths-by-police.html [http://perma.cc/6S59-957P].

19. *See generally* Matt Apuzzo & Sheryl Gay Stolberg, *Justice Department Will Investigate Baltimore Police Practices*, N.Y. TIMES (May 7, 2015), http://www.nytimes.com/2015/05/08/us/politics/justice-department-will-investigate-baltimore-police-practices-after-freddie-gray-case.html [http://perma.cc/78Y8-GZ7U]; Richard Pérez-Peña, *The Ferguson Police Department: The Justice Department Report, Annotated*, N.Y. TIMES (Mar. 4, 2015), http://www.nytimes.com/interactive/2015/03/04/us/ferguson-police-justice-department-report.html [http://perma.cc/R4MP-UXP4]; Mitch Smith & Matt Apuzzo, *Police in Cleveland Accept Tough Standards on Force*, N.Y. TIMES (May 26, 2015), http://www.nytimes.com/2015/05/27/us/cleveland-police-accept-use-of-force-rules-in-justice-dept-deal.html [http://perma.cc/F9ZG-JD5N]. In its report on the Ferguson Police Department, the Department of Justice concluded that Ferguson police had engaged in a "pattern or practice of unlawful conduct," routinely subjecting African-American citizens to unlawful stops, arrests, and excessive force, among other violations of the First, Fourth, and Fourteenth Amendments to the U.S. Constitution. *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV. INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015).

20. *See* KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION (2016); *see also* Jay Caspian Kang, *Our Demand is Simple: Stop Killing Us*, N.Y. TIMES MAG. (May 4, 2015), http://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html [http://perma.cc/4U3H-CTB4] ("[T]he movement has managed to activate a sense of red alert around a chronic problem that, until now, has remained mostly invisible outside the communities that suffer from it. Statistics on the subject are notoriously poor, but evidence does not suggest that shootings of black men by police officers have been significantly on the rise. Nevertheless, police killings have become front-page news and a political flash point, entirely because of the sense of emergency that the movement has sustained.").

cutting threaten to displace more promising reform, particularly if their destructive entailments are not identified.

A separate approach in contemporary reform, however, centers not only on modestly reducing drug-related incarceration but also on developing an array of related programs including jail diversion, bail reform, reentry support, alternative violence prevention, and restorative justice conferencing. In combination, these projects attempt to more substantially transform U.S. criminal procedures in large part by fostering security through mechanisms other than police and prisons and by attending to racial and economic inequality in criminal law enforcement.[21] While on their own terms, as Gottschalk persuasively demonstrates, these efforts will not substantially reduce incarceration or predatory criminal law enforcement, these projects could, I will argue, open the door to more thoroughgoing change precisely because their inadequacy may provoke deeper public reflection regarding necessary change. In other words, the gap between mounting public interest in criminal law reform and the impotence of proposed drug law and related reform measures could be the impetus for a broader public reckoning with our carceral state—informed by the critical insights of impacted communities and experts, including Gottschalk's own work, as well as by the creative and compelling advocacy of the Black Lives Matter movement and other contemporary movements for social, racial, and economic justice.

This is not to deny the enormous obstacles to change that Gottschalk powerfully illuminates. But it remains at least possible to pursue existing pathways to reach more expansive goals. This Essay might be understood, then, as an effort to marshal an optimism of the will over a pessimism of the intellect by attending to how certain currents in contemporary criminal law reform could perhaps serve as an occasion for a public reconsideration of more comprehensive and promising alternative frameworks for carceral change—that is, as an opportunity to envision a form of security not measured 'in chains and corpses.'[22]

Widespread interest in decarceration should encourage us not only to expose the inadequacy of current reform efforts but also to engage public interest in more effective, farther reaching alternatives. Those committed to dismantling the carceral state could, for example, use the case against solitary confinement, recently endorsed by at least one member of the U.S. Supreme Court and powerfully challenged by 30,000 hunger-striking prisoners in California, as an opportunity to call into question more

21. *See infra* subpart II(B), Part III.

22. *See* ANTONIO GRAMSCI, LETTERS FROM PRISON 159–60 (exploring the importance of both a clear-eyed, honest, critical appraisal of current possibilities—a pessimism of the intellect—and the courage to try to alter those possibilities—an optimism of the will—to attempt difficult things despite the odds).

generally harsh penal practices.[23] Likewise, the commitment to reducing drug sentences may be extended well beyond the current and excessively cautious focus on low-level possession offenses by seizing the opportunity of widespread interest in decarceration to underscore the inadequacy of minor drug law reform as a vehicle for meaningfully reducing incarceration and instead exploring other alternatives. It is for this reason that Gottschalk's account may rest on an unduly static view of unfolding political and legal processes when, perhaps, initial limited openings in public discourse could be directed toward more transformative ends.

To identify longer-term visions of decarceration that might orient near-term reform, this Essay begins to explore Finland's dramatic decarceration and the Black Lives Matter movement in the United States. Finland's prison population reduction serves as a case study of the potential cascade effect of efforts to thoroughly reorient penal philosophy and social policy.[24] In the mid-twentieth century, in part as a consequence of more than a century of Russian occupation, unrest, and war, Finland faced especially high levels of incarceration, on par with the United States at the time and more akin to its former-Soviet than Nordic neighbors.[25] In the intervening years, Finland radically decarcerated. As most other countries' prison populations increased, Finland slashed its imprisonment rate and fundamentally transformed its penal system.[26] Finland's decarceration was compelled in part by a collective shame at the outsized scope of its own punitiveness. The sense of disgrace associated with Finland's penal practices motivated not only thorough reform of sentencing laws, but also a reconceptualization of the role of penal policy relative to that of other state-

23. *See* Davis v. Ayala, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J. concurring) (noting with approval the historical and contemporary objections to the draconian nature of solitary confinement); Ian Lovett, *Inmates End Hunger Strike in California*, N.Y. TIMES (Sept. 5, 2013), http://www.nytimes.com/2013/09/06/us/inmates-end-hunger-strike-in-california.html [http://perma.cc/Z6RP-89V2] (discussing the influence of hunger strikes on reforming solitary confinement); Mohamed Shehk, *California Prisoners Win Historic Gains with Settlement Against Solitary Confinement*, S.F. BAY VIEW (Sept. 1, 2015), http://sfbayview.com/2015/09/california-prisoners-win-historic-gains-with-settlement-against-solitary-confinement/ [http://perma.cc/WK6C-QDFD] (same).

24. *See* Tapio Lappi-Seppälä, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 92, 106–22 (Michael H. Tonry & Richard S. Frase eds. 2001) (discussing the factors that contributed to the decline in Finland's prison population).

25. Ikponwosa Ekunwe & Richard S. Jones, *Finnish Criminal Policy: From Hard Time to Gentle Justice*, 21 J. PRISONERS ON PRISONS 173, 173–76 (2012); *see also* MARGARET WERNER CALAHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, at 193 (1986) (indicating the U.S. rate of incarceration in state and federal prisons as 117 per 100,000 in 1950 and 126 per 100,000 in 1960); HANNS VON HOFER ET AL., NORDIC CRIMINAL STATISTICS 1950–2010, at 68 (2012) (reporting the Finnish incarceration rate as 187 per 100,000 population in 1950 and as 154 per 100,000 in 1960, compared to 51 and 44 for Norway, and 35 and 65 for Sweden in the same years).

26. Lappi-Seppälä, *supra* note 24, at 106.

led projects in public life.[27] The notion of a social rather than punitive response to crime is familiar, but the reorientation of state projects and national identity, leading to the largest decarceration in history, is less familiar.

In the United States, in the Black Lives Matter movement, a compelling criminal law reform effort is also taking shape, focused on particular threats to black life, but opening more broadly into a forceful call to dismantle the carceral state and to come to terms with the United States' own national shame.[28] What distinguishes this burgeoning movement in the United States, like the movement for decarceration in Finland, is the identification of criminal law reform not only with a fundamental shift in penal policy and criminal procedures, but with a reorientation of the state more generally from regressive and punitive to social ends. These efforts may not result in immediate policy successes, particularly in those jurisdictions presently characterized by a regressive political climate, but these efforts do project a longer-term vision of change and one that could portend fundamental transformation of our carceral state in the perhaps not so distant future.

This Essay unfolds in three parts. Part I begins by further considering Gottschalk's critical account of ongoing criminal law reform efforts. Part II reveals the significant variation between distinct impulses in contemporary criminal law reform efforts, proposing that decarceration efforts motivated primarily by cost-cutting have the potential to do more harm than good, while those efforts concerned with limited drug law and related reform could be expanded to reach more transformative goals. Part III addresses longer term visions of decarceration by exploring the experience of Finland's dramatic decarceration and the Movement for Black Lives in the United States.

I. Mapping the Tenacious Carceral State

Marie Gottschalk's masterful book *Caught: The Prison State and the Lockdown of American Politics* offers a comprehensive critical map of the U.S. carceral state. Her primary argument is that American carceral practices are more impervious to change than most people imagine.[29] Gottschalk draws both on the vast literature examining the expansion of the

27. *See* PATRIK TÖRNUDD, HELSINKI NAT'L RESEARCH INST. OF LEGAL POLICY, FIFTEEN YEARS OF DECREASING PRISONER RATES 12 (1993) ("[T]hose experts who were in charge of planning the reforms and research shared an almost unanimous conviction that Finland's internationally high prisoner rate was a disgrace."), *quoted in* Lappi-Seppälä, *supra* note 37, at 140 (adding that this sense of disgrace and support for reform were widely shared among Finland's civil servants, members of the judiciary, prison authorities, and politicians).

28. *See infra* subpart III(B).

29. *See generally* GOTTSCHALK, *supra* note 2.

carceral state, including her own earlier work, as well as media coverage and policy reports addressing ongoing reform.[30]

Gottschalk explains that it should be possible, in principle, to greatly reduce incarceration levels without tackling what she calls 'structural problems' or the root causes of crime.[31] After all, as she notes, 'a focus on structural problems conflates two problems that are actually quite distinct—the problem of mass incarceration and the problem of crime.'[32] While incarceration levels are determined by sentencing laws and policies, crime is generally associated with a wide range of independent factors including underlying social conditions, inequality, concentrated poverty, prevalence of access to legal as opposed to underground economies, drug addiction, and the pervasiveness of guns.[33] Although in principle it should be possible to eliminate excessive carceral practices through straightforward sentencing reform, Gottschalk argues that, given current political conditions, contemporary reform efforts are bound to fail.[34] Gottschalk concludes that what is needed to overcome current political obstacles is a 'convulsive politics from below.'[35] In her account, though, as in most of the related scholarship, this sort of public groundswell is understood to be absent from the contemporary scene, as are any significant prospects for substantial change.[36]

More specifically, Gottschalk identifies two dominant 'frames' in contemporary reform efforts.[37] The first frame—which Gottschalk calls the racial justice frame or the *New Jim Crow* frame—is centered on racial injustice in criminal law enforcement.[38] The second frame she identifies is the bipartisan consensus to reduce incarceration.[39] This second frame focuses on reducing the severity of sentences for drug-related and other minor offenses, though it is sometimes motivated predominantly by a desire to decrease government spending.[40]

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30. *See generally id.*: GOTTSCHALK, *supra* note 10 (examining the historical, political, and institutional foundations of the U.S. carceral state and the role of four key movements and groups—the victims' movement, the women's movement, the prisoners' rights movement, and opponents of the death penalty—in unwittingly mediating the construction of the carceral state in important ways).

31. GOTTSCHALK, *supra* note 2, at 258–59.

32. *Id.* at 259.

33. *See id.* at 277–79 (discussing the multitude of factors that influence the rate of crime). *See generally* NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 3 (Jeremy Travis & Bruce Western eds. 2014) (explaining the relationship between policy choices and incarceration rates).

34. *See* GOTTSCHALK, *supra* note 2, at 2, 258–60.

35. GOTTSCHALK, *supra* note 2, at 282.

36. *Id.* at 276, 282.

37. *Id.* at 3.

38. *Id.*

39. *Id.*

40. *Id.*

Gottschalk reveals that the effects of the various reform efforts associated with these two frames have been quite modest, and she dismisses both as inadequate.[41] She points out that if the United States were to reduce its incarceration rate by 50%, it would still possess an extraordinarily high incarceration rate of about 350 per 100,000 people, a rate far greater than that of otherwise-similar states.[42] Reducing the U.S. incarceration rate to its historical norm of 120 to 130 inmates per 100,000 people would entail an approximately 75% reduction in incarceration—a change that currently proposed reforms are powerless to achieve.[43]

With reform underway in many jurisdictions, the population of prisoners in the custody of the Federal Bureau of Prisons decreased for the first time in 2013, though only by 0.9%.[44] The total prison population under the jurisdiction of U.S. state and federal authorities at the end of 2013 reflected an increase of approximately 4,300 prisoners over the 2012 total, after several years of decline.[45] State prison populations in the United States have decreased slightly in the aggregate, with some states reporting more significant decreases and others slight increases.[46]

In Gottschalk's view, the powerlessness of the racial justice frame to alter these trends is twofold. First, Gottschalk is critical of the capacity of the racial justice frame to contribute to meaningful decarceration because of the 'gross limitations of oppositional strategies formed primarily around identity-based politics.'[47] Research in social psychology, for example, suggests that white people are more likely to support punitive policies when they are made aware that those punitive measures have racially disparate effects on people of color.[48] Gottschalk goes on to suggest that reform efforts organized around racial justice elide the political-economic dimensions of carceral practices. As a consequence, Gottschalk argues that

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41. *Id.*

42. *Id.* at 15.

43. *Id.* at 2, 15 (explaining that a reduction in prisoner population to 120 to 130 inmates per 100,000 people would reduce the current incarceration rate to a quarter of what it currently is and describing the various changes that the carceral state has caused outside the prison context, such as vast disenfranchisement of minority groups and fluctuations in the political environment).

44. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013, at 1 (2014), https://www.bjs.gov/content/pub/pdf/p13.pdf [https://perma.cc/U8P9-R5FZ].

45. *Id.* at 2.

46. *Id.*

47. GOTTSCHALK, *supra* note 2, at 20.

48. *See generally* NAZGOL GHANDNOOSH, SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES (2014); Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949 (2014); J.T. Pickett & T. Chiricos, *Controlling Other People's Children: Racialized Views of Delinquency and Whites' Punitive Attitudes Toward Juvenile Offenders*, 50 CRIMINOLOGY 673, 692 (2012); J.T. Pickett et al., *The Racial Foundations of Whites' Support for Child Saving*, 44 SOC. SCI. RES. 44 (2014).

the racial justice frame neglects the importance of class and other nonracial factors in the formation of the carceral state.[49]

But Gottschalk is simply mistaken that the racial justice frame uniformly neglects economic and other considerations and that equality-based arguments necessarily fall short as a mobilizing framework. There is no reason why attention to racial violence necessarily obscures political-economic or other important considerations. Nor is a racial justice frame at odds with coalitional efforts that attend to racial injustice in connection with other concerns.

Perhaps Gottschalk is dismissive of the racial justice frame in part because she appears to associate the racial justice frame with the content of Michelle Alexander's *The New Jim Crow*, a book which Gottschalk praises but ultimately regards as flawed.[50] Yet, the movement for racial justice in criminal law enforcement is by no means limited to the content of Alexander's book. The demands of Black Lives Matter and the Movement for Black Lives, for instance, reach significantly beyond drug-related criminal law enforcement, which is the primary focus of Alexander's analysis.[51] The racial justice critique of U.S. carceral practices is also informed by much important scholarly and activist work beyond Alexander's *The New Jim Crow*.[52]

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49. More specifically, Gottschalk contends that the focus on racial disparities in criminal enforcement obscures broad changes in the U.S. political economy associated with the carceral state's entrenchment and with sustained racial subordination of poor people of color. These changes in the U.S. political economy include growing income and other inequalities, an escalating political assault on the public sector and organized labor, the economic decline in wide areas of rural and urban America, and deep structural changes in the job market. *See* GOTTSCHALK, *supra* note 2, at 10–14.

50. Gottschalk repeatedly references Alexander's book as an illustration of projects to advance racial justice in criminal law enforcement. And though Gottschalk celebrates the enormous contribution made by Alexander's book, and the social activism that the book inspired, Gottschalk recognizes the inattention to political economy and the broader scope of the carceral state as significant limitations for the '*New Jim Crow* frame' as a comprehensive analytic or decarceration framework. According to Gottschalk, the '*New Jim Crow* frame' is unable to 'sustain the broad political movement necessary to dramatically reduce the number of people in jail and prison or ameliorate the many ways in which the carceral state has deformed U.S. society and political institutions. *Id.* at 3, 5, 13–14. Later in her analysis, Gottschalk acknowledges that Alexander herself may have reconceptualized her own political engagement of criminal law reform to encompass political-economic concerns, but this does not inform Gottschalk's overwhelmingly critical assessment of the prospects of a movement for racial justice in criminal law enforcement to register wider ranging effects. *See id.* at 276 ("Since publishing *The New Jim Crow*, Michelle Alexander has become an outspoken advocate of forging a political movement to challenge the carceral state that is more encompassing than the race-centered approach she appeared to be endorsing in her book."). For an example of Michelle Alexander's more recent public engagement, see Michelle Alexander, *Breaking My Silence*, NATION (Sept. 4, 2013), http://www.thenation.com/article/breaking-my-silence/ [http://perma.cc/DQ46-9AUM].

51. *See infra* subpart III(B).

52. *See generally* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE (2010); COLE, *supra* note 8; ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF

Second, Gottschalk argues that the racial justice frame is misguided because there are many people—millions in fact—who are subject to excessive criminalization and brutal punishment in the United States who are Latino or white.[53] Gottschalk acknowledges that race matters deeply in any effort to dismantle the carceral state, but she points out that 'the United States would still have an incarceration crisis even if African-Americans were sent to prison and jail at 'only' the rate at which whites in the United States are currently locked up.'[54] The incarceration rate for white males in the United States is approximately 708 per 100,000—significantly greater than the total incarceration rate of punitive Russia, which is 568 per 100,000, and radically more than the incarceration rates of otherwise-similar states like Canada, which incarcerates 117 per 100,000 of its citizens, or Germany, which incarcerates 85 per 100,000 of its citizens.[55] By contrast, the incarceration rate for African-Americans was over 2,000 per 100,000 in 2010.[56] Still, new waves of harsh criminal enforcement against immigration-law violators, methamphetamine drug abusers, and those labeled sex offenders increasingly impact Latinos, immigrants, and low-income whites rather than African-Americans.[57]

But racial justice critics understand that there are countless people affected by hyperpunitive policies who are Latino and white.[58] Instead, their focus on the racial dimensions of criminal law enforcement underscores the fact that criminal processes in the United States assumed their especially degrading and dehumanizing character through historical practices of racial subordination that have led blackness and criminality to be connected in the American imagination.[59] These racial dynamics generally inform the American tolerance for penal severity, thoroughly infecting U.S. penal practices and modes of thought about crime and punishment. Racialized ideas about crime and imprisonment influence

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MODERN URBAN AMERICA (2011); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2014).

53. GOTTSCHALK, *supra* note 2, at 4–5.

54. *Id.* at 4.

55. *Id.* at 5 fig.1.1.

56. *See, e.g.*, *United States Incarceration Rates by Race and Ethnicity, 2010*, PRISON POL'Y INITIATIVE (2010), http://www.prisonpolicy.org/graphs/raceinc.html [https://perma.cc/S365-J82H].

57. GOTTSCHALK, *supra* note 2, at 4, 6.

58. *See* MARC MAUER, THE SENTENCING PROJECT, THE CHANGING DYNAMICS OF WOMEN'S INCARCERATION 6 (2013) (detailing a drastic increase in incarcerations of Latina and white women over the last decade). *See generally* BUTLER, *supra* note 52; DAVIS, *supra* note 52; MUHAMMAD, *supra* note 52.

59. *See* MUHAMMAD, *supra* note 52 at 1, 227 (exploring the history of the statistical link between criminality and race and concluding that the way statistics are compiled and interpreted depends heavily on one's own perspectives).

criminal law's harshness and violence, in other words, even when criminal suspects and defendants are not African-American.[60]

Recognizing these dynamics spurred by racial inequity should motivate a fundamental reconsideration of the justice of U.S. criminal practices, across the board, or so the racial justice frame avers. The fact that the Black Lives Matter movement has garnered widespread, interracial support speaks to the political possibilities of such equality-based appeals, even if the movement has also met with hostility from other quarters. The results of social-psychological studies suggesting racial disparities increase whites' support for punitive policies do not mean that the racial justice framing of reform should be rejected, but that racial inequity in the criminal process must be exposed in ways that even more starkly call into question the legitimacy of these practices. I will return to these matters in Part III where I consider in more depth movements for racial and social justice in criminal law enforcement.

Gottschalk identifies a second reform frame in the bipartisan efforts to reduce incarceration primarily through drug law and related reform, much of which is motivated by cost-cutting and is now associated perhaps most prominently with the Cut50 coalition. Cut50, an unlikely alliance of progressives and conservatives, has resolved to cut incarceration levels by 50% over ten years, joining in common cause the National Association for the Advancement of Colored People with Newt Gingrich, Grover Norquist, Republican senators and representatives, and the conservative criminal law reform group "Right on Crime."[61]

Gottschalk exposes with dazzling force the weaknesses of current bipartisan reform efforts. These efforts often center on reducing the severity of punishment for low-level drug offenses and other nonviolent, nonserious, nonsex crimes—what Gottschalk calls the 'non, non, nons.'[62] But sentencing reform along these lines, Gottschalk reveals, will barely make a dent in outsized U.S. prison populations, as the majority of prisoners are not convicted of offenses unambiguously classified as low-level, nonviolent crimes.[63] As she puts it, 'U.S. prisons are not filled with easily identifiable Jean Valjeans.'[64]

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60. GHANDNOOSH, *supra* note 48, at 33.

61. *Our Mission & Work*, #CUT50, http://www.cut50.org/mission [http://perma.cc/Y8HX-6APW] ("#cut50 is a national bipartisan initiative to safely and smartly reduce our incarcerated population by 50 percent over the next 10 years.").

62. GOTTSCHALK, *supra* note 2, at 165.

63. *See id.* at 169 (explaining that four out of five state prisoners classified as "nonviolent" have committed "serious" crimes, that many individuals serving time for nonviolent offenses have actually committed violent offenses in the past, and that only a quarter of federal and a fifth of state prisoners are serving time for a first offense).

64. *Id.* (referencing the sympathetic petty thief in *Les Miserables*).

Bipartisan efforts also prize drug courts, reentry courts, and a constellation of programs focused on reducing recidivism, reentry, and justice reinvestment (especially for the 'non, non, nons")—an array of programs Gottschalk terms the three Rs.[65] But she shows that these measures too are insufficient to address the enormity of the problems they purport to confront.[66] A résumé-writing class, or a drug treatment court, for example, will not ameliorate the chronic unemployment and vulnerability to incarceration of the many mentally ill, addicted people who cycle through U.S. jails and prisons, doing life, as some commentators term it, 'on the installment plan. '[67]

One further prominent current in contemporary bipartisan reform places particular emphasis on reducing budget deficits through decarceration and other fiscal policy reform. Gottschalk shows how bipartisan budget-based reform likewise presents an empty promise of change, because state expenditures on corrections amount to only a small, single-digit percentage of total state expenditures, with most prison costs largely fixed and not readily cut.[68] What is more, many powerful interests profit from mass incarceration—both politically and economically.[69] Thus, decarceration rooted in mere cost-cutting tends, in Gottschalk's analysis, to make prisons 'leaner and meaner' without enabling other, more transformative change.[70]

Gottschalk regards these various bipartisan reform efforts—the focus on the 'non, non, nons, the RRR programs, and budget-based criminal law reform—as intricately entwined and as similar to racial justice projects in their inability to bring about meaningful change.[71] By conflating these distinct currents of reform, however, she misses the opportunity to fully identify the most concerning aspects of certain of these initiatives and to constructively engage the more promising possibilities of certain other reform projects. It is to these matters that we now turn.

II. Engaging the Limits of Proposed Reform

We might understand contemporary criminal law reform initiatives as actually consisting of two further, distinguishable currents. The first entails

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65. *See id.* at 79–80.

66. *See id.* at 97, 100, 106 (arguing that the focus on reentry, recidivism, and justice reinvestment is misplaced as these policies and programs overlook the deeper, structural socioeconomic and political causes behind the rise of the carceral state).

67. Joan Petersilia & Robert Weisberg, *Parole in California: It's a Crime*, L.A. TIMES (Apr. 23, 2006), http://articles.latimes.com/2006/apr/23/opinion/op-petersilia23 [http://perma.cc/P2BE-2SXH].

68. GOTTSCHALK, *supra* note 2, at 9.

69. *Id.*

70. *Id.*

71. *See id.* at 3, 17.

decarceration reform motivated principally by cost-cutting, which I am calling 'neoliberal penal reform. The second involves drug law reform, police reform, and related efforts intended to reduce mass incarceration and overcriminalization and, often, to address racial disparities in criminal law enforcement—which I will designate, as a shorthand, 'drug law reform, though these projects frequently incorporate other, broader modifications to sentencing laws, police practices, and expansion of mental health, addiction-treatment, and other programs.

Neoliberal penal reform threatens to disguise, while further entrenching, the carceral state. Although neoliberal penal reform may advance the cause of decarceration in some measure, mainly by attracting more adherents to the cause, its underlying values and fiscally regressive orientation are at odds with the social turn in public policy that would be necessary to constitute forms of governance beyond our carceral state.

Proposed reform emphasizing changes to drug law enforcement similarly stands to reduce incarceration and shift other carceral practices only modestly. But, as it is typically coupled with a commitment to more substantially reduce penal severity, these efforts could be developed to more promising ends—to engender a deeper public reconsideration of what would actually be necessary to begin to dismantle our current practices of incarceration and criminalization.

A. The Perils of Neoliberal Penal Reform

While Gottschalk regards cost-cutting and drug law reform efforts as equally ineffective, these two reform imperatives differ both in their underlying motivations as well as in their effects. In contrast to cost-cutting reform, drug law reform is often pursued through resource-intensive, state-supported diversionary alternatives for people who would not otherwise face prison sentences. Though in many reform packages both imperatives are present to a greater or lesser degree, drug law reform—typically motivated by humanitarian, racial justice, and public health concerns—ought to be distinguished, at least conceptually, from a program of decarceration that is primarily moved, in Grover Norquist's terms, to shrink government 'down to the size where we can drown it in the bathtub.'[72]

Insofar as reducing government spending is its primary motivation, decarceration tied to regressive fiscal reform might be recognized as a form of neoliberal governance.[73] Neoliberal governance refers generally to a constellation of policies and associated ideas that promote financial and trade deregulation, low taxes, privatization of public services, and minimal

72. Editorial, *Rethinking Their Pledge*, N.Y. TIMES (Apr. 22, 2011), http://www.nytimes.com/2011/04/22/opinion/22fri1.html?_r=0 [http://perma.cc/F4YJ-GNDX].

73. *See* CHUCK DEVORE, TEX. PUB. POLICY FOUND., THE TEXAS MODEL: PROSPERITY IN THE LONE STAR STATE AND LESSONS FOR AMERICA, 119–22 (2012 ed. 2012).

welfare assistance in an effort to limit the role of government in addressing social and economic problems.[74]

Gottschalk makes an overwhelming case that neoliberal penality—with its emphasis on slashing criminal law enforcement and penal expenditures—is an ineffective decarceration framework.[75] These measures should not be expected to significantly reduce incarceration and overcriminalization.

But Gottschalk gives short shrift to the ways in which decarceration paired with regressive fiscal reform threatens to deepen immiseration inside and outside of prisons in ways fundamentally at odds with dismantling the carceral state. Though Gottschalk persuasively demonstrates that it should be possible in principle to substantially reduce incarceration through comprehensive sentencing reform without resolving more fundamental 'structural problems, a criminal law reform program organized around reduced government spending, without other animating social goals, tends toward concealment and displacement of incarceration and the expansion of other trends that reinforce overcriminalization and penal severity.[76]

Consider, for instance, Texas's often-celebrated decarceration. When a budget projection in 2007 by the Texas Legislative Budget Board indicated Texas would need an additional 17,000 prison beds at a cost of $2 billion by the end of 2012, the state enacted a series of criminal law reforms to avoid these expenditures.[77] Promoted by the Texas Public Policy

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74. David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 1, 2 ("Neoliberalism is an overlapping set of arguments and premises that are united by their tendency to support market imperatives and unequal economic power in the context of political conflicts "); *see also* GOTTSCHALK, *supra* note 2, at 11 (noting that '[n]eoliberalism has long rested on privatizing failure and denigrating the role of government to solve economic and social problems"); HARCOURT, *supra* note 6, at 41 (suggesting that a core idea of neoliberal penality is that the government's legitimate role is essentially limited to the punishment arena); Michael Dawson, *3 of 10 Theses on Neoliberalism in the U.S. During the Early 21st Century*, 6 CARCERAL NOTEBOOKS 11, 17 (2010) (recognizing neoliberalism's "sterile and extremely limited notion of politics").

75. *See* GOTTSCHALK, *supra* note 2, at 77–78 (arguing that the neoliberal push to privatize government services led to a massive and expensive expansion of the penal system because private interests became deeply invested in the carceral state).

76. *See id.* at 111, 260.

77. Texas's reform occurred in several phases. In 2007, with HB 1 and SB 166, the legislature reduced the likelihood that technical violations would result in reincarceration by investing $241 million to create less costly treatment programs and provide financial incentives to local probation departments to apply alternative sanctions for technical violations. *See* Tex. H.B. 1, 80th Leg., R.S. (2007) (authorizing 800 new beds for people on probation with substance-abuse needs in a residential program; 3,000 new slots for people on probation in outpatient substance-abuse treatment; 1,400 new beds in intermediate sanction facilities to divert technical probation and parole violators; 300 new beds for people on parole in halfway houses; 500 new beds for people convicted of DWI offenses in an in-prison treatment unit; 1,500 new beds for in-prison substance-abuse treatment programs; 1,200 new slots for substance-abuse treatment programs in the state jail system). Also in 2007, with SB 103, the legislature eliminated prison sentences for juvenile misdemeanors and gave judges more discretion over the imposition of sentences for other

Foundation (TPPF)—a prominent conservative think tank—and Right on Crime—a national organization dedicated to aligning criminal law reform with traditional conservative commitments—the state's decarceration initiatives have centered on cutting costs, advancing TPPF's agenda of maintaining 'low taxes' and 'a light and predictable regulatory burden.'[78]

A bipartisan coalition of Texas lawmakers led by Republican State Representative Jerry Madden and Democratic State Senator John Whitmire set out to avoid the projected $2 billion expenditure required for prison expansion by committing to spend $241 million on less costly initiatives designated as 'prison diversion' programs.[79] TPPF has proudly announced that the state implemented its criminal law reform 'without lowering the penalties for any offense, even lengthening some sentences, and by placing less serious '[n]onviolent drug and property offenders under control in a separate system' rather than setting them 'free.'[80]

During this same period, Texas also cut taxes and reduced social spending in other areas—primarily education and other public services. Governor Rick Perry promoted a significant reduction in property taxes in 2006. When Texas faced a $27 billion budget deficit for fiscal years 2012 and 2013, Perry sought the aid of Grover Norquist, who toured the state with the governor urging legislators to resist implementing any new taxes.[81] Heeding that urging, legislators ensured that the state's biennial budget for

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juvenile offenses. Tex. S.B. 103, 80th Leg. R.S. (2007). This allowed the state to close three juvenile prisons in 2009, and the state reinvested the savings into juvenile probation and alternative facilities. *See generally* MARC LEVIN, CTR. FOR EFFECTIVE JUSTICE, ADULT CORRECTION REFORM: LOWER CRIME, LOWER COSTS (2011) (recognizing the savings associated with closing three juvenile lockups and noting that policymakers invested part of the money saved primarily by closing two remote juvenile lockups in juvenile probation). In 2011, with HB 2649 and HB 1205, the Texas legislature expanded earned-credit eligibility for both people incarcerated for committing nonviolent offenses and probationers. *See* LEVIN, *supra*, at 2. The 2001 scandal in Tulia, Texas, where dozens of African-Americans were charged and convicted of false, low-level cocaine offenses based on uncorroborated testimony and sentenced to 20, 40, and even up to 90 years, had earlier prompted significant pressure for criminal law reform in Texas. In the wake of the Tulia scandal, Governor Rick Perry pardoned the Tulia defendants, and the Texas legislature passed bills requiring corroboration of confidential informants' testimony, prohibiting racial profiling by police officers, and providing for public legal defense for indigent defendants. But the Tulia scandal did not generate as much momentum for decarceration reform as the later budget projection. Scott Gold, *35 Are Pardoned in Texas Drug Case*, L.A. TIMES (Aug. 23, 2003), http://articles.latimes.com/2003/aug/23/nation/na-tulia23 [http://perma.cc/PW3G-7W6G]; *see also* Tex. H.B. 2351, 77th Leg. R.S. (2001) (requiring corroboration of testimony from confidential informants); Tex. S.B. 1074, 77th Leg. R.S. (2001) (prohibiting racial profiling by peace officers).

78. DEVORE, *supra* note 73, at 4, 54, 119–26.

79. Tierney Sneed, *What Texas is Teaching the Country About Mass Incarceration*, U.S. NEWS & WORLD REP. (Nov. 19, 2014), http://www.usnews.com/news/articles/2014/11/19/texas-georgia-mississippi-set-conservative-example-for-criminal-justice-reform [http://perma.cc/JX3Q-6XMJ] (noting that Texas has the fourth-highest adult incarceration rate in the country).

80. DEVORE, *supra* note 73, at 122.

81. GOTTSCHALK, *supra* note 2, at 112.

2012 and 2013 reflected substantial cuts in state spending for education and social services, and the legislature again declined to increase taxes.[82]

Although Texas reports that its criminal law reforms have resulted in a 10% drop in the state's prison population during a period when the state's crime rate declined by 18%, as Gottschalk suggests, the size of the overall decline is itself the subject of controversy.[83] The federal Bureau of Justice Statistics indicates the state prison population declined by only 3.5%.[84] The state and federal figures diverge because Texas does not include in its prison counts the thousands of state prisoners held in lockdown facilities designated as prison alternatives, nor does it include those persons incarcerated in county jails, or even those confined in prison but designated in 'pre-release' status.[85]

Indeed, in the aftermath of the 2007 reform, Texas allocated millions of dollars to creating less costly, fully secured facilities for people with drug offenses or who violate the conditions of probation or parole. Though these facilities look and operate like prisons, with terms of lockdown confinement typically ranging between two to six months for probation or parole violators, people detained in these facilities are not included in the state's

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82. *Id.*; *see also* Ross Ramsey et al., *Texas Legislature Passes $15 Billion in Cuts*, TEX. TRIB. (May 28, 2011), http://www.texastribune.org/2011/05/28/liveblog-texas-legislature-passes-15-billion/ [http://perma.cc/J5K8-HGZQ] (noting that the biggest cuts were in education and health and human services); Paul J. Weber, *Texas School Budget Cuts, Teacher Layoffs Add to Unemployment*, HUFFINGTON POST (Sept. 29, 2011, 9:42 AM), http://www.huffingtonpost.com/2011/09/29/shrinking-texas-school-pa_0_n_986909.html [http://perma.cc/Q6MW-N992] (observing that while '[t]he Legislature cut public education by about $537 per student over the next two years, Governor Perry and Republican leaders refused to raise taxes or dip into the "rainy day fund").

83. In 2007, Texas reported an incarcerated population of 226,901, one of the largest incarcerated populations in the United States. Texas's budget for prison, jail, parole, and probation programs amounted to nearly $3 billion annually. *See* PEW CTR. ON THE STATES, PUB. SAFETY PERFORMANCE PROJECT, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 41–42 (2009) (reporting that Texas's state jail and prison populations totaled to 226,901 in 2007 and that Texas spent $2.958 billion on corrections in fiscal year 2008). From 2007 to 2009, the state reported that its prison population stabilized instead of increasing, as more people were diverted from prison to probation and intermediate sanction facilities. *See* Keith B. Richburg, *States Seek Less Costly Substitutes for Prison*, WASH. POST (July 13, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/12/AR2009071202432_2.html [http://perma.cc/7MXW-4ZDS] (stating that, from January 2007 until December 2008, Texas added 529 inmates, which was only a tenth of what was projected). In 2009, direct sentences to prison reportedly decreased 6%. *State Initiatives: Texas*, RIGHT ON CRIME, TEX. PUB. POL'Y FOUND. http://rightoncrime.com/category/state-initiatives/texas/ [http://perma.cc/6YPM-XYUS]. Between 2009 and 2014, Texas's imprisonment rate declined by 10% while crime dropped by 18%. Sneed, *supra* note 79. *But see* GOTTSCHALK, *supra* note 2, at 108–09 (recognizing the disparity between the federal and state figures).

84. GOTTSCHALK, *supra* note 2, at 108–09.

85. *See id.* at 109 (explaining that Texas does not count the state inmates held in county jails or those confined to "fully secured substance abuse treatment facilities" and "intermediate sanction facilities").

prison population totals.[86] Whereas aggregate incarceration levels may have modestly decreased in Texas, accurate counting of incarcerated populations has been undermined as the designation of incarceration in certain 'intermediate sanction facilities, 'Substance Abuse Felony Punishment Facilities, and a range of other privately contracted detention settings may fall outside state prison population statistics.[87] Figures on jail populations are likewise difficult to come by because numbers are generally recorded separately in each county, with considerable fluctuations over time due to many short stays and without reliable aggregate accounting.[88]

'The dirty little secret' about Texas's decarceration reform, according to Representative Madden, 'is we built about 4,000 beds, but we made them short-term substance-abuse facilities and after-care in communities. As Senator Whitmire explained: 'Those are lockup facilities. They've got razor wire If you want to call them prisons for political cover, fine. '[89] Along these lines, neoliberal penal reform tends to disguise cost-cutting initiatives as decarceration, when in fact these measures largely preserve the status quo at reduced expense.

Gottschalk reveals that when deficit reduction drives decarceration initiatives, the result is generally an expansion in the fines and fees imposed on defendants, on the one hand, and cuts in essential prison expenditures like health services and food, on the other.[90] Prisons and jails, as Gottschalk underscores, become 'leaner and meaner. '[91] For example, in the face of an epidemic of prison rape, Texas Governor Rick Perry wrote a letter in 2014 to the Department of Justice announcing that Texas would not assume the expense for making required modifications to comply with the Prison Rape Elimination Act.[92] Texas does not provide air conditioning even in the hottest months in many of its prisons.[93] And when the prison guards' union joined in support of a prisoners' lawsuit challenging the excessive heat in Texas prisons—after learning the state planned to construct climate-controlled barns to raise pigs for prisoners' consumption—Democratic Senator Whitmire, sponsor of Texas's criminal law reform, responded that 'the people of Texas don't want air-conditioned

86. *Id.*

87. *Id.*; *see also Private Facility Contract Monitoring/Oversight Division*, TEX. DEP'T CRIM. JUST. https://www.tdcj.state.tx.us/divisions/pf/index.html [http://perma.cc/K55U-4V27] (providing an overview of the Private Facility Contract Monitoring/Oversight Division).

88. *See Private Facility Contract Monitoring/Oversight Division*, *supra* note 98.

89. Donald Gilliland, *Prison System 6: An Unlikely Duo Break the Cycle in Texas*, PENN LIVE (Mar. 3, 2011), http://www.pennlive.com/specialprojects/index.ssf/2011/03/in_texas_an _unlikely _duo_break.html [http://perma.cc/A8QV-JFNH].

90. GOTTSCHALK, *supra* note 2, at 9.

91. *See supra* note 82 and accompanying text.

92. *Id.* at 137.

93. *See id.* at 136 (noting that "less than one-fifth of the state's prisons [are] fully air-conditioned").

prisons, and there's a lot of other things on my list above the heat.'[94] In 2011, the Texas legislature considered a bill that would establish tent cities to house inmates as a cost-saving measure.[95] Pressures to reduce spending also encourage increased reliance on privatization of imprisonment and operational and other savings through the use of prison labor.[96] Gottschalk thoroughly persuades that budget deficits will not enable substantial decarceration without a concomitant shift in penal philosophy and sentencing law and policy.[97]

But a regressive fiscal agenda is not merely ineffective as a decarceration framework; it is at odds with dismantling the carceral state. Although Gottschalk lays bare the weaknesses of neoliberal penal reform, the masking and displacement these developments evidence should be understood as a product of the emphasis on regressive fiscal reform, rather than merely reflecting the limits of this approach to achieve reductions in penal severity.[98] More specifically, anti-tax initiatives and cuts to government spending threaten to further embed carceral practices, especially beyond jail and prison walls, entrenching punitive policies. To respond to mental illness, addiction, poverty, and other root causes will require governments to allocate additional resources to those ends. Neoliberal penal reform, however, is typically accompanied by a lack of funding for mental health and other diversionary programs that might otherwise provide the requisite diversionary services to facilitate meaningful decarceration. Accordingly, even as Texas has established mental health and other diversion programs, they are unable to operate as intended. At one Right on Crime convening, Andrew Keller, a director of a mental health diversion policy institute in Harris County, Texas, reported a lack of adequate resources, mental health benefits, and Medicaid funds for the programs he oversees, noting that programs are unable to recruit providers because '[t]hey aren't going to be paid very much, and then they

94. *Id.* *see also* Ann Zimmerman, *Extreme Heat Tests Prisons*, WALL STREET J. (Oct. 17, 2013), http://www.wsj.com/articles/SB10001424052702304441404579123381202026834 [http://perma.cc/27WJ-KESR]; Editorial, *Failure to Communicate*, HOUS. CHRON. (Apr. 25, 2014), http://www.chron.com/opinion/editorials/article/Failure-to-communicate-5430794.php [http://perma.cc/9HPM-H2ZL].

95. GOTTSCHALK, *supra* note 2, at 40.

96. *See id.* at 40, 49 (noting increased pressure to cut expenditures in prisons and discussing the political narrative driving alternative prison-funding mechanisms).

97. *See id.* at 25 ("[M]ounting budgetary and fiscal pressures will not be enough on their own to spur cities, counties, states, and the federal government to make deep and lasting cuts in their incarceration rates and to address the far-reaching political, social and economic consequences of the carceral state.").

98. *See id.* at 9 (noting that, '[f]aced with powerful interests that profit politically and economically from mass imprisonment, states have been making largely symbolic cuts that do not significantly reduce the incarcerated population or save much money").

see the paper work and they just won't agree to it. '[99] Keller reports that the state fails to cover treatment for PTSD and anxiety disorder outside prison or jail even though these conditions frequently afflict individuals who are subject to minor criminal sentences and could otherwise be diverted from jail or prison.[100]

Gottschalk does recognize that Texas's anti-tax and deregulatory measures defund or underfund the very sort of social projects—high-quality schools, living-wage jobs, public health care, mental health care, affordable housing, and social services—that are most likely to improve the quality of life for people in areas substantially impacted by crime and incarceration.[101] But she stops short of identifying neoliberal penal reform as itself a fundamental obstacle to meaningful decarceration.

These dynamics are powerfully illustrated by the criminalization of student misconduct in Texas public schools at the same time that funding to education has been cut. With limited means to engage youth and maintain an environment conducive to learning in under-resourced public schools, Texas has increasingly come to rely on school police officers to respond to youthful misbehavior.[102] Tickets commonly issued to students by school police have included tickets for disruption of class and disorderly conduct.[103] Many school districts contract with local law enforcement agencies to assign one or more police officers to the district.[104] Other schools have commissioned their own police forces—roughly 167 Texas school districts, encompassing half of the state's students, use a school-commissioned police force model.[105] Economically disadvantaged schools with a majority of racial-minority students are more likely to employ police officers in schools, and hence, misbehaving students in these schools are more likely to suffer criminal consequences for their misbehavior.[106] In 2015, Texas eliminated criminal penalties for truancy after a state-level

99. *See* RIGHT ON CRIME, PRE-TRIAL AND MENTAL HEALTH POLICY IN HARRIS COUNTY, TEXAS: FRONT-END REFORMS THAT PROTECT CITIZENS, CONTROL COSTS, AND ENSURE JUSTICE 49 (2015) (quoting Andrew Keller).

100. *See id.* (quoting Ryan Sullivan, Policy Advisor, Harris County Sheriff's Office).

101. *See* GOTTSCHALK, *supra* note 2, at 261 (asserting that decarceration will require significant social projects and will cost money).

102. Class C misdemeanors include disruption of class, disruption of transportation, and gang membership. Tex. Educ. Code Ann. §§ 37.121, 37.124, 37.126 (West 2012).

103. TEX. APPLESEED, TEXAS' SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST, AND USE OF FORCE IN PUBLIC SCHOOLS 5 (2010).

104. *Id.* at 38.

105. *Id.* at 43.

106. *See* Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009) (discussing research on school police officers and anticipating that conflicts will more frequently be resolved by arrests in schools with officers).

study uncovered 115,000 criminal truancy cases filed in 2013 alone.[107] Juvenile incarceration has also been reduced.[108] But schools persist in pursuing criminal charges against schoolchildren—especially for misbehavior in class, swearing, and disturbing the peace.[109]

Moreover, according to the Appleseed study,

> [f]our in five children sent to court for truancy were found to be economically disadvantaged, meaning they are eligible for free and reduced lunch, and are least able to afford steep fines typically levied in response to truancy charges. Failure to pay fines, which can run as high as $500, can result in an arrest warrant and even incarceration.[110]

Once a child turned eighteen, the study described, if the ticket-related fines had not been paid, the young person faced a warrant and jail time.[111] A lawsuit filed by the ACLU of Texas has cited the jailing of hundreds of teenagers for unpaid tickets issued years before.[112] Even after truancy was eliminated as a ground for criminal conviction of young people, for other in-school misbehavior—a fight in which students pour milk on each other, for instance—students may find themselves in criminal court, facing substantial fines, criminal records, and ultimately incarceration.[113] In these ways, cuts to school funding in an atmosphere of existing reliance on policing to ensure school discipline further embeds the criminalization of low-income youth of color and reinforces the school-to-prison pipeline.

Regressive fiscal and antiregulatory commitments associated with Texas's cost-cutting reforms also interfere with meaningful decarceration in other respects, exacerbating the criminalization of poverty. The case of

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107. Terri Langford, *Schools, Courts Worry About New Truancy Law*, TEX. TRIB. (July 12, 2015), http://www.texastribune.org/2015/07/12/schools-courts-worry-about-truancy-law/ [http://perma.cc/4HDY-A96L].

108. TONY FABELO ET AL. THE COUNCIL OF STATE GOV'TS JUSTICE CTR.. CLOSER TO HOME: AN ANALYSIS OF THE STATE AND LOCAL IMPACT OF THE TEXAS JUVENILE JUSTICE REFORMS 1 (2015).

109. Therese Edmiston, Note, *Classroom to Courtroom: How Texas's Unique School-Based Ticketing Practice Turns Students into Criminals, Burdens Courts, and Violates the Eighth Amendment*, 17 TEX. J. C.L. & C.R. 181, 192–93 (2012); Press Release, Texas Appleseed, New Report Finds Inconsistent and Unfair Texas Truancy Policies Disproportionately Hurt Low-Income Kids and Students of Color (Mar. 5, 2015), https://www.texasappleseed.org/sites/default/files/ForWeb2015TruancyReportRelease-FINAL-March5.pdf [http://perma.cc/G5Y6-ZUB2].

110. Press Release, Texas Appleseed, *supra* note 121.

111. Edmiston, *supra* note 109, at 191–92.

112. De Luna v. Hidalgo Cty. 853 F. Supp. 2d 623, 626 (S.D. Tex. 2012); Edmiston, *supra* note 109, at 192.

113. Edmiston, *supra* note 109, at 182, 192;Donna St. George, *In Texas Schools, Response to Misbehavior Is Questioned*, WASH. POST (Aug. 21, 2011), https://www.washingtonpost.com/local/education/in-texas-schools-a-criminal-response-to-misbehavior/2011/08/04/gIQA5EG9UJ_story.html [http://perma.cc/BNR6-N7XW]; Brian Thevenot, *School District Cops Ticket Thousands of Students*, TEX. TRIB. (June 2, 2010), http://www.texastribune.org/2010/06/02/school-district-cops-ticket-thousands-of-students/ [http://perma.cc/KCC6-XPG6].

debt-related incarceration serves as a notable example. As Gottschalk explores, when criminal law reform is organized around an effort to reduce state expenditures, pressures increase to charge defendants and convicted persons fines and fees to subsidize the costs of the criminal process.[114] But beyond criminal legal debt, a regressive fiscal and antiregulatory agenda exacerbates other dimensions of the criminalization of poverty. For instance, payday lenders—who profit on the economic precarity of low-income people who require small, short-term loans to cover basic expenses—thrive in an environment where there is a minimal social safety net for those in desperate economic straits and a meager regulatory apparatus to constrain collections practices. Texas payday loan businesses have routinely engaged in the unlawful use of criminal charges to collect debts in violation of state laws governing the operations of credit-access businesses and the filing of such criminal charges, as well as state and federal fair debt collection laws.[115] Over 1,500 criminal complaints of bad check and theft by check were filed by thirteen payday lenders between January 2012 and 2014 in Texas—sometimes resulting in jailing of debtors.[116] In one bad-check case, the court ordered payment of $918.91 for a defaulted $225 payday loan.[117] In another case, in November 2012, Cristina McHan defaulted on a $200 loan from Cash Biz outside Houston; she was arrested, pled guilty, and was assessed a further $305 in court costs and fines.[118] McHan ultimately 'paid off" the debt in part by serving a night in jail.[119]

Although the Texas Finance Code explicitly prohibits payday loan businesses from pursuing criminal charges related to check authorization,[120]

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114. *See* GOTTSCHALK, *supra* note 2, at 36 (explaining that, as state funding has declined and legislators pushed to slash budgets, state courts and correctional departments have begun collecting fees and fines from defendants).

115. Forrest Wilder, *Fast Cash: How Taking Out a Payday Loan Could Land You in Jail*, TEX. OBSERVER (July 16, 2013), http://www.texasobserver.org/cash-fast-how-taking-out-a-payday-loan-could-land-you-in-jail/ [http://perma.cc/FBV6-AVVD]; Letter from Texas Appleseed to Consumer Finance Protection Bureau, Federal Trade Commission, Office of the Attorney General, and Office of Consumer Credit of Texas (Dec. 17, 2014) [hereinafter Letter to CFPB], https://www.texasappleseed.org/sites/default/files/Complaint-CriminalCharges-PaydayBusinesses-Final2014.pdf [http://perma.cc/NVD3-3LME].

116. Melanie Hicken, *In Texas, Payday Lenders Are Getting Borrowers Arrested*, CNN MONEY (Jan. 8, 2015, 7:05 PM), http://money.cnn.com/2015/01/08/pf/payday-lenders-texas/ [http://perma.cc/CH2E-2C6V].

117. Letter to CFPB, *supra* note 115.

118. Wilder, *supra* note 115.

119. *Id.*

120. TEX. FIN. CODE ANN. § 393.201(c)(3). The Republic of Texas Constitution drafted in 1836 plainly states as well that '[n]o person shall be imprisoned for debt in consequence of inability to pay" and the current Texas Constitution's Bill of Rights provides that '[n]o person shall ever be imprisoned for debt.' REPUB. TEX. CONST. OF 1836, Declaration of Rights, Twelfth, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1069, 1083 (1898); TEX. CONST. art. I, § 18.

and although the Texas Penal Code does not criminalize (as theft or fraud) the conveyance of checks to payday lenders that later bounce,[121] when some borrowers have failed to pay off or refinance their payday loans by paying a new finance charge, payday lenders have threatened borrowers with criminal cases, filing complaints with county attorneys, district attorneys, or the courts.[122] In some instances, this has occurred even after the borrower has paid refinance fees that amount to more than the original borrowed amount.[123] The threat of criminal charges and imprisonment serves as a powerful debt-collection tactic as it intimidates borrowers to pay even when they are barely able to do so and when paying may imperil the basic health and well-being of themselves and their families.[124] Prosecutors and judges have participated in this intimidation by pursuing charges on these criminal complaints, mailing demand letters, and incarcerating debtors, either unaware of or undeterred by the illegality of these practices under Texas law.[125] Many of these criminal cases were filed after Texas enacted a law in 2012 further specifying that payday lenders are not authorized to pursue criminal charges for nonpayment unless there is clear evidence of fraud.[126]

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121. *See* TEX. PENAL CODE ANN. §§ 31.04, 31.06, 32.41 (West 2011) (maintaining an exception: that a check was postdated at issuance is a defense to prosecution for theft of service and defeats the general presumption of knowledge or intent applied to bad checks for purposes of prosecution for theft or fraud). Payday loan businesses typically offer short-term loans to borrowers who offer a postdated personal check or authorize electronic debits from their bank account for a finance charge and the borrowed amount. Leah A. Plunkett & Ana Lucía Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 SUFFOLK U. L. REV. 31, 33–34 (2011). After the loan term expires, generally within a matter of weeks, on the borrower's next payday, the loan is to be repaid by the borrower either by allowing the check to be deposited by the payday loan business or by allowing the business to debit the designated account; alternatively, the borrower may pay a new finance charge to roll over the debt for another pay period. *Id.* at 34.

122. Letter to CFPB, *supra* note 115.

123. *Id.*

124. *See* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 86–87 (2002) (noting that most people "will find a way" to repay a loan when threatened with criminal prosecution and jail time).

125. *See* Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenges to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. REV. 589, 610 (2000) (noting that payday lenders filed over 13,000 criminal charges with law enforcement officials against borrowers in one year in a single Dallas precinct); Wilder, *supra* note 120 (relating one instance in which the Bexar County District Attorney's office not only sent a demand letter on behalf of a payday lender, but also included a demand for 'district attorney fees"). In one court, from which more detailed data is available, arrest warrants were issued in 42% of cases brought on the basis of payday loan business complaints. Letter to CFPB, *supra* note 115. In the county with the highest number of documented complaints—more than 700—there was a 28% collection rate, resulting in a recovery of $131,836 from 204 persons. *Id.*

126. *See* Letter to CFPB, *supra* note 115 (explaining new findings based exclusively on complaints and cases filed after Texas Finance Code § 393.201(c)(3) went into effect). Thousands of similar cases have been identified over a period of roughly fifteen years. *See* RUTH CARDELLA ET AL., CONSUMERS UNION, WOLF IN SHEEP'S CLOTHING: PAYDAY LOANS DISGUISE ILLEGAL LENDING (1999); Drysdale & Keest, *supra* note 124, at 610.

Federal regulatory oversight may correct some of these abuses, but the Texas regulatory body tasked with enforcing the law as it applies to payday lenders—the Texas Office of the Credit Consumer Commissioner—has already warned payday lenders to cease filing criminal charges against customers. The Commission reports that it simply lacks the resources to address the problem and has no jurisdiction over prosecutors or judges.[127] Though in some cases federal regulatory actors might offer support, if they do not, the Texas Commission has only thirty field examiners to undertake its work, and those thirty examiners are tasked with regulating 15,000 businesses, including 3,500 payday and title loan businesses.[128] As the director of consumer protection explained: 'Although I'd love to take a bunch of folks and go at that one issue I don't have that luxury.'[129] According to the director, his field examiners are able to find violations only when consumers complain—a rare occurrence, particularly if a person with limited resources and legal literacy is facing criminal charges—or there is a spot inspection of a particular business that happens to reveal during the on-site inspection improper use of criminal complaints to collect debts.[130]

The reasons these problems persist, then, are several. First, Texas has relied heavily on criminal enforcement measures as a vehicle for maintaining social order and enforcing obligations in the absence of other social investment to promote public welfare and social cohesion.[131] Relatedly, individuals living in economically precarious circumstances with a depleted social safety net may have few alternative avenues to address their hardship.[132] An anti-tax, antiregulatory reform agenda is in these respects not simply ineffective as an approach to reducing incarceration; it reinforces hypercriminalization, masks the actual extent of the uses of imprisonment, and impoverishes those public resources that would be crucial as a practical matter to meaningfully dismantle the carceral state even if in principle underlying structural problems are independent of the excessive punitiveness wrought by sentencing law and policy. As the next subpart will explore, neoliberal penal reform poses risks distinct from the relative impotence of drug law reform.

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127. *See* Wilder, *supra* note 115.

128. *Id.*

129. *Id.*

130. *Id.*

131. *See* ELLIOT CURRIE, CRIME AND PUNISHMENT IN AMERICA 17 (1998) (positing that greater imprisonment means a greater reliance on the penal system to maintain social order); ELIZABETH MCNICHOL & NICHOLAS JOHNSON, CTR. ON BUDGET & POLICY PRIORITIES, THE TEXAS ECONOMIC MODEL: HARD FOR OTHER STATES TO FOLLOW AND NOT ALL IT SEEMS 8–9 (2012) (reporting that Texas offers few public services to its residents and has high levels of poverty and low-wage jobs).

132. Johnson, *supra* note 124, at 11–12.

B. The Limits of Drug Law Reform

A separate current of contemporary criminal law reform focuses on drug law reform, diversionary sentencing, policing reform, reentry programming, restorative justice, and other sentencing modifications for minor offenses. Although these programs promise to bring limited change to the scale of incarceration, they offer a useful starting point for engaging the widespread public commitment to decarcerate. This becomes possible, though, only with a clear-eyed account of the inadequacy of current drug law and related reform.

As Gottschalk persuasively explains, it is implausible that drug law reform and other related minor-offense reforms—on their own—will meaningfully transform U.S. carceral practices.[133] Just as President Obama's federal prison-sentence commutations addressed only a small number of those convicted of drug offenses, proposed drug law reform on its own terms will do little to reduce the monstrous scope and severity of U.S. criminal law enforcement.[134] At the state level, the entire population convicted of all drug offenses constitutes only roughly 17% of those in state prisons, and many of these people may have some criminal history that involves other categories of offenses.[135] At the federal level, drug law reform could in principle facilitate somewhat more significant change, because roughly 50% of the federal prison population is incarcerated on drug-related charges.[136] But the federal prison population is only 11% of the total incarcerated population in the United States, and likewise many people convicted of federal drug offenses are also convicted of other non-drug-related offenses or of more serious drug trafficking crimes.[137] What these facts reveal is that there is no immediate politically palatable legislative fix to mass incarceration through drug law reform, even at the federal level. Accordingly, Gottschalk and other commentators lament that sentencing reform for drug-related and other offenses has generated, at best, modest results—and projections based on the content of proposed legislation indicate only very minor modifications to the status quo in the future.

But this account fails to recognize the complicated reverberations and effects that might be generated by current drug law and related reform

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133. GOTTSCHALK, *supra* note 2, at 5–6; John Pfaff, *Escaping From the Standard Story: Why the Conventional Wisdom on Prison Growth is Wrong, and Where We Can Go from Here*, 26 FED. SENT'G REP. 265, 265–66 (2014) (explaining that drug law reform is inadequate to reduce the scale of incarceration in the United States because less than half of the increase in incarceration since 1990 is due to drug-related offenses).

134. *See* Pfaff, *supra* note 15, at 176 (noting that people serving time for drug offenses "make up a relatively small share of the prison population").

135. *Id.*; *see* GOTTSCHALK, *supra* note 2, at 5.

136. Pfaff, *supra* note 14, at 180 n.12.

137. *Id.*

initiatives. Quite apart from the specifics of proposed drug law reform legislation, what the emergence of the Black Lives Matter movement and even the Cut50 coalition plainly mark is an opportunity to reorient public discourse surrounding crime, punishment, and the role of the state. The confluence of the limits of drug law and related reform and a professed commitment to substantially reduce carceral severity at least present an occasion to confront directly and openly the fact that changing course with respect to U.S. carceral practices will not come to pass unless we devote ourselves to much broader and deeper reform.

Moreover, there is at least some basis to believe that shifts in public opinion could shape criminal law enforcement practices, particularly at the local and state level, even without legislative change. New York's substantial decarceration provides one example. Remarkably, New York has reduced its prison population by 25% since its peak in 1999, closing sixteen jail and prison facilities, during a period when many other states' prison populations increased.[138] Interestingly, though, New York's prison population began to fall significantly before drug law reform came into effect, that is, before the state largely repealed its punitive Rockefeller Drug Laws in 2009.[139] Felony drug arrests dropped after the publication of a widely publicized poll indicating public disapproval of mandatory-minimum felony drug sentences.[140] According to several studies of these developments, the changes in New York may have been prompted by widely expressed changes in public opinion at the state and local levels that influenced local law enforcement and prosecutorial behavior, particularly in New York City.[141] This indicates that vocal, critical public response to prosecutorial and sentencing behavior in particular jurisdictions may shift sentencing practices even without (or prior to) legislative change.

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138. *SI's Arthur Kill Correctional Facility Closed, Six Others Shuttered*, N.Y. POST (Jan. 3, 2012, 2:26 PM), http://nypost.com/2012/01/03/sis-arthur-kill-correctional-facility-closed-six-others-shuttered/ [http://perma.cc/ML7K-2BZD]; *Governor Cuomo Announces Closure of Seven State Prison Facilities*, N.Y. STATE (June 30, 2011), https://www.governor.ny.gov/news/governor-cuomo-announces-closure-seven-state-prison-facilities [http://perma.cc/YX6P-PF4G]; *see also* MARC MAUER, SENTENCING PROJECT, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES 1 (2014). New York has cut its entire incarcerated population by approximately 15,000 people since 2005. N.Y. COMM'N OF CORRECTION, INMATE POPULATION STATISTICS (2005–2015) (providing inmate population statistics for state prisons and county jails). On their current terms, drug law reform measures at the state level will be unable to achieve further marked reductions in the scale of incarceration given the relatively small proportion of individuals incarcerated in state prison for drug offenses. Pfaff, *supra* note 14, at 176.

139. *See* JAMES AUSTIN & MICHAEL JACOBSON, BRENNAN CTR. FOR JUSTICE, HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE? 6 (2013) (indicating that the New York State prison population began to decline in 1992 and declined by 17% between 2000 and 2009).

140. MAUER, *supra* note 150, at 6.

141. AUSTIN & JACOBSON, *supra* note 139, at 6; Pfaff, *supra* note 14, at 216.

And the ground for a broader public reappraisal of sentencing policy and proposed reform has already been laid well beyond New York City, as public policy organizations, scholars, and other commentators, including Gottschalk herself, point out that currently proposed reform will not substantially reduce incarceration.[142] For example, various web-based 'prison population forecasters' allow citizens to determine what reforms might feasibly reduce incarceration levels.[143] These widely available web applications allow anyone with access to a computer the opportunity to test themselves for how they might approach reducing mass incarceration. One such web tool, created by the Marshall Project, allows users to consider how they might work to realize the Cut50 goal, seeking to reduce the U.S. state prison population by 50%.[144] Users quickly recognize the inadequacy of drug law reform as the exclusive mechanism of decarceration as the tool reflects that the effect of eliminating entirely all state prison sentences for drug offenses and releasing all people sentenced to state prisons for drugs would generate a reduction in state prison populations of only 16%, leaving U.S. state prisons at 84% of current occupancy.[145]

One conclusion that could be drawn from this is that little can be done to fundamentally change U.S. carceral practices—and indeed this is the conclusion some scholars and commentators, including Gottschalk, draw.[146] But these circumstances might also provide a public occasion for imagining more meaningful alternatives to our carceral state. Beyond drug law reform, how might we approach the project of decarceration? What responses other than incarceration might address other types of crime beyond drug offenses? To what extent is the U.S. prison boom responsible for maintaining public safety and security? What causes violent crime, and

142. *See, e.g.*. Marc Mauer & David Cole, *How to Lock Up Fewer People*, N.Y. TIMES (May 23, 2015), http://www.nytimes.com/2015/05/24/opinion/sunday/how-to-lock-up-fewer-people.html [http://perma.cc/S8YM-WHDP] ("Even if we released everyone imprisoned for drugs tomorrow, the United States would still have 1.7 million people behind bars, and an incarceration rate four times that of many Western European nations. Mass incarceration can be ended. But that won't happen unless we confront the true scale of the problem.").

143. *See, e.g.*. Ryan King et al. *Prison Population Forecaster*, URBAN INSTITUTE (Aug. 2015), http://webapp.urban.org/reducing-mass-incarceration/ [http://perma.cc/7NYT-GXJ9].

144. *See* Dana Goldstein, *How to Cut the Prison Population by 50 Percent—No, Freeing Pot Heads and Shoplifters Is Not Enough*, MARSHALL PROJECT (Mar. 4, 2015), https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent [https://perma.cc/AK9S-XAHM] (providing an interactive tool that allows users to change the percentage of persons imprisoned for specific crimes with the goal of reducing the total state prison population by 50%).

145. *Id.* It should be noted that current drug law reform legislation does not reduce or eliminate drug sentences by anywhere near this magnitude, as many persons classified as drug offenders would not be included in reform efforts that center predominantly on the non, non, nons. *See supra* note 68 and accompanying text.

146. *See, e.g.*. Pfaff, *supra* note 14, at 178–79 (expressing doubt about the ability of legislatures to do anything that will dramatically affect the growth rates of the prison population in the U.S.).

what, other than current sentencing policies, might serve to prevent interpersonal violence?

This gesture toward other possibilities in public discourse and perhaps even in the legislative arena is not merely an effort to generate a less dispiriting account of our possible futures, but to take seriously the potential of rejuvenated public engagement at the local level with questions of enormous common concern while recognizing both the plurality and contingency of political and legal discourse. The aim of such efforts might be to respond to the circumstances at hand opportunistically without foregoing a further reaching, more ambitious political vision. As social theorist Michel De Certeau reminds us, even in circumstances of relative hopelessness, individuals retain their capacity to turn the context at hand to their own independent purposes.[147] De Certeau seeks to reorient our political engagement from large-scale revolutionary or top-down models of political change to a more situational practice that he refers to as 'tactical' politics.[148] He writes of the individual's capacity to make unanticipated use of the circumstances at hand: 'Without leaving the place where he has no choice but to live and which lays down its law for him, he establishes within it a degree of *plurality* and creativity draw[ing] unexpected results from his situation.'[149] Tactics are weapons of the relatively weak, strategic deployments of fleeting opportunities to advance otherwise unattainable ends: 'there are countless ways of 'making do' '—and De Certeau understands the use of tactics ultimately as an art of 'making do.'[150] Particularly in this moment of a growing commitment in many quarters to decarcerate, rather than resign ourselves to the limitations of the present, we should remain alert to opportunities to tactically engage the gap between expressed desires for change and the inadequacy of current proposals.

Further, to limit political possibilities to the projected results of particular pieces of proposed or enacted legislation offers an unduly static conception of politics and of law. Instead, we might recognize how criminal law enforcement practices may be shaped by public engagement, even absent or prior to legislative change—as the New York case illustrates—and how the inadequacy of existing drug law reform initiatives might be understood as an opening to confront entrenched interests toward more transformative ends.

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147. MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE 30 (Steven Rendall trans. 1984).

148. *Id.* at 37.

149. *Id.* at 30. As De Certeau explains, "a tactic boldly juxtaposes diverse elements in order suddenly to produce a flash shedding a different light" on an otherwise bleak situation. *Id.* at 37–38.

150. *Id.* at 28, 37.

The remainder of this Part will begin to stage in brief what such a public reconsideration of criminal law reform might address, engaging again with the work of Gottschalk and others. One of the obstacles to more humane criminal policy in the United States has been the relative marginalization of impacted communities, concerned nongovernmental organizations, and academic experts. But the increasing public commitment to decarcerate at least in certain jurisdictions alongside the current lack of viable proposed means to achieve that end creates a crucial, and perhaps more welcome, role for citizen engagement and expert guidance. As Gottschalk makes clear, it is no mystery to criminal law and sentencing experts what would be required to begin to decarcerate: decrease sentence lengths across the board (not only for less serious drug offenses), admit radically fewer people to jail and prison, reduce criminal filings, and constrain police and prosecutorial discretion.[151] I would add to this, though Gottschalk focuses less on this point, a greater investment in other social projects to maintain some measure of public order and collective peace.[152] At present, however, this is a reform agenda nowhere on Congress's or any state's agenda.

Proposals to reduce incarceration more substantially and to moderate criminal law enforcement across the board invariably raise questions about what impact these reforms would have on public safety. Or, to pose the question another way, to what extent did the U.S. prison boom reflect a response to rising crime, and to what degree is our large incarcerated population necessary to maintain relatively low levels of criminal victimization? As Gottschalk and others have shown, the factors that cause crime are largely independent of the factors responsible for high rates of incarceration.[153] Incarceration levels respond to legislatively and judicially established sentencing law—that is, to sentencing policy and political

151. GOTTSCHALK, *supra* note 2, at 259–60, 262–63, 266–68; *see also* JAMES AUSTIN ET AL., ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT 5 (2013) ("[Our] vision calls for the creation of multi-sector campaigns coordinated by coalitions of locally based grassroots organizations, grass-tops leaders and in-state advocacy groups, national advocacy organizations, state and local lawmakers, researchers and policy analysts, and communications professionals. Together, these coalitions could identify the drivers of state and local corrections populations, the policy mechanisms needed to make major reductions in these correctional populations, and the pertinent political pressure points. They could mount sophisticated, multi-faceted public education campaigns. The overarching goals would be to create sustained demand for long-term corrections reform, major cuts in overall correctional populations, and establish investment in high incarceration communities.").

152. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1163 (2015); *see also* AUSTIN ET AL., *supra* note 151, at 5 (discussing the importance of investment in high-incarceration communities alongside other criminal law reforms).

153. *See* GOTTSCHALK, *supra* note 2, at 259–60 (clarifying that the factors that cause crime are distinct from the issues of penal policy and law enforcement that cause high rates of incarceration).

choices, not exclusively or even primarily to crime.[154] A U.S. National Research Council study has recently established, for example, that over the forty years when U.S. incarceration rates steadily increased, U.S. crime rates did not respond in any consistent manner: 'the rate of violent crime rose, then fell, rose again, then declined sharply.'[155] Consequently. the study relates: 'The best single proximate explanation of the rise in incarceration is not rising crime rates, but the policy choices made by legislators to greatly increase the use of imprisonment as a response to crime.'[156] The National Research Council study concludes that the 'increase in incarceration may have caused a decrease in crime, but the magnitude is highly uncertain and the results of most studies suggest it was unlikely to have been large.'[157]

Still, even if current incarceration levels are not responsible for low crime rates, the Marshall Project tool makes clear that meaningful reform must confront the prevalence in prisons of persons classified as having committed violent and serious property offenses. Based on the Bureau of Justice Statistics data, it is plain that there are hundreds of thousands of people incarcerated for sex offenses, burglary, and other serious violent and property crimes.[158]

This concern illuminates a crucial problem in the predominant conceptualization of how to decarcerate—a problem that is reflected in the design of the web-based sentencing reform tool itself, as well as in the data on which it relies. As Gottschalk demonstrates, many offenses classified as violent do not reflect what are commonly thought of as acts of violence: for instance, possession of a gun or statutory rape may be classified as violent offenses.[159] Likewise, a conviction for a property offense like burglary may describe a homeless person's harmless trespass in an empty building, or it could describe conduct that provoked terror and resulted in grave harm.[160] More fundamentally, Gottschalk shows that '[d]rawing a firm line between nonviolent drug offenders and serious, violent, or sex offenders in policy debates reinforces the misleading view that there are clear-cut, largely immutable, and readily identifiable categories of offenders who are best

154. *See id.* at 259 (observing that major decarcerations have occurred in other places by focusing on reforming penal and sentencing policy rather than focusing on the root causes of crime).

155. NAT'L RES. COUNCIL, *supra* note 33, at 3.

156. *Id.*

157. *Id.* at 337.

158. Goldstein, *supra* note 144.

159. Leon Neyfakh, *OK, So Who Gets to Go Free?*. SLATE (Mar. 4, 2015), http://www.slate.com/articles/news_and_politics/crime/2015/03/prison_reform_releasing_only_nonviolent_offenders_won_t_get_you_very_far.html [http://perma.cc/MW3J-PVJ6].

160. *See* GOTTSCHALK, *supra* note 2, at 183 (relating how the burglary of an unoccupied home was considered a violent offense under California's Proposition 36).

defined by the offense that sent them to prison.'[161] In reality, the category of offense in which a defendant falls is substantially based on the availability of evidence and is frequently arbitrary.[162]

Nevertheless, a significant number of men and women are incarcerated for homicide offenses or for having perpetrated very serious harm against other human beings.[163] How might we conceptualize a noncarceral means of addressing serious violent crime? A large body of research bears on this question. Criminologists have clarified, for example, the factors that are likely most consequential in producing higher rates of concentrated violent crime. These factors include especially high rates of poverty, high income inequality, residential segregation, and pervasive economic discrimination against certain groups.[164] While crime has fallen in the United States over the last decades, the most feared forms of violent crime remain highly concentrated in particular neighborhoods, especially those that are predominantly poor and African-American. As Gottschalk reports, the homicide rate in Chicago's Hyde Park neighborhood, which Obama calls home, is 3 per 100,000, while the homicide rate in nearby Washington Park, which is overwhelmingly poor and African-American, is 78 per 100,000.[165] For a young black man involved in a criminally active group on Chicago's west side, the homicide rate is 3,000 per 100,000—600 times higher than the national rate.[166]

This combination of street violence, carceral control, and isolation from other public social support in poor African-American communities is conceptualized by political scientist Lisa L. Miller as 'racialized state failure.' Miller explains: 'African-Americans, far more than their white counterparts, experience a *failing state* characterized by the devastating dual problems of under-protection and over-enforcement of the law.'[167]

In her account of the homicide epidemic in the low-income, segregated African-American community of Watts, Los Angeles, Jill Leovy explores

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161. *Id.* at 168.

162. *Id.* (citing Robert J. Sampson, *The Incarceration Ledger: Toward a New Era in Assessing Societal Consequences*, 10 CRIMINOLOGY & PUB. POL'Y 819, 823 (2011)).

163. *Id.* at 178.

164. *Id.* at 277; KAREN F. PARKER, UNEQUAL CRIME DECLINE: THEORIZING RACE, URBAN INEQUALITY, AND CRIMINAL VIOLENCE 114–20 (2008); Patricia L. McCall et al., *An Empirical Assessment of What We Know About Structural Covariates of Homicide Rates: A Return to a Classic 20 Years Later*, 14 HOMICIDE STUD. 219, 226–28, 235–36 (2010); Steven F. Messner, *Economic Discrimination and Societal Homicide Rates: Further Evidence on the Cost of Inequality*, 54 AM. SOC. REV. 597, 607 (1989); Robert J. Sampson, *Urban Black Violence: The Effect of Male Joblessness and Family Disruption*, AM. J. SOC. 354, 376–78 (1987).

165. GOTTSCHALK, *supra* note 2, at 276–77.

166. *Id.* at 277.

167. Lisa L. Miller, *Reforming Police and Prisons Will Not Save Us*, BALKINIZATION (Aug. 10, 2015), http://balkin.blogspot.com/2015/08/reforming-police-and-prisons-will-not.html [http://perma.cc/KKS9-NKXC].

further these links between poverty, inequality, and the awful violence associated with certain underground economies.[168] Leovy focuses on the importance of criminally prosecuting these homicide cases given that so many killings of African-American youth are never solved. She also provides a rich description of how young people, unable to find other forms of self-support, often turn to the underground economy and to crime, fueling violence:

> When your business dealings are illegal, you have no legal recourse. Many poor, 'underclass' men of Watts had little to live on except a couple hundreds dollars a month in county General Relief. They 'cliqued up' for all sorts of illegal enterprises, not just selling drugs and pimping but also fraudulent check schemes, tax cons, unlicensed car repair businesses, or hair braiding. Some bounced from hustle to hustle. They bartered goods, struck deals, and shared proceeds, all off the books. Violence substituted for contract litigation. Young men in Watts frequently compared their participation in so-called gang culture to the way white-collar businesspeople sue customers, competitors, or suppliers in civil courts. They spoke of policing themselves, adjudicating their own disputes.[169]

Greater access to money in neighborhoods with concentrated poverty and crime would considerably reduce the violence associated with the underground economy, the fallout from which accounts for a large proportion of homicides.[170] Leovy describes how even a very modest increase in public benefits in the mid-2000s paid to indigent African-Americans, especially young men, in South Central Los Angeles may have functioned to transform certain of the dynamics in underground markets fueling the homicide epidemic, and how the killings modestly subsided.[171]

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168. JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA (2015).

169. *Id.* at 79; *see also* BASTARDS OF THE PARTY (2005) (exploring the emergence and life of the Bloods and Crips gangs in Los Angeles written by a former member of the Bloods).

170. *See* LEOVY, *supra* note 168; *see also* Miller, *supra* note 167 ("Such policies, for example, the GI Bill, have helped make society more secure for whites; but the life course of Black Americans reveals the persistent failure of state institutions to work proactively to provide the same protections from risk to which whites are privilege[d]. The biggest flaw of American democracy with respect to African-Americans is not that the state does too much but, rather, that [it] has done *too little* to help generate the kinds of safety, prosperity and security from the state that Whites enjoy.").

171. *See* LEOVY, *supra* note 168, at 317–18. As Leovy describes:

> The federal Second Chance Act in 2005 inspired new efforts to provide SSI [Supplemental Security Income, a payment available to people with disabilities] to prisoners upon reentry; many prisoners qualify, since a third of the state's inmates have been diagnosed with mental illness. As we have seen, autonomy counters homicide. Money translates to autonomy. Economic autonomy is like legal autonomy. It helps break apart homicidal enclaves by reducing interdependence and lowering the stakes of conflicts. The many indigent black men who now report themselves to be "on disability" signal an unprecedented income stream for a population that once suffered near-absolute economic marginalization. An eight-

Apart from efforts to address violence by targeting its underlying causes, such as reducing reliance on underground economies for basic survival needs, experts disagree on how much to credit policing resources and strategies for reductions in crime, as Gottschalk helpfully explains.[172] It is likely that a heavy police presence in areas frequented by criminally active individuals and groups reduces some criminal activity—an approach referred to as 'hot spot' policing.[173] And if the only two available options are to (1) use intense police presence to prevent crime or (2) wait for people to commit violent crime and then arrest and incarcerate them, then hot spot policing may well be preferable to the alternative. But as Jazz Hayden, an advocate in the campaign to end New York's 'stop and frisk' program, notes, '[t]urning our communities into open-air prisons is not the solution to violence' or to mass incarceration.[174] There are other ways we might aim to reduce both interpersonal harm and incarceration, which do not involve exclusive reliance on an aggressive criminal law enforcement presence in low-income communities.

In confronting violent crime, for example, current reform efforts might also benefit from considering how concerned citizens could work to prevent violence and other forms of interpersonal harm without relying on the threat of imprisonment, policing, or other newfangled surveillance technologies. 'Violence Interrupters, 'Sistas Liberated Ground, and community-based urban revitalization projects that reclaim abandoned public space offer examples of communities organizing themselves to promote security from violence without calling for an aggressive police or other surveillance presence.[175] The Violence Interrupters—now operating as the Cure Violence and Safe Streets initiatives—are a task force of mediators, many formerly gang-involved, convened in communities around the country who

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> hundred-dollar a month check for an unemployed black ex-felon makes a big difference in his life. The risks and benefits of various hustles surely appear different to him. He can move, ditch his homeys, commit fewer crimes, walk away from more fights.

Id. at 317. Other factors Leovy notes that may have contributed to a decline in homicides in South Los Angeles include the increased reliance on cellphones to conduct drug sales indoors, the relative increase in abuse of legal pharmaceutical drugs as compared to narcotics sold exclusively on the underground market, and the popularity of video games that keep adolescents inside. *Id.* at 317–18.

172. GOTTSCHALK, *supra* note 2, at 278.

173. *See* FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 107–08 (2012) (describing experiments with a version of problem-solving policing generally called "hot spots" patrol enhancement, targeted either on crack houses or other places with extremely high violent crime or drug activity); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*. 10 CRIMINOLOGY & PUB. POL'Y 13, 34–35 (2011) (discussing the efficacy of hot spot policing).

174. MAYA SCHENWAR, LOCKED DOWN, LOCKED OUT: WHY PRISON DOESN'T WORK AND HOW WE CAN DO BETTER 133 (2014).

175. McLeod, *supra* note 152, at 1227–29.

may be called upon to help de-escalate situations of mounting community conflict, whether gang-related or otherwise.[176] The work of Violence Interrupters in Chicago and Baltimore is credited with decreasing homicides, according to studies conducted by researchers at Northwestern and Johns Hopkins University.[177] Homicide rates reportedly decreased in one neighborhood by over 50%.[178]

The Brooklyn-based organization 'Sistas Liberated Ground' (SLG) is composed of local women of color who work together to hold others in their community accountable for domestic violence and seek to empower vulnerable individuals to keep themselves safe, locate safe spaces, access mediation, and address their needs for security outside the criminal process if they choose.[179] These antiviolence mediation projects promise to help keep people secure without police involvement or threats of imprisonment. Certain cities are also beginning to experiment with paying violence mediators to reduce crime.[180]

Large-scale, community-led urban regeneration projects in areas that have been essentially abandoned also serve to bring community members out into public space and similarly stand to improve safety and security without relying on hot spot policing or other carceral responses.[181] These efforts do not operate at scale, nor would they be adequate to prevent violence altogether, but if further resources were allocated to large-scale regeneration projects and the impoverished communities where they operate, there is good reason to believe their impact in promoting community security and well-being would expand. In addition, an infusion of resources to areas most besieged by violence would create opportunities for people and communities devastated by criminal violence and aggressive

176. Daniel W. Webster et al., *Effects of Baltimore's* Safe Streets *Program on Gun Violence: A Replication of Chicago's* CeaseFire *Program*, 90 J. URB. HEALTH 27, 28 (2012).

177. *Id.* at 28, 38.

178. *Id.* at 38.

179. McLeod, *supra* note 152, at 1217.

180. *See, e.g.*, Richard Gonzales, *To Reduce Gun Violence, Potential Offenders Offered Support and Cash*, NPR (March 28, 2016, 4:00 PM), http://www.npr.org/2016/03/28/472138377/to-reduce-gun-violence-potential-offenders-offered-support-and-cash [https://perma.cc/M34Z-LXKZ].

181. *See* Charles C. Branas et al., *A Difference-in-Differences Analysis of Health, Safety, and Greening Vacant Urban Space*, 174 AM. J. EPIDEMIOLOGY 1296, 1296 (2011) (discussing the manner in which green spaces can decrease criminal activity); Michaela Krauser, *The Urban Garden as Crime Fighter*, NEXT CITY (Aug. 22, 2012), http://nextcity.org/daily/entry/the-urban-garden-as-crime-fighter [http//perma.cc/H2MQ-M747] (noting inconsistent results across cities that seek to reduce crime by increasing urban green space); Eugenia C. Garvin et al., *Greening Vacant Lots to Reduce Violent Crime: A Randomised Controlled Trial*, 19 INJ. PREVENTION 198, 201 (2013) (concluding that, while the addition of green space to an urban area had a nonsignificant net reduction in total crime at the greening site, it led to a net increase in residents' perceptions of the area's safeness).

policing to participate in devising other means of ensuring collective security.

Black Lives Matter and affiliated organizations have created an independent public space for intraracial and interracial exchange about other forms of criminal law enforcement violence, and in so doing these efforts have reshaped in some measure public understanding of the relative costs and benefits of policing as compared to other forms of ensuring collective well-being. Among their many important contributions, these fora have allowed certain communities to bring to wider public attention a quality of violence associated with our carceral state that is not captured by the scale of mass incarceration but targets with horrific specificity black bodies—outside of jails and prisons, at the pool, in cars, or on the street. This violence is characterized by both an absence of meaningful state support and protection and excessive exposure to police abuse.[182]

What all of this makes clear is that although incarceration and predatory policing could be reduced without addressing the root causes of crime—simply by changing sentencing law and policy—to address concentrated violent crime in tandem with substantial decarceration will require allocation of public resources to alleviate poverty, provide adequate mental health care, public health services, public education, and reduce inequality. And while rejuvenating public discourse and promoting citizen engagement may influence carceral practices even without legislative change, as the case of New York again potentially illustrates, legislative and other political and legal processes should not be conceptualized as necessarily static either. Notwithstanding the current entrenched interests and formidable obstacles to more substantial legislative action in Congress and many states, legal and political processes, too, are at least subject to sudden shifts and the use of tactics. It is not unthinkable that measures that constrain police discretion to arrest for minor offenses, for example, or increase good-time credits and other means of backdoor sentencing reform could function as means of tactically advancing a meaningful agenda for change even in the contemporary, often-stymied legislative arena.

Legislative efforts focused on drug law reform are after all increasingly comprehensive—containing many distinct measures in separate and combined bills, with various moving parts—creating an opening to include less visible provisions that more meaningfully adjust criminal law and policy.[183] Multipart reform bills may incorporate

182. *See generally, e.g.*, Hansford, *supra* note 17.

183. *See, e.g.*, Sensenbrenner–Scott SAFE Justice Reinvestment Act of 2015, H.R. 2944, 114th Cong. (2015) (combining in one bill many aspects of other proposed federal criminal law reforms).

numerous provisions that reach far beyond the most low-level, insignificant drug offenses.[184]

Although Gottschalk warns that sentencing reform carving out specific, more sympathetic categories of convicted individuals may legitimate punitive criminal enforcement more generally, it is likely that the felt urgency of reform will remain because any particular category of narrow reform will do so little to reduce the vast scale of U.S. penal practices.[185] A further role for expert input might involve identifying other technical, backdoor measures to constrain carceral severity and violence. And while Gottschalk generally dismisses 'technicist' fixes to carceral reform as misguided given the ultimately political character of criminal punishment,[186] some less visible technical measures may hold significant potential to reduce penal harshness. For example, John Pfaff attributes the rise of mass incarceration in significant part to prosecutors' decisions to charge certain cases as felonies rather than lesser offenses and to seek prison time where previously they had not.[187] If Pfaff's analysis accurately reflects part of what explains federal-level and particular state-level incarceration patterns, that could generate popular and possibly ultimately legislative support for prosecutorial guidelines and other measures to cabin such discretion.[188] Even if prosecutors adamantly resisted this development

184. *Id.*

185. *See* GOTTSCHALK, *supra* note 2, at 165 ("Drawing a firm line between the non, non, nons and other offenders has contributed to the further demonization of people convicted of sex offenses or violent crimes in the public imagination and in policy debates."). Notably, too, several progressive criminal law reform organizations withheld support for California's Proposition 47—a ballot initiative which passed in late 2014, reducing various low-level drug and other nonviolent offenses in California from felonies to misdemeanors—on the ground that it hardened distinctions between those serving sentences for these crimes and for more serious felony offenses in a manner that would ultimately further entrench harsh punitive practices and large-scale incarceration. *See, e.g.*, *A Few Views on Prop 47*, FLYING OVER WALLS (Nov. 13, 2014), https://flyingoverwalls.wordpress.com/2014/11/03/a-few-views-on-prop-47/ [http://perma.cc/WEJ5-2RK4] ("The initiative strengthens the idea that those with certain violent felony convictions should not be part of the sentencing reform discussion. These convictions in many cases can be attributed to the structural racism, sexism and classism of the criminal legal system. When 'violent felony convictions' becomes the dividing line for sentencing reform it reinforces the idea that such convictions are just and acceptable. Because it demonizes people with prior convictions, the disparities and racism of the existing system will be reinforced and deepened . "). Perhaps it should be noted, though, with more emphasis than in Gottschalk's account, that drug law reform stands to improve the life chances of hundreds of thousands of people sentenced for drug offenses. There are at any given time approximately 200,000 people in prison on drug charges, and during the period 2000–2012, 1.6 million people passed through state prisons as a consequence of a drug offense. *See* Pfaff, *supra* note 14, at 178.

186. *See* GOTTSCHALK, *supra* note 2, at 278 (asserting that a technicist approach "is inattentive to the important political and symbolic dimensions of crime prevention and penal policy more generally").

187. Pfaff, *supra* note 14, at 198.

188. Gottschalk, in her brief discussion of untapped resources that might serve to modestly reduce incarceration and rein in the carceral state, focuses especially on prosecutorial and executive discretion, although these measures enter her analysis almost as an afterthought and

and inhibited legislative or popular action, calling more public attention to irresponsible charging decisions might in itself influence prosecutorial behavior in a more moderate direction.

In summary, the inadequacy of proposed drug law and related reform stands in sharp contrast to a reformist trend centered on reducing state criminal expenditures while advancing other regressive fiscal policy initiatives. The important distinctions between these various criminal law reform projects should be identified and confronted rather than conflated or overlooked.

Yet, any of these various projects may well be tactically engaged to achieve other, more transformative goals. In the end, after all, there is generally no way out but through. There is no way of confronting present injustice other than by making do—making the most of the opportunities and circumstances at hand. Despite their limitations and perils, if drug law and neoliberal penal reform in more conservative jurisdictions modestly reduce carceral severity and are the only reform inroads available, these initiatives may be preferable to any plausible alternatives and to the status quo. In many places, both impulses may be necessary to achieve majority support. Still, in the process of engaging achievable near-term reform projects, it remains critical to be vigilant about less visible threats posed by certain reform agendas as well as to attend to more promising visions of how to dismantle the carceral state, both for the possibilities of a noncarceral future those visions may hold, and because they may orient the tactical engagement of near-term reform toward more promising aspirational horizons.

III. Imagining Beyond the Carceral State

To project a longer-term vision of carceral change, this Part focuses on Finland's dramatic decarceration and on the movement for racial justice in U.S. criminal law enforcement. Finland, like the United States, once faced levels of incarceration far in excess of its peer states, but managed to radically moderate its punitive practices through a sustained project of criminal law reform alongside a more general reconfiguration of social policy. This Part also looks to the Black Lives Matter movement, where a related critique and reform program are taking shape. This critique focuses on particular threats to black life in the United States, but opens into a wide-ranging and profound challenge to the U.S. carceral state and its associated political, legal, and economic orders.

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receive little by way of sustained analysis. *See* GOTTSCHALK, *supra* note 2, at 266 (asserting that "[t]o reduce the imprisonment rate, prosecutors will have to be cajoled or pressured into embracing a commitment to send fewer people to prison and to reduce sentence lengths").

A. Finland's Dramatic Decarceration and Nordic Abolitionist Reform

The Nordic prison movement took shape in the late 1960s, inspired by the student revolts and political protest of that period, with the aim of fundamentally reforming imprisonment and reconfiguring regimes of social control in more humane and egalitarian terms.[189] The movement sought to humanize the treatment of prisoners and to reduce, and perhaps abolish altogether, the use of incarceration.[190]

Thomas Mathiesen—a Norwegian social theorist, criminologist, and prison movement participant—has published an account of the Nordic prison movement, which offers, in his words, an 'ethnographic description"[191] of 'our common experiences in written form.'[192] According to Mathiesen, the Swedish organization Kriminalvårdens Humanisering, or Correctional Humanization (KRUM), inaugurated the Scandinavian prison movement with a national meeting in 1966 called 'The Parliament of Thieves.'[193] The Parliament of Thieves convened for the first time in history large numbers of prisoners furloughed from confinement and ex-prisoners who spoke with the audience and the press about their lives in prison.[194] Movement participants came to believe 'prisons were inhumane and did not work according to plan.'[195] The movement in Sweden and neighboring countries focused initially on incarceration levels and prison conditions in order to raise awareness and generate momentum for radical reform.[196] Current and former prisoners themselves played a major role: '[P]risoners were to be brought into the organization as active participants.'[197]

The Finnish counterpart KRIM had a large membership among the prisoners, while the Finnish November movement was a more politically oriented pressure group.[198] Like its counterpart in Sweden, Finnish KRIM convened study groups in prisons, cultural programs for prisoners, and other humanitarian activities and advocacy initiatives.[199] Through the

189. *See* THOMAS MATHIESEN, THE POLITICS OF ABOLITION REVISITED 5 (2015).

190. *See generally id.*

191. *Id.* at xvi.

192. *Id.* at xvii.

193. Movement organizations included KRUM in Sweden, founded in 1966; KRIM in Denmark, established in 1967; KROM in Norway, established in 1968; and, in Finland, the November movement and KRIM, founded in 1967 and 1968. *Id.* at 5. The analysis in this Part draws on a companion essay in *Harvard Unbound. See* Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109 (2013).

194. MATHIESON, *supra* note 189, at 5.

195. *Id.* at 9.

196. *Id.*

197. *Id.*

198. *Id.* at 77.

199. *Id.* at 77–78.

active involvement of prisoners, the movement 'had fresh unbureaucratic information on what was going on in prisons.'[200] Prisoners staged repeated hunger strikes and other protests. Mathiesen notes that 'the involvement of prisoners was certainly a novelty, and caused great alarm and major write-ups in the mass media at the time.'[201]

Around that time, in 1970, the United States had the highest incarceration rate of Western industrialized countries, with approximately 166 people per 100,000 inhabitants; Finland had the second highest incarceration rate, with roughly 113 prisoners per 100,000 inhabitants.[202] Today, the United States's incarceration rate has increased many fold to 748 per 100,000 inhabitants, while Finland has reduced its incarceration rate drastically, by approximately 50%, to 59 prisoners per 100,000 inhabitants, and otherwise has fundamentally reformed its criminal law and policy. Many of the relatively small number of remaining Finnish prisoners are confined in 'open prisons' where they work and interact with others outside the prison setting, following short and humane periods of limited detention.[203] Finland has further humanized its penal policy by replacing penal intervention with other social projects in various domains—using situational crime prevention and developing a robust welfare state.[204]

The earlier harshness of Finnish penal practices compared to its neighboring countries arose after a century of Russian occupation, unrest, and war. Finland has a longstanding and close relationship with both Sweden and Russia.[205] Although Finland was a part of Sweden up until 1809, the country was occupied by Russia for more than one hundred years, from 1809 until 1917.[206] The Finnish penal system was constituted during the period of Russian occupation.[207] Consequently, by the mid-twentieth century, Finnish criminal sanctions were much harsher than those of Finland's Nordic neighbors.[208] Provisions of the Criminal Code of 1889 were still in force, and there was frequent recourse to incarceration even for

200. *Id.* at 38.

201. *Id.* at 9.

202. *See id.* at 7.

203. *Id.*

204. *See* Tapio Lappi-Seppälä, *Imprisonment and Penal Policy in Finland*, 54 SCANDINAVIAN STUD. L. 333, 350 (discussing the period of Finland's criminal reform in which "the arsenal of the possible means of criminal policy expanded in comparison with the traditional penal system").

205. Lappi-Seppälä, *supra* note 24, at 92.

206. *See id.* ("Finland remained an autonomous grand duchy of the Russian Empire (but still maintain[ed] its own laws).").

207. *See id.* at 92–93 (noting the evolution of the penal system from the original Criminal Code of 1889, and that the Code is still formally in force).

208. *Id.*

relatively minor social-order violations.[209] Not only was Finland's prison population much larger than its Nordic neighbors, and its punishments harsher, but the Finnish state also relied broadly on criminal regulation to achieve social order as opposed to other social measures.[210] Whereas other Scandinavian states already were established as welfare states—and prison-movement activists in those countries invoked welfare-state traditions with the goal of extending social concern to prisoners—Finland did not have the same welfare-state tradition, and it was in part through its reconsideration of the legitimacy of its penal practices that a Finnish welfare state took shape.[211]

By the late 1960s, many in Finland began to regard its high incarceration rate as a disgrace and source of shame.[212] This sense of shame associated with the perceived overuse of prison gave way to a consensus that it was both necessary and possible to change.[213] While incarceration rates in almost every other country modestly increased over the late-twentieth and early-twenty-first centuries, Finland alone has drastically reduced its incarcerated population.[214]

Actively responding to the sense of shame in its high levels of punitiveness and imprisonment, Finland engaged simultaneously in specific reform and in an effort to reconfigure more fundamentally the punitive orientation of the Finnish state.[215] As Finland sought to reduce its incarcerated population, it lowered sentences and increased judicial

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209. *See id.* at 113–16 (noting that the Finnish prison population fell after high minimum penalties for petty property offenses were reduced and drunken driving was no longer punished by incarceration).

210. *Id.* at 108.

211. Mathiesen explains that central to the emergence of the Norwegian prison movement, its "anger and consternation, was the sense that despite the advent of the welfare state, prisoners "were left behind the general development," "hidden or forgotten, and "in drastic need of help." The prison movement embraced the Scandinavian welfare states and sought to improve and extend their reach to incorporate those consigned to prisons. Mathiesen writes of the Norwegian prison-movement organization:

> [W]e basically stayed on the 'side' of Norwegian society. We basically like (if you can use such a word) the Norwegian state. The Norwegian state had its definite basic shortcomings in the area which concerned us, criminal policy, and we had clear misgivings about it, but we thought that some or many of them could be improved with time.

Id. at 10, 38.

212. Stan C. Proband, *Success in Finland in Reducing Prison Use*, *in* SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 187, 188 (Michael Tonry & Kathleen Hatlestad eds., 1997).

213. *Id.*

214. *Id.* (comparing Finland to fifteen other Western countries and concluding that "the Finnish experience is not common . . . Most countries either had stable populations or increases of as much as 100 percent. Only in Finland did the prison population decline substantially.").

215. Lappi-Seppälä, *supra* note 24, at 108.

discretion with respect to all categories of offenses.[216] The core predicate factor, however, as understood by scholars of Finnish criminal policy, was the 'attitudinal readiness of the civil servants, the judiciary, and the prison authorities to use all available means in order to bring down the number of prisoners.'[217] Officials in Finland had come to believe that higher incarceration rates do not produce a safer society, and they were moved to action by the sense of discord between a commitment to certain humanitarian and libertarian values and Finland's heavy reliance on imprisonment.[218]

This account of how collective shame may motivate transformative change challenges a prominent view in philosophical and social-theoretical scholarship that shame tends to promote reactionary and repressive responses.[219] Yet, as the experience of Finnish decarceration illustrates, a sense of collective disgrace may also motivate self-correction and reconstitution of the terms of political engagement.

The initial Finnish criminal reforms took place in the early 1970s.[220] A complete reform of the criminal code began in 1972.[221] The minimum sentence for parole eligibility was shortened first to six months and then to

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216. *Id.* at 113–14.

217. Proband, *supra* note 212, at 189.

218. *See id.* at 188–89 (noting that Finnish officials saw the high prisoner rate as a "disgrace" and were "embarrassed" by where the country ranked in relation to other nations).

219. Martha Nussbaum, for example, understands shame—the state in which one recognizes oneself "falling short of some desired ideal"—as a negative emotion, one of "compassion's enemies. MARTHA C. NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE 314, 361 (2013). According to Nussbaum, whereas the "natural response of guilt is apology and reparation; the natural reflex of shame is hiding.' *Id.* at 361. Although Nussbaum acknowledges that shame may be constructive, far more often, in Nussbaum's analysis, "shame fractures social unity, causing society to lose the full contribution of the shamed. *Id.* at 364. Guilt is distinguished from shame, on Nussbaum's account, in that guilt "pertains to an act (or intended act); shame is directed at the present state of the self.' *Id.* Political theorist Jon Elster argues that '[i]n shame, the immediate impulse is to hide, to run away, to shrink . Sometimes, shame can induce aggression, not only as a reaction to shaming but also as a way of leveling the playing field. JON ELSTER, ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS 153 (1999). Social theorist Sara Ahmed writes of shame likewise that it, "in exposing that which has been covered[,] demands us to re-cover.' SARA AHMED, THE CULTURAL POLITICS OF EMOTION 104 (2004). *But see* ELSPETH PROBYN, BLUSH: FACES OF SHAME, at xiii (2005) ("Shame can entail self-evaluation and transformation As such, shame promises a return of interest, joy, and connection."); CHRISTINA H. TARNOPOLSKY, PRUDES, PERVERTS, AND TYRANTS: PLATO'S GORGIAS AND THE POLITICS OF SHAME 9 (2010) (arguing that human beings may respond to shame in public discourse by attempting to understand themselves better and to change so that their behavior and their ideals are in closer accord); BERNARD WILLIAMS, SHAME AND NECESSITY 90 (1993) ("[S]hame may be expressed in attempts to reconstruct or improve oneself."). This is decidedly not an argument regarding shaming as a form of punishment, but an account of how collective shame may motivate a profound reckoning with and dismantling of a carceral state. *Cf.* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (exploring shaming penalties).

220. Lappi-Seppälä, *supra* note 204, at 93.

221. *Id.*

fourteen days in 1989.[222] Parole was to be automatically granted to all first-time offenders after serving half their sentences.[223] Mediation was adopted as an alternative to criminal prosecution upon agreement of all the parties, and successful mediation might conclude in a nonprosecution or a waiver of sentence for the accused.[224] Finnish legislators further redefined the crime of theft and imposed substantially shorter sentences for property offenses.[225] The number of prison sentences imposed for theft fell by 27% from 1971 to 1991.[226] The median prison-sentence length for theft decreased from twelve months in 1950 to two and a half months in 1991.[227] Finland also expanded judicial discretion to impose fines or conditional (suspended) sentences for Driving While Intoxicated (DWI) offenses.[228] The rate of DWI offenders who received custodial sentences fell dramatically, and many DWI offenders now are sentenced only to community service.[229] By contrast, in Texas, jail time is often imposed for first-time, minor DWI offenses, and recidivist DWI offenders face between two and ten years of imprisonment.[230] Finland also significantly reduced the incarceration of juveniles.[231]

Fines are assessed as a percentage of a person's daily pay, dependent on income, rather than setting fines as a fixed sum that attaches to a given offense.[232] The sentence of life imprisonment may only be imposed for genocide, treason, or certain aggravated murder offenses, though life-sentenced prisoners are generally released after ten to twelve years by presidential pardon.[233] Typically, sentences can be no more than twelve years for a single offense and fifteen years for several offenses, and most sentences are far shorter than this.[234] Many sentences are conditional; the person sentenced remains at liberty, effectively on probation or parole.[235] Conditional sentences may be applied for a wide range of offenses, and

222. *Id.* at 119.

223. Patrik Törnudd, *Sentencing and Punishment in Finland*, *in* SENTENCING REFORMS IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 189, 192 (Michael Tonry & Kathleen Hatlestad eds. 1997).

224. Lappi-Seppälä, *supra* note 24, at 96.

225. *Id.* at 113.

226. *Id.*

227. *Id.* at 114.

228. *Id.* at 115–17.

229. *Id.*

230. Third-time DWI offenders are guilty of a third degree felony, TEX. PENAL CODE ANN. § 49.09 (West 2015), which carries with it a two-to-ten year sentence. *Id.* § 12.34.

231. Lappi-Seppälä, *supra* note 24, at 117–18.

232. *Id.* at 94; Törnudd, *supra* note 223, at 191.

233. Lappi-Seppälä, *supra* note 24, at 94.

234. *Id.* at 94 ("A sentence of imprisonment may be imposed either for a determinate period (at least fourteen days and at most twelve years for a single offense and fifteen years for several offenses) or for life.").

235. *Id.* at 95.

those subject to conditional sentences have no reporting terms but may access services without punitive or surveillance conditions.[236] Finland's dramatic decarceration illustrates, among other lessons, that the use of imprisonment may be radically reduced without introducing much in the way of new alternative sanctions.[237]

In lieu of achieving collective security primarily through criminal law enforcement, reformers promoted the idea of social prevention of crime in Finland and throughout Scandinavia.[238] The concept was to ensure collective security, to the greatest extent possible, without relying on prisons policing, or other forms of surveillant control.[239] In Finland, it came to be accepted that 'convincing crime prevention [operates] outside the domain of criminal law' through situational prevention and social policy interventions like quality education and other flourishing social welfare institutions.[240] Organizing slogans captured the idea that '[g]ood social development policy is the best criminal policy' and '[c]riminal policy is an inseparable part of general social development policy.'[241] Other animating ideas included the 'principle of normalization, which aims to make prison conditions as much like living conditions in society in general as possible, with the understanding that the punishment is to be limited to the deprivation of liberty, without further state-imposed suffering.[242] The use of 'open' prisons, from which sentenced persons may come and go, arose in accord with this idea.[243] Reformers focused on the 'minimization, rather than elimination, of crime in order to properly calibrate expectations regarding risk and security.[244] Reformers also emphasized the principle of 'fair distribution'—that is, to fairly distribute costs of crime and crime prevention among the offender, the victim, and society, with society bearing

236. *See id.* at 94–95 ("Sentences of imprisonment of at most two years may be imposed conditionally, provided that 'the maintenance of general respect for the law' does not require an unconditional sentence. An offender who is sentenced conditionally is placed on probation for one to three years. For adults, such probation does not involve supervision. [T]he law no longer contains any other behavioral restrictions or conditions for the offender.").

237. Proband, *supra* note 212, at 194.

238. *Id.* at 190 ("The rationale of the criminal justice system is usually thought to be *general prevention*—not *general deterrence*. In the Nordic countries, the concept of general prevention is strongly connected with the idea that a properly working criminal justice system has powerful indirect influences on peoples' beliefs and behavior. General deterrence is an element of general prevention, but the deterrence mechanisms are not necessarily the most important ones in maintaining respect for the law. It is, however, necessary that citizens perceive the system to be reasonably efficient and legitimate. Such a system promotes internalization and acceptance of the social norms lying behind prohibitions of the criminal law.").

239. *Id.* at 189.

240. Lappi-Seppälä, *supra* note 24, at 139–40.

241. *Id.* at 108.

242. *Id.* at 100.

243. *Id.*

244. *Id.* at 108.

some of the cost through enabling situational prevention and social welfare projects that tend, among other welfare-enhancing consequences, to reduce crime.[245] As a consequence, 'punishment, once regarded as the primary means of criminal policy, came to be seen as only one option among many."[246]

Mathiesen identifies two related, more general objectives of the Nordic prison movement: First, '[i]n the short run to tear down all walls which are not strictly speaking necessary: to humanize the various forms of imprisonment, and to soften the suffering which society inflicts on its prisoners.'[247] And second, 'in the long run to change general thinking concerning punishment, and to replace the prison system by up-to-date and adequate measures'—measures that would substitute other social projects for criminal regulation.[248]

According to Mathiesen, after an initial period of focusing on prison reform to implement a treatment philosophy, this substitutive social program came to be understood by many in the Nordic prison movements in terms of the *abolition* of prisons.[249] 'What does it mean to be an 'abolitionist?' Mathiesen reflects. 'Why do I call myself an abolitionist?"[250] Abolition should be understood, Mathiesen proposes, as 'a stance, a guiding ideal, 'the attitude of saying 'no' to building prisons as a way of responding to shared social concerns.[251] Prison abolition seeks a world without prisons, where both penal institutions and the harms posed by dangerous people are eliminated, to the greatest extent possible by nonpenal measures that facilitate peaceful coexistence. Though it 'will not occur in our time, prison abolition may serve as 'a guiding ideal for the future,'[252] Mathiesen suggests, and in the present, its identifying character would be this 'generalized 'no!' to prisons whenever and wherever possible.[253] In the immediate term, then, in the Nordic prison movement, an abolitionist stance captured 'a constant and deeply critical attitude to prisons and penal systems as human (and inhumane) solutions.'[254]

This stance, this refusal, the generalized 'no' to prisons, may be conceptualized also in reference to what Bernard Harcourt calls 'political

245. *Id.*
246. *Id.* at 109.
247. MATHIESEN, *supra* note 189, at 80.
248. *Id.*
249. *Id.* at 9.
250. *Id.* at 3.
251. *Id.*
252. *Id.*
253. *Id.* at 34.
254. *Id.* at 32.

disobedience.'[255] Harcourt writes: 'political disobedience resists the very way we are governed. It refuses to willingly accept the sanctions meted out by our legal and political system. It challenges the conventional way in which political governance takes place and laws are enforced. And it turns its back on conventional political ideologies.'[256] It is a resistance not to being governed, but 'to being governed *in this way*.'[257]

Mathiesen acknowledges abolition may have been and may still be a 'wild thought.' But, he urges, 'the times need wild thoughts.'[258] Along these lines, Mathiesen explains, the Nordic prison movement 'argued in a new (and, I think, convincing) way.'[259] Convincing both because of the attention it commanded in its bold wildness and because '[a]t the time we were professionally on the top of our field and could compete successfully with almost anyone, certainly the top men in the prison administration.'[260] As with the active involvement of prisoners, Mathiesen reports, the abolitionist orientation of the movement 'created alarm and sensation in the mass media of the time, generating further attention to the cause of prison reform.'[261]

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255. Bernard Harcourt, *Political Disobedience*, *in* OCCUPY: THREE INQUIRIES IN DISOBEDIENCE 45, 47 (W.J.T. Mitchell et al. eds., 2013).

256. *Id.*

257. *Id.* at 53. One perhaps unexpected site of a more recent abolitionist "no" is the refusal of a U.S.-based architectural association to participate in prison construction—the organization Architects/Designers/Planners for Social Responsibility (ADPSR) has boycotted all prison-related projects, concluding that prisons are a "moral blight on society" and an "economic burden." Yvonne Jewkes, *Afterword: Abolishing the Architecture and Alphabet of Fear*, *in* THE POLITICS OF ABOLITION REVISITED, *supra* note 189, at 321, 324. Architect Raphael Sperry, who organized the Prison Design Boycott Campaign in the United States to encourage architects to quit building prisons, exhorts architects instead to engage in "making our country and our world a more sustainable, prosperous, beautiful place. Saying 'no' to prisons is a very important part of that. Saying we're going to make prettier prisons, it's not part of that." *See* Troy Fuss, *Rethinking Prison Design: Is It Time to Throw Away the Key to Prison Architecture?*, L.A. ARCHITECT May/June 2002, at 62, 64. For Sperry, as for the Nordic prison movement, this abolitionist stance is in part about refusing prison construction, but it is as importantly about building flourishing spaces and communities outside of prison. Sperry explains:

> [W]e have a lot of communities that fail their residents because they leave them without hope and without opportunity, and it would take a major national program to build a resurgence in those communities. And we'd like architects, designers, and planners to be engaged in that. [B]uilding prisons detracts from the opportunity to do that because the mentality that licenses the world's largest per capita prison population is incapable of envisioning these kinds of safe, prosperous, contented communities for everybody.

Id.

258. MATHIESEN, *supra* note 189, at 35.

259. *Id.* at 38.

260. *Id.*

261. *Id.* at 9. Apart from generating media attention, a further important goal of the Nordic prison movement was to create what Mathiesen calls "an alternative public space"—a space where "argumentation and principled thinking represent the dominant values. *Id.* at 28. This required in certain instances a willingness to operate without seeking mainstream media coverage, to

The inclination to be 'wild' that Mathiesen attributes to Nordic-prison-movement work is one that those concerned with humane legal and political reform perhaps ought not resist—after all, the Right on Crime projects celebrated in Texas and elsewhere embrace a certain rogue wildness that progressive commentators and reformers often shy away from. For example, Sheriff Adrian Garcia of Harris County, Texas explained at a Right on Crime convening that he describes the 'philosophy' of his office as 'WAI, in his words, 'wild-ass ideas, by which he means ideas that reflect the 'courage to try new things.'[262]

One of the core ideas of the Nordic prison movement that was embraced by public officials in Finland is that crime is caused by one set of factors and high levels of incarceration by separate variables.[263] Incarceration levels respond primarily to legislatively and judicially established sentencing law frameworks—that is, to sentencing policy and political choices—not to crime.[264] The more recent experience of Finnish decarceration supports this general criminological conclusion that crime rates increase and drop according to dynamics independent of incarceration trends.[265] As the figure below reflects, Finland's crime rate roughly corresponded to other states in the region despite markedly different trends in imprisonment.

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engage in discussions beyond those which might be palatable for a popular television or newspaper audience. *Id.* at 28–29. Mathiesen explains that an alternative public space is one where intellectuals—social scientists, artists, scientists, writers—bear responsibility to refuse the norms of 'mass media show business' and to revitalize research by 'taking the interests of common people as a point of departure.' *Id.* at 29. KROM sought to undertake this work through its 'strange hybrid' organization, comprised of 'intellectuals and prisoners with a common cause.' *Id.* The hope is that, in the end, the alternative public space 'may compete with the superficial public space of the mass media.' *Id.*

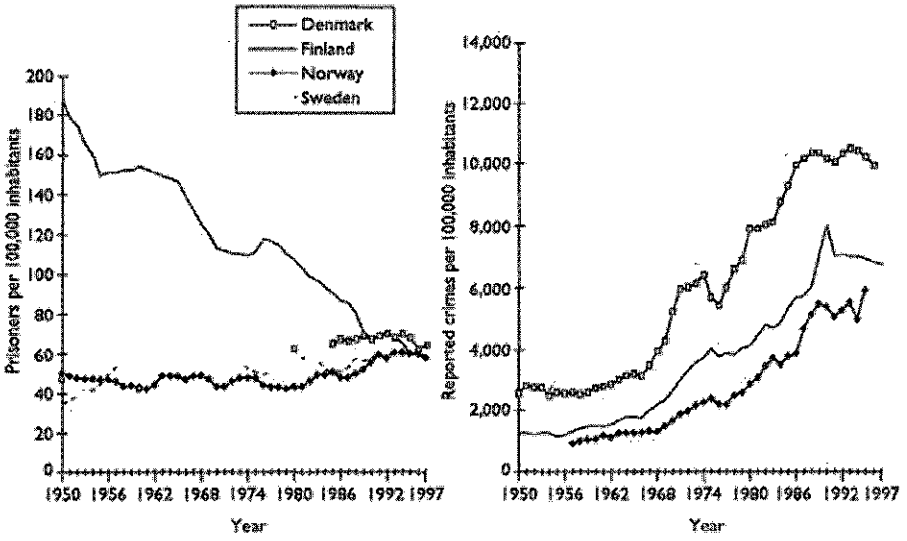
262. *See* TEX. PUB. POLICY FOUND., PRE-TRIAL AND MENTAL HEALTH POLICY IN HARRIS COUNTY, TEXAS: FRONT-END REFORMS THAT PROTECT CITIZENS, CONTROL COSTS, AND ENSURE JUSTICE 21 (2015).

263. *See* Lappi-Seppälä, *supra* note 24, at 111–22 (noting that crime rates and sentencing policies are practically independent of each other and describing Finland's use of various methods—such as imposing shorter sentences, increasing the use of fines, and adopting community service as a new sanction—to lower incarceration rates).

264. *See* MICHAEL H. TONRY & RICHARD S. FRASE, SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 122 (2001); TRAVIS & WESTERN, *supra* note 33, at 3.

265. The notion that reform entailed a learning process led participants to view their work as unfinished, ongoing, and subject to revision, and created space for the involvement of researchers in the movement to engage in 'action research' as part of their 'research activity during 'working hours.' MATHIESEN, *supra* note 189, at 10. The concept of 'the unfinished' is perhaps Mathiesen's most significant contribution to social theory—the idea that unfinished, partial, in-process interventions open unique possibilities distinct from fully elaborated reformist alternatives. *Id.* This conceptualization served as a crucial foundation for Nordic abolitionist politics. *Id.*; *see also* Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 109–32 (2013).

Prison rates (*left*) and reported crime (*right*) in the Nordic countries, 1950–1997 (per 100,000 population).



Sources: von Hofer (1997); Lappi-Seppälä (1998).[266]

Of course, the Scandinavian abolitionist project has failed, but the prison movements succeeded at radically humanizing their countries' prisons—open prisons are within the norm; noncustodial nonreporting sentences are common; and even the most serious sentences are served in relatively comfortable conditions.[267] The criminal law and policy of Finland, Norway. Denmark, and Sweden certainly suffer their own problems, excesses, and injustices too.[268] For instance, in 2012, an influx of Roma people from Bulgaria and Romania to Norway. many of whom were so poor they sought to support themselves by begging in the street, resulted in a national clamor to adopt a forced prohibition on begging for all municipalities, to commence in 2015.[269] Immigrants are imprisoned throughout the region at a rate that exceeds their representation in the population as a whole.[270] And even in more comfortable environs,

266. Lappi-Seppälä, *supra* note 204, at 121.

267. *See, e.g.*. *id.* at 100 (noting that one-quarter of prison places in Finland are in open conditions).

268. *See* Vanessa Barker, *Nordic Exceptionalism Revisited: Explaining the Paradox of a Janus-Faced Penal Regime*, 17 THEORETICAL CRIMINOLOGY 5 (2013) (exploring the extreme deprivations of liberty and violations of human rights that befall perceived outsiders in the Nordic welfare state, particularly foreign nationals).

269. *See* MATHIESEN, *supra* note 189, at 42 n.13.

270. *See, e.g.*. MICHAEL CAVADINO & JAMES DIGNAN, PENAL SYSTEMS: A COMPARATIVE APPROACH 166 (2006) (noting that foreigners are overrepresented in Finnish prisons although

Scandinavian prisoners still experience thoroughgoing bodily control by others, all the more painful, perhaps, in the seeming absence of any visible, deliberately imposed discomfort.[271] Yet still, through the Parliament of Thieves and later Nordic prisoner-organized actions and reform, the prison movement demonstrated, at least for all of the Nordic countries, that it was 'possible for *the bottom to surface*'—the title of the book on Swedish KRUM written by its founders—and for penal and social policy to fundamentally change.[272]

The purpose of this detour into Finnish and Scandinavian prison reform is not to suggest that the problems of the U.S. carceral state might be resolved as they have been in Finland, or that the United States ought to become more like one of the Nordic countries—a futile prospect in any case. The United States is considerably different from Finland in that it has a much larger and more diverse population, and a unique racial history that exerts an overwhelming influence on criminal law enforcement, local and national politics. Another set of differences relates to the relatively-less-significant role of experts and expertise in the U.S. criminal process and the disaggregation of decision making across hundreds of separate U.S. state and local jurisdictions.[273] The United States will not solve its carceral problems in the same way as Finland, but we might nonetheless learn from their experiences. As James Whitman suggests of comparative law, the purpose of this comparative investigation is 'to broaden the mind—to help us to escape the conceptual cage of our own tradition.'[274] Here, more specifically, the aim is to recognize that we might address our growing

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their absolute numbers are small); Lars Holmberg & Britta Kyvsgaard, *Are Immigrants and Their Descendants Discriminated Against in the Danish Criminal System?*, 4 CRIMINOLOGY & CRIME PREVENTION 125, 125–42 (2003) (finding that persons with a foreign background in Denmark are more likely to be arrested in relation to a charge, more likely to be remanded in custody without subsequently being convicted, and more likely not to be convicted when charged); Hans Von Hofer et al., *Minorities, Crime, and Criminal Justice in Sweden*, *in* MINORITIES, MIGRANTS, AND CRIME: DIVERSITY AND SIMILARITY ACROSS EUROPE AND THE UNITED STATES 62, 71 (Inke Haen Marshall ed., 1997) (reporting that all immigrant groups are overrepresented in conviction statistics when compared to indigenous Swedes).

271. *See* Jewkes, *supra* note 257, at 321, 323 (suggesting that experiments in aesthetically appealing penal architecture and design, such as in Norway's new prisons, may represent a "more insidious form of control that brings its own distinctive pain, one all the more inhuman due to its apparent absence").

272. MATHIESEN, *supra* note 189, at 17–19.

273. *See* Lappi-Seppälä, *supra* note 24, at 140–42 (noting that criminal justice policies in Finland are heavily influenced by experts and that consequently, unlike in the United States, criminal justice reform has been largely unaffected by politicization and lowbrow populism). *Compare* Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 222, 222–23 (Michael Tonry & Richard S. Frase eds., 2001) (describing the wide array of diverse experimental approaches to sentencing in U.S. jurisdictions), *with* Törnudd, *supra* note 234, at 189 (noting that sentencing policies in Finland have remained stable for a long time).

274. James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice*, 94 TEXAS L. REV. 933, 984 (2016).

discomfort in the United States with our own racialized penal practices with a genuine commitment to change. Just as some of the Finnish motivation to change may have arisen from a disidentification with historical Russian influence, so too, we in the United States might come to disidentify with the historical forms of shameful racial subordination that shape current criminal law enforcement among other practices. Further, dramatic decarceration, including with respect to those convicted of violent and dangerous offenses, does not necessarily threaten an epidemic of violent crime, because we learn that radical decarceration in Finland was followed by crime rates comparable to neighboring states that experienced opposite incarceration trends.

Indeed, a sustained commitment to decarcerate may generate deep-seated transformation over time by gradually substituting social projects like neighborhood revitalization, education, and social welfare provision for punitive surveillance and penal intervention, with an abolitionist orientation that relies on the least restrictive conditions of confinement only in those instances where penal intervention is absolutely necessary. Ultimately, Finland establishes that a carceral state may wither, and a social state may flourish in its stead. To invoke Whitman again, '[w]e *can* think differently—and that matters a great deal, because we are going to have to think differently.'[275]

B. Black Lives Matter and Movements for Criminal Reform, Racial and Social Justice

While prison reform swept the Nordic countries, prisoner uprisings and social movements gripped the United States. But the reaction of prison authorities and other U.S. public officials was ultimately repressive rather than reconstitutive of penal policy.[276]

In late 1970, when scholar and activist Angela Davis was jailed, facing the death penalty for allegedly providing aid to a prisoner uprising in San Quentin prison, author James Baldwin wrote an open letter to Davis published in the *New York Review of Books*.[277] Baldwin decried the absence of collective shame in the U.S. response to its penal policies and entwined practices of racial violence, as cited in the epigraph to this Essay:

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275. *Id.*

276. *See* DAN BERGER, CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA 270 (2014) (describing the prison rebellions of the 1960s and 1970s leading to the prominence of solitary confinement); GOTTSCHALK, *supra* note 8, at 165 ("The United States gave birth to a prisoners' rights movement that was initially more powerful and significant than prison reform movements that emerged elsewhere at roughly the same time. But the U.S. movement developed in ways that helped create conditions conducive to launching the 'race to incarcerate.'").

277. Baldwin, *supra* note 1, at 15.

> One might have hoped that, by this hour, the very sight of chains on black flesh, or the very sight of chains, would be so intolerable a sight for the American people, and so unbearable a memory, that they would themselves spontaneously rise up and strike off the manacles. But, no, they appear to glory in their chains; now, more than ever, they appear to measure their safety in chains and corpses.[278]

Over the 1970s, African-American male unemployment in low-income communities grew to record proportions as a result of labor market restructuring, increasing from 25.9% to 40.7%.[279] The U.S. carceral boom began in earnest, responding harshly to African-Americans accused of criminal offenses and often underenforcing the law against white people, with now all-too-familiar and highly racially and economically skewed effects.[280]

In the years to follow, police killed thousands of citizens in the United States, disproportionately people of color, and many of them—like Michael Brown, Tamir Rice, Eric Garner, Dontre Hamilton, Kendra James, LaTanya Haggerty, and Eleanor Bumpers—unarmed.[281] Responding to these and other related events, in the aftermath of the killing of Trayvon Martin, three African-American women activists—Alicia Garza, Patrisse Cullors, and Opal Tometi—created Black Lives Matter.[282] In the face of further awful deaths, Black Lives Matter has grown into a national and international movement.[283]

The Black Lives Matter movement's writings imagine another course of response to police violence and an alternative framework for decarceration. According to one affiliated movement effort, Ferguson Action:

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278. *Id.*; ANGELA Y. DAVIS ET AL., IF THEY COME IN THE MORNING 13 (1971) (reprinting open letter from James Baldwin).

279. LISA MARIE CACHO, SOCIAL DEATH: RACIALIZED RIGHTLESSNESS AND THE CRIMINALIZATION OF THE UNPROTECTED 120 (2012) (citing Robert L. Wagmiller, *Male Nonemployment in White, Black, Hispanic and Multiethnic Urban Neighborhoods, 1970-2000*, 44 URB. AFF. REV. 85, 100 (2008)).

280. *See, e.g.*, Vesla M. Weaver, *The Missing Lesson of Ferguson: Conduct ≠ Contact*, BALKANIZATION (Aug. 11, 2015), http://balkin.blogspot.com/2015/08/the-missing-lesson-of-ferguson-conduct.html [http://perma.cc/5LB9-LCFF].

281. *Id.*; Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 696 (1996) (documenting that African-Americans are disproportionately killed by police); Jon Swaine et al., *Black Americans Killed by Police Twice as Likely to Be Unarmed as White People*, GUARDIAN (June 1, 2015), http://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis [perma.cc/24AV-2HLX] (detailing an investigation finding that African-Americans in the United States are more than twice as likely to be unarmed when killed during encounters with police as white people and that 135 of 464 people killed in incidents with police in the first five months of 2015 were black).

282. *About*, BLACK LIVES MATTER, http://blacklivesmatter.com/about/ [http://perma.cc/G94X-EUVH].

283. *See supra* note 21 and accompanying text.

> The United States Government must acknowledge and address the structural violence and institutional discrimination that continues to imprison our communities either in a life of poverty and/or one behind bars We want an immediate end to state sanctioned violence against our communities. We want full employment for our people[.] Every individual has the human right to employment and a living wage. Inability to access employment and fair pay continues to marginalize our communities, ready us for imprisonment, and deny us of our right to a life with dignity. We want decent housing fit for the shelter of human beings[.] Our communities have a human right to access quality housing that protects our families and allows for our children to be free from harm. We want an end to the school to prison pipeline & quality education for all We want an end to the over policing and surveillance of our communities We call for the cessation of mass incarceration and the eradication of the prison industrial complex all together. In its place we will address harm and conflict in our communities through community based, restorative solutions.[284]

Other related 'national demands' in these writings include a '[c]omprehensive [r]eview of systemic abuses by local police departments, including the publication of data relating to racially biased policing, and the development of best practices, and hearings to investigate 'the criminalization of communities of color, racial profiling, police abuses and torture by law enforcement. '[285]

The subsequently published Vision for Black Lives, authored by a collective of more than 50 organizations representing Black people across the county, imagines necessary change to criminal law enforcement in these terms:

> We demand investments in the education, health and safety of Black people, instead of investments in the criminalizing, caging, and harming of Black people. We want investments in Black communities, determined by Black communities, and divestment from exploitative forces including prisons, fossil fuels, police, surveillance and exploitative corporations.[286]

We might recognize this reform framework as an effort to refuse and supplant prisons and punitive policing with other social projects—with employment, housing, quality education—as well as to proliferate mechanisms for restorative accountability. In the words of historian and

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284. *Our Vision for a New America*, FERGUSON ACTION, http://fergusonaction.com/demands/ [http://perma.cc/WSN5-X269].

285. *Id.*

286. *See A Vision for Black Lives: Policy Demands for Black Power, Freedom and Justice*, *supra* note 16.

prison activist Dan Berger, this may be understood as 'reform in pursuit of abolition.'[287] It is a call at once for 'eradication of prison' and basic economic security, but also for more modest, practicable, immediately achievable ends: 'publication of data relating to racially biased policing, and the development of best practices.'[288] Andrea Smith, of INCITE!: Women of Color Against Violence, explains of contemporary U.S. prison-abolitionist discourse: 'When we think about the prison abolition movement it's not 'Tear down all prison walls tomorrow, it's 'crowd out prisons' with other things that work effectively and bring communities together rather than destroying them.'[289] An advocate with Decarcerate PA put it in these terms: 'Abolition is a complicated goal which involves tearing down one world and building another.'[290] Relatedly, the Movement for Black Lives recognizes that the human right to freedom from police and vigilante violence cannot be enjoyed without the human right to housing, education, and basic economic well-being.

This account of criminal law reform as related to economic security calls to mind W.E.B. Du Bois's writings on the close connection in African-American historical experience between criminalization and economic dispossession. Du Bois began *The Souls of Black Folk* by identifying 'the shades of the prison-house closed round about us all,'[291] and in *Black Reconstruction in America*, his masterwork, published several decades later, he condemned the failures of Reconstruction for having rendered African-Americans 'caged human being[s].'[292] Du Bois recognized that a meaningful response to these conditions would include not just an absence of violence but some measure of economic security, which was actively refused during a period of U.S. history Du Bois explores in a chapter titled 'Counter-Revolution of Property.'[293] Freedom, yet to be realized in the accounts of Black Lives Matter and Du Bois, is envisioned simultaneously as positive and negative freedom—it is a freedom to be left alone but in conditions adequate for human flourishing. To thoroughly dismantle the carceral state will require that we imagine and begin to constitute a new state, a noncarceral state, a social state that better enables equality, freedom, economic justice, and human flourishing.

The Black Lives Matter movement offers an alternative political model seeking to achieve these ends—it is a dynamic, youth-led movement that rejects the familiar form of singular, charismatic leadership in favor of

287. Dan Berger, *Social Movements and Mass Incarceration*, 15 SOULS: CRITICAL J. BLACK POL. CULTURE AND SOC'Y 3, 14 (2013).

288. *Our Vision for a New America*, *supra* note 297.

289. Berger, *supra* note 299, at 59.

290. *Id.* at 134.

291. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 13 (1903).

292. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 12, 701 (1935).

293. *Id.* at 580.

locally dispersed, diverse, proliferating organizations and coalitions. Rather than seeking incorporation, the Black Lives Matter movement has adopted strategies of disruption that aim to enable us to see the world differently. Like Du Bois's analysis of carceral violence, the Black Lives Matter movement's calls for criminal law reform are not limited to the criminal domain but attempt to more fundamentally re-envision the role of the state, of emergent social movements, and of communities in ensuring collective security.[294]

Even if these more ambitious visions of decarceration remain relatively peripheral, they nonetheless offer a set of transformative aspirational ideas which might orient current reform efforts, rescuing more moderate criminal law reform from its weakest and most disappointing possible futures. If decarceration is ultimately to be part of egalitarian democratic political change, its champions will require a conception of the state beyond the carceral state and a more expansive coalitional politics that reaches further than the domain of criminal law and wider than the span of any narrow existing bipartisan consensus.[295] This imaginative conjuring will not, of course, bring about desired transformation in itself, but any such alternatives will be foreclosed if we neglect to attend to them altogether.

Conclusion

At the end of her powerful and ruthless critique in *Caught*, Gottschalk gestures toward what she understands as necessary to 'dismantle the carceral state and ameliorate other gaping inequalities'—what she describes as a 'convulsive politics from below.'[296] In Gottschalk's account, though, as in most of the scholarship on the carceral state, this convulsive politics is assumed to be absent from the contemporary scene, as are any significant prospects for substantial reform.[297] Yet, the burgeoning movements for racial justice and criminal law reform may portend a convulsive politics from below already unfolding in our midst. This Essay has sought to locate provisional frameworks for decarceration that these and other efforts might deploy, by tactically engaging ongoing drug law and related reform, while

294. *E.g.*, Carla Shedd, Assistant Professor of Sociology and African-American Studies, Women Mobilizing Memory: Collaboration and Co-Resistance, Conference Proceedings at Columbia University (Sept. 10, 2015) (on file with author).

295. Relevant to this project are far-reaching matters of law reform and social policy—public welfare law, tax law, and the role of the state. *See* Tracy Meares, *A Third Reconstruction?*, BALKANIZATION (Aug. 14, 2015), http://balkin.blogspot.com/2015/08/a-third-reconstruction.html [http://perma.cc/X5LP-YRPU] ("[L]aw can do more. Redistribution, yes. But deep structural change in the law's orientation towards all citizens especially in the operation of the criminal justice system also is necessary."). *See generally, e.g.*, EDWARD D. KLEINBARD, WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY (2015); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014).

296. GOTTSCHALK, *supra* note 2, at 282.

297. *Id.* at 276.

orienting near-term reform to the aspirational horizons conjured by Finland's dramatic decarceration and the Black Lives Matter movement's calls for criminal law reform as a project of racial, social, and economic justice.

What distinguishes these more transformative visions, both in the Black Lives Matter movement and in Finland, is the identification of criminal law reform not only with a fundamental shift in penal policy, but with a reorientation of the state and law more generally from punitive to social ends. Criminal law reform should connect decarceration to broader and deeper matters that define our economic and social lives so that we might begin to constitute a state beyond the carceral state.

Notes

Cruel and Unusual Parole*

Introduction

In *Graham v. Florida*,[1] the Supreme Court categorically barred life-without-parole sentences for juvenile defendants convicted of nonhomicide crimes.[2] Likening the severity of life without parole to the death penalty when applied to juveniles, the Court held that states must give such juvenile defendants 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'[3]

However, the Court did not make clear whether it was applying a new constitutional rule to state parole systems or merely directing states to open their existing systems, such as they are, to defendants like Graham.[4] Did the case announce 'a rule of constitutional criminal procedure' for parole proceedings,[5] or as state officials think, did the ruling simply touch sentencing schemes, with no new requirements for parole systems?[6]

It is possible to read *Graham* merely as requiring states to open their existing parole systems to previously ineligible prisoners. But suppose a state complied with *Graham* by converting prisoners' sentences to life with parole eligibility, and its parole system then gave each prisoner only infrequent, cursory reviews. With no investigation, this parole board issued perfunctory

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1. 560 U.S. 48 (2010).
2. *Id.* at 74.
3. *Id.* at 69, 75.
4. Justice Thomas did raise these questions in dissent. *Id.* at 123 (Thomas, J., dissenting) ("But what, exactly, does such a 'meaningful' opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years."). Justice Roberts raised a similar practical question at oral argument. Transcript of Oral Argument at 7, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412) ("What about – what if it's pursuant to the usual State parole system, and it turns out that grants parole to 1 out of 20 applicants?").
5. Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1748 (2012).
6. Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 396 (2014); *see, e.g.*, Defendant-Appellant's Opening Brief at 21–28, Hayden v. Butler, No. 15-7676 (4th Cir. Aug. 1, 2016) (arguing that "parole consideration or its equivalent alone would suffice" to protect an offender's Eighth Amendment rights, and that *Graham* did not "establish that the 'meaningful opportunity' requires additional, specific parole procedures for juvenile offenders convicted of nonhomicide offenses").

denials based on the severity of the offense and did so, year after year, with no member of its *Graham* population ever gaining release. Alternatively, suppose that it simply evaluated the severity of prisoners' offenses and, on that basis, delayed their earliest possible release dates until the next century.[7] It is difficult to imagine the Supreme Court agreeing that such unfair parole review complies with its decision in *Graham*.

Litigation has now begun to bear that out.[8] Prisoners serving life sentences for nonhomicide crimes committed as juveniles are now suing their parole boards, arguing that the boards' procedures and decisions fail to afford them a meaningful opportunity to obtain release. Through these cases, the shape of the basic *Graham* parole claim has emerged—unfair parole review is unconstitutional because it transforms an otherwise constitutional sentence into the functional equivalent of life without parole.[9]

This Note analyzes that new litigation. Part I sets the background—the history of parole and the pre-*Graham* standards for due process claims against parole boards, set by *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*.[10] *Greenholtz* offers prisoners minimal relief from parole's status quo, in which cursory decisions are the norm and the severity of the original offense is the overriding concern. Part I then analyzes *Graham v. Florida* and two subsequent cases, *Miller v. Alabama*[11] and *Montgomery v. Louisiana*,[12] in which the Supreme Court offered suggestive new language about the importance of rehabilitation and parole release in its juvenile sentencing jurisprudence.[13]

Part I also makes sense of *Graham*'s logic. Different readings of the decision could yield different types of constitutional claims. If life without parole is unconstitutionally severe for depriving prisoners of hope, the fairness of parole release determinations should be the focus of constitutional litigation. But if it is unconstitutionally severe for undermining the process of personal development, the availability of prison rehabilitative opportunities also becomes significant. Read this way, *Graham* seems to imply a right to rehabilitative treatment for the prisoners within its holding.

Part II then discusses four cases that exemplify the new litigation against parole systems, which Part III then analyzes. Prisoners' claims based on *Graham*, which have survived tests of their legal validity. have concentrated

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7. *See* Atwell v. State, 197 So. 3d 1040, 1041–43 (Fla. 2016) (considering a challenge to the Florida Commission on Offender Review by Angelo Atwell, who was convicted as a juvenile in 1990 of first-degree murder and armed robbery, and whose presumptive parole release date was set by the commission to be 2130).

8. *See infra* subparts II(A)–(D).

9. *See infra* subpart III(A).

10. 442 U.S. 1 (1979).

11. 132 S. Ct. 2455 (2012).

12. 136 S. Ct. 718 (2016).

13. 136 S. Ct. at 734–35; 132 S. Ct. 2469; 442 U.S. 15–16.

on parole systems' procedures and decisions, rather than the availability of rehabilitative opportunities. Part III offers reasons to conclude that *Graham* will give rise only to claims focusing on the former and not the latter. Finally, noting that courts have not settled on a framework for analyzing *Graham* parole claims, Part III suggests adapting the standard procedural due process framework, taking cues from *Graham*.

Part IV argues that the logic of *Graham* parole claims extends naturally to juvenile defendants convicted of homicide offenses, but the Court's adult sentencing jurisprudence[14] bars comparable challenges by adults. Until that jurisprudence evolves, only limited categories of prisoners will be able to bring Eighth Amendment parole challenges. In the interim, the adjudication of those claims can at least begin to model fairer parole decision making that focuses not on the severity of the original crime but on the prisoner's maturation since its commission.

I. The Context for the New Challenges

A. The Evolution of Parole

Parole has two distinct components: release determinations and field supervision.[15] Parole boards serve the former function, managing the release of prisoners under either mandatory or discretionary release schemes.[16] Mandatory release occurs when prisoners are sentenced under 'determinate' sentencing statutes that set specific terms of imprisonment and permit the parole board little or no discretion in the timing of release.[17] Discretionary release, by contrast, occurs when prisoners are sentenced under 'indeterminate' sentencing statutes, which leave the timing of release to the board.[18]

The first state to adopt discretionary release was New York in the 1870s, and all states and the federal government had parole systems by 1930.[19] In this period, parole's perceived virtues were the incentives that it gave prisoners to behave well and the flexibility that it offered administrators to manage prison crowding.[20] Into the 1960s, a 'rehabilitative ideal' guided the

14. Lockyer v. Andrade, 538 U.S. 63, 77 (2003); Harmelin v. Michigan, 501 U.S. 957, 996 (1991).

15. Joan Petersilia, *Parole and Prisoner Re-entry*, *in* THE OXFORD HANDBOOK OF CRIME AND CRIMINAL JUSTICE 925, 928 (Michael Tonry ed., 2011).

16. *Id.*

17. *Id.* at 928, 932.

18. *Id.* at 928.

19. *Id.* at 929. Of course, there were dramatic, essentially incommensurable regional differences in prison systems. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010).

20. Petersilia, *supra* note 15, at 929–30.

operation of parole boards, which understood that their role was 'to change the offender's behavior rather than simply to punish.'[21]

Sentencing and parole in that era were vastly different from today. *Connecticut Board of Pardons v. Dumschat*,[22] which dealt with the parole system of Connecticut in the mid-1970s, furnishes an illustration. Connecticut's Board of Pardons could commute prisoners' sentences, including life sentences, by reducing the minimum term that the prisoner had to serve before the Board of Parole—a separate body—could consider releasing the prisoner.[23] Three-quarters of prisoners serving life sentences received a commutation before finishing the minimum term,[24] which was twenty-five years.[25] Ninety percent of that group was then released by the Board of Parole within the first year of eligibility.[26] Overall, less than fifteen percent of Connecticut prisoners with life sentences served up to the minimum term.[27]

This norm was not limited to New England. In the 1950s, a prisoner sentenced to life in prison in North Carolina served only fourteen years on average.[28] In Texas, the average was only eleven years; in Kentucky, it was ten.[29]

However, in the 1970s, vigorous criticism emerged. There was 'rapid disillusionment and a corrosive loss of confidence' in the rehabilitative mode that then prevailed in parole systems.[30] In part, Robert Martinson's *What Works?* article, a meta-analysis of correctional programs' effects on recidivism, created doubt that prison-rehabilitative programs actually helped prisoners to reintegrate and that parole-board members could accurately identify the successfully rehabilitated.[31] Meanwhile, a coalition of the left and right united in criticizing indeterminate sentencing—the left, concerned

21. *Id.* at 930.
22. 452 U.S. 458 (1981).
23. *Id.* at 460 & n.3.
24. *Id.* at 461.
25. *Id.* at 460 n.1.
26. *Id.* at 461 n.4.
27. *Id.*
28. MARIE GOTTSCHALK, CAUGHT 357 n.33 (2015).
29. *Id.*
30. Edward E. Rhine, *The Present Status and Future Prospects of Parole Boards and Parole Supervision*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 627, 627–28 (Joan Petersilia & Kevin R. Reitz eds. 2012); *see also* Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, 49 GA. L. REV. 383, 388 (2015) (describing rehabilitation's "rapid decline into near irrelevance" in this period).
31. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, PUB. INT. Spring 1974, at 22, 25; *see also* Flanders, *supra* note 30, at 397 (describing Martinson's article as "hugely influential").

by parole boards' hidden racial and class biases, and the right, concerned by their leniency.[32]

Consequently, sentencing grew more standardized, then more punitive. Efforts to standardize sentencing and release decisions from the mid-1970s to mid-1980s yielded guidelines for judges and parole-board members.[33] Numerous states, beginning with Maine in 1975, abolished parole in this period.[34] From the mid-1980s, laws proliferated that raised minimum criminal sentences, that created sentencing enhancements for repeat offenders, or that required a greater portion of the sentence to be served before parole eligibility.[35] Life-without-parole sentences grew much more common,[36] and the population serving them ballooned. By 2008, there were over 41,000 such prisoners, more than triple the number in 1992.[37] The impact of this policy shift on parole systems was similarly dramatic. Before the shift, three-quarters of prison releases were discretionary.[38] By 2000, discretionary release accounted for only one-quarter.[39]

According to a 2008 survey, the typical parole board would have gubernatorial appointees serving five-year terms.[40] Its state's sentencing laws would set minimum percentages of the sentence that the prisoner must serve, which would be particularly high for violent and sex offenses.[41] The board would use risk assessments to anticipate recidivism[42] and would rely

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32. COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS. THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 72 (Jeremy Travis et al. eds., 2014) [hereinafter COMMITTEE] (describing shifts in attitudes about parole); Petersilia, *supra* note 15, at 932.

33. COMMITTEE, *supra* note 31, at 72–73.

34. *Id.* at 76. Nineteen states had done so by 2002. Petersilia, *supra* note 15, at 932.

35. COMMITTEE, *supra* note 32, at 73.

36. *See id.* (describing life-without-parole laws as a mechanism for increasing the harshness and certainty of criminal convictions). Among other causes, death penalty opponents supported life without parole as a sufficiently-severe-but-nevertheless-preferable alternative to the death penalty. *Id.* at 73 n.2; *see also* Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 158 (2008) (attributing the rise of life-without-parole sentences partly to "the alliance of the abolitionist left and tough-on-crime right," due to the former's search for a "workable and humane alternative to the death penalty").

37. ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 9 fig.2 (2009) (illustrating the increase from 12,453 prisoners in 1992 to 41,095 prisoners in 2008).

38. Petersilia, *supra* note 15, at 930 (72% in 1977).

39. *Id.* at 932 (24% in 2000).

40. SUSAN C. KINNEVY & JOEL M. CAPLAN, CTR. FOR RESEARCH ON YOUTH AND SOC. POLICY, UNIV. OF PA., FINDINGS FROM THE APAI INTERNATIONAL SURVEY OF RELEASING AUTHORITIES 7 (2008), http://www.apaintl.org/resources/documents/surveys/2008.pdf [https://perma.cc/YS3A-X9J7]. The survey reached all states except for Indiana, Mississippi, and California. *Id.* at 6.

41. *Id.* at 19.

42. *Id.* at 12.

on case summaries and recommendations by analysts.[43] The board members would interview the prisoner, and they would also be required by law to hear in-person testimony from victims or their survivors.[44] The board members would find this in-person testimony the most compelling.[45] They would weigh crime severity, victim impact, and the prisoner's offense history most heavily.[46] Considerably less importance would be given to the prisoner's age, circumstances at the time of the crime, or indications of maturation since that time.[47] The board frequently would delay release decisions because inadequate funding for rehabilitative programs prevented prisoners from completing prerequisites for release.[48]

In modern parole systems, political appointment of board members yields a heightened concern for public safety and an emphasis on the severity of the offense, in order to protect governors against political risk.[49] Parole systems ostensibly tasked with gauging a prisoner's rehabilitation and readiness for release focus instead on the original crime's shock value.[50] Because parole board decisions are subject only to the most deferential judicial review in state courts, if at all, they have virtual "carte blanche' to deny release.[51]

B. Due Process Challenges to Parole Boards

The Supreme Court decided on the framework for due process challenges to parole boards during the period of changing attitudes about parole. In 1979, Nebraska prisoners argued that Nebraska's procedures for discretionary parole release violated the Due Process Clause.[52] Success in the lower courts yielded an order requiring the Nebraska Parole Board to

43. *See id.* at 14 (discussing the role played by case officers in the risk assessment).

44. *Id.* at 15, 17.

45. *Id.* at 18.

46. *See id.* at 19 (listing crime severity, offender's criminal history, crime type, number of victims, and age of victims as the most impactful factors).

47. *Id.*

48. *Id.* at 21; *see also* Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC. REV. 33, 58 (2011) (noting that "correction departments often condition early release to parole on the completion of required programming").

49. *See* Bierschbach, *supra* note 5, at 1782 (noting that parole-board commissioners are frequently appointed by governors and that new offenses by parolees are politically harmful); JONATHAN SIMON, GOVERNING THROUGH CRIME 161 (2007) (discussing Gray Davis, former Governor of California, whose parole-board appointees granted vanishingly few releases, thereby "plac[ing] the governor on the side of victims and potential victims, and in opposition to courts and other political actors).

50. *See* Bierschbach, *supra* note 5, at 1751 (describing the change in sentencing aims from rehabilitation to retribution and the corresponding focus on "dangerousness" for parole).

51. Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 CARDOZO L. REV. 1031, 1077 (2014).

52. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 3–4 (1979).

conduct 'full formal hearings' (and to no longer bar the prisoner from hearing adverse testimony or cross-examining witnesses); to give the prisoner precise notice of the hearing's timing (and not just the month in which it would occur); to permit in-person hearings; to produce a written record of the proceedings (and not merely a videotape); and to give the prisoner a full statement of reasons and evidence after parole denials (and not the curt explanation it then issued).[53]

In *Greenholtz*, the Supreme Court's reversal of that order was based on its generally applicable procedural due process jurisprudence,[54] and it had three important elements. First, the Court set the constitutional baseline: there was 'no constitutional or inherent right to be conditionally released before the expiration of a valid sentence, and states were under no obligation to operate a parole system at all.[55] Second, a prisoner had a protected liberty interest at stake in parole proceedings only if the statute used mandatory language that bound the parole board to release him under specified circumstances.[56] Third, the liberty interest that Nebraska's statute created in this instance imposed a minimal burden on the parole system, and Nebraska's existing procedures met that burden.[57]

The Court's reversal of the lower court's detailed order reflected a dismissive view of parole systems' ability to forecast risk and control recidivism. Chief Justice Burger's majority opinion upholding Nebraska's existing procedures rested on the view that additional procedures 'would provide at best a negligible decrease in the risk of error.'[58] In part, that was because the Court viewed the parole determination as an ineffable inquiry—a 'discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become.'[59] But it was also because—channeling Robert Martinson's *What Works?*—the Court doubted whether parole boards were any good at their jobs: 'anticipations and hopes for rehabilitation programs have fallen far short of expectations of a generation ago.'[60] That Chief Justice Burger felt the need to say states should not necessarily 'abandon hopes for those objectives' was a suggestion that

53. *Id.* at 4–5 (status quo procedures); *id.* at 6 (court-ordered procedures).

54. *See id.* at 7 (relying on the "legitimate claim of entitlement" test of *Bd. of Regents v. Roth*, 408 U.S. 564, 570–71 (1972) to conclude that parole eligibility did not confer a "protectible right"); *id.* at 13 (citing the framework of Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

55. *Id.* at 7.

56. *Id.* at 11–12 (quoting the Nebraska statute's command that the board 'shall order [the prisoner's] release unless' certain conditions were met).

57. *Id.* at 16.

58. *Id.* at 13 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976), for the applicable standard); *id.* at 14 (applying the standard).

59. *Id.* at 10 (quoting Sanford H. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 813 (1961)).

60. *Id.* at 13.

the states should at least consider it.[61] Given prison rehabilitation's 'disappointing' results, additional parole procedures seemed pointless.[62]

This due process framework, built by *Greenholtz* on a foundation of skepticism and disappointment, remains good law. In 2011, the Supreme Court reiterated that there is no constitutional right to conditional release, that states are not obligated to offer parole, and that the procedures required to protect whatever liberty interests that state law might create remain 'minimal.'[63]

C. Graham v. Florida

In *Graham v. Florida*, the Supreme Court complicated the rule that states are never obligated to offer parole. Holding that the Eighth Amendment prohibits life-without-parole sentences for juveniles convicted of nonhomicide offenses,[64] the Court required states to deal differently with those defendants. Shorter term-of-years sentences could satisfy *Graham*, but if states complied by conferring parole eligibility, the Court's reasoning suggested that, contra *Greenholtz*, the Constitution in fact requires parole systems to offer a meaningful chance at release.

Terrance Graham was sixteen years old when he received probation for attempted robbery and seventeen years old when he violated that probation by participating in two more robberies.[65] Concluding that Graham had no hope of rehabilitation, the trial court gave him a life sentence; Florida's abolition of its parole system some years earlier rendered it a sentence of life without parole.[66]

Conducting an Eighth Amendment proportionality analysis of Graham's sentence, the Court made a novel move. Rather than apply its proportionality framework for noncapital sentences, the Court followed its framework for capital sentences.[67] This decision—based on the questionable

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61. *Id.*

62. *Id.*

63. Swarthout v. Cooke, 562 U.S. 216, 220 (2011) (per curiam). There once was an alternative viewpoint. *See* Bd. of Pardons v. Allen, 482 U.S. 369, 373 n.3 (1987) (stating that four justices—Justices Powell, Brennan, Marshall, and Stevens—believe the requirement of due process in parole proceedings should not depend solely on state statutory language and putting forth the principle that "liberty from bodily restraint is at the heart of the liberty protected by the Due Process Clause"). However, that view never commanded a majority.

64. Graham v. Florida, 560 U.S. 48, 74 (2010).

65. *Id.* at 53–55.

66. *Id.* at 56–57.

67. *Id.* at 60–62; *see* Ewing v. California, 538 U.S. 11, 23–24 (2003) (citing Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J. concurring)) (stating that in noncapital cases, the "Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime"); *infra* subpart IV(B) (discussing the difficulty of having a prison sentence invalidated under the Eighth Amendment).

distinction between challenges to 'a particular defendant's sentence' and 'a sentencing practice itself'[68]—allowed the Court to follow its earlier decision in *Roper v. Simmons*,[69] in which it banned the death penalty for defendants under the age of eighteen and began developing its 'new doctrine of youth.'[70]

In noncapital proportionality analysis, the Court defers to state legislatures on sentence length, declines to favor any one penological goal over another, and acts only in instances of 'gross disproportion[ality].'[71] Under this approach, the Supreme Court has invalidated no sentences since 1983.[72] By contrast, in capital proportionality analysis, the Court considers 'evolving standards of decency' and engages in '[t]he judicial exercise of independent judgment.'[73]

Engaging in that exercise of judgment, the Court emphasized the distinctive attributes of youth that had controlled the result in *Roper*: juveniles' 'lack of maturity' and 'underdeveloped sense of responsibility'; their vulnerability to 'negative influences and outside pressures, including peer pressure'; and their characters that are not yet fully formed.[74] Each of these features weakens the penological justifications for harsh punishment. Deterrence is less effective against a less mature, less responsible defendant; retribution is less appropriate against a less culpable defendant.[75]

Likewise, the rationales of incapacitation and rehabilitation counsel against life-without-parole sentences. In *Graham*, Justice Kennedy noted the same difficulties of prediction that Chief Justice Burger had emphasized in *Greenholtz*. Life-without-parole sentences are based on 'a judgment that the juvenile is incorrigible,' but '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects

68. *Graham*, 560 U.S. at 61. Initial responses to the case doubted the soundness of this distinction. *See, e.g.*, Rachel E. Barkow, *Categorizing* Graham, 23 FED. SENT'G REP. 49, 49–50 (2010); Carol S. Steiker & Jordan M. Steiker, Graham *Lets the Sun Shine In: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT'G REP. 79, 80–81 (2010).

69. 543 U.S. 551 (2005).

70. *Id.* at 578; *see* Cohen, *supra* note 51, at 1057 (arguing that *Roper*, *Graham*, and subsequent cases should be understood as developing 'a *sui generis* jurisprudential stew of developmental science, brain science, and Eighth Amendment case law").

71. *Ewing*, 538 U.S. at 23–24 (citing Harmelin v. Michigan, 501 U.S. 957, 997, 1001 (1991) (Kennedy, J. concurring)); *Harmelin*, 501 U.S. at 997, 999, 1001 (Kennedy, J. concurring).

72. *See infra* subpart IV(B). That invalidation occurred in: *Solem v. Helm*, 463 U.S. 277, 281, 284 (1983) (invalidating a life-without-parole sentence for passing a bad check worth $100).

73. *Graham*, 560 U.S. at 58, 67.

74. *Id.* at 68 (quoting Roper v. Simmons, 543 U.S. 551, 569–70 (2005)). Later, the Court added that "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. *Id.* at 78.

75. *Id.* at 71–72.

irreparable corruption.'[76] But where difficulties of prediction weighed against greater protections for prisoners in *Greenholtz*, here they weighed in favor.

Similarly, recall Chief Justice Burger's skepticism of rehabilitative programs, which inclined him to dismiss the value of additional parole procedures.[77] Where Burger was pessimistic, saying that rehabilitative programs had 'fallen far short of expectations,'[78] Kennedy took a different tone. Kennedy was at least moderately hopeful about the prospects of rehabilitative efforts, characterizing them as 'the subject of a substantial, dynamic field of inquiry and dialogue.'[79] Whichever programs are available,[80] Kennedy suggested that they have some measure of constitutional significance: '[T]he absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.'[81]

Concerning parole release, the Court emphasized that states are 'not required to guarantee eventual freedom' to defendants like Graham.[82] However, states do have an obligation to 'give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'[83] Relatedly, the Court suggested that prisons bear an obligation to increase their rehabilitative efforts. In the Court's view, 'the system itself becomes complicit in [a prisoner's] lack of development' when it 'withhold[s] counseling, education, and rehabilitation programs for those who are ineligible for parole consideration.'[84]

Justice Kennedy drew on two amici for these ideas.[85] The Sentencing Project had explained that rehabilitative programs often are unavailable to juveniles serving long sentences.[86] Prison systems, having limited resources, understandably prioritize prisoners nearing release.[87] But the deprivation of

76. *Id.* at 72–73 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)). *See* Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 8 (1979) (characterizing the parole release determination as "a predictive judgment" based on weighing facts, observations, and personal experience "that cannot always be articulated in traditional findings").

77. *Greenholtz*, 442 U.S. at 13–14.

78. *Id.* at 13.

79. *Graham*, 560 U.S. at 73; *see also* Flanders, *supra* note 30, at 387 (analyzing Justice Kennedy's attention to rehabilitation against the backdrop of the preceding decades' "anti-rehabilitative trend") (emphasis omitted).

80. Kennedy allowed that this was a policy judgment for legislatures. *Graham*, 560 U.S. at 73–74.

81. *Id.* at 74.

82. *Id.* at 75.

83. *Id.*

84. *Id.* at 79.

85. *Id.* at 74.

86. Brief of the Sentencing Project as *Amicus Curiae* in Support of Petitioners at 11–13, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

87. *Id.* at 12.

rehabilitative opportunities is important, because research shows that these opportunities matter.[88] According to a group of scholars who study adolescent behavior and development, 'rehabilitation in adolescents is highly effective, even for youth that 'repeatedly violate[] basic social rules' who were once thought 'impervious to treatment.'[89] But rather than require specific rehabilitative opportunities, the Court hedged, letting legislatures 'determine what rehabilitative techniques are appropriate and effective.'[90]

D. Graham, *Rehabilitation, and Release*

The logic of *Graham*, as it pertains to rehabilitation and release, can be developed along two nonexclusive lines, offering different bases for litigation against prisons and parole systems. First, if a state complies with *Graham* by granting parole eligibility rather than shortening sentences, the state must allow prisoners like Graham a meaningful chance to demonstrate their personal development in parole proceedings that are fair and sensitive to the considerations of youth.[91] Second, the Court's declaration that states are complicit in prisoners' lack of development may create new obligations concerning their rehabilitation. That statement may be read as an instruction for states to enable prisoners like Graham actually to *experience* maturation and rehabilitation. Read expansively, *Graham* might even imply a right to rehabilitative treatment for prisoners within its scope, resuscitating an idea that briefly had life in some lower courts in the 1970s and early 1980s.[92]

The validity of extending *Graham*'s logic in these ways depends on why, exactly, the Court chose to declare life-without-parole sentences unconstitutional. At bottom, *Graham* is a decision based on the Eighth Amendment's proportionality principle; it is a judgment that, in some circumstances, a life-without-parole sentence is too severe. Aaron Sussman notes that *Graham* seems to be concerned both with prisoners' 'opportunity for release' and their 'opportunity for reentering the community,' and these

88. *See Graham*, 560 U.S. at 74 (citing Brief of *Amicus Curiae* J. Lawrence Aber et al. at 28–31, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) [hereinafter Aber Brief] (summarizing research that demonstrates rehabilitation programs are effective, "even for the most difficult adolescents")).

89. Aber Brief, *supra* note 88, at 28, 30.

90. *Graham*, 560 U.S. at 73–74.

91. Sarah French Russell suggests that *Graham* has three requirements: "(1) individuals must have a chance of release at a meaningful point in time, (2) rehabilitated prisoners must have a realistic likelihood of being released, and (3) the parole board or other releasing authority must employ procedures that allow an individual a meaningful opportunity to be heard." Russell, *supra* note 6, at 375–76.

92. Aaron Sussman, *The Paradox of* Graham v. Florida *and the Juvenile Justice System*, 37 VT. L. REV. 381, 385 n.33 (2012) (collecting district and circuit decisions from 1976 to 1983); Andrew D. Roth, Note, *An Examination of Whether Incarcerated Juveniles Are Entitled by the Constitution to Rehabilitative Treatment*, 84 MICH. L. REV. 286, 290–92 (1985) (analyzing these cases).

distinct ideas have different implications.[93] For Alice Ristroph, the emphasis is on Sussman's former consideration—hope of release.[94] Life without parole is distinctively severe, second only to death, because of the deprivation of hope.[95] A defendant sentenced to a term of years may remain in prison just as long, but if he is parole eligible, he avoids that 'bleakness of beliefs that would reduce [him] to numbed inaction.'[96] On this view, the experience of incarceration is more severe when no hope of release is possible.[97] Ristroph acknowledges that it also is cruel to have one's hope crushed. To avoid that prospect, there must be some nontrivial chance that the hope is realized.[98] Indeed, there is a suggestion in *Graham* that parole systems must attain some minimal release rate to be constitutional. Justice Kennedy rejected the idea that executive clemency can mitigate the hopelessness of life without parole because clemency happens too rarely.[99]

For Michael O'Hear, the emphasis is on the latter consideration raised by Sussman—rejoining one's community.[100] The chance at rehabilitation and release matters because it is linked to 'a moral–relational human flourishing.'[101] Life without parole is unconstitutionally severe because it excludes a person from society not just physically but also morally. There is no opportunity for reconciliation; there is no recognition of the prisoner's atonement; there is no way to develop 'moral relationships with others.'[102] Separation and exclusion stunt the moral development of the prisoner and

93. Sussman, *supra* note 92, at 386.

94. Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT'G REP. 75, 75–76 (2010).

95. *Id.* at 76 (citing *Graham*'s discussion of the "denial of hope," 560 U.S. at 69–70); *see also* Marsha A. Levick & Robert G. Schwartz, *Practical Implications of* Miller v. Jackson*: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 395 (2013) (quoting a juvenile lifer: "I gave up all hope of ever having an opportunity to ever see life outside of these walls. [B]ecause of that lack of hope our minds began to deteriorate, and with no rehabilitation taking place for us our stress, anger, confusion, and frustration would lash out.").

96. Ristroph, *supra* note 94, at 76 (quoting Philip Pettit, *Hope and Its Place in the Mind*, 592 ANNALS AM. ACAD. POL. & SOC. SCI. 152, 159 (2004)).

97. *Id.* at 77.

98. *Id.*

99. *Graham*, 560 U.S. at 69–70; *see* Bierschbach, *supra* note 5, at 1761–62 (proposing this interpretation of Justice Kennedy's statement).

100. Michael M. O'Hear, *Not Just Kid Stuff? Extending* Graham *and* Miller *to Adults*, 78 MO. L. REV. 1087, 1104 (2013).

101. *Id.*

102. *Id.* at 1103.

society alike.[103] In this reading, *Graham* treats rehabilitation as 'moral reform.'[104]

These differing interpretations of *Graham* produce the different types of constitutional claims noted above. If Ristroph is right that *Graham* is concerned with the punitive severity of incarceration without hope of release, then the parole release determination stands out as the significant moment. Not only must the consideration given to the prisoner in that moment be fair, but the parole system must also grant release at nontrivial rates, so that prisoners are not given false hope.

However, if O'Hear is correct that *Graham*'s deeper concern—that the experience of incarceration inhibits maturation and moral development—is central to its holding, then the logic of *Graham* may support more far-reaching claims about the availability of prison rehabilitative opportunities and perhaps even about prison conditions.[105] But there is reason to be skeptical. Claims based on this more expansive reading would sweep far more broadly, creating substantially larger costs for states.[106] Moreover, *Graham*'s discussion of rehabilitation may be an outlier among the Court's recent decisions, with the Court expressing skepticism elsewhere about the possibility of rehabilitation in the prison environment.[107] Part III returns to these interpretive questions, drawing insight from the new *Graham* parole litigation.

E. Miller *and* Montgomery

Whatever *Graham*'s logical implications, its holding applies only to a small, narrowly defined group. The decision reached only juveniles, not adults; concerned only life-without-parole sentences, not all lengthy prison terms; and dealt only with nonhomicide crimes, for which juvenile life-without-parole sentences are rare. One estimate suggests that as few as 123

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103. *Id.* at 1103–04. Richard Bierschbach likewise suggests that it is "the permanent exclusion of an offender as hopelessly outside the moral community that tips the severity balance. Bierschbach, *supra* note 5, at 1765. In this vein, consider Justice Kennedy's statement that the "juvenile should not be deprived of the opportunity to achieve self-recognition of human worth and potential. *Graham*, 560 U.S. at 79.

104. Flanders, *supra* note 30, at 420.

105. *Cf.* Levick & Schwartz, *supra* note 95, at 403 ("[D]enying juveniles correctional programming increases the chances that they will misbehave while in prison, prevents them from building evidence of rehabilitation, increases the chances that they will be a risk if released, and almost certainly reduces any chance they will have for parole.").

106. Sussman, *supra* note 92, at 385, 399–404 (describing the considerable mental health, educational, and social needs of incarcerated juveniles and the developmental difficulties that they face in the prison environment).

107. Flanders, *supra* note 30, at 403, 411–12 (discussing the "pronounced hostility" to the rehabilitative ideal shaping the Court's decisions in Tapia v. United States, 564 U.S. 319 (2011) and Pepper v. United States, 562 U.S. 476 (2011)).

prisoners met these criteria at the time that *Graham* was decided.[108] However, two years after *Graham*, the Supreme Court brought another class of defendants within its new juvenile-sentencing jurisprudence.

In *Miller v. Alabama*, the Court held that mandatory life-without-parole sentences for juvenile defendants convicted of homicide offenses violate the Eighth Amendment.[109] *Miller* drew on the same salient characteristics of youth that had shaped the outcomes of *Graham* and *Roper*.[110] For defendants who receive parole eligibility as a result of *Miller*, the Court said that they too must receive 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'[111]

Though *Miller* still permits life without parole for juvenile defendants convicted of homicide offenses, the Court said that this sentencing choice should be 'uncommon.'[112] The distinctive features of youth should significantly influence sentencing, because only 'the rare juvenile offender' should receive the harshest punishment available.[113] This language effectively creates a presumption that juvenile defendants should not receive life-without-parole sentences, and it is the state's burden to rebut that presumption.

Miller is important for this Note's discussion of rehabilitation and parole release because the population of *Miller* defendants and prisoners is significantly larger than the *Graham* population; nearly 2,500 prisoners were serving *Miller* sentences at the time the case was decided.[114] The extension of *Graham*'s parole and rehabilitation logic to the *Miller* population would mark a substantial expansion of its scope.[115]

The Court addressed the question of *Miller*'s retroactive application to those 2,500 people in *Montgomery v. Louisiana*.[116] Holding that *Miller* applied retroactively,[117] the Court robustly affirmed *Miller*'s holding, stating it as the principle that life without parole is an unconstitutional sentence for 'all but the rare juvenile offender whose crime reflects irreparable corruption.'[118] Significantly, *Montgomery* entrusted the effectuation of *Miller* to state parole systems: '[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather

108. O'Hear, *supra* note 100, at 1099. The Court in *Graham* suggested that there may have been only 109. 560 U.S. at 62–63.

109. 132 S. Ct. 2455, 2469 (2012).

110. *Id.* at 2468.

111. *Id.* at 2469 (quoting Graham v. Florida, 506 U.S. 48, 75 (2010)).

112. *Id.*

113. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

114. *Id.* at 2477 (Roberts, J., dissenting).

115. *See infra* subpart IV(A).

116. 136 S. Ct. 718 (2016).

117. *Id.* at 736.

118. *Id.* at 734 (citations omitted).

than by resentencing them.'[119] It is parole systems that must act against the 'grave risk' that many juvenile defendants 'are being held in violation of the Constitution.'[120] The Court even advised parole boards on the factors that ought to determine their release decisions.[121] To the extent *Graham* imposes new obligations on states, *Montgomery* indicates that those obligations are now owed to another, considerably larger set of prisoners.

II. The New Challenges

This Part collects four cases that have raised the question of whether *Graham* imposes a new constitutional mandate on parole boards. The cases demonstrate how the new *Graham* parole challenges intersect with the pre-*Graham* framework of *Greenholtz*, and they suggest how *Graham* may be used to challenge the practices of prisons and parole systems that concern rehabilitation and release. Though this litigation is piecemeal, it nevertheless clarifies the nature and scope of parole claims based on *Graham* and suggests the course of future development. Part II describes the cases, with analysis following in Part III.

A. Hill v. Snyder

Seven months after *Graham*, Michigan prisoners serving life without parole for first-degree murders committed as juveniles challenged the constitutionality of their sentences.[122] They argued that because the Michigan Parole Board could not consider the salient differences between juveniles and adults, their sentences and the parole statute violated the Eighth Amendment principles articulated in *Graham*.[123]

These plaintiffs had anticipated *Miller*. *Graham* did not apply to them directly because they had been convicted of homicide. They nevertheless recognized the ramifications of *Graham*'s reasoning, and their case eventually raised the question of parole reforms needed to ensure meaningful consideration. Once *Miller* was decided, the district court held that *Miller* rendered the state's parole statute unconstitutional as applied,[124] thereby setting up two questions: first, which of these plaintiffs should be made

119. *Id.* at 736.

120. *Id.*

121. *Id.* (describing the petitioner's prison employment, activities, and record of behavior as examples of the "kind[s] of evidence that prisoners might use to demonstrate rehabilitation").

122. Complaint for Declaratory and Injunctive Relief at 29–30, Hill v. Snyder, 2013 WL 364198 (E.D. Mich. Nov. 17, 2010) (No. 10-14568).

123. *Id.*

124. Opinion & Order Granting in Part & Denying in Part Plaintiffs' Motion for Summary Judgment & Denying Defendants' Cross-Motion for Summary Judgment at 5–6, Hill v. Snyder, 2013 WL 364198 (E.D. Mich. Jan. 30, 2013) (No. 10-14568).

eligible for parole; and second, whether the board needed reforms to ensure that it considered potential parolees fairly.[125]

The plaintiffs' response was the first indication of the demands that prisoners have started to make of their parole systems. Arguing that 'dumping them into the existing parole review system [would] deprive them of the meaningful and realistic opportunity for release mandated by *Graham*,' they argued that the parole board's exercise of discretion was not subject to meaningful guidelines or judicial review.[126] Moreover, only one in six parole-eligible prisoners serving a life sentence for a crime committed as a juvenile had even received a hearing.[127] Even model prisoners were denied consideration with no hearing or explanation.[128]

The plaintiffs then demanded numerous procedural and substantive changes to the board's release determinations.[129] Their procedural proposals were in-person public hearings that the board could not avoid by declaring 'no interest' hearings every three years, starting after ten years of incarceration; explanations of parole denials and expectations for the prisoner to work on; and judicial review of parole denials.[130] They also requested that board members undergo training in brain science and adolescent development and use decision criteria based on *Miller*, sensitive to the experience of young prisoners (e.g., their heightened vulnerability in prison—and hence their higher likelihood of disciplinary infraction).[131]

In response,[132] Michigan chose the path that each state has so far taken in *Graham* parole litigation—arguing that *Graham* concerned only sentencing and that *Graham*'s 'meaningful opportunity' language did not alter the constitutional standards for parole boards from *Greenholtz*.[133] State law had to create a liberty interest for constitutional analysis of parole procedures, and Michigan's parole statute was not such a law.[134]

However, the question of *Graham*'s impact on state parole boards was never reached. The then-unresolved issue of *Miller*'s retroactive application

125. *Id.* at 5–6.

126. Plaintiffs' Briefing in Compliance with this Court's Order of January 30, 2013 at 3–4, Hill v. Snyder, 2013 WL 364198 (E.D. Mich. Mar. 1, 2013) (No. 10-14568).

127. *Id.* at 12.

128. *Id.* at 13–14 (describing Anthony Jones, the lone Michigan prisoner serving life without parole to obtain a sentence modification after *Graham*, who was denied release despite being convicted only of felony murder, having 'substantial community support,' and having a clean disciplinary record).

129. *Id.* at 15–16.

130. *Id.*

131. *Id.*

132. Defendants' Supplemental Brief in Compliance with This Court's Order of January 30, 2013 at 6, Hill v. Snyder, 2013 WL 364198 (E.D. Mich. Mar. 22, 2013) (No. 10-14568).

133. *Id.* at 6–7 (citing Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979)).

134. *Id.* at 15.

came to dominate the case. The court's next order to the board, which dealt solely with *Miller* compliance,[135] was stayed by the Sixth Circuit,[136] and the case progressed no further.[137]

B. Wershe v. Combs

Another case soon allowed the Sixth Circuit to address whether *Graham* supported an Eighth Amendment claim against parole boards.[138] Richard Wershe, arrested at seventeen for possessing over 650 grams of cocaine, was sentenced to life without parole.[139] After the statute under which he was sentenced survived Eighth Amendment challenge in *Harmelin v. Michigan*,[140] the Michigan Supreme Court invalidated it on state-constitutional grounds, converting the sentences of defendants like Wershe to life with parole.[141] In 2012, Wershe received notice of an interview with the parole board, but the interview never occurred.[142] Instead, the board told Wershe that it had no interest in his case and would reconsider him five years later, thereby prompting Wershe's Eighth and Fourteenth Amendment claims.[143]

Significantly, the Sixth Circuit allowed Wershe's Eighth Amendment 'meaningful opportunity' claim based on *Graham* to proceed, while dismissing his due process claim because it was unsupported by a protected liberty interest.[144] Noting the 'novelty' of Wershe's Eighth Amendment claim, the court recognized that it presented questions of first impression.[145] It then remanded the case for consideration of the Eighth Amendment claim in the first instance.[146]

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135. Order Requiring Immediate Compliance with *Miller*, Hill v. Snyder, 2013 WL 364198 (E.D. Mich. Nov. 26, 2013) (No. 10-14568).

136. Order at 4–5, Maxey v. Snyder, No. 13-2661 (6th Cir. Dec. 23, 2013).

137. After a two-year wait, the decision in *Montgomery* led the Sixth Circuit to vacate the district court's orders and remand the case, essentially instructing the district court to start over. Hill v. Snyder, No. 13-2661/2705 (6th Cir. May 11, 2016).

138. *See* Wershe v. Combs, 763 F.3d 500, 504–06 (6th Cir. 2014) (vacating the district court's dismissal of Wershe's Eighth Amendment claim, reasoning that the district court considered only pre-*Graham* case law but not the implications of *Graham* for parole procedures).

139. For more on Wershe's unusual personal history, see Vince Wade, *Is Cocaine Legend White Boy Rick Serving Life for Busting Crooked Cops?*. DAILY BEAST (Nov. 29, 2015, 12:00 AM), http://www.thedailybeast.com/articles/2015/11/29/is-cocaine-legend-white-boy-rick-serving-life-for-busting-crooked-cops.html [https://perma.cc/5EZM-4SCA].

140. 501 U.S. 957, 996 (1991). For more on *Harmelin*'s significance, see *infra* subpart IV(B).

141. *Wershe*, 763 F.3d at 502 (citing People v. Bullock, 485 N.W.2d 866, 875–77 (Mich. 1992)).

142. *Id.* at 503.

143. *Id.* at 503–04.

144. *Id.* at 505–06 (citing the circuit's cases based on *Greenholtz*: Crump v. Lafler, 657 F.3d 393, 404 (6th Cir. 2011); Sweeton v. Brown, 27 F.3d 1162, 1164 (6th Cir. 1994)).

145. *Wershe*, 763 F.3d at 505–06.

146. *Id.* at 506.

On remand, Wershe asked the board to explain its 'no interest' denials over the years, to give weighty consideration to his youth at the time of his crime, and to provide detailed expectations so he could work toward release.[147] However, Wershe was not the ideal candidate for parole release. In 2006, he had been convicted for racketeering, apparently for conduct in prison; unsurprisingly, the district court upheld the board's denial of release.[148] In the process, the court expressed a narrow view of *Graham*, stating that '*Graham* was not intended to upend parole systems' and 'does not allow courts to undertake a full review of the State's parole procedures and substitute its own judgment for the State's.'[149] While the court clarified that it was finding the board in compliance with *Graham* only in Wershe's case,[150] its statements indicated a dim view of any future plaintiff, even one with more favorable facts, seeking changes to parole procedures.

C. Greiman v. Hodges

Greiman v. Hodges[151] presented an Eighth Amendment challenge to the Iowa Board of Paroles (IBOP) that withstood the State's motion to dismiss.[152] In 1982, at the age of sixteen, Blair Greiman received life without parole for first-degree kidnapping, the mandatory sentence at the time.[153] Following *Graham*, the Iowa Supreme Court declared that statute unconstitutional, and Greiman's sentence was altered to life-with-parole eligibility after twenty-five years.[154] Having already served twenty-five years, Greiman was immediately eligible, but despite *Graham*'s emphasis on demonstrated post-conviction maturation and rehabilitation, the IBOP denied release due to 'the seriousness of the crime.'[155]

Responding to the State's motion to dismiss, Greiman advanced two theories based on *Graham*'s interpretation of the Eighth Amendment. First, Greiman alleged that the IBOP's failure to consider his youth at the time of the crime and subsequent maturation deprived him of a meaningful

147. Plaintiff's Objections to Magistrate's Report and Recommendation at 5–8, Wershe v. Combs, 2016 WL 1253036 (W.D. Mich. Jan. 18, 2016) (No. 1:12-CV-1375).

148. Order Adopting Report and Recommendation at 2, 8, Wershe v. Combs, 2016 WL 1253036 (W.D. Mich. Mar. 31, 2016) (No. 1:12-CV-1375).

149. *Id.* at 7 (quoting the statement in *Graham* that '[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance,' 560 U.S. 48, 75 (2010)). This likely misreads that passage from *Graham*. The Court was discussing how a state would determine sentence modifications for prisoners serving unconstitutional life-without-parole sentences, not how a state would ensure its parole system functions fairly.

150. *Id.* at 8.

151. 79 F. Supp. 3d 933 (S.D. Iowa 2015).

152. *Id.* at 944–46.

153. *Id.* at 935.

154. *Id.* at 935–36.

155. *Id.* at 936 (citation omitted).

opportunity to obtain release.[156] This claim tracked the arguments of the *Hill* plaintiffs and Richard Wershe, discussed above. Second, Greiman alleged that the state denied him participation in a treatment program for prisoners with sex offense convictions that was a prerequisite for release, 'thereby *de facto* eliminating [a] meaningful opportunity for parole.'[157] Relying on the *Graham* opinion's discussion of prison policies that keep juvenile defendants out of rehabilitative programs,[158] Greiman argued that prison policies made it impossible for him to obtain release.[159] He had to complete the treatment program to be considered for release, but he could not enroll in it until he had a discharge date.[160] This catch-22 consigned him to life without parole.[161]

The court had numerous bases on which to reject Greiman's claims. The court could have accepted Iowa's argument that *Graham* applied only to sentencing and placed no burden on state parole systems.[162] It could have relied on *Greenholtz* and held that Greiman had no protected liberty interest at stake in parole proceedings.[163] Regarding Greiman's claim that the prison's policies were an obstacle preventing parole review, the court could have agreed with Iowa that there is no cognizable interest in participating in rehabilitative programs, even those bearing on parole release.[164] More generally, it could have invoked the federal courts' customary deference to prison administrators.[165]

Instead, the court distinguished *Greenholtz* and explained that *Graham* changed the constitutional analysis of parole.[166] *Graham* made Greiman the bearer of a new 'categorical entitlement'[167] and assigned the IBOP a new constitutional mandate: 'the responsibility for ensuring that Plaintiff receives his constitutionally mandated 'meaningful opportunity to obtain release

156. *Id.* at 938.

157. *Id.*

158. Plaintiff's Brief in Resistance to Defendants' Rule 12(b)(6) Motion to Dismiss at 19, Greiman v. Hodges, 79 F. Supp. 3d 933 (S.D. Iowa 2015) (No. 4:13-cv-00510-RP-CFB) (citing Graham v. Florida, 560 U.S. 48, 74, 79 (2010)).

159. *Id.*

160. *Id.* at 19–20, 29.

161. *Id.* at 19.

162. Brief in Support of Motion to Dismiss at 7–8, Greiman v. Hodges, 79 F. Supp. 3d 933 (S.D. Iowa 2015) (No. 4:13-cv-00510-RP-CFB).

163. *Id.* at 10 (citing Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979)).

164. *Id.* at 9 (citing Stewart v. Davies, 954 F.2d 515, 516 (8th Cir. 1992) and Wishon v. Gammon, 978 F.2d 446, 450 (8th Cir. 1992) in which the Eighth Circuit rejected prisoners' constitutional arguments about exclusion from rehabilitative programs).

165. *See, e.g.*, Preiser v. Rodriguez, 411 U.S. 475, 492 (1973) (recognizing that "internal problems of state prisons involve issues so peculiarly within state authority and expertise").

166. *Greiman*, 79 F. Supp. 3d at 945 ("The present case is distinguishable [from *Greenholtz*] because although *Graham* stops short of guaranteeing parole, it does provide the juvenile offender with substantially more than a *possibility* of parole or a mere hope of parole ") (citations omitted).

167. *Id.*

based on demonstrated maturity and rehabilitation' lies squarely with IBOP and the other State-actor Defendants.'[168] Then, in an apparent narrowing of circuit precedent, the court recognized that Greiman presented 'at least a plausible' argument that exclusion from rehabilitative programs violated *Graham* by condemning him to a '*de facto* life without parole sentence.'[169] Contrary to federal courts' typical reluctance to interfere with prison administration, the court's holding suggested that *Graham* brings such prison policies under federal court review.

However, *Greiman* would not be the case to prove the point conclusively. Soon after the court denied the motion to dismiss, Greiman moved to continue the trial date, explaining that the board was granting him review.[170] Citing favorable settlement discussions, he wished to hold off on further proceedings.[171] The IBOP also let Greiman into the required treatment program, a concession that mooted Greiman's second claim.[172]

D. Hayden v. Keller

Hayden v. Keller[173] went further than *Greiman*, taking a hard look at the operations of the North Carolina Parole Commission.[174] Shaun Hayden was sixteen when he pled guilty to first-degree burglary, a first-degree sexual offense, and other charges.[175] He was sentenced to 'a term of his natural life' in 1983, and since becoming eligible for parole in 2002, the Commission denied his parole at the initial stage of review each year.[176]

At summary judgment, Hayden argued that the lack of meaningful parole review in North Carolina gave him the functional equivalent of that prohibited sentence.[177] The court agreed: '[i]f a juvenile offender's life sentence is the functional equivalent of a life sentence without parole, then the State has denied that offender the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' that the Eighth Amendment demands.'[178] Following *Greiman*, it acknowledged *Greenholtz*'s principle that there is generally no right to release before the

168. *Id.* at 943.

169. *Id.* at 944.

170. *See* Motion to Extend Time for Discovery, Dispositive Motions, & Continue Trial Date at 1–2, Greiman v. Hodges, 79 F. Supp. 3d 933 (S.D. Iowa 2015) (No. 4:13-cv-00510-RP-CFB) (explaining that Greiman was "tentatively scheduled for a file review hearing before the Board . with a personal interview with the Board likely to follow several weeks later").

171. *Id.*

172. Email from John Whiston, Univ. of Iowa Coll. of Law, to author (April 14, 2016, 9:36 AM CST) (then Greiman's attorney).

173. 134 F. Supp. 3d 1000 (E.D.N.C. 2015).

174. *Id.* at 1009–11.

175. *Id.* at 1001.

176. *Id.* at 1001–02.

177. *Id.* at 1007.

178. *Id.* at 1009 (citing Greiman v. Hodges, 79 F. Supp. 3d 933, 944 (S.D. Iowa 2015)).

expiration of a valid sentence,[179] but it recognized that *Graham* imposed a new requirement on states vis-à-vis prisoners convicted for juvenile nonhomicide offenses.[180]

Central to the case was a detailed analysis of the North Carolina Parole Commission.[181] The court looked beneath the surface of North Carolina's parole statutes and scrutinized whether the state's actual practices granted each eligible prisoner meaningful and fair consideration.[182] It considered case analysts' and commissioners' workloads—4,338 prisoners per analyst, and ninety-one votes per day for each commissioner on whether to give prisoners a full review for parole release.[183] The court noted that from 2010 to 2015, around 500 inmates received full review each year, but typically ten or fewer received release.[184] Often none were juvenile offenders.[185]

The Commission's particular failing was not considering that Hayden was a youth at the time of the crime.[186] Analysts did not note which prisoners had been convicted for juvenile crimes and did not attend to prisoners' maturation or rehabilitation.[187] Instead of demonstrated rehabilitation, the 'brutality' of the prisoner's original offense predominated in the release determination.[188] Hayden's prison disciplinary violations were heavily frontloaded to his early years in prison, but that seemingly did not matter.[189] Crucially, the court also emphasized the Commission's low release rate.[190] While acknowledging that *Graham* did not guarantee release, the court found that the low release rate 'raise[d] questions about the meaningfulness of the process as applied to juvenile offenders.'[191]

The Commission's procedures were also flawed. The Commission gave victims notice and the opportunity for in-person testimony, but gave neither

179. *Id.* at 1006 (citing Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979)).

180. *Id.* at 1008–09 (citing Greiman v. Hodges, 79 F. Supp. 3d 933, 943 (S.D. Iowa 2015), and *Graham v. Florida*, 560 U.S. 48, 79 (2010)).

181. *See id.* at 1002–05 (facts); *id* at 1008–09 (analysis).

182. *Greiman* suggested that this type of functional analysis would be necessary, but that case did not progress far enough for the court to take that step. *See* Greiman v. Hodges, 79 F. Supp. 3d 933, 943 (concerning the state's claims about its official procedures, "the Court cannot simply presume that such procedures were actually employed by the IBOP").

183. *Hayden*, 134 F. Supp. 3d at 1002.

184. *Id.* at 1005. Excluding 2010, an outlier, the Commission released only 1.2% to 2.7% of those considered. *Id.* The state contested these numbers, arguing that the court overlooked a conditional work-release program. Defendant–Appellant's Opening Brief at 15, 28, Hayden v. Butler, No. 15-7676 (4th Cir. Aug. 1, 2016). It is unclear from the filings how many prisoners who received conditional work-release obtained actual release.

185. *Hayden*, 134 F. Supp. 3d at 1005.

186. *Id.* at 1009.

187. *Id.*

188. *Id.*

189. *Id.* at 1010.

190. *Id.*

191. *Id.*

to the prisoner or anyone supporting his release.[192] These procedures rendered him 'an entirely passive participant' in the parole review proceeding.[193] The court also called into question the Commission's very structure. Noting the small staff and huge workloads, the court questioned whether the 'sheer volume of work may itself preclude' fair consideration.[194] This line of analysis raises fairness considerations for all prisoners, not just juveniles convicted of nonhomicide offenses.

However, though the court read *Graham* expansively to warrant a close examination of state-government operations, it read the case narrowly in another respect. Noting *Graham*'s statement that '[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance, the court granted Hayden's motion for summary judgment only in part; it denied his requested relief and ordered the parties to negotiate a plan for compliance with *Graham*.[195] In and of itself, a federal court ordering a state to negotiate parole reforms with a prisoner is momentous, particularly when it follows on a critique of the system's entire structure. In this instance, however, the process slowed amid ineffectual appeals and stalled negotiations,[196] so the shape of the reform to come remains unclear.[197]

III. The Nature and Scope of the New Challenges

A. Understanding the Graham *Claim*

The cases addressing whether *Graham* imposes new obligations on parole boards allow us to begin answering the questions posed in the introduction to this Note. The first insight to draw from them is that the courts consistently have understood *Graham* to create a new rule for parole boards. No court accepted the argument that *Graham* is purely a sentencing case with no impact on parole systems, and none considered *Greenholtz*'s due process framework to be controlling. This development is particularly significant for prisoners in states with purely discretionary parole release,

192. *Id.* at 1009–10.

193. *Id.* at 1009–11.

194. *Id.* at 1009.

195. *Id.* at 1011 (quoting Graham v. Florida, 560 U.S. 48, 75 (2010)).

196. *See* Notice of Appeal, Hayden v. Butler, 134 F. Supp. 3d 1000 (E.D.N.C. Oct. 21, 2015) (No. 5:10–CT–3123–BO). In August 2016, the Fourth Circuit dismissed the appeal. Hayden v. Butler, No. 15-7676, 2016 WL 4073275, slip op. at 4 (4th Cir. Aug. 1, 2016) (per curiam). Because North Carolina refused to negotiate with Hayden, the district court never ordered any injunctive relief, and there was no final judgment for the appellate court to review. *Id.* at 3–4.

197. As of this writing, negotiations were unsuccessful, and the parties' competing plans for compliance were pending before the district court. *See* Memorandum in Support of Plaintiff's Proposed Plan for North Carolina's Compliance with *Graham* at 4–10, Hayden v. Butler, 134 F. Supp. 3d 1000 (E.D.N.C. Oct. 24, 2016) (No. 5:10–CT–3123–BO); Defendant's Response in Opposition to Plaintiff's Proposed Plan for North Carolina's Compliance with *Graham*, Hayden v. Butler, 134 F. Supp. 3d 1000 (E.D.N.C. Oct. 24, 2016) (No. 5:10–CT–3123–BO).

who are completely incapable of challenging their parole systems under *Greenholtz*.

A second insight is their crystallization of the basic *Graham* parole claim—unfair parole systems turn otherwise constitutional sentences into the functional equivalent of life without parole. The parole challenge therefore is tied to the constitutional sentencing analysis. A prisoner can bring this claim only if it would be unconstitutional for him to receive life without parole. Only then does the deprivation of a meaningful opportunity to obtain release become an Eighth Amendment violation.

As suggested in Part II, *Graham*'s discussion of rehabilitation and release could be developed in two ways, depending on one's interpretation. If life without parole's deprivation of hope makes it unconstitutionally severe, then the fairness of parole proceedings should be the focus of constitutional claims. But if life without parole is unconstitutionally severe also because of how it undermines a person's moral development, then *Graham* claims may reach the availability of rehabilitative opportunities and even basic prison conditions.

The former type of claim has predominated in the cases. Prisoners who have directly experienced parole denial have sought reforms of parole boards' procedures and substantive criteria in order to reduce the rate of denials. They have demonstrated the deprivation of a meaningful opportunity to obtain release largely through inference, by showing the system's procedural deficiencies. Low or nonexistent release rates have been crucial evidence. The Michigan plaintiffs in *Hill* drew attention to them, as did the North Carolina plaintiff in *Hayden*. If all prisoners struggle to obtain release, denials likely result from systemic problems requiring systemic changes rather than from reasonable assessments of individuals' worthiness.

Only *Greiman* presented an alternative to the straightforward *Graham* claim, arguing that the state's policies—requiring completion of a treatment program but barring him from enrolling—functioned to block him from reaching parole review. How should we think of this claim? Is it just a variation on the theme that unfair parole review processes are unconstitutional, or is it the distinct argument that rehabilitative opportunities must be made available for the sake of the prisoner's personal development? If it is the former, it may be remedied by eliminating the requirement. If it is the latter, states may face much more robust demands.

Greiman's out-of-court settlement means that it will not provide a clear answer. That said, there are good reasons to think that this alternative is just a variation on the straightforward *Graham* claim, that it does not herald a larger push for the right to rehabilitative treatment, and that *Graham* likely cannot support such a push. First, the court in *Greiman* construed the claim in the former, narrower fashion, as an arbitrary and therefore unfair

procedural obstacle.[198] Second, the broader construction of Greiman's claim—that the treatment program must be provided, not just eliminated as a barrier to review—would enlist federal courts in imposing much more burdensome requirements if applied to the rest of the country. Suppose a state had no treatment programs for its parole-eligible prisoners convicted of sex offenses. If *Graham* requires such programs to be available, it would obligate those states to create programs that do not yet exist. This is a much more substantial undertaking than the narrower interpretation requires. Third, the narrower interpretation is consonant with *Graham*'s statement that it 'is for legislatures to determine what rehabilitative techniques are appropriate and effective.'[199] Admittedly, *Graham* did also state that 'the system itself becomes complicit in the lack of development' when rehabilitative programs are withheld,[200] but that general statement can be true without being enforceable through the courts. It should not be read to trump the more specific grant of deference to legislatures. Fourth, and finally, institutional-reform litigation against prisons, even in its 1970s and 1980s heyday, generally has not managed to alter the rehabilitative programming available to prisoners.[201] Against that status quo and *Graham*'s deference to legislatures, it is best to read Greiman's second claim as a variation on the standard *Graham* claim, rather than as a sign that *Graham* will soon cause the recognition of the right to rehabilitative treatment.

B. Adjudicating the Graham *Claim*

None of the cases has yet yielded a full remedial order. Consequently, it remains to be seen how courts will turn *Graham*'s 'meaningful opportunity' requirement into a tractable framework for analyzing cases and determining the requisite reforms.[202] *Hayden*'s order to the parties to

198. Greiman v. Hodges, 79 F. Supp. 3d 933, 944 (S.D. Iowa 2016) ("Plaintiff, however, does not claim that he is directly deprived of a constitutional right by virtue of being denied sex offender treatment; rather, Plaintiff claims that the IDOC's policy results in a *de facto* denial of his right to a 'meaningful opportunity to obtain release' pursuant to *Graham*.").

199. Graham v. Florida, 560 U.S. 48, 73–74 (2010).

200. *Id.* at 79.

201. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 563–64 (2006).

202. State courts, it should be said, are not limited to ordering such reforms. They can solve the problem of unfair parole review by ordering resentencing and enabling the challenger to avoid parole review altogether. *See, e.g.*, Atwell v. State, 197 So. 3d 1040, 1041–43 (Fla. 2016) (ordering the resentencing of a prisoner whose release had been postponed by the Florida parole system until 2130). Federal courts, by contrast, can provide relief only in the form of procedural changes, at least when the parole challenges are brought via § 1983. A prisoner's request for resentencing via § 1983 would in effect be a challenge to the "fact or duration of his confinement," for which the writ of habeas corpus furnishes the exclusive remedy. *See* Wilkinson v. Dotson, 544 U.S. 74, 78 (2005) (quoting Preiser v. Rodriguez, 411 U.S. 475, 489 (1973)). Each of the cases discussed in this Note were § 1983 claims. For any such challenges in the future, state courts have a powerful remedial option that federal courts do not.

negotiate reforms is not a solution to this problem. The court would still need some standard by which to decide whether the resulting reforms passed constitutional muster and, if it retains jurisdiction to ensure that the reforms are implemented, to measure the state's progress. Sarah French Russell suggested that courts might either treat parole challenges like Fourteenth Amendment procedural due process cases, as *Greenholtz* did,[203] or develop new procedural requirements out of the Eighth Amendment itself, as occurred in the capital-sentencing context.[204] Rather than developing some new *sui generis* framework, adapting the familiar principles of procedural due process is the more sensible course.[205]

One reason is that the analogy to procedural due process is more intuitive. In both *Greiman* and *Hayden*, the judges apparently were thinking in due process terms. Though both courts recognized that the claimed injury was substantive and rooted in the Eighth Amendment, they used the language of due process to discuss that injury and potential remedies. In *Greiman*, the court said, 'Plaintiff has adequately stated a plausible due process claim.'[206] Likewise, in *Hayden*, the court relied on *Greenholtz*'s statement that 'due process is flexible and calls for such procedural protections *as the particular situation demands*.'[207]

Moreover, the *Graham* opinion can be mapped onto the standard due process framework, provided that appropriate adjustments are made. The canonical procedural due process analysis from *Mathews v. Eldridge*[208] has three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[209]

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203. Russell, *supra* note 6, at 417.

204. *Id.* at 416 (citing Woodson v. North Carolina, 428 U.S. 280 (1976) and *Lockett v. Ohio*, 438 U.S. 586 (1978), as well as Bierschbach, *supra* note 5, at 1749, who suggested this possibility).

205. As this Note was being finalized for publication, Hayden employed the approach proposed here, filing a brief replete with citations to the procedural due process case law. Memorandum in Support of Plaintiff's Proposed Plan for North Carolina's Compliance with *Graham* at 4–10, Hayden v. Butler, 134 F. Supp. 3d 1000 (E.D.N.C. Oct. 24, 2016) (No. 5:10–CT–3123–BO). Whether this court and others will follow the same framework remains to be seen.

206. Greiman v. Hodges, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015).

207. Hayden v. Keller, 134 F. Supp. 3d 1000, 1010 (E.D.N.C. 2015) (citing Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 12 (1979)).

208. 424 U.S. 319 (1976).

209. *Id.* at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)).

Justice Kennedy made clear that the private interests are substantial. The Eighth Amendment's prohibition of cruel and unusual punishment is at stake.[210] That prohibition is protection against a particularly acute form of suffering: 'depriv[ation] of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.'[211] By contrast, governmental interests are diminished. The traditional penological goals of deterrence, retribution, and incapacitation have less purchase where juvenile defendants are concerned, while rehabilitation joins with the prisoner's private interest in justifying more fair, robust procedures.[212]

As to the risk of erroneous deprivation from insufficient procedure, *Graham* seems agnostic about the particular procedures that states should employ. Notably. the Court expressed doubt that sentencing authorities 'could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.'[213] That statement concerned the difficulties of forecasting risk at sentencing. However, its contrasting of the 'few' with the 'many' may be read to suggest that most members of the *Graham* population might well be deserving of release and that parole boards should work hard to identify them. The Court's reiteration in *Miller* and *Montgomery* that only the 'rare' juvenile defendant actually deserves life without parole[214] lends further support to that interpretation, as does the absence of the despair and futility that characterized *Greenholtz*.[215] These aspects of *Graham* do not necessarily imply that additional procedures will enhance the accuracy of parole-board determinations, per the second *Eldridge* factor, but they at least imply that releases of *Graham* prisoners should be common, denials should be viewed with suspicion, and parole boards should make their decisions carefully. Thus, in the *Eldridge* framework, *Graham* indicates strong private interests, diminished public interests, and the expectation that release should regularly be granted, all of which weigh in favor of robust procedural protections.[216]

Additional advantages of adapting the *Eldridge* framework, rather than crafting novel Eighth Amendment standards, are harmonization with

210. Graham v. Florida, 560 U.S. 48, 58–59 (2010) (laying out the Eighth Amendment standards); *id.* at 74–75 (stating the Court's holding).

211. *Id.* at 79.

212. *Id.* at 71–74.

213. *Id.* at 77.

214. *See supra* notes 119, 124 and accompanying text.

215. *See supra* notes 64–66 and accompanying text.

216. For discussion of reforms that parole systems should adopt to comply with *Graham*, see Megan Annitto, Graham*'s Gatekeeper and Beyond: Juvenile Sentencing and Release Reform in the Wake of* Graham *and* Miller, 80 BROOK. L. REV. 119, 161–67 (2014); Cohen, *supra* note 51, at 1087–88; and Russell, *supra* note 6, at 406–33.

precedent and familiarity. Not only is *Greenholtz* a branch off the 1970s procedural due process tree; parole revocation—the process by which parolees are returned to prison for technical violations or new offenses—is governed by a contemporaneous due process case, *Morrissey v. Brewer*.[217] Adapting *Eldridge* to *Graham* parole claims would bring a measure of order to the doctrine. Likewise, procedural due process is a familiar mode of analysis for judges, and the vast decisional law can supply comparators for the myriad of factual questions that *Graham* parole claims will likely raise.

But the analytical framework should not end there. In due process analysis, 'the procedures [must] be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard. '[218] That principle, coupled with the Supreme Court's reiteration of youth's distinctive characteristics, requires that the attributes of youth are central to punishment decisions. As such, enhanced procedures must be accompanied by a change in the substantive criteria that determine parole release. No longer should the severity of the original offense be the overriding concern.[219] To ensure compliance with *Graham*, courts must see to it that youth informs parole boards' evaluations of the original crimes and that maturation in the intervening decades receives its appropriate weight.[220] The effective application of these standards to the *Graham* population then can help to develop better parole decision making that points the way to a fairer system for all prisoners.

IV The Next Challenges

The cases discussed in this Note have revealed problems of fairness for all parole-eligible prisoners, regardless of their age at the time of the crime. For example, the brief, superficial consideration given to each parole-eligible North Carolina prisoner, as described in *Hayden*,[221] hardly offers a meaningful chance at release to any prisoner. Given that, the *Graham* parole challenge makes an odd fit with the existing constitutional jurisprudence of parole. A relative handful of prisoners seemingly can make substantial demands of state parole systems, while the vast majority have either the minimal *Greenholtz* due process claim or none at all, depending on whether the phrasing of their state's parole statute happens to create a protected liberty

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217. 408 U.S. 471, 481–84 (1972). Russell does not see this harmonization as a virtue because of how weak the procedural due process framework has been when applied to parole systems in the past. Russell, *supra* note 6, at 418–19.

218. Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (quoting Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970)).

219. Annitto, *supra* note 216, at 163.

220. Recall the Court's suggestion in *Montgomery* that a prisoner's status as a model member of the prison community was 'one kind of evidence that prisoners might use to demonstrate rehabilitation. Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

221. *See supra* notes 185–189 and accompanying text.

interest. Under this jurisprudence, if two high-schoolers commit a crime together—one shortly before his eighteenth birthday, the other shortly after—only one can make this new constitutional claim.

Whether the logic of *Graham* will extend to *Miller* defendants and, beyond them, to adults, will determine the fate of this odd state of jurisprudential affairs. Juvenile defendants convicted of homicide who later become parole eligible should be able to challenge ineffective parole review, just like juvenile defendants convicted of nonhomicide offenses. However, the Eighth Amendment-noncapital-sentencing jurisprudence must evolve before adults will be able to do the same.

A. Extending Graham *Parole Claims to* Miller

Miller v. Alabama called for all but the rare juvenile offender to receive a sentence less severe than life without parole.[222] States can comply either through sentences shorter than the term of a natural life or through life sentences with parole eligibility. *Montgomery v. Louisiana* encouraged states to remedy *Miller* violations through the latter option,[223] reiterating that these once-juvenile defendants should have a fair opportunity to demonstrate their maturation and should have 'their hope for some years of life outside prison walls restored.'[224] Thus, if *Graham* supports a claim for the deprivation of the opportunity to obtain release, it stands to reason that *Miller* and *Montgomery* do as well.[225]

The reasoning underlying the *Graham* parole claim transfers naturally to the *Miller* population. The basic *Graham* parole claim—that ineffective parole review transforms the prisoner's sentence into the functional equivalent of life without parole—would require only a small alteration. A plaintiff would argue that *Miller* requires juvenile defendants convicted of homicide crimes to be sentenced only after full consideration of youth and its salient characteristics. Because *Miller* barred life without parole for 'all but the rarest juvenile offenders,' a decision to confer parole eligibility should carry constitutional significance. Unfair parole review would negate that decision, converting a parole-eligible sentence into the functional equivalent

222. 132 S. Ct. 2455, 2469 (2012).

223. 136 S. Ct. at 736.

224. *Id.* at 736–37.

225. For initial validation of this reasoning, see *Diatchenko v. Dist. Attorney for Suffolk*, 27 N.E.3d 349, 353 (Mass. 2015) (finding that the state parole board's handling of juvenile homicide cases violated both the U.S. Constitution as well as the Massachusetts Declaration of Rights and ordering the appointment of counsel, the provision of funds, and the opportunity for judicial review); *Hawkins v. N.Y. State Dep't of Corr. & Cmty. Sup.*, 30 N.Y.S.2d 397, 401 (N.Y. App. Div. 2016) (annulling the denial of parole to a once-juvenile defendant convicted of second-degree murder and instructing the parole board to conduct a new hearing focusing on youth's 'attendant characteristics").

of life without parole.[226] Such parole review should then be considered a violation of *Miller* and grounds for constitutional challenge.

B. Beyond Graham *and* Miller

The new Eighth Amendment parole challenges depend on the constitutionality of the underlying sentence. A prisoner convicted of a juvenile nonhomicide offense can bring this claim only because the Supreme Court has declared that he should not receive life without parole. A prisoner convicted of a juvenile homicide offense should be able to bring this claim only because the Court has declared that most defendants like him should not receive life without parole either. But until the Court prohibits life without parole for additional categories of defendants, no other prisoners can bring Eighth Amendment parole claims of this kind.

The jurisprudence applying the Eighth Amendment to adult criminal sentences 'make[s] it very difficult, if not impossible, for courts to invalidate any prison sentence.[227] In *Solem v. Helm*,[228] the Supreme Court had held that it was unconstitutional for South Dakota to issue life without parole for passing a 'no account' check worth $100, a sentence under the state's recidivist statute that was triggered by the defendant's string of minor prior offenses.[229] *Solem* remains good law,[230] but the Court soon curtailed its precedential effect.[231] In *Harmelin v. Michigan*, the Court upheld a life-without-parole sentence for the possession of over 650 grams of cocaine.[232] *Solem*'s effect was further limited by *Lockyer v. Andrade*,[233] in which the Court upheld a life sentence with parole eligibility after fifty years for petty theft.[234] The case was an application of California's 'three strikes' law.[235]

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226. Along similar lines, see W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi, *Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 971–72 (2009) (advancing the theory that parole denials based on the severity of the original offense "second-guess the jury," thereby violating the principle of *Apprendi v. New Jersey*, 530 U.S. 466, 496–97 (2000) that sentence-lengthening facts should be found by a jury beyond a reasonable doubt).

227. Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1050 (2004).

228. 463 U.S. 277 (1983).

229. *Id.* at 281, 284.

230. *See* Graham v. Florida, 560 U.S. 48, 59 (2010) (citing *Solem* as such).

231. *Cf.* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1160 (2009) ("*Solem* now stands as an outlier.").

232. 501 U.S. 957, 961, 996 (1991).

233. 538 U.S. 63 (2003).

234. *Id.* at 67, 77.

235. *Id.* at 68. The Court issued another Eighth Amendment proportionality decision the same day, *Ewing v. California*, 538 U.S. 11 (2003). However, *Ewing* is a somewhat-less-stark example of the Court's tolerance for lengthy adult prison sentences, in that the crime at issue was more

Andrade had stolen videotapes worth approximately $150 from two stores, which garnered him two criminal charges.[236] Convicted on both, he received two sentences of twenty-five years to life, served consecutively.[237] The Court distinguished *Solem*'s invalidation of a life-without-parole sentence, because Andrade was lucky enough to have parole eligibility after 50 years.[238]

'The bottom line' of this jurisprudence is that 'it is hard to imagine what prison sentence will be deemed to violate the Eighth Amendment.'[239] As long as *Harmelin* and *Andrade* govern life-without-parole sentences for adults, states can rebuff Eighth Amendment parole challenges by adults because it would be constitutional for these adults simply to receive life without parole. They can argue further that the law does not obligate them to offer parole to adults at all.[240]

A full discussion of the Court's adult-sentencing decisions is beyond this Note's scope,[241] but it is worth noting that *Graham*, *Miller*, and *Montgomery* furnish new material with which defendants can challenge their life-without-parole sentences on Eighth Amendment grounds. *Harmelin* had featured impassioned argument from Justice Kennedy in his controlling concurrence about the inherently violent nature of drug distribution.[242] In *Graham*, by contrast, Kennedy's arguments conveyed a different sort of passion—not fear of drug crime, but sadness for the 'forfeiture [of life] that is irrevocable' when a juvenile defendant receives life without parole and sympathy for the 'denial of hope' experienced by that defendant.[243]

If the principles of *Harmelin* and *Andrade* are soon revised, it will more likely result from changed circumstances: judicial notice of the swelling life-

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serious (theft of approximately $1,200 of property, rather than $150) and parole eligibility began earlier (after twenty-five years, not fifty). *Id.* at 18, 20.

236. 538 U.S. at 66–67.

237. *Id.* at 66, 68.

238. *Id.* at 74.

239. Chemerinsky, *supra* note 227, at 1061; *see also* Barkow, *supra* note 231, at 1148 (characterizing this jurisprudence as "a backwater devoid of any procedural protections").

240. *See* Swarthout v. Cooke, 562 U.S. 216, 220 (2011) ("There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners.").

241. For such discussion, see Barkow, *supra* note 231, at 1197–205 (proposing a "uniform jurisprudence of sentencing," in which the judge-made rules in the capital context are extended to noncapital sentencing decisions); O'Hear, *supra* note 100, at 1122–23 (identifying 21 U.S.C. § 814(b)(1)(A), a sentencing statute for repeat high-level drug offenders, as the first target for adults bringing Eighth Amendment challenges against their life-without-parole sentences); William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327, 338–41 (2014) (advocating the extension of Miller's prohibition on mandatory life-without-parole sentences to all "death-in-custody" sentences).

242. *See* Harmelin v. Michigan, 501 U.S. 957, 1002 (1991) ("Petitioner's suggestion that his crime was nonviolent and victimless is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.").

243. Graham v. Florida, 560 U.S. 48, 69–70 (2010).

without-parole population;[244] long-term decreases in crime that lower the emotional intensity of sentencing debates;[245] growing skepticism that harsh punishment effectively reduces crime;[246] the death penalty's declining frequency,[247] rendering life without parole the harshest available sentence;[248] scientific advances that change our perceptions of other defendants, just as adolescent brain science has changed our view of juvenile defendants;[249] and changes in the Supreme Court's composition, amid these other shifts.

When the challenge comes, *Graham*'s sensitivity to the severity of life without parole will make it harder for the Court to hew to *Harmelin* and *Andrade*. In the interim, parole challenges under *Graham* and *Miller* can point the way towards better parole regimes that offer fair consideration of the person's rehabilitation and maturation over time, rather than repetitive condemnation of the original crime.

Conclusion

This Note has reviewed new litigation demonstrating that *Graham v. Florida* enables prisoners within the scope of its holding to make novel demands of their states' parole systems. These new Eighth Amendment parole challenges raise the same question that hangs over any effort to alter dysfunctional institutions through constitutional litigation: Will new procedural requirements for state parole and prison systems meant to aid the *Graham* and *Miller* populations actually produce better, fairer outcomes, or will they merely layer a patina of legitimacy atop a system that remains no less punitive or unfair?[250]

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244. *See* NELLIS & KING, *supra* note 37, at 9 fig.2 (showing a tripling of the number of life-without-parole sentences being served in the United States between 1992 and 2008).

245. *Cf.* COMMITTEE, *supra* note 32, at 114–15 (describing the social and political conditions of the 1960s and 1970s, including rising crime, that "helped foster a receptive environment for political appeals for harsher criminal justice policies and laws").

246. COMMITTEE, *supra* note 32, at 340.

247. Carol S. Steiker & Jordan M. Steiker, *The Death Penalty and Mass Incarceration: Convergences and Divergences*, 41 AM. J. CRIM. L. 189, 197–98 (2014).

248. *Id.* at 205–06 (suggesting that "when the death penalty is no longer a penal option, political and legal challenges to [life without parole] would likely be invigorated"). Of note, in *Solem v. Helm*, Helm's sentence was invalidated in part because life without parole was then South Dakota's most severe sentence, and it seemed excessive to mete it out for passing a bad check. 463 U.S. 277, 297 (1983).

249. *See* Nancy Gertner, Miller v. Alabama*: What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041, 1051 (2013) (speculating that scientific evidence of mental impairment may alter the constitutional analysis of criminal sentences).

250. *See* Bierschbach, *supra* note 5, at 1788 (warning that procedural parole reforms might "mak[e] it seem as if life without parole punishments for juveniles are largely off the table when in fact no one is released"); *cf.* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 402–03, 438 (1995) (characterizing modern death penalty jurisprudence as "the worst of all possible worlds" because it created an illusion of fairness that served to legitimate the increased frequency of execution).

This Note has argued that the standard procedural due process framework, if enhanced in accord with *Graham*'s principles, offers a sensible and familiar way to analyze *Graham* parole challenges. Courts adjudicating these new parole claims should attend to parole systems' structure, actual practice, and release rates. They should also inquire into the prerequisites for parole release to see whether prison policies are creating arbitrary barriers to parole review. Such judicial scrutiny would help not only to ensure that *Graham*'s call for a 'meaningful opportunity to obtain release' is realized, but also to nudge parole systems towards more fair and appropriate decision making.

The more difficult question is whether the courts will extend this logic beyond *Graham* and *Miller*. The broadening of Eighth Amendment parole challenges will bring the federal courts into conflict with the criminal laws and policies that states have consciously chosen. The risk of politicization is real. Releasing prisoners convicted of serious crimes is sure to draw attention, particularly if more crimes follow.[251] The coming years will test the Supreme Court's resolve that, for recipients of unconstitutional life-without-parole sentences, 'their hope for some years of life outside prison walls must be restored.'[252]

—*Matthew Drecun*

251. *See, e.g.*, Peter Holley, *A Convicted Murderer was Released Early for Good Behavior. Months Later, He Killed Again*, WASH. POST (Apr. 25, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/04/25/he-was-released-early-for-good-behavior-it-took-him-less-than-a-year-to-kill-again/ [https://perma.cc/7ZXZ-RJNC] (reporting on a man who spent nineteen years in prison for second-degree murder and committed another murder within nine months of his release for good behavior).

252. Montgomery v. Louisiana, 136 S. Ct. 718, 737 (2016).

The Social Significance of Modern Trademarks: Authorizing the Appropriation of Marks as Source Identifiers for Expressive Works*

Dieuson Octave is a nineteen-year-old rapper from Florida that recently signed a deal with Atlantic Records. His YouTube videos have millions of views. He releases his music under the name Kodak Black.

Some graffiti writers use stickers in addition to spray paint. In San Francisco, a writer named Ther had stickers appropriating the The North Face logo. Instead of reading The North Face in stacked type, Ther's stickers read 'Ther Norco Face. Norco is a brand of prescription painkiller.

Vaporwave is an obscure genre of music. Largely sample-based, it is characterized by an obsession with retro aesthetics, new technology, and consumerism. Songs range from upbeat to hypnogogic. They sometimes incorporate sound marks. Vaporwave musicians have monikers like Saint Pepsi and Macintosh Plus.

Gucci Mane is a rap star and actor from Atlanta. All nine of his studio albums have placed on the Billboard Top 200. In 2013, he starred alongside James Franco and Selena Gomez in *Spring Breakers*, which competed for the Golden Lion award at the sixty-ninth Venice International Film Festival.

Stuart Helm is an artist who formerly used the moniker King VelVeeda. Until the early 2000s, he operated cheeseygraphics.com, a website that sold his bawdy-themed art and advertised commercial art services.

Horst Simco is a recording artist from Houston who goes by Riff Raff. His collection of tattoos includes the NBA logo, the MTV logo, and the BET logo. *Neon Icon*, his 2014 album, debuted at number twenty-two on the Billboard Top 200 and contains a track called 'Versace Python.

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Introduction

The social significance of trademarks continues to evolve. More than ever, trademarks find their way into everyday conversation and expression. Inherently, expressions are communicative. That expressive works today often reference, incorporate, and/or appropriate trademarks—one of society's time-tested communicative tools—should come as no surprise. As a result, the tension between trademark law's commercial purpose and the public's interest in free expression is increasingly salient.

Interestingly, the clash appears to be reflective of the larger disparity between trademark law's historical purpose and modern brand power. Historically, trademarks functioned merely as a signature that decreased search costs and encouraged manufacturers to make higher quality goods.[1] Today, however, they convey far more information than source and product quality.[2] That shift has altered trademarks' social significance such that it often revolves around the particular mark's expressive aspects in addition to its commercial aspects.

This tension is exemplified in the Federal Circuit's recent en banc decision in *In re Tam*.[3] Simon Shiao Tam, an Asian-American, chose THE SLANTS as his band's mark to comment on racial and cultural issues.[4] Agreeing that Tam's band name achieved that goal, the majority observed that the decision to name a band THE SLANTS 'conveys more about our society than many volumes of undisputedly protected speech.'[5] Although the name surely offends some, the majority relied specifically on the offensive nature of the mark when it concluded that 'Mr. Tam's band name is expressive speech.'[6] Because the commercial aspects and expressive aspects of the mark were inextricably intertwined, the commercial speech doctrine was inapplicable since the statutory prohibition regulated the expressive aspect.[7]

Additionally, acknowledging the expressive power that trademarks often wield, the majority in *Tam* conceded that '[c]ourts have been slow to

1. William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 268–69 (1987) (explaining that a trademark's economizing function is to decrease search costs, which requires the trademark owner to maintain a consistent quality); *see also* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 169 (2004) (asserting that trademark labels "enable consumers to make purchase decisions on the basis of product quality" and incentivize sellers "to produce goods and services of high quality").

2. *See* Alex Kozinski, Essay, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 972–75 (1993) (discussing modern uses of trademarks in public discourse).

3. 808 F.3d 1321 (Fed. Cir. 2015), *cert. granted sub nom.* Lee v. Tam, 85 U.S.L.W. 3114 (U.S. Sept. 29, 2016) (No. 15-1293).

4. *Id.* at 1327–28.

5. *Id.* at 1328.

6. *Id.* at 1338.

7. *Id.* at 1339 (quoting Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796 (1988)).

appreciate the expressive power of trademarks."[8] Noting that '[w]ords—even a single word—can be powerful, the majority recognized that 'marks often have an expressive aspect over and above their commercial-speech aspect."[9] Although *Tam* appears to be the first occasion where a court has ruled that a trademark used as a source identifier can be expressive speech rather than commercial speech, the decision can be seen as consistent with the recent judicial trend toward expanding First Amendment protection in the realm of trademark law.[10]

Still, the majority's conclusion raises a new question: If trademark appropriations used as source identifiers for expressive works are expressive speech instead of commercial speech, how far can trademark law bend to accommodate those uses? Prior to Congress passing the Federal Trademark Dilution Act,[11] the Lanham Act did not contain any provisions related to the First Amendment. Consequently, courts experimented with various devices to address expressive-speech concerns.[12] It is usually more difficult for trademark owners to stop expressive appropriation of their marks as long as the marks are not used as source identifiers. When an appropriation features direct commentary or criticism towards the mark or its owner, the law affords greater expressive leeway.

Accordingly, the appropriation of a trademark as a source identifier for expressive works, artificially defined in this Note as 'expressive trademark use, falls outside the current framework.[13] Rather, when a trademark serves

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8. *Id.* at 1327. It also fair to say that courts have long recognized trademark law's complexity and proceeded with caution. *See* HMH Publ'g Co. v. Brincat, 504 F.2d 713, 716 (9th Cir. 1974) ("Trademark infringement is a peculiarly complex area of the law. Its hallmarks are doctrinal confusion, conflicting results, and judicial prolixity. This case is no different from its kind, and we approach it with a keen awareness of its difficulty and our peril.").

9. *In re Tam*, 808 F.3d at 1327, 1338.

10. *Compare* Mut. of Omaha Ins. Co. v. Novak, 836 F.2d 397, 402 (8th Cir. 1987) (holding that the First Amendment did not apply to expressive use where the defendant could have used alternative methods to express his concern), *with* Louis Vuitton Malletier, S.A. v. My Other Bag, Inc. 156 F. Supp. 3d 425, 436 (S.D.N.Y. 2016) (declining to strictly require that there be no alternative methods of expression before allowing an expressive trademark appropriation).

11. Federal Trademark Dilution Act, 15 U.S.C. § 1125 (2012).

12. *See, e.g.*, Anheuser-Busch, Inc. v. Balducci Publ'ns, 28 F.3d 769, 776 (8th Cir. 1994) (admonishing that unnecessary confusion could be avoided with a disclaimer); Rogers v. Grimaldi, 875 F.2d 994, 998–99 (2d Cir. 1989) (balancing artistic relevance with consumer confusion); *Mut. of Omaha*, 836 F.2d at 402 (determining whether alternative avenues for expression were available).

13. This Note relies on specific definitions for "expressive use" and "expressive trademark use." Some commentators have used the terms interchangeably to refer to expressive appropriations in a variety of contexts. *See, e.g.*, Robert E. Pfeffer, *Who's Fooling Whom: An Economic Analysis of Expressive Trademark Use*, 6 WAKE FOREST INTELL. PROP. L.J. 69, 69, 72 (2006) (using "expressive use" and "expressive trademark use" interchangeably). Here, "expressive use" refers to any trademark appropriation that is not used as a source identifier. For example, Riff Raff's use of the VERSACE mark in his song title "Versace Python" is merely an expressive use because, unlike his stage name Riff Raff, the appropriation is used in the title of a song rather than as a source identifier for his music. "Expressive trademark use," however, specifically refers to the use of another's mark as a source identifier for expressive works. The artist King VelVeeda's use of the

as a source identifier, it is considered commercial speech because its strict purpose is 'to convey information about the type, price, and quality' related to a particular good or service.[14] Unlike mere expressive uses that do not appropriate a mark for source identification, expressive trademark use directly conflicts with the trademark owner's exclusive right to use the mark in commerce.[15] Moreover, it risks confusion-based harm to consumers and dilution of the mark itself, both of which negatively impact the trademark owner and undermine trademark law's fundamental policies. Therefore, 'trademark law generally prevails over the First Amendment.'[16]

Nevertheless, this Note develops an argument in favor of authorizing expressive trademark use based on the relationship between the social significance of modern trademarks and expressive works. Modern marks possess immense communicative power and transmit an array of information, much of which is derived from characteristics of the trademark owner as well as any underlying activities associated with that owner. Those activities include any products, services, advertisements, sponsorships, charitable efforts, or scandals that are connected to the mark or its owner. For example, the CHIK-FIL-A mark is associated with fried chicken and opposition to same-sex marriage.[17] Likewise, the MARLBORO mark relates to cigarettes and lung cancer.[18]

VELVEETA mark constitutes expressive trademark use because he used the mark as a moniker that identified the source of his comics. Put in more simple terms, expressive trademark use is the appropriation and use of another's name (or some recognizable form of it) as your own. The term "trademark use" is itself a term of art and controversial doctrine. *Compare* Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 92 IOWA L. REV. 1669, 1673 (2007) ("The evolution of the trademark use doctrine reflects an attempt to ground trademark law in the kinds of claims it has traditionally countenanced, both by focusing its mission and by minimizing collateral damage from overly sweeping trademark claims."), *with* Graeme B. Dinwoodie & Mark D. Janis, *Lessons from the Trademark Use Debate*, 92 IOWA L. REV. 1703, 1704 (2007) ("[W]e remain unconvinced that the trademark use doctrine will serve the goals of the trademark system, regardless of whether the doctrine can be cabined successfully in accord with the Dogan and Lemley reformulation."). Nuance aside, virtually everyone would agree that a use like Kodak Black's use of the KODAK mark or Saint Pepsi's use of the PEPSI mark functions as a source identifier.

14. Friedman v. Rogers, 440 U.S. 1, 11 (1979).

15. *See, e.g.*, Yankee Publ'g Inc. v. News Am. Publ'g Inc., 809 F. Supp. 267, 275–76 (S.D.N.Y. 1992) (explaining the distinction between the use of a mark for the purpose of expression or communication, and the use of a mark "for the purpose of source identification") (emphasis omitted).

16. *Id.* at 276.

17. *See* Sarah Aarthun, *Chick-fil-A Wades into a Fast-Food Fight over Same-Sex Marriage Rights*, CNN (July 28, 2012), http://www.cnn.com/2012/07/27/us/chick-fil-a-controversy/ [https://perma.cc/5LXR-K2UQ].

18. *See* Rob Taylor, *Philip Morris Loses Latest Case Against Australia Cigarette-Pack Laws*, WALL STREET J. (Dec. 18, 2015), http://www.wsj.com/articles/philip-morris-loses-latest-case-against-australia-cigarette-pack-laws-1450415295 [https://perma.cc/GE7S-7Y6R] (reporting that an Australian law aimed at reducing smoking-related cancer would remain in effect).

Therefore, whether the appropriation of a mark as a source identifier is expressive speech rather than commercial speech cannot be judged without looking to the content and meaning of the underlying activity. When the underlying activity is the creation, distribution, or performance of expressive works, the mark absorbs and reflects the expressive content. As a result, marks appropriated in this context are arguably expressive speech. Indeed, '[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.'[19]

Because the public has a heightened interest in avoiding misleading speech and confusion-based harm, however, this Note focuses exclusively on claims under the federal dilution statute, which does not require consumer-confusion as a prerequisite for liability.[20] Although trademark owners certainly have an interest in avoiding the dilution of their marks, that interest is 'inherently less weighty' than the interests served by trademark infringement.[21] At any rate, expressive trademark use often involves famous marks where consumer confusion is unlikely. Absent consumer confusion, trademark owners will be unable to bring successful infringement claims, but they can still rely on dilution claims to stop unauthorized appropriations.

That said, the federal dilution statute has a provision containing exclusions from liability, which were specifically added in response to First Amendment concerns.[22] The exclusions for noncommercial use and fair use are relevant to the following discussion. Given that 'noncommercial use' refers to the commercial speech doctrine,[23] the exclusion may be applicable to expressive trademark use under the majority's reasoning in *Tam*. If the use of a mark as a source identifier for expressive works is expressive speech rather than commercial speech, as the Majority in *Tam* concluded regarding THE SLANTS mark, the exclusion appears to authorize expressive trademark use. Still, other potential limitations that stem from the fair use exclusion are necessary to consider.

The discussion proceeds in three parts. Part I contextualizes the social significance of modern marks by outlining their development and evolution. Part II lays out the legal framework for trademark dilution and the statutory exclusions from liability, and covers the relevant limitations on applying the exclusions, including the commercial speech doctrine. Finally, Part III

19. Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65 (1981).

20. *See* 15 U.S.C. § 1125(c) (2012) (authorizing injunctive relief for owners of famous trademarks 'regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury").

21. Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 905 (9th Cir. 2002).

22. 151 CONG. REC. 6,936 (2005) (statement of Rep. Berman) (explaining that the exclusion provision "balance[s] trademark law with first amendment concerns").

23. *E.g.*, Radiance Found., Inc. v. NAACP, 786 F.3d 316, 331 (4th Cir. 2015).

argues in favor of applying the noncommercial use exclusion to expressive trademark use as consistent with congressional intent and the policies served by First Amendment protection for expressive speech. It also provides a framework to easily apply the exclusion.

I. The Evolution and Development of Trademarks

Today, trademarks are unavoidable. They are used on clothing, food products, household items, and various other goods that people encounter daily.[24] Consequently, everyone inherently knows how trademarks work. People rely on them constantly, not only for commercial purposes when it comes to differentiating between goods, but also for communicative purposes when it is easier to convey an idea embodied in a trademark by simply invoking the mark. Although the information conveyed by marks was previously limited to qualities about the good, modern trademarks communicate a wealth of meanings that are disconnected from any association with a particular product.

A. Historical Framework for Trademark Protection

The highly evolved communicative purpose of modern trademarks is rooted in trademark law's historical aim. Marks function as signatures that designate a good's source and assure a standard quality, which allows consumers to quickly locate familiar goods that are known to be reliable.[25] As a result, trademarks acquire and reflect reputational information about a source based on the attributes of goods originating from that source.[26]

If a company begins selling peanut butter under the mark JIFFY, consumers interested in JIF or SKIPPY peanut butter might mistake one brand for the other and spend more time inspecting products to ensure that they make the right choice. Moreover, if JIFFY peanut butter is of inferior quality and a consumer accidently buys it, the consumer might mistakenly associate the inferior quality with the wrong brand, which harms the trademark owner. Guarding against this kind of consumer confusion is the classic function of trademark law.[27]

To enforce their trademark rights, owners of the JIF and SKIPPY marks would bring a claim for trademark infringement. Infringement is a confusion-based theory of liability that stems from a mark's use in

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24. *See* ENCYCLOPEDIA OF NEW MEDIA: AN ESSENTIAL REFERENCE TO COMMUNICATION AND TECHNOLOGY 441 (Steve Jones ed., 2003) (describing the ubiquity of trademarks in people's lives).

25. Landes & Posner, *supra* note 1, at 268–69.

26. SHAVELL, *supra* note 1, at 169.

27. *See* Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 160 ("The concept of customer confusion is thus the touchstone of traditional trademark theory.").

connection with specific goods.[28] By prohibiting the use of confusingly similar marks on similar types of goods at the point of sale, infringement claims decrease consumer search costs by eliminating the need to inspect a particular good.[29] They also ensure that trademark owners will enjoy reputational gains as a result of their investment in higher product quality. Because firms will enjoy this reputational gain, they are more likely to invest in higher quality, which leads to a more competitive market.[30]

If trademark law did not prohibit the use of the JIFFY mark on peanut-butter products, owners of the JIF and SKIPPY marks might be less inclined to invest in their brand because they could not capture reputational benefits from confused consumers. Consumers would then be hurt by fewer choices and unreliable quality. In short, trademarks historically derived their value through their association with specific goods or products and were primarily oriented around benefitting and protecting consumers.[31]

B. Expanding Protection Beyond Point-of-Sale Confusion

During the 20th century, however, trademark infringement expanded beyond consumer confusion at the point of sale.[32] Now, trademark infringement can protect against things like post-sale confusion.[33] If a consumer sees someone walking down the street in Yves Saint Laurent heels that have a red bottom, the consumer might confuse them as coming from Christian Louboutin, a brand that is widely recognized for using red on the bottom of all its heels.[34] Here, the consumer is not a confused purchaser. Rather, the consumer is a confused member of the public, which is comprised of both potential purchasers and nonpurchasers.

Other expansions include theories of liability like merchandising rights and initial-interest confusion.[35] Ultimately, these expansions culminated in

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28. *See* 15 U.S.C. § 1125(a)(1)(A) (2012) (creating civil liability where use "is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person").

29. Landes & Posner, *supra* note 1, at 270.

30. *Id.*

31. *E.g.*, Schneider v. Williams, 44 N.J. Eq. 391, 394 (N.J. Ch. 1888) ("It would seem to be settled beyond question that there can be no such thing as a trade-mark distinct from and unconnected with a vendible commodity. It is only when it is affixed to or associated with some vendible commodity, so as to distinguish that particular commodity from others of the same class or kind, that it is possible for it to possess the essential quality of a trade-mark.").

32. Robert G. Bone, *Taking the Confusion Out of "Likelihood of Confusion" Toward a More Sensible Approach to Trademark Infringement*, 106 NW. L. REV. 1307, 1339 (2012).

33. *E.g.*, Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co. 799 F.2d 867, 872 (2d Cir. 1986) ("[I]t is [] clear that post-sale confusion as to source is actionable under the Lanham Act.").

34. Christian Louboutin S.A. v. Yves St. Laurent Am. Holdings, Inc., 696 F.3d 206, 227 (2d Cir. 2012) (concluding that Christian Louboutin's red soles are recognized by consumers as a source identifier).

35. *See, e.g.*, Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc., 457 F.3d 1062, 1066, 1078 (9th Cir. 2006) (rejecting the lower court's ruling that the plaintiffs' marks were not used as a source

the federal dilution statute, passed in 1995 and revised in 2006, which gives trademark owners the ability to bring claims even when there is no risk of confusion.[36] Unlike trademark infringement, dilution essentially protects the mark itself, outside of its relation to specific goods.

Generally speaking, these increased protections coincided with the evolution of trademarks' communicative power. As marks began to convey more types of information to consumers, the law increasingly preserved that ability. There is little doubt that consumers today draw far more information from marks than source and quality. Indeed, savvy trademark owners have branded their marks with a variety of meanings.

For example, the VICTORIA'S SECRET mark conveys the image of someone that is 'sexy and playful' and urges consumers to be 'bad for goodness sake.'[37] PLAYBOY on the other hand, invokes 'romance and *joie de vivre*.'[38] Also, whereas marks like ANN TAYLOR and BROOKS BROTHERS are considered 'classic,'[39] JUICY COUTURE is for those interested in an 'irreverent, fun, and on-trend lifestyle.'[40] Similarly, the NIKE mark is associated with 'explosive movement,'[41] CARTIER is worn by 'cosmopolitan' consumers,[42] and FUBU represents the 'multicultural youth generation.'[43]

C. *Modern Trademarks and Their Social Significance*

As illustrated by the examples above, brand power is a dominant force influencing individual behavior in modern society, and trademarks are the receptacles of that power. Marks are so thoroughly enmeshed in the cultural fabric that people frequently use them as shorthand devices.[44] Often, they efficiently and effectively illustrate or articulate something that is difficult or cumbersome to convey.

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identifier on third-party accessories); Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188, 203–04 (5th Cir. 1998) (affirming liability for infringement based on initial-interest confusion).

36. Federal Trademark Dilution Act, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified as amended at 15 U.S.C. §§ 1125(c)(1), 1127 (2000)); Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (2006) (amending 15 U.S.C. §§ 1125, 1127).

37. V Secret Catalogue, Inc. v. Moseley, 605 F.3d 382, 394 & n.4 (6th Cir. 2010) (Moore, J. dissenting) (discussing content used in advertisements for Victoria's Secret and the company's explanation concerning the meanings behind the VICTORIA'S SECRET mark).

38. Playboy Enters. Inc. v. Webbworld, Inc., 991 F. Supp. 543, 558 (N.D. Tex. 1997).

39. Urban Outfitters, Inc. v. BCBG Max Azria Grp. Inc. 511 F. Supp. 2d 482, 499 (E.D. Pa. 2007).

40. Juicy Couture, Inc. v. Bella Int'l Ltd., 930 F. Supp. 2d 489, 495 (S.D.N.Y. 2013).

41. Tovey v. Nike, Inc., No. 1:12CV448, 2014 WL 3510975, at *5 (N.D. Ohio July 10, 2014).

42. Cartier, Inc. v. Four Star Jewelry Creations, Inc. No. 01 Civ. 11295, 2003 WL 21056809, at *8 (S.D.N.Y. May 8, 2003).

43. GTFM, LLC v. Universal Studios, Inc. No. 02 CV. 0506(RO), 2006 WL 1377048, at *1 (S.D.N.Y. May 16, 2006).

44. *See* Kozinski, *supra* note 2, at 972–75 (discussing modern uses of trademarks in public discourse).

Consider the following: Joanna's new road bike is the Bentley of bikes. Clark hopes Jessica is down to Netflix and chill tonight. The summer mosquito population in Texas is like Starbucks. Don't believe me? Google it. Each time, the invocation or referencing of a mark broadens the statement's implications because the speaker is able to tap into the meaning that popular culture associates with the mark. Undeniably, 'some words, phrases or symbols better convey their intended meanings than others.'[45]

This change in trademarks' social significance is related, at least in part, to technological achievements.[46] Through channels like social media, consumers encounter an overwhelming amount of trademarks daily.[47] Given the frequency of these encounters and the variety of meanings that modern trademarks embody, appropriating them for expressive purposes comes naturally because it allows individuals to exploit that meaning for their work.

Additionally, the ease with which expressive works can be made is unprecedented. A significant amount of the global population has access to devices and software that enable expressive activities that used to be prohibitively expensive or require specialized skills.[48] Moreover, appropriating another's mark is as easy as speaking it, and digital copies can be quickly found online. All Kodak Black has to do to harness the KODAK mark's meaning is call himself that and release his music. Likewise, Ther can make his stickers simply by downloading THE NORTH FACE design mark and altering it with basic software.

Now that expressive works can be instantaneously disseminated over the Internet, individuals are able to engage large segments of the population in discourse using widely known words and symbols. Consequently, the social significance of modern trademarks increasingly revolves around their

45. New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 306 (9th Cir. 1992).

46. *See generally* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) (examining how digital technologies have altered the social conditions of speech).

47. *See* Sydney Ember & Rachel Abrams, *On Instagram and Other Social Media, Redefining 'User Engagement*, N.Y. TIMES (Sept. 20, 2015) http://www.nytimes.com/2015/09/21/business/media/retailers-use-of-their-fans-photos-draws-scrutiny.html?_r=0 [https://perma.cc/X3AC-9WRK] (detailing efforts by brands to engage consumers through social media).

48. *See ICT Facts and Figures 2016*, INT'L TELECOMM. UNION (June 2016), http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2016.pdf [https://perma.cc/47DP-HQ3R] (concluding that 47% of the world population will be using the Internet by the end of 2016); *Internet User Demographics*, PEW RES. CTR. (Jan. 2014), http://www.pewinternet.org/data-trend/internet-use/latest-stats/ [https://perma.cc/KML3-FE6X] (reporting that 87% of American adults use the Internet); Art Tavana, *Democracy of Sound: Is GarageBand Good for Music?*, PITCHFORK (Sept. 30, 2015), http://pitchfork.com/features/article/9728-democracy-of-sound-is-garageband-good-for-music/ [https://perma.cc/7659-RCH7] (listing examples of popular songs that were created on free computer software).

expressive qualities, and that shift seems both obvious and unavoidable. From this perspective, the result in *Tam* appears to align with reality.

Like the majority's observation that Tam's choice to adopt an allegedly disparaging mark conveys 'more about our society than many volumes of undisputedly protected speech, a person's choice to appropriate another's trademark for his or her expressive work can be similarly reflective outside of the disparagement context.[49] What does it say about modern society when a mark like PEPSI is beatified in a moniker like Saint Pepsi? Is Gucci Mane's decision to appropriate the GUCCI mark for his works not indicative of certain values promoted in popular culture? As trademarks continue to grow in communicative power, it will become increasingly difficult to argue that these appropriations cannot be 'fairly considered as relating to matter[s] of political, social, or other concern to the community.'[50]

II. The Federal Trademark Dilution Statute

Confronted by unauthorized appropriations in contexts where consumer confusion is nonexistent, trademark owners can turn to the federal dilution statute to enjoin unwanted uses. Available only to famous marks, trademark dilution is not limited to claims involving similar goods or services.[51] Although the statutory exclusions from liability are generally effective for protecting expressive use, they have not been applied to expressive trademark use. The following discussion first outlines liability under the statute. It then describes the relevant statutory exclusions from liability. Afterwards, it considers what limitations on applying the noncommercial use exclusion are necessary by examining the forms of expression allowed by the fair use exclusion.

A. Trademark Dilution

A trademark owner's rights effectively expand once a mark becomes as well-known as the VELVEETA or VERSACE marks. As discussed above, federal dilution claims protect against unauthorized uses in contexts completely unrelated to the mark's original public association.[52] The statute's purpose is to stop unauthorized appropriations that 'seize upon the popularity of a trademark at the expense of the rightful owner and the public.'[53] Importantly, both expressive use and expressive trademark use

49. *In re* Tam, 808 F.3d 1321, 1328 (Fed. Cir. 2015), *cert. granted sub nom.* Lee v. Tam, 85 U.S.L.W. 3114 (U.S. Sept. 29, 2016) (No. 15-1293).

50. *Id.* at 1339 (quoting Snyder v. Phelps, 562 U.S. 443, 453 (2011)).

51. *See* 15 U.S.C. § 1125(c) (2012) (authorizing injunctive relief for owners of famous trademarks, regardless of actual or likely confusion or competition).

52. *See id.* (creating liability where a person begins to use a famous mark "at any time after the owner's mark has become famous").

53. 152 CONG. REC. H6,963 (daily ed. Sept. 25, 2006) (statement of Rep. Sensenbrenner).

often involve famous marks because the public's familiarity with them allows the party appropriating the mark to harness its communicative power.

Two kinds of dilution are possible under the statute: blurring and tarnishment.[54] Blurring addresses harm that occurs when other trademarks exist that are similar to a well-known, unique mark.[55] Because the public overwhelmingly associates famous marks with 'one source and only one source, unauthorized appropriations of those marks for unrelated goods or services 'blur[s] the association in the public mind between the famous mark and its original source.'[56] Kodak Black's appropriation of the KODAK mark is an example of blurring.

By comparison, tarnishment occurs when someone uses a mark that is similar to the famous mark in such a way that consumers might develop negative associations with the famous one.[57] Here, the new use risks harming the brand's reputation among consumers.[58] For example, the injunction that barred Stuart Helm from using his King VelVeeda moniker in connection with his work was aimed at stopping the public from 'associat[ing] Velveeta® with Mr. Helm's arguably offensive product, thereby tarnishing the Velveeta® mark.'[59]

To bring a successful dilution claim, trademark owners need not definitively prove dilution. Instead, demonstrating a likelihood of dilution is sufficient.[60] Concerning remedies, trademark owners can recover profits, damages, and attorney's fees if the party appropriating the mark did so willfully for the purpose of trading on its widespread recognition or harming its reputation.[61] Otherwise, trademark owners are generally entitled only to injunctive relief regardless of actual economic harm.[62] Still, an injunction is a powerful tool that is available as soon as the trademark owner can prove he or she has a 'better than negligible chance of success on the merits.'[63]

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54. 15 U.S.C. § 1125(c).

55. William G. Barber, *The Trademark Dilution Revision Act of 2005: Breathing Life Back into the Federal Dilution Statute*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1113, 1134 (2006).

56. *Id.*

57. *Id.* at 1123–24.

58. *See* Hormel Foods Corp. v. Jim Henson Prods., Inc. 73 F.3d 497, 507 (2d Cir. 1996) ("The sine qua non of tarnishment is a finding that plaintiff's mark will suffer negative associations through defendant's use.").

59. Kraft Foods Holdings, Inc. v. Helm, 205 F. Supp. 2d 942, 949–50 (N.D. Ill. 2002).

60. 15 U.S.C. § 1125(c)(1) (2012).

61. *Id.* § 1125(c)(5).

62. *Id.* § 1125(c)(1).

63. *Helm*, 205 F. Supp. 2d at 945–46 (internal quotation omitted).

B. *Statutory Exclusions from Liability*

To 'balance trademark law with first amendment concerns, the federal dilution statute includes several exclusions from liability.[64] If applicable, they prohibit liability for both blurring dilution and tarnishment dilution.[65] Although the argument in favor of expressive trademark use relies on the exclusion for noncommercial use, its reach is implicated by limitations on the exclusion for fair use. Accordingly, each is discussed in turn.

1. The Noncommercial Use Exclusion.—The statutory text outlining the noncommercial use exclusion is minimal. It merely states that trademark appropriations 'shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection' concerning 'any noncommercial use of a mark.'[66] The legislative history explains that noncommercial use should be read 'as that term has been defined by the courts.'[67] Courts have concluded that the term is 'a somewhat inexact, shorthand reference to 'speech protected by the First Amendment.'[68] In other words, the exclusion limits liability to speech that falls under the commercial speech doctrine.[69]

The commercial speech doctrine concerns speech that is not entitled to full First Amendment protection when balanced against the state's compelling interest in ensuring the truthfulness of speech in the commercial arena.[70] Its roots can be traced as far back as 1942 when the Supreme Court suggested that the Constitution does not impose restraints on regulations that restrict 'purely commercial advertising.'[71] Rather than developing along a clear path, however, the doctrine's applicability has shifted in different directions.[72]

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64. 151 CONG. REC. 6,936 (2005) (statement of Rep. Berman).

65. 15 U.S.C. § 1125(c)(3).

66. *Id.* § 1125(c)(3)(C).

67. H.R. REP. NO. 104–374, at 4 (1995).

68. Am. Family Life Ins. Co. v. Hagan, 266 F. Supp. 2d 682, 695 (N.D. Ohio 2002); *see, e.g.*, Radiance Found., Inc. v. NAACP, 786 F.3d 316, 332 (4th Cir. 2015) (noting that trademark law is not a proper tool for thwarting speech that one does not agree with, and that the use of trademark law to prevent noncommercial speech would cause many social commentators and websites to be silenced); Mattel, Inc. v. MCA Records, Inc. 296 F.3d 894, 907 (9th Cir. 2002) (holding that partially commercial speech that serves a noncommercial purpose, such as humor, is fully protected under the First Amendment).

69. *See Radiance Found.*, 786 F.3d at 331 ("The term 'noncommercial' refers to the First Amendment commercial speech doctrine.").

70. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. 447 U.S. 557, 563 n.5 (1980) (explaining that the state has an interest in regulating speech in the context of commercial transactions so that information not only flows "freely" but also "cleanly").

71. *See* Valentine v. Chrestensen, 316 U.S. 52, 54–55 (1942) (upholding an ordinance that prohibited distribution of commercial handbills).

72. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 822–25 (1975) (explaining that courts in Virginia erred in their assumption that advertisements were not entitled to First Amendment protection).

Ultimately recognizing that commercial speech is not a zero-sum proposition, the Supreme Court subsequently explained that an advertisement that does 'more than simply propose a commercial transaction' is entitled to full First Amendment protection.[73] Moreover, it later held in *Riley v. National Federation of the Blind*[74] that those protections apply to mixed speech if its commercial and expressive aspects are 'inextricably intertwined' and the expressive aspect is targeted by a regulation.[75] The fact that the mark may be used in a for-profit enterprise is of no consequence.[76] Because trademarks 'necessarily pertain to commercial transactions,' however, they have historically been treated as strictly commercial speech.[77]

Nevertheless courts have, on multiple occasions, ruled that certain appropriations did more than simply 'propose a commercial transaction' and concluded that the appropriations were not commercial speech.[78] Accordingly the courts applied the dilution statute's exclusion for noncommercial use.[79] Although those cases involved expressive use rather than expressive trademark use, the increasing reality that marks 'often have an expressive aspect over and above their commercial-speech aspect' suggests that the exclusion can be applied more broadly if expressive trademark use is not commercial speech.[80] Indeed, Kodak Black's use of the KODAK mark and Macintosh Plus's use of the MACINTOSH mark certainly

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73. *See id.* at 822, 829 (holding that an advertisement for abortions was entitled to First Amendment protection because it was not wholly commercial speech).

74. 487 U.S. 781 (1988).

75. *Id.* at 796.

76. *See, e.g.*, Ayres v. City of Chicago, 125 F.3d 1010, 1014 (7th Cir. 1997) ("[T]here is no question that the T-shirts are a medium of expression prima facie protected by the free-speech clause of the First Amendment, and they do not lose their protection by being sold rather than given away.").

77. Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439, 457 n.6 (E.D. Va. 2015) ("A trademark, however, is commercial speech."); *see also* Friedman v. Rogers, 440 U.S. 1, 11 (1979) (holding that the trade name of an optometrist was commercial speech); Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC, 221 F. Supp. 2d 410, 415 (S.D.N.Y. 2002) (noting that, to the extent expressive trademark use of another's mark on a commercial product causes confusion, it is not protected).

78. *See, e.g.*, Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 906–07 (9th Cir. 2002) (finding that the "Barbie Girl" song by the band Aqua was parodic noncommercial use).

79. *See* Radiance Found., Inc. v. NAACP, 786 F.3d 316, 332 (4th Cir. 2015) (relying on the federal dilution statute's exclusion for noncommercial use to conclude that the appropriation of the NAACP's mark for the purpose of criticism was not subject to dilution liability); *Mattel*, 296 F.3d at 907 (finding that "Barbie Girl" song's parodic noncommercial use did not dilute the Barbie trademark); Smith v. Wal-Mart Stores, Inc., 537 F. Supp. 2d 1302, 1340 (N.D. Ga. 2008) (explaining that the federal dilution statute did not apply to t-shirts appropriating the WAL-MART logo to criticize Wal-Mart's business practices because such criticism was noncommercial use); Kiedis v. Showtime Networks, Inc. No. CV 07-8185 DSF (MANx), 2008 WL 11173143, at *5 (C.D. Cal. Feb. 19, 2008) ("The Court has no doubt that the title 'Californication,' as used by Defendants, has sufficient artistic qualities to take it out of the realm of purely commercial speech.").

80. *In re* Tam, 808 F.3d 1321, 1338 (Fed. Cir. 2015), *cert. granted sub nom.* Lee v. Tam, 85 U.S.L.W. 3114 (U.S. Sept. 29, 2016) (No. 15-1293).

communicate more than 'type, price, and quality, especially in light of their underlying activity.[81]

2. The Fair Use Exclusion.—While the noncommercial use exclusion on its face appears applicable to expressive trademark use where the appropriation is expressive speech rather than commercial speech, limitations on the fair use exclusion's applicability are necessary to consider. Unlike the exclusion for noncommercial use, the fair use exclusion's statutory language limits its application to specific circumstances. These limitations are relevant because applying the exclusion for noncommercial use without reference to them potentially casts too broad a net.

The fair use exclusion is inapplicable to appropriations that are used 'as a designation of source for the person's own goods or services.'[82] Therefore, expressive trademark use is clearly prohibited by the exclusion's plain language. Moreover, protection extends only to appropriations that are used 'in connection with identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.'[83] An appropriation that does not specifically address the trademark owner's practices, products, or services does not trigger the exclusion.

To illustrate, consider the difference between parody and satire. Unlike parody, which clearly fits within the exclusion, satire is a grey area. The difference between the two relates to purpose and necessity. Parody appropriates a trademark to directly poke fun at the mark or its owner.[84] By nature, a parody must mimic what it criticizes—while simultaneously communicating that it is different—to have its intended effect.[85] Satire, on the other hand, appropriates a mark to comment on a broader social issue that the mark is only one part of, which means the appropriation is not necessarily required.[86]

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81. Friedman v. Rogers, 440 U.S. 1, 11 (1979).

82. 15 U.S.C. § 1125(c)(3)(A) (2012).

83. *Id.* § 1125(c)(3)(A)(ii). The fair use exclusion also permits advertising or promotion that permits consumers to compare goods or services, but that exclusion necessarily applies to commercial speech rather than expressive speech. *Id.* § 1125(c)(3)(A)(i).

84. *See* Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 260–61 (4th Cir. 2007) (holding that an inexpensive dog toy modelled after a Louis Vuitton handbag successfully parodied the handbag by poking fun at the handbag's elegance and expensiveness).

85. *Id.*

86. *See, e.g.*, Starbucks Corp. v. Wolfe's Borough Coffee, Inc. 588 F.3d 97, 113 (2nd Cir. 2009) (holding that defendant's use of "Charbucks" was at most a 'subtle satire" of Starbucks that did not rise to the level of a successful parody protected in *Haute Diggity Dog*, 507 F.3d at 260); *see also* Louis Vuitton Malletier, S.A. v. Hyundai Motor Am., No. 10 Civ. 1611(PKC), 2012 WL 1022247, at *20 (S.D.N.Y. Mar. 22, 2012) ("Courts have, however, not applied fair use when the defendant's mark is instead 'a subtle satire' of the original.") (quoting Starbucks Corp. v. Wolfe's Borough Coffee, Inc. 588 F.3d 97, 113 (2nd Cir. 2009)).

Consequently, expressive trademark use would not qualify for protection under the fair use exclusion even if the appropriation of a mark as a source identifier were not flatly prohibited. Often, expressive trademark use involves appropriations that lack an obvious intent to directly criticize or comment on the trademark owner. In fact, Saint Pepsi claimed in an interview that his work has nothing to do with PepsiCo or the PEPSI mark.[87] Additionally, the requisite intent does not become visible when considering the underlying activity. Kodak Black has yet to write a track praising Eastman Kodak for surviving its bankruptcy woes[88] or criticizing it for allegedly polluting New York waterways.[89]

C. Limitations on the Noncommercial Use Exclusion

Given the differences between the exclusions for noncommercial and fair use, it is apparent that the noncommercial use exclusion ought to be applied with the limitations on the fair use provision in mind. By limiting protection to appropriations which directly comment on or criticize the trademark owner, the fair use exclusion attempts to preserve the balance between expressive freedom and the trademark owner's rights.[90] Functionally, the requirement ensures that a particular appropriation embodies sufficient expressive value to merit First Amendment protection. It would therefore be troubling to apply the noncommercial use exclusion when the exclusion for fair use would deem the appropriation unworthy of protection.

In essence, requiring that appropriations directly address the trademark owner achieves its purpose by discriminating on the basis of the form of expression. Consider again the difference between parody and satire. Parody is allowed because it must, by nature, directly address the trademark owner. Satire, by comparison, is prohibited because the owner is, at most, peripheral to the purpose of the appropriation. Expressive trademark use—further away from the spectrum of permissible uses than satire—is a completely different

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87. *See Saint Pepsi: An Interview With BC's Up and Coming Music Producer*, GAVEL (Aug. 27, 2013), http://bcgavel.com/2013/08/27/saint-pepsi-an-interview-with-bcs-up-and-coming-music-producer/ [https://perma.cc/2SD5-8FU9] ("SAINT PEPSI just sorta came into my head when I was discussing the name for a 'future project' with my best friend ").

88. Maggie McGrath, *Kodak Is Back on the Big Board After Bankruptcy*, FORBES (Nov. 1, 2013), http://www.forbes.com/sites/maggiemcgrath/2013/11/01/there-and-back-again-10-companies-that-returned-to-the-market-after-bankruptcy/#2d11c3fc1ce3 [https://perma.cc/A3HY-F7ET].

89. Thomas Adams, *Report: Kodak Helped Make N.Y.'s Waterways Among Most Toxic*, ROCHESTER BUS. J. (June 20, 2014), http://rbj.net/article.asp?aID=209728 [https://perma.cc/7VVZ-NZNZ].

90. *Cf.* Mut. of Omaha Ins. Co. v. Novak, 836 F.2d 397, 402 (8th Cir. 1987) (rejecting a First Amendment defense to trademark infringement because the trademark owner's rights "need not yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist for it would diminish [those] rights without significantly enhancing the asserted right of free speech") (internal quotations omitted).

form of expression. Rather, it is a 'post-parody' form of expression that resembles pastiche, which undoubtedly violates the terms for protection under the fair use exclusion.[91]

Pastiche is really just a fancy word for 'hodgepodge' that refers to works that incorporate styles and elements from other works, artists, or time periods.[92] Whereas parody and satire reference specific features of the materials that they appropriate to serve their critical purposes, pastiche neither criticizes nor celebrates the appropriated material.[93] Instead, different materials are more like artifacts that can be combined to constitute a new, distinctive style. Although pastiche is surely different, it suffers from the same problem as satire concerning the fair use exclusion. If it neither criticizes nor celebrates the appropriated materials, it cannot be described as directly addressing the trademark owner.

Vaporwave music released by Saint Pepsi or Macintosh Plus is an example of pastiche.[94] The use of those marks as monikers to release music seemingly has nothing to do with the trademark owner's products or practices. Accordingly, application of the noncommercial use exclusion to expressive trademark use is potentially inappropriate if it undermines the limitations on the exclusion for fair use. Unless an alternative basis ensures that appropriations for expressive trademark use are consistent with First Amendment protection, authorizing those appropriations under the noncommercial use exclusion.

III. Arguments in Favor of Allowing Expressive Trademark Use Under the Noncommercial Use Exclusion

To summarize the preceding discussion, modern trademarks differ in their communicative power from trademarks historically, largely because they relate to the entirety of the trademark owner's underlying activity rather than only a particular good or service. As a result, they are thoroughly

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91. *See generally* Charles E. Colman, *Trademark Law and the Prickly Ambivalence of Post-Parodies*, 163 U. PA. L. REV. ONLINE 11 (2014) (referring to new expressive activities like pastiche as "post-parody" and discussing post-parody in the context of trademark law and fashion).

92. *See id.* at 26 n.37 (explaining that "[p]astiche is, like parody, the imitation of a peculiar or unique, idiosyncratic style, the wearing of a linguistic mask, speech in a dead language") (quoting FREDRIC JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM 17 (1991)).

93. *Id.*

94. *See* Christian Ward, *Vaporwave: Soundtrack to Austerity*, STYLUS (Jan. 29, 2014), http://www.stylus.com/hzwtls [https://perma.cc/M57G-EP59] (explaining that "Vaporwave is a micro-genre of electronic music that draws on the corporate sonic ephemera of the 80s and 90s—such as lift muzak, ad soundtracks, 'hold' music, and cocktail jazz—to satirise the emptiness of a hyper-capitalist society"); *see also* Michelle Lhooq, *Is Vaporwave the Next Seapunk?*, THUMP (Dec. 27, 2013), http://thump.vice.com/en_us/article/is-vaporwave-the-next-seapunk [https://perma.cc/48EU-55KY] (noting that many commentators and producers within the Vaporwave genre have considered as central to the genre a satirical but not necessarily critical preoccupation with consumer capitalism, popular culture, and new-age tropes).

enmeshed in the popular culture and appropriated for expressive works, which, by virtue of modern trademarks' expressive features, often constitute expressive speech rather than commercial speech. As expressive speech, these appropriations should be excluded from liability under the dilution statute's noncommercial use provision.

Several things must be addressed to establish that the provision's application is appropriate. Most importantly. it cannot contravene Congress's intent as expressed in the statutory text or legislative history. If Congress has clearly spoken on the issue, an alternative interpretation is per se unreasonable. Additionally, there has to be expressive value associated with expressive trademark use that justifies First Amendment protection. Finally. a principle that clearly defines the new boundaries is necessary to ensure that the provision does not ultimately undermine the statute's legitimate functions.

A. Consistency with the Statutory Text and Legislative History

As noted above, the noncommercial use exclusion's language differs from the language of the fair use provision. Whereas the exclusion for fair use does not apply to marks used 'as a designation of source, the noncommercial use exclusion does not have the same limiting language.[95] The absence of such language suggests that Congress did not intend for the noncommercial use exclusion to be read as narrowly as the exclusion for fair use.

Unlike claims for trademark infringement, claims for dilution do not have a built-in mechanism that limits a trademark owner's ability to stop expressive appropriations. There is no consumer-confusion requirement for dilution, which lessens the trademark owner's burden of proof and allows dilution to reach across different markets.[96] Relatedly. distinct from an injunction for trademark infringement that is necessarily based on consumer-confusion concerns, an injunction for dilution is premised on protecting a mark's value, which is 'inherently less weighty. '[97] Consequently, there is good reason to read the exclusion broadly on the basis of the text alone given dilution's broad reach and the public's decreased interest in prohibiting it.

Moreover, the dilution statute's legislative history contains clear statements clarifying that Congress intended the exclusion to alleviate First Amendment concerns. Although the exclusion was initially pulled from the

95. *See* 15 U.S.C. §§ 1125(c)(3)(A)(ii), (C) (2012) ("The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection: (A) Any fair use other than as a designation of source in connection with (ii) identifying and parodying, criticizing, or commenting upon the famous mark owner. (C) Any noncommercial use of a mark.").

96. *See* Mattel, Inc. v. MCA Records, Inc.. 296 F.3d 894, 904–05 (9th Cir. 2002) ("A dilution injunction will generally sweep across broad vistas of the economy.").

97. *Id.* at 905.

statute during the 2005 revisions, the Senate Judiciary Committee added it back in for added protection before the revisions were passed.[98] During deliberations for the pre-revision version statute, Congress explained that the dilution statute would not 'prohibit or threaten noncommercial expression, such as parody, satire, editorial and other forms of expression that are not a part of a commercial transaction.'[99] Further, it noted that the statute would not 'prohibit or threaten 'noncommercial' expression, as that term has been defined by the courts.'[100] Therefore, Congress expressly delegated authority to the courts to determine the exclusion's scope.

That delegation especially makes sense in light of the role courts have played concerning the appropriate balance between trademark law and the First Amendment. Early cases like *L.L. Bean v. Drake Publishers, Inc.*[101] and *Rogers v. Grimaldi*[102] recognized the tension that arises when trademark owners attempt to enforce their rights against expressive appropriations and took great pains to protect the public's interest in free expression.[103] Subsequently, courts have expanded expressive protections for new appropriations emerging in unfamiliar places.[104]

Admittedly, *Tam* appears to be the first court to hold that a trademark used as a source identifier can be expressive speech entitled to First Amendment protection. That said, the majority's conclusion represents merely another occasion where courts have adjusted the doctrine to account for modern conditions. By expressly stating that the exclusion is based on commercial speech as defined by the courts, Congress demonstrated not only its intent but also its reliance on the judiciary to define the boundaries of the exclusion's application.

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98. *See* Paul Alan Levy, *The Trademark Dilution Revision Act—A Consumer Perspective*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1189, 1211–12 (2006) ("[O]n the eve of the Senate Judiciary Committee's markup, the Senators agreed to restore the non-commercial use exception to section 43(c)(3).").

99. 141 CONG. REC. S19,310 (daily ed. Dec. 29, 1995) (statement of Sen. Hatch).

100. H.R. REP. NO. 104-374, at 4 (1995).

101. 811 F.2d 26 (1st Cir. 1987).

102. 875 F.2d 994 (2d Cir. 1989).

103. *See Rogers*, 875 F.2d at 1000 ("Where a title with at least some artistic relevance to the work is not explicitly misleading as to the content of the work, it is not false advertising This construction of the Lanham Act accommodates consumer and artistic interests."); *L.L. Bean*, 811 F.2d at 33–34 ("The district court's injunction falls not only because it trammels upon a protected form of expression, but also because it depends upon an untoward judicial evaluation of the offensiveness or unwholesomeness of the appellant's materials.").

104. *See, e.g.*, E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc. 547 F.3d 1095, 1099 (9th Cir. 2008) (applying the rule from *Rogers* beyond the title of an expressive work to content within in the work itself).

B. *Consistency with the First Amendment*

Nevertheless, even if applying the noncommercial use exclusion to expressive trademark use is consistent with Congress's intent, courts have overwhelmingly applied the exclusion where the appropriation was directed at the trademark owner and its activities. For example, in *Smith v. Wal-Mart Stores*[105] the appropriation of the WAL-MART mark in works referring to Wal-Mart as 'Wal-qaeda' or 'Walocaust' was allowed under the exclusion because the works expressed the defendant's 'strongly adverse positions' concerning Wal-Mart's business practices.[106] As discussed above, allowing trademark appropriation only when it directly targets the owner functionally ensures that the appropriation has sufficient expressive value to merit First Amendment protection.

While that limitation applies only to the fair use exclusion and is absent from the noncommercial use exclusion's statutory language, its foundation cannot be overlooked. Expressive trademark use cannot be authorized unless there is expressive value associated with it. Generally, speech that implicates the 'public concern' merits First Amendment protection because it relates to 'political, social, or other concern[s] to the community.'[107] Although appropriating the mark is not necessary for expressive trademark use in the same sense as parody, allowing expressive trademark use nonetheless nurtures the kind of discourse that the First Amendment endeavors to protect. Individuals encounter numerous trademarks every day and absorb the vast array of different meanings imbued in them. Consequently, marks are often appropriated for expressive works, which are then publicly disseminated into the cultural sphere. As the public begins to engage and respond to those works, the process becomes increasingly synonymous with the kind of political discourse that merits protection.[108]

Ultimately, trademarks are part of "the cultural resources available to us (and within us)' that individuals use to express, critique, revise, and consider new ideas.[109] By disseminating expressive works that contribute to discourse in the cultural sphere, 'ordinary people gain a greater say over the institutions

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105. 537 F. Supp. 2d 1302 (N.D. Ga. 2008).

106. *Id.* at 1340.

107. *In re* Tam, 808 F.3d 1321, 1339 (Fed. Cir. 2015) (quoting Snyder v. Phelps, 562 U.S. 443, 453 (2011)), *cert. granted sub nom.* Lee v. Tam, 85 U.S.L.W. 3114 (U.S. Sept. 29, 2016) (No. 15-1293).

108. *See* Neil Weinstock Netanel, *Copyright and A Democratic Civil Society*, 106 YALE L.J. 283, 350–51 (1996) ("Even seemingly innocuous cartoon characters, like Bart Simpson and Mickey Mouse, may be used to subvert (or reinforce) prevailing cultural values and assumptions—and with greater social impact than the most carefully considered Habermasian dialogue.").

109. Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEXAS L. REV. 1853, 1866 (1991); *see* Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 253–56 (2014) (describing the effects of particular democratic theories of copyright).

and practices that shape them and their futures.'[110] Regardless of whether those ideas are ultimately accepted or rejected, that participation 'lies at the heart of a democratic civil society.'[111] Trademarks are especially effective at enabling that participation because of the public's familiarity with them.[112] For example, Stuart Helm's use of Kraft's VELVEETA mark allowed him to comically masquerade as a well-known corporate identity and, at the same time, subversively comment on the norms embodied in that identity. Indeed, the references to sexuality and drug use in King VelVeeda's works stands in stark contrast to the image of a 'wholesome, family-oriented product' cultivated by Kraft.[113] It is precisely that contrast—achieved, in part, through the appropriation—that evidences political discourse. The appropriation aided Helm's participation in the cultural dialogue, and while his ideas may not be completely clear, the opportunity to disseminate those ideas into the cultural sphere merits protection.

Correspondingly, whether individuals specifically intend for their works to carry direct commentary or criticism is irrelevant to that participation. Often, the act of appropriation alone conveys meaning. Whether or not Macintosh Plus took the MACINTOSH mark as a source identifier to criticize Apple, the act alone bespeaks Apple's overwhelming significance in society. In the context of the vaporwave music it identifies, the moniker Macintosh Plus just as easily implies admiration regarding the positive benefits engendered by Apple's inventive prowess as it suggests aversion concerning Apple's seemingly insurmountable dominance in the marketplace. What difference does it make if individuals encountering the work are unsure which meaning was intended? Rather, 'First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.'[114]

C. *Framework for Protection*

Having established a basis for authorizing expressive trademark use under the federal dilution statute, a framework is necessary to guide the noncommercial use exclusion's application. Artistic relevance—a concept that is largely applied to claims for infringement rather than dilution—is an attractive candidate.[115] It is the heart of the rule originating from *Rogers v.*

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110. *See* Balkin, *supra* note 46, at 35.

111. Netanel, *supra* note 108, at 348.

112. *See* Balkin, *supra* note 46, at 12. ("Mass media products—popular movies, popular music, trademarks, commercial slogans, and commercial iconography—have become the common reference points of popular culture.").

113. Kraft Foods Holdings, Inc. v. Helm, 205 F. Supp. 2d 942, 949 (N.D. Ill. 2002).

114. Yankee Publ'g Inc. v. News Am. Publ'g Inc. 809 F. Supp. 267, 280 (S.D.N.Y. 1992).

115. *See* Louis Vuitton Malletier S.A. v. Warner Bros. Ent. Inc. 868 F. Supp. 2d 172, 178 (S.D.N.Y. 2012) ("The artistic relevance prong ensures that the defendant intended an artistic—i.e. noncommercial—association with the plaintiff's mark, as opposed to one in which the defendant

Grimaldi, which has been widely adopted.[116] Referred to as the *Rogers* rule, it is relevant for trademark appropriation in the context of expressive works like movies, music, paintings, and video games.

The rule was initially crafted to address First Amendment concerns related to the titles of expressive works. In *Rogers*, the Second Circuit considered trademark appropriation in the context of a movie title. The court agreed that the title of an expressive work can be an 'integral element' of the work's expressive value and that 'the expressive element of titles requires more protection than the labeling of ordinary commercial products.'[117] Moreover, it rejected the argument that First Amendment protection applies to trademark appropriations only when there is no alternative avenue of expression, reasoning that the restriction provided insufficient leeway for the creation of expressive works.[118] Because the Lanham Act should 'apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression, the court concluded that risk of confusion in the context of titles is minimal since consumers 'do not regard titles of artistic works in the same way as the names of ordinary commercial products.'[119] Still, the court acknowledged that appropriations in the titles of works may nonetheless create confusion.[120] In such a case, 'the slight risk that such use might implicitly suggest endorsement or sponsorship to some people is outweighed by the danger of restricting artistic expression.'[121] Therefore, if the appropriation has at least 'some artistic relevance, it is permissible as long as it does nothing to explicitly mislead or add to any potential confusion.[122]

More recently, the rule has been applied beyond titles to trademark appropriations within the work itself. For example, the Sixth Circuit applied the rule to a painting commemorating Tiger Woods's historic victory at the 1997 Masters Tournament in Augusta that included a rendering of Woods and the use of his name.[123] Likewise, the Ninth Circuit held that the rule precluded liability for trademark infringement in a case involving the virtual re-creation of a Los Angeles strip club in the *Grand Theft Auto: San Andreas* video game.[124] Concluding that the threshold amount of artistic relevance to

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intends to associate with the mark to exploit the mark's popularity and good will.").

116. Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989); *see generally* David M. Kelly & Lynn M. Jordan, *Twenty Years of* Rogers v. Grimaldi*: Balancing the Lanham Act with the First Amendment Rights of Creators of Artistic Works*, 99 TRADEMARK REP. 1360 (2009) (discussing the evolution and expansion of the *Rogers* rule).

117. *Rogers*, 875 F.2d at 998.

118. *Id.* at 999.

119. *Id.* at 999–1000.

120. *Id.*

121. *Id.* at 1000.

122. *Id.*

123. ETW Corp. v. Jireh Publ'g, Inc. 332 F.3d 915, 936–37 (6th Cir. 2003).

124. E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1096, 1101 (9th Cir. 2008).

trigger First Amendment protection is quite low, the Ninth Circuit explained that it "merely must be above zero."[125] More interestingly, the court acknowledged that the game was not directly criticizing or commenting on the trademark owner but considered that fact 'hardly dispositive' considering the low threshold of artistic relevance required for First Amendment protection.[126]

Taken together, the concept of artistic relevance and its subsequent evolution offer a convenient framework for authorizing expressive trademark use under the federal dilution statute. Although it has not been applied to infringement or dilution claims where the appropriation functions as a source identifier, the underlying policy considerations from *Rogers* are applicable to expressive trademark use. An artist's name is as much an 'integral element' of the work's expressive content as the title.[127] Indeed, the name of the artist is as closely associated with an individual work as the title of the work. In that way, expressive trademark use adds to the work's expressive value.

Moreover, the observation made by the court in *Rogers* that the public is highly unlikely to be confused in the context of titles remains true regarding expressive trademark use.[128] Consumers are bombarded by trademarks daily, and they understand how marks function in the context of expressive works. It should be immediately apparent to anyone encountering works by Kodak Black, Gucci Mane, or Macintosh Plus that there is no affiliation or sponsorship between them and the owners of the trademarks that they appropriate.

Admittedly, authorizing expressive trademark use would potentially dilute the appropriated marks, but the interest in avoiding dilution alone cannot outweigh the public's interest in expressive freedom. Despite its assertion that the public is unlikely to be confused, the court in *Rogers* explained that the existence of consumer confusion was insufficient to justify application of the Lanham Act in the context of expressive works unless the appropriation does something explicitly misleading.[129] If the interest in avoiding dilution is not as weighty as the interest in avoiding confusion, it would not make sense to preclude liability for infringement where confusion exists but allow liability for dilution.

Finally, there is no reason to limit application of artistic relevance to claims for infringement. In fact, several district courts have relied on the concept to dispose of both infringement and dilution claims.[130] For example,

125. *Id.* at 1100.

126. *Id.*

127. *Rogers*, 875 F.2d at 998.

128. *Id.* at 999.

129. *Id.* at 998–1000.

130. *See* Stewart Surfboards, Inc. v. Disney Book Grp. CV 10-2982 GAF (SSx), 2011 WL 12877019, at *8 (C.D. Cal. May 11, 2011) (citing the noncommercial use exclusion and explaining that "[t]he Ninth Circuit has not applied the *Rogers* test to trademark dilution claims under 15 U.S.C.

in *Roxbury Entertainment v. Penthouse Media Group*,[131] the court analyzed the plaintiff's infringement claim using the *Rogers* Rule, and then disposed the plaintiff's dilution claim in a footnote, reasoning that the noncommercial use exclusion applied.[132] Although these cases involved expressive use, the reasoning applies to appropriations for expressive trademark use if those appropriations constitute expressive speech.

Accordingly, to apply artistic relevance to expressive trademark use, a court would examine the expressive activity identified by the appropriated mark. The inquiry might include reviewing the content of the individual works and any performance or distribution of those works. Mirroring the *Rogers* rule and its evolution, whether the activity is directed at the trademark owner or whether alternative avenues of expression exist would be irrelevant. As long as there is some artistic relevance, the appropriation would be permissible. Applied in this way, the framework would provide robust protection in favor of the public interest in free expression without causing any material harm to the trademark owner's interests.

Conclusion

The social significance of modern trademarks has evolved. Historically commercial tools, marks today are imbued with a wealth of different meanings, and their appropriation for expressive trademark use will become more commonplace. Although these appropriations conflict with trademark owners' exclusive rights, the public has a competing interest in expressive freedom. Trademark law will continue to be tasked with discerning the appropriate balance between the two, and in the context of expressive trademark use, the arguments in this Note resolve that conflict in favor of the public's interest in expressive freedom based on trademarks' increasingly expressive significance. Trademarks have indeed evolved into effective vehicles for participation in the cultural sphere, which shapes political discourse and, ultimately, society as a whole. Favoring expressive freedom in this context largely aligns not only with the Lanham Act's statutory provisions but also with the body of judicial precedent that has recently developed to address the issue. Nevertheless, as the majority in *Tam* acknowledged, courts have been slow to evolve. Moving forward, sensitivity

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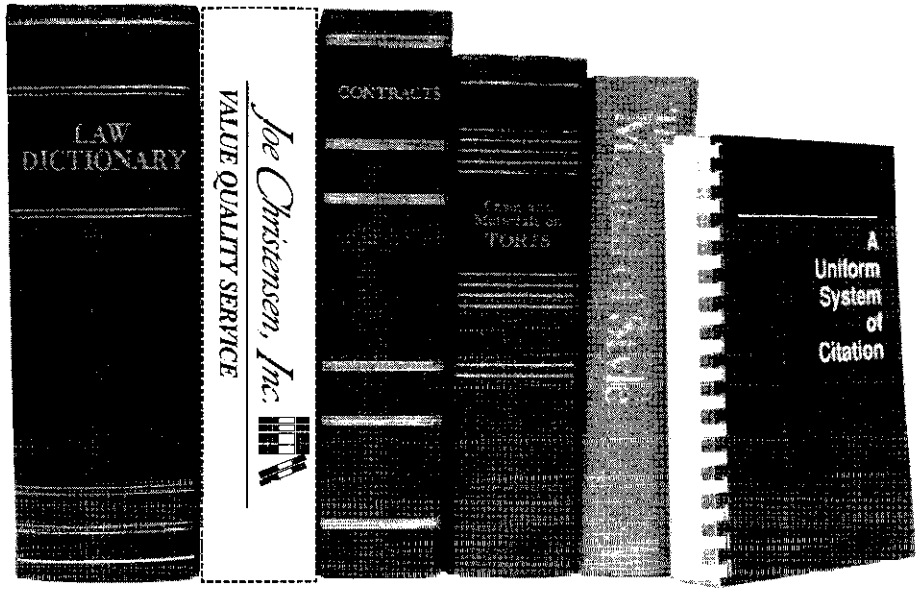
§ 1125(c), but artistic trademark uses are protected from trademark dilution liability for similar reasons"); Kiedis v. Showtime Networks, Inc., No. CV 07-8185 DSF (MANx), 2008 WL 11173143, at *5 (C.D. Cal. Feb. 19, 2008) ("The Court has no doubt that the title 'Californication, as used by Defendants, has sufficient artistic qualities to take it out of the realm of purely commercial speech.").

131. 669 F. Supp. 2d 1170 (C.D. Cal. 2009).

132. *Id.* at 1175 n.8 ("Although the analysis detailed here focuses on the First Amendment defense to Plaintiff's *infringement* claims, the result is the same with respect to Plaintiff's dilution claims, because Defendants' use of 'Route 66' in the movie title falls within the noncommercial use exemption for federal trademark dilution claims.").

to trademark law's complexities is warranted, but so is sensitivity to the expressive value embodied by modern marks, much of which may be subtle or initially difficult to discern. Expressive trademark use provides a valuable opportunity for individual participation. Whether or not it should be considered expressive speech and excluded from dilution liability is a difficult question that deserves careful consideration.

—Giulio Ernesto Yaquinto



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