COLUMBIA LAW REVIEW

ARTICLES

NOTES

ESSAY

VOL. 124 **MAY 2024** **NO. 4**

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ABSTRACTS

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The law does not possess the language that we desperately need to accurately capture the totality of the Palestinian condition. From occupation to apartheid and genocide, the most commonly applied legal concepts rely on abstraction and analogy to reveal particular facets of subordination. This Article introduces Nakba as a legal concept to resolve this tension. Meaning "Catastrophe" in Arabic, the term "al-Nakba" (النكبة) is often used to refer to the ruinous process of establishing the State of Israel in Palestine. But the Nakba has undergone a metamorphosis; it has evolved from a historical calamity into a brutally sophisticated structure of oppression. This ongoing Nakba includes episodes of genocide and variants of apartheid but remains rooted in a historically and analytically distinct foundation, structure, and purpose.

This Article therefore proposes to distinguish apartheid, genocide, and Nakba as different, yet overlapping, modalities of crimes against humanity. It first identifies Zionism as Nakba's ideological counterpart and insists on understanding these concepts as mutually constitutive. Considering the limits of existing legal frameworks, this Article goes on to analyze the legal anatomy of the ongoing Nakba. It positions displacement as the Nakba's foundational violence, fragmentation as its structure, and the denial of self-determination as its purpose. Taken together, these elements give substance to a concept in the making that may prove useful in other contexts as well.

Social data production—accumulating, processing, and using large volumes of data about people—is a unique form of value creation that characterizes the digital economy. Social data production also presents critical challenges for the legal regimes that encounter it. This Article provides scholars and policymakers with the tools to comprehend this new form of value creation through two descriptive contributions. First, it presents a theoretical account of social data, a mode of production that is cultivated and exploited for two distinct (albeit related) forms of value: prediction value and exchange value. Second,

it creates and defends a taxonomy of three "scripts" that companies follow to build up and leverage prediction value and explains their normative and legal ramifications.

Through the examples of tax and data privacy law, the Article applies these descriptive contributions to demonstrate how legal regimes fail to effectively regulate social data value creation. Tax law demonstrates how legal regimes historically tasked with regulating value creation struggle with this new form of value creation. Data privacy law shows how legal regimes that have historically regulated social data struggle with regulating data's role in value creation.

The Article argues that separately analyzing data's prediction value and its exchange value is helpful to understanding the challenges the law faces in governing social data production and its surrounding political economy. This improved understanding will equip legal scholars to better confront the harms of law's failures in the digital economy, reduce legal arbitrage by powerful actors, and facilitate opportunities to maximize the beneficial potential of social data value.

NOTES

Anthropogenic climate change is altering humanity's relationship to the natural world. As extreme weather events become more frequent and biodiversity plummets, humankind has three responsibilities: lower carbon dioxide emissions, preserve what remains of the natural world, and generate new pockets of nature to slowly rebuild what we have destroyed.

Trees—particularly when grouped together in forests—are humanity's allies. Yet while tree planting is an often-hailed solution to climate change, few legal tools exist in the United States to foster afforestation on private land. Current federal programs directed at tree planting focus on lumber production or agriculture, with little attention to small-scale afforestation projects aimed at restoring and recreating the natural world.

This Note joins a growing body of literature suggesting that individual property owners can make a difference in the fight against climate change by supporting natural landscapes. It terms a subset of these efforts "distributed nature" and posits that incentivizing property owners to engage in distributed nature requires legal intervention. It then suggests a legal tool, the afforestation easement, which would provide individual landowners with tax benefits for donating their land for permanent afforestation. Along the way, it reimagines the concept of "conservation" to include setting aside land not only for static preservation but also for dynamic regeneration.

ESSAY

From subtle shifts in the procedural mechanics of self-defense doctrine to substantive expansions of justified lethal force, legislatures are delegating larger amounts of "violence work" to the private sphere. These regulatory innovations layer on top of existing rules that broadly authorize private violence—both defensive and offensive—for self-protection and the ostensible maintenance of law and order. Yet such significant authority for private violence, and the values it projects, can have tragic real-world consequences, especially for marginalized communities and people of color.

We argue that these expansions of private violence tap into an ancient form of social control—outlawry: the removal of the sovereign's protection from a person and the empowerment of private violence in service of law enforcement and punishment. Indeed, we argue that regulatory innovations in the law of self-defense, defense of property, and citizen's arrest form a species of "New Outlawry" that test constitutional boundaries and raise profound questions about law and violence, private and public action.

Simultaneously, we use the New Outlawry as a frame to explore connections between several constitutional doctrines heretofore considered distinct. Whether limits on authorized private violence fall under the state action doctrine, the private nondelegation doctrine, due process or equal protection, or the republican form of government guarantee, experimentation with the New Outlawry provides an opportunity to explore how these different doctrinal categories share common jurisprudential and normative roots in the state's monopoly over legitimate violence.

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COLUMBIA LAW REVIEW

VOL. 124 **MAY 2024** **NO. 4**

COLUMBIA LAW REVIEW

VOL. 124 MAY 2024 NO. 4

ARTICLES

TOWARD NAKBA AS A LEGAL CONCEPT

*Rabea Eghbariah**

The law does not possess the language that we desperately need to accurately capture the totality of the Palestinian condition. From occupation to apartheid and genocide, the most commonly applied legal concepts rely on abstraction and analogy to reveal particular facets of subordination. This Article introduces Nakba as a legal concept to resolve this tension. Meaning "Catastrophe" in Arabic, the term "al-Nakba" (النكبة) is often used to refer to the ruinous process of establishing the State of Israel in Palestine. But the Nakba has undergone a metamorphosis; it has evolved from a historical calamity into a brutally sophisticated structure of oppression. This ongoing Nakba includes episodes of genocide and variants of apartheid but remains rooted in a historically and analytically distinct foundation, structure, and purpose.

This Article therefore proposes to distinguish apartheid, genocide, and Nakba as different, yet overlapping, modalities of crimes against humanity. It first identifies Zionism as Nakba's ideological counterpart and insists on understanding these concepts as mutually constitutive. Considering the limits of existing legal frameworks, this Article goes on to analyze the legal anatomy of the ongoing Nakba. It positions displacement as the Nakba's foundational violence, fragmentation as its structure, and the denial of self-determination as its purpose. Taken together, these elements give substance to a concept in the making that may prove useful in other contexts as well.

* S.J.D. Candidate, Harvard Law School. This Article is dedicated to the victims and survivors of the ongoing Nakba. I am indebted to the community that made this Article possible, one that stretches between and beyond rivers and seas.

"*This is a unique colonialism that we've been subjected to where they have no use for us. The best Palestinian for them is either dead or gone. It's not that they want to exploit us, or that they need to keep us there in the way of Algeria or South Africa as a subclass.*"

— Edward Said.[1]

INTRODUCTION

Legal theory still lacks an adequate analytical framework to describe the reality of domination and violence in Palestine. The law does not possess the language we desperately need to accurately capture the totality of Palestinian subjugation. Instead, we resort to a dictionary of misnaming, one that distorts our understanding of the problem, obfuscates its inception, and misplaces its spatial and temporal coordinates. From occupation to apartheid and genocide, the most commonly applied legal concepts rely on abstraction and analogy, revealing particular facets of subordination. While these concepts are certainly helpful, they risk distorting the variegated structure behind the Palestinian reality, and their invocation has often muted Palestinian articulations of their own experience.

There is a dire need for a new approach. This Article introduces the concept of Nakba to legal discourse to encapsulate the ongoing structure of subjugation in Palestine and derive a legal formulation of

1. Edward W. Said, The Pen and the Sword 54 (1994).

the Palestinian condition. Meaning "catastrophe" in Arabic, the term "al-Nakba" (النكبة) is often used—as a proper noun, with a definite article—to refer to the ruinous establishment of Israel in Palestine,[2] a chronicle of partition, conquest, and ethnic cleansing that forcibly displaced more than 750,000 Palestinians from their ancestral homes and depopulated hundreds of Palestinian villages between late 1947 and early 1949.[3] But the Palestinian Catastrophe—the Nakba—remains an ongoing and unrelenting ordeal, one that has never been resolved but rather managed.

The Nakba has thus undergone a metamorphosis. The mid-twentieth century mass expulsion of Palestinians from their homes by Zionist paramilitary forces, and then by the army of the newly founded Israeli state, transformed the Nakba into a tenacious system of Israeli domination; a "Nakba regime" grounded in the destruction of Palestinian society and the continuous denial of its right to self-determination. The spectacular violence of conquest, dispossession, and displacement evolved into a brutally sophisticated regime of oppression. Across Israel, the West Bank, the Gaza Strip, Jerusalem, and refugee camps, Palestinians now occupy distinctive and discounted coordinates in a convoluted matrix of law, whereas Jewish Israelis maintain a singular and superior status, regardless of territorial divisions.

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2. See Lila Abu-Lughod & Ahmad H. Sa'di, Introduction: The Claims of Memory, *in* Nakba: Palestine, 1948, and the Claims of Memory 1, 3 (Ahmad H. Sa'di & Lila Abu-Lughod eds., 2007) [hereinafter Nakba: Palestine]; About the Nakba, United Nations: The Question of Palestine, https://www.un.org/unispal/about-the-nakba/ [https://perma.cc/4PGF-NLYZ] (last visited Mar. 30, 2024).

3. See Ilan Pappé, The 1948 Ethnic Cleansing of Palestine, J. Palestine Stud., Autumn 2006, at 6, 7. As early as September 1949, the United Nations Conciliation Commission for Palestine reported over 710,000 Palestinian refugees, excluding thousands of internally displaced people. See Conciliation Comm'n for Palestine, Gen. Progress Rep. & Supplementary Rep. on Its Fifth Session, Supp. No. 18 at app. 4, ¶ 15, U.N. Doc. A/1367/Rev.1 (1951) ("The estimate of the statistical expert, which the Committee believes to be as accurate as circumstances permit, indicates that the refugees from Israel-controlled territory amount to approximately 711,000."); see also Benny Morris, The Birth of the Palestinian Refugee Problem Revisited 1 (2004) [hereinafter Morris, Palestinian Refugee Problem] (noting that from November 1947 to October 1950 "an estimated 600,000 to 760,000 Palestinian Arabs departed their homes, moving to other parts of Palestine (i.e., the West Bank and Gaza Strip) or abroad, primarily to Jordan, Syria and Lebanon").

Historian Walid Khalidi's seminal book *All That Remains* provided the first comprehensive documentation of 418 villages that were depopulated and partly or largely destroyed in 1948 and its aftermath. All That Remains (Walid Khalidi ed., 1992) [hereinafter Khalidi, All That Remains]. Khalidi's list of villages excludes, for example, the localities of Bedouin communities in the Naqab; Khalidi estimates that between 70,000 and 100,000 Bedouin refugees were uprooted. Id. at 582. Salman Abu-Sitta's compendium *The Atlas of Palestine* identified over one hundred additional villages, bringing unparalleled detail to the widely cited figure of about 530 villages. See Salman H. Abu-Sitta, The Atlas of Palestine, 1917–1966, at 106–19 (2010). For a brief etymology of the concept of Nakba and its usages, see infra section III.A.

Palestinians, meanwhile, have never recovered[4] from the material and psychic reality of the 1948 Nakba: For every household there is a Nakba story, for each refugee a stolen home.[5] The conditions that the Nakba

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4. The understanding of the Nakba as an ongoing condition precludes an entirely post-hoc analysis. Palestinian and other mental health experts have long criticized existing frameworks to assess the exposure to trauma in a prolonged reality of political violence and domination. See, e.g., Olivia Goldhill, Palestine's Head of Mental Health Services Says PTSD Is a Western Concept, Quartz (Jan. 13, 2019), https://qz.com/1521806/palestines-head-of-mental-health-services-says-ptsd-is-a-western-concept [https://perma.cc/6U22-Q8AN] ("What is sick, the context or the person? In Palestine, we see many people whose symptoms—unusual emotional reaction or a behaviors—are a normal reaction to a pathogenic context . . . . There is no 'post' because the trauma is repetitive and ongoing and continuous." (internal quotation marks omitted) (quoting Dr. Samah Jabr, Chair of the Mental Health Unit at the Palestinian Ministry of Health)); see also Brian K. Barber, Clea A. McNeely, Eyad El Sarraj, Mahmoud Daher, Rita Giacaman, Cairo Arafat, William Barnes, Mohammed Abu Mallouh, Mental Suffering in Protracted Political Conflict: Feeling Broken or Destroyed, PLoS ONE, May 27, 2016, at 6 ("The construct for broken/destroyed was identified upon close examination of the sub-codes for the political and health domains.").

5. Oral history plays a crucial role in understanding the full scope of the Nakba. Hundreds of Nakba testimonies are accessible online through the databases of the Palestinian Oral History Archive at the American University of Beirut and the Zochrot Collection of Nakba Testimonies. See Palestinian Oral History Archive, Am. Univ. Beirut, https://libraries.aub.edu.lb/poha/ [https://perma.cc/ELZ7-AWWM] (last visited Mar. 30, 2024); Testimonies, Zochrot, https://www.zochrot.org/testimonies/all/en?Testimonies_ [https://perma.cc/S8CG-TNWB] (last visited Mar. 30, 2024). Some of these testimonies have been transcribed and translated into English through the Nakba Archive. See About, Nakba Archive, https://www.nakba-archive.org/ [https://perma.cc/CQB7-HA55] (last visited Apr. 12, 2024).

Palestinians have also written important personal accounts of the Nakba. E.g., Fawaz Turki, The Disinherited: Journal of a Palestinian Exile (1972); Sami Hadawi, Catastrophe Overtakes the Palestinians: Memoirs, Part II, Jerusalem Q., Summer 2014, at 100; Adel Manna, From Seferberlik to the Nakba: A Personal Account of the Life of Zahra Al-Ja'uniyya, Jerusalem Q., Spring 2007, at 59. Many of these accounts have also been published in English in the *Journal of Palestine Studies*. See, e.g., Muhammad Hallaj, Recollections of the Nakba Through a Teenager's Eyes, J. Palestine Stud., Autumn 2008, at 66; Ghada Karmi, The 1948 Exodus: A Family Story, J. Palestine Stud., Winter 1994, at 31; Mamdouh Nofal, Fawaz Turki, Haidar Abdel Shafi, Inea Bushnaq, Yezid Sayigh, Shafiq Al-Hout, Salma Khadra Jayyusi & Musa Budeiri, Reflections on Al-Nakba, J. Palestine Stud., Autumn 1998, at 5; Elias Srouji, The Last Days of "Free Galilee": Memories of 1948, J. Palestine Stud., Fall 2003, at 55; Um Jabr Wishah, Palestinian Voices: The 1948 War and Its Aftermath, J. Palestine Stud., Summer 2006, at 54.

Journalist Rosemary Sayigh's work *The Palestinians* produced an early and pioneering account of the Nakba based on extensive interviews with Palestinian refugees. Rosemary Sayigh, The Palestinians (1979).

For an account of my grandmother's Nakba testimony, see Rabea Eghbariah, The Nakba of Nazmiya Al-Kilani, Jadaliyya (May 15, 2023), https://www.jadaliyya.com/Details/45041 [https://perma.cc/UN4X-V8RR].

Oral history is an especially important source given the Israeli government's history of manipulating Israeli archives as well as obliterating and looting Palestinian archives. See, e.g., Nahla Abdo & Nur Masalha, Introduction to An Oral History of the Palestinian Nakba 1 (Nahla Abdo & Nur Masalha eds., 2019) (using "oral history, personal memories, narratives and interviews to study, analyse and represent the Palestinian Nakba/genocide"); Nur Masalha, The Palestine Nakba: Decolonising History, Narrating the Subaltern,

created have become an infernal feature of Palestinian existence that extends from the twentieth into the twenty-first century. Put simply, an ongoing Nakba.[6]

For those expelled, refugeehood has become a form of permanent exile;[7] three generations after the 1948 Nakba, millions are still being born

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Reclaiming Memory 137–39, 143–47 (2012) (describing instances in which Israeli officials have "looted or destroyed" Palestinian archives and artifacts); Seth Anziska, The Erasure of the Nakba in Israel's Archives, J. Palestine Stud., Autumn 2019, at 64, 66–68 (describing the Israeli government's efforts to conceal and remove archival documents in order to reshape "how the past is narrated and who is believed"); Ariella Azoulay, Photographic Conditions: Looting, Archives, and the Figure of the "Infiltrator", Jerusalem Q., Winter 2015, at 6, 10 ("Looting was not a single past instance; the looting of Palestinian archives has been an ongoing procedure . . . ."); Hagar Shezaf, Burying the Nakba: How Israel Systematically Hides Evidence of 1948 Expulsion of Arabs, Haaretz (July 5, 2019), https://www.haaretz.com/israel-news/2019-07-05/ty-article-magazine/.premium/how-israel-systematically-hides-evidence-of-1948-expulsion-of-arabs/0000017f-f303-d487-abff-f3ff69de0000 (on file with the *Columbia Law Review*) ("Since the start of the last decade, [Israeli] Defense Ministry teams have been scouring Israel's archives and removing historic documents. . . . Hundreds of documents have been concealed as part of a systematic effort to hide evidence of the Nakba.").

6. I first explored the ongoing Nakba as a legal concept in a piece that the *Harvard Law Review* solicited, edited, approved, and then nixed. Natasha Lennard, *Harvard Law Review* Editors Vote to Kill Article About Genocide in Gaza, The Intercept (Nov. 21, 2023), https://theintercept.com/2023/11/21/harvard-law-review-gaza-israel/ [https://perma.cc/NSD5-HEL5]. *The Nation* published a full version of the piece prefaced by a note explaining the "'unprecedented decision' by the leadership of the *Harvard Law Review* to prevent the piece's publication." See Rabea Eghbariah, The *Harvard Law Review* Refused to Run This Piece About Genocide in Gaza, The Nation (Nov. 21, 2023), https://www.thenation.com/article/archive/harvard-law-review-gaza-israel-genocide/ [https://perma.cc/8Q82-JGXR].

The decision spurred wide public condemnation, including the public dissent of over twenty-five editors. Letter from Int'l Solidarity Team, Academia for Equal., to Bd. of Eds., Harv. L. Rev., Your Decision Regarding Rabea Eghbariah's *HLR Online* Article—Upholding Freedom of Speech Requires Courage (Dec. 11, 2023), https://663a4684-b06c-4c86-9e17-b8de8637525a.usrfiles.com/ugd/663a46_72d448d12f57411e8e0a6ad537c81569.pdf [https://perma.cc/U8SU-8BPM]; Alonso Gurmendi, Open Statement by University Law Teachers on Academic Freedom, OpinioJuris (Dec. 8, 2023), https://opiniojuris.org/2023/12/08/open-statement-by-university-law-teachers-on-academic-freedom/ [https://perma.cc/X28W-3XQJ]; Hina Uddin, Opinion, The *Harvard Law Review*'s Palestine Exception, The Crimson (Dec. 1, 2023), https://www.thecrimson.com/article/2023/12/1/uddin-harvard-palestine-exception/ [https://perma.cc/3VNG-EGUE]. The *NYU Review of Law and Social Change* republished the piece and included a statement from its board noting that "we cannot allow those who seek to silence Palestinians to obfuscate the scope and genocidal nature of this tragedy." Rabea Eghbariah, The Ongoing Nakba: Toward a Legal Framework for Palestine, 48 N.Y.U. Rev. L. & Soc. Change: Harbinger 94 (2023), https://socialchangenyu.com/harbinger/toward-a-legal-framework-for-palestine/ [https://perma.cc/Y47H-3RDK] [hereinafter Eghbariah, The Ongoing Nakba].

I am thankful to the student editors with the *Columbia Law Review* for pursuing this Article and demonstrating an extraordinarily principled, professional, and unwavering commitment to (academic) freedom in a climate of intense intimidation and unparalleled repression.

7. The concept of exile is a central feature of the Palestinian experience. See Edward Said, Reflections on Exile and Other Essays 173 (2002) ("Exile is strangely compelling to think about but terrible to experience. It is the unhealable rift forced between a human

into refugee status and languishing in refugee camps.[8] For those who managed to remain within the 1949 armistice territories delineating Israel's unofficial borders, nineteen years of military rule followed,[9] marking the beginning of institutional subjugation and second-class citizenship.[10] For those who lived in or were displaced to the West Bank,

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being and a native place, between the self and its true home: its essential sadness can never be surmounted.").

8. Palestinian refugees inhabit a unique legal status in the international legal order as the 1951 Refugee Convention effectively excluded them from its purview. See Susan M. Akram, Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution, J. Palestine Stud., Spring 2002, at 36, 38–40. The international community has since managed the precarious situation of Palestinian refugees through the combination of the United Nations Conciliation Commission for Palestine (UNCCP) and the United Nations Relief and Works Agency for Palestine Refugees (UNRWA). Id. For a review of the legal status of Palestinian refugees, see generally Francesca P. Albanese & Lex Takkenberg, Palestinian Refugees in International Law (2d ed. 2020); Akram, supra. According to UNRWA, "Nearly one-third of the registered Palestine refugees, more than 1.5 million individuals, live in 58 recognized Palestine refugee camps in Jordan, Lebanon, the Syrian Arab Republic, the Gaza Strip and the West Bank, including East Jerusalem." Palestine Refugees, UN Relief & Works Agency for Palestine Refugees Near E., https://www.unrwa.org/palestine-refugees [https://perma.cc/96EC-MF63] (last visited Apr. 12, 2024). This number does not reflect the nearly 1.9 million Palestinians displaced during the unfolding genocide in the Gaza strip. Hostilities in the Gaza Strip and Israel | Flash Update #68, U.N. Off. for Coordination Humanitarian Affs. (Dec. 13, 2023), https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-68 [https://perma.cc/BC39-247M] ("As of 12 December, according to UNRWA, almost 1.9 million people in Gaza, or nearly 85 per cent of the population, are estimated to be internally displaced, many of them have been displaced multiple times.").

9. Shira Robinson, Citizen Strangers 38–47 (2013) ("By far the most important step that Zionist leaders took to ensure absolute Jewish rule over the Palestinians who remained in Israel was to entrench rather than abolish the military regime they had established after the formal end of the war."); see also Sabri Jiryis, Inst. for Palestine Stud., The Arabs in Israel, 1948–1966, at 119–74 (Meric Dobson trans., 1969) (describing the conditions faced by Palestinians in Israel prior to 1967); Yair Bäuml, Israel's Military Rule Over Its Palestinian Citizens (1948–1968), *in* Israel and Its Palestinian Citizens 103, 108–12 (Nadim M. Rouhana ed., 2017) (describing the creation and operation of the post-Nakba military government); Mansour Nasasra, Two Decades of Bedouin Resistance and Survival Under Israeli Military Rule, 1948–1967, 56 Middle E. Stud. 64, 64–66 (2020) (recounting the operation of Israeli military rule in the Naqab). For further insightful studies of the military rule imposed on Palestinian citizens, see generally Al-Aqlīyah Al-'Arabīyah Al-Filasṭīnīyah fī Isrā'īl: Fī Ẓili Al-Ḥukm Al-'Askarī Wa'irthih [The Arab Palestinian Minority in Israel in the Shadow of the Military Rule and Its Legacy] (Mustafa Kabaha ed., 2014); Hillel Cohen, Good Arabs: The Israeli Security Agencies and the Israeli Arabs, 1948–1967 (2010).

10. See Robinson, supra note 9, at 188–93 (noting the ways in which Palestinians were denied meaningful citizenship under military rule). For additional scholarship on the legal status of Palestinian citizens of Israel, see Mazen Masri, The Dynamics of Exclusionary Constitutionalism 4 (2017) (discussing the tensions and challenges of Israel's self-definition as a "Jewish and democratic" state, particularly in a state with a large indigenous, non-Jewish minority population); Hassan Jabareen, Hobbesian Citizenship: How the Palestinians Became a Minority in Israel, *in* Multiculturalism and Minority Rights in the Arab World 189, 193 (Will Kymlicka & Eva Pföstl eds., 2014) [hereinafter Jabareen, Hobbesian Citizenship] (discussing the creation of "Hobbesian citizenship" for Palestinians in 1949 and 1950, which distinguished Palestinians as "the conquered, occupied, and defeated community"); Nimer

the Gaza Strip, Jerusalem, or the Syrian Golan Heights, the extension of the Israeli occupation in 1967 has brought about further displacement[11] and decades of military domination, siege, and annexation, imposing divergent realities on these locales.[12] Israeli policies and practices of dispossession and displacement have continued to crisscross these legally fragmented geographies to grant Jewish Israelis exclusive property rights throughout the entirety of the land.[13]

Sultany, The Legal Structure of Subordination: The Palestinian Minority and Israeli Law, *in* Israel and Its Palestinian Citizens, supra note 9, at 191, 191 (describing how Israeli law "generally advanced, justified, and perpetuated a separate and inferior status for the Palestinian citizens in Israel").

In 2018, Israel added a constitutional layer to the inferiority of Palestinian citizens by enacting a Basic Law known as the Jewish Nation-State Law. See Hassan Jabareen & Suhad Bishara, The Jewish Nation-State Law: Antecedents and Constitutional Implications, J. Palestine Stud., Winter 2019, at 43, 50.

11. As Israel occupied the West Bank, it displaced some 200,000 Palestinians to Jordan. See Atwa Jaber, No Bridge Will Take You Home: The Jordan Valley Exodus Remembered Through the UNRWA Archives, Jerusalem Q., Winter 2023, at 10, 20. An additional 130,000 Syrians and Palestinians have been forcibly displaced from the occupied Golan Heights, where Israel depopulated over 130 villages. See Tayseer Mara'i & Usama R. Halabi, Life Under Occupation in the Golan Heights, J. Palestine Stud., Autumn 1992, at 78–79.

12. While international law still clusters the West Bank, the Gaza Strip, and East Jerusalem under the single label of "Occupied Palestinian Territories," the indefinite reality of occupation has manifested through different Israeli legal designations and governance structures in each of these locales. Although formal annexation took place only in 1980, Israel extended its law to East Jerusalem immediately after occupying that area in 1967 and designated the Palestinian Jerusalemite population as residents but not citizens, a disenfranchised, precarious, and revocable legal status. Compare Law and Administration Ordinance (Amendment No. 11) Law, 5727–1967, LSI 21 75 (1966–67) (Isr.) (allowing, in 1967, the Israeli government to extend Israeli law to any area by order), and Municipalities Ordinance (Amendment No. 6) Law, 5727–1967, LSI 21 75 (1966–67) (Isr.) (allowing, in 1967, the Israeli government to extend the boundaries of any Israeli municipality into areas where Israeli law had been extended), with Basic Law: Jerusalem, Capital of Israel, 5740–1980, LSI 34 209 (1979–80), as amended (Isr.) (designating "Jerusalem, complete and united" as the capital of Israel).

In contrast, the Palestinian populations in the West Bank and Gaza have remained subjects of Israeli control but neither citizens nor residents of the Israeli state. Freedom in the World 2024: West Bank, Freedom House, https://freedomhouse.org/country/west-bank/freedom-world/2024 [https://perma.cc/2L83-G2X5] (last visited Mar. 30, 2024) (describing the administrative status of Palestinian people living in the West Bank and Gaza). The emergence of the Palestinian Authority and the fragmentation of the West Bank into areas A, B, and C has further complicated this legal structure. See id. The chasm between the legal status of Palestinians in Gaza and Palestinians in the West Bank was further cemented after the Israeli blockade on the Gaza Strip in 2007, which imposed severely brutal restrictions on movement of both people and goods. Freedom in the World 2024: Gaza Strip, Freedom House, https://freedomhouse.org/country/gaza-strip/freedom-world/2024 [https://perma.cc/SUF6-CS53] (last visited Mar. 30, 2024).

For a visualization of these fragmentary policies, see Conquer and Divide, B'Tselem, https://conquer-and-divide.btselem.org/map-en.html [https://perma.cc/KJ68-ZJQW] (last visited Apr. 11, 2024). For more on the structure of fragmentation, see infra section III.B.2.

13. Rabea Eghbariah, Jewishness as Property Under Israeli Law, Law & Pol. Econ. Project Blog (July 9, 2021), https://lpeproject.org/blog/jewishness-as-property-under-israeli-law/ [https://perma.cc/KZY4-Y4KE].

Institutionalizing the reality of the Nakba has therefore not only birthed a structure of legal fragmentation but also has instilled one of Jewish supremacy, under which Jewishness has served as the ultimate key to citizenship, rights, and resources.[14] The compounded structure of legal fragmentation includes at least five legal statuses for Palestinians—citizens of Israel, residents of Jerusalem, residents of the West Bank, residents of Gaza, or refugees—that set their respective sociolegal positionalities in the system. Each of these "fragments" is subject to a distinctive dialectic of violence and relative legal privilege in which power dynamics and control mechanisms operate uniquely and shape the experiences of those within its sphere. The Israeli regime has thus crafted an institutional design that is premised on different and mutating laboratories of oppression,[15] together forming a totality of evolving domination best identified through the concept of Nakba and its structure of fragmentation.[16]

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14. Id.; see also B'Tselem, A Regime of Jewish Supremacy From the Jordan River to the Mediterranean Sea: This Is Apartheid 2 (2021), https://www.btselem.org/sites/default/files/publications/202101_this_is_apartheid_eng.pdf [https://perma.cc/2GPN-UJMY] ("In the entire area between the Mediterranean Sea and the Jordan River, the Israeli regime implements laws, practices and state violence designed to cement the supremacy of one group – Jews – over another – Palestinians."); Jabareen & Bishara, supra note 10, at 52 (arguing that the enactment of the 2018 Jewish Nation State Law has contributed to "the consolidation of Jewish ethnic supremacy and domination").

15. The concept "laboratories of oppression" echoes the concept of "laboratories of democracy" that Justice Louis Brandeis originated in *New State Ice Co. v. Liebmann*. See 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Brandeis's Zionist legacy and his contribution to the colonization of Palestine remains unrecognized at best, or celebrated at worst, in American legal education. For more on Brandeis's Zionism, see generally Louis Brandeis, Brandeis on Zionism: A Collection of Addresses and Statements (1942).

I first thought of the concept of "laboratories of oppression" in conversation with Alice Speri from *The Intercept*. See Alice Speri, Labs of Oppression, The Intercept (Apr. 1, 2023), https://theintercept.com/2023/04/01/israel-palestine-apartheid-settlements/ [https://perma.cc/2AY2-P5TR]. The concept of "laboratories of oppression" invites further scrutiny into the functions and profits that each laboratory generates. See Antony Loewenstein, The Palestine Laboratory: How Israel Exports the Technology of Occupation Around the World 15 (2023) (examining "[h]ow Israel has exported the occupation and why it's such an attractive model" and arguing that Palestine has served as a "laboratory for methods of control and separation of populations"); Darryl Li, The Gaza Strip as Laboratory: Notes in the Wake of Disengagement, J. Palestine Stud., Winter 2006, at 38, 38–39 (arguing that Gaza functions as an experimental zone for the Israeli government to test means of control to later be used in the West Bank).

16. The emergence of a regime premised on legal fragmentation is the result of both classic divide-and-conquer tactics and the lack of an overall Israeli "solution" or "exit strategy" for the Palestinian population that remained in Palestine and came under Israeli rule. The intense contradictions that underpin the Israeli desire to acquire the land but not its Palestinian population have increasingly produced fragmentation as a structure of governance. Israeli Prime Minister Benjamin Netanyahu encapsulated this logic by asserting in 2019 that "whoever wants to prevent a Palestinian state must support Hamas and the transfer of money to Hamas . . . . This is part of our strategy—to divide and distinguish the Palestinians in Gaza from the Palestinians in Judea and Samaria [i.e., the occupied West Bank]." Shaul Arieli, Opinion, HaFalstinim l'o Yevatru al A'za t [The Palestinians Will Not Give Up Gaza], Haaretz (Aug. 25, 2022), https://www.haaretz.co.il/opinions/2022-08-

From 1948 until the present, the evolution of the Nakba into ongoing Nakba has resembled the Palestinian present continuous,[17] an ongoing reality characterized by displacement and replacement.[18] And yet, the imbrication of the concept of Nakba in law remains unrecognized and often misnamed. This Article brings Nakba to the center of legal analysis, considering it as an independent legal concept encapsulating a distinctive category of violence committed against a group.[19] To understand the Palestinian condition in law, this Article proposes an approach that considers Nakba as a legal concept capable of encompassing a phenomenon that has included genocide, apartheid, and military occupation but remains rooted in historically and analytically distinct foundation, structure, and purpose.[20]

To advance this overarching argument, this Article proceeds as follows. Part I traces the origins of Nakba to Zionism—a European political ideology that pursued the creation of a Jewish state in Palestine—and argues that Zionism and Nakba are mutually constitutive. The emergence of modern Zionism has not only displaced Palestinians from Palestine but also replaced Europe's "Jewish Question" with the ostensibly non-European "Question of Palestine." Colonization and expulsion constituted an overarching logic of Zionism, culminating in the reality of

25/ty-article-opinion/.premium/00000182-d4df-d9c0-a3d3-fcdff75e0000 (on file with the *Columbia Law Review*) (author's translation). The evolution of this regime has not been comprehensively examined in legal literature, although the concept of fragmentation as domination is often invoked as part of the apartheid analysis. For further discussion on fragmentation, see infra section III.B.2.

17. Much like the present continuous verb tense, it is defined by its ongoing and present nature.

18. For imagery of pre-1948 Nakba Palestine, see generally Teresa Aranguren & Sandra Barrilaro, Against Erasure: A Photographic Memory of Palestine Before the Nakba (Haymarket Books 2024) (Róisín Davis & Hugo Rayón Aranguren trans., 2016) (documenting, through photographs, pre-1948 Palestinian life); Ariella Azoulay, From Palestine to Israel: A Photographic Record of Destruction and State Formation, 1947–1950 (2011) ("Bringing these photographs together allowed me to create a new archive: a civil archive which makes it possible to view the catastrophe they recorded."); Walid Khalidi, Before Their Diaspora: A Photographic History of the Palestinians, 1876–1948 (2d ed. 1991) [hereinafter Khalidi, Before Their Diaspora] ("[A] retrospective glance can also serve a constructive purpose. That is the intent of this book, which it is hoped will shed some light on the Palestinians as a people in Palestine before their diaspora, and on the genesis and evolution of the Palestine problem during its formative phase.").

19. This Article uses the term "Nakba" in three distinct ways: "1948 Nakba" to refer to the foundational event(s) of the Palestinian Nakba; "ongoing Nakba" to refer to the continuous Palestinian reality since 1948; and "Nakba," without a definite article, to refer to the concept of Nakba more broadly, including in law. Since this Article focuses on the concept of Nakba as applied to Palestine, it capitalizes the term in all instances.

20. The terms "ethnic cleansing" and "settler colonialism" are two additional frameworks often invoked to describe the reality of Palestinians. The exclusion of these terms from Part II stems from the fact that neither ethnic cleansing nor settler colonialism are doctrinally consolidated or codified legal frameworks. The discussion in the introduction to Part II and Part III expands on the placement of settler colonialism and ethnic cleansing in the context of the Nakba.

Nakba. And yet, the very occurrence of the foundational violence of the Nakba is widely denied, dismissed, downplayed, or excused to salvage the ideology of Zionism.[21] To recognize the legal concept of Nakba, this Article first identifies Zionism as its ideological counterpart and insists on understanding Zionism in terms of the Nakba it produced.

Part II considers three overlapping legal frameworks that have been widely applied to Palestine—occupation, apartheid, and genocide—and shows that these frameworks, while useful, remain incapable of capturing the totality of the Palestinian condition.[22] The Nakba has encompassed

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21. For examples of such scholarship, see infra notes 35, 36, 39, 40, 119, 148, and 149. In 2011, the Israeli Parliament passed a law known as the "Nakba Law," which authorized defunding any public institution—including Palestinian cultural or educational institutions in Israel—that engages in activities commemorating the Nakba. The Israeli Supreme Court has dismissed a challenge to the Nakba Law, citing the ripeness doctrine and dismissing the chilling effect the law creates. HCJ 3429/11 Alumni Ass'n of the Arab Orthodox Sch. in Haifa v. Minister of Fin., 2012 Isr. Law Rep. 55; see also Adalah and ACRI: Israeli High Court Ignored the Chilling Effect Already Caused by the "Nakba Law," Adalah (Jan. 5, 2012), https://www.adalah.org/en/content/view/7188 [https://perma.cc/7KMV-BJPP] (describing how the court's ruling encourages discrimination against Arabs in Israel); Shira Kadari-Ovadia, Israeli University Cancels Event Marking Nakba Day, Citing Violation of Law, Haaretz (May 16, 2019), https://www.haaretz.com/israel-news/2019-05-16/ty-article/.premium/in-first-israeli-university-bans-political-event-citing-violation-of-nakba-law/ (on file with the *Columbia Law Review*) (describing how the Nakba Law allows Israel to limit funds to institutions that treat Independence Day as a day of mourning for the hundreds of thousands of Arabs displaced during the 1948 war); Shira Kadari-Ovadia, Israel's Education Ministry Includes Anti-Nakba Clause in Tender, Haaretz (Apr. 14, 2022), https://www.haaretz.com/israel-news/2022-04-14/ty-article/.premium/israels-education-ministry-includes-anti-nakba-clause-in-tender/00000180-5ba8-db1e-a1d4-dfe905900000 (on file with the *Columbia Law Review*) (describing the Education Ministry's decision to conflate the day of mourning in reference to Nakba day with Holocaust denial); Sawsan Zaher, The Prohibition on Teaching the Nakba in the Arab Education System in Israel, Adalah's Newsl. (Adalah, Haifa, Isr.), Sept. 2010, https://www.adalah.org/uploads/oldfiles/newsletter/eng/sep10/docs/Sawsan%20Nakba%20English%20final.pdf [https://perma.cc/Q25N-YM9D] (describing the vast repercussions of the Knesset Members' decision to prohibit any reference to the Nakba as a day of mourning). For scholarship that further explores this phenomenon of Nakba denial, see generally Ronit Lentin, Co-Memory and Melancholia: Israelis Memorialising the Palestinian Nakba (2010); Saree Makdisi, Tolerance Is a Wasteland: Palestine and the Culture of Denial (2022); Nur Masalha, The Politics of Denial: Israel and the Palestinian Refugee Problem (2003); Ilan Pappe, Nakba Denial and the "Peace Process," *in* The Ethnic Cleansing of Palestine (2006) [hereinafter Pappe, Ethnic Cleansing]; Maha Nassar, Exodus, Nakba Denialism, and the Mobilization of Anti-Arab Racism, 49 Critical Socio. 1037 (2023); Uri Ram, Ways of Forgetting: Israel and the Obliterated Memory of the Palestinian Nakba, 22 J. Hist. Socio. 366 (2009).

22. While this Article argues for the recognition of the Nakba as such, it simultaneously recognizes the value and importance of analogies. The tensions between the universal and the particular is a theme that accompanies this Article and invites further reflections. This Article understands the particularity of the Nakba as reinforcing, rather than undermining, universal lessons. For the importance of analogy in the case of Palestine, see Masha Gessen, In the Shadow of the Holocaust, New Yorker (Dec. 9, 2023), https://www.newyorker.com/news/the-weekend-essay/in-the-shadow-of-the-holocaust (on file with the *Columbia Law Review*) (arguing that "[f]or the last seventeen years, Gaza has been a hyperdensely populated, impoverished, walled-in compound where only a small fraction of the

different legal concepts in a way that makes it fulfill these legal definitions at various junctures, all the while transcending their limits. One key to resolving this tension lies in the recognition of Nakba as a distinct legal concept.

Part III thus moves forward to articulate the form and substance of Nakba as a legal concept. While the frameworks of apartheid and genocide loom over discussions of the Nakba, this Article proposes to distinguish between these three concepts as different, yet overlapping, modalities of crimes against humanity. Deriving a legal understanding of Nakba from its juxtaposition with the most recognizable crimes against groups—genocide and apartheid—allows for the synthesis of existing paradigms into a new concept. Part III thus poses three questions: What is the foundational violence of Nakba? What is the structure of Nakba? And what purpose does Nakba serve? In a nutshell, this Article positions displacement as Nakba's foundational violence, fragmentation as its structure, and the denial of self-determination as its purpose. Taken together, these components provide an initial legal anatomy of the ongoing Nakba and give substance to a concept in the making.

The conclusion therefore calls for articulating a vision that undoes the Nakba and remedies its persisting abuses. Undoing the Nakba is the only way to transition to a more just and equitable legal and political system that will safeguard the well-being of all people in the territory between the Jordan River and the Mediterranean Sea. This Article suggests five main components as an initial framework toward that end: recognition, return, reparation, redistribution, and reconstitution. Taken together, these components ultimately mean dismantling the regime of domination and reconstructing an egalitarian political framework (or several such frameworks) based on a recognition of the Nakba's historical and ongoing injustice; the implementation of the right of return; and a combination of reparations and redistribution as a material remedy to the persisting harms of the Nakba.

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population had the right to leave for even a short amount of time—in other words, a ghetto"); Eric Levitz, Masha Gessen on Israel, Gaza, and Holocaust Analogies, N.Y. Mag. (Dec. 23, 2023), https://nymag.com/intelligencer/2023/12/masha-gessen-on-israel-gaza-and-holocaust-analogies.html [https://perma.cc/6RRT-GT5J] ("[I]f the whole rationale for maintaining Holocaust memory is the promise of 'Never again' — is the pledge to learn from history — then how in the world do you learn from history . . . if you say that it cannot be compared to anything that is going on now?"). For making this analogy, Masha Gessen's Hannah Arendt award ceremony was suspended in Germany. Kate Connolly, Award Ceremony Suspended After Writer Compares Gaza to Nazi-Era Jewish Ghettos, The Guardian (Dec. 14, 2023), https://www.theguardian.com/world/2023/dec/14/award-ceremony-suspended-after-writer-masha-gessen-compares-gaza-to-nazi-era-jewish-ghettos [https://perma.cc/9BCV-UQBD].

The genocide in Gaza has underscored the centrality of Palestine to the international legal order.[23] As the world continues to face the consequences and legacies of colonialism, Palestine remains the most vivid manifestation of the colonial ordering that the international community purports to have transcended.[24] Precisely because of this feature, undoing

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23. Naming the genocide in Gaza is not contingent upon a final finding by a legal tribunal. See Eghbariah, The Ongoing Nakba, supra note 6, at 94–95 ("Some may claim that the invocation of genocide, especially in Gaza, is fraught. But does one have to wait for a genocide to be successfully completed to name it?" (footnotes omitted)). We know that Israel is committing a genocide in Gaza not because a legal tribunal said so, but because genocidal intent permeates Israeli society, military, and politics and because it is corroborated by the material reality of Palestinians in Gaza. While the International Court of Justice has recognized South Africa's case charging Israel of genocide as "plausible," its ruling is best understood as declarative rather than constitutive. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order, 2024 I.C.J. No. 192, ¶ 54 (Jan. 26), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf [https://perma.cc/L9MW-R77T] ("In the Court's view, the facts and circumstances mentioned above are sufficient to conclude that at least some of the rights . . . for which [South Africa] is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts . . . .").

For a database containing over 500 instances of Israeli incitement to genocide, see Law for Palestine Releases Database With 500+ Instances of Israeli Incitement to Genocide—Continuously Updated, Law for Palestine (Jan. 4, 2024), https://law4palestine.org/law-for-palestine-releases-database-with-500-instances-of-israeli-incitement-to-genocide-continuously-updated [https://perma.cc/BTN7-9BVZ].

Reports, expert opinions, and court documents have compiled undeniably strong evidence showing that Israel is committing genocidal acts in Gaza. See, e.g., Human Rights Council, Anatomy of a Genocide—Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territory Occupied Since 1967, U.N. Doc. A/HRC/55/73 (Mar. 24, 2024), https://www.un.org/unispal/document/anatomy-of-a-genocide-report-of-the-special-rapporteur-on-the-situation-of-human-rights-in-the-palestinian-territory-occupied-since-1967-to-human-rights-council-advance-unedited-version-a-hrc-55 [https://perma.cc/EBX2-HV6D] [hereinafter Anatomy of a Genocide]; Application Instituting Proceedings 1 (S. Afr. v. Isr.), https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf [https://perma.cc/8SZQ-XQVW]; Complaint at 1–2, Def. for Child. Int'l—Palestine v. Biden, No. 3:23-cv-05829 (filed Nov. 13, 2023), https://ccrjustice.org/sites/default/files/attach/2023/11/Complaint_DCI-Pal-v-Biden_ww.pdf [https://perma.cc/H9W4-MXM5]; Declaration of William A. Schabas in Support of Plaintiffs' Motion for Preliminary Injunction at 1, *Def. for Child. Int'l*, No. 3:23-cv-05829 (filed Nov. 16, 2023), https://ccrjustice.org/sites/default/files/attach/2023/11/Declaration%20Expert%20William%20Schabas_w.pdf [https://perma.cc/Y4Q7-ULLN].

24. A vast body of scholarship has articulated the symbiosis between colonialism and international law. See generally Anthony Anghie, Imperialism, Sovereignty, and the Making of International Law (2007); Siba N'Zatioula Grovogui, Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law (1996); Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960 (2001); Makau Mutua, Savages, Victims, Saviors: The Metaphor of Human Rights, 42 Harvard Int'l L.J. 201 (2001). For a discussion on the placement of Palestine within Third World Approaches to International Law (TWAIL) literature, see Roundtable: Locating Palestine in Third World Approaches to International Law, 52 J. Palestine Stud., no. 4, 2023, at 100, 101 (observing that "[i]nternational law in its past and present is deeply implicated in the

the Nakba offers an opportunity to reconstruct the international legal structure and restore faith in the project of international law or, indeed, in the very notion of universal norms.[25] Dismantling the ongoing Nakba is not only a pressing shared responsibility; it is also an auspicious possibility.

The objective of this Article is not to examine the legality of the Nakba as much as to generate a legal framework from the Palestinian experience of the ongoing Nakba. Therefore, this Article neither provides a comprehensive legal history of Palestine nor engages in a doctrinal examination of Israeli violations of international law.[26] Instead, it seeks to transcend existing legal limits and imagine new ways of apprehending the Palestinian condition in law, and by extension, new ways of thinking about undoing the oppressive structures that international law has nurtured and sustained. This Article may thus offer more questions than provide answers, including ones about the applicability of the concept of Nakba to other contexts.[27]

Taking a generative approach to legal doctrine allows us to reassess the often-contradictory international legal corpus and unshackle Palestinians from the unjust legal structures that have often been implemented to confine them.[28] Seeing Palestine through the framework of Nakba allows us to take an unflinching look at the material reality and legal structures that

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settler colonization of Palestine and the subordination of Palestinians" and discussing the placement within and absence of Palestine from "the overall canon of TWAIL scholarship").

25. Reflective of this sentiment are the words of Irish lawyer Blinne Ní Ghrálaigh in the closing remarks of South Africa's case before the International Court of Justice charging Israel of genocide. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Verbatim Record, 70 ¶ 28 (Jan. 11, 2024, 10 a.m.), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240111-ora-01-00-bi.pdf [https://perma.cc/X3QU-XG5D] ("Some might say that the very reputation of international law—its ability and willingness to bind and to protect all peoples equally—hangs in the balance.").

26. See, e.g., Press Release, Security Council, Israel's Settlements Have No Legal Validity, Constitute Flagrant Violation of International Law, Security Council Reaffirms, U.N. Press Release SC/12657 (Dec. 23, 2016).

27. See infra section III.B.

28. If Israel has never abided by United Nations Resolution 181 (II), see G.A. Res. 181 (II) (Nov. 29, 1947) (regarding the Partition of Palestine), or Security Council Resolution 242, see S.C. Res. 242 (Nov. 22, 1967) (regarding Israel's withdrawal from "territories" occupied in the aftermath of 1967), why should Palestinians or the international community continue to accept these legal frameworks as the limits of their imagination? See Richard Falk, International Law and the Al-Aqsa Intifada, Middle E. Rep., Winter 2000, at 16, 16–18 (arguing that Israel has acted "in consistent and relentless defiance of the overwhelming will of the organized international community" as "expressed through widely supported resolutions passed by the Security Council and the General Assembly of the United Nations"). The intention to defy the Partition Plan long predated the establishment of the Israeli state. In fact, accepting the resolution was simply a veneer to set facts on the ground. As the first Israeli Prime Minister Ben-Gurion himself put it: "We presume that this is only a temporary situation. We will settle first in this place, become a major power, and then find a way to revoke the partition. . . . I do not see partition as a final solution to the Palestine question." Tom Segev, A State at Any Cost 264 (2019) [hereinafter Segev, A State at Any Cost] (internal quotation marks omitted) (quoting David Ben-Gurion).

the 1948 Nakba has created, instead of blindly adopting the international fantasy of a "two-state solution."[29] The framework of Nakba allows us to reconsider the inextricable legal and political arrangements that govern the lives of Palestinians and Jewish Israelis between the Jordan River and the Mediterranean Sea, maintaining an ethnonational hierarchy that continues to produce an intense, brutal, and asymmetrical reality of death and violence.

This Article therefore posits Nakba as the most accurate framework to grasp the regime of domination in Palestine. This call is premised on the understanding that legal concepts do not exist in a vacuum, but within narratives that assign them meaning.[30] Historically and conceptually, the 1948 Nakba has existed at the juncture of the Holocaust and Apartheid South Africa.[31] The concept of Nakba thus provides an opportunity to generate an independent framework that structures the legal questions at play and moves beyond simple analogy. Recognizing Nakba not only bestows a belated recognition upon its primary victims and allows us to imagine liberatory, egalitarian, and just futures but also reinforces, rather than undermines, the universal lessons of the Holocaust by recognizing

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29. See Tareq Baconi, Opinion, The Two-State Solution Is an Unjust, Impossible Fantasy, N.Y. Times (Apr. 1, 2024), https://www.nytimes.com/2024/04/01/opinion/two-state-solution-israel-palestine.html (on file with the *Columbia Law Review*) ("Repeating the two-state solution mantra has allowed policymakers to avoid confronting the reality that partition is unattainable . . . and illegitimate as an arrangement originally imposed on Palestinians without their consent in 1947. . . . [T]he two-state solution has evolved to become a central pillar of sustaining Palestinian subjugation and Israeli impunity."). In the past few years, there has been a revived scholarly interest in revisiting the partition of Palestine and its legality. See generally The Breakup of India and Palestine (Victor Kattan & Amit Ranjan eds., 2023) (studying the partition of India and Palestine both separately and comparatively); Ardi Imseis, The United Nations and the Question of Palestine (2023) [hereinafter Imseis, United Nations and the Question of Palestine] (offering a meticulous legal examination of U.N. Resolution 181(II) to partition Palestine and analyzing the verbatim and summary records of the United Nations Special Committee on Palestine recommending partition); Partitions: A Transnational History of Twentieth-Century Territorial Separatism (Arie M. Dubnov & Laura Robson eds., 2019) [hereinafter Partitions] (exploring the origins of partition, focusing on Ireland, Palestine, and India and Pakistan); Penny Sinanoglou, Partitioning Palestine: British Policymaking at the End of Empire (2019) (studying the trajectory of partition in Palestine and uncovering how "in the eyes of many British officials, partition had become imaginable by the late 1920s, desirable by the mid-1930s, impossible by the late 1930s, and seemingly unavoidable by the mid-1940s").

30. See Robert M. Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 4–5 (1983) ("Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.").

31. See, e.g., Elias Khoury, Foreword to The Holocaust and the Nakba: A New Grammar of Trauma and History, at ix (Bashir Bashir & Amos Goldberg eds., 2019) [hereinafter The Holocaust and the Nakba] (addressing the "complicated and multilayered intersections of the Holocaust and Nakba"). The rise of the apartheid regime in South Africa following the elections in May 1948 took place in parallel with the 1948 Nakba. For more on the interconnected nature of Israel and Apartheid South Africa, see infra section II.B.

the grave dangers of situations in which victimhood is used and abused to victimize others.[32]

I. ZIONISM AS NAKBA

The year 1948 marks a key moment in the historical genesis of Nakba, signifying the mass displacement and dispossession of Palestinians from Palestine and the destruction and looting of Palestinian homes and villages by Zionist paramilitary groups.[33] This seismic experience violently shattered Palestinian life and restructured Palestinian existence. The 1948 Nakba has not only fragmented the territorial integrity of Palestine, constructing a self-identifying Jewish state on top of over seventy-seven percent of its conquered territory, but also ruptured and bifurcated Palestinian memory into "before" and "after."[34] Put simply, the 1948 Nakba has produced an ongoing Nakba; the first is an event, the latter is a structure and a continuous process.

Still, the very fact that the 1948 Nakba occurred—namely, the fact that Zionist paramilitary groups forcibly displaced hundreds of thousands of Palestinians from their homes, committed massacres, looted property, and

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32. It is important to note that, while Israel capitalized on the Holocaust to create a powerful narrative that monopolizes victimhood to the state, many of the actual victims of the Holocaust have often remained mistreated in and by Israel. See Zahava Solomon, From Denial to Recognition: Attitudes Toward Holocaust Survivors From World War II to the Present, 8 J. Traumatic Stress 215, 216 (1995) ("For the first 20 years after the Holocaust, the distress of the survivors went almost totally unacknowledged. . . . [T]he helping professions . . . engaged in what may be considered dual manifestations of the inability or unwillingness to cope with the survivors' experience: a conspiracy of silence and blaming the victim."); Yardena Schwartz, How the State of Israel Abuses Holocaust Survivors, Tablet (Jan. 25, 2017), https://www.tabletmag.com/sections/israel-middle-east/articles/israel-abuses-holocaust-survivors [https://perma.cc/BWT9-XGPK] (noting that since the end of WWII, Germany has paid "about $31 billion . . . to Holocaust victims in Israel," but that "more than 20,000 survivors in Israel had never received the government assistance owed to them" and "nearly a third . . . live below the poverty line"); see also Edward Said, The One State Solution, N.Y. Times (Jan. 10, 1999), https://www.nytimes.com/1999/01/10/magazine/the-one-state-solution.html [https://perma.cc/65QP-3472] ("Thus [the Palestinians] are the victims of the victims, the refugees of the refugees.").

33. This Article uses the phrase "1948 Nakba" to refer to the events between 1947 and 1949, which have defined the core structure of the ongoing Nakba. It is important to note, however, that while the year 1948 is a pivotal moment that marked the inception of the term as applied to Palestine, the structure of Zionist settler colonization, dispossession, and displacement long predated the seismic violence of that year. See Areej Sabbagh-Khoury, Colonizing Palestine: The Zionist Left and the Making of the Palestinian Nakba 15, 83–119 (2023). By 1948, some seventy Palestinian villages had already been depopulated and dispossessed in a process that Professor Areej Sabbagh-Khoury describes as "colonialism by purchase." Id.

34. See Ahmad Sa'di & Lila Abu-Lughod, Introduction to Nakba: Palestine, supra note 2, at 3 ("The Nakba has thus become, both in Palestinian memory and history, the demarcation line between two qualitatively opposing periods. After 1948, the lives of the Palestinians at the individual, community, and national level were dramatically and irreversibly changed.").

destroyed Palestinian localities in the process of establishing a Jewish state in Palestine—has often been denied, dismissed, or downplayed.[35] Instead, mythical accounts of Zionism and the establishment of the state of Israel have emerged to replace these realities in the West.[36] Under these myth-propagating epistemologies, the Palestinians themselves were the sole culprits of the Nakba: Zionism features in these accounts as a national movement that simply brought about the establishment of the State of Israel in response to centuries of Jewish persecution. Under this account, Israel is described as a tiny and premature nation that was bullied by neighboring Arab states yet miraculously still emerged triumphant.[37]

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35. For early works that established this phenomenon of Nakba denial under the pretext of knowledge production, see generally Jon Kimche & David Kimche, Both Sides of the Hill: Britain and the Palestine War (1960); Netanel Lorch, The Edge of the Sword: Israel's War of Independence, 1947–1949 (1961); Joseph B. Schechtman, The Arab Refugee Problem (1952). A similar line of works extended well into the 1980s and further entrenched these misconceptions. Professor Rashid Khalidi refers to Joan Peters's 1984 book *From Time Immemorial* to exemplify this phenomenon. See Rashid Khalidi, The Hundred Years' War on Palestine 11–12 (2020) [hereinafter Khalidi, Hundred Years' War] ("The idea that the Palestinians simply do not exist, or even worse, are the malicious invention of those who wish Israel ill, is supported by such fraudulent books as Joan Peters's *From Time Immemorial*, now universally considered by scholars to be completely without merit.").

36. See Avi Shlaim, The Debate About 1948, *in* The Israel/Palestine Question 150, 150–51, 164–65 (Ilan Pappé ed., 2005) (summarizing such accounts and noting that they are "not history in the proper sense of the word" and "little more than the propaganda of the victors"). Historian Ilan Pappe has described the efforts to combat this rewriting of history:

> [T]he victims of the ethnic cleansing started reassembling the historical picture that the official Israeli narrative of 1948 had done everything to conceal and distort. The tale Israeli historiography had concocted spoke of a massive 'voluntary transfer' of hundreds of thousands of Palestinians who had decided temporarily to leave their homes and villages so as to make way for the invading Arab armies bent on destroying the fledgling Jewish state. By collecting authentic memories and documents about what had happened to their people, Palestinian historians in the 1970s, Walid Khalidi foremost among them, were able to retrieve a significant part of the picture Israel had tried to erase. But they were quickly overshadowed by publications such as Dan Kurzman's *Genesis 1948* which appeared in 1970 and again in 1992 (now with an introduction by one of the executors of the ethnic cleansing of Palestine, Yitzhak Rabin, then Israel's prime minister).

Pappe, Ethnic Cleansing, supra note 21, at xiv.

37. Historian Michael Fischbach describes this narrative as "Nakba denial" and notes that it is premised on four commonly applied arguments. The first argument contends that "war is war," in which "tragic events inevitably occur." See Michael R. Fischbach, Nakba Denial: Israeli Resistance to Palestinian Refugee Reparations, *in* Time for Reparations 183, 191–93 (Jacqueline Bhabha, Margareta Matache & Caroline Elkins eds., 2021) [hereinafter Fischbach, Nakba Denial]. The second "equates the experience of Palestinian refugees with the experience of Jewish emigrants from Arab countries." Id. at 193–95. The third rejects "any individual or even collective obligations to Palestinians as refugees, or even as persons." Id. at 195–97. The fourth refuses any recognition of "'moral reparations' or other payments or statements that might constitute an admission of responsibility or guilt." Id. at 197–99.

If acknowledged as a people at all,[38] Palestinians are presented as the ones to blame for their "free" decision to flee their homes as part of an otherwise "natural" process of war.[39] According to more fanciful versions of this narrative, Zionists did not commit any systemic expulsions, massacres, looting, or dispossession during the war; in more sober versions, these occurrences were simply an ordinary feature of war. That Palestinian society was decimated in the process, or that Palestinian refugees have since been denied return features in this story is a marginal, rather than foundational, issue to Zionism or Israel.[40] Instead, the Israeli regime is described as a success story through which a liberal democracy emerged, a robust economy developed, and the desert finally bloomed.[41]

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38. This denial of Palestinian peoplehood is encapsulated in former Israeli Prime Minister Golda Meir's infamous statement that "[t]here was no such thing as Palestinians." See Frank Giles, Golda Meir: 'Who Can Blame Israel?', Sunday Times, June 15, 1969, at 12 (quoting Golda Meir). From Meir's time to the present, Israeli politicians and other supporters of Zionism have repeatedly denied the existence of the Palestinians as a people. Israeli Minister Bezalel Smotrich, for example, recently declared, "There is no such thing as a Palestinian nation. There is no Palestinian history. There is no Palestinian language[.]" Israeli Minister Condemned for Claiming 'No Such Thing' as a Palestinian People, The Guardian (Mar. 20, 2023), https://www.theguardian.com/world/2023/mar/20/israeli-minister-condemned-claiming-no-such-thing-as-a-palestinian-people-bezalel-smotrich [https://perma.cc/9U32-PZLA] (internal quotation marks omitted). Knesset Member Anat Berko once argued that the lack of the letter "P" in Arabic proves that there is no Palestinian people. Isabel Kershner, No 'P' in Arabic Means No Palestine, Israeli Lawmaker Says, N.Y. Times (Feb. 11, 2016), https://www.nytimes.com/2016/02/12/world/middleeast/israel-anat-berko-palestine.html (on file with the *Columbia Law Review*).

39. To this day, academics continue to produce these misleading and intellectually dishonest accounts. Compare, e.g., Efraim Karsh, Palestine Betrayed 2 (2010) (describing the mass expulsion of Palestinians prior to May 1948 as simply "300,000–340,000 [Palestinians] fleeing their homes"), and Efraim Karsh, Reclaiming a Historical Truth, Haaretz (June 10, 2011), https://www.haaretz.com/2011-06-10/ty-article/reclaiming-a-historical-truth/0000017f-dbff-db22-a17f-ffff2b5d0000 (on file with the *Columbia Law Review*) [hereinafter Karsh, Reclaiming a Historical Truth] (claiming that "the tragedy befalling the Palestinian Arabs in 1948 was exclusively of their own making"), with Walid Khalidi, Why Did the Palestinians Leave, Revisited, J. Palestine Stud., Winter 2005, at 42, 46–47 (debunking the myth that Arab leaders ordered Palestinians to leave their homes, in part by examining radio broadcasts that ordered various Palestinian professionals to "carry on their work as usual" and "continue their duties").

40. See, e.g., Alan Dershowitz, The Case for Israel 5 (2003) ("[N]o one will ever know—or convince his or her opponents—whether most of the Arabs who left Israel were chased, left on their own, or experienced some combination of factors that led them to move from one place to another."); Karsh, Reclaiming a Historical Truth, supra note 39 (describing "the tragedy befalling the Palestinian Arabs in 1948" as part of a larger "Arab-instigated exodus" scheme). Fischbach explains that this "counternarrative" in which "the tragedy of the refugees was not Israel's fault and that the continued plight of the refugees therefore is a problem for the Arab World and the United Nations, not Israel" is part of the broader phenomenon of Nakba denial. Fischbach, Nakba Denial, supra note 37, at 190–91.

41. See generally Yael Zerubavel, Desert in the Promised Land (2019) ("In the distinct 'spatial code' that emerged in the Zionist Hebrew culture in Palestine, the 'desert' and the 'settlement' constituted key symbolic landscapes, defined by their opposition as well as their interdependence."); Alan George, "Making the Desert Bloom": A Myth Examined, J. Palestine Stud., Winter 1979, at 88–89 (noting that Zionists' claims that they "made the

These narratives of Nakba denial are still present today throughout the mainstream milieus of Western politics and society at large.[42] And yet, one need not go to great lengths to set a few facts in place. Palestinian and other historiographies have produced an enormous body of knowledge about Palestine, Zionism, and the Nakba at least since the 1960s.[43] In the past few decades, this knowledge has been enriched and expanded on by seminal works documenting the foundational violence of the Nakba;[44] explicating the social, political, and economic conditions that predated it;[45] studying the political ideology of Zionism that underpinned it;[46] and highlighting the

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desert bloom" minimizes the Nakba, implying that "the country had been an almost unpopulated desert before the Zionists' arrival," and suggest that "they have a stronger claim to sovereignty over the country because they have exploited its agricultural potential more efficiently" (internal quotation marks omitted)); see also Meron Benvenisti, Sacred Landscape 2 (2000) ("As a member of a pioneering youth movement, I myself 'made the desert bloom' by uprooting the ancient olive trees of al-Bassa [a displaced Palestinian village] to clear the ground for a banana grove, as required by the 'planned farming' principles of my kibbutz, Rosh Haniqra.").

42. As a minister in British Columbia put it, Palestine was a "crappy piece of land with nothing on it": "There were several hundred thousand people but, other than that, it didn't produce an economy. It couldn't grow things. It didn't have anything on it." Rhianna Schmunk, B.C. Minister Under Fire for Comments About Middle East Before Creation of Israeli State, CBC News (Feb. 2, 2024), https://www.cbc.ca/news/canada/british-columbia/selina-robinson-israel-comments-calls-to-resign-1.7102824 [https://perma.cc/5GDF-LEKE] (internal quotation marks omitted) (quoting B.C. Minister Selina Robinson). EU President Ursula von der Leyen similarly stated, "Today, we celebrate 75 years of vibrant democracy in the heart of the Middle East. . . . You [Israel] have literally made the desert bloom." EU in Israel (@EUinIsrael), Twitter, at 0:21–0:41 (Apr. 26, 2023), https://x.com/EUinIsrael/status/1651088583644594177 (on file with the *Columbia Law Review*); see also Pauline Ertel, Germany: Berlin Schools Asked to Distribute Leaflet Describing the 1948 Nakba as a "Myth," Middle E. Eye (Feb. 23, 2024), https://www.middleeasteye.net/news/berlin-schools-handout-leaflet-myth-israel-1948 [https://perma.cc/8UMS-K53X].

43. One pioneering site of scholarship on Palestinian history in English has been the *Journal of Palestine Studies*, first published in 1971. For background on the *Journal*'s development and evolution, see generally Sherene Seikaly, In the Shadow of War: The *Journal of Palestine Studies* as Archive, 51 J. Palestine Stud., no. 2, 2022, at 5 [hereinafter Seikaly, JPS as Archive].

Early works in English also include From Haven to Conquest: Readings in Zionism and the Palestine Problem Until 1948 (Walid Khalidi ed., 1971) [hereinafter Khalidi, From Haven to Conquest]; Sami Hadawi, Bitter Harvest: Palestine Between 1914–1967 (1967); Palestine and the Arab-Israeli Conflict (Walid Khalidi & Jill Khadduri eds., 1974); The Transformation of Palestine (Ibrahim A. Abu-Lughod ed., 1987).

44. See generally, e.g., Khalidi, All that Remains, supra note 3; Khalidi, Before Their Diaspora, supra note 18; The Palestinian Nakba 1948: The Register of Depopulated Localities in Palestine (S. H. Abu-Sitta ed., 2000).

45. See, e.g., Beshara Doumani, Rediscovering Palestine: Merchants and Peasants in Jabal Nablus (1995); Samih K. Farsoun, Palestine and the Palestinians: A Social and Political History (2006); Rashid Khalidi, Palestinian Identity: The Construction of Modern National Consciousness (2010) [hereinafter Khalidi, Palestinian Identity]; Sherene Seikaly, Men of Capital: Scarcity and Economy in Mandate Palestine (2016) [hereinafter Seikaly, Men of Capital]; Salim Tamari, Mountain Against the Sea: Essays on Palestinian Society and Culture (2009).

46. See generally, e.g., Nur Masalha, Expulsion of the Palestinians: The Concept of "Transfer" in Zionist Political Thought, 1882–1948 (1992) [hereinafter Masalha, Expulsion of the Palestinians].

British indulgence for the Zionist project and, later, American patronage of Israel.[47]

It was not until the late 1980s that the most basic facts underpinning the Nakba began to be more widely recognized. In a series of studies published by a group of Israeli scholars often referred to as the "New Historians,"[48] the foundational myths about the establishment of Israel have become widely contested,[49] though not without attempts to justify the Nakba.[50] These studies corroborated existing Nakba historiographies and unveiled new facets of the 1948 Nakba by relying on declassified documents from Israeli archives.[51] The fact that Zionist militias forcibly displaced hundreds of thousands of Palestinians[52] who were then

47. Rashid Khalidi, Brokers of Deceit: How the U.S. Has Undermined Peace in the Middle East, at x (2013) [hereinafter Khalidi, Brokers of Deceit] ("[A]n American-brokered political process . . . has reinforced the subjugation of the Palestinian people, provided Israel and the United States with a variety of advantages, and made considerably more unlikely the prospects of a just and lasting settlement of the conflict between Israel and the Arabs."); Khalidi, Hundred Years' War, supra note 35, at 13–14 ("Zionism initially had clung tightly to the British Empire for support, and had only successfully implanted itself in Palestine thanks to the unceasing efforts of British imperialism.").

48. See Ilan Pappé, Fifty Years Through the Eyes of "New Historians" in Israel, Middle E. Rep., Summer 1998, at 14, 14 (describing the "new historians" as "professional Israeli scholars" who "have been challenging the official Israeli version of the origins of Zionism and the birth of Israel" (internal quotation marks omitted)).

49. The most notable scholarship of the "New Historians" includes Simha Flapan, The Birth of Israel: Myths and Realities (1987); Morris, Palestinian Refugee Problem, supra note 3; Ilan Pappé, The Making of the Arab–Israeli Conflict, 1947–51 (1992) [hereinafter Pappé, Arab–Israeli Conflict]; Tom Segev, 1949: The First Israelis (1986); Avi Shlaim, Collusion Across the Jordan: King Abdullah, the Zionist Movement, and the Partition of Palestine (1988) [hereinafter Shlaim, Collusion].

50. Edward Said, New History, Old Ideas, Al-Ahram Wkly. (May 21, 1998), https://english.ahram.org.eg/NewsContent/50/1260/500760/AlAhram-Weekly/Nakba-remembered/New-history,-old-ideas.aspx [https://perma.cc/7B8J-6KSS] (last updated May 14, 2023) (describing the "profound contradiction, bordering on schizophrenia" that underlies most Israeli New Historians' commitment to ideological Zionism, which makes them "reluctant to draw the inevitable conclusions" from the evidence they produce). Compare Nur Masalha, The Palestine Nakba: Decolonising History, Narrating the Subaltern, Reclaiming Memory 148–200 (2012) (arguing that most Israeli "new historians" do not engage with "the nexus of power and knowledge – the immense power asymmetry between coloniser and colonised"), with Efraim Karsh, Fabricating Israeli History: The "New Historians" xv (2d ed. 2000) (noting that the publication of the book's first edition "was welcomed by those who had long been troubled by the 'revisionist' rewriting of history in a manner casting the birth of the Jewish State as the source of all evil").

51. The reliance on Israeli archives as the supreme source of knowledge production reified the archival power and access of the "New Historians" at the cost of dismissing and superseding Palestinian oral history. See, e.g., Morris, Palestinian Refugee Problem, supra note 3, at 4 ("I believe in the value of documents. . . . The value of oral testimony about 1948, if anything, has diminished with the passage of the 20 years since I first researched the birth of the Palestinian refugee problem.").

52. The question of whether Palestinians fled their homes because of fear or were actively expelled by Zionist forces is one of little importance. An Israeli Intelligence Service report assessed as early as June 30, 1948 that "the impact of 'Jewish military action'

prevented from returning to their homes is now indisputable.[53] That Zionist—and later Israeli—forces committed massacres, raped, and looted property is now an established, incontestable, scholarly fact.[54] The epistemic closures around the 1948 Nakba have started to form, albeit only in certain academic circles.

The following sections argue that Zionism must be understood in terms of the Nakba it generated. Destructive ideologies mirror the calamities they produce and often become defined from the perspective of their victims. Just as Nazi ideology produced the Holocaust and Afrikaner nationalism generated apartheid, Zionism similarly birthed the Nakba.

Section I.A traces Zionism to its European origins and argues that Zionism is a modern European phenomenon that furnished a national-colonial "solution" to European antisemitism through the colonization of Palestine and resettlement of Jews outside of Europe. Section I.B highlights the centrality of colonialism and expulsion to Zionist thought. Far from being incidental or marginal features, the recurring concepts of colonialism and expulsion were central to and constitutive of Zionist political thought. Zionism adopted settler colonialism as the vehicle for its nation-building project and fashioned expulsion as the solution to the problem posed by the existing Arab-Palestinian population in Palestine. Section I.C proceeds to outline the 1948 Nakba as the material manifestation or praxis of Zionism. Once placed in the context of the Nakba, the other facets of Zionism assume secondary importance. Put simply, Zionism was a modern European phenomenon born out of antisemitism, nationalism, and colonialism, and it is best understood through the prism of the Nakba it has brought about.

A. *From the Jewish Question to the Question of Palestine*

A search for the origins of the Nakba leads to Europe. The displacement of Palestinians during the 1948 Nakba is the result of a different type of displacement: that of Europe's "Jewish Question" onto Palestine. The "Jewish Question" became an increasingly commonplace way for Europeans to refer to the status of Jews in Europe throughout the

(Haganah and Dissidents) on the migration [i.e., displacement of Palestinians] was decisive, as some 70% of the residents left their communities and migrated as a result of these actions." Intelligence Service (Arab Section), Migration of *Eretz Yisrael* Arabs Between December 1, 1947 and June 1, 1948, https://www.akevot.org.il/wp-content/uploads/2019/07/1948ISReport-Eng.pdf [https://perma.cc/N9WL-88L5] (last visited May 5, 2024); see also Benny Morris, The Causes and Character of the Arab Exodus from Palestine: The Israel Defence Forces Intelligence Branch Analysis of June 1948, 22 Middle East Stud. 5, 5 (1986) (examining the document in detail).

53. Historian Adel Manna tells the story of those who attempted to return and sketches the Israeli law of deportation that developed in the aftermath of 1948. See generally Adel Manna, Nakba and Survival (2022) [hereinafter Manna, Nakba and Survival]. In some rare cases, those who managed to "infiltrate" back to their own homeland were reunited with their families and allowed to remain. That is the case of my grandfather.

54. See infra notes 167–171 and accompanying text.

second half of the nineteenth century.[55] This was particularly apparent in Germany, where the question essentially posed was, "[C]ould a Jew ever be a *true* German . . . ?"[56] In the post-Enlightenment era, during (and in some cases even *after*) the political, social, and legal emancipation of Jews in Europe, their increased visibility and social integration contributed to a heightened attention to the essentialized nature of Jew as "other."[57] The framing of Jewish presence in Europe as a "question" not only cast Jews as a problem but eventually manifested in genocide as its "[f]inal [s]olution."[58]

The Jewish experience of discrimination and emancipation varied widely across Europe. The process commonly known as "Jewish Emancipation" (Jews gaining civil, political, and legal rights) was protracted, nonlinear, and geographically variable—indeed, as some argue that "emancipation continues to the present."[59] For some Jews in western and central Europe, newly won rights and freedoms in the late nineteenth century opened the door to substantial upward social and economic mobility and accelerated the process of secularization, coupled with the integration and assimilation of some Jews in European societies.[60] But despite the proclamation of equality, the rights of Jews in Europe continued to suffer substantial setbacks and state infringement. Gentile perceptions of Jewish economic and racial difference involving the antisemitic stereotypes of control, greed, and dual loyalties became all the more prominent.[61]

At the turn of the century, the Dreyfus affair, wherein a French Jewish officer was falsely charged of treason, encapsulated and symbolized the persistence of antisemitism in France, where Jews supposedly enjoyed full civil rights.[62] In eastern Europe, where Jewish emancipation was not achieved until the 1917 Russian Revolution, most Jewish communities

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55. See, e.g., Lucy S. Dawidowicz, The War Against the Jews, 1933–1945, at xxxv–xxxvi (10th ed. 1986) ("The term 'Jewish question,' as first used during the early Enlightenment/Emancipation period in Western Europe, referred to the 'question' or 'problem' that the anomalous persistence of the Jews as a people posed to the new nation-states and the rising political nationalisms.").

56. Werner E. Mosse, From "*Schutzjuden*" to "*Deutsche Staatsbürger Jüdischen Glauben*": The Long and Bumpy Road of Jewish Emancipation in Germany, *in* Paths of Emancipation 59, 92 (Pierre Birnbaum & Ira Katznelson eds., 1995) (emphasis added).

57. Jonathan M. Hess, Germans, Jews and the Claims of Modernity 3–5 (2002).

58. Dawidowicz, supra note 55, at xxxv–xxxvi (internal quotation marks omitted); see also Derek J. Penslar, Zionism: An Emotional State 19 (2023) [hereinafter Penslar, Zionism] ("[T]he term . . . 'Jewish question' flourished in Europe from the 1840s until the Nazis attempted to solve it through a genocidal 'final solution.'").

59. David Sorkin, Jewish Emancipation: A History Across Five Centuries 5 (2019).

60. See Elmer Berger, Mendelssohn and Dreyfus *in* Khalidi, Haven to Conquest, supra note 43, at 57, 62.

61. Derek Penslar, Shylock's Children: Economics and Jewish Identity in Modern Europe 205–06 (2001).

62. Id.

continued to suffer from intense persecution and pogroms.[63] Reacting to this reality, the British government had passed the 1905 Aliens Act, which essentially controlled and restricted the immigration of Jews fleeing eastern Europe.[64] The status of Jews in Europe, in short, was dire.

Against this background, coupled with the proliferation of nationalism and the formation of European nation-states, the political ideology of Zionism emerged,[65] among other competing forms of Jewish politics.[66] As Professor Edward Said observed, unlike rival ideologies, "Zionism offered the neatness of a specific solution (or answer) to a specific problem."[67] Championed by Theodor Herzl, the founder of political Zionism, the Zionist movement promoted the idea of a Jewish nation-state as the exclusive solution to the "Jewish Question."[68] Herzl, influenced by the ideals of the Enlightenment and nationalism, sought to alter the social, political, and religious configurations that defined the Jewish people and reconstitute them as secular subjects organized under a nation-state with defined, sovereign territory rather than a religious or cultural community dispersed throughout Europe.[69]

Zionists, however, did not strive for a nation-state in Europe but rather sought to extend Europe elsewhere by the means of colonization.[70] Indeed, Zionism reproduced antisemitism's basic premise that Jews did not belong in Europe and therefore sought resettlement outside the continent.[71] Herzl understood and capitalized on this premise of

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63. See Sorkin, supra note 59, at 208, 278.

64. Bernard Gainer, The Alien Invasion 199–201 (1972) (noting the antisemitic and anti-immigrant motivations that drove the enactment of the Aliens Act following Jewish migration from eastern Europe in the late nineteenth century).

65. Theodor Herzl, The Jewish State 92–93 (Jacob M. Alkow, ed. & trans., Dover Publ'n Inc. 1988) (1896) [hereinafter Herzl, The Jewish State] ("The creation of a new State is neither ridiculous nor impossible. . . . The Governments of all countries scourged by Anti-Semitism will be keenly interested in assisting us to obtain the sovereignty we want.").

66. Zionism was far from a success story from its inception. It competed with other ideologies, such as the Jewish Labour Bund, which advanced a secular socialist ideology that rejected Zionism. See Walter Laqueur, A History of Zionism 273 (2003); see also Penslar, Zionism, supra note 58, at 35–36.

67. Edward Said, The Question of Palestine 25 (1979) [hereinafter Said, The Question of Palestine].

68. Herzl, The Jewish State, supra note 65, at 92 (arguing in response to the "Jewish Question" that "sovereignty be granted us over a portion of the globe large enough to satisfy the rightful requirements of a nation; the rest we shall manage for ourselves").

69. Id. at 92–95.

70. The centrality of the concept and method of colonization to Zionist thought is explored infra section I.B.

71. See Seikaly, Men of Capital, supra note 45, at 6 ("Zionism promised Jews who had suffered religious, political, and racial persecution for centuries in Europe that they could finally become European but only by *leaving* Europe. Anti-Semitism and Zionism had one thing in common: the belief that Jews could never assimilate in Europe."). For Hannah Arendt's views in this context, see generally Gabriel Piterberg, Zion's Rebel Daughter: Hannah Arendt on Palestine and Jewish Politics, New Left Rev., Nov.–Dec. 2007, at 39 (noting that Arendt believed that "Jewish identities could not, and should not, just be

antisemitism to advance Zionism, adopting some of the most antisemitic tropes about Jews in his infamous essay *Mauschel*. In this essay, he describes an eponymous anti-Zionist Jewish European character as a "distortion of human character, something unspeakably low and repugnant."[72] In his diaries, Herzl observed, "The anti-Semites will become our most dependable friends, the anti-Semitic countries our allies."[73]

The location that Zionists sought was Palestine. Although Palestine was not the only territory considered, it had certainly been the prime option for Zionist colonization from the outset.[74] In *Der Judenstaat* (*The State of Jews*), Herzl laid out his theory for a Jewish state and contemplated the idea of Palestine and Argentina as two possible alternatives.[75] While Argentina was "one of the most fertile countries in the world" with "a sparse population and a mild climate,"[76] Palestine was the "ever-memorable historic home."[77] Herzl wrote that if the Zionists managed to persuade the Ottoman sultan to establish a Jewish state in Palestine, the Zionists "should there form a portion of a rampart of Europe against Asia, an outpost of civilization as opposed to barbarism."[78]

But the mass colonization of Palestine remained out of reach at the turn of the century, and Herzl did not live to see his grandiose visions come

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dissolved into the surrounding citizenries of the various European nation-states" but that "the 'utterly unhistorical' theory of an unalterable Jewish essence—had proved disastrous"); Samantha Hill, Hannah Arendt Would Not Qualify for the Hannah Arendt Prize in Germany Today, The Guardian (Dec. 18, 2023), https://www.theguardian.com/commentisfree/2023/dec/18/hannah-arendt-prize-masha-gessen-israel-gaza-essay [https://perma.cc/97RM-PCWJ] ("Arendt was critical of the nation-state of Israel from its founding, in part because she was worried that the state would exhibit the worst tendencies of the European nation-state."). For a discussion of orientalism and Jews, see generally Amnon Raz-Krakotzkin, The Zionist Return to the West and the Mizrahi Jewish Perspective, *in* Orientalism and the Jews (Ivan Davidson Kalmar & Derek J. Penslar eds., 2020) ("[O]rientalism was essential to the nationalization of the Jewish collectivity and the ways in which the nation was imagined. . . . Despite the Zionist rejection of 'assimilationist trends,' it can be read as an extreme expression of the desire to assimilate the Jews into the Western narrative of enlightenment and redemption.").

72. Theodor Herzl, Mauschel, *in* Zionist Writings: Essays and Addresses 163, 164 (Harry Zohn trans., 1973); see also Daniel Boyarin, Unheroic Conduct 296 (1997) ("Herzl was indeed an antisemite, as were many Viennese Jews of the fin de siècle. He adopted all of the most vicious stereotypes of Jew hatred but employed an almost classic psychological move, splitting, in order to separate himself from them." (footnote omitted)); Derek Penslar, Theodor Herzl, Race, and Empire, *in* 12 Studia Judaeoslavica, Making History Jewish 185, 195 (Paweł Maciejko & Scott Ury eds., 2020) ("Jewish intellectuals of Herzl's era widely accepted many antisemitic critiques of alleged Jewish character flaws and socio-economic dysfunction yet rejected antisemitic views that Jews were irredeemably flawed.").

73. 1 Theodor Herzl, The Complete Diaries of Theodor Herzl 68 (Raphael Patai ed., Harry Zohn trans., 1960) [hereinafter Herzl, Complete Diaries].

74. See Herzl, The Jewish State, supra note 65, at 95–96.

75. Id.

76. Id. at 95.

77. Id. at 96.

78. Id.

true. Herzl's attempts to convince the Ottoman Sultan Abdul Hamid II to grant the Zionists a colonization charter in Palestine did not bear fruit.[79] Disappointed by the Ottomans and what appeared to be a lost quest for Palestine, Herzl turned to lobbying for British support.[80] In 1902, Herzl met with Lord Rothschild in London, where he proposed to petition the British for a "colonisation charter."[81] Concerned by the optics, Lord Rothschild instructed: "Don't say 'charter'. This word has a bad sound."[82] Herzl responded, "Call it what you please . . . I want to found a Jewish colony in a British possession."[83]

It is against this background that the "Uganda Scheme" emerged and several other colonial territories under British control were considered for Zionist settlement.[84] But these plans were abandoned not long after their inception, and the Zionist movement redoubled its efforts toward the colonization of Palestine.[85]

The fall of the Ottoman Empire brought about the British colonization of Palestine, entwined with the "colonisation charter"[86] that Herzl had long hoped for but did not live to witness. On November 2, 1917, as Jerusalem had not yet been occupied and the fighting with the Ottoman armies continued, the British Foreign Secretary Arthur Balfour issued a letter to the Zionist movement declaring:

> His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious

79. Walid Khalidi, The Jewish-Ottoman Land Company: Herzl's Blueprint for the Colonization of Palestine, J. Palestine Stud., Winter 1993, at 30, 31–32.

80. Laqueur, supra note 66, at 119.

81. Id. at 120 (internal quotation marks omitted).

82. Id. (internal quotation marks omitted).

83. Id. (internal quotation marks omitted).

84. In the meeting described by Laqueur, Lord Rothschild proposed Uganda as the location for the establishment of the Jewish state, and while Herzl clearly preferred territories closer to Palestine—mentioning the Sinai Peninsula, Egyptian Palestine, or Cyprus—he later lobbied the Sixth Zionist Congress in 1903 to send a commission to East Africa to assess the conditions for Jewish colonization. The Uganda Scheme, however, threatened a split among the members of the Zionist movement and prompted negative reactions among the British colonial administration. Id at 119–29.

85. See Adam Rovner, In the Shadow of Zion: Promised Lands Before Israel 227 (2014) (writing that Africa was not "acknowledged as [a] Jewish home[]" because the "mythopoesis of Israel ultimately proved more potent a nationalist force than any other territory"); Robert G. Weisbord, African Zion: The Attempt to Establish a Jewish Colony in the East Africa Protectorate, 1903–1905, at 224–27 (1968) (describing how early Zionists renewed their efforts to colonize Palestine after plans to do so in East Africa proved unpopular within the Zionist movement).

86. Laqueur, supra note 66, at 120. (internal quotation marks omitted).

> rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.[87]

This letter, known as the Balfour Declaration,[88] was codified into the League of Nation's British Mandate for Palestine and therefore set the international legal framework for Zionist settler colonization over the following three decades.[89] The British Mandate, applied in the territory between the Jordan River and the Mediterranean Sea,[90] thus became the only case where the League of Nations mandate system has officially and successfully promoted a settler project under the auspices of one of its own mandates for colonial power.[91]

While the Declaration acknowledged and promoted Zionist interests, it defined the Arab-Palestinian majority—ninety-four percent of the population in 1917—as merely "non-Jewish communities" and promised them only "civil and religious rights" rather than national self-determination.[92] As Balfour would explicitly write to British Prime Minister Lloyd George, "[I]n the case of Palestine we deliberately and rightly decline to accept the principle of self-determination."[93]

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87. Letter from Arthur Balfour, British Foreign Sec'y, to Lionel Walter Rothschild (Nov. 2, 1917), https://ecf.org.il/media_items/297 [https://perma.cc/KH36-FMK9] [hereinafter Balfour Declaration] (internal quotation marks omitted).

88. See Zena Al Tahhan, More Than a Century On: The Balfour Declaration Explained, Al Jazeera (Nov. 2, 2018), https://www.aljazeera.com/features/2018/11/2/more-than-a-century-on-the-balfour-declaration-explained [https://perma.cc/2ASN-DPWX]. See generally Jonathan Schneer, The Balfour Declaration: The Origins of the Arab-Israeli Conflict (2010) (exploring the junctures, interests, and lobbying efforts that ultimately led Britain to support Zionism in the form of the Balfour Declaration).

89. Antony Anghie, Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations, 34 N.Y.U. J. Int'l L. & Pol. 513, 514–16 (2002) (describing the Mandate System as "an international regime created for the purpose of governing the territories . . . annexed or colonized by Germany and the Ottoman Empire" and arguing that "colonialism profoundly shaped the character of international institutions at their formative stage").

90. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. No. 131, ¶ 70 (July 9).

91. Susan Pederson, Settler Colonialism at the Bar of the League of Nations, *in* Settler Colonialism in the Twentieth Century 113, 124–29 (Caroline Elkins and Susan Pederson eds., 2005) (noting that "[o]nly in one instance between the wars did the League and progressive Western international opinion fairly and unambiguously support a settler project; this was the Zionist project in Palestine").

92. Balfour Declaration, supra note 87; see also Justin McCarthy, The Population of Palestine 10 tbl.1.4D (1990) [hereinafter McCarthy, The Population of Palestine].

93. See Noura Erakat, Justice for Some: Law and the Question of Palestine 31 (2019) [hereinafter Erakat, Justice for Some] (quoting Letter from Arthur Balfour, British Foreign Sec'y, to Lloyd George, British Prime Minister (Feb. 19, 1919)). Balfour expanded on the Palestinians' exclusion from the principle of self-determination in a confidential memorandum:

> Our justification for our policy is that we regard Palestine as being absolutely exceptional; that we consider the question of Jews outside Palestine as one of world importance, and that we conceive the Jews to have historic claim to a home in their ancient land; provided that home

The privileging of Zionist interests over the "non-Jewish communities in Palestine" became an explicit, central, and recurring theme codified into the articles of the British Mandate in 1922.[94] Notably, the acquisition of "Palestinian citizenship by Jews" is the only mention of the word "Palestinian" in the entire twenty-eight articles of the Mandate.[95] In effect, the British Mandate served as an incubator for the Zionist settlement project, one that facilitated the creation of a Zionist "state within a state,"[96] all while suppressing the Palestinian population. As revisionist Zionist leader Vladimir Jabotinsky bluntly wrote, "What need, otherwise, of the Balfour Declaration? Or of the Mandate? Their value to us is that an outside Power has undertaken to create in the country such conditions of administration and security that if the native population should desire to hinder our work, they will find it impossible."[97]

A comprehensive survey of the British–Zionist nexus is beyond the purview of this Article, but it is important to note that the endorsement of Zionism by the preeminent imperial power of the time and the displacement of the Jewish Question from Europe has entailed a radical reconfiguration of what the category "Jewish" actually meant within and outside Europe. For Edwin Montagu, the only Jewish person in the British cabinet at the time of the Balfour Declaration, it seemed "inconceivable

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> can be given to them without either dispossessing or oppressing the present inhabitants.

Id. (quoting Letter from Arthur Balfour, British Foreign Sec'y, to Lloyd George, British Prime Minister (Feb. 19, 1919)).

94. See Mandate for Palestine and Memorandum by the British Government Relating to its Application to Transjordan, League of Nations Doc. C.529.M.314.1922.VI (1922) [hereinafter British Mandate]. For example, Article 2 of the British Mandate states that the Mandate "shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home." Id. art. 2. Article 4 further grants the Zionist Organization a special status as a "public body for the purpose of advising and co-operating with the Administration of Palestine." Id. art. 4. This body, the so-called "Jewish agency," was authorized to "assist and take part in the development of the country," which Article 11 instructs may include "any public works, services and utilities, and to develop any of the natural resources of the country." Id. art. 4, 11.

95. See British Mandate, supra note 94. Within the first eight years of the British Mandate, the Jewish population in Palestine increased dramatically from about six percent to over nineteen percent. See Khalidi, From Haven to Conquest, supra note 43, app. I. Article 6 instructed the Palestinian administration to "facilitate Jewish immigration" and encouraged the "close settlement by Jews on the land." British Mandate, supra note 94, art. 6. To further expedite the process of Jewish immigration, Article 7 laid the framework of a nationality law "framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine." Id. art. 7.

96. Barbara J. Smith, The Roots of Separatism in Palestine: British Economic Policy, 1920–1929, at 3 (1993) (internal quotation marks omitted) ("By the end of the 1930s the Zionists in Palestine had formed virtually a 'state within a state' with a military organization and political, social, economic, and financial institutions separate from those of the indigenous population as well as from the British Mandatory Administration.").

97. Vladimir Jabotinsky, The Iron Wall, Jewish Herald (Nov. 26, 1937), https://www.infocenters.co.il/jabo/jabo_multimedia/articlesl/%D7%90%D7%A0%D7%92%D7%9C%D7%99%D7%AA/1923_204.pdf#page=11 [https://perma.cc/9KAC-H5C6].

that Zionism should be officially recognised by the British Government."[98] Like many other Jews who opposed the Zionist premise that Jews did not belong in Europe, Montagu regarded the Balfour Declaration as endorsing antisemitism: "[T]he policy of His Majesty's Government is anti-Semitic in result and will prove a rallying ground for Anti-Semites in every country in the world."[99]

The language of the British also officially bifurcated the "Arab" and "Jew," positioning these two identities as mutually exclusive. At the turn of the century, the Jewish community in Palestine was largely integrated into the local social fabric, which included Muslim, Christian, Jewish, and Druze, among other communities. As historian Rashid Khalidi put it: "In spite of marked religious distinctions between [the Jewish communities in Palestine] and their neighbors, they were not foreigners, nor were they Europeans or settlers: they were, saw themselves, and were seen as Jews who were part of the indigenous Muslim-majority society."[100]

The coexistence of Jews with other communities in Palestine was not an exceptional phenomenon[101] but one that reflected the status of Jews who were also Arabs, or Arabs who were also Jewish, across the Arab and Muslim world until the mid-twentieth century.[102] As Professor Avi Shlaim

98. Walid Khalidi, Edwin Montagu and Zionism, 1917, *in* Khalidi, From Haven to Conquest, supra note 43, at 144 [hereinafter Khalidi, Edwin Montagu and Zionism] (reprinting Memorandum from Edwin Montagu on the Anti-Semitism of the Present (British) Government to the British Cabinet (Aug. 23, 1917)). The tension between Zionism and broader Jewish interests would become all the more apparent as the Nazi regime came into power. The Zionist leadership not only passively benefited from antisemitism, which provided it with an impetus for Jewish migration to Palestine, but also actively negotiated the Transfer Agreement with the Nazi government, arranging the transfer of 60,000 Jews and $100 million to Palestine in return for halting the anti-Nazi boycott of 1933. See Edwin Black, The Transfer Agreement: The Dramatic Zionist Rescue of Jews From the Third Reich to Jewish Palestine, at ix (2009).

99. Khalidi, Edwin Montagu and Zionism, supra note 98, at 143.

100. See Khalidi, Hundred Years' War, supra note 35, at 23. The waves of Jewish immigration before World War II did not substantially alter Palestine's demographic composition. By the start of the war, Palestine was home to about 60,000 Jews in a country of over 700,000 Muslims and Christians. See McCarthy, The Population of Palestine, supra note 92, at 35 tbl.2.15 (showing that World War II did not substantially change Palestine's demographics).

101. Considerable scholarship shows that Arab-Jews were highly integrated in Palestinian society around the turn of the century and that tensions increased with the materialization of Zionist aspirations in Palestine. See, e.g., Menachem Klein, Lives in Common: Arabs and Jews in Jerusalem, Jaffa, and Hebron 19 (2014) (discussing the history of Jewish and Arab communities in Jaffa, Hebron, and Jerusalem); Zachary Lockman, Comrades and Enemies: Arab and Jewish Workers in Palestine, 1906–1948, at 45–47 (1996) (reviewing the history of Palestine during the late Ottoman period and the subsequent British rule); Gershon Shafir, Land, Labor and the Origins of the Israeli-Palestinian Conflict 1882–1914, at 199–202 (1996) (discussing the impact of European Jewish migration into Palestine) [hereinafter Shafir, Origins of the Israeli-Palestinian Conflict].

102. See Avi Shlaim, Three Worlds: Memoirs of an Arab-Jew 13 (2023) [hereinafter Shlaim, Three Worlds] ("Unlike Europe, the Middle East did not have a 'Jewish Question' – antisemitism was a European malady that later infected the Near East. Antisemitic

recounts in his memoir, "We were Arab-Jews. We lived in Baghdad and we were well-integrated into Iraqi society."[103] Shlaim narrates the history of his Jewish Iraqi community as it was torn apart by "the combined pressures of Arab and Jewish nationalism" and "conscripted into the Zionist project."[104] In a rich account, Shlaim details the involvement of the Zionist movement in at least three out of five bombing incidents that targeted the Jewish Iraqi community and catalyzed its mass emigration to Israel between March 1950 and June 1951.[105] Shlaim concludes that "Zionism not only turned the Palestinians into refugees; it turned the Jews of the East into strangers in their own land."[106]

The materialization of Zionism in Palestine has gradually rendered the identity of the Arab-Jew practically impossible.[107] The drastic, and often violent, transformation of Arab-Jewish existence from reality to impossibility would intensify and culminate in the aftermath of the 1948 Nakba, profoundly reconfiguring the identities of Arabs, Jews, and Arab-Jews into contrarian categories of Arabs versus Jews.[108] The identity of Jews in

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literature had to be translated from European languages because there was so little of it in Arabic."). Some scholars have contested this view. Historian Mark R. Cohen, for example, argues that

> [t]he interfaith utopia was to a certain extent a myth; it ignored, or left unmentioned, the legal inferiority of the Jews and periodic outbursts of violence. Yet, when compared to the gloomier history of Jews in the medieval Ashkenazic world of Northern Europe and late medieval Spain, and the far more frequent and severe persecution in those regions, it contained a very large kernel of truth.

Mark R. Cohen, Prologue: The "Golden Age" of Jewish–Muslim Relations: Myth and Reality, *in* A History of Jewish–Muslim Relations 28, 28 (Jane Marie Todd & Michael B. Smith trans., Princeton Univ. Press 2013).

103. Shlaim, Three Worlds, supra note 102, at 8. Shlaim makes a point similar to Khalidi's, noting that his family were "Iraqis whose religion happened to be Jewish and as such . . . were a minority, like the Yazidis, Chaldean Catholics, Assyrians, Armenians, Circassians, Turkomans and other Iraqi minorities. Relations between these diverse communities before the age of nationalism . . . were better characterised as a dialogue rather than a 'clash of civilisations'." Id.

104. Id. at 7, 10.

105. See id. at 125–51. Shlaim notes that "[t]he person who was responsible for three of the bombs was Yusef Ibrahim Basri, a 28-year-old Baghdadi Jew, a lawyer by profession, a socialist, an ardent Jewish nationalist and a member of Hashura, the military wing of Hatenua, the Movement [a Zionist organization]." Id. at 131.

106. Id. at 296.

107. See Ella Shohat, On the Arab-Jew, Palestine, and Other Displacements: Selected Writings 6 (2017) ("The reconceptualization of Jewishness as a national identity had profound implications for Arab Jews. . . . The meaning of the phrase 'Arab-Jew' was transformed from being a taken-for-granted marker of religious (Jewish) and cultural (Arab) affiliation into a vexed question mark within competing nationalisms . . . .").

108. See Yehouda Shenhav, The Arab Jews: A Postcolonial Reading of Nationalism, Religion, and Ethnicity 7–13 (2006) (describing the evolution of Arab-Jewish identity); Shlaim, Three Worlds, supra note 102, at 5 ("If I had to identify one key factor that shaped my early relationship to Israeli society, it would be an inferiority complex. I was an Iraqi boy in a land of Europeans."); Shohat, supra note 107, at 2 ("[T]he conceptual schism between

Europe, especially in Germany, had already undergone a similarly reductive transformation that rejected "the Jewish-German symbiosis."[109] The rise of Nazism to power and its culmination in the Holocaust contributed to the creation of an exclusivist and ethnonationalist Jewish identity among European Jewry, ultimately popularizing the political project of Zionism.[110]

Seen against this background, it becomes clear that Europe never resolved its "Jewish Question" but rather reconfigured and outsourced it to Palestine in the form of Zionism.[111] Zionism emerged in Europe rather than in Palestine as a reaction to European antisemitism, nationalism, and colonialism at once.[112] The proliferation of antisemitism in Europe popularized Zionism as a solution, which endorsed a project of settler colonization to establish a Jewish nation-state in Palestine. The "Question of Palestine" thus became the global iteration of Europe's

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'the Arab' and 'the Jew,' or alternatively between 'the Muslim' and 'the Jew,' can be traced back to the imperialized Middle East and North Africa."); Lital Levy, Historicizing the Concept of Arab Jews in the "Mashriq," 98 Jewish Q. Rev. 452, 464 (2008) ("Arab Jewish identity today is a statement about its own impossibility, about the unbridgeable gap between the unfulfilled wish or desire embedded in what one calls oneself and the ascriptive identity assigned one by normative or hegemonic social forces.").

109. Omer Bartov, Defining Enemies, Making Victims: Germans, Jews, and the Holocaust, 103 Am. Hist. Rev. 771, 782 (1998).

110. Id. at 807 ("The Zionists . . . presented gentile European society as the greatest danger to Jewish existence and promoted the idea of a Jewish state, applying to it the . . . model of Central European nationalism that had . . . viewed Jews as an alien race but combining it with traditional Jewish attitudes to their non-Jewish environment."); see also Omer Bartov, Mirrors of Destruction: War, Genocide, and Modern Identity 168 (2000) ("[S]ince Zionism was largely predicated on the assumption of an approaching catastrophe for European Jewry long before the rise of Nazism, after the war it tended to present the mass murder of Jews as the final . . . proof of the need for a Jewish national home.").

111. The Biltmore Program, adopted by the World Zionist Organization in 1942 against the backdrop of World War II, provides a clear understanding of this formula:

> The Conference declares that the new world order that will follow victory cannot be established on foundations of peace, justice and equality, unless the problem of Jewish homelessness is finally solved. The Conference urges that the gates of Palestine be opened; that the Jewish Agency be vested with control of immigration into Palestine and with the necessary authority for upbuilding the country, including the development of its unoccupied and uncultivated lands; and that Palestine be established as a Jewish Commonwealth integrated in the structure of the new democratic world.

UN, Declaration Adopted by the Extraordinary Zionist Conference at the Biltmore Hotel of New York City, ¶ 8 (May 11, 1942), https://www.un.org/unispal/document/auto-insert-206268/ [https://perma.cc/2RYK-YDVC].

The transformation of Hannah Arendt and her opposition to Zionism emerged out of the Biltmore Conference. See Hannah Arendt, Zionism Reconsidered, *in* The Jewish Writings 343, 343 (Jerome Kohn & Ron H. Feldman eds., Catherine Temerson & Edna Brocke trans., 2007) (describing the Biltmore Conference as a "turning point in Zionist history; for it mean[t] that the Revisionist program, so long bitterly repudiated, ha[d] proved finally victorious").

112. Edward Said, Permission to Narrate 31 (1984) ("Zionism was a hothouse flower grown from European nationalism, anti-semitism and colonialism . . . .").

"Jewish Question" as projected onto Palestine in the twentieth and twenty-first centuries.[113]

B. *Colonialism and Expulsion in Zionist Thought*

As the previous section showed, the colonial origins of Zionism were omnipresent in Herzl's vision of Palestine.[114] While Herzl's quest for a "colonization charter" may have passed from the acceptable vocabulary of our time, the notion of Israel as "an outpost of civilization as opposed to barbarism" still echoes in the words of countless politicians, scholars, and others today.[115] These conceptions are rooted in the articulations of

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113. See generally Said, The Question of Palestine, supra note 67, at 43 (providing an overview of the "Palestinian experience" as characterized by its "traumatic national encounter with [overseas] Zionism").

114. In a letter to Cecil Rhodes, Herzl wrote:

> You are being invited to help make history. That cannot frighten you, nor will you laugh at it. It is not in your accustomed line; it doesn't involve Africa, but a piece of Asia Minor, not Englishmen, but Jews.
>
> But had this been on your path, you would have done it yourself by now.
>
> How, then, do I happen to turn to you, since this is an out-of-the way matter for you? How indeed? Because it is something colonial, and because it presupposes understanding of a development which will take twenty or thirty years.

Letter from Theodor Herzl to Cecil Rhodes, translated in 3, Herzl, Complete Diaries, supra note 73, at 1194.

115. Herzl, The Jewish State, supra note 65, at 96. For recent examples that employ such colonial language, see, e.g., Alan Dershowitz, War Against the Jews: How to End Hamas Barbarism 19 (2023) ("Israel is fighting a war not only for its own survival, but for the victory of humanity over barbarity."); Thomas L. Friedman, Opinion, Understanding the Middle East Through the Animal Kingdom, N.Y. Times: The Point (Feb. 2, 2024), https://www.nytimes.com/live/2024/01/30/opinion/thepoint#friedman-middle-east-animals (on file with the *Columbia Law Review*) ("Sometimes I contemplate the Middle East by watching CNN. Other times, I prefer Animal Planet."); Benjamin Netanyahu, Opinion, The Battle of Civilization, Wall St. J. (Oct. 30, 2023), https://www.wsj.com/articles/the-battle-of-civilization-in-gaza-israel-hamas-3236b023 (on file with the *Columbia Law Review*) ("The horrors that Hamas perpetrated on Oct. 7 remind us that we won't realize the promise of a better future unless we, the civilized world, are willing to fight the barbarians."). This thread, however, is not new or exclusive to right-wing Zionism. In 1996, then–Israeli Prime Minister Ehud Barak announced: "We still live in a modern and prosperous villa in the middle of the jungle, a place where different laws prevail. No hope for those who cannot defend themselves and no mercy for the weak." Lazar Berman, After Walling Itself In, Israel Learns to Hazard the Jungle Beyond, Times Isr. (Mar. 8, 2021), https://www.timesofisrael.com/after-walling-itself-in-israel-learns-to-hazard-the-jungle-beyond/ [https://perma.cc/A5E6-P5SS]. Such discourse positions Zionist settlers as modern civilizers and native Arabs, conversely, as backward and uncivilized.

For more about these colonial dichotomies as reflected in the Zionist project's attitude toward the land and landscape, see Irus Braverman, Planted Flags: Trees, Land, and Law in Israel/Palestine 1–3 (2009) (examining how these colonial dichotomies are "reflected, mediated, and, above all, reinforced through the polarization of the natural landscape into two juxtaposed treescapes"—pine forests and olive groves); Irus Braverman, Settling Nature: The Conservation Regime in Palestine–Israel 2–3 (2023) (examining how Israel's "nature

Zionism as colonialism by its leading thinkers, an ideological infrastructure that would later generate the 1948 Nakba.

Zionism's national aspirations went hand in hand with colonial methods. In line with other colonial enterprises, Herzl proposed a "Jewish Company" that "might be called a Jewish Chartered Company, though it cannot exercise sovereign power, and has other than purely colonial tasks."[116] In 1897, only a year after the publication of Herzl's influential pamphlet, the First Zionist Congress convened in Basel and adopted the Basel Program declaring that "Zionism aims at establishing for the Jewish people a publicly and legally assured home in Palestine."[117] In 1899, the Second Zionist Congress established the Jewish Colonial Trust, modeled after Herzl's "Jewish Company."[118]

Colonization was still a fashionable phenomenon at the end of the nineteenth century, and Zionism demanded an equal share in the European "right" to colonize.[119] The self-evident colonial essence of

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administration" in the form of national park designation and protection of flora and fauna "advances the Zionist project of Jewish settlement alongside the corresponding dispossession of non-Jews from this space"); Gary Fields, Enclosure: Palestinian Landscapes in a Historical Mirror 19 (2017) (exploring how Israel has used enclosure to "forcibly transfer[] Palestinians from areas of present-day Israel to outlying foreign territories or into the West Bank and Gaza Strip, where they assume[] a new social status as refugees"); Zerubavel, supra note 41, at 2 (using the desert as a symbolic landscape to explore "the ways in which Zionist Jews perceived, conceived, encoded, and reshaped the land they considered their ancient homeland").

116. Herzl, The Jewish State, supra note 65, at 98.

117. See 1897: The First Zionist Congress Takes Place in Basel, Switzerland, Isr. Ministry of Foreign Affs., https://mfa.gov.il/Jubilee-years/Pages/1897-The-First-Zionist-Congress-takes-place-in-Basel,-Switzerland.aspx [https://perma.cc/BJK7-FGKP] (last visited Mar. 30, 2024) (internal quotation marks omitted). Note that from the outset, Zionism's aims have been framed in legal terms, as evidenced by the phrase "publicly and *legally* assured home in Palestine." Id. (emphasis added).

118. Zionism: Jewish Colonial Trust, Jewish Virtual Libr., https://www.jewishvirtuallibrary.org/jewish-colonial-trust [https://perma.cc/J9CQ-S4QM] (last visited Mar. 30, 2024). That same year, the *New York Times* reported on the "Conference of Zionists" in Baltimore that "Will Colonize Palestine." Conference of Zionists, N.Y. Times (June 19, 1899), https://www.nytimes.com/1899/06/20/archives/conference-of-zionists-elect-delegates-at-their-meeting-in.html (on file with the *Columbia Law Review*).

119. On the development and demise of the right to colonial conquest in international law, see Sharon Korman, The Right of Conquest 41–66 (1996). Lawyer Sharon Korman provides an uncritical account of the legal history of conquest. Korman's failure to draw any critical insights with regard to conquest becomes clear in her discussion of Israel, in which she skips the question of conquest regarding the 1948 Nakba altogether, simply asserting that "the problem of the future of Palestine was settled by armed force." Id. at 251. Korman continues to examine Israel's annexation of East Jerusalem, guided by the misleading assertion that "Israel's status in East Jerusalem is slightly less problematic than it is in the West Bank." Id. at 253. In this sense, Korman's study provides a useful example of epistemological inquiries informed by Nakba denialism. See supra note 21 and accompanying text. Previous attempts to justify Israel's conquest during the 1948 Nakba have similarly relied on now irrefutably incorrect facts. See, e.g., Stephen M. Schwebel, What Weight to Conquest?, 64 Am. J. Int'l L. 344, 346–47 (1970) (arguing that Israel's conquest in 1948 was justified because Israel was "acting defensively"). But cf. Victor Kattan, From

Zionism did not preclude it from serving simultaneously as a national movement claiming to represent the Jewish people,[120] one that capitalized on a powerful biblical narrative to generate a secularized nation-state.[121] Indeed, the words "Jewish" and "colonial" simultaneously defined major Zionist institutions such as the Jewish Colonial Trust, the Jewish Colonization Association, and ultimately the Palestine Jewish Colonization Association established as late as 1924.[122] Once understood as both a national and colonial movement at once, it becomes easier to understand that these facets of Zionism are not mutually exclusive but rather co-constitutive.[123]

Zionism treated Palestine's native population as disposable. Settler-colonial articulations of Zionism are ubiquitous among Zionist leaders of the twentieth century, who grappled with early iterations of the "Question of Palestine" or the then-called "Arab Question": namely, the fate of the native Arab Palestinian population in the wake of a Jewish state.[124] Israel

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Coexistence to Conquest: International Law and the Origins of the Arab–Israeli Conflict, 1891–1949, at 174–77 (2009) (rebutting Schwebel's and others' arguments that Israel's 1948 conquests were legitimate, including the premise that Israel acted defensively); infra notes 378–379 and accompanying text.

120. Edward Said, Zionism From the Standpoint of Its Victims, Soc. Text, Winter 1979, at 7, 7–10 [hereinafter Said, Zionism].

121. See Amnon Raz-Krakotzkin, Religion and Nationalism in the Jewish and Zionist Context, *in* When Politics Are Sacralized 33, 38 (Nadim N. Rouhana & Nadera Shalhoub-Kevorkian eds., 2021) (describing how "[s]ecularization in Zionism meant the nationalization of religious-messianic conceptions, not their replacement" whereas paradoxically "God does not exist, but he promised us the Land"); Nadim Rouhana, Religious Claims and Nationalism in Zionism, *in* When Politics Are Sacralized, supra, at 54, 65 ("The essence of Zionism as envisioned by its secular founders was to transform the cultural connection – zeroing in on the religious component – into political entitlement, that is, the Zionists' exclusive right of sovereignty over Palestine.").

122. See Theodore Norman, An Outstretched Arm: A History of the Jewish Colonization Association 153 (1985) (Palestine Jewish Colonization Association); Jewish Colonization Association (ICA), Jewish Virtual Libr., https://www.jewishvirtuallibrary.org/jewish-colonization-association-ica [https://perma.cc/MS59-5873] (last visited Mar. 30, 2024) (Jewish Colonization Association); Zionism: Jewish Colonial Trust, Jewish Virtual Libr., https://www.jewishvirtuallibrary.org/jewish-colonial-trust [https://perma.cc/7XK6-2N72] (last visited Apr. 11, 2024) (Jewish Colonial Trust).

123. Nadia Abu El-Haj has powerfully demonstrated how archeology has served the Israeli national-colonial project by "producing facts through which historical-national claims, territorial transformations, heritage objects, and historicities 'happen'." Nadia Abu El-Haj, Facts on the Ground: Archeological Practice and Territorial Self-Fashioning in Israeli Society 6 (2001) (quoting Rogers Brubaker, Nationalism Reframed: Nationhood and the National Question in the New Europe 19 (1996)). Abu El-Haj explained that "[r]ather than analytically arguing for Zionism's colonial *or* national dimensions or, as is also common in scholarship on Israeli society, effacing the colonial question altogether, [she] insist[ed] on the articulation of the colonial *and* national projects" because "[n]ation and empire were always and everywhere co-constituted." Id. at 4–5.

124. See generally Neil Caplan, Palestine Jewry and the Arab Question 1917–1925, at 3 (1978) (characterizing the Arab question as the Zionist concern about the "serious demographic, political and/or physical threats posed by the Arabs," and identifying these concerns as varying in priority and intensity); Bashir Bashir & Leila Farsakh, Introduction:

Zangwill, an early Zionist figure, posed this question after realizing that Palestine was already inhabited: "One of the two: a different place must be found either for the Jews or for their neighbours [the Palestinians]."[125]

Clearly, the Zionist movement adopted the latter approach. Making room for a Jewish state in Palestine was understood by most schools of Zionism to require an exclusive Jewish majority in the future territory of the Jewish state.[126] Put simply, Zionism worked to implement the notion of "maximum territory, minimum Arabs."[127] As such, it necessitated in one way or another the mass transfer of Palestinians from the land.[128] Zangwill, for example, at different times suggested an "Arab exodus" that would include "race redistribution," which he contended was "literally the only 'way out' of the difficulty of creating a Jewish State in Palestine."[129] But he also realized that expelling the Palestinian people might be an unviable option and pose an existential threat to Zionism, leading him to establish the Jewish Territorial Organization and advocate for a Jewish state elsewhere.[130]

Three Questions that Make One, *in* The Arab and Jewish Questions: Geographies of Entanglement in Palestine and Beyond 8 (Bashir Bashir & Leila Farsakh eds., 2020) (defining the "Arab question" as "what to do with the existence and resistance of the indigenous Arab population in Palestine to the Zionist project" and criticizing alternative definitions that rendered it about "the relations between Jews and Arabs in the country" (internal quotation marks omitted)).

125. Masalha, Expulsion of the Palestinians, supra note 46, at 10 (internal quotation marks omitted) (quoting Zionist leader Israel Zangwill). As Zangwill also put it,

> Palestine proper has already its inhabitants. The pashalik of Jerusalem is already twice as thickly populated as the United States, having fifty-two souls to the square mile, and not 25 per cent of them Jews; so we must be prepared either to drive out by the sword the tribes in possession as our forefather did, or to grapple with the problem of a large alien population, mostly Mohammedan and accustomed for centuries to despise us.

The East Africa Offer, *in* Speeches, Articles, and Letters of Israel Zangwill 198, 210 (Maurice Simon ed., 1937).

126. Alternative strands of Zionism imagined binational statehood but were entirely marginalized by the dominant Zionist schools of thought. See, e.g., Adi Gordon, Rejecting Partition: The Imported Lessons of Palestine's Binational Zionists, *in* Partitions, supra note 29, at 175–77.

127. Segev, A State at Any Cost, supra note 28, at 407.

128. Especially relevant to the subject of the mass transfer of Palestinians is Nur Masalha's book *Expulsion of the Palestinians: The Concept of "Transfer" in Zionist Political Thought, 1882–1948*, which provides a detailed survey of Zionist political thought and reveals the centrality of the concept of transfer to Zionism. Masalha, Expulsion of the Palestinians, supra note 46.

129. Id. at 13 (quoting Israel Zangwill, The Voice of Jerusalem 103 (1920)). But see Meri-Jane Rochelson, A Jew in the Public Arena: The Career of Israel Zangwill 166 (2008) (arguing that "[w]hile the phrase 'race redistribution' sounds frighteningly Hitlerian, in February 1919 it was part of an idealistic plan to create a world of peace and justice").

130. Meri-Jane Rochelson, supra note 129, at 165 ("[Zangwill] may have been the first Zionist to recognize the difficulties that the Palestinian Arab population would pose, and in the end he could see no way around it but to search for a homeland elsewhere."); see also Gur Alroey, Zionism Without Zion: The Jewish Territorial Organization and Its Conflict With the Zionist Organization 202–53 (2016) (tracing Zangwill's "unremitting efforts" to find a territory that

Unlike Zangwill, leading Zionist thinkers—from Theodor Herzl[131] to Chaim Weizmann[132] to David Ben-Gurion[133]—remained committed to the project of Zionism in Palestine and lucidly articulated colonialism and expulsion as central tenets of their project. But no articulation of Zionism has put it as bluntly as Jabotinsky, the father of revisionism, a school of Zionism that provides the political ideology of Benjamin Netanyahu's Likud party

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would be suitable for the Zionist project, a search which took him to "Africa, Australia, the Americas, and Asia").

131. For Theodor Herzl, Zionism had certainly entailed a process of dispossession and removal of the native population from the land by creating an alliance with a tiny class of native landowners:

> We shall try to spirit the penniless population across the border by procuring employment for it in the transit countries, while denying it any employment in our own country.
>
> The property-owners will come over to our side. Both the process of expropriation and the removal of the poor must be carried out discreetly and circumspectly.

1, Herzl, Complete Diaries, supra note 73, at 88; see also Ghassan Kanafani, The Revolution of 1936–1939 in Palestine: Background, Details, and Analysis 6 (Hazem Jamjoum trans., 2023) (analyzing this unfulfilled alliance and arguing that "[t]he middle Arab landowners and urban bourgeoisie began to feel that Jewish capital was fast encroaching upon their interests").

132. For Chaim Weizmann, the president of the World Zionist Organization and first president of Israel, "the native [Palestinian] population was akin to 'the rocks of Judea, as obstacles that had to be cleared on a difficult path.'" Masalha, Expulsion of the Palestinians, supra note 46, at 17 (quoting Simha Flapan, Zionism and the Palestinians 56 (1979)). When asked about the residents of Palestine, Weizmann said, "The British told us that there are some hundred thousands negroes [Kushim] and for those there is no value." Id. at 6 (alteration in original) (quoting David Ben-Gurion, 1 Yoman Hamilhamah 22 (1982)).

Weizmann further articulated Zionism as colonialism before the UN Special Committee on Palestine as late as 1947:

> All of you will remember the East Indian Charter Company. But charter companies were hard to fashion in 1918, the first quarter of the twentieth century. The Wilsonian conception of the world certainly would not have allowed a charter company. Therefore, we had to create a substitute. This substitute was the Jewish Agency which had the function of a charter company, which had the function of a body which would conduct the *colonization*, immigration, improvement of the land, and do all the work which a government usually does, without really being a government.

U.N. GAOR, 2d Sess., 21st mtg., A/364/Add.2 PV.21 (July 8, 1947), https://www.un.org/unispal/document/auto-insert-183165/ [https://perma.cc/Q6CR-LKHM] (emphasis added).

133. Ben-Gurion endorsed the idea of transfer and stated, "With compulsory transfer we [would] have vast areas [for settlement]. . . . I support compulsory transfer. I do not see anything immoral in it." Masalha, Expulsion of the Palestinians, supra note 46, at 117 (internal quotation marks omitted) (quoting David Ben-Gurion, Protocol of the Jewish Agency Executive Meeting of 12 June 1938, vol. 28, no. 53, Cent. Zionist Archives, Jerusalem). Ben-Gurion would reiterate in 1937 that Israel "must expel Arabs and take their places . . . and if we have to use force—not to dispossess the Arabs of the Negev and Transjordan, but to guarantee our own right to settle in those places—then we have force at our disposal." Id. at 65–66. Tom Segev's biography of Ben-Gurion provides numerous other examples that animate Ben-Gurion's endorsement of transfer. At one instance, for example, Ben-Gurion declared to the Israeli cabinet, "We have decided to help [Etzel] cleanse Ramla." See Segev, A State at Any Cost, supra note 28, at 438.

today.[134] In *The Iron Wall*, Jabotinsky articulates Zionism as settler colonialism, acknowledging that Palestinians would naturally resist Zionist colonization: "The native populations, civilised or uncivilised, have always stubbornly resisted the colonists, irrespective of whether they were civilised or savage."[135] For Jabotinsky, therefore, the only path forward is the use of force: "*Zionist colonisation must either stop, or else proceed regardless of the native population.* Which means that it can proceed and develop only under the protection of a power that is independent of the native population—behind an iron wall, which the native population cannot breach."[136] This idea of an "iron wall," namely, employing violence to assert a Zionist sovereignty against the will of the native Palestinian population, has continued to influence the Israeli doctrine of colonization and state building until this day.[137]

As should be clear from the foregoing,[138] Zionist leaders have always articulated their project as a settler-colonial project involving the transfer

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134. Masalha, Expulsion of the Palestinians, supra note 46, at 10.

135. Jabotinsky, supra note 97 (emphasis omitted).

136. Id.

137. From Moshe Dayan to Benjamin Netanyahu, the idea that Israel must be maintained by force has been a dominant feature of Israeli politics. As early as 1956, Moshe Dayan articulated this doctrine in a famous eulogy for an Israeli soldier named Ro'i Rotberg, who was murdered near Gaza:

> Let us not today fling accusations at the murderers. What cause have we to complain about their fierce hatred for us? For eight years now, they sit in their refugee camps in Gaza, and before their eyes we turn into our homestead the land and villages in which they and their forefathers have lived.
>
> We should demand [Ro'i's] blood not from the Arabs of Gaza but from ourselves. . . . We are a generation of settlers, and without the steel helmet and the gun barrel we will not be able to plant a tree or build a house.

See Avi Shlaim, The Iron Wall: Israel and the Arab World 106–07 (2d ed. 2014) [hereinafter Shlaim, Iron Wall].

Netanyahu encapsulated this doctrine by famously stating in 2015 that Israel would "forever live by the sword." See Barak Ravid, Netanyahu: I Don't Want a Binational State, But We Need to Control All of the Territory for the Foreseeable Future, Haaretz (Oct. 26, 2015), https://www.haaretz.com/israel-news/2015-10-26/ty-article/.premium/netanyahu-i-dont-want-a-binational-state-but-we-need-to-control-all-of-the-territory-for-the-foreseeable-future/0000017f-e67d-da9b-a1ff-ee7f93240000 (on file with the *Columbia Law Review*).

138. Mohammed El Kurd positions the Palestinian subjects themselves as sources of knowledge, contesting the need to cite Zionist articulations to corroborate the Palestinian experience:

> I know I am native to Jerusalem, not because Jabotinsky said so, but because I am. I know that Zionists have colonized Palestine without the need to cite Herzl. I know this because I live it, because the ruins of countless depopulated villages provide the material evidence of calculated ethnic cleansing. When we as Palestinians speak about this ongoing and ignored ethnic cleansing—which is inherent to Zionist ideology, by the way—we are at best passionate and at worst angry and hateful. But in reality, we are just reliable narrators. I say we are reliable

and the expulsion of the native Palestinian population.[139] These concepts have constituted an overarching and organizing logic of Zionist thought, resembling a particular articulation of what historian Patrick Wolfe has called the "logic of elimination."[140]

As Professor Rashid Khalidi shows, Palestinians have realized and contested Zionism's basic tenets from its inception.[141] It is precisely against this background that scholars and others have long characterized Zionism as a form of colonialism and racism.[142] In 1965, Arab Palestinian

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> narrators not because we're Palestinians. It's not on an identitarian basis that we must be given, or must take, the authority to narrate. But history tells us that those who have oppressed, who have monopolized and institutionalized violence, will not tell the truth, let alone hold themselves accountable.

Mohammed El Kurd, The Right to Speak for Ourselves, The Nation (Nov. 27, 2023), https://www.thenation.com/article/world/palestinians-claim-the-right-to-narrate/ (on file with the *Columbia Law Review*).

139. Zionists' unreflective use of "colonization" to describe the Zionist and Israeli projects continued after 1948. E.g., Yaakov Morris, Pioneers From the West: A History of Colonization in Israel by Settlers From English-Speaking Countries (1953). For further studies of Zionism as colonialism, see Ilan Pappé, Zionism as Colonialism: A Comparative View of Diluted Colonialism in Asia and Africa, 107 S. Atl. Q. 611, 612 (2008); Gershon Shafir, Theorizing Zionist Settler Colonialism in Palestine, *in* The Routledge Handbook of the History of Settler Colonialism 339, 339 (Edward Cavanagh & Lorenzo Veracini eds., 2017).

140. Patrick Wolfe, Settler Colonialism and the Elimination of the Native, 8 J. Genocide Rsch. 387, 387 (2006) [hereinafter Wolfe, Elimination of the Native] ("I contend that, though [genocide and the settler-colonial tendency] have converged—which is to say, the settler-colonial logic of elimination has manifested as genocidal—they should be distinguished. Settler colonialism is inherently eliminatory but not invariably genocidal."); see also Patrick Wolfe, Structure and Event: Settler Colonialism, Time, and the Question of Genocide, *in* Empire, Colony, Genocide 102, 102–05 (A. Dirk Moses ed., 2008) [hereinafter Wolfe, Structure and Event] ("The logic of elimination is a primary motivation or agenda of settler colonialism that distinguishes it from other forms of colonialism . . . . [S]ettler colonialism is first and foremost a territorial project, whose priority is replacing natives on their land . . . .").

141. As early as 1899, former mayor of Jerusalem Yusuf Diya al-Din Pasha al-Khalidi noted in his correspondence with Herzl that "Palestine is an integral part of the Ottoman Empire, and more gravely, it is inhabited by others" and asked that "Palestine be left alone." See Khalidi, Hundred Years' War, supra note 35, at 2, 4–5. Palestinians had become increasingly aware of Zionist endeavors, objectives, and goals well before those things culminated in the 1948 Nakba. Palestinian figures such as journalists 'Isa al-'Isa and Najib Nassar, who published two influential newspapers—*Filastin* and *al-Karmil*, respectively—also warned about the perils of Zionism. See Khalidi, Palestinian Identity, supra note 45, at 119–44 (delineating the treatment of Zionism in Arabic press). The organization of the Palestine Arab Congress from 1919 to 1928 also reflects this growing consciousness. See Farsoun, supra note 45, at 85–87.

142. For examples of the first wave of scholarship on the subject, see generally George Jabbour, Settler Colonialism in Southern Africa and the Middle East 7 (1970) (arguing that "there is a pattern of behavior which is identical in its general lines exhibited by those European settlers who have formed political entities in non-European lands . . . recognizable in South Africa, Southern Rhodesia and Israel" and studying these similarities through the lens of "settler colonialism"); Jiryis, supra note 9 (describing the conditions

intellectual Fayez Sayegh argued, "'Jewish nationalism' would thus fulfil itself through the process of colonization, which other European nations had utilized for empire-building. For, Zionism, then, colonization would be the instrument of nation-building, not the by-product of an already-fulfilled nationalism."[143] Based on the understanding of Zionism as a form of colonialism that seeks to "establish a settler-community," Sayegh argued that "Zionist racial identification produces three corollaries: racial self-segregation, racial exclusiveness, and racial supremacy," which he described as "the core of the Zionist ideology."[144] Sayegh's theorization of Zionism eventually led the United Nations General Assembly to adopt Resolution 3379 in 1975, declaring Zionism a "form of racism and racial discrimination."[145] In 1991, however, the United States successfully led the diplomatic efforts to repeal the resolution,[146] after convincing the Palestine Liberation Organization (PLO) to agree with its efforts as part of the "peace process" scheme.[147]

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faced by Palestinians in Israel prior to 1967); Baruch Kimmerling, Zionism and Territory: The Socio-Territorial Dimensions of Zionist Politics 1 (1983) (analyzing the "settler society . . . established by immigrant Jews in Palestine" by examining Zionism and the "territory chosen for colonization"); Maxime Rodinson, Israel: A Colonial-Settler State? (1973) (studying Israel's colonial-settler origins); Fayez A. Sayegh, Zionist Colonialism in Palestine (1965) (explaining characteristics of the colonization of Palestine, including expulsion); Shafir, Origins of the Israeli-Palestinian Conflict, supra note 101 (seeking to explain the social origins of the Israeli–Palestinian conflict); Elia T. Zureik, The Palestinians in Israel: A Study in Internal Colonialism (1979) (studying the sociology of Palestinian Arabs in Israel through the lens of internal colonialism); Jamil Hilal, Imperialism and Settler Colonialism in West Asia: Israel and the Arab Palestinian Struggle, 1 Utafiti J. Arts & Soc. Scis. 51 (1976) (reviewing the origins of Zionism); Said, Zionism, supra note 120, at 67 (studying Zionism as both nationalism and settler colonialism). For examples of more recent scholarship, see generally Abu El-Haj, supra note 123 (analyzing the role and effects of archeology in Israeli narrative and nation-building); Seikaly, Men of Capital, supra note 45 (reviewing capitalist movements in pre-1948 Palestine).

143. Sayegh, supra note 142, at 1–2 (emphasis omitted).

144. Id. at 1, 22 (emphasis omitted).

145. G.A. Res. 3379, ¶ 6 (Nov. 10, 1975).

146. G.A. Res. 46/86 (Dec. 16, 1991). See also Paul Lewis, U.N. Repeals Its '75 Resolution Equating Zionism With Racism, N.Y. Times, Dec. 17, 1991, at A1 ("For the United States, the heavy vote in favor of repeal was a demonstration of its diplomatic power. After President Bush called for the repeal in . . . a speech to the General Assembly, United States embassies around the world were instructed to put maximum pressure to secure the repeal.").

147. See Noura Erakat, Beyond Discrimination: Apartheid Is a Colonial Project and Zionism Is a Form of Racism, Eur. J. Int'l L.: Talk! (July 5, 2021), https://www.ejiltalk.org/beyond-discrimination-apartheid-is-a-colonial-project-and-zionism-is-a-form-of-racism/ [https://perma.cc/9L3C-ZLRR] [hereinafter Erakat, Beyond Discrimination] ("The Oslo agreements[,] which resulted [from rescinding the Resolution,] are better understood as a model for ghettoized sovereignty undergirding contemporary claims of Israeli apartheid, rather than a roadmap to Palestinian statehood."). For further context, see Noura Erakat, Unfinished Business: Zionism as a Form of Racism and Racial Discrimination (forthcoming) (manuscript at 1), https://www.academia.edu/79821831/Unfinished_Business_Zionism_as_a_Form_of_Racism_and_Racial_Discrimination [https://perma.cc/9L7U-JTTA] ("In 1991, the PLO agreed to rescind the Resolution as a precondition for entering into the Oslo

Against this background, this Article advances an understanding of Zionism as Nakba. Typically, Zionism is recognized primarily as a movement of Jewish self-determination without attending to its key material consequence. The Nakba, which is the material corroboration and culmination of the ideals espoused by Zionism, leaves no room for doubt as to Zionism's key feature. If before 1948 one could still arguably distinguish between Zionism and its commitment to expulsion or consider the tensions between the colonial and national facets of the movement, then after 1948—and certainly since then—this attempt cannot be understood as anything but an excuse for Zionism and an attempt to salvage Zionism from the atrocities it has committed.[148]

To recognize Zionism as Nakba is to take seriously the magnitude and mechanisms of Palestinian displacement as well as to situate that process within its historical context, namely European antisemitism, the destruction of European Jewry, and the supremacist claims made by European Zionists on Palestinian land. The Nakba has emanated from Zionist praxis and provided an irrefutable material instantiation of Zionist ideology that must inform how we define it.[149]

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peace agreement . . . . The US-led bilateral agreement reframed the Palestinian freedom struggle from one against Zionist settler-colonial 'racial elimination' and territorial expansion to a conflict between two warring peoples.").

148. Professor Derek Penslar provides a sophisticated example of the claim that "[p]lacing Zionism within the broad sweep of Western colonialism leaves unexplained many of its key aspects, such as the nature of Zionism's connection with historic Palestine." Penslar, Zionism, supra note 58, at 70. Interestingly, while Penslar notes that "[w]hether Zionism's particularities or its commonalities with other forms of settlement colonialism are more important is largely a function of the observer's disciplinary position and political commitments," he does not disclose to the readers his own viewpoint, given his disciplinary position or political commitments. See id. at 95–96 (describing what he calls "[e]ngaged scholarship"). One is left wondering: Is nuance the enemy of a value judgment? What is the value of nuance if it obfuscates the harms essential to certain ideologies? If Zionism is colonialism—and surely, other things as well—why should we dissect this facet from its other manifestations and exceptionalize it? This broader attempt to sever Zionism from its family name—colonialism—or the need to constantly assert that it has other relatives called "antisemitism" and "nationalism" remains a puzzling issue. The national and colonial facets of Zionism are not contrary but rather co-constitutive. Zionism was born out of their amalgamation.

149. And yet some scholars have claimed, for example, that Zionism remains a just or justifiable ideology despite the intense moral tensions stemming from its treatment of Palestinians. See, e.g., Chaim Gans, A Just Zionism: On the Morality of the Jewish State 5–6 (2008) (defending the justice of Zionism's "defining principles," though acknowledging the "gap between a particular version of Zionist ideology that could be considered just and the situation today"). Benny Morris, a historian who has written extensively about the Nakba, somehow maintains that Zionist forces' expulsions of Palestinians are not "war crimes": "[I]t was necessary to uproot [Palestinians]. There was no choice but to expel that population. . . . It was necessary to cleanse the villages from which [Jewish] convoys and [Jewish] settlements were fired on." Survival of the Fittest (Cont.), Haaretz (Jan. 8, 2004), https://www.haaretz.com/2004-01-08/ty-article/survival-of-the-fittest-cont/0000017f-e86d-da9b-a1ff-ec6fb5000000 (on file with the *Columbia Law Review*) [hereinafter Survival of the Fittest] (internal quotation marks omitted) (quoting Benny Morris).

C. *Zionism in Praxis*

The Nakba of 1948, then, is the material manifestation of Zionism. The May 14, 1948 declaration establishing the State of Israel provides a useful temporal mark to distinguish the two main stages of the Nakba. The first stage, inaugurated by the United Nations' adoption of the Partition Plan,[150] unfolded between November 30, 1947, and May 14, 1948. At this first stage of the Nakba, no neighboring Arab armies intervened, and the British had still not yet completed their full withdrawal from Palestine.[151]

And yet, this first stage yielded catastrophic results for the Palestinians and put in place a pattern of expulsion and displacement. The United Nations' adoption of the Partition Plan sparked a process of intensifying violence between Jews and Arabs in Palestine—violence that increasingly

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Although Morris argued that the Nakba is a justifiable case of ethnic cleansing, he later contended that Israel conducted no ethnic cleansing. Compare Survival of the Fittest, supra (stating that "[t]here are circumstances in history that justify ethnic cleansing" and that the expulsions were "necessary to cleanse the hinterland and cleanse the border areas and cleanse the main roads") (internal quotation marks omitted), with Benny Morris, Opinion, Israel Conducted No Ethnic Cleansing in 1948, Haaretz (Oct. 10, 2016), https://www.haaretz.com/opinion/2016-10-10/ty-article/.premium/israel-conducted-no-ethnic-cleansing-in-1948/0000017f-db91-d3a5-af7f-fbbfa2270000 (on file with the *Columbia Law Review*) ("I don't accept the definition 'ethnic cleansing' for what the Jews in prestate Israel did in 1948."). But see Daniel Blatman, Opinion, Yes, Benny Morris, Israel Did Perpetrate Ethnic Cleansing in 1948, Haaretz (Oct. 14, 2016), https://www.haaretz.com/opinion/2016-10-14/ty-article/.premium/yes-benny-morris-it-was-ethnic-cleansing-in-1948/0000017f-da72-d938-a17f-fe7a4a4f0000 (on file with the *Columbia Law Review*) (noting Morris's shift and arguing that he has "betrayed two key duties of the historian: to be open-minded and recognize the extensive research literature that directly relates to his own areas of research; and not to distort his own previous conclusions due to current political insights").

Similarly, historian Adam Raz, author of *Looting of Arab Property in the War of Independence*—a book on the looting of Palestinian property—still opens his book insisting that Zionism was not an ideology of dispossession. Adam Raz, Bizat Harekhush Ha'rvi Bimilḥemet Ha'tzma'ut [The Looting of Arab Property in the War of Independence] 15 (2020) [hereinafter Raz, Looting of Arab Property] ("The Zionist movement was not from the outset a dispossessory movement. In fact, even after the War of Independence, it should not be seen as such.") (author's translation). For an important review of Raz's book, see Avi-ram Tzoreff, Carpets, Books, and Jewelry: Why Looting Was Central to the Nakba, +972 Mag. (Mar. 24, 2022), https://www.972mag.com/looting-1948-historiography/ [https://perma.cc/R9FU-DXX7].

150. G.A. Res. 181 (II) (Nov. 29, 1947). A comprehensive discussion of the Partition Plan is beyond the capacity of this Article. For studies of the partition of Palestine, including the United Nations Partition Plan, see supra note 29.

151. See infra notes 162–171 and accompanying text. A plethora of works provide exhaustive historical detail on the Palestinian Nakba. In this section, I largely rely on Rashid Khalidi's *The Hundred Years' War on Palestine: A History of Settler Colonialism and Resistance, 1917–2017*; Ilan Pappe's *The Making of the Arab-Israeli Conflict 1947–51*; Avi Shlaim's *The Iron Wall: Israel and The Arab World*; and Victor Kattan's *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1981–1949*.

victimized Palestinian Arabs.[152] By then, the Zionists had already developed a strong paramilitary force, benefiting from the advantage and training of the British military.[153] The Zionist military infrastructure included better organized, equipped, and trained forces than the barely prepared Palestinian paramilitary groups, which were substantially smaller and significantly less armed.[154]

These tensions culminated in Plan Dalet, a military offensive waged by the Haganah forces starting in April 1948.[155] The self-described aim of

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152. See Pappé, Arab-Israeli Conflict, supra note 49, at 76–77 (describing the "outbreak of violence" after ratification of the Partition Plan, including the offensive and provocative nature of Jewish violence in Jerusalem on December 25, 1947). In January 1948, Sir Alexander Cadogan, Britain's former representative to the UN, stated, "[T]he Jewish story that the Arabs are the attackers and the Jews the attacked is not tenable." Kattan, supra note 119, at 178 (2009) (quoting UN Palestine Comm'n, First Monthly Progress Rep. to the Sec. Council, ¶ 7(c), U.N. Doc. A/AC.21/7 (1948)). In December 1947, Sir Alan Cunningham, the British High-Commissioner of Palestine, described the nature of this violence: "The initial Arab outbreaks were spontaneous and unorganized and were more demonstrations of displeasure . . . than determined attacks on Jews. The weapons initially employed were sticks and stones and had it not been for Jewish resource to firearms, it is not impossible that . . . little loss of life [would have] been caused." Id. (quoting Michael Palumbo, The Palestinian Catastrophe 35–36 (1987)).

153. Pappé, Arab–Israeli Conflict, supra note 49, at 50 ("The experience of some 27,000 Jewish veterans who had served with the British army and the establishment of commando units (Palmach) in 1941, enabled the political leadership to proceed with its plans in defiance of British and Arab opposition."). As early as November 1947, the main and largest paramilitary group, the Haganah, was restructured as a conscription-based army under Ben-Gurion. Id. at 51; see also Shlaim, Iron Wall, supra note 137, at 32–33 (describing Ben-Gurion's military strategy in April and May of 1948 and noting that "the Haganah thus directly and decisively contributed to the birth of the Palestinian refugee problem").

154. Victor Kattan summarizes the disparity before May 1948 as follows:

> Prior to May 1948, the Haganah was able to field 30,000 front-line troops backed up by 32,000 garrison forces, 15,410 settlement police and the 32,000 men of the Home Guard. The Irgun had 5,000 men and Lehi had approximately 1,000 'freedom fighters'. The Palestinian Arabs, on the other hand, had to rely on the *Jaysh al-Jihad al-Muqaddes*, which was their only indigenous defence force, numbering 5,000 men, which had no modern weapons, few sources of finance, and fought with weapons discarded in earlier wars, mostly rifles. The *Jaysh al-Inqadh*, the so-called 'Arab Liberation Army', numbered between 3,000 and 4,000 men, of whom 1,500 were Palestinian Arab. They were described as being poorly trained both militarily and politically, and lacking the formation necessary for mobilising popular resistance.

Kattan, supra note 119, at 178 (footnotes omitted) (first citing David Gilmour, Dispossessed: The Ordeal of the Palestinians 63 (1982); then citing Rosemary Sayigh, The Palestinians: From Peasants to Revolutionaries 79 (2d ed. 2007)); see also Pappé, Arab-Israeli Conflict, supra note 49, at 52 (describing the "growth of the Jewish military potential").

155. See Kattan, supra note 119, at 9–19 ("On 1 April 1948, the Haganah implemented Operation Nachshon, the first of many such operations undertaken as part of Plan Dalet . . . .").

The Haganah was the largest Zionist paramilitary group under the British Mandate era. Id. at 178. It joined the Irgun and Lehi, two smaller Zionist militias that were officially designated as terrorist, to form the Israeli army known as the Israeli Defense Forces (IDF). See

Plan Dalet was to "gain control" of both the territories allocated by the UN Partition Plan, as well as "areas of Jewish settlement and concentration which were located outside the borders [of the Hebrew state]."[156] The plan detailed the methods by which such conquest would take place and directed the "[d]estruction of villages (setting fire to, blowing up, and planting mines in the debris), especially those population centers which [were] difficult to control continuously" and clarified that "[i]n the event of resistance, the armed force must be wiped out and the population must be expelled outside the borders of the state."[157]

The implementation of Plan Dalet marked the start of a systematic campaign of ethnic cleansing and included various operations that oversaw the bombardment, conquest, and depopulation of major cities, such as Haifa, Jaffa, Safad, Tiberias, and the western part of Jerusalem.[158] During this period, on April 9, 1948, the Zionist paramilitary forces slaughtered over a hundred Palestinians from the village of Deir Yassin in a massacre that would leave an indelible mark on Palestinian collective memory.[159] The news of the Deir Yassin massacre fueled an atmosphere of horror among Palestinians and terrorized families into fleeing Palestine.[160]

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id. at 397–98 (providing glossary definitions of the Haganah, Irgun, and Lehi); Shlaim, Iron Wall, supra note 137, at 35.

156. See Walid Khalidi, Plan Dalet: Master Plan for the Conquest of Palestine, J. Palestine Stud., Autumn 1988, at 4, 24 [hereinafter Khalidi, Plan Dalet] (alteration in original) (translating the text of Plan Dalet). Khalidi cites an IDF publication referring to Plan Dalet's purpose as the "control of the area given to us by the UN in addition to areas occupied by us which were outside these borders and the setting up of forces to counter the possible invasion of Arab armies after May 15." Id. at 16 (emphasis omitted) (internal quotation marks omitted) (quoting Isr. Def. Force, Qravot 5708 (Battles of 1948), at 16 (1955)).

157. Id. at 29 (translating the text of Plan Dalet).

158. See Walid Khalidi, The Fall of Haifa Revisited, J. Palestine Stud., Spring 2008, at 30, 31 [hereinafter Khalidi, Fall of Haifa] ("Plan Dalet . . . which spelled out its guidelines and operational orders in meticulous detail, comprised a core of subsidiary operations for the conquest of given regions or towns . . . ."); Khalidi, Plan Dalet, supra note 156, at 7–18 (describing the objectives of Plan Dalet); see also Pappe, Ethnic Cleansing, supra note 36, at 88 ("Whereas the official Plan Dalet gave the villages the option to surrender, the operational orders did not exempt any village for any reason. With this the blueprint was converted into military order to begin destroying villages.").

159. See Sharif Kana'ana & Nehad Zeitawi, Diyr Yasiyn [Deir Yassin], 4 Silsilah al-Qurá al-Filasṭyniyyah al-Mudamarah [The Destroyed Palestinian Villages Series] 57–60 (1987) (listing the names of 107 Palestinians killed in the Deir Yassin massacre based on survivors' testimonies); Ofer Aderet, Testimonies From the Censored Deir Yassin Massacre: 'They Piled Bodies and Burned Them', Haaretz (July 16, 2017), https://www.haaretz.com/israel-news/2017-07-16/ty-article-magazine/testimonies-from-the-censored-massacre-at-deir-yassin/0000017f-e364-d38f-a57f-e77689930000 [https://perma.cc/QPP3-ZW9L] (describing testimonies of Zionist soldiers from the massacre and noting that "most researchers state that 110 inhabitants of the village, among them women, children and elderly people, were killed there."). The Deir Yassin massacre is perhaps the most discussed tragedy but is certainly not an exception. For more on the massacres of the 1948 Nakba, see infra note 169.

160. See Khalidi, Hundred Years' War, supra note 35, at 74–75.

By mid-May of 1948, some 300,000 Palestinians had already been displaced by Zionist forces.[161]

The second stage of the Nakba followed. On May 14, 1948, as the British Mandate officially came to its end, the Zionist leadership declared the independence of the State of Israel, relying on United Nations Resolution 181(II) as an "irrevocable" right to establish Jewish statehood while defying the Resolution's delineated borders.[162] The next day, a war with Arab countries commenced, lasting until the first truce on June 11, 1948.[163] But contrary to the Zionist account of a tiny Israel unexpectedly defeating various Arab countries who came to invade it,[164] in reality, the Israeli army both "outnumbered and outgunned its opponents."[165]

Over the course of a few months, the well-equipped and well-organized military force of the newly established State of Israel crushed the weak and uncoordinated Arab armies[166] while concurrently expanding the conquest of Palestine and forcibly expelling entire Palestinian communities along the way.[167] During this second stage of the Nakba,

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161. Id. at 75.

162. See Declaration of Israel's Independence ¶ 9 (Isr. 1948) ("This recognition by the United Nations of the right of the Jewish people to establish their State is irrevocable.").

163. See Khalidi, Hundred Years' War, supra note 35, at 75. Shlaim, Iron Wall, supra note 137, at 35 ("The first round lasted from 15 May until 11 June, the second from 9 to 18 July, and the third from 15 October until 7 January 1949.").

164. Shlaim, Iron Wall, supra note 137, at 35–36 (depicting the "conventional Zionist version" which "portrays the 1948 war as a simple, bipolar, no-holds-barred struggle between a monolithic Arab adversary and a tiny Israel" wherein "the infant Jewish state fought a desperate, heroic, and ultimately successful battle for survival against overwhelming odds").

165. Khalidi, Hundred Years' War, supra note 35, at 77. Similarly, Shlaim notes:

> [I]n mid-May 1948 the total number of Arab troops, both regular and irregular, operating in the Palestine theater was under 25,000, whereas the IDF fielded over 35,000 troops. By mid-July the IDF mobilized 65,000 men under arms, and by December its numbers had reached a peak of 96,441. The Arab states also reinforced their armies, but they could not match this rate of increase. . . . [A]t each stage of the war, the IDF significantly outnumbered all the Arab forces arrayed against it, and by the final stage of the war its superiority ratio was nearly two to one. The final outcome of the war was therefore not a miracle but a reflection of the underlying Arab-Israeli military balance.

Shlaim, Iron Wall, supra note 137, at 36–37.

166. See Khalidi, Hundred Years' War, supra note 35, at 75 (describing the defeat of the Arab armies, the displacement of Palestinians, and the destruction of Palestinians' homes and villages). See also infra note 173 and accompanying text (describing the "collusion" that formed between the Kingdom of Jordan, the Zionist leadership, and the British prior to 1948).

167. The expulsion of Palestinian communities from Lydda and Ramla in July 1948, ordered by Ben-Gurion, constituted the largest instance of ethnic cleansing in 1948, whereby over 70,000 Palestinians were expelled from their homes. See Morris, Palestinian Refugee Problem, supra note 3, at 429 (describing Ben-Gurion's order to "[e]xpel them [*garesh otam*]" and Yitzhak Rabin's official directive that "[t]he inhabitants of Lydda must be expelled quickly without attention to age" (second alteration in original) (internal quotation marks omitted) (first quoting David Ben-Gurion; then quoting Yitzhak Rabin's

Israeli forces displaced and dispossessed over 400,000 additional Palestinians[168] while committing various massacres,[169] looting Palestinian property,[170] and in some cases raping Palestinian women.[171]

The Arab defeat in the war was not only a product of inferior military capabilities but also a result of these newly formed regimes' dependency

official directive)); Reja-e Busailah, The Fall of Lydda, 1948: Impressions and Reminiscences, 3 Arab Stud. Q. 123, 140–41 (1981) ("We were ordered to move eastward . . . . We were striking into the wilderness, robbed, and without a Moses."); Walid Khalidi, Introduction to Spiro Munayyer, The Fall of Lydda, J. Palestine Stud., Summer 1998, at 80, 80–82 (describing the expulsion from Lydda, Ramla, and some twenty-five neighboring villages). See generally Maḥmūd Zaydān, Interview with Ismāʿīl ʿAbd al-Qādir Shammūṭ (Oct. 11, 2003), https://libraries.aub.edu.lb/poha/Record/4522 [https://perma.cc/FS3X-7X9J] (describing childhood in Lydda and the expulsion from it).

168. See Khalidi, Hundred Years' War, supra note 35, at 75.

169. The exclusion of Palestinian sources and oral histories by some historians has obfuscated, downplayed, and underestimated the systemic nature of the massacres committed during the 1948 Nakba. Compare Morris, Palestinian Refugee Problem, supra note 3, at 592 ("Apart from the 20-odd cases of massacre, Jewish troops often randomly killed individual prisoners of war, farm hands in the fields and the occasional villager who had stayed behind."), with Saleh Abdel Jawad, Zionist Massacres: The Creation of the Palestinian Refugee Problem in the 1948 War, *in* Israel and the Palestinian Refugees 59, 61–62, 104–24 (Eyal Benvenisti, Chaim Gans & Sari Hanafi eds., 2007) (documenting sixty-eight massacres of Palestinians by Zionist forces between December 1947 through November 1948 and arguing that when the entire pattern is considered, "it is enough to demonstrate a centralised Zionist/Israeli policy of ethnic cleansing, even without 'smoking gun' documents asserting to such a centralized policy"); see also Manna, Nakba and Survival, supra note 53, at 62, 70–77 (describing massacres in ʿIlabun, Saliha, and other villages that took place during "Operation Hiram" to occupy the Galilee following May 1948 and concluding that "[t]he fact that the army perpetrated fifteen massacres during a single week after occupying the Galilee speaks to the presence of a formal policy"); Adam Raz, Classified Docs Reveal Massacres of Palestinians in '48—and What Israeli Leaders Knew, Haaretz (Dec. 9, 2021), https://www.haaretz.com/israel-news/2021-12-09/ty-article-magazine/.highlight/classified-docs-reveal-deir-yassin-massacIsnt-the-only-one-perpetrated-by-isra/0000017f-e496-d7b2-a77f-e79772340000 (on file with the *Columbia Law Review*) ("Morris recorded 24 massacres during the 1948 war. Today it can be said that the number is higher, standing at several dozen cases. . . . With the exception of . . . Deir Yassin . . . this gloomy slice of history appears to have been repressed and pushed aside from the Israeli public discourse.").

170. See Michael R. Fischbach, Records of Dispossession 1 (2003) (describing Israel's dispossession of Palestinian refugees from property during and after 1948); Manna, Nakba and Survival, supra note 53, at 213 (describing the "systematic pillaging by the government of absentee property and possessions"); see generally Raz, Looting of Arab Property, supra note 150 (describing the looting of Palestinian property from various cities including Tiberias, Haifa, Jerusalem, Jaffa, Acre, Safad, Bisan, Ramla, and Lydda).

171. See Morris, Palestinian Refugee Problem, supra note 3, at 220, 231, 238, 249, 257–258, 592 (mentioning instances of rape by Zionist soldiers in Jaffa, Acre, Deir Yassin, Hunin, Abu Shusha, and Burayr); Frances Hasso, Modernity and Gender in Arab Accounts of the 1948 and 1967 Defeats, 32 Int'l J. Middle E. Stud. 491, 497–98 (2000) (analyzing accounts of rape in Deir Yassin); Isabelle Humphries & Laleh Khalili, Gender of Nakba Memory, *in* Nakba: Palestine, supra note 2, at 207, 211–12 (discussing the rapes in Safsaf and Deir Yassin and observing that "[d]espite the use of rape as an instrument of expulsion, however, direct descriptions of the circumstances of rapes have never been incorporated into narratives of Nakba atrocities, and raped women have rarely—if ever—been named").

on imperial powers.[172] In the case of the Kingdom of Jordan, which had the best-trained Arab army at the time, the Kingdom's interests in expanding its territory, economy, and population after independence collided with its putative interest in an independent Palestinian state.[173]

In the first half of 1949, Israel signed a series of armistice agreements with Egypt, Lebanon, Jordan, and Syria, bringing the war to an official end.[174] The agreements established the so-called Green Line, encircling seventy-seven percent of the territory of Palestine, as Israel's unofficial borders.[175] Soon after, the United Nations admitted Israel as a member state to its organization.[176] Egypt assumed control over the Gaza Strip, whereas Jordan assumed control over the West Bank and East Jerusalem.[177] These territories, known today as the Palestinian Territories, would later be occupied by Israel in 1967 following another war between Israel and neighboring Arab states.[178]

By the time the 1948 war concluded, a dramatically new reality emerged. The calamitous results of the Zionist conquest of Palestine and the formation of the State of Israel had left Palestinian society decimated and Arab nations defeated. Hundreds of Palestinian villages were depopulated and destroyed.[179] Over 750,000 Palestinians became refugees,

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172. See Khalidi, Hundred Years' War, supra note 35, at 77–78 ("Jordan's Arab Legion and Iraq's forces[] were forbidden by their British allies from breaching the borders of the areas allocated to the Jewish state by partition . . . .").

173. As Avi Shlaim has shown, the Zionist leadership, the Hashemite Kingdom of Jordan, and the British formed a "collusion to frustrate the United Nations partition resolution of 29 November 1947 and to prevent the establishment of a Palestinian Arab state." Shlaim, Collusion, supra note 49, at 1. Shlaim further argues that "in 1947 an explicit agreement was reached between the Hashemites and the Zionists on the carving up of Palestine following the termination of the British mandate, and that this agreement laid the foundation for mutual restraint during 1948 and for continuing collaboration in the aftermath of war." Id.

174. Benny Morris, Israel's Border Wars 1949–1956, at 1 (1993) ("The 1948 war officially ended with the signing in the spring and summer of 1949 of a series of 'general armistice' agreements between Israel and each of its neighbours . . . . But, for all practical purposes, the fighting between Israel and Lebanon, Syria, and Jordan had already ended in the summer of 1948 . . . .").

175. Robert C. Cottrell, The Green Line: The Division of Palestine 2–4 (2005). Note, however, the narratives of Nakba denialism that inform the author, omitting any mention of systematic expulsions of Palestinians. Id. at 4.

176. Growth in United Nations Membership, UN, https://www.un.org/en/about-us/growth-in-un-membership [https://perma.cc/AX68-2NV7] (last visited Apr. 12, 2024) (noting the addition of Israel as a member state in 1949).

177. For a description of the buildup to and aftermath of the 1967 war, see Khalidi, Hundred Years' War, supra note 35, at 96–137; see also Sara Roy, Inst. for Palestine Stud., The Gaza Strip: The Political Economy of De-Development 65 (3d ed. 2016).

178. See supra note 11 and accompanying text.

179. See supra note 3 and accompanying text; Noga Kadman, Erased From Space and Consciousness: Israel and the Depopulated Palestinian Villages of 1948, at 9 (Dimi Reider & Ofer Neiman trans., 2015) ("Some four hundred thousand of the refugees came from several hundred villages that remained in Israeli hands after the war, ravaged and empty.").

dispossessed, and were denied their right to return to their homes—a reality that continues in the present.[180]

In the aftermath of the 1948 Nakba, the Israeli state has not only denied the Palestinian refugees their right of return and demolished their depopulated villages but also committed further mass expulsions.[181] About 160,000 Palestinians managed to remain within the Green Line demarcating the 1949 armistice borders of the Israeli state, becoming second-class Israeli citizens governed by a military rule that lasted until 1966.[182] In 1967, Israel would occupy the West Bank, the Gaza Strip, and

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180. The United Nations acknowledged the Palestinian refugees' right of return as early as 1948. See G.A. Res. 194 (III), ¶ 11 (Dec. 11, 1948) ("[Palestinian] refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date . . . ."). For more on the right of return, see Kathleen Lawand, The Right to Return of Palestinians in International Law, 8 Int'l J. Refugee L. 533, 533–34 (1996); John Quigley, Displaced Palestinians and a Right of Return, 39 Harv. Int'l L.J. 171, 171–72 (1998); Wadie Said, The Obligations of Host Countries to Refugees Under International Law: The Case of Lebanon, *in* Palestinian Refugees: The Right of Return 123, 125 (Naseer Aruri ed., 2001); Rashid Khalidi, Observations on the Right of Return, 21 J. Palestine Stud., Winter 1992, at 29, 29. See also infra notes 317–319 and accompanying text.

181. See Pappe, Ethnic Cleansing, supra note 21, at 220 (describing the depopulation of Umm al-Faraj village in 1953 and the expulsion of Bedouin tribe of al-Hawashli in 1962); Avi Shlaim, Iron Wall, supra note 137, at 75 (describing the "forcible evacuation of the eight hundred inhabitants of two Arab villages" from the Israel–Syria demilitarized zone in March 1951).

Two villages—Iqrit and Kafr Bir'im—have received exceptional attention within this broader pattern of expulsion and exclusion. These villages' exceptional character is partly because, as early as 1951, the Israeli Supreme Court acknowledged the illegality of the villagers' removal. And yet the Israeli government has prevented residents of these villages from returning. See HCJ 64/51 Daoud v. Minister of Defence, 5(2) PD 1117 (1951) (Isr.) (holding that the petitioners may return to reside in the village of Ikrit); Baruch Kimmerling, Sovereignty, Ownership, and "Presence" in the Jewish–Arab Territorial Conflict: The Case of Bir'im and Ikrit, 10 Compar. Pol. Stud. 155, 160 (1977) ("In July 1951, the inhabitants [of Bir'im and Ikrit] appealed to the Supreme Court, which declared that no *legal* barrier existed to their return."); Joseph L. Ryan, Refugees Within Israel: The Case of the Villagers of Kafr Bir'im and Iqrit, J. Palestine Stud., Summer 1973, at 55, 55 ("The inhabitants of these two villages . . . who were dispossessed by the Israeli army in 1948, have been struggling from within Israel for a quarter of a century for the right to return to their homes.").

182. See Robinson, supra note 9, at 48 ("Most, if not all, Knesset deputies knew that military rule was imposed solely on Palestinians and that the permit system [that restricted day-to-day travel] was racially enforced."); Jabareen, Hobbesian Citizenship, supra note 10, at 193–98 ("Only about 160,000 Palestinians remained . . . . [T]hey lost their leaders, elites, cities, and contact with their relatives, friends, the rest of their people, and the Arab nation."); Nadim N. Rouhana & Areej Sabbagh-Khoury, Settler-Colonial Citizenship: Conceptualizing the Relationship Between Israel and Its Palestinian Citizens, 5 Settler Colonial Stud. 205, 207 (2015) ("One of the most prominent features of citizenship, the right to vote and be elected, was granted, as were other social and economic rights. But at the same time, Israel introduced policies that made meaningful citizenship unattainable."); Lana Tatour, Citizenship as Domination: Settler Colonialism and the Making of Palestinian Citizenship in Israel, Arab Stud. J., Fall 2019, at 8, 10 ("[I]n Israel, as in other settler polities, citizenship has figured as an institution of domination, functioning as a mechanism of elimination, a site of subjectivation, and an instrument of race making.").

East Jerusalem, displacing hundreds of thousands more Palestinians and imposing a military occupation that persists until today.[183]

To summarize: the mass expulsion of Palestinians began before the intervention of any Arab states in May 1948, and defined the process of the Nakba, which extended well beyond 1948 and continues to order Palestinian existence to this day. Common descriptions of 1948 as simply a war have thus obfuscated and grossly reduced the full meaning of the Nakba, which has never been merely a result of war but was rather a set of catastrophic transformations imposed by force on Palestine, the Palestinian people, and, indeed, the Arab world more broadly. These transformations, captured through the concept of Nakba, are the result of Zionism in praxis; a national-colonial enterprise that emerged in Europe and contained expulsion in its ideological DNA.

II. NAKBA AND ITS LEGAL OTHERS

The terms "occupation," "apartheid," and "genocide" have often been invoked to describe the Palestinian condition from a legal standpoint. And yet, one need not be a scholar of international law to grasp that the word occupation denotes—or at least should denote—situations that are in essence different from apartheid, and that both terms, in turn, are distinct from genocide. Palestine is a site of conceptual collision and overlap, where existing frameworks are stretched to the verge of collapse. Too often, the legal discourse around Palestine is cacophonous and muddled, not least because the violence that is committed against the Palestinian people is multifaceted.

What is the most sensible legal category to capture the Palestinian condition? This Article proposes that the answer is all of the above and none at once: Palestine is best understood through the prism of Nakba, which may fulfill the legal definitions of occupation, apartheid, and genocide at various points while still transcending their confines. In other words, the terms we possess have failed to capture the reality of Palestine not because they are incorrect but because each term highlights only part of the story. Adopting the Nakba framework as an overarching legal concept insists on contending with the totality of the Palestinian condition, one that is greater than the sum of its parts. It allows us to fine-tune, synthesize, and locate existing terms within a broader context and apply them to specific facets of Palestinian subordination.

As this Part shows, existing legal frameworks are prone to contest the very core of the Palestinian experience rather than recognize it and circumvent legal questions about the Nakba rather than contend with them. This tension is entrenched in the legal history of Palestine, which is characterized by successive attempts to quash the Palestinian right to self-

183. See supra note 177.

determination ever since the inception of the British Mandate.[184] It is against this background that the Palestinian condition must be analyzed and formulated in legal terms. A legal conception of Palestine must account for this obstructed process of decolonization. Once the United Nations adopted the partition scheme and recognized the State of Israel in 1949, it effectively reconfigured Zionism from an institutionalized settler movement into a new juridical category—statehood—that entrenched the denial of Palestinian self-determination.[185] The Nakba framework thus insists on examining the legal questions stemming from this order.

Part III further explores what the imbrication of Nakba in law may look like. But before moving forward, we must consider the limitations of the existing legal concepts. This Part excludes a detailed exploration of the terms ethnic cleansing, colonialism, and settler colonialism. This decision stems from the fact that, at least in a doctrinal sense, these terms are not as well consolidated as the categories of occupation, apartheid, or genocide.[186] As Part III will explore, the concept of Nakba overlaps with

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184. See supra notes 94–97 and accompanying text.

185. Article 4(1) of the United Nations Charter states that "Membership in the United Nations is open to all other *peace-loving states* which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." U.N. Charter art. 4 ¶ 1 (emphasis added).

In 1948, Article 4(1) notwithstanding, the U.S. Representative to the UN Philip Jessup made the case for the admission of Israel as a UN member state, despite the conquest of territories beyond the boundaries of the Partition Plan. Notably, he argued

> We all know that, historically, many States have begun their existence with their frontiers unsettled. Let me take as one example, my own country, the United States of America. Like the State of Israel in its origin, it had certain territory along the seacoast. It had various indeterminate claims to an extended territory westward. But, in the case of the United States, that land had not even been explored, and no one knew just where the American claims ended and where French and British and Spanish claims began. . . . I maintain that, in the light of history and in the light of the practice and acceptance by other States, the existence of the United States of America was not in question before its final boundaries were determined.

U.N. SCOR, 3d Sess. 383d mtg. at 11, U.N. Doc. S/PV.383 (Dec. 2, 1948).

In 2024, the United States vetoed a widely supported resolution to admit Palestine as a member state of the United Nations. The U.S. Representative to the UN Robert Wood claimed that "We also have long been clear that premature actions here in New York, even with the best intentions, will not achieve statehood for the Palestinian people. . . . [I]t will only come from direct negotiations between the parties." See Robert Wood, Explanation of Vote at a UN Security Council Meeting on Palestinian Membership, U.S. Mission to UN (Apr. 18, 2024), https://usun.usmission.gov/explanation-of-vote-at-a-un-security-council-meeting-on-palestinian-membership/ [https://perma.cc/FC9K-6RT7]; see also infra notes 412–414 and accompanying text.

186. Antony Anghie, Imperialism, Sovereignty, and the Making of International Law 4–5 (2012) ("[M]any international lawyers . . . write as if international law came to the colonies . . . ready for application, as if the colonial project simply entailed assimilating these aberrant societies into an existing, stable, 'Eurocentric' system – as if . . . the doctrines of

settler colonialism and ethnic cleansing while not matching them perfectly. In a nutshell, ethnic cleansing is a central and foundational act of Nakba, but the structure of Nakba cannot be reduced to ethnic cleansing.[187] If ethnic cleansing is too limited, settler colonialism is too broad. Settler colonialism is a relevant concept, but it includes radically different modalities and does not fully capture the variegated structure of Nakba.[188] Furthermore, invoking settler colonialism has reproduced existing divisions about the geographical location of its applicability.[189]

This Article does not articulate the limits of existing frameworks to advocate for relinquishing them. The reality of violence and domination in Palestine does not allow us the luxury of abandoning any tool available to us in the pursuit of justice and emancipation. Each of these frameworks foregrounds a different set of legal questions that are central to the Palestinian condition. And yet, the totality of the Palestinian reality can only be captured through the concept of Nakba, which locates these legal concepts in a broader picture that ultimately makes other, and harder, questions more salient.

A. *Occupation*

The Israeli occupation of Palestine is infamous for being the most prolonged case of military occupation in modern history.[190] And yet, the

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international law solved the problem of difference by preceding it."); William A. Schabas, 'Ethnic Cleansing' and Genocide: Similarities and Distinctions, *in* Minority Governance in and Beyond Europe 39, 42 (Tove H. Malloy & Joseph Marko eds., 2014) [hereinafter Schabas, Ethnic Cleansing] ("'Ethnic cleansing' is probably better described as a popular or journalistic expression, with no recognized legal meaning in a technical sense." (cleaned up)); see also Wolfe, Structure and Event, supra note 140, at 103 (defining colonialism and settler colonialism through examples rather than legal categorization). This is not to say that ethnic cleansing, colonialism, or settler colonialism are not legal concepts prohibited by international law but rather that international law lacks some concrete, codified, and widely accepted legal definition of these terms.

187. See infra notes 381–382 and accompanying text.

188. See infra notes 385–387 and accompanying text.

189. While some invoke settler colonialism to describe the structure of Zionism, others have confined that concept to Israeli policies in the 1967 occupied Palestinian territories. See, e.g., Michael Lynk (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 38, U.N. Doc. A/73/447 (Oct. 22, 2018) ("[T]he consistent policy of Israel since 1967 has been to secure an overwhelming Israeli Jewish majority in Jerusalem, achieved through settler implantation and demographic gerrymandering."). Conversely, Professor Lorenzo Veracini has argued that "Israeli/Zionist settler colonialism was remarkably successful before 1967, and was largely unsuccessful thereafter," leading to the conclusion that "the 'classic' model of settler colonialism . . . does not apply in the 1967 territories." Lorenzo Veracini, The Other Shift: Settler Colonialism, Israel, and the Occupation, J. Palestine Stud., Winter 2013, at 26, 28–29.

190. Lisa Hajjar, Courting Conflict: The Israeli Military Court System in the West Bank and Gaza 2 (2005) ("Israel's occupation of the West Bank and Gaza is the longest in modern history and has taken on many permanent-looking features . . . .").

legal framework of occupation illustrates the anomalies that stem from a top-down and noncontextual application of the law. International law only recognizes Israeli occupation to the extent that the 1967 occupation of the West Bank, East Jerusalem, and the Gaza Strip is concerned.[191] The premise that the Israeli regime of domination is rooted in the occupation of the 1967 territories shrinks the law's purview and misdiagnoses the core of the problem. Once the lens of occupation is applied, the totality of the Palestinian condition is distorted, and the Nakba is relegated, as if by amnesia, to a legal limbo.[192]

This tension stems from the origins of the legal concept of occupation, which developed distinctly from the concepts of conquest and colonization.[193] Rooted in the material and conceptual transformations in

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191. This is not tantamount to claiming that occupation, as a legal framework, should be extended to apply monolithically to Palestine since 1948. Instead, this Article suggests that we should formulate a legal conception of the Nakba that includes, but is not limited to, the Israeli occupation of the 1967 territories.

192. Israeli legal scholars have produced substantial and influential knowledge on the law of occupation, taking the Israeli occupation of the 1967 Palestinian territories and the jurisprudence produced by the Israeli Supreme Court as a focal case study. See, e.g., Eyal Benvenisti, The International Law of Occupation 239–48 (2d ed. 2012) [hereinafter Benvenisti, International Law of Occupation]; Yoram Dinstein, The International Law of Belligerent Occupation 1–8 (2d ed. 2019); David Kretzmer & Yaël Ronen, The Occupation of Justice 1–26 (2d ed. 2021); Eliav Lieblich & Eyal Benvenisti, Occupation in International Law 76–77 (2022). Many of these works examine the illegality of the Israeli occupation. Yet none seriously examine the legal questions stemming from the Nakba. Even more critical accounts that acknowledge the relevancy of colonialism to Israeli policies stop short of addressing the occupation regime within its broader ecosystem or scrutinizing the legality of the Nakba. See, e.g., Neve Gordon, Israel's Occupation, at xix–xx (2008); Aeyal Gross, The Writing on the Wall: Rethinking the International Law of Occupation 10–16 (2017). Elsewhere, I have argued that this dichotomy is illustrative of the epistemic erasure of the Nakba constitutive of Israeli legal education. See Rabea Eghbariah, Studentim Aravim-Falastinim Befakultot Yisraeliyot Lemishpatim: Kri'aa Bikortit shel Haḥinukh Hamishpati BeYisrael [Arab-Palestinian Students in Israeli Law Schools: A Critical Reading of Legal Education in Israel], 9 Ma'asei Mishpat [Law & Soc. Change] 219, 222–23 (2017) (arguing that "the reliance of [Israeli legal] education on an ideological underpinning that barely challenges the Zionist tenet of a Jewish and democratic state prevents considering Israeli law from an angle that sees the overall regime as an integral part of the problem." (author's translation)); see also Maya Wind, Towers of Ivory and Steel: How Israeli Universities Deny Palestinian Freedom 115–46 (2024) ("The rising interest of Palestinian citizens in their history has been met with growing limits imposed on its study, as well as on events commemorating it.").

193. See Sharon Korman, The Right of Conquest 110–11 (1996) (describing the evolution of the concept of "occupation" following the Napoleonic Wars); Yutaka Arai-Takahashi, Preoccupied With Occupation: Critical Examinations of the Historical Development of the Law of Occupation, 94 Int'l Rev. Red Cross 51, 56 (2012) ("Unlike the notion of conquest, which gave valid sovereign title to conquered territories, occupation was understood as leaving the sovereignty of the ousted government intact."); Eyal Benvenisti, The Origins of the Concept of Belligerent Occupation, 26 Law & Hist. Rev. 621, 621 (2008) ("The contemporary international law of occupation, which regulates the conduct of occupying forces during wartime, was framed over the course of deliberations among European governments during the second half of the nineteenth century."); Nehal Bhuta,

nineteenth-century Europe, the burgeoning law of occupation sought to regulate certain violence that applied between "civilized" nations. The concepts of conquest and colonial occupation as applied by European nations to non-European peoples were thus initially excluded from the doctrine of belligerent occupation.[194]

The rise of self-determination in the twentieth century reconfigured the legal terrain toward a prohibition on conquest and a universalized understanding of the law of occupation as part of International Humanitarian Law (IHL).[195] The denial of a Palestinian right to self-determination and the failure to decolonize Palestine at the end of the British Mandate, however, resulted in a new reality that escaped the existing legal concepts.

Israel's borders have never been officially and fully defined. Despite this, Israel has extended its sovereignty beyond the demarcated borders of the United Nations (UN) Partition Plan. Recognition of Israel as a member of the UN in 1949, however, effectively sidelined most questions pertaining to conquest, occupation, annexation, and secession.[196] The international community's reluctance to fully recognize Israeli sovereignty over so-called West Jerusalem remains a salient exception to this overall tendency to disregard the legal questions stemming from the 1948 Nakba.[197]

The Antinomies of Transformative Occupation, 16 Eur. J. Int'l L. 721, 722 (2005) (discussing the conceptual problems created by applying "[t]he concept of belligerent occupation, born of the nineteenth century intra-European land order" to the U.S. occupation of Iraq).

194. Articles 42 and 43 of the 1907 Hague Regulations set the initial framework of occupation. See Convention Respecting the Laws and Customs of War on Land arts. 42–43, Oct. 18, 1907, 36 Stat. 2277, 2306. The Geneva Conventions, especially the Fourth Geneva Convention, expanded this framework and the protections granted to the civilian populations. In this context, the Hague Regulations define a territory as occupied when "it is actually placed under the authority of the hostile army," Id. at 2306. The law of occupation has developed based on the principles that (1) an occupation is temporary in essence; (2) occupation does not yield sovereignty or title over the occupied territory; and (3) the occupant's powers are limited to the task of managing the territory for the benefit of the occupied people. Benvenisti, International Law of Occupation, supra note 192, at 43–67.

195. See Convention Respecting the Laws and Customs of War on Land, supra note 194. On the universalization of international law, see Antony Anghie, Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law, 40 Harv. Int'l L.J. 1, 1–5 (1999) (contrasting "a universal international law deriving from human reason [that] applied to all peoples" with a "positivist international law [that] distinguished between civilized states and non-civilized states").

196. For a discussion of these legal questions and their placement in the context of Nakba, see infra note 380 and accompanying text.

197. Reflective of this reluctance is the refusal of most states to recognize Jerusalem as the capital of Israel and to relocate their embassies to Jerusalem. The status of Jerusalem thus remains a legally unresolved issue under international law. See, e.g., Antonio Cassese, Legal Considerations on the International Status of Jerusalem, *in* The Human Dimension of International Law: Selected Papers of Antonio Cassese 290 (Antonio Cassese & Salvatore Zappalà eds., 2008); Henry Cattan, The Status of Jerusalem Under International Law and

Between 1948 and 1966, the State of Israel governed the Palestinians who remained in the territories it controlled through a separate military rule that in most practical ways resembled a military occupation.[198] Yet, only once Israel began to extend its control to rule the West Bank, the Gaza Strip, East Jerusalem, the Golan Heights, and the Sinai Peninsula, did the international community start to invoke the notion of military occupation.

UN Security Council Resolution 242, requiring "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict[,]"[199] centralized the framework of occupation while sidelining the 1948 Nakba and the unresolved legal questions that it produced. The intentionally vague terms of the resolution, however, requiring withdrawal "from territories" rather than from "all territories," allowed Israel, and the United States, to argue that the resolution had simply imposed an obligation to withdraw from *some* territories but not all of them.[200] Then–U.S. Secretary of State Dean Rusk later commented, "We wanted that to be left a little vague and subject to future negotiation because we thought the Israeli border along the West Bank could be 'rationalized'."[201]

Resolution 242 has de facto reformulated the Question of Palestine into a question of occupation within the 1967 territories, envisioning the termination of that occupation through a process of negotiation.[202] These shortcomings of the occupation framework foreground fundamental limits that impair a holistic understanding of the Palestinian reality. Much like the wall that cuts off the West Bank, the application of the occupation framework has entrenched a conceptual wall that separates Israel from the

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United Nations Resolutions, J. Palestine Stud., Spring 1981, at 3, 4. Even after Israel had been admitted as a member state, the United Nations still pursued a "corpus separatum" in Jerusalem. Ben-Gurion declared against this background that "[w]e do not admit for one minute that the United Nations will try to take Jerusalem by force from Israel." See Ben-Gurion, supra note 28. In December 1949, the United Nations still adopted General Assembly Resolution 303, deciding that "Jerusalem should be placed under a permanent international regime." See G.A. Res. 303 (IV), ¶ 1 (Dec. 9, 1949); see also Yaël Ronen, Schrödinger's Occupation: West Jerusalem 1948–1949, 58 Tex. Int'l L.J. 119, 120 (2023) [hereinafter Ronen, Schrödinger's Occupation] (arguing that Israel "acted on the premise that under international law it was bound to apply [the law of occupation in West Jerusalem between 1948 and 1949]," wherein "a military government was established").

198. See Robinson, supra note 9, at 155–56 (referring to "the brutality of the military regime [and] the devastating economic strangulation of Palestinian communities resulting from the confiscation of their lands"); supra note 9.

199. S.C. Res. 242, ¶ 1(i) (Nov. 22, 1967).

200. See Michael Lynk, Conceived in Law: The Legal Foundations of Resolution 242, J. Palestine Stud., Autumn 2007, at 7, 8, 15.

201. Dean Rusk, As I Saw It: A Secretary of State's Memoirs 333 (1991).

202. Henry Cattan, The Palestine Question 109 (Routledge 2022) (1988) ("[T]he enormity of the damage caused and its sequels have overshadowed the Palestine Question itself . . . .").

territories it occupies.[203] Within this framework, the Israeli occupation of the Palestinian territories in 1967 is treated as the inception of the problem rather than its extension.[204]

This formulation of the problem is a map of misreading.[205] Viewing the 1967 occupation in isolation from the Nakba disassociates the (il)legalities of the Nakba from the (il)legalities of the occupation that followed it nineteen years later. Once these twin events are conceptually segregated, the legal assessment of the territory takes center stage, overshadowing both the legal status of the Palestinian *people* and the nature of the Israeli *regime*. Attempting to apprehend Palestine through the occupation framework obfuscates the legal questions of conquest, secession, the status of Jerusalem, and the crimes committed during the 1948 Nakba. This limited framework also marginalizes the Palestinian refugees' right of return, limits the scope of the Palestinian people's right to self-determination, and conceals the continuum of violence that extends across both sides of the so-called Green Line.[206]

The issues of conquest, self-determination, and return nevertheless continue to pose crucial and unresolved legal questions that stem from

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203. Some Israeli jurists have attempted to advance the argument that the law of occupation does not apply to the 1967 territories because they do not belong to any sovereign state. See, e.g., Yehuda Z. Blum, The Missing Reversioner: Reflections on the Status of Judea and Samaria, 3 Isr. L. Rev. 279, 293 (1968) ("It would seem to follow that, in a case like the present where the ousted State never was the legitimate sovereign, those rules of belligerent occupation directed to safeguarding that sovereign's reversionary rights have no application."). Meir Shamgar, often considered the legal architect of the Israeli occupation, continued to argue that the Fourth Geneva Convention does not apply as a matter of law—in his view, Israel applies it voluntarily as a matter of fact. See Meir Shamgar, The Observance of International Law in the Administered Territories, 1 Isr. Y.B. on Hum. Rts. 262, 265–66 (1971); see also Meir Shamgar, Legal Concepts and Problems of the Israeli Military Government: The Initial Stage, *in* Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects 1 (Meir Shamgar ed., 1982).

The international community—including the International Court of Justice (ICJ)—has widely rejected this position in favor of the view that the 1967 Palestinian territories are occupied. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 140, 166–67 (July 9). The ICJ discussion, however, avoids the legal questions stemming from the 1948 Nakba; rather, it provides a brief and vague summary of this period. See id. at 165–66.

204. Nathan Thrall, The Separate Regimes Delusion, London Rev. Books, Jan. 21, 2021, at 3 (contesting the "belief that one can separate the pre-1967 state from the rest of the territory under its control[,]" a belief which maintains a "conceptual wall" between "(good) democratic Israel and its (bad) provisional occupation").

205. I draw the concept of a "map of misreading" from Boaventura De Sousa Santos, Law: A Map of Misreading. Toward a Postmodern Conception of Law, 14 J.L. & Soc'y 279 (1987).

206. See Ralph Wilde, Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation, Palestine Y.B. Int'l L., 2019–2020, at 3, 7–8, 12 (arguing that the reasons for "downgrading and even bypassing the question of realizing Palestinian self-determination" include "the exclusive focus on occupation law, and the characterization of the situation as an 'occupation'").

legal obligations that date back to the British Mandate system.[207] Centering occupation against this background becomes a choice that relegates these questions to "history" as opposed to "law."[208] In effect, the occupation framework has served to not only shift the focus away from the Palestinian people as the primary subjects of rights—this framework has also elided the fact that, for the past seventy-six years, Israel has effectively and continuously exerted its control over the entire territory of Mandatory Palestine, consolidating a regime of domination that constitutes a "one-state reality."[209]

But even if we overlook this crucial deficiency in the application of the law of occupation, two other limitations arise. First, occupation is not

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207. See Erakat, Justice for Some, supra note 93, at 232 ("We can see, for example, how self-determination is initially cast—during the Mandate era—as a tool facilitating colonial governance and penetration under the veneer of a 'sacred trust of civilization' to usher a state to independence."); Imseis, United Nations and the Question of Palestine, supra note 29, at 256–58 (identifying "British imperial secret treaty-making and diplomacy" during the Mandate of Palestine as resulting "in the international legal disenfranchisement of the indigenous Palestinians in favour of a European settler-colonial movement" and as the source of "Palestine's legal subalternity"); Kattan, supra note 119, at 3–7 ("[I]t was during the 1922–48 mandate, when Britain facilitated the Zionists in their colonial enterprise, through which international law was instrumental, that the seeds of conflict were first sown. . . . So what can international lawyers learn from the turbulent legal history of the British Mandate of Palestine?"); Ralph Wilde, Tears of the Olive Trees: Mandatory Palestine, the UK, and Reparations for Colonialism in International Law, 25 J. Hist. Int'l L. 387, 422 (2023) [hereinafter Wilde, Tears of the Olive Trees] ("[T]he violation of Palestinian self-determination that began with the UK's failure in 1948 (and, as indicated, before in unlawfully proceeding with and maintaining plenary administration in Mandatory Palestine rather than provisionally recognizing statehood) has continued ever since then, right up until today."). For a discussion of other unanswered legal questions see infra note 380 and accompanying text.

208. Professor Hani Sayed highlights the future-driven political consequences of this distinction: "[T]he focus on the legality of the occupation per se is not politically neutral, to the extent that it implicitly incorporates a specific substantive position on the future of the Palestinians and the nature of the political solution to the conflict." Hani Sayed, The Fictions of the "Illegal" Occupation in the West Bank and Gaza, 16 Or. Rev. Int'l L. 79, 83 (2014).

209. Although different scholars trace the emergence of this condition to different time periods, the understanding of the Israeli regime as a "one state reality," spanning from the Jordan River to the Mediterranean Sea, has gained currency. See Michael Barnett, Nathan Brown, Marc Lynch & Shibley Telhami, Israel's One-State Reality: It's Time to Give Up on the Two-State Solution, Foreign Affs. (Apr. 14, 2023), https://www.foreignaffairs.com/middle-east/israel-palestine-one-state-solution (on file with the *Columbia Law Review*) (discussing the imminence of a "one-state reality" under Prime Minister Benjamin Netanyahu's political regime); see generally Ariella Azoulay & Adi Ophir, The One-State Condition: Occupation and Democracy in Israel/Palestine (Tal Haran trans., 2012) (discussing how the construction of the Israeli occupation as a two-state system "creates the illusion that the ruling apparatus in the Occupied Territories is detached and separate from Israel proper—[which] is crucial to the integration of the Occupation into the Israeli state and the transformation of the regime"); Ian S. Lustick, Paradigm Lost: From Two-State Solution to One-State Reality (2019) (describing how "[t]he ghost of the [two-state solution] haunts the conflict and obscures the reality that all of Palestine is controlled by one state, and the name of that state is Israel").

inherently prohibited in international law, and second, the longstanding and protracted Israeli occupation has resulted in divergent legal situations that can hardly be captured through a monolithic framework. While supposedly temporary in nature, the Israeli occupation has now extended well beyond half a century and has included the annexation of East Jerusalem, the fragmentation and ever-increasing settlement of the West Bank, and the prolonged blockade over the Gaza Strip followed by a genocidal war.

The indefinite extension of the ostensibly temporary Israeli occupation—an evident contradiction in terms—has led scholars to argue that Israeli occupation is illegal, full stop, rather than focusing on specific violations that the occupying power commits.[210] The view that the Israeli occupation regime is illegal, as such, has regained currency within the UN in recent years.[211] Its legality has been referred for review to the

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210. See Gross, supra note 192, at 10 ("[T]he law of occupation may offer a way of legitimizing new forms of regimes akin to conquest, colonialism, and apartheid by dressing them up as a legitimate and temporary institution."); Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, Illegal Occupation: Framing the Occupied Palestinian Territory, 23 Berkeley J. Int'l L. 551, 555 (2005) (stating that "an occupation that cannot be regarded as temporary defies both the principle of trust and of self-determination," rendering such an occupation illegal per se, which "is the nature of the Israeli occupation of the Occupied Palestinian Territory (OPT)"); see generally Ardi Imseis, Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020, 31 Eur. J. Int'l L. 1055 (2020) [hereinafter Imseis, Negotiating the Illegal]. This thread of scholarship has developed the conceptualization of the temporal aspect of occupation from a "prolonged occupation" framework into an "illegal occupation" framework. See, e.g., Adam Roberts, Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967, 84 Am. J. Int'l L. 44, 99–103 (1990).

211. See Francesca Albanese (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 4, U.N. Doc. A/78/545 (Oct. 20, 2023) (referring to the Israeli occupation as the "illegal colonization of . . . occupied territory"); Michael Lynk (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 12, U.N. Doc. A/HRC/49/87 (Aug. 12, 2022) [hereinafter Lynk, 2022 Report on the Situation of Human Rights] (noting that "the protracted Israeli occupation has crossed the bright red line into illegality"); Rep. of the Indep. Int'l Comm'n of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, ¶ 65, U.N. Doc. A/78/198 (Sept. 5, 2023); see also Al Jazeera, UN's Navi Pillay: Israel Has 'No Intention of Ending Occupation' (Oct. 28, 2023), https://www.aljazeera.com/program/talk-to-al-jazeera/2023/10/28/un-navi-pillay-israel-has-no-intention-of-ending-occupation [https://perma.cc/LG6T-4HTD] (asserting that "the increasingly militarized law enforcement operations of Israel and repeated attacks by Israel on Gaza are aimed at maintaining its unlawful 56-year occupation"); Vito Todeschini, The (il)Legality of Israel's Prolonged Occupation of the Palestinian Territory: Perspectives From the UN Special Rapporteur and Commission of Inquiry's September 2022 Reports, OpinioJuris (Mar. 7, 2023), https://opiniojuris.org/2023/03/07/the-illegality-of-israels-prolonged-occupation-of-the-palestinian-territory-perspectives-from-the-un-special-rapporteur-and-commission-of-inquirys-september-2022-reports/ [https://perma.cc/RD3V-YFP6] (last updated Mar. 10, 2023).

International Court of Justice (ICJ),[212] to whom over fifty parties have submitted their positions on the matter.[213] While the ICJ advisory opinion is likely to conclude that the occupation has become illegal, the reality of the military occupation will most definitely continue to defy any opinion by the court.[214] As Dr. Nimer Sultany put it, as long as the conditions that enabled this reality to emerge persist, "a change in the legal analysis from 'occupation' to 'unlawful occupation' to 'apartheid' is not going to transform law into a potent force for positive change."[215]

Here lies one more weakness of the occupation framework. As the occupation has continued, Israel has fragmented the occupied territories and implemented differential policies across the West Bank, the Gaza

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In this context, Ardi Imseis has examined the UN's treatment of the legality of the occupation and traced the changing language used to frame the illegality of the occupation since 1967. Imseis argues that given the occupation's illegality, an immediate and unconditional termination of the occupation should follow, rather than conditioning freedom on negotiations. See Imseis, Negotiating the Illegal, supra note 210, at 1056.

212. See G.A. Res. 77/247, Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem, ¶ 18 (Dec. 30, 2022) (tasking the ICJ with issuing an advisory opinion on two questions related to the legal consequences of Israel's ongoing violation of the Palestinian people's right to self-determination and the effect of Israel's policies and practices on the legal status of the occupation); see also Ata Hindi, The United Nations General Assembly Request to the International Court of Justice for an Advisory Opinion: (Some) Reflections, OpinioJuris (Jan. 20, 2023), https://opiniojuris.org/2023/01/20/the-united-nations-general-assembly-request-to-the-international-court-of-justice-for-an-advisory-opinion-some-reflections/ [https://perma.cc/425P-QEQ9] (discussing the ICJ's task of assessing the "(il)legality" of Israel's occupation of Palestine); Ralph Wilde, The Illegality of the Israeli Occupation of the Palestinian West Bank (Including East Jerusalem) and Gaza: What the International Court of Justice Will Have to Determine in Its Advisory Opinion for the United Nations General Assembly, OpinioJuris (Dec. 23, 2022), https://opiniojuris.org/2022/12/23/the-illegality-of-the-israeli-occupation-of-the-palestinian-west-bank-including-east-jerusalem-and-gaza-what-the-international-court-of-justice-will-have-to-determine-in-its-advisory-opinion-for-th/ [https://perma.cc/BWY2-88AF] (summarizing what it might mean for the ICJ to find the occupation "illegal" under international law).

213. See Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, ICJ, https://www.icj-cij.org/case/186 [https://perma.cc/49UE-T3NB] (last visited Mar. 31, 2024) (listing submissions from various countries).

214. In a written statement submitted to the court, the State of Israel described the request for an advisory opinion from the court as "plainly biased." Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Request for an Advisory Opinion), Statement of the State of Israel Pursuant to the Court's Order of 3 February 2023 Relating to the Advisory Proceedings Initiated by UN General Assembly Resolution 77/247, at 1, 4 (July 24, 2023), https://www.icj-cij.org/sites/default/files/case-related/186/186-20230724-wri-08-00-en.pdf [https://perma.cc/W67K-EWDX]. Israel contended that bringing the matter before the court risks "fundamentally delegitimizing the established legal framework governing the conflict and any future prospect of negotiations between Israelis and the Palestinians." Id. at 4.

215. Nimer Sultany, The Question of Palestine as a Litmus Test: On Human Rights and Root Causes, Palestine Y.B. Int'l L., 2022, at 3, 32–33 [hereinafter Sultany, The Question of Palestine].

Strip, and occupied Jerusalem, in ways that stratify and classify Palestinians into distinct geo-legal categories.[216] The emergence of the Palestinian Authority after the 1993 Oslo Accords and Hamas's 2006 rise to power in the Gaza Strip has added more layers to the already polylithic structure of occupation.[217] The reality is that today there are distinct modes of domination across these territories that cannot simply be captured by the legal framework of occupation.[218]

Certainly, the occupation discourse has been helpful in centering specific facets of the regime and underscoring the illegality of the Israeli settlements in the territories in question. Acknowledging the limits of this framework, however, may help us place the occupation as merely one layer in the broader concept of Nakba—one that allows us to construct an organic understanding of the Palestinian condition and account for the broader continuum of violence.

B. *Apartheid*

The parallels between Israel and apartheid South Africa are multifarious. The Israel–South Africa apartheid analogy was invoked as early as the 1960s by no other than Hendrik Verwoerd, the "architect of apartheid."[219] In 1961, during his tenure as the South African Prime Minister, Verwoerd remarked in response to an Israeli UN vote cast against South Africa that "[t]he Jews took Israel from the Arabs after the Arabs had lived there for a thousand years," and in light of that, agreed that "Israel, like South Africa, is an apartheid state."[220]

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216. See Sayed, supra note 208, at 92–98 (discussing the translation of policies and settlement strategies between Gaza and the West Bank); see also supra note 16.

217. See Tareq Baconi, Hamas Contained: The Rise and Pacification of Palestinian Resistance 1–29 (2018) (describing the initial development of Hamas); Roy, supra note 177, at 103–10 (describing the influence of the PLO in Gaza).

218. Hani Sayed examines the reality of the occupation and notes:

> [It] involves a multiplicity of formal and informal regimes, spread vertically on many levels of governance. The interaction among these regimes and their effects on shaping space, the lives of their inhabitants, and the distribution of fortunes amongst them can hardly be described or explained through a hermeneutic of the rules of the international law of occupation.

Sayed, supra note 208, at 85. Sayed concludes that "[t]he challenge is ultimately to imagine a legal framework for understanding the situation in the [West Bank and Gaza Strip] that does not link the Palestinian right to self-determination to the law of occupation." Id. at 126. This Article takes on Sayed's challenge to show that the West Bank and Gaza Strip are only two locales in a broader structure of subordination best understood through the legal concept of Nakba, see infra section III.B.

219. See Henry Kenney, Verwoerd: Architect of Apartheid 10 (1980) (labeling Hendrik Verwoerd as the "architect of apartheid" for the significant role he played in engineering apartheid in South Africa).

220. Chris McGreal, Worlds Apart, The Guardian (Feb. 6, 2006), https://www.theguardian.com/world/2006/feb/06/southafrica.israel [https://perma.cc/8DLT-5JGC]; Andrew James Clarno, The Empire's New Walls: Sovereignty, Neo-Liberalism, and

Both Israel and Apartheid South Africa emerged in May 1948, though under vastly different circumstances. While Israel's relations with South Africa in the 1950s and 1960s were marked by fluctuations and occasional tensions,[221] the collaboration between the two regimes reached its peak in the 1970s, as Israel nurtured a close security and strategic alliance with the Apartheid regime.[222] Israeli Minister of Defense Ariel Sharon would remark after a visit to South Africa in 1981: "I am certain that the relationship between us will deepen as we work to ensure the National Defence of both our countries."[223] In the same letter to his South African counterpart, Sharon authorized "General Raphael Eitan, the Chief of General Staff to pay a visit to [South Africa]."[224] Eitan himself would later assert that "Blacks in South Africa want to gain control over the white minority just like Arabs here want to gain control over us. And we too, like the white minority in South Africa, must act to prevent them from taking us over."[225]

The comparisons between Israel and apartheid South Africa have become ubiquitous, often invoked by figures holding divergent positionalities. From the PLO to high-ranking Israeli officials,[226] from South

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the Production of Space in Post-Apartheid South Africa and Post-Oslo Palestine/Israel 66 (2009) (Ph.D. dissertation, University of Michigan) (on file with the *Columbia Law Review*) ("As far back as 1961, South African Prime Minister Hendrik Verwoerd, the 'architect of apartheid,' famously dismissed an Israeli vote against South Africa at the United Nations by insisting that . . . 'Israel, like South Africa is an apartheid state.'" (quoting Premier Lashes Israel, Rand Daily Mail (Nov. 23, 1961))).

221. Rotem Giladi, Negotiating Identity: Israel, Apartheid, and the United Nations, 1949–1952, 132 English Hist. Rev. 1440, 1445 (2017) (internal quotation marks omitted).

222. See Sasha Polakow-Suransky, The Unspoken Alliance 6–8 (2010) (discussing the shared military and economic interests that drove the Israeli–South African relationship in the 1970s).

223. Letter from Ariel Sharon, Minister of Def. of the State of Isr., to Magnus Malan, S. African Def. Minister of the Rep. of S. Afr. (Dec. 7, 1981), https://digitalarchive.wilsoncenter.org/document/letter-israeli-defense-minister-ariel-sharon-south-african-defence-minister-magnus-malan [https://perma.cc/DU77-79M5].

224. Id.

225. Ilan Pappé, Introduction to Israel and South Africa: The Many Faces of Apartheid 1, 1 (Ilan Pappé ed., 2015) [hereinafter Many Faces of Apartheid].

226. For a brief history of the use of the term "apartheid" among Arab and Palestinian leadership dating back to the 1960s, see generally Omar H. Rahman, Apartheid and the Palestine Liberation Movement: Opportunities and Challenges, Middle E. Council on Glob. Affs. (2023), https://mecouncil.org/publication/apartheid-and-the-palestine-liberation-movement-opportunities-and-challenges/ [https://perma.cc/3JR5-YKRQ]. Israeli politicians and top officials who invoked the apartheid analogy include two former prime ministers and a former attorney general. See, e.g., Israel's Former Attorney General Says His Country Is an 'Apartheid Regime', Middle E. Eye (Feb. 11, 2022), https://www.middleeasteye.net/news/israel-apartheid-amnesty-report-attorney-general [https://perma.cc/5RUN-VPSE] (noting former Israeli attorney general Michael Ben-Yair's agreement with the Amnesty International report's assessment that Israel is an apartheid state); Rory McCarthy, Barak: Make Peace With Palestinians or Face Apartheid, The Guardian (Feb. 2, 2010), https://www.theguardian.com/world/2010/feb/03/barak-apartheid-palestine-peace [https://perma.cc/W67G-BNTQ] ("Ehud Barak, Israel's defence minister, last night delivered an unusually blunt warning to his country that a failure to make peace with the

African figures like Verwoerd[227] to anti-Apartheid leaders like Desmond Tutu,[228] and from former U.S. President Jimmy Carter[229] to academic scholars and human rights organizations[230]—use of the term "apartheid" has become a central pillar of the conversation around the Israeli system of domination in Palestine.

Since the 1990s, there has been a notable resurgence in the apartheid analogy, combined with the emergence of the Palestinian Boycott, Divestment, Sanctions (BDS) movement in the early 2000s.[231] Books,[232] articles,[233] and reports[234] have been published on the subject of

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Palestinians would leave either a state with no Jewish majority or an 'apartheid' regime."); Rory McCarthy, Israel Risks Apartheid-Like Struggle if Two-State Solution Fails, Says Olmert, The Guardian (Nov. 30, 2007), https://www.theguardian.com/world/2007/nov/30/israel [https://perma.cc/C7U9-VBUA] (quoting former Israel prime minister Ehud Olmert who compared Israel's potential fate to South Africa if it forced Palestinians to fight for their rights).

227. See supra note 219.

228. See Desmund Tutu, Apartheid in the Holy Land, The Guardian (Apr. 28, 2002), https://www.theguardian.com/world/2002/apr/29/comment [https://perma.cc/E3XX-KB5D].

229. See Jimmy Carter, Palestine: Peace Not Apartheid 215 (2006) (drawing a comparison to South African apartheid in laying out potential paths that Israel could take).

230. See Omar Shakir, Hum. Rts. Watch, A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution 3–4 (2021), https://www.hrw.org/sites/default/files/media_2021/04/israel_palestine0421_web_0.pdf [https://perma.cc/8NFP-7DBY] (discussing how apartheid is used to describe both the trajectory and reality of Palestine); see also infra note 234.

231. See Omar Barghouti, Boycott, Divestment, Sanctions: The Global Struggle for Palestinian Rights 21–22 (2011) (discussing the rise of the BDS movement, facilitated on college campuses by the development of Israeli Apartheid Week in 2005).

232. See, e.g., Uri Davis, Israel: An Apartheid State 26 (1987) ("In the case of Israel, Zionist apartheid is applied under the categories of 'Jew' versus 'non-Jew'."); Oren Ben-Dor, Apartheid and the Question of Origin, *in* Many Faces of Apartheid, supra note 225, at 89 (discussing how Israel escapes the simplicity of the apartheid construction as compared to South Africa); Jon Soske & Sean Jacobs, Introduction to Apartheid Israel 4 (Jon Soske & Sean Jacobs eds., 2015) ("Apartheid South Africa and Israel both originated through a process of conquest and settlement justified largely on the grounds of religion and ethnic nationalism.").

233. See, e.g., John Dugard & John Reynolds, Apartheid, International Law, and the Occupied Palestinian Territory, 24 Eur. J. Int'l L. 867, 871 (2013) (assessing Israel's policies and practices and whether they constitute apartheid as understood in international law); John Quigley, Apartheid Outside Africa: The Case of Israel, 1 Ind. Int'l & Compar. L. Rev. 221, 249–51 (1991).

234. Over the past decade, there have been an increasing number of human rights reports arguing that Israel's occupation constitutes apartheid. See, e.g., Francesca Albanese (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 42, U.N. Doc. A/77/356 (Sept. 21, 2022); Lynk, 2022 Report on the Situation of Human Rights, supra note 213, at ¶ 56; Richard Falk (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 78, U.N. Doc. A/HRC/25/67 (Jan. 13, 2014); John Dugard (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories

Israeli apartheid. The discourse tying Israel to apartheid has culminated in two reports by international human rights organizations—Amnesty International and Human Rights Watch—which determined that Israel is practicing the crime of apartheid according to international law,[235] marking a "paradigm shift" in the liberal discourse around Israel.[236]

And yet, it is evident that within each invocation of the term "apartheid" lies an entirely different conception about what apartheid means, where it applies, how it manifests, and what its solution is. The umbrella term "apartheid" has encompassed radically different interpretations, which together form a coalition of views best described as an agreement to disagree.[237] This section briefly examines some prominent features of Israeli apartheid and argues that the application of the term to the Palestinian condition allows for an obfuscation of the 1948 Nakba and muzzles Palestinian articulations of their own reality.

This critique is not intended to dismiss the relevance of apartheid to Palestine but rather to lay the ground for situating the overlapping concepts of apartheid and Nakba. The discourse that has developed around apartheid over the years has allowed, although it did not necessitate, the sidelining of crucial questions that stem from the Nakba.

Occupied Since 1967), Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council," ¶ 61, U.N. Doc. A/HRC/4/17 (Jan. 29, 2007); Richard Falk & Virginia Tilley, Econ. & Soc. Comm'n for W. Asia, Israeli Practices Towards the Palestinian People and the Question of Apartheid, at 51, U.N. Doc. E/ESCWA/ECRI/2017/1 (Mar. 15, 2017); B'Tselem, supra note 14. Reports by other UN-associated bodies have similarly analyzed the occupation in terms of apartheid See, e.g., Russell Tribunal on Palestine, Suggested Issue for Consideration by the UN Committee on the Elimination of Racial Discrimination (CERD) in Its Review of Israel's 14th to 16th Periodic Reports to the Committee (2012), https://www2.ohchr.org/english/bodies/cerd/docs/ngos/RussellTribunalOnPalestine_Israel80.pdf [https://perma.cc/ZBU5-XA9A]. And many outside organizations and commentators have also shared in that criticism. See, e.g., Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories 227 (Virginia Tilley ed., 2012); Michael Sfard, Yesh Din, The Israeli Occupation of the West Bank and the Crime of Apartheid: Legal Opinion 57 (2020), https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/Apartheid+2020/Apartheid+ENG.pdf [https://perma.cc/JTS6-68J5].

235. See Amnesty Int'l, Israel's Apartheid Against Palestinians: Cruel System of Domination and Crime Against Humanity 266 (2022), https://www.amnesty.org/en/wp-content/uploads/2022/02/MDE1551412022ENGLISH.pdf [https://perma.cc/DV4K-9D9T] [hereinafter Amnesty Int'l, Apartheid Against Palestinians]; Shakir, supra note 230, at 169 ("The severity of the repression carried out in the [Occupied Palestinian Territories] amounts to 'systematic oppression' by one racial group over another, a key component for the crime of apartheid as set out in both the Rome Statute and Apartheid Convention.").

236. Smadar Ben-Natan, The Apartheid Reports: A Paradigm Shift on Israel/Palestine (Part I), OpinioJuris (Apr. 12, 2022), https://opiniojuris.org/2022/04/12/the-apartheid-reports-a-paradigm-shift-on-israel-palestine-part-i/ [https://perma.cc/6RPC-JFHX]; but see Erakat, Beyond Discrimination, supra note 147 (contrasting the intellectual differences between institutional reports on Israel and Palestinian conceptions of Israel).

237. See Erakat, Beyond Discrimination, supra note 147 ("Despite this seeming analytical convergence, there remains significant disagreement among the individuals and organizations who otherwise concur that Israel oversees an apartheid regime.").

It has thus reproduced intense and sharp divisions in the terms used in the conversation rather than resolving and synthesizing them. These divisions manifest on at least three levels: the conceptual understanding of apartheid, apartheid's relation to the legal concepts of colonialism and self-determination, and apartheid's spatiotemporal applicability in Palestine.

Scholars have attempted to elucidate the concept of apartheid by distinguishing between "historical" apartheid and "generic" apartheid.[238] While useful, this analytical distinction has often collapsed. An understanding of Israeli apartheid has inescapably remained an *analogy*, one that is rooted in and confused with the manifestations of apartheid in South Africa.[239] Some have attempted to exploit this analogical trait to claim that the comparison is faulty, often by pointing to the legal status of Palestinian citizens of Israel.[240]

The legal understanding of the term "apartheid," which reflects the generic understanding of the term, has further embedded in it this tension between the universal and the particular. The Apartheid Convention, for example, contributes to the confusion by defining the "crime of apartheid"

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238. See Ran Greenstein, Israel–Palestine and the Apartheid Analogy: Critics, Apologists and Strategic Lessons, *in* Many Faces of Apartheid, supra note 225, at 325, 326 ("We need to distinguish between historical apartheid (the specific system that prevailed in South Africa between 1948 and 1994) and the generic notion of apartheid that stands for an oppressive system which allocates political and social rights in a differentiated manner based on people's origins . . . .").

239. See Raef Zreik & Azar Dakwar, What's in the Apartheid Analogy? Palestine/Israel Refracted, 23 Theory & Event 664, 667, 688–89 (2020) (comparing manifestations of apartheid in Israel and South Africa and arguing that conditions necessary to create apartheid in South Africa "have been relatively absent in Palestine," citing "labor relations, political theology of the dominant group, role and social function of language(s), and geo-political unit(y)" as some such conditions).

240. For example, French President Emmanuel Macron asked, "How dare we talk about apartheid in a state where Arab citizens are represented in government and positions of leadership and responsibility?" Zvika Klein, France's Macron Comes Out Against Claims of Israeli Apartheid, Jerusalem Post (Feb. 28, 2022), https://www.jpost.com/diaspora/antisemitism/article-698925 [https://perma.cc/N7WG-GTSS] (internal quotation marks omitted) (quoting French Prime Minister Jean Castex reading a speech on behalf of President Macron); see also Richard J. Goldstone, Opinion, Israel and the Apartheid Slander, N.Y. Times (Oct. 31, 2011), https://www.nytimes.com/2011/11/01/opinion/israel-and-the-apartheid-slander.html (on file with the *Columbia Law Review*) ("In Israel, there is no apartheid. . . . Israeli Arabs—20 percent of Israel's population—vote, have political parties and representatives in the Knesset and occupy positions of acclaim, including on its Supreme Court. Arab patients lie alongside Jewish patients in Israeli hospitals, receiving identical treatment."); Eugene Kontorovich, The Apartheid Accusation Against Israel Is Baseless—and Agenda-Driven, Eur. J. Int'l L.: Talk! (July 8, 2021), https://www.ejiltalk.org/the-apartheid-accusation-against-israel-lacks-is-baseless-and-agenda-driven/ [https://perma.cc/C8H5-WGNN] ("[A] fundamental weakness of the [Human Rights Watch] report is its failure to examine what happened in South Africa and analogize to [Israel].").

as one that "shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa."[241]

But even when a distinction between the historical and legal understanding of the term is stabilized, a different division emerges, one that places the analytical approaches to apartheid on a spectrum between a "regime approach" and a "crime approach."[242] Whereas the former examines the overall goals and policies of the regime, the latter focuses on certain manifestations or policies of the regime in a particular spatial and temporal setting.[243] Although these approaches are not mutually exclusive, they have further divided the conceptual understanding of the term and reinforced an implied dispute about the characterization of the problem: Does the crime of apartheid lie in a particular subset of Israeli policies or is it the raison d'être of the Israeli regime?

And yet, even the broader regime approach still manifests major tensions. A substantial point of contention that remains is apartheid's connection to the concept of settler colonialism and more specifically, the political ideology of Zionism. A broad coalition of Palestinian human rights organizations, for example, have emphasized that apartheid should be understood "as a tool to . . . further entrench Zionist settler colonialisation" and have centered the denial of self-determination in their analysis of apartheid.[244] Distinguished Professor Noura Erakat has highlighted in this context the "dominant tradition among Palestinian intellectuals and organizations that have understood Zionism as a settler-colonial project predicated on Palestinian elimination" and has proposed that "Zionism is better understood as a political and intellectual analog of apartheid in order to emphasize that Israel did not *become* a discriminatory regime but is *defined* by such discrimination."[245]

Nonetheless, the reports of Human Rights Watch and Amnesty International reveal the extent to which these interconnections between apartheid, Zionism, and settler colonialism have been largely undermined. Both organizations have sidelined the related legal questions of colonialism and self-determination in their analyses.[246] Human Rights Watch claims in this context that its work is "focused on impartially

241. International Convention on the Suppression and Punishment of the Crime of Apartheid art. 2, Nov. 30, 1973, 1015 U.N.T.S. 243, 245.

242. Ben-Natan, supra note 236.

243. See id.

244. Rania Muhareb, Elizabeth Rghebi, Pearce Clancy, Joseph Schechla, Nada Awad & Maha Abdallah, Al-Haq, Israeli Apartheid: Tool of Zionist Settler Colonialism 88 (2022), https://www.alhaq.org/publications/20940.html [https://perma.cc/CSW3-CGUC].

245. Erakat, Beyond Discrimination, supra note 147.

246. For a comprehensive study of the limits of these reports, see generally Sultany, Question of Palestine, supra note 215; Tareq Baconi, Israel's Apartheid: A Structure of Colonial Domination Since 1948, 51 J. Palestine Stud., no. 3, 2022, at 44, 44 ("[The reports] limit[] [themselves] . . . from taking a position on Palestinian self-determination and sovereignty, which [they] view[] as political decisions.").

applying the facts to the law, and does not address concepts that are not based in international law, including settler colonialism or Zionism as an ideology."[247] For its part, Amnesty International acknowledges that self-determination is a right rooted in international law, and while it recognizes "the potential validity" of the self-determination frame, "Amnesty International limits its analysis to legal frameworks that explicitly address institutionalized racial discrimination."[248] That is because it "does not take a position on international political or legal arrangements that might be adopted to implement that right [to self-determination]."[249] As Sultany observed, "The omission of self-determination from the apartheid reports is not accidental, but reflects an apolitical posture that inhibits the search for root causes."[250] The contemporary liberal approach to apartheid has thus positioned it as a concept that is separate and distinct from both colonialism and the right to self-determination.

And still, adopting this limited approach that separates apartheid from self-determination does not produce an agreement on fundamental issues. Despite taking a similar analytical approach that decouples apartheid from self-determination, Amnesty International and Human Rights Watch do not agree on crucial questions such as: Where does the system of Israeli apartheid exist in space, and when did it start in time? While Human Rights Watch finds "intent by Israeli authorities to maintain systematic domination by Jewish Israelis over Palestinians" in the entire territory under Israeli control,[251] it concludes that the crime of apartheid is practiced only in the occupied Palestinian territories.[252] In contrast, Amnesty International goes a step further and concludes that the crime of apartheid applies to the entire territory, including to the treatment of Palestinian citizens in Israel.[253]

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247. Clive Baldwin & Emilie Max, Human Rights Watch Responds: Reflections on Apartheid and Persecution in International Law, Eur. J. Int'l L.: Talk! (July 9, 2021), https://www.ejiltalk.org/human-rights-watch-responds-reflections-on-apartheid-and-persecution-in-international-law/ [https://perma.cc/TC67-Y979].

248. Amnesty Int'l, Apartheid Against Palestinians, supra note 235, at 38.

249. Id.; see also Soheir Assad & Rania Muhareb, Dismantle What? Amnesty's Conflicted Messaging on Israeli Apartheid, Inst. for Palestine Stud. (Feb. 15, 2022), https://www.palestine-studies.org/en/node/1652565 [https://perma.cc/EJ74-GC99].

250. Sultany, Question of Palestine, supra note 215, at 18.

251. Shakir, supra note 230, at 78.

252. For a concise critique of this position, see Rania Muhareb, Apartheid, the Green Line, and the Need to Overcome Palestinian Fragmentation, Eur. J. Int'l L.: Talk! (July 7, 2021), https://www.ejiltalk.org/apartheid-the-green-line-and-the-need-to-overcome-palestinian-fragmentation/ [perma.cc/K9R8-MF6K].

253. Amnesty Int'l, Apartheid Against Palestinians, supra note 235, at 62 ("Palestinian citizens of Israel are subject to Israeli civil laws, which . . . nonetheless deny them equal rights with Jewish Israelis (including to political participation) and institutionalize discrimination against them.").

This disagreement is not incidental but rather illustrates the limits of seeing the Palestinian reality through the lens of apartheid[254] rather than examining apartheid through the lens of Nakba. Saying that the apartheid framework is limited does not mean that we should relinquish it as a legal tool of analysis, just as saying that the apartheid framework has obscured the Nakba does not mean that we cannot attempt to recenter the Nakba in our depictions of Israeli apartheid. Nonetheless, the manifestation of the Israeli system of domination has resulted in different "variants" of apartheid, suggesting that the term's ability to capture the entirety of the Palestinian condition has become too convoluted.[255] The best way to resolve these tensions is to recognize Nakba as a legal concept, one that overlaps with apartheid but does not perfectly match the latter concept's original manifestation.[256]

The incoherencies and tensions that the apartheid analysis produces are not limited to the disagreement about the spatiotemporal limits of the regime but also extend to its relationship with the legal framework of military occupation.[257] For instance, despite concluding that Israel is

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254. Some Palestinian scholars have articulated a critique of apartheid that leans toward relinquishing the comparison altogether. See, e.g., Saleh Abd al-Jawad, La Ya Saadah . . . Innhu Laysa Abartheid! [No, Gentlemen . . . It's Not Apartheid!], Al-Akhbar (Nov. 11, 2023), https://al-akhbar.com/Palestine/372884 [https://perma.cc/85DN-EZHD] (arguing that despite the commonalities between Palestine and Apartheid South Africa, there are essential factors that make the analogy unviable, including the demographic composition of society, the role of religion, and the motive of domination being exploitation in South Africa versus expulsion in Palestine).

255. This tension is reflected in the words of many who employed the term. See, e.g., Russell Tribunal on Palestine, supra note 234, at 21 (noting that the Israeli "discriminatory regime manifests in varying intensity and forms against different categories of Palestinians depending on their location"). Former President Jimmy Carter, defending the use of the term "apartheid" to refer to Israel, said:

> Apartheid is a word that is an accurate description of what has been going on in the West Bank, and it's based on the desire or avarice of a minority of Israelis for Palestinian land. It's not based on racism. . . . [Apartheid] is a word that's a very accurate description of the forced separation within the West Bank of Israelis from Palestinians and the total domination and oppression of Palestinians by the dominant Israeli military.

Jimmy Carter Defends 'Peace Not Apartheid', NPR (Jan. 25, 2007), https://www.npr.org/2007/01/25/7004473/jimmy-carter-defends-peace-not-apartheid [https://perma.cc/HDD7-CM2T] (quoting Jimmy Carter); see also Elia Zureik, David Lyon & Yasmeen Abu-Laban, Surveillance and Control in Israel/Palestine 58 (2011) ("While official *de jure* apartheid of the South African variety does not exist in Israel, national apartheid on the latent and informal levels . . . is a characteristic feature of Israeli society." (internal quotation marks omitted) (alteration in original) (quoting Zureik, supra note 128, at 16)).

256. Even though Nakba has not yet been understood as a legal concept, Palestinian human rights organizations have already advocated for grounding the apartheid analysis in the ongoing Nakba. See, e.g., Muhareb et al., supra note 244, at 1 ("Since 1948, Palestinians have endured an ongoing *Nakba* (catastrophe) of . . . domination, foreign occupation, annexation, population transfer, and settler colonisation." (emphasis omitted)).

257. See generally Miles Jackson, Expert Opinion on the Interplay Between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid Under

practicing the crime of apartheid, Amnesty International simultaneously reiterates that "Amnesty hasn't taken a position on occupation. [The organization's] focus has been on the Israeli government's obligations, as the occupying power, under international law, but Amnesty has taken no position on the occupation itself."[258] From this, we learn, the demand to end apartheid is not necessarily synonymous with the demand to end occupation. The framework of Nakba thus brings into focus different legal questions than apartheid. If apartheid assumes that the demand for justice is *equality* based on the notion of nonracialism, Nakba poses the question of *liberty* as a core component of self-determination, which necessarily includes the immediate termination of the military occupation.[259] To think of the future as one that dismantles the Israeli modalities of apartheid, we need to first name and recognize the entirety of the Palestinian condition: the Nakba.

C. *Genocide*

In February 1983, an Israeli Commission of Inquiry found that Ariel Sharon, then Israeli Minister of Defense, bore "personal responsibility" for failing to prevent the atrocious massacres committed in Lebanon's Sabra and Shatila refugee camps in September 1982.[260] The Commission further found that other senior Israeli officials, including the Israeli Prime Minister Menachem Begin, were also "indirectly responsible" for the massacres.[261] The report noted that on September 16, the same night the massacre commenced, Sharon's office issued instructions asserting that

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International Law (2021), https://apidiakoniase.cdn.triggerfish.cloud/uploads/sites/2/2021/05/expert-opinion-apartheid-and-occupation.pdf [https://perma.cc/BV2X-M9KY] (considering how the legal frameworks of apartheid and occupation apply to Israel and Palestine).

258. Amnesty International USA (@amnestyusa), Twitter (Feb. 1, 2022), https://twitter.com/amnestyusa/status/1488519451976810499 [https://perma.cc/6MQN-WZY6]; see also Assad & Muhareb, supra note 249 (critiquing Amnesty International's limited position on Israeli apartheid).

259. On the concept of liberty, see generally Isaiah Berlin, Two Concepts of Liberty 41–42 (1958) ("What [oppressed classes or nationalities] want, as often as not, is simply recognition . . . and not to be ruled, educated, guided, with however light a hand, as being not quite fully human, and therefore not quite fully free."); see also Avishai Margalit, Home and Homeland: Isaiah Berlin's Zionism, 57 Dissent 66, 68 (2010) (describing Zionism as a cure for lack of freedom).

260. Final Report of the Israeli Commission of Inquiry Into the Events at the Refugee Camps in Beirut (1983), reprinted in J. Palestine Stud., Spring 1983, at 89, 91–92, 115–16 [hereinafter Kahan Report] (publishing excerpts from the English translation of the report).

261. Id. at 106. The report omits and obfuscates the full picture of Israeli liability for the massacre. For a critique of the report, see Noam Chomsky, Fateful Triangle: The United States, Israel & the Palestinians 397–409 (2d ed., Black Rose Books 1999) (1983).

"[f]or the operation in the [refugee] camps the Phalangists should be sent in."[262]

That night, Lebanese Phalangist militias were allowed into the refugee camps to conduct the massacres as the Israeli military fired flares to illuminate their vision.[263] As historian Seth Anziska further revealed, in a meeting with Morris Draper—the American envoy to the Middle East—Sharon declared, "If you don't want the Lebanese to kill them, we will kill them."[264] By September 18, the Phalangist militias had murdered over 1300 men, women, and children.[265] Three decades later, the Israeli archives would reveal that Sharon had feared being held liable for genocide.[266]

That same month, another important yet much less discussed report concerning Israeli conduct in Lebanon was published.[267] The 282-page report was the product of an unofficial initiative of six esteemed jurists headed by Seán MacBride ("the Commission").[268] The Commission was

262. Kahan Report, supra note 260, at 93–94 (internal quotation marks omitted) (quoting a document sent by the Defense Minister's office to the director of Military Intelligence's office on September 16, 1982).

263. Seth Anziska, Opinion, A Preventable Massacre, N.Y. Times (Sept. 16, 2012), https://www.nytimes.com/2012/09/17/opinion/a-preventable-massacre.html (on file with the *Columbia Law Review*).

264. Id. (internal quotation marks omitted) (quoting Sharon) ("The verbatim transcripts reveal that the Israelis misled American diplomats . . . . [W]hen the United States was in a position to . . . end[] the atrocities, it failed to do so. As a result, Phalange militiamen were able to murder Palestinian civilians, whom America had pledged to protect just weeks earlier."). For the declassified documents, see Declassified Documents Shed Light on a 1982 Massacre, N.Y. Times (Sept. 16, 2012), https://archive.nytimes.com/www.nytimes.com/interactive/2012/09/16/opinion/20120916_lebanondoc.html (on file with the *Columbia Law Review*); see also Seth Anziska, Sabra and Shatila: New Revelations, N.Y. Rev. (Sept. 17, 2018), https://www.nybooks.com/online/2018/09/17/sabra-and-shatila-new-revelations/ (on file with the *Columbia Law Review*) (describing the documents and how they were discovered).

265. Bayan Nuwayhed al-Hout, Sabra and Shatila: September 1982, at 276 (2004).

266. Ofer Aderet, A'hry Sabra Veshatila: Sharon Ḥashash Sheyu'sham Beretzaḥ A'm [After Sabra and Shatila: Sharon Feared Genocide Accusations], Haaretz (Feb. 21, 2013), https://www.haaretz.co.il/news/politics/2013-02-21/ty-article/0000017f-dbcd-d856-a37f-ffcd75d50000 [https://perma.cc/4FVD-KYTC]; see also Ofer Aderet, What Historical Mossad Files Reveal About 'Israel's Most Planned War', Haaretz (Sept. 8, 2022), https://www.haaretz.com/israel-news/2022-09-08/ty-article-magazine/.highlight/israels-most-planned-war-historical-mossad-file-details-lebanon-policy/00000183-1dce-d11f-a1e3-5fde579b0000 (on file with the *Columbia Law Review*).

267. Int'l Comm'n to Enquire into Reported Violations of Int'l L. by Isr. During Its Invasion of Leb., Israel in Lebanon (1983) [hereinafter MacBride Report].

268. See id. Seán MacBride was, among other things, the former Assistant Secretary General of the United Nations, former Minister of External Affairs of Ireland, and a Nobel Peace Prize winner. See Seán MacBride, Encyc. Britannica, https://www.britannica.com/biography/Sean-MacBride [https://perma.cc/2FG7-QNBC] (last updated Mar. 22, 2024).

constituted in August 1982, before the Sabra and Shatila massacres, to review the legality of the Israeli invasion and conduct in Lebanon.[269]

By the time both Commissions published their reports, the UN General Assembly had already adopted a resolution strongly condemning Israeli action, declaring the Sabra and Shatila massacre an "act of genocide" and calling to "suspend economic, financial and technological assistance to and co-operation with Israel."[270] Notably, the resolution included a clause deploring the United States' veto cast in favor of Israel earlier that year to prevent the implementation of a Security Council decision that declared the Israeli annexation of the occupied Syrian Golan Heights "null and void."[271]

Revisiting the almost-forgotten report four decades after its publication is revealing.[272] The Commission opens its report with a statement reflective of a momentous crisis facing the legitimacy of international law, one that seems acutely relevant to our present:

> It is easy to become cynical about the relevance of law to the conduct of war. Our sensibilities are by now flooded with images of massacres and atrocities committed in the name of this or that cause. These most gross, barbaric features of warfare, as present in modern times as in ancient, remind us also that international society lacks any consistent means of law enforcement. When it comes to war the attempt to have law without government often seems, indeed, like grasping at straws.[273]

And yet the Commission explained that the only hope is to salvage the project of international law by creating "a climate in which public opinion insists upon adherence by all states and political movements to the international law relative to war."[274] It thus moved forward to examine

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269. See MacBride Report, supra note 267, at v (describing the founding of the Commission).

270. G.A. Res. 37/123, at 37–38 (Dec. 16, 1982). The resolution was adopted by a majority of 123 member states with twenty-two abstaining votes. How Has My Country Voted at the UN?, Al Jazeera, https://interactive.aljazeera.com/aje/2019/how-has-my-country-voted-at-unga/index.html [https://perma.cc/R5TP-YGHT] (last visited Apr. 13, 2024).

271. G.A. Res. 37/123, supra note 270, at 37 (explaining that the General Assembly "[s]trongly deplores the negative vote by a permanent member of the Security Council which prevented the Council from adopting against Israel . . . the 'appropriate measures' . . . unanimously adopted by the Council" (emphasis omitted)); see also S.C. Res. 497 (Dec. 17, 1981).

272. Much of the legal scholarship on Sabra and Shatila barely mentions the MacBride report while extensively discussing the Kahan report. See, e.g., Linda A. Malone, The Kahan Report, Ariel Sharon and the Sabra-Shatilla Massacres in Lebanon: Responsibility Under International Law for Massacres of Civilian Populations, 1985 Utah L. Rev. 373, 413 n.184, 432 n.277 (describing the MacBride report only in a few footnotes, without any meaningful discussion); Yuval Shany & Keren R. Michaeli, The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility, 34 N.Y.U. J. Int'l L. & Pol. 797, 798 n.3 (2002) (mentioning the MacBride report only once in a footnote).

273. MacBride Report, supra note 267, at xi.

274. Id. at xiii.

at length the legal implications of the Israeli recourse to war, the conduct of war, and the occupation of Lebanon.[275]

The parallels that may be drawn between the past and the present fall beyond the scope of this Article. The conclusions of the Commission's report and its treatment of the question of genocide are, however, of utmost importance since they reveal the tensions embedded in the interpretation of the crime of genocide and the understanding of its legal boundaries. The UN Genocide Convention defines genocide as certain acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[276] These acts include, but are not limited to: "[k]illing members of the [protected] group" or "[c]ausing serious bodily or mental harm to members of the group" or "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[277]

In examining the applicability of genocide to Israeli actions in Sabra and Shatila, the Commission members were split about the standard of intent required for the crime of genocide; specifically, two members of the Commission concluded that genocide "requires a special intent."[278] While the Commission refrained from issuing conclusive recommendations about genocide,[279] it still included an illuminating "Majority Note on Genocide and Ethnocide" in its appendices, where it expanded on the Commission's majority opinion pertaining to the question of genocide.[280] In this appendix, the Commission's approach attempts to trace the connections between the massacres in Sabra and Shatila and a broader objective of the Israeli regime it encountered:

> The massacres that took place at Sabra and Chatila in September 1982 can be described as genocidal massacres, and the term 'complicity in genocide' is wide enough to establish the responsibility of Israel for these acts. But the denial of nationality to Palestinians has resulted in all Palestinian social institutions being considered to be part of the apparatus of the 'terrorists of the PLO'. The borderline between [then Israeli Prime Minister] Mr[.] Begin's claim to 'eliminate the PLO' and the total destruction of the social organisation of the Palestinian people in Lebanon is a very narrow one and the constant reference to

275. Id.

276. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280.

277. Id.

278. MacBride Report, supra note 267, at x ("The majority . . . took the view that the actions of the Israeli authorities amounted to . . . genocide. Two members of the Commission, however, took the view that while the conduct . . . did constitute grave violations of international law, these violations did not amount to the crime of genocide which requires a special intent.").

279. Id. (recommending that, while the Commission's terms of reference did not require a finding of genocide, the conduct of the Israeli government must be evaluated to determine whether it amounted to genocide).

280. Id. at 194.

> the need to 'purify' the territory of the Lebanon of PLO elements has been conducive to attacks on the autonomy of the Palestinian people.[281]

The Commission stated that "there is evidence to show" that "the treatment of Palestinians in those dispersal areas occupied by Israel in Lebanon" was related to "Israeli policies in the West Bank."[282] Taken together, these policies "attempt to disrupt the social organisation of the Palestinian people to ensure that, through their disposal, their sense of identity and group loyalty would be weakened, if not destroyed."[283]

Contemplating the applicability of the Genocide Convention to the Israeli policies against the Palestinian people, the Commission concluded, "The definition of genocide is not limited to the formula adopted by the United Nations in . . . 1948. The legal concept of genocide is quite consistent with identifying policies designed to destroy the identity and will of a national group, as well as the Nazi paradigm of the Holocaust."[284]

In fact, the Commission went further to articulate the Palestinian condition as a "particular form of genocide," one that it considered consistent with Raphael Lemkin's concept of the term:[285]

> The particular form of genocide as applied to the Palestinians does not appear to be aimed at killing the Palestinians in a systematic fashion. It could be argued that if this was the intention, many more could have been killed. The specific form of genocide which can be said to apply is the adoption of all kinds of measures, short of killing, to destroy the national culture, political autonomy and national will in the context of the Palestinian struggle for national liberation and self-determination.[286]

The Commission's treatment of the applicability of genocide to the Palestinian condition at large is illustrative of the challenges that the international legal community has long faced in framing the Israeli injustices and crimes committed against the Palestinian people. The disagreement about the "correct" interpretation of genocide, and the underlying tensions and anxieties about the confines of our legal language, are precisely what led the Commission to ultimately recommend that "a competent international body be designated or established to

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281. Id. at 196.

282. Id.

283. Id.

284. Id. at 194.

285. Id. ("[G]enocide was never meant to cover simply the physical extermination of a people. . . . Raphael Lemkin, who coined the word, explained that genocide was intended to signify a co-ordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups . . . ."). Raphael Lemkin first developed the concept of genocide in his book *Axis Rule*. See Raphael Lemkin, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress 79–80 (1944). See also infra note 336 and accompanying text.

286. MacBride Report, supra note 267, at 194.

clarify the conception of genocide in relation to Israeli policies and practices toward the Palestinian people."[287]

While no such international body was ever established, the International Court of Justice found, four decades later, that South Africa's genocide case against Israel for its war on Gaza was "plausible."[288] Gaza has reignited the scholarly interest in the conversation about the applicability of genocide to the Palestinian condition.[289] At the core of this conversation are questions about how the concept of genocide relates to the 1948 Nakba and whether the ongoing Nakba should be understood as a form of genocide.[290] In this context, scholars have developed and employed several variations on the term in relation to Palestine, including: politicide,[291] sociocide,[292] memoricide,[293] and others.[294]

And still, these discussions seem to have a life of their own in specialized journals, one that remains separated and siloed from the legal or popular understanding of the term "genocide." If "genocide" leads to an almost eternal debate about what it means, and whether it can be understood to include this or that interpretation for it to encompass the totality of the Palestinian reality, scholarship might as well acknowledge the Nakba for what it is: an organic articulation of the Palestinian condition. Recognizing the Nakba as its own concept allows us to synthesize different conversations that are otherwise tucked into separated disciplinary silos.

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287. Id. at 193.

288. See supra note 23 and accompanying text.

289. For an excellent summary and contribution to this conversation prior to the ongoing genocide in Gaza, see Haifa Rashed, Damien Short & John Docker, Nakba Memoricide: Genocide Studies and the Zionist/Israeli Genocide of Palestine, 13 Holy Land Stud. 1, 6 (2014) ("If we look at the publications of Genocide Studies, year after year Zionist Israel as a possible case study is an egregious absence.").

290. See id. at 3.

291. See Baruch Kimmerling, Politicide: Ariel Sharon's War Against the Palestinians 3 (2003) ("By *politicide* I mean a process that has, as its ultimate goal, the dissolution—or, at the very least, a great weakening—of the Palestinian people's existence as a legitimate social, political, and economic entity.").

292. See Saleh Abdel-Jawad, War by Other Means, Al-Ahram Wkly. (Jan. 8, 1998), republished in Ahram Online (May 16, 2023), https://english.ahram.org.eg/News/500920.aspx (on file with the *Columbia Law Review*) ("These drastic measures . . . to expel the indigenous population . . . have given way to a policy which I shall call 'sociocide', that is the gradual undermining of the communal and psychological structures of Palestinian society in order to compel the Palestinians to leave by other means.").

293. See Pappe, Ethnic Cleansing, supra note 21, at 225–35.

294. Nurhan Abujidi, Urbicide in Palestine: Spaces of Oppression and Resilience 64 (2014). The term "domicide" has also been invoked in relation to Gaza. See Mahdi Sabbagh, Taking Stock of an Unrecognizable Gaza: What Israel's Bombing Has Wrought, Curbed (Feb. 28, 2024), https://www.curbed.com/article/gaza-israel-urban-fabric-destruction-domicide-urbicide.html [https://perma.cc/L27M-GSDY] ("Some have referred to what is happening in Gaza as an act of domicide, or the systematic destruction of homes.").

The ongoing condition of the Nakba is not exactly genocide, although it may contain genocidal episodes that fulfill the legal definition of the term. The ongoing Nakba is the continuation of genocide *by other means*.[295] This Article does not argue for broadening the definition of genocide to include the totality of the Nakba, although that line of argumentation may be legally plausible.[296] Rather, this Article suggests distinguishing between these analytically independent concepts while recognizing their potential overlap. While the ongoing Nakba has involved acts of genocide—and most recently what has been called a "textbook case of genocide"[297]—this overlap does not mean that Nakba is synonymous with genocide or that genocide is synonymous with Nakba.

III. NAKBA AS A LEGAL CONCEPT

The notion of Nakba is absent from law. To generate the language we lack, to name the Palestinian condition of domination, and to provide an adequate legal framework for the structures of oppression in Palestine, we must recognize and theorize the ongoing Nakba as a legal concept. The concept of Nakba is the most genuine articulation of the Palestinian

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295. The idea of Nakba as genocide by other means reflects both a conceptual and historical argument. Historically, the Nakba has stemmed out of the repercussions of the Holocaust and the collective trauma of the Holocaust has become intertwined with the collective trauma of the Nakba. See Bashir Bashir & Leila Farsakh, Introduction: Three Questions that Make One, *in* The Arab and Jewish Questions, supra note 124, at 1, 5 ("Palestinian and Arab writers have found in literature a productive space to unpack the implications of the Holocaust for Palestinian, and Jewish, political rights in Palestine . . . [and] the tragic entanglement of the Jewish question and the Holocaust with the question of Palestine and the Nakba."); Bashir Bashir & Amos Goldberg, Introduction: The Holocaust and the Nakba: A New Syntax of History, Memory, and Political Thought, *in* The Holocaust and the Nakba, supra note 31, at 2 ("Neither the Holocaust nor the Nakba represents the totality of Jewish or Palestinian identity in the early twenty-first century; however, both are central, perhaps even crucial components in the collective identity and consciousness of each of the two peoples."). Nakba and genocide are tangent concepts. French philosopher Gilles Deleuze argued in this context that Nakba is "a genocide, but one in which physical extermination remains subordinated to geographical evacuation . . . . Physical extermination, though it may or may not be entrusted to mercenaries, is most certainly present. But this isn't a genocide, they say, since it's not the 'final goal' . . . it's just one means among others." Gilles Deleuze, The Grandeur of Yasser Arafat, 20 Discourse at 30, 31 (1998).

296. See, e.g., The Genocide of the Palestinian People: An International Law and Human Rights Perspective, Ctr. for Const. Rts. (Aug. 25, 2016), https://ccrjustice.org/genocide-palestinian-people-international-law-and-human-rights-perspective [https://perma.cc/UYR3-DVJA].

297. See, e.g., Raz Segal, A Textbook Case of Genocide, Jewish Currents (Oct. 13, 2023), https://jewishcurrents.org/a-textbook-case-of-genocide [https://perma.cc/FMF4-CYRV] (describing Israel's campaign in Gaza as a "textbook case of genocide"); Letter from Craig Mokhiber, Dir. New York Off. of the High Comm'r for Hum. Rts., to Volker Turk, UN High Comm'r for Hum. Rts. (Oct. 28, 2023), https://s3.documentcloud.org/documents/24103463/craig-mokhiber-resignation-letter.pdf [https://perma.cc/L93G-L5VU] (same); see also supra note 23.

condition as derived from the material reality and collective vernacular of its victims.

Conceptualizing Nakba in law allows us to explore new ways to think about Palestine, to ask new questions, to identify the root cause of violence, to synthesize existing concepts, and ultimately, to imagine new configurations to undo Nakba. One quality of Nakba is that it has become an ever-present condition: Nakba continues to unfold as those who experienced its foundational violence die, and its trauma is transmitted and reenacted across generations. Once understood as an ongoing process, Nakba brings into view a totality that is greater than the sum of its parts.

This Part is an initial attempt toward a legal conceptualization of Nakba, one that not only locates the Palestinian reality in law but also derives law from the Palestinian reality. Part III.A. provides a brief etymology of the term "Nakba," tracing its evolution from a rupture into an enduring structure. Part III.B. goes on to identify three components—foundation, structure, and purpose—that together form a legal anatomy of the ongoing Nakba.

A. *A Brief Etymology of a Concept*

The term "Nakba," meaning "catastrophe," has been used to signify changing, and often competing, meanings. Nakba has most commonly been invoked to signify two temporal modes: one that relegates it to the past, and one that extends it to the present. In the first instance, the Nakba—always with a definite article—signifies the manifestations of the 1948 war on Palestine, the mass dispossession and displacement of Palestinians, and the destruction of Palestinian society at large. The second instance is used to refer to the totality of Palestinian condition of subjugation and domination that spans from 1948 through the present.

This Article uses the term "Nakba" in three distinct ways: "1948 Nakba" to refer to the foundational event(s) of the Palestinian Nakba; "ongoing Nakba" to refer to the continuous Palestinian reality since 1948; and "Nakba," without a definite article, to introduce a broader concept, including in law, which may be applied to Palestine and prove useful to other contexts as well. A brief exploration of the term "Nakba" shows that its meaning has undergone significant transformations over time. While the term has a long and under-researched intellectual history,[298] this

298. One famous invocation of the term "Nakba" is associated with the trial and expulsion of twelfth-century Andalusian philosopher Ibn Rushd (Averroes) from Andalusia to Marrakesh. See Ahmad Mahmoud, Nakbat Ibn Rush [The Nakba of Ibn Rush], Al-Ahram (Apr. 18, 2016), https://gate.ahram.org.eg/daily/News/151878/59/499539/ [https://perma.cc/KF3M-CBYP]. Prior to 1948, the term Nakba had been used to refer to different types of calamities, ranging from massacres to famine. At least two books from the late nineteenth century and early twentieth century use the word "nakabat" (plural of nakba) in their title to refer to the massacres of Christians and Armenians in the late nineteenth and early twentieth century. See Shahin Makaryus, Hasr al-Litham 'an Nakabat al-Sham [Disasters of the Levant Revealed] (1895); Is-haq Armaleh, Al-Qousara fi Nakabat

section offers a brief etymology of the term as it relates to Palestine.[299] Since 1948, the term "Nakba" has become almost synonymous with the Palestinian experience, and as novelist Elias Khoury put it, "when a word becomes an untranslatable proper name, we have to try to understand the wisdom of language."[300]

1. *The Nakba as a Rupture.* — The emergence of the word "Nakba" points to an issue broader than the calamity befalling its direct and primary victims, the Palestinian people. Since its association with Palestine, the term "Nakba" has been inextricably related to the fate of the Arab nations. The term was first invoked in the context of the Zionist conquest of Palestine by the Syrian intellectual Constantine Zurayk, in his book *Ma'na al-Nakba* (later translated as *The Meaning of the Disaster*), published during the summer truce of 1948 and against the background of a decisive Arab defeat in the war.[301]

As early as 1948, Zurayk realized that the magnitude and ramifications of the Zionist conquest of Palestine were unparalleled. Zurayk opens his book by stating:

> The defeat of the Arabs in Palestine is no simple setback or light, passing evil. It is a disaster in every sense of the word and one of the harshest of the trials and tribulations with which the Arabs have been affected throughout their long history—a history marked by numerous trials and tribulations.[302]

Annasara [The Foremost Disasters of Christians] (1919). Notably, writer and editor Shahin Makaryus's book *Hasr al-Litham 'an Nakabat al-Sham* opens with a description of the Levant's geography and describes four major religious communities living in the Levant: Muslims, Christians, Jews, and Druze. Makaryus, supra, at 3–8. Makaryus interestingly uses the terms "Jews" and "Israelis" interchangeably as early as 1895, writing that the Israeli sect mostly resided in the al-Quds' area and were gradually growing in numbers out of the belief that the land would soon be theirs, especially because they were supported by Jewish figures that would help them purchase lands and build settlements. See id. at 8.

299. While I am unaware of any scholarship about the concept of Nakba before 1948, two main articles have studied the concept of Nakba in Arab thought after 1948. See Anaheed Al-Hardan, Al-Nakbah in Arab Thought: The Transformation of a Concept, 35 Compar. Stud. S. Asia, Afr. & Middle E. 622 (2015) [hereinafter Al-Hardan, Al-Nakbah in Arab Thought]; Ali E. Hillal Dessouki, Arab Intellectuals and Al-Nakba: The Search for Fundamentalism, 9 Middle E. Stud. 187 (1973).

300. Elias Khoury, Rethinking the Nakba, 38 Critical Inquiry 250, 255 (2012) [hereinafter Khoury, Rethinking the Nakba].

301. Constantine K. Zurayk, The Meaning of the Disaster (R. Bayly Winder trans., 1956) (1948). Zurayk was a man of many hats: a pan-Arab intellectual, a Princeton-educated historian, a Professor and Vice President of the American University of Beirut (AUB), a President of the Syrian University of Damascus (SU), a founding member of the Institute for Palestine Studies, the First Counselor to the Syrian Legation to the United States, and Syria's representative at the United Nations and Security Council, among many other things. See Hana Sleiman, History Writing and History Making in Twentieth Century Beirut 42, 56, 68 (2021) (Ph.D. dissertation, University of Cambridge), https://api.repository.cam.ac.uk/server/api/core/bitstreams/94e553c7-e907-4389-9f70-92ccce443616/content [https://perma.cc/A6BE-ZKLZ].

302. Zurayk, supra note 301, at 2.

The book, premised on the rejection of Zionism as a settler project in Palestine, offers a scathing critique of Arab sociopolitical conditions and warns of the existential crisis facing Arab nationalisms.[303] To undo the Nakba, Zurayk called for a radical reconfiguration of Arab societies, one that is premised on the ideals of science, modernity, and rationality.[304]

For Zurayk, the Nakba was at its core an Arab issue unfolding in Palestine rather than a Palestinian issue projecting itself onto the Arab world.[305] The Nakba, for the Arab consciousness of the time, posed an existential threat both to the territorial continuity of the Arab world and the very idea of Arab nationhood, modernity, and future. As Said writes, Zurayk understood the Nakba as a "deviation, a veering out of course."[306] He articulated the Nakba as a problem of the present, one that had diverted the Arab world from a progressive path into a regressive and catastrophic future.[307] Said elaborates:

> The development of Zurayk's argument in his book led him, as it was to lead many other writers since 1948, to interpret *al-nakba* as a rupture of the most profound sort. . . . So strong was the deflection, or the deviation, from the Arabs' persistence in time up to 1948, that the issue for the Arabs became whether what was "natural" to them—their continued national duration in history—would be possible at all.[308]

This understanding of the Nakba as a Palestinian manifestation of an Arab tragedy was a common thread among Zurayk's generation of Arab

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303. Id. at 34–35.

304. Id. at 39–40.

305. Id. at 49.

306. Edward Said, Arabic Prose and Prose Fiction After 1948, *in* Reflections on Exile and Other Essays 41, 47 (2000) [hereinafter Said, Arabic Prose].

307. Id. at 47–48. Writing on the Nakba's effect on the history of the Arab world, Said observed:

> [F]rom the perspective of the past, the Arabs would seem to have swerved from the path toward national identity, union, and so on; from the perspective of the future, the disaster raised the specter of national fragmentation or extinction. The paradox is that both of these observations hold, so that at the intersection of past and future stands the disaster, which on the one hand reveals the deviation from *what has yet to happen* (a unified, collective Arab identity) and on the other reveals the possibility of *what may happen* (Arab extinction as a cultural or national unit). The true force then of Zurayk's book is that it made clear the problem of the *present*, a problematic site of contemporaneity, occupied and blocked from the Arabs. For the Arabs to act knowingly was to *create* the present, and this was a battle of restoring historical continuity, healing a rupture, and—most important—forging a historic possibility.

Id. (discussing Zurayk, supra note 301).

308. Id. at 47.

intellectuals,[309] who produced a variety of works on the subject.[310] Zurayk and his milieu of Arab intellectuals used the term Nakba to identify, name, and theorize a calamity that their generation experienced when "[n]o concept seemed large enough, no language precise enough to take in the common fate."[311]

2. *The Nakba as a Structure.* — When Israel defeated the Arab states in the 1967 war—an event that became known as the *naksa* (meaning setback)—various claims about the meaning of Nakba arose in relation to the more recent defeat.[312] In his book *Ma'ana al-Nakba Mujaddadan* (*The Meaning of the Nakba Again*), Zurayk contested the term "naksa" and insisted on calling 1967 "a catastrophe [*nakba*] and not a setback [*naksa*]."[313] For Zurayk, and many other writers, the 1967 defeat was another Nakba grounded in the 1948 Nakba.[314] As Zurayk puts it, the 1967 defeat reflected an "old meaning . . . anew."[315]

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309. See Anaheed Al-Hardan, Palestinians in Syria: Nakba Memories of Shattered Communities 35 (2016) [hereinafter Al-Hardan, Palestinians in Syria] (explaining that for this generation of intellectuals, the "pan-Arab link remains important and the Nakba cannot be understood outside this context").

310. 'Arif al-'Arif, for example, published between 1958 and 1960 a six-volume book titled *al-Nakba* in which he explains his choice of the term:

> How can I not call it [the book] 'The Nakba'? We have been afflicted by catastrophe, we the Arabs in general and the Palestinians in particular, during this period of time in a way in which we have not been subjected to a catastrophe in centuries and in other periods of time: our homeland was stolen, we were thrown out of our homes, we lost a large number of our sons and of our young ones, and in addition to all this, the core of our dignity was also afflicted.

Id. at 35 (internal quotation marks omitted) (quoting 'Arif al-'Arif, 1 Al-Nakba: Nakbat Beit al-Maqdis wal-Firdaws al-Mafqood bayn 'amay 1947–1949 [The Nakba: The Nakba of Jerusalem and the Lost Paradise, 1947–1949], at 3 (1956)). Other important contributions from that period include publications by Musa Alami, Muhammad Nimr al-Khatib, Jurj Hanna, and Qadri Tuqan, among others. See Al-Hardan, Palestinians in Syria, supra note 309, at 31.

311. See Said, Arabic Prose, supra note 306, at 46. A more comprehensive exploration of these works can be found in Al-Hardan, Palestinians in Syria, supra note 309; Al-Hardan, Al Nakbah in Arab Thought, supra note 299; and Dessouki, supra note 299.

312. Seikaly, JPS as Archive, supra note 43, at 56 (showing that some academics "framed the disaster as a setback, Naksa, a rhythmic analogue to, but less injurious than, the Nakba or catastrophe" and that they "still call it Naksa despite the consensus that 1967 was but a station in an ongoing catastrophe"); see also Al-Hardan, Palestinians in Syria, supra note 309, at 41 ("In his insistence on 1948 and 1967 as catastrophes rather than mere setbacks, Zurayk seems to be directly contesting Nasser's response to the latest defeat.").

313. Al-Hardan, Palestinians in Syria, supra note 309, at 41 (internal quotation marks omitted) (quoting Constantine Zurayk, Ma'na al-Nakba Mujaddadan [The Meaning of the Nakba Again] 996 (1967)).

314. Id. ("Although the works that emerged in the aftermath of 1967 assessed the new defeat in different ways, what they shared in common was linking 1967 and 1948.").

315. Id. at 42 (alteration in original) (internal quotation marks omitted) (quoting Constantine Zurayk, Ma'na al-Nakba Mujaddadan [The Meaning of the Nakba Again] 1031 (1967)).

Although Zurayk continued to understand the Nakba as a rupture, he simultaneously planted the seeds for an emerging conception of the Nakba as a process that looms over the Arab and Palestinian condition at large. As Arab fragmentation became all the more entrenched, the Nakba became all the more Palestinian. It grew to encapsulate the totality of the Palestinian experience: an overarching frame that encompasses the individual and collective subjugation of the Palestinian people and can be traced to the constitutive violence of 1948.[316]

Said, for example, articulated the Nakba as an "explosion" that continues to irrevocably shape the present.[317] As he put it elsewhere, "For Palestinians, a vast collective feeling of injustice continues to hang over our lives with undiminished weight."[318] While Said did not explicitly define the Nakba as both the "explosion" and the continuous process itself, others have started to articulate this notion. The famed Palestinian poet Mahmoud Darwish wrote, for example, that "the Nakba is an extended present that promises to continue in the future. . . . [W]e continue to live [the Nakba] in the here and now."[319]

The conception of the Nakba as an ongoing process has gradually emerged as an internal response to the intellectual tradition spanning

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316. Palestinian writer and poet Mohammed El-Kurd encapsulates the collective and individual experiences of the Nakba by writing:

> For Palestinians, the Nakba is relentless and recurring. It happens in the present tense—and it happens everywhere on the map. Not a corner of our geography is spared, not a generation since the 1940s. For my own family, the Nakba was my grandmother's experience of expulsion from Haifa by the Haganah in 1948—but it was also her cautionary tales warning me of what would inevitably be my fate when army-backed settlers with Brooklyn accents took over half of my home in Sheikh Jarrah in 2009, declaring my house their own by divine decree. For other families, the Nakba began when a beloved grandfather was expelled from Jaffa and sought refuge in Gaza—where it continues in the rumble of the warplanes dropping bombs on overcrowded refugee camps, introducing his grandchildren to their first (or perhaps third or sixth) war. It is their faces on the posters that are yet to be printed.

Mohammed El-Kurd, Reflections on the 75th Anniversary of a Nakba that Never Ended, The Nation (May 15, 2023), https://www.thenation.com/article/world/reflections-on-the-75th-anniversary-the-nakba/ [https://perma.cc/PD46-M59J].

317. Said, Arabic Prose, supra note 306, at 46 ("The year and the processes which [the Nakba] culminated represent an explosion whose effects continue to fall unrelentingly into the present.").

318. Edward W. Said, Introduction: The Right of Return at Last, *in* Palestinian Refugees, supra note 180, at 1.

319. Mahmoud Darwish, Not to Begin at the End, Al-Ahram Wkly. (2001), https://web.archive.org/web/20011202055655/http:/www.ahram.org.eg/weekly/2001/533/op1.htm (on file with the *Columbia Law Review*) (translated from Arabic to English). The notion of the Nakba as an ongoing and repetitive process of loss has predated the usage of the phrase "ongoing Nakba." See, e.g., Shir Alon, No One to See Here: Genres of Neutralization and the Ongoing Nakba, 27 Arab Stud. J. 90, 92 (2019) (charting the use of the term "ongoing Nakba" from its first use in 2001 to ubiquity in 2008).

from Zurayk to Said, and their interpretation of its meaning.[320] The Nakba has become a sort of suspension in time, a liminal condition that defines the time and space between a romanticized past and a barely imaginable future.[321] In this context, the desire to articulate the Nakba as an overarching framework reflected an attempt to theorize the Palestinian experience as a distinctive form of colonialism,[322] which may be understood in line with the articulations of apartheid as "Colonialism of a Special Type."[323] Reflective of this understanding is a 2001 address at the conference against racism in Durban, South Africa, where Hanan Ashrawi stated that the Palestinian people constitute "a nation in captivity held hostage to an ongoing *Nakba* [catastrophe], as the most intricate and pervasive expression of colonialism, apartheid, racism, and victimization."[324]

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320. In an intervention that crystalizes this critique, Khoury notes that Zurayk's analyses neglect "the nature of the *nakba*" and rather understand the Nakba as "a historical event"; Zurayk's view does not consider "that the Zionist victory in 1948 was the beginning of the process and not its end." Khoury, Rethinking the Nakba, supra note 300, at 250, 256.

321. Historian Sherene Seikaly argued in this context:

> In the age of catastrophe, Palestine is a paradigm. It can teach us about our present condition of the permanent temporary: we are all unclear about what the future holds. We are all suspended in time with no end in sight. We are all uncertain if there is any "normal" to which we can return. For some, this realization is a rupture. For most, violence and dispossession are not interruptions. They are markers of the temporal and spatial suspension that make up the everyday.

See Sherene Seikaly, Nakba in the Age of Catastrophe, Jadaliyya (May 15, 2023), https://www.jadaliyya.com/Details/45037 [https://perma.cc/4LK2-QVMB] [hereinafter Seikaly, Age of Catastrophe].

322. Since the turn of the century, Palestinian scholars have intensified the study of settler colonialism as it applies to Palestine, situating the Nakba as the distinctive structure of settler colonialism in Palestine:

> [V]iewed through the lens of settler colonialism, the *Nakba* in 1948 is not simply a precondition for the creation of Israel or the outcome of early Zionist ambitions; the *Nakba* is not a singular event but is manifested today in the continuing subjection of Palestinians by Israelis. In order to move forward and create a transformative, liberatory research agenda, it is necessary to analyse Zionism's structural continuities and the ideology that informs Israeli policies and practices in Israel and toward Palestinians everywhere. In other words, while Israel's tactics have often been described as settler colonial, the settler colonial *structure* underpinning them must be a central object of analysis.

Omar Jabary Salamanca, Mezna Qato, Kareem Rabie & Sobhi Samour, Past Is Present: Settler Colonialism in Palestine, 2 Settler Colonial Stud., no. 1, 2012, at 1, 2 (emphasis omitted).

323. Ronnie Kasrils, Birds of a Feather: Israel and Apartheid South Africa—Colonialism of a Special Type, *in* Many Faces of Apartheid, supra note 225, at 25 ("Israel, from its very conception and inception, embodies similar features ascribed to 'Colonialism of a Special Type' (CST), the term coined by the South African Communist Party in 1962 . . . .").

324. Hanan Ashrawi, Member, Palestinian Auth. Legis. Council, Address Before the United Nations Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerances (Aug. 28, 2001), *in* 41 Islamic Stud. 97, 98 (2002).

Professor Joseph Massad has also criticized the relegation of the Nakba to the past:

Such articulations of the ongoing Nakba have since become all the more common.[325] While different interventions highlight different features of the Nakba, common ground among them is the idea that 1948 was a foundational moment that has restructured Palestinian lives and continues to subject Palestinians to various forms of violence.[326] Taken

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> To identify the Nakba as a past and finished event is to declare its success and insist on the irreversibility of its achievements. It is to insist that there is no longer a struggle to define it, nor a successful resistance that stands in its way. It is to grant it historical and political legitimacy as a fact of life, but also to endow all its subsequent effects as its natural outcome.

Joseph Massad, Resisting the Nakba, Al-Ahram Wkly. (May 15, 2008), republished in Elec. Intifada (May 16, 2008), https://electronicintifada.net/content/resisting-nakba/7518 [https://perma.cc/PHE8-2X3Y] [hereinafter Massad, Resisting the Nakba].

325. Scholar Karma Nabulsi, for example, positions the destruction of Palestinian collectivity as the binding force of the ongoing Nakba, noting that "the relentless and dynamic nature of the Catastrophe - because it is an ongoing daily Palestinian experience - the current attempts to destroy the Palestinian collectivity today bind this generation directly to that older one, and bind the exile to the core of the Palestinian body politic." Karma Nabulsi, From Generation to Generation, Ongoing Nakba, al-Majdal, Spring 2006, at 12, 14.

Elias Khoury instead asks "[h]ow can we read the *nakba* today, and what is the place of memory in this reading?" Khoury, Rethinking the Nakba, supra note 300, at 257–58. In this context, Khoury articulates four pillars of loss that are central to the ongoing Nakba: the loss of the land; the loss of the city; the loss of the name; and the loss of the ability to narrate. See id. at 259–60.

Joseph Massad, in contrast, positions the agency of Palestinians, the subjects of the Nakba, at the center of its ongoing nature: "To insist that the Nakba is a present continuous act of destruction that remains unfinished is to resist acknowledging that its work has been completed. Palestinian resistance is what accounts for the unfinished work of the Nakba and for its ongoing brutality." Massad, Resisting the Nakba, supra note 320.

Ilan Pappe posits ethnic cleansing as the defining feature of the ongoing Nakba, so much so that the Nakba becomes subsumed by ethnic cleansing: "[T]he Nakba continues, or more forcefully and accurately, the ethnic cleansing rages on." Ilan Pappe, Calling a Spade a Spade: The 1948 Ethnic Cleansing of Palestine, Ongoing Nakba, al-Majdal, Spring 2006, at 21, 21.

326. Rashid Khalidi has argued that "the Nakba can be understood as an ongoing process," positioning expulsion as its dominant feature and understanding it as part of "a colonial war waged against the indigenous population, by a variety of parties, to force them to relinquish their homeland to another people against their will." Khalidi, Hundred Years' War, supra note 35, at 9, 75.

Scholar Tareq Baconi has contended that the ongoing Nakba is a "relentless structure of colonization" that includes "many microcosms . . . and multiple frontlines" that are "not just fragmented geographically" but "also exist on a temporal continuum." Tareq Baconi, Sheikh Jarrah: Ethnic Cleansing in Jerusalem, Madamasr (June 20, 2022), https://www.madamasr.com/en/2022/06/20/feature/politics/sheikh-jarrah-ethnic-cleansing-in-jerusalem/ [https://perma.cc/VX7B-3TE2].

El-Kurd has articulated dispossession as the overarching theme of the ongoing Nakba: "For Palestinians, the Nakba is relentless and recurring. . . . The Zionist movement has worked to make dispossession a timeless theme of the Palestinian experience . . . ." El-Kurd, supra note 316.

Seikaly has argued that the Nakba's "present condition of the permanent temporary" holds "an abundance of lessons about persisting in the looped and looping time of the

together, these articulations provide a rich and organic corpus that theorizes the Palestinian condition.[327] The framework of the ongoing Nakba is thus an overarching concept that captures the totality of the Palestinian experience across time and space, one in which the Nakba features not as a rupture but as a structure.[328] And yet, the entanglement of the Nakba in law has been scarcely theorized. This Article attempts to ask and provide an initial answer to the question of how we might conceptualize the ongoing Nakba in legal terms.

B. *A Legal Anatomy of the Ongoing Nakba*

A legal conceptualization of the ongoing Nakba must encompass the Nakba's transformation from rupture to structure. We need to ask: What is Nakba's foundational violence? What is its structure? What purpose has it served, and what purpose does it continue to serve? Answering these questions will allow us to give substance to a concept in the making. This section conceptualizes the legal pillars of Nakba by identifying three elements—foundation, structure, and purpose—that together form a comprehensive legal framework for understanding the Palestinian condition.

In a nutshell, the foundational violence of the 1948 Nakba has not only dispossessed and displaced Palestinians but also fractured Palestinian society and put in place a new regime that is committed to denying Palestinian self-determination in favor of the settler society. The structure of this regime overlaps with apartheid and is best defined by the concept

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present" in which "[w]e are all suspended in time with no end in sight." Seikaly, Age of Catastrophe, supra note 321.

Writer Rana Issa has written that the "[N]akba is the paradigm of suffering that turned [her] . . . aunts and cousins [from Palestinian town Tarshiha] into total strangers" and is "not only a paradigmatic shared narrative, but also a concept that is laden with fractured experiences, singular and experientially divisive." Rana Issa, Nakba, Sumud, Intifada: A Personal Lexicon of Palestinian Loss and Resistance, The Funambulist (Oct. 25, 2023), https://thefunambulist.net/magazine/redefining-our-terms/nakba-sumud-intifada-a-personal-lexicon-of-palestinian-loss-and-resistance [https://perma.cc/UR7N-6GEK] (emphasis omitted).

Erakat has argued that Israel is pursuing "Nakba Peace," namely "the establishment of security achieved through the removal of native Palestinians who, by their very existence and refusal to disappear, challenge Zionist settler sovereignty." Noura Erakat, Inst. for Palestine Stud., Nakba Peace: Israel's Demand for Exception to the Prohibition on Genocide 2 (2024), https://www.palestine-studies.org/en/node/1655200 [https://perma.cc/6QPB-H8AD] [hereinafter Erakat, Nakba Peace].

327. For a rich study that demonstrates the centrality of the ongoing Nakba framework to the third generation of Palestinians after the 1948 Nakba, see generally Zarefa Ali, A Narration Without an End: Palestine and the Continuing Nakba (Masters thesis, Birzeit University) (Sept. 11, 2012), https://fada.birzeit.edu/bitstream/20.500.11889/1502/1/thesis_19022013_102752.pdf [https://perma.cc/5T7K-PMZW].

328. Additional studies and edited volumes that address the Nakba and its continuity include: Diana Allan, Voices of the Nakba: A Living History of Palestine (2021) and Abu-Lughod & Sa'di, supra note 2.

of legal fragmentation, namely, the stratification and classification of Palestinians into distinctive legal statuses that correspond with different forms of violence and divergent degrees of legal privilege.

The breakdown of Nakba into foundation, structure, and purpose provides an analytical roadmap for the various legal questions at play. The foundational element allows us to consider the crimes committed during the 1948 Nakba and the unresolved legal questions stemming from the establishment of the State of Israel over Palestinian ruins. The structural element allows us to examine the various forms of domination practiced by the Israeli regime that emerged from that violence. The discussion about apartheid is thus located within the structural element of the Nakba. The purpose—denying Palestinians the right to self-determination—allows us to reconsider the legal questions pertaining to the denial of territorial integrity and ability to exercise self-determination as a group. Taken together, these elements form a legal anatomy of the ongoing Nakba. More about these elements later.[329]

What form should the Nakba take in law is a separate question. One obvious way to articulate Nakba in legal terms is to codify its elements in the form of a convention, such that it is placed on par with other atrocity crimes emerging from major historical calamities, specifically the crimes of apartheid and genocide.

Generalizing a legal framework based on the Palestinian experience may prove applicable to other contexts as well. Nakba may be thought of as an aggregation or continuum of different crimes, some of which are recognized in international law and others which are not. On an abstract level, Nakba must be able to account for a wide spectrum of injustices, including indefinite denial of self-determination, illegal and nonconsensual partitioning of a territory by force, conquest and ethnic cleansing, demographic engineering of a population, denial of refugees' right of return, indefinite military occupation, settlement of an occupied territory, annexation of an occupied territory, implementation of apartheid, and enactment of genocidal violence. On a material level, each act of killing, maiming, imprisoning, shelling, expelling, or otherwise subordinating can be understood as an act of Nakba.

Criminalization may seem to be a natural byproduct of codifying Nakba as a legal concept. It is crucial, however, to remember that there is more to law than the act of criminalization.[330] In fact, criminal law

329. See infra section III.B.1.–B.3.

330. The convention, if adopted, has the potential to not only clarify the legal configurations that make up the crime of Nakba, but also deal with other legal questions such as the imposition of third state responsibility, reparations for group crimes, or the illegality of indefinite occupation. South Africa, despite adopting a convention that declared apartheid a crime against humanity, has resorted to a model of transitional justice based on Truth and Reconciliation Committees rather than criminal prosecution. See Natasa Mavronicola & Mattia Pinto, The Hegemony of Penal Accountability: Some Critical Reflections During (Ongoing) Atrocities, Eur. J. Int'l L.: Talk! (Dec. 15, 2023),

approaches have often proven ineffective in breaking down political structures of violence and domination.[331] The criminalization of Nakba may still be useful insofar as it sets a legal frame of reference, advances an understanding of the violence at play, recognizes Palestine as its paradigm case, and highlights the international community's disapprobation of its persistence. It is beyond the scope of this Article to articulate a doctrine of the crime of Nakba. Nevertheless, the practice of making new legal categories is not only constructive of legal doctrine but often contributes to the formation and development of norms and narrative structures.[332] Put simply, there is value in the process of legal recognition itself.

Before outlining the elements of Nakba as a legal concept, which are potentially instructive in future articulations of doctrine, a few notes on the making of legal categories are due. The guardians of the status quo and doctrine may claim that there is no need to recognize the Nakba as a legal concept, cast doubt on its generalizability, or claim that international law already includes different recognized crimes applicable to the Palestinian context. But these traditionalists miss a crucial point: The value of developing the Nakba as a legal concept lies not necessarily in the potential for its criminalization but in its recognition as a distinctive modality of group domination.

Naming certain manifestations of violence and oppression and assigning them legal meaning lies at the core idea of what law is. In fact, the making of new crimes is not unique to international law. Consider, for example, the recognition of sexual harassment or hate crimes as distinctive legal categories that highlight crucial facets of a behavior which is often already prohibited.[333] Underlying this notion is an understanding that

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https://www.ejiltalk.org/the-hegemony-of-penal-accountability-some-critical-reflections-during-ongoing-atrocities/ [https://perma.cc/SS6H-VW5Y] (cautioning against "[l]imiting the scope of legitimate condemnation to the penal frame and the legal process").

331. See, e.g., Mahmood Mamdani, Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa, 43 Pol. & Soc'y 61, 63–66 (2014) (arguing that Nuremburg was "symbolic and performative" and obtained "little justice for victims"); Immi Tallgren, The Sensibility and Sense of International Criminal Law, 13 Eur. J. Int'l L. 561, 593 (2002) ("[A]n overwhelming majority of the crucial problems of the societies concerned are not adequately addressed by criminal law."); Ruti Teitel, Transitional Jurisprudence: The Role of Law in Political Transformation, 106 Yale L.J. 2009, 2040–41 (1997) (noting that "our intuitions regarding the nature of criminal liability in ordinary times may not account well for transitional criminal justice"). But see Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 Yale L.J. 2537, 2540 (1991) ("[T]he central importance of the rule of law in civilized societies requires, within defined but principled limits, prosecution of especially atrocious crimes.").

332. See Cover, supra note 30, at 7–9 (explaining that "[j]ust as the meaning of law is determined by our interpretive commitments, so also can many of our actions be understood only in relation to a norm").

333. See Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 77–81 (1979) (tracing the definition and development of sexual

violence committed against members of a particular group is regarded as especially heinous and therefore deserving of distinctive recognition in the legal domain.[334]

International law has thus often recognized new, specific types of violence and domination against groups, even when these acts could be tried, analyzed, or classified under existing legal concepts. The Nuremberg Trials, for example, preceded the codification of the Genocide Convention and predominantly relied on the legal framework of crimes against humanity, rather than genocide, to prosecute the Nazi atrocities against the Jewish people.[335] And yet, the international community proceeded to develop an overlapping, yet distinctive, legal concept of genocide, culminating in its codification in the Genocide Convention in 1948.[336] The need for such recognition was motivated not by the idea that crimes against humanity were not bad enough but rather by the fact that crimes against humanity were not *specific* enough.[337]

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harassment); Reva B. Siegel, Introduction: A Short History of Sexual Harassment, *in* Directions in Sexual Harassment Law 1, 1–28 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (same); Keller G. Sheppard, Nathaniel L. Lawshe & Jack McDevitt, Hate Crimes in a Cross-Cultural Context, Oxford Rsch. Encycs.: Criminology & Crim. Just. (Feb. 23, 2021), https://oxfordre.com/criminology/display/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-564 [https://perma.cc/52Q4-HW68] (noting that "the *motivation* of criminal behavior is the critical element of [hate crimes], distinguishing them from other offenses").

334. See, e.g., Sheppard et al., supra note 333. Sheppard, Lawshe, and McDevitt note that this type of violence is "considered especially harmful due to its profound impact on not only the well-being of individuals but also the community in which that individual belongs" and that "[i]n recognition of the personal and societal harms caused by bias-motivated offenses, many nations have sought to criminalize hate-motivated violence." Id.

335. See William A. Schabas, Genocide in International Law: The Crimes of Crimes 36–42 (2000) [hereinafter Schabas, Crimes of Crimes]. For additional background on the Nuremburg Trials' legal framework, see generally Donald Bloxham, Genocide on Trial (2001) (explaining the similarities and differences among the various post–World War II prosecutions of Nazi criminality); Philippe Sands, East West Street (2017) (tracing the genealogies of genocide and crimes against humanity through the lives of Raphael Lemkin and Hersch Lauterpacht, respectively, and highlighting the different theory of rights—group rights versus individual rights—that underpins each concept).

336. See Schabas, Crimes of Crimes, supra note 335, at 51–101 (tracing the "[d]rafting of the Convention and subsequent normative developments"); see also Raphael Lemkin, Genocide as a Crime Under International Law, 41 Am. J. Int'l L. 145, 147 (1947) (defining genocide as "a wide range of actions" that are all "subordinated to the criminal intent to destroy or to cripple permanently a human group"); Matthew Lippman, The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 3 B.U. Int'l L.J. 1, 1 (1985) (noting that Lemkin coined the term "genocide" in 1944).

337. Schabas, Crime of Crimes, supra note 335, at 38 ("[The Holocaust] is a crime so monstrous, so undreamt of in history through the Christian era up to the birth of Hitlerism, that the term 'genocide' had to be coined to define it." (internal quotation marks omitted) (quoting French prosecutor Champetier de Ribes)).

Generating legal language, and by extension doctrine, to name certain types of oppression is a crucial step toward demanding justice.[338] It is against this background that the international community has also recognized the crime of apartheid as deserving of distinctive legal formulation and prohibition,[339] even though it could have equally been addressed in the abstracted terms of crimes against humanity.[340] The 1973 adoption of the Apartheid Convention did not bring about the immediate end of apartheid in South Africa, but it galvanized a process that evidently contributed to that endpoint.[341]

The codification of genocide and apartheid as grave crimes of international law has recognized the collective harm inflicted by the Holocaust and the Apartheid regime in South Africa, formulating these experiences in abstracted legal terms. The suffering endured by the victims of these destructive systems has informed our understanding of these legal concepts. We needed the language to capture the distinctive type of brutality, to describe the totality of these experiences, to let the world know about the *particularity* of these catastrophes and draw universal lessons informed by these histories. The generic character of crimes against humanity, which rested on a theory of crimes against individuals, did not seem to be enough. Once again, a crucial point in recognizing these atrocities in the form of international crimes lay in the intrinsic value of recognition itself.[342]

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338. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . . , 15 Law & Soc'y Rev. 631, 635 (1981) ("Though hard to study empirically, naming may be the critical transformation; the level and kind of disputing in a society may turn more on what is initially perceived as an injury than on any later decision." (citations omitted)).

339. See generally UN Dept. of Pub. Info., The United Nations and Apartheid, 1948–1994 (1994), https://digitallibrary.un.org/record/198101/files/%5EST_%5EDPI_1568-EN.pdf [https://perma.cc/PM8U-72XY] (tracing the development of apartheid as a cognizable crime and its recognition by the United Nations); John Dugard, Convention on the Suppression and Punishment of the Crime of Apartheid, UN Audiovisual Libr. of Int'l L. (Nov. 30, 1973), https://legal.un.org/avl/pdf/ha/cspca/cspca_e.pdf (on file with the *Columbia Law Review*) (similar).

340. In 1966, the General Assembly adopted Resolution 2202, declaring apartheid as a crime against humanity. G.A. Res. 2202 (XXI), at 20 (Dec. 16, 1966). The adoption of the 1973 Apartheid Convention reflected this understanding. See Ronald Slye, Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission, 20 Mich. J. Int'l L. 267, 292–93 (1999). In 1984, the Security Council adopted Resolution 556 and reinforced this determination. S.C. Res. 556, ¶ 1–4 (Oct. 23, 1984). The Rome Statute of the International Criminal Court classifies apartheid under Article 7, which is dedicated to crimes against humanity. Rome Statute of the International Criminal Court art. 7, § 2, July 17, 1998, 2187 U.N.T.S. 38544.

341. Audie Klotz, Norms in International Relations: The Struggle Against Apartheid, 39–55 (1995).

342. Bloxham shows that the Allies' policy during the Nuremberg trials avoided recognizing the racial character of the crimes. Bloxham, supra note 335, at 57 ("The scale and extremity of Nazi genocide occasionally forced recognition of 'race'-specific crimes, but at no time were the underlying principles of Allied policy reconsidered. The overall effect

Genocide, apartheid, and crimes against humanity are clearly not mutually exclusive concepts. Is it not evidently valid to state that the Nazi regime also implemented a regime of apartheid against the Jewish people, separating and concentrating them in confined areas of mass slaughter? Is it not also valid to argue that apartheid is a form of genocide?[343] It is even more unremarkable to assert that both apartheid and genocide are specific forms of crimes against humanity. Nevertheless, the international community has recognized the value in assigning distinctive names to these atrocities and distinguishing them analytically under the umbrella of crimes against humanity. The recognition of the abominable character of these systems was not only an act of generating law to regulate the future but also, crucially, an act of generating law to reckon with the present. Legal recognition was needed to bring about closure—including reparations—to the victims of these systems.

Against this background, this Article contends that Nakba, as embodied in the case of Palestine, should be recognized as an independent modality of crimes against humanity—one that is distinct enough from both apartheid and genocide to warrant individual recognition, while overlapping with these legal definitions at various points in time. Nakba, apartheid, and genocide are not exclusive frameworks that stand at odds with each other but rather make certain types of violence more salient in each case.

This Article also suggests thinking about genocide, apartheid, and Nakba as three concepts that together form a triangle of group crimes that correspond with three distinguishable modalities of settler colonialism's "logic of elimination."[344] Recent history has witnessed a range of successful, less successful, and failed settler-colonial projects. For instance, the United States or Canada are strikingly different cases from South Africa, which is, in turn, different from Palestine, Ireland, or Algeria. The logic of the settler colonists might have been similar, but the manifestation of the settler-colonial project has in effect mutated through its contact with the colonized groups.

Though settler colonialism has certainly practiced genocidal violence, the term "genocide" remains analytically independent from settler

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was that crimes against Jews were subsumed within the general Nazi policies of repression and persecution.").

343. See, e.g., Victor Kattan & Gerhard Kemp, Apartheid as a Form of Genocide: Reflections on South Africa v Israel, Eur. J. Int'l L.: Talk! (Jan. 25, 2024), https://www.ejiltalk.org/apartheid-as-a-form-of-genocide-reflections-on-south-africa-v-israel/ [https://perma.cc/H5DA-QAFW] (discussing the interplay between apartheid and genocide within South Africa's case against Israel at the ICJ).

344. See Wolfe, Elimination of the Native, supra note 140 at 387 (arguing that although "the settler-colonial logic of elimination has manifested as genocidal" in some cases, these terms "should be distinguished"); see also John Docker, Are Settler-Colonies Inherently Genocidal? Re-reading Lemkin, *in* Empire, Colony, Genocide, supra note 140, at 81, 81–83 (highlighting Lemkin's "multifaceted analyses of settler colonial histories *in relation to* genocide" (emphasis added)).

colonialism.[345] In fact, "genocide" was coined to name atrocities committed within and against Europe.[346] Similarly, although apartheid originated from a settler-colonial setting, the codified legal articulations of apartheid have largely reflected a liberal interpretation of the term and have abandoned colonialism as a necessary element for the crime.[347] One can arguably speak today of apartheid and genocide as concepts that are independent of settler colonialism.

Should the legal articulation of Nakba entail a future transformation into, simply, "nakba" as a common noun? Should Nakba then transcend its settler-colonial origins? What cases might then qualify for a Nakba analogy? Might we understand the Armenian displacement from Artsakh as a Nakba?[348] Might scholars understand an Indian implementation of the "Israel model"[349] in Kashmir as a Nakba? Or perhaps we should invoke the

345. As Wolfe notes, "Settler colonialism is inherently eliminatory but not invariably genocidal." Wolfe, Elimination of the Native, supra note 140, at 387; see also Raymond Evans, "Crime Without a Name": Colonialism and the Case for "Indigenocide," *in* Empire, Colony, Genocide, supra note 140, at 133, 141 (offering the term "indigenocide" as an "attempt to incorporate the cataclysmic impact of settler colonialism upon host cultures, particularly the lethal effects of imperial migration, intrusion, and land seizure").

346. Aimé Césaire argued that what was exceptional about the Holocaust was "not the crime in itself, the crime against man" or "the humiliation of man as such" but rather "the crime against the white man, the humiliation of the white man" and the application "to Europe [of] colonialist procedures which until then had been reserved exclusively for" the indigenous communities of color in Algeria, India, and Africa. See Aimé Césaire, Discourse on Colonialism 36 (Joan Pinkham trans., 2000) (emphasis omitted). Césaire's argument goes hand in hand with the understanding that Jews in Europe were clearly racialized as an inferior "other" and excluded from the racial construct of whiteness. See, e.g., Jean-Paul Sartre, Anti-Semite and Jew 48 (1944) ("In a word, the Jew is perfectly assimilable by modern nations, but he is to be defined as one whom these nations do not wish to assimilate."). Sartre's commitment to Zionism, however, has alienated generations of Arab and decolonial intellectuals, especially after Israel's 1967 occupation of Arab lands. See generally Houria Bouteldja, Whites, Jews, and Us: Toward a Politics of Revolutionary Love (2016); Yoav Di-Capua, No Exit: Arab Existentialism, Jean-Paul Sartre, and Decolonization (2018); Edward Said, My Encounter With Sartre, 22 London Rev. Books, June 1, 2000, https://www.lrb.co.uk/the-paper/v22/n11/edward-said/diary [https://perma.cc/Q9GE-7K3Z]; Reda Merida, Opinion, On Jean-Paul Sartre and Palestine, Middle E. Eye (May 20, 2020), https://www.middleeasteye.net/opinion/jean-paul-sartre-and-palestine [https://perma.cc/U4CQ-RQFY].

347. See, e.g., Noura Erakat & John Reynolds, Understanding Apartheid, Jewish Currents (Nov. 1, 2022), https://jewishcurrents.org/understanding-apartheid [https://perma.cc/JX9K-3F67] ("[T]he International Criminal Court's 1998 definition [of apartheid] . . . subtly backed away from the anti-colonial core of the UN's 1973 Convention. The ICC definition . . . ties it more narrowly to the perpetration of crimes against humanity, stripping away the emphasis on its entanglement with settler colonialism . . . .").

348. E.g., Sébastien Gray, UN Reports Between 50–1,000 Armenians Remain Within Artsakh, 99% of Population Gone, Atlas News (Oct. 4, 2023), https://theatlasnews.co/conflict/2023/10/04/un-reports-between-50-1000-armenians-remain-within-artsakh-99-of-population-gone/ [https://perma.cc/36J8-RKJJ] (last modified Jan. 22, 2024).

349. See, e.g., Anger Over India's Diplomat Calling for 'Israel Model' in Kashmir, Al Jazeera (Nov. 28, 2019), https://www.aljazeera.com/news/2019/11/28/anger-over-indias-diplomat-calling-for-israel-model-in-kashmir [https://perma.cc/AD7Y-2QTT] (highlighting comments

concept of Nakba in relation to the Trail of Tears[350] and the decimation of Native nations in North America?[351] Should scholars understand the denial of the Sahrawi people's right to self-determination[352]—or perhaps Russia's potentially indefinite occupation of Ukrainian territory[353]—as a Nakba? Must all components of Nakba—foundation, structure, and purpose—be fulfilled for a case to qualify for that category? Or should the legal formulation of the crime broaden its application to cases that correspond with only some of these elements?

This Article leaves these questions open. The value of recognizing the Nakba does not necessarily lie in its generalizability, although generalizability is a natural byproduct of codification. Importing the concept of Nakba to other contexts is ultimately the decision of those who inhabit the crushing violence of those contexts. Nonetheless, the colossal violence of

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from India's consul general in New York that called Israel "a model in the world" (internal quotation marks omitted) (quoting India's Consul General in New York, Sandeep Chakravorty)).

350. The Trail of Tears was the U.S. government's mid-nineteenth century "forced removal of the Cherokee, Muscogee (Creek) Nation, Seminole, Chickasaw, Choctaw and other Native American nations." E.g., This Day in History: May 23, 1838: The Trail of Tears Began, Zinn Educ. Project, https://www.zinnedproject.org/news/tdih/trail-of-tears/ [https://perma.cc/5FV6-W3ZH] (last visited Apr. 13, 2024). It is widely considered "a land theft, massacre, and attempted genocide." See id.

351. "When European settlers arrived in the Americas, historians estimate there were over 10 million Native Americans living there. By 1900, their estimated population was under 300,000. Native Americans were subjected to many different forms of violence, all with the intention of destroying the community." Genocide of Indigenous Peoples, Holocaust Museum Hous., https://hmh.org/library/research/genocide-of-indigenous-peoples-guide/ [https://perma.cc/44BG-ZA2R] (last visited Apr. 13, 2024).

352. The ICJ has recognized the Sahrawi people's right to self-determination in its advisory opinion of 1975. See Western Sahara, Advisory Opinion, 1975 I.C.J. 58, ¶ 162 (Oct. 16) (concluding that "the Court has not found legal ties . . . [that] might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory"). However, Morocco has since occupied and annexed the majority of Western Sahara's territory. See Omar Yousef Shehabi, No Alternative to Despair? Sahrawis, Palestinians, and the International Law of Nationalism, Palestine Y.B. Int'l L., 2022, at 53, 57 (noting "Morocco's occupation and annexation of Western Sahara" where "the process of decolonizing a European colonial territory abruptly became a South-South conflict, with the 'liberation' of Western Sahara forming part of Morocco's own decolonization narrative"). In 2020, the Trump Administration recognized Morocco's claims over Western Sahara, a move that has been described as a "quid pro quo" for Morocco's normalization of relations with Israel. See Jacob Mundy, The U.S. Recognized Moroccan Sovereignty Over the Disputed Western Sahara. Here's What That Means., Wash. Post (Dec. 11, 2020), https://www.washingtonpost.com/politics/2020/12/11/us-recognized-moroccan-sovereignty-over-disputed-western-sahara-heres-what-that-means/ (on file with the *Columbia Law Review*).

353. Military Occupation of Ukraine by Russia, Rule of L. in Armed Conflicts Project, Geneva Acad. Int'l Humanitarian L. & Hum. Rts., https://www.rulac.org/browse/conflicts/military-occupation-of-ukraine [https://perma.cc/P4V7-EQP3] (last updated Jan. 12, 2023) (noting that Russia has been occupying Crimea since March 2014 and "large territories in the south and the east of Ukraine since February 2022").

the ongoing Nakba provides a rich reference point that may lend itself to a variety of analogies and open the door for highlighting different facets of oppression.

1. *Foundation.* — For each calamity, there is a foundational violence at its core. For each system of domination, a distinctive type of pain. The terms in our vocabulary are inevitably associated with archetypal cases that inform the inception of these concepts. The words and the imagery associated with them thus become signifiers of certain ideas that correspond with a foundational violence defining the core of each concept.[354]

As much as "apartheid" is associated with racial segregation in South Africa, the term "genocide" is associated with the annihilation of Jews during the Holocaust. If the imageries of apartheid are those of petty apartheid, like a "White Area" sign marking the system of racial segregation, the imageries of the Holocaust are those of concentration camps and gas chambers, signifying the system of extermination. Clearly, then, the United States, for example, has also enforced a system equivalent to apartheid against Black people,[355] and Germany also committed genocide in Namibia against the Herero and Nama people in the early twentieth century.[356] And

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354. The idea of language as a system of signs—namely, sound–image signifiers and signified concepts—is expounded in Ferdinand de Saussure, Nature of the Linguistic Sign, *in* Course in General Linguistics 65 (Roy Harris trans., 1972). This Article draws on de Saussure to juxtapose the Nakba, apartheid, and genocide as signifiers of different foundational violence and ideological underpinnings.

355. For works applying the apartheid frame in the U.S. context, see, e.g., Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass 15–16 (1993) ("The segregation of American [B]lacks was no historical accident . . . . Although America's apartheid may not be rooted in the legal strictures of its South African relative, it is no less effective in perpetuating racial inequality . . . ."); Harriet A. Washington, Medical Apartheid: The Dark History of Medical Experimentation on Black Americans From Colonial Times to the Present 20 (2006) ("The much bewailed racial health gap is not a gap, but a chasm wider and deeper than a mass grave. This gulf has riven our nation so dramatically that it appears as if we were considering the health profiles of people in two different countries—a medical *apartheid.*"). Despite the invocation of apartheid in the American context, the ongoing subjugation of Black people in the United States has often been theorized and understood on its own terms, without neglecting the interconnected nature of transnational systems of oppression. See generally Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 11 (2010) (arguing that "mass incarceration is, metaphorically, the New Jim Crow").

356. See Philip Oltermann, Germany Agrees to Pay Namibia €1.1bn Over Historical Herero-Nama Genocide, The Guardian (May 28, 2021), https://www.theguardian.com/world/2021/may/28/germany-agrees-to-pay-namibia-11bn-over-historical-herero-nama-genocide [https://perma.cc/XRH3-YQRR]; see also Jeremy Sarkin, Colonial Genocide and Reparations Claims in the 21st Century 1 (2009) (noting that "today there is a growing acceptance that colonial abuses may have belated legal implications, and that some of the colonizers' actions do not merely retrospectively qualify as violations but were already violations under the laws of that time"); Zoé Samudzi, Looting the Archive: German Genocide and Incarcerated Skulls, 19 Soc. & Health Scis. 1, 1 (2021) ("The recent discourses and actions around the material remnants of colonial genocide demand historical contextualisation.").

yet, South African apartheid and the Holocaust became the paradigmatic cases that yielded the legal recognition of these concepts.[357]

The foundational violence of apartheid and genocide has defined the understanding of these concepts in global and legal consciousnesses. While the term "genocide" signifies the annihilation of a group,[358] the word "apartheid" signifies policies of segregation, especially ones enacted along racial lines.[359] Though these terms' legal definitions overlap, the foundational violence that lies at the core of these crimes is different and informs their respective meanings.[360]

Put simply, annihilation is the foundational violence of genocide, and segregation is the foundational violence of apartheid, although these concepts are not limited to their foundational violence.[361] What then is the

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357. See supra text accompanying notes 238–239 (describing the association of apartheid with South Africa); supra text accompanying note 284 (describing the prevalence of the Nazi paradigm associated with genocide).

358. See Convention on the Prevention and Punishment of the Crime of Genocide, supra note 276, at art. II ("[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group . . . .").

359. See International Convention on the Suppression and Punishment of the Crime of Apartheid, supra note 241, at art. I ("[A]partheid is a crime against humanity and . . . inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination . . . are crimes violating the principles of international law . . . .").

The term "racial" in the international legal corpus has been defined expansively. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) states:

> [T]he term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art I (Dec. 21, 1965).

360. Articles II(a)(i), II(a)(ii), and II(b) of the Apartheid Convention, for example, overlap with the language of articles II(a), II(b), and II(c) of the Genocide Convention, respectively. Compare International Convention on the Suppression and Punishment of the Crime of Apartheid, supra note 241, 1015 U.N.T.S. at 245 (describing as mechanisms of apartheid "murder of members of a racial group or groups," "infliction upon the members of a racial group or groups of serious bodily or mental harm," and "deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part"), with Convention on the Prevention and Punishment of the Crime of Genocide, supra note 276, 78 U.N.T.S. at 280 (describing as mechanisms of genocide "[k]illing members of the group," "[c]ausing serious bodily or mental harm to members of the group," and "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"); see also Kattan & Kemp, supra note 343 (discussing the interplay and overlap between the Apartheid and Genocide Conventions).

361. The suffix "-cide" in the term "genocide," meaning "the act of killing" in Latin, reflects this foundational violence of annihilation. Genocide's intentional element, requiring intent to "destroy" the group, further builds on this foundational conception. The Apartheid Convention

foundational violence of Nakba? Juxtaposing these terms allows us to refine the meaning of each concept. Reducing these concepts to a unifocal understanding—that of their signifiers—reveals their distinctive nature, and their juxtaposition elucidates their analytical independence.

If the endpoint of genocide leaves the entire group exterminated, and that of apartheid leaves the entire group segregated, then the endpoint of the Nakba leaves the entire group displaced. If genocide dominates by annihilation, and apartheid dominates by segregation, then the Nakba dominates by displacement. The Arabic words denoting uprooting and displacement are central to the constitutive pain, humiliation, and experience of the 1948 Nakba and its aftermath.[362] By its very nature, forced displacement implies dispossessing people from their home, land, and property.

The symbols of the Nakba have thus become those of dispossession and refugeehood: preserved keys of stolen homes and tent camps of eternal waiting. Though displacement is the Nakba's *foundational* violence, the timeframe that produced the 1948 Nakba still included other grave manifestations of violence, such as massacres, killings, rape, imprisonment, and torture. Still, these forms are concomitant to the theme of displacement that defines the constitutive experience of the Nakba.

Inversely, the foundational violence inflicted on the victims of genocide and apartheid reflects a foundational feature of the ideologies that underpin both crimes. As much as the Holocaust was underpinned by a genocidal Nazi ideology, and apartheid by a segregationist ideology of Afrikaner nationalism,[363] the Nakba was underpinned by the ideology of Zionism, taking "transfer" as its "logic of elimination."[364]

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similarly reflects apartheid's foundational violence of racial segregation by referring to "the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination" in both article 1 and article 2. See Convention on the Prevention and Punishment of the Crime of Genocide, supra note 276, 78 U.N.T.S. at 280.

362. Professor Samera Esmeir encourages us to look to the vocabulary depicting the 1948 Nakba "if we wish to diagnose the danger ahead" (author's translation). See Samera Esmeir, Irshādat Ghazzah: 'an Nihāyah alḥukm ali'sti'māry [Gaza Instructions: The End of Colonial Government], Majallat al-Dirasat al-Filastiyniyya [J. Palestine Stud.], Winter 2024, at 27, 32 (highlighting the words "الاقتلاع (ali'qtilā', meaning "uprooting"), الترحيل (altarhīyl, meaning "driving out"), التهجير (altahjīyr, meaning "displacement"), التشريد (altashrīyd, meaning "expulsion")" (author's translation)).

363. On the ideological development of segregationist ideology in South Africa, see Saul Dubow, Racial Segregation and the Origins of Apartheid in South Africa, 1919–36, at 21–51 (1989) (studying the development of segregationist ideology between 1900–1936); Hermann Giliomee, The Making of the Apartheid Plan, 1929–1948, 29 J. S. Afr. Stud. 373, 376 (2003) (tracing the "the development and dissemination of apartheid as the operational ideology of Afrikaner nationalism").

364. Wolfe, Elimination of the Native, supra note 140, at 387, 392; see also supra section I.B. Wolfe refers to the "murderous activities of the frontier" in the settler colony of the United States as its "principal means of expansion." See Wolfe, Elimination of the Native, supra note 140, at 392. Similarly, one can understand displacement as the Nakba's principal means of expansion. Veracini has expanded on Nur Masalha's concept of transfer and positioned it at the center of his characterization of settler colonialism. See Lorenzo

Insights from settler-colonial theory further inform our understanding of Nakba in this context. Nakba is *not* a process of displacement for the sake of displacement but rather a process of displacement for the sake of *re*placement. Nakba displaces an existing group to settle a different one. As Wolfe famously put it, "settler colonizers come to stay: invasion is a structure not an event."[365] The material space—the land, the home, the territory, the *place*—is thus at the center of this process (dis*place*ment/re*place*ment). Nakba displaces a group and breaks up the territorial integrity of their homeland to settle a different group and create a new homeland on its ruins.[366] For Palestinians, however, displacement has never entailed a full process of assimilation and emancipation elsewhere, and the Palestinian struggle for their homeland persists.[367] Displacement has become an indefinite condition of *mis*placement, one that continues to deny the group their right to self-determination.

For now, it is sufficient to ask what the foundational violence means for the purpose of a legal notion of the Nakba. If displacement is Nakba's foundational violence, then partition, conquest, and ethnic cleansing are the umbrella concepts that allow us to examine the Nakba's foundational crimes and legal questions.[368] While the concepts of partition and conquest allow us to assess the legality of both the UN Partition Plan and

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Veracini, Settler Colonialism: A Theoretical Overview 33 (2010). While plausible, this interpretive move broadens the analytical frame of "transfer" at the risk of compromising its ability to capture the different dynamics and nuances between different types of transfer. Similarly, one may broaden the idea of "elimination" to encompass a variety of concepts. These broad understandings of elimination or transfer are not only counterintuitive to cases where elimination or transfer had practically failed but also compromise nuance that allows us to better understand the divergence between different settler-colonial settings. See Jasbir Puar, The Right to Maim: Debility, Capacity, Disability 144 (2017) ("The understanding of maiming as a specific aim of biopolitics tests the framing of settler colonialism as a project of elimination of the indigenous through either genocide or assimilation.").

365. Wolfe, Structure and Event, supra note 140, at 388.

366. See infra section III.B.3.

367. As the Palestinian poet Mahmoud Darwish put it: "But the Nakba-makers have not managed to break the will of the Palestinian people or efface their national identity – not by displacement, not by massacres, not by the transformation of illusion into reality or by the falsification of history." Darwish, supra note 319.

368. Both conquest and ethnic cleansing are unlawful under international law, although they are not defined as crimes under these names. The crimes associated with each concept may vary and include annexation as a form of aggression, forcible transfer as a crime against humanity, and other war crimes. See, e.g., Korman, supra note 119, at 133 (describing how "the legal prohibition of the use of force by states . . . has rendered conquest, or the forcible acquisition of territory, no longer a valid mode of acquisition of title"); Ethnic Cleansing, UN Off. on Genocide Prevention & Resp. to Prot., https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml [https://perma.cc/268L-NCPN] (noting that the mechanisms used to carry out ethnic cleansing can "constitute crimes against humanity," "can be assimilated to specific war crimes," and "could also fall within the meaning of the Genocide Convention" (internal quotation marks omitted) (quoting a UN Commission of Experts report)).

Israel's subsequent proclamation of territory in Palestine, the concept of ethnic cleansing opens the door to consider the systematic depopulation, forcible transfer, massacres, and other violations committed against Palestinians.[369]

"Ethnic cleansing," a term that emerged in popular and legal consciousness in relation to the 1990s atrocities in the former Yugoslavia,[370] has often been understood as "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area."[371] Although the invocation of ethnic cleansing against the background of the Yugoslav Wars has often been associated with genocide, it has grown into an analytically independent concept.[372] Tempting as it is to subscribe to the frame of ethnic cleansing to describe the foundational violence of the Nakba, it is important to note that ethnic cleansing does not necessarily include partition or conquest.[373]

These distinctions are not a matter of semantics but rather an attempt to identify and elucidate the core legal questions that pertain to the ongoing Palestinian condition.[374] The 1948 Nakba was not merely a

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369. Ilan Pappe has been the leading figure in popularizing the application of the ethnic cleansing paradigm to Palestine. Pappe defines ethnic cleansing as the "expulsion by force in order to homogenise the ethnically mixed population of a particular region or territory" and shows with great detail how Zionist forces carried out the ethnic cleansing of Palestine. See Pappe, Ethnic Cleansing, supra note 21, at 2. The framework of the Nakba does not stand in tension with Pappe's analysis but rather complements it.

370. See generally Steven Béla Várdy & T. Hunt Tooley, Introduction: Ethnic Cleansing in History, *in* Ethnic Cleansing in Twentieth-Century Europe 1, 7 (Steven Béla Várdy & T. Hunt Tooley eds., 2003) ("The most recent manifestations of ethnic cleansing . . . were cases which were experienced recently by the former Yugoslav provinces of Bosnia and Kosovo. These were the actions that popularized the expression 'ethnic cleansing.'").

371. U.N. Secretary-General, Letter dated May 24, 1994 from Secretary-General Boutros Boutros-Ghali addressed to the President of the Security Council, ¶ 129, U.N. Doc. S/1994/674 (May 27, 1994).

372. Compare Catherine A. MacKinnon, Rape, Genocide and Women's Human Rights, 17 Harv. Women's L.J. 5, 8 (1994) (asserting that "'[e]thnic cleansing' is a euphemism for genocide"), with Klejda Mulaj, Ethnic Cleansing in the Former Yugoslavia in the 1990s: A Euphemism for Genocide?, *in* Ethnic Cleansing in Twentieth-Century Europe, supra note 370, at 693, 711 ("The interchangeable use of the terms genocide and ethnic cleansing does not render justice to either term . . . ."); Drazen Petrovic, Ethnic Cleansing—An Attempt at Methodology, 5 Eur. J. Int'l L. 342, 354–59 (1994) (arguing that ethnic cleansing can, but does not necessarily, constitute genocide); Schabas, Ethnic Cleansing, supra note 186, at 42 (showing that while "genocide" is a legal term, "ethnic cleansing" was a popular term innovated to describe the acts committed in Yugoslavia).

373. Ethnic cleansing describes a systematic policy applied to a group in a certain territory, and as such it may occur against a minority group in a territorially defined nation-state. See, e.g., Petrovic, supra note 372, at 351.

374. See James Crawford, The Creation of States in International Law 421 (2d ed. 2006) ("The creation of the State of Israel in 1948 to 1949 presents a perplexing and important instance of international legal arguments adduced for and against the existence of States, initially Israel, subsequently Palestine."). These questions include different aspects pertaining to the legality of the British Mandate, the legality of UN Resolution 181(II), the right of self-determination, and the legal basis upon which Israel declared its independence. Id. at 421–48.

process of homogenizing the territory along ethnonational lines—it also conjoined ethnic cleansing with a process of colonization, partition, and an act of conquest to establish a nation-state in that territory and redefine its boundaries.[375] And regardless of the legality of the Partition Plan to begin with,[376] the establishment of the State of Israel clearly did not abide by that plan;[377] Israel instead claimed vast swaths of territory beyond its demarcated boundaries through conquest and annexation.[378] As Dr. Victor Kattan notes, "there was simply no other way Israel could obtain title over Palestine other than to conquer it."[379] The foundational legal questions stemming from this reality have thus been truly resolved.[380]

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375. See Esmeir, supra note 362, at 31–32 ("The notion of ethnic cleansing is not entirely accurate [in relation to Palestine] because the Palestinian tie to the land, and the collective existence that this tie allows, and not their ethnic belonging or their permanent collective identity, is what reinforces the brutality of settler colonialism against them [the Palestinians]." (author's translation)).

376. The legal assessment of partition is two-fold as it pertains to questions of *ultra vires* and self-determination. See Crawford, supra note 374, at 428–30. Whereas the question whether Resolution 181(II) was *ultra vires* is best analyzed as part of Nakba's foundation, the question of self-determination is best analyzed as part of Nakba's purpose. See infra note 412 and accompanying text.

377. Professor James Crawford concludes:

> [A]lthough the Israeli Declaration of Independence partly relied upon [the Partition Plan], Israel was not created either pursuant to an authoritative disposition of the territory, or to a valid and subsisting authorization. But even if [the Partition Plan] had constituted such a disposition or authorization, it would have been difficult to argue that the creation of Israel occurred in compliance with it. At the time of the ceasefire Israel extended over substantially greater territory than that accorded it by the Partition Resolution. It was not created in the manner there laid down, and it did not comply with the prescribed conditions for protection of minorities, etc. . . . Israel was created without the consent of any previous sovereign and without complying with any valid act of disposition.

See Crawford, supra note 374, at 432 (footnote omitted); see also Kattan, supra note 119, at 240–45 (discussing Israel's noncompliance with the Partition Plan and with other pillars of international law); John Quigley, The Legality of a Jewish State: A Century of Debate Over Rights in Palestine 3–6 (2021) [hereinafter Quigley, Legality of a Jewish State] (describing the 1940s legal battle over Israel's legitimacy).

378. Kattan, supra note 119, at 232–47 ("The *Yishuv* accomplished [the domination of Palestine] through war, occupation and annexation after which the Provisional Government of Israel extended its administration and laws there.").

379. Id. at 241. Kattan rules out the four other methods of acquiring territorial sovereignty recognized by international law: (1) accretion; (2) cession; (3) occupation of terra nullius; and (4) prescription. See Kattan, supra note 119, at 78. But see Crawford, supra note 374, at 433 ("Secession would thus appear to be the appropriate mode, and the question then becomes [when] Israel qualified as a seceding State . . . . Israel must be considered to have met that standard [of secessionary independence] by [February 24, 1949], when the Egyptian-Israel Armistice Agreement was signed.").

380. See supra note 379; see also Imseis, United Nations and the Question of Palestine, supra note 29, at 52–109 (examining the legality of Resolution 181(II) and arguing that "the resolution was neither procedurally ultra vires the General Assembly, nor was it substantively consistent with prevailing international law as regards the self-determination of peoples"

This Article posits that the breakdown of the legal concept of Nakba into foundation, structure, and purpose is crucial if one is to understand and structure the legal questions at play. The formulation of Nakba's foundational element in law requires an understanding of the concept of ethnic cleansing in conjunction with that of partition and conquest. This nuanced understanding is especially important because the 1948 Nakba not only "cleansed" an ethnonational population from a territory but also divided, conquered, and entirely redefined both the group's organization and the territory's political and administrative demarcations by force.[381]

Also, "ethnic cleansing" is an accurate term only insofar as the positionality of the *cleanser*—the one performing the act of "cleansing"—is concerned. It does not tell us much about what happens to those *cleansed* or what structures of violence they become trapped in. Inversely, as a conceptual term, "ethnic cleansing" does not tell us much about what happens to those who are *not* cleansed, or perhaps not cleansed *yet*. Indeed, the victims and potential victims of ethnic cleansing are reduced to the fantasies of their victimizers. Once subjected to ethnic cleansing, they disappear beyond the purview of the paradigm; they cease to exist in time or space and simply become a "refugee problem."[382]

The ongoing Nakba is premised on a broader anatomy—one that includes conquest, fragmentation, and denial of self-determination—although its foundational violence overlaps with ethnic cleansing, and ethnic cleansing is a feature of the structure that underpins the ongoing Nakba. Once placed within the Nakba's foundational element, the concepts of partition, conquest, and ethnic cleansing become legible as part of a broader framework that includes a structure and purpose.

2. *Structure.* — The seismic rupture in the fabric of society following the foundational violence of displacement creates a fracture, one that fragments the group into at least two parts: those who remained under the new regime and those who were made refugees. Preventing refugees from returning to their homes is central to stabilizing the new regime, which transforms displacement into a permanent state of exile and maintains the demographic composition to favor the settler society.

(emphasis omitted)); Quigley, Legality of a Jewish State, supra note 377, at 3–6 (examining legal questions stemming from the British Mandate and the establishment of the State of Israel and noting that "[t]he question of the legality of Israel . . . has persisted"); Ronen, Schrödinger's Occupation, supra note 196, at 146 (examining the application of the law of occupation in Jerusalem in 1948–1949 and concluding that "[t]hroughout its existence, Israel's conduct was characterized by gradual transformations of fortuitous factual situations into claims of entitlement"); Yuval Shany, Legal Entitlements, Changing Circumstances and Intertemporality: A Comment On the Creation of Israel and the Status of Palestine, 49 Isr. L. Rev. 391, 392 (2016) (offering a "critical assessment of some of the legal conclusions" of Professor James Crawford pertaining to "the creation of Israel").

381. See Crawford, supra note 377, at 433 (discussing the fracturing of Palestinian territory and self-determination during the 1948 Nakba).

382. Pappe, Ethnic Cleansing, supra note 36, at 2 ("The end result of such acts is the creation of a refugee problem.").

Committing a Nakba, then, does not mean succeeding in displacing the entire group, as much as committing a genocide does not mean the full and absolute annihilation of the entire group. Since the Nakba is not only an event of displacement but an ongoing process of replacement, it undergoes a metamorphosis that shapes its foundational violence into a structure of domination. The rise of what may be called a "Nakba regime" is thus not contingent upon the displacement of an entire group from their land, but rather upon the successful conquest of some portion of a territory, the displacement of a sizable portion of the group from that territory, and the erection of a new regime dominated by the settler society in that territory. The foundational violence of displacement is thus of *transitional* character in that it transforms Nakba from an event of spectacular violence into a regime of domination.

But what defines a Nakba regime? What are the conditions experienced by the group(s) under such a regime? What happens to those who remain, and what happens to those displaced? Theorizing the structure of Nakba must account for the pivotal bifurcation of the group and its dispersal across fragmented geographies and legal statuses. Examining the removal of the Choctaw Nation, Wolfe concludes that what distinguished "the removing Choctaw from those who stayed behind was collectivity. . . . [T]he Choctaw who stayed became individual proprietors, each to his own, of separately allotted fragments of what had previously been the tribal estate . . . . Without the tribe, though, for all practical purposes they were no longer Indians."[383] For Wolfe, the incorporation of those who managed to remain as citizens of the new settler polity constituted elimination by assimilation, or in Wolfe's terms, "[a] kind of death."[384]

Here, the Nakba framework stands in tension with the eliminatory determinism of the settler-colonial paradigm and invites us to think about what happens when collective elimination by settler-colonial projects—whether through annihilation, displacement, or assimilation—fails.[385] We must meditate on this liminal condition between liberation and elimination, because that is precisely where Nakba as an ongoing process lies. Since 1948, Palestinians have been fragmented but not eliminated, incorporated but not entirely assimilated, occupied but not vanquished, besieged but not defeated.[386]

The ongoing nature of Nakba is premised on the failure to sufficiently eliminate the group by the combination of methods that include ethnic

383. Wolfe, Elimination of the Native, supra note 140, at 397.

384. Id.

385. See Rashid Khalidi, Israel: 'A Failed Settler-Colonial Project', Inst. for Palestine Stud. (May 10, 2018), https://www.palestine-studies.org/en/node/232079 [https://perma.cc/MQ7S-B23U].

386. Alaa Abd El-Fattah, Gaza: On Being Prisoner to Your Own Victory, *in* You Have Not Yet Been Defeated 94, 95–105 (A Collective trans., 2021).

cleansing, killing, dispossession, imprisonment, fragmentation, or assimilation. The persistence of the group thus frustrates and disrupts the stability of the Nakba regime and yet is also the pretext for its continued existence.[387] The Nakba regime therefore includes a system of domination, which may overlap with the crime of apartheid, as a central mode of governance applicable to those who remained. The military regime applied to govern Palestinians who remained in the 1949 armistice territories thus constitutes the genesis of this system, applied to manage the population who survived the 1948 Nakba and became incorporated into the new polity as citizens.[388]

And yet, what do we call the crime committed against those displaced beyond the territorial purview of the regime? How do we understand the injustice committed against those still languishing in refugee camps over seventy-five years later? Here, the analytical divergence of the Nakba regime from apartheid becomes clearer. The concept of "apartheid" presupposes a political community existing within a territorial unit that the system of racial segregation subjugates.[389] In contrast, the Nakba regime is one that is constituted by the exclusion of a group from the territorial terrain altogether. The permanent exclusion of those ousted from the territory provides a crucial reminder that Nakba is not only a regime of domination against those remaining in the territory but also a regime of subjugation by exclusion from the territory.

The aggregation of these internal and external counterparts constitutes the structure of a Nakba regime. Nakba may institute and stabilize a structure that is tantamount to the crime of apartheid, but its genesis remains rooted in the fragmentation of the group and the exclusion of people from the territory. As much as the 1948 Nakba fragmented the group through expulsion and imposed apartheidist policies against the Palestinians who became citizens of Israel, the 1967 Israeli occupation replicated this pattern of Nakba and apartheid, albeit on a different scale and in another form.[390] The structure of Nakba is

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387. See Erakat, Nakba Peace, supra note 326, at 6 (introducing the framework of "Nakba peace").

388. For a description of the military rule in the armistice territories, see supra note 9 and accompanying text.

389. Dubow's study highlights the emergence of South African apartheid from the segregationist policies in the first half of the twentieth century. See Dubow, supra note 363, at 1. Dubow writes, for example, that in this context, "[t]he adoption of segregation as a national political programme represented an attempt to systematise relations of authority and domination in a heterogenous society which had only recently been conquered and unified into a single state." Id. In contrast, the Nakba had broken up the British Mandate's administrative unit, partitioned the territory, and furnished Zionism as the regime's national program. See supra text accompanying notes 33–41.

390. This time, the foundational violence of Nakba extended not only to Palestinian territories but also to Syrian and Egyptian ones, having an especially devastating impact on those who used to live in the now-annexed Syrian Golan Heights. See Amnesty Int'l, Apartheid Against Palestinians, supra note 235, at 37 n.3 (describing the occupation of the

therefore best understood through the lens of fragmentation, namely, the modes of domination that Nakba has applied across time for each subgroup that it has produced. The Nakba regime is the totality of these modes of domination, each forming a laboratory of oppression.[391]

Nakba thus does not eliminate the group but dramatically alters its organization. If the settler-colonial structure is premised on elimination, and the apartheid structure on racial segregation, Nakba's structure is premised on fragmentation.[392] The foundational violence of Nakba fragments the group and radically rearranges the previous ordering of society, creating a matrix of converging and diverging logics, whereas dispossession and ethnic cleansing continue to feature as a central theme.[393]

The structure of fragmentation simultaneously asserts the dominance and unity of a new group that settles on the territory and establishes a new political regime.[394] It is in this sense that the groups may still be distinguished as native and settler, indicating their political positions in a

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Golan Heights). The displacement of populations during the 1967 occupation has further replicated the bifurcation between those who remained and those displaced, and once again applied a militarily enforced apartheid solution to the population that remained in the occupied territories. Id. Considering this structure in conjunction with the 1948 Nakba yields four different groups: (1) those displaced in 1948 and displaced in 1967; (2) those displaced in 1948 but remained in 1967; (3) those who remained in 1948 but displaced in 1967; and (4) those who remained in both 1948 and 1967. Those displaced in 1948 and occupied in 1967 have experienced two overlapping modes of domination: the ongoing exclusion from the territories occupied in 1948, and the extension of a militarily administered apartheid system to govern them in 1967. Id. at 76.

391. See supra note 15 and accompanying text (articulating "laboratories of oppression" as a foil to the Brandeisian concept of laboratories of democracy).

392. Scholars have articulated the centrality of fragmentation to the Palestinian experience. See Amahl Bishara, Crossing a Line: Laws, Violence, and Roadblocks to Palestinian Political Expression 8 (2022) ("[T]he primary engine of Palestinian fragmentation over the last seventy plus years has been Israeli settler colonialism."); Falk & Tilley, supra note 234, at 37–48 (reviewing the different legal statuses of different groups of Palestinians in and outside of Israel); Joshua Rickard, The Fragmentation of Palestine: Identity and Isolation Since the Second Intifada 3 (2022) (exploring the "physical fragmentation of the West Bank" and "the internal isolation between Palestinian communities that have resulted from political and social fragmentation"); Rinad Abdulla, Colonialism and Apartheid Against Fragmented Palestinians: Putting the Pieces Back Together, 5 State Crime J. 51, 57–64 (2016) (discussing the current fragmented state of Palestinian people across different geographic areas); Jamal Nabulsi, "To Stop the Earthquake": Palestine and the Settler Colonial Logic of Fragmentation, 56 Antipode 187, 188 (2024) [hereinafter Nabulsi, "To Stop the Earthquake"] ("Fragmentation is a long-standing colonial strategy to which Palestinians enact resistance."). For an interesting early study of the phenomenon, see generally Abraham Ashkenasi, Israeli Policies and Palestinian Fragmentation: Political and Social Impacts in Israel and Jerusalem (1988).

393. Eghbariah, Jewishness as Property, supra note 13.

394. Nabulsi, "To Stop the Earthquake", supra note 392, at 199 ("In fragmenting Palestine, the Zionist project seeks to render Israel a seamless entity. That is, the fragmentation of Palestine and Palestinians is coterminous with the production of the state of Israel and the Israeli people as a coherent whole.").

Nakba regime. The settler/native divide, however, is insufficient as a framework for the *legal* positionality of the natives under a system of fragmentation.[395] Once we recognize a Nakba regime, we can enhance our understanding of its structure and map the fragmentation it generates.

Fragmentation is instilled by exclusion and structured by law: drawing and enforcing boundaries—visible and invisible, material and legal—between territories and people. In Palestine, this structure has developed into a sophisticated legal regime that stratifies and classifies Palestinians under Israeli rule into different legal statuses, subjecting each subgroup to distinctive types of violence and differential access to fundamental rights.[396] Following the 1948 Nakba, the Palestinian collectivity was not only divided into those who remained and those who were displaced; the remaining group was trifurcated into territories that fell under Israeli, Jordanian, and Egyptian control.[397] Once considered against this background, it becomes clearer that apartheid overlaps with the Nakba regime but can hardly encompass its inception.[398]

Counterintuitively, perhaps, the 1967 Israeli occupation of the West Bank, the Gaza Strip, and East Jerusalem have brought about a peculiar condition of impaired unity by consolidating the entirety of historic Palestine under some form of Israeli control.[399] Nevertheless, the

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395. In this context, Professor Mahmood Mamdani identifies a tripartite structure of Palestinian existence: refugees, citizens of Israel, and residents of the West Bank and Gaza. Mahmood Mamdani, Neither Settler nor Native: The Making and Unmaking of Permanent Minorities 304 (2020) [hereinafter Mamdani, Neither Settler nor Native]. Mamdani invites us to reflect about this structure and asserts the lack of language to talk about it: "There is no single and universally accepted political terminology to identify these three groups—one expelled, one incorporated, one colonized and occupied." Id. Mamdani explains:

> The creation of the state of Israel in 1948 began a process that fractured the Palestinian people into three groups who have taken decades to recognize their collective interest in contesting the Israeli regime. One of these groups became refugees outside historical Palestine. The second comprised those who remained within the borders of the new state of Israel and became its second-class citizens. The third group, residents of the West Bank and Gaza, became citizens of Jordan and Egypt in 1948. In 1967 they were colonized by Israel and have lived under occupation ever since.

Id. While Mamdani observes this structure, his project is primarily concerned with transcending it toward a "nonnational state." This objective makes Mamdani skip the question of fragmentation too swiftly. Id. at 324.

396. Id. at 304; see also Falk & Tilley, supra note 234, at 37–48 (describing the different legal statuses of Palestinians and the rights associated with them).

397. Mamdani, Neither Settler nor Native, supra note 395, at 304.

398. See Falk & Tilley, supra note 234, at 37 ("[The] [f]ragmentation of the Palestinian people is indeed the core method through which Israel enforces apartheid.").

399. Journalist Amjad Iraqi argues in this context that "despite their physical dispersal, the Palestinian people have never been more connected." See Amjad Iraqi, Palestinian Resistance Tore Down the Green Line Long Ago, The Nation (Aug. 10, 2022), https://www.thenation.com/article/world/palestinian-resistance-green-line/ [https://perma.cc/XCQ4-STMA].

Palestinian population has remained governed by a system of legal fragmentation that has assigned different legal statuses to distinct subgroups.[400] In fact, the 1967 Israeli occupation deepened this fragmentation by annexing East Jerusalem and assigning a different legal status to its Palestinian residents.[401] Today, different identification cards stratify and classify Palestinians into at least five categories,[402] each with a distinct legal status: Palestinian citizens of Israel;[403] Palestinian residents of Jerusalem;

400. Political scientist Menachem Klein argues in this context that "Israel operates a regime that includes and excludes the Palestinians under its rule via a graduated system of controls . . . in the entire area from Jordan to the Mediterranean." Menachem Klein, The Shift: Israel–Palestine From Border Struggle to Ethnic Conflict 19 (2010) [hereinafter Klein, The Shift]. While Klein identifies five distinct Palestinian groups that are subject to "differential levels of state supervision, security control, bureaucratic rules, civil rights and citizen benefits," id. at 96–108, he traces the emergence of this regime to the early 2000s and argues that "a single state . . . is the current problematic reality rather than a viable solution," id. at 3–7.

401. For an overview of the legal status of Palestinian residents of Jerusalem, see generally Ir Amim, Permanent Residency: A Temporary Status Set in Stone (2012), https://www.ir-amim.org.il/sites/default/files/permanent%20residency.pdf [https://perma.cc/K29U-T49G] ("Since 1967, Israel has treated the territory of East Jerusalem as if it were part of Israel—the territory but not the Palestinians living within its borders. . . . These residents are excluded from the political arena and are not entitled to full political rights."); Yaël Ronen, Toshavim, L'o Ezraḥim: Yisrael Ve'arviyey Mizrah Yerushalayim, 1967–2017 [Residents, Not Citizens: Israeli Policy Towards the Arabs in East Jerusalem], 1967–2017 (2017) (tracing the history of the unique "social and legal status of East Jerusalem Arabs" since the 1967 war); Danielle C. Jefferis, Institutionalizing Statelessness: The Revocation of Residency Rights of Palestinians in East Jerusalem, 24 Int'l J. Refugee L. 202 (2012) (identifying Israeli policies that "trap[] Palestinian East Jerusalemites "in a fine limbo between permanent residency . . . and statelessness"); Nadera Shalhoub-Kevorkian, Trapped: The Violence of Exclusion in Jerusalem, Jerusalem Q., Spring 2012, at 6 (presenting findings from interviews with dozens of Palestinians living in Jerusalem about their experiences living under "Israeli policies of exclusion and discrimination").

402. For an exploration of the identification card regime within the territories under Israeli control, see generally Helga Tawil-Souri, Uneven Borders, Coloured (Im)mobilities: ID Cards in Palestine/Israel, 17 Geopolitics 153 (2012). Compare id. at 169 ("The very real threats hanging over Palestinians with green, orange or Jerusalem-blue ID cards [with color based on residency] symbolise . . . the enforced fragmentation of Palestinians from each other . . . and the determinative importance of an ID card as a border."), with Klein, The Shift, supra note 400, at 96–97 ("The fundamental and most visible division is the territorial/legal one that divides Palestinians into five groups: Israeli Palestinians; Jerusalem Palestinians; Palestinians who reside between the Security Barrier and the Green Line; Palestinians in the rest of the West Bank; and Gaza Strip Palestinians."). Klein's classifications, however, confuse *legal* fragmentation with strictly *territorial* fragmentation. While there is a strong correlation between the legal status assigned to individuals and the specific territorial fragment involved, this correlation does not imply synonymy.

403. From the outset, the category of "Israeliness" is not a meaningful unit of legal analysis since it is not recognized as a nationality even under Israeli law. See Masri, supra note 10, at 57–58. Israeli citizenship relies on a bifurcated structure that distinguishes nationality from citizenship. See id.; Tawil-Souri, supra note 402, at 159–60 (describing differences in official identification cards based on nationality and citizenship). Though both the Jewish and Palestinian communities in Israel are citizens of the state, they still hold legally distinguished nationalities. In CivA 8573/08 *Ornan v. Ministry of the Interior*, the Israeli Supreme Court reaffirmed its 1972 precedent *Tamrin v. State of Israel*, which held

Palestinian residents of the West Bank; Palestinian residents of the Gaza Strip; and Palestinian refugees (a category that contains various fragments itself).[404]

A comprehensive exploration of the legalities of this structure in Palestine remains beyond the scope of this Article, particularly since the above categories may still contain further fragmentation.[405] What is notable is not only that they provide a structure to the ongoing Nakba but that this structure is primarily a legal one. Central to the principle of fragmentation are limitations on upward legal mobility and legal restrictions on family life.[406] The structure is made and enforced by the constant classification of people and limitation of their upward mobility between legal classes.[407]

The Nakba regime is therefore best defined by its structure of fragmentation rather than by a singular form of violence it practices. Fragmentation brings into focus questions about not only the interplay between existing and changing legal statuses but also the ways in which these legalities influence processes of subjective and collective identity formation. Since the 1948 Nakba, Palestinian collective existence has continuously developed in this liminal space between unity and fragmentation.[408] Unity and fragmentation have not been static modes of collective existence but rather dialectical forces that forged Palestinian identity and

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that the self-description "Israeli" cannot be used in lieu of "Jewish" for the purposes of the population registry. See CivA 8573/08 Ornan v. Ministry of the Interior, 2013 Isr. L. Rep. 571, 599–600, 619, aff'g CivA 630/70 Tamrin v. State of Israel, 26(1) PD 197 (1972) (Isr.). In 2013, the *Ornan* Court held that the petitioners had failed to show that an "Israeli nation" that is distinct from the "Jewish nation" has formed in Israel since its earlier decision. Id. at 600, 604–05. For literature that explicates the legal status of Palestinian citizens of Israel, see supra note 10.

404. See Tawil-Souri, supra note 402, at 155–60.

405. Consider, for example, the fragmentation of the population across areas A, B, and C in the occupied West Bank as part of the 1995 Oslo II Accord; the fragmentation of the population of Gaza into north and south after the genocidal war; or the differentiated status of the refugee communities across Jordan, Lebanon, Syria, Gaza, the West Bank, and other locales.

406. See, e.g., Hassan Jabareen, How the Law of Return Creates One Legal Order in Palestine, 21 Theoretical Inquiries L. 459, 466–82 (2020) (detailing several case studies illustrating that "[s]ince 1948, the [Israeli] Supreme Court has denied the right of family unification to Palestinian citizens").

407. Even in the relatively rare cases in which Palestinian residents of Jerusalem apply for Israeli citizenship, Israel rejects the overwhelming majority of those requests for a variety of reasons, including social media posts "in memory of the Nakba." See Nir Hasson, East Jerusalem Resident Could Be Denied Citizenship Due to Posts Critical of Israel, Haaretz (Jan. 18, 2024), https://www.haaretz.com/israel-news/2024-01-18/ty-article/.premium/east-jerusalem-resident-could-be-denied-citizenship-due-to-posts-critical-of-israel/0000018d-1cf9-db77-ad9f-dffb40820000 (on file with the *Columbia Law Review*).

408. See Khalidi, Palestinian Identity, supra note 45, at 194 ("For in spite of their dispersion and fragmentation among several new successor states and forms of refugee status, what the Palestinians now shared was far greater than what separated them; all had been dispossessed, none were masters of their own fate . . . .").

nationalism itself.[409] It is true that fragmentation operates as a tool of intense domination under which Palestinians exist. But it is not *only* that: Fragmentation creates a collective consciousness that revolves around dispersion. Fragmentation becomes the shared collective experience that causes Palestinians to gravitate toward one another while simultaneously keeping them apart.[410]

The fragmented and multifocal nature of the ongoing Nakba is what makes it difficult to reduce to a monolithic framework. While one can explicate the nature of violence practiced against each fragment, the totality of this experience can only be captured through the concept of fragmentation itself. Recognizing the Nakba allows us to assemble the

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409. Reflecting on this trajectory against the backdrop of the then-ongoing Oslo negotiations, Khalidi concludes his 1996 book *Palestinian Identity* by wondering how this tension between unity and fragmentation would unfold across the Green Line should the Oslo Accords materialize. Khalidi leaves the readers with an open-ended question about how different groups of Palestinians will continue to relate to each other despite their radically different lived experiences:

> How will [Palestinian citizens of Israel] relate to their fellow-Palestinians in the West Bank and Gaza Strip once the final arrangements have been sorted out, and one lot are on one side of a final frontier and another on the other? One segment of Palestinians study Hebrew literature and Jewish history in school, carry Israeli passports and vote in Israeli elections; members of another are learning Arabic literature and Palestinian history, carry a bewildering array of travel documents or none at all, plus a new Palestinian passport whose value has yet to be tested, and voted in a Palestinian election. Yet both identify with the same national symbols . . . and both groups regard themselves and each other as Palestinians.

Id. at 207.

More than a decade later, Khalidi observes that a "new and deadly danger faces Palestinian identity today, one that was only dimly visible in the early to mid-1990s. This is the dual danger of the fragmentation of the remainder of the Palestinian homeland and of the unity of the Palestinian national movement." Id. at xxxii. According to Khalidi, this growing fragmentation involves not only "potentially lasting physical divisions between and within what remains of the imagined homeland of the would-be Palestinian state" but also "the profound and growing chasm between the two Palestinian 'Authorities': those of Fateh and Hamas." Id.

410. Compare Benedict Anderson, Imagined Communities: Reflections on the Origins and Spread of Nationalism 5–7 (rev. ed. 2006) (positing a definition of "nation" as "an imagined political community," one that is "imagined as both inherently limited and sovereign"), with Louis Hartz, The Founding of New Societies 11–12 (1964) ("Being part of a whole is psychologically tolerable, but being merely a part, isolated from a whole, is not. It is obvious that there is a major problem of self-definition inherent in the process of fragmentation. . . . [N]ew generations emerge within the fragment to whom it is, in sober truth, a 'nation.'"). The notion of fragmented nationalism may appear to stand at odds with certain currents of postcolonial literature that defend the "fragments" in the face of the totalizing nation. See Partha Chatterjee, The Nation and Its Fragments: Colonial and Postcolonial Histories 11–13 (1993) (identifying "numerous fragmented resistances to [the] normalizing project" of "nationalist modernity" and urging that explicating these "fragment[s]" can allow for the imagining of "new forms of the modern community . . . [and] state").

fragments by naming and codifying a variety of conditions into one legal framework. The permanence of fragmentation itself is the structural abstraction of the ongoing Nakba.

3. *Purpose.* — What purpose has the Nakba served, and what purpose does it continue to serve? For Zionism, the 1948 Nakba meant achieving the goal of national sovereignty in the form of a Jewish state in Palestine, and it is thus commonly referred to as the War of Independence. Clearly, this conception is correct only insofar as Zionist national aspirations are concerned. The flipside of this account, one that considers the Palestinian people, is that Zionist sovereignty has been committed to—and could only be achieved through—suppressing Palestinian self-determination. To make room for an exclusively Jewish state, Palestinians had to be minoritized and denied territorial integrity in Palestine, undermining a cornerstone of self-determination.

From the Balfour Declaration onwards, the legal order that the League of Nations had imposed on Palestine served to sideline and deny Palestinian self-determination in favor of Zionist aspirations. As Balfour himself noted:

> [I]n Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country. . . . The four Great Powers are committed to Zionism. And Zionism, be it right or wrong, good or bad, is rooted in age-long traditions, in present needs, in future hopes, of far profounder import than the desires and prejudices of the 700,000 Arabs who now inhabit that ancient land.[411]

Palestine had thus been exceptionalized from other cases of colonial domination and treated as sui generis. The notion of partition, which the UN fashioned as a solution to terminate the British Mandate, further imposed an undemocratic regime on the Palestinian people[412]—one that ran counter to the very idea of self-determination.[413] The UN Partition

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411. Khalidi, Hundred Years' War, supra note 35, at 38 (omission in original) (internal quotation marks omitted) (quoting Memorandum from Arthur Balfour, Foreign Secretary, Respecting Syria, Palestine, and Mesopotamia (Aug. 11, 1919), *in* 4 Documents on British Foreign Policy, 1919–1939, at 340, 345 (E.L. Woodward & Rohan Butler eds., 1952)).

412. Professor Ardi Imseis captured these dynamics by referring to the UN's treatment of the Palestine Question as rule *by* law rather than rule *of* law. Imseis analyzed the various biases underpinning the UN Special Committee on Palestine (UNSCOP), the body that formulated and recommended the UN Partition Plan in 1947, showing how the "cynical use, abuse, [and] selective application of international legal norms . . . perpetuat[ed] inequity between hegemonic and subaltern actors on the system." Ardi Imseis, The United Nations Plan of Partition for Palestine Revisited: On the Origins of Palestine's International Legal Subalternity, 57 Stan. J. Int'l L. 1, 4 (2021).

413. See Imseis, United Nations and the Question of Palestine, supra note 29, at 257–58 (arguing that "[i]nternational legal subalternity finds sustained expression in the UN's prolonged management of the question of Palestine"); Quigley, Legality of a Jewish State, supra note 377, at 93–97 (describing how the wishes of Palestinian and Arab states were left out of UN processes relating to the formation of Israel); M.C. Bassiouni, "Self-Determination" and the Palestinians, 65 Am. Soc'y Int'l L. Proc. 31, 37 (1971) ("The

Plan granted fifty-six percent of Palestine's territory to the "Hebrew State" at a time when Jewish-owned lands did not exceed seven percent.[414] The UN Special Committee on Palestine (UNSCOP) majority opinion bluntly repeated Balfour's logic and reaffirmed the exclusion of Palestine from the right to self-determination:

> With regard to the principle of self-determination, although international recognition was extended to this principle . . . it was not applied to Palestine, obviously because of the intention to make possible the creation of the Jewish National Home there. Actually, it may well be said that the Jewish National Home and the *sui generis* Mandate for Palestine run counter to that principle.[415]

The 1948 Nakba emanating from this order, and the establishment of Israel during that process by the force of arms, created "facts on the ground" that prevented Palestinians from achieving self-determination and relegated them to a reality of indefinite displacement and fragmentation. The Israeli state has since continued to deny Palestinians self-determination not only within the 1949 armistice borders but also in the remaining Palestinian territories that Israel occupied in 1967. It is precisely this intention to deny Palestinians self-determination that led Israeli historian and scholar Baruch Kimmerling to refer to these developments as "politicide"—namely, the intention to "destroy the political and national viability of a whole community of people and thus deny [them] the possibility of genuine self-determination."[416]

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partition, in effect, foreclosed the Palestinians' right of self-determination by including in the category of 'people' eligible to exercise it, persons who did not qualify under the nationality criterion."); Cherif Bassiouni, Some Legal Aspects of the Arab-Israeli Conflict, *in* The Arab-Israeli Confrontation of June 1967: An Arab Perspective 91, 97 (Ibrahim Abu-Lughod ed., 1970) ("The then European majority control in the U.N. in the name of international law had unilaterally abrogated the Palestinians' right to self-determination—a tragic lesson in practical world politics."); Nabil Elaraby, Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements, 33 Law & Contemp. Probs. 97, 97 (1968) ("The fate of the Palestinians was decided for them by the United Nations, to their detriment, without reference to the rule of law."); Wilde, Tears of the Olive Trees, supra note 207, at 412–14 (explaining contemporary self-determination law and comparing it to the British Mandate).

414. Walid Khalidi, Revisiting the UNGA Partition Resolution, J. Palestine Stud., Autumn 1997, at 5, 11, 21 n.35 (internal quotation marks omitted) (quoting Khalidi, Plan Dalet, supra note 156, at 4 app. B at 24 (English translation of the text of Plan Dalet)). The partition favored the Jewish state in terms of not only the percentage of the land but also its quality. The report states, "The Jews will have the more economically developed part of the country embracing practically the whole *of* the citrus-producing area which includes a large number of Arab producers." UN Special Comm. on Palestine, Rep. to the Gen. Assemb. on Its Second Session, ch. 6, pt. I, ¶ 13, U.N. Doc A/364 (Sept. 3, 1947), https://www.un.org/unispal/document/auto-insert-179435/ [https://perma.cc/6XD7-YJ6T] [hereinafter UNSCOP Report].

415. UNSCOP Report, supra note 414, ch. 2, ¶ 176.

416. Kimmerling, Politicide, supra note 291, at 3.

This context is crucial to understanding the legal questions that undergird both the 1948 Nakba and the condition of Nakba. The Israeli regime has not only displaced and dispossessed the majority of Palestinians, but in doing so has entrenched a legal and material reality that denied Palestinian people the right to exercise their political will as a group. The purpose of Nakba must therefore be understood as the denial of a group their inalienable right to self-determination both within the territorial unit and beyond it.

The question has therefore never been whether, but rather to what extent, and by what means, Palestinian self-determination was to be curtailed. Top Zionist leaders in the years leading up to the 1948 Nakba adopted "transfer" as the primary "solution" to what they understood as the "Arab question."[417] The execution of that "solution" produced a modified version of the question, that of the "refugee problem," which Israel has since dealt with in the form of denying return.[418] Displacement and denial of return were therefore the cornerstones of preventing Palestinian self-determination in order to stabilize Zionist sovereignty within the 1949 armistice borders.

But the extent and means by which Israel has suppressed Palestinian self-determination have shifted over time, ultimately reformulating the question from the displacement and conquest of 1948, to the 1967 Israeli occupation of the Palestinian territories.[419] Although the question of Palestinian refugees has never been resolved, the assertion of the military occupation of the 1967 territories, the settlement of these territories with Israeli-Jews, and the extension of a militarily administered apartheid regime have become the new and central forms in which Israel has denied Palestinian self-determination.

The Oslo Accords that established the Palestinian Authority under the pretext of "self-government" in the 1990s have by design prevented Palestinian self-determination and entrenched a reality of "indefinite occupation, statelessness, and deep fragmentation for Palestinians."[420] Once again, the ongoing Nakba has undergone a metamorphosis that has complicated its institutional structure but has maintained its purpose: the denial of Palestinian self-determination.

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417. See supra section I.B.

418. See supra notes 179–181 and accompanying text.

419. See supra section II.A.

420. Seth Anziska, Preventing Palestine: A Political History From Camp David to Oslo 4–5 (2018).

CONCLUSION

"*South Africa has recognized the ongoing Nakba of the Palestinian people through Israel's colonization since 1948, which has systematically and forcibly dispossessed, displaced, and fragmented the Palestinian people, deliberately denying them their internationally recognized, inalienable right to self-determination, and their internationally recognized right of return as refugees to their towns and villages, in what is now the State of Israel.*"

— Vusimuzi Madonsela.[421]

The Palestinian ordeal of ongoing Nakba continues. Over a hundred years since the Balfour Declaration, the West continues to uphold Zionism as its political compass in Palestine, indulging Israel with unconditional material and moral support at the direct expense of Palestinian lands and lives. Palestine thus continues to pose a pressing question to the world, exposing Western hypocrisy, uncovering global hierarchies, and elucidating the colonial conditions still pervasive in the twenty-first century. For the West, Palestine is not only a nuisance but also an enigma, one that defies the solutions of power and embarrassingly turns Joe Biden into "Genocide Joe." For the wretched of the earth, Palestine is a mirror in which to behold their own reflection as they struggle for full liberation from the shackles of colonialism.

This Article contends that Palestine is most accurately comprehended through the concept of ongoing Nakba, an egregious crime against humanity that intersects with the crimes of apartheid, genocide, and indefinite occupation but stands apart as its own indelible tragedy composed of a distinctive foundation, structure, and purpose. For the question of Palestine to be truly resolved, the international community must grapple with the ongoing Nakba. Recognition of Nakba as a universal concept, one acknowledged and prohibited by international norms, is therefore the first step toward a just and lasting solution in Palestine.

The international community has a responsibility to dismantle the ongoing Nakba that twentieth-century colonialism has constructed in Palestine. Zionism—only one modality of Jewish existence in Palestine—is conditioned upon the subjugation of the Palestinian people. There is a long and rich history of Jewish existence in Palestine that is *not* premised on systemic violence, domination, and ethnonational supremacy. Drawing from this tradition may provide inspiration, even though Zionism and its ultimate manifestation in the ongoing Nakba have ruptured and restructured reality in myriad ways that hinder our ability to imagine such futures. But once the Nakba is centered and recognized, it becomes easier

421. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Verbatim Record, 17, ¶ 3 (Jan. 11, 2024, 10 a.m.), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240111-ora-01-00-bi.pdf [https://perma.cc/X3QU-XG5D] (statement of Vusimuzi Madonsela, South African Ambassador to the Netherlands) (footnotes omitted).

to articulate a vision of freedom and dignity for all people concerned. Justice is not naivety, and the reality of ongoing Nakba is not inevitable.[422]

Undoing the Nakba does not mean resurrecting a past but reimagining a future. Existing approaches have been fixated for years on discussing the solution in terms of one state versus two states, but the "state solution" formulation places the cart before the horse. This statist approach informing the so-called peace process—a process that has rather entrenched the ongoing Nakba—has long obfuscated a simple truth: Statehood and liberation are not synonymous concepts.[423]

To break this impasse and undo the Nakba, we must start from *recognition* and move toward *reconstitution*. If recognition of the Nakba means the acknowledgement of the injustice that modern Zionism has inflicted upon the Palestinian people, reconstitution is concerned with the reformulation of the polity in a way that dismantles the Nakba regime and reconfigures the constitutional design of the system(s) on an egalitarian and democratic basis.

Yet, before any reconstitution can take place, a number of fundamental issues must be addressed. These include return of those Palestinian refugees who desire it; reparations for the victims of the ongoing Nakba; and redistribution of the material resources to ensure that the ongoing Nakba does not morph, repackage, and maintain itself under a private law infrastructure.[424] Taken together, these components therefore provide an initial legal framework to remedy the ongoing Nakba: Recognition, Return, Reparations, Redistribution, and Reconstitution.

The road to undoing the ongoing Nakba and achieving justice in Palestine may be torturous because it stands to disrupt international power structures and radically transmute existing global hierarchies. This is precisely what makes Palestine a possibility that is all the more important to pursue. Palestine and the Nakba offer rich universalist lessons to the world. If Apartheid taught us about the dangers of racialism and the possibility of reconciliation, and the Holocaust taught us about the banality of evil[425] and warned "Never Again," the Nakba can complicate our understanding of these lessons by reminding us that group victimhood is not a fixed category, and that a victimized group may easily become victimizers. That once the abuses of the Nakba are redressed, Palestinians

422. See Anatomy of a Genocide, supra note 23, ¶ 95 ("The ongoing Nakba must be stopped and remedied once and for all.").

423. Edward Said, The Question of Palestine, supra note 67, at xii ("The most noticeable result of these international effects was, of course, the transformation of a liberation movement into a national independence movement, already implicit in the 1974 [Palestinian National Council] notion of a state and national authority.").

424. Sizwe Mpofu-Walsh, The New Apartheid 13, 17 (2021) (making the argument that "[a]partheid did not die; it was privatised" wherein "[t]he market, not the state, now dictates the boundaries of opportunity, and financial barriers have replaced legal edicts as the key instrument of segregation").

425. Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (1963).

will also have to transcend their own victimhood. That we must ensure we always stand in solidarity with the oppressed, the vilified, and the dehumanized.[426] That people need not always be perfect victims to qualify for freedom, dignity, and fundamental rights.[427] Only once we realize these hard truths, Palestine will set us all free.

426. Viet Thanh Nguyen, Palestine Is in Asia: An Asian American Argument for Solidarity, The Nation (Jan. 29, 2024), https://www.thenation.com/article/world/palestine-asia-orientalism-expansive-solidarity/ [https://perma.cc/2YKN-GS2C] ("What is the worth of defending our lives if we do not seek to protect the lives of others? As for whom we should feel solidarity with, the answer is simple albeit difficult: whoever is the cockroach. Whoever is the monster.").

427. El-Kurd, The Right to Speak for Ourselves, supra note 138 ("[H]opes of countering the traditional portrayal of the Palestinian as a terrorist . . . produce[d] a false, flattening dichotomy between terrorists and victims, but the victimhood that emerges within this framework is a perfect victimhood, an ethnocentric requirement for sympathy and solidarity.").

VALUING SOCIAL DATA

Amanda Parsons & Salomé Viljoen***

Social data production—accumulating, processing, and using large volumes of data about people—is a unique form of value creation that characterizes the digital economy. Social data production also presents critical challenges for the legal regimes that encounter it. This Article provides scholars and policymakers with the tools to comprehend this new form of value creation through two descriptive contributions. First, it presents a theoretical account of social data, a mode of production that is cultivated and exploited for two distinct (albeit related) forms of value: prediction value and exchange value. Second, it creates and defends a taxonomy of three "scripts" that companies follow to build up and leverage prediction value and explains their normative and legal ramifications.

Through the examples of tax and data privacy law, the Article applies these descriptive contributions to demonstrate how legal regimes fail to effectively regulate social data value creation. Tax law demonstrates how legal regimes historically tasked with regulating value creation struggle with this new form of value creation. Data privacy law shows how legal regimes that have historically regulated social data struggle with regulating data's role in value creation.

The Article argues that separately analyzing data's prediction value and its exchange value is helpful to understanding the challenges the law faces in governing social data production and its surrounding political economy. This improved understanding will equip legal scholars to better confront the harms of law's failures in the digital economy, reduce legal arbitrage by powerful actors, and facilitate opportunities to maximize the beneficial potential of social data value.

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** Assistant Professor of Law, University of Michigan Law School. The authors extend their sincere thanks to Ashraf Ahmed, José Argueta Funes, Oren Bracha, William E. Forbath, Don Herzog, Sari Mazzurco, Katharina Pistor, Angie Raymond, Neil Richards, Felix Wu, Tim Wu, and participants at the 2024 University of Michigan Law School Legal Theory Workshop, the 2023 University of Texas School of Law Faculty Colloquium, the 2023 Schwartz Reisman Institute at the University of Toronto Seminar Series, the 2023 LPE of Tech Workshop, the 2023 Ostrom Workshop, the 2023 Privacy Law Scholars Conference, the 2023 NYU Privacy Research Group, the 2022 Joel R. Reidenberg Northeast Privacy Scholars Workshop, and the 2022 Columbia Academic Fellows Workshop for helpful and thought-provoking conversations and comments. We are grateful to the editorial staff at the *Columbia Law Review* for their helpful suggestions and edits, especially Zakiya Williams Wells. Finally, we would like to thank our new co-authors, Henry (born December 2023) and Aviva (born March 2024), who did not write a word but were everything nonetheless.

INTRODUCTION

Anna is sixteen weeks pregnant.[1] Anna uses Pineapple, a popular fertility and pregnancy tracking and social media app. In the app, Anna inputs information about her ovulation cycle, pregnancy symptoms, sleep patterns, eating habits, exercise, and moods. Anna also consumes Pineapple's content on pregnancy and fetal development and engages with other Pineapple users in their forum, swapping questions on pregnancy and preparing for a new baby.

Pineapple collects, aggregates, and synthesizes data that Anna and other users share. This data includes not only the information that Anna inputs in the app but also data about the content she consumes and her interactions with other users. Pineapple does not sell this data directly—in fact, their privacy policy explicitly states that they will never sell or license individual user data. But Pineapple does sell insights about their user base as a whole to clients like advertisers, employment agencies, and consumer credit agencies. This is how Pineapple makes its money—the app is free to Anna. Pineapple's clients then combine the data they receive from Pineapple with data from other companies to build out a more complete picture of the behavior of pregnant people. This could include data on TV viewing patterns from video streaming platforms, movement and sleep patterns from wearable fitness devices, or online purchasing behaviors.[2]

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1. This example is adapted from various presentations made by Salomé Viljoen in 2022 and 2023, including at the 2022 Annual Meeting of the American Society of International Law, Seventh Annual Detlev Vagts Roundtable. Salomé Viljoen, Remarks by Salomé Viljoen, 116 Proc. Am. Soc'y Int'l L. Ann. Meeting 122, 122–25 (2022).

2. While this is a hypothetical example, it draws on real uses of social data. See, e.g., Hooman Mohajeri Moghaddam, Gunes Acar, Ben Burgess, Arunesh Mathur, Danny Yuxing Huang, Nick Feamster, Edward W. Felten, Prateek Mittal & Arvind Narayanan, Watching You Watch: The Tracking Ecosystem of Over-the-Top TV Streaming Devices, 2019 Proc. Ass'n for Computing Mach. Conf. on Comput. & Commc'ns Sec. 131, 142 (studying two thousand "over-the-top" streaming channels, finding widespread user tracking and data collection with little recourse for consumers to disable tracking through countermeasures); Tong Yan, Yachao Lu & Nan Zhang, Privacy Disclosure From Wearable Devices, 2015 Proc. Ass'n for Computing Mach. Workshop on Priv.-Aware Mobile Computing 13, 18 (studying how aggregated data from fitness trackers can be used to infer a user's behavioral patterns, such as when they will go grocery shopping, get coffee, or work out); Jonah Engel Bromwich & Jessica Testa, They See You When You're Shopping, N.Y. Times (Nov. 26, 2019), https://www.nytimes.com/2019/11/26/style/powerfront-software-ecommerce-cartoons.html (on file with the *Columbia Law Review*) (describing how e-commerce customer service representatives can now visualize emotional profiles of customers visiting their sites or using support chats); Aljoscha Dietrich, Kurunandan Jain, Georg Gutjahr, Bianca Steffes

Becca has never used Pineapple. But she does watch streaming services, owns a wearable fitness device, and shops online. And Becca's behavioral patterns on these platforms have shifted in similar ways to Anna's and other Pineapple users' behaviors. Pineapple's clients can, therefore, infer that Becca is also likely pregnant and treat her accordingly.

Why do companies care about Anna's and Becca's pregnancy status? Because early pregnancy data is incredibly valuable. Pregnancy signals that a consumer is about to undergo a significant change in their daily habits and their buying activities; the birth of a child is a time when someone's buying habits, brand loyalties, and daily routines are in flux. Getting to such consumers early is a valuable opportunity to shape their future purchasing behaviors. Diaper companies can advertise to Becca or Anna before competitors and get them locked into their brand. Grocery stores, online subscription services, car manufacturers, and others can also reach out, offering deals favorable to new parents that entice them to switch entrenched behaviors and brand loyalties. Aggregate pregnancy data also provides an opportunity to understand the nature of consumer change more generally—how and why do consumption patterns change? When are such changes most robust, and why? How can you predict (and modify) those behavioral changes?

Data about Anna's and Becca's pregnancies is what this Article calls *social data*.[3] Social data refers jointly to two interrelated types of data about people. The first is data that directly materializes and stores traces of human activity.[4] This includes, for example, information on Anna's or Becca's TV viewing patterns, ovulation, or movement. This type of social data is directly collected from data subjects, like the data Pineapple collects and uses about Anna. The second is data that is used to apprehend, infer, or predict human activity.[5] For example, Pineapple collects data about Anna (and other users) to aggregate and analyze for insights about pregnant people as a group, which it sells to third parties. Those third parties may use this data in turn to gain insight about, and drive decisions regarding, Becca. Thus, data about Anna and her pregnancy is *also* data

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& Christoph Sorge, I Recognize You by Your Steps: Privacy Impact of Pedometer Data, Computs. & Sec., Jan 2023, no. 102994, at 1, 7 (demonstrating how fifteen minutes of pedometer data alone—data collected on nearly every smartphone—can identify users).

3. Part I provides a more detailed definition of this concept.

4. This first category is adapted from Julie E. Cohen's concept of the "data refinery"—the data-processing practice of "refin[ing] and massag[ing] flows of personal data to produce virtual representations . . . optimized for modulating human behavior systematically"—as a "centrally important means of economic production." Julie E. Cohen, Between Truth and Power: The Legal Constructions of Informational Capitalism 66–68 (2019) [hereinafter Cohen, Between Truth and Power].

5. Part I describes the difference between the two below. But for now, it is important to note that data used to infer or predict human activity need not always derive from data directly about human activity. For further discussion of the significance of the second category, see Alicia Solow-Niederman, Information Privacy and the Inference Economy, 117 Nw. U. L. Rev. 357, 400–03 (2022).

about Becca's pregnancy, even though it was not directly collected from Becca.[6] Indeed, data that can be used to infer or predict human activity need not be collected from people at all—for example, data about weather can be used to predict and infer commuting behavior. In contrast with the more commonplace term "personal data," "social data" nicely expresses the view (and a central focus of this Article) that data is socially useful and economically valuable—not only for what it can tell the world about any one person, like Anna, but also, and especially, for what it can tell the world about people.[7]

The value of Anna's and Becca's social data is what this Article refers to as *prediction value*.[8] Prediction value is a particular form of use value that lies in social data's capacity to infer or predict things about people—in this case, pregnancy status—and to act on that knowledge. For example a firm with access to Becca's social data may send Becca a diaper coupon or free prenatal vitamins, a hospital where Anna will give birth may use it to inform labor and delivery staffing plans, or an employer's hiring algorithm may flag Becca as a potentially risky and expensive hire and exclude her from a pool of prospective employees. Social data stores the value of being able to apprehend behavior, to infer, predict, and direct the future actions of people (who are not always the data subject), and to develop informed strategies to obtain some objective. It provides the valuable capacity to exert some measure of insight into and control over future behavior.[9] The capacity of social data to store insight into human behavior, guide predictions about that behavior, and optimize strategies to guide and change human behavior is (much of) what drives companies to collect the data they collect and use the data in the way that they do.[10]

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6. See Salomé Viljoen, A Relational Theory of Data Governance, 131 Yale L.J. 573, 606–08 (2021) [hereinafter Viljoen, Relational Theory] (describing a hypothetical scenario in which a tattoo AI company creates an algorithm based on the dataset of the social media company it acquires that allows data collected from one person to be used to infer information about a second person).

7. Id. at 609–11. For examples of the ubiquity of the term "personal data" in common references to data privacy, see, e.g., Colleen McClain, Michelle Faverio, Monica Anderson & Eugenie Park, Pew Rsch. Ctr., How Americans View Data Privacy 12, 18 (2023), https://www.pewresearch.org/internet/2023/10/18/views-of-data-privacy-risks-personal-data-and-digital-privacy-laws/ [https://perma.cc/M82M-BATC] (using the term "personal data" frequently to refer to aggregated, predictive insights); Hossein Rahnama & Alex "Sandy" Pentland, The New Rules of Data Privacy, Harv. Bus. Rev. (Feb. 25, 2022) https://hbr.org/2022/02/the-new-rules-of-data-privacy (on file with the *Columbia Law Review*) (describing "personal data" as individual data points aggregated to generate broader consumer insights).

8. Part I provides a more detailed definition of this concept.

9. See David Graeber & David Wengrow, The Dawn of Everything 364–65 (2021) (arguing that "control of information" is one of three bases of social power).

10. Part II covers this at length. For a specific example relevant to the scenario here, see Eric Siegel, Predictive Analytics: The Power to Predict Who Will Click, Buy, Lie, or Die 6–12 (rev. ed. 2016) (detailing the variety of predictive models organizations employ across various sectors, including healthcare, retail, and the mortgage industry, to attract, retain,

Social data cultivation is key to the business strategies of some of the wealthiest and most powerful companies operating today. Companies face generalized market pressure to engage in the accumulation and cultivation of social data and its prediction value to stay competitive.[11] Indeed, the widespread practice of treating social data as a key input to production is part of what it means to refer to contemporary capitalism as an informational capitalism.[12] Recent technological transformations, like improved chip processing power, ubiquitous connected devices like smartphones, and improvements in machine-learning techniques, have all contributed to the feasibility and utility of entities cultivating, refining, and extracting social data value.[13] These technological changes have allowed entities to exploit for economic gain what has long been true: People are social beings, deeply knowable and materially influenced by relations to one another. Thus, the stakes of understanding social data's particular form of value, and the social and economic effects that its widespread cultivation produces, have grown more salient.

A primary way the digital economy works is by using prediction value to increase monetary value: to grow profits by raising revenue and by lowering costs, or to grow market share (and, the thinking goes, future profits) by expanding customer bases and entering new markets.[14] As Part II will survey in greater detail, companies deploy a variety of strategies to transform prediction value into *exchange value*—the priced, monetary value of a good, service, or company, typically expressed as a "market price." Exchange value, as a general theory and form of value, posits that the value of a thing is the value derived from its exchange, expressed via

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and win back customers). Specifically, Eric Siegel covers Target's use of big data to identify pregnant customers: Target created a training model based on users who signed up for Target's baby registry and then applied it to customers who had not registered. Id. at 48–50.

11. See Cohen, Between Truth and Power, supra note 4, at 6 ("In a regime of informational capitalism, market actors use knowledge, culture, and networked information technologies as means of extracting and appropriating surplus value, including consumer surplus.").

12. See Viljoen, Relational Theory, supra note 6, at 577, 586 ("Data plays a central role in both descriptive and critical accounts that characterize the contemporary digital political economy as informational capitalism.").

13. See Beth Gutelius & Sanjay Pinto, Ctr. for Urb. Econ. Dev., Pain Points: Data on Work Intensity, Monitoring, and Health at Amazon Warehouses 20 (2023), https://cued.uic.edu/wp-content/uploads/sites/219/2023/10/Pain-Points_Final_Oct2023.pdf [https://perma.cc/WQ2K-8V9V] (describing the impact on workers of the "company's system of technology-enabled workplace monitoring"); Valerio De Stefano & Simon Taes, Algorithmic Management and Collective Bargaining, 29 Transfer 21, 23–25 (2023) (discussing how employers use data gathered from various technological tools to track workers' physical locations, mental and emotional states, and digital activity to make decisions and predictions regarding workers' conduct and productivity); Matt Burgess, All the Data Apple Collects About You—And How to Limit It, Wired (Jan. 16, 2023), https://www.wired.com/story/apple-privacy-data-collection/ (on file with the *Columbia Law Review*) (describing all of the ways that Apple products may track and collect data about how users interact with their products).

14. Sections II.A and II.B provide a detailed analysis of these profitmaking strategies.

price, on a real or imagined market.[15] So, prediction value can be—and is—transformed into exchange value. But it doesn't have to be. Prediction value is distinct from (and not always neatly transformed into) exchange value. Part I provides greater detail defending the descriptive and analytic virtues of cataloging this distinction.

Prediction value confers on its holder the power to apprehend, shape, and thus exert some measure of control over people's behavior. In fact, the central preoccupation of privacy scholars and many other observers of the digital economy is this potential for the control power of social data, cultivated for its conversion into priced value, to be repurposed toward other (potentially disempowering) ends.[16] These purposes can coexist with strategies to grow exchange value, such as the use of prediction value in labor settings to reduce operating costs by eroding workplace protections, or lie outside the commercial realm entirely, such as immigration officials repurposing location data cultivated for commercial ends to detect and detain suspected undocumented immigrants.[17] Indeed, much of privacy law's traditional concern regarding privately cultivated surveillance capacities is how such capacities fall into the hands of state actors and empower state action without sufficient scrutiny.[18]

Of course, there is also some amount of speculative behavior around prediction value, as when entities, in order to secure valuations of high exchange value, overclaim or overpromise on the prediction value their products can deliver—a phenomenon the computer scientists Sayash Kapoor and Arvind Narayanan refer to as "AI snake oil."[19] But this, too, highlights the importance of disentangling assessments of social data value from priced exchange value—to better identify when claims of social data value (and its potential to transform into priced exchange value) are

15. See Dave Elder-Vass, Inventing Value 1, 22 (2022) (noting the mainstream notion of value as the equilibrium price of demand and supply and arguing that equilibrium price is "not the same thing as actual price[]" but a "regulative concept: the notional price at which marginalist theory says goods ought to be exchanged"); see also R.H. Coase, The Nature of the Firm, 4 Economica 386, 388 (1937) ("Outside the firm, price movements direct production, which is co-ordinated through a series of exchange transactions on the market.").

16. See infra section III.C.

17. Paul Blest, ICE Is Using Location Data From Games and Apps to Track and Arrest Immigrants, Report Says, Vice News (Feb. 7, 2020), https://www.vice.com/en/article/v7479m/ice-is-using-location-data-from-games-and-apps-to-track-and-arrest-immigrants-report-says [https://perma.cc/C24R-GB9R].

18. On use of data in workplace settings, see infra section II.A. On the traditional focus on state actors as a source of power-related privacy harm, see infra section III.C.

19. See Sayash Kapoor & Arvind Naryanan, About the Book and This Substack, AI Snake Oil, https://www.aisnakeoil.com/about [https://perma.cc/SM2P-J4ET] (last visited Feb. 19, 2024) (explaining the foundations of the AI snake oil project, which seeks "to dispel hype, remove misconceptions, and clarify the limits of AI"); see also Louise Matsakis, The Princeton Researchers Calling Out 'AI Snake Oil', Semafor (Sept. 15, 2023), https://www.semafor.com/article/09/15/2023/the-princeton-researchers-calling-out-ai-snake-oil [https://perma.cc/XMU9-TTNP].

overblown.[20] As Aaron Shapiro notes in his excellent work on gig platforms, when it comes to understanding the way platforms capitalize on prediction value by turning it into market valuation, there is a considerable "gap between what platforms do and what they say they do."[21] Clarifying the two modes of value production (and how they relate to each other) can help regulators and other observers traverse this gap and evaluate when claims are plausible and when they are not.

This Article argues for the importance of understanding how social data value is cultivated and used for regulating the digital economy. Part I provides greater detail on the concepts of social data and prediction value and argues for the distinctive value proposition of cultivating, accumulating, and using social data. It also provides theoretical context to distinguish the concept of exchange value—priced monetary value—from the concept of value more broadly and from prediction value as a particular kind of use value.

Part II offers a taxonomy of the business models and practices developed around cultivating and using social data value. This taxonomy divides the ways in which companies leverage prediction value to produce wealth and power for themselves and their investors into three scripts. The first script is direct and immediate conversion of social data value into exchange value through means such as direct sale of data, or through the premiums charged for targeted, as opposed to untargeted, advertising. The second script is indirect and often delayed conversion of prediction value into exchange value through improving and developing new products and services, lowering costs, increasing and stabilizing revenue, and expanding into new business lines and industries. The third script is leveraging prediction value to accrue power. This script catalogs how social data value can be a source of economic and political power, and thus of value to companies in their longer-term aims to secure market power and favorable regulatory environments. After cataloging and describing these

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20. See Inioluwa Deborah Raji, I. Elizabeth Kumar, Aaron Horowitz & Andrew D. Selbst, The Fallacy of AI Functionality, 2022 Proceedings Ass'n for Computing Mach. Conf. on Fairness, Accountability & Transparency 959, 961–65 (describing various ways in which AI systems fail to produce certain claimed outcomes, whether because the objectives were impossible, the systems were designed in faulty ways, or the systems' capabilities were falsified, misrepresented, or overstated); Angelina Wang, Sayash Kapoor, Solon Barocas & Arvind Narayanan, Against Predictive Optimization: On the Legitimacy of Decision-Making Algorithms that Optimize Predictive Accuracy, Ass'n for Computing Mach. J. Responsible Computing, Mar. 2024, no. 9, at 1, 8–16 (identifying specific shortcomings in datasets or modeling that interfere with the ability to optimize the predictive value of AI and machine-learning models).

21. Aaron Shapiro, Platform Sabotage, 16 J. Cultural Econ. 203, 204 (2023) [hereinafter Shapiro, Platform Sabotage]. Tim Hwang compares the behavioral advertising market to the subprime mortgage crisis of 2008, arguing that companies' claims that behavioral advertising is more effective are, like the supposed value of subprime mortgage–backed financial products, empirically dubious. Yet, similar to the 2008 financial crisis, these empirically dubious value propositions nevertheless produce widespread social disruption as companies pursue them. Tim Hwang, Subprime Attention Crisis 76–92 (2020).

three scripts, the Article explores some specific business practices associated with following these scripts, each of which focus on growth and expansion. These practices include offering free and low-cost services, creating ecosystems of products and services, and embarking on aggressive merger and acquisition strategies. The Article shows how these strategies differ from traditional ones in ways that carry both legal and normative significance.

In Part III, this Article explores how disambiguating prediction value and exchange value (conceptually and normatively) can illuminate why such a variety of existing legal regimes fail to properly manage the social and economic disruptions that have accompanied capitalism's informational turn. In short, the same legal regimes that structure the transformation of prediction value into exchange value fail to grasp—in its entirety—the messy, imperfect, and socially disruptive process by which this transformation occurs. While the regulatory challenges of the digital economy increasingly place strain on various areas of law, most consider only small portions of this process and lack a systematic understanding of social data value production.[22]

The Article identifies two contexts in which the legal regimes that structure this process index only part of its legally relevant features. The first context is legal regimes that have historically been tasked with governing value creation.[23] Such regimes are focused on evaluating and regulating companies' claims of exchange value and thus only apprehend or index prediction value (indeed, they only consider such value normatively and legally relevant) at the point it is transformed into exchange value. As section III.B will show, this can miss many legally salient features of prediction value, such as how it is cultivated and the wider social effects that cultivation creates. This leaves such regimes poorly equipped to properly achieve their normative goals. The Article chronicles these struggles through the example of tax law.

The second context is legal regimes that have not historically understood themselves to be tasked with governing value creation but that are focused on the legal significance of informational power. Such regimes are attentive to the capacity of information about people to create power over them, but they regulate social data along a strict public–private divide. Through the example of privacy and data governance law, the Article shows the conceptual and programmatic challenges of this approach. Privacy and data governance law govern private data collection primarily

22. Julie E. Cohen & Ari Ezra Waldman, Introduction: Framing Regulatory Managerialism as an Object of Study and Strategic Displacement, 86 Law & Contemp. Probs., no. 3, 2023, at i, ii–iii (detailing the "long and growing" list of harms from informational capitalism as managed under current regulatory paradigms and noting that adequate responses to these harms are beyond the capacities of current regulatory approaches).

23. See infra Part III.

via individual control and consent rights.[24] Privacy law traditionally apprehends or indexes social concerns regarding prediction value, and its capacity to coerce action and remake social relations, only if or when it falls into the hands of public actors. And while the near-exclusive focus on state surveillance in the field is shifting, both popular and doctrinal conceptions of socially coercive privacy harm remain primarily focused on public, rather than private, actors. This ignores many salient concerns regarding informational power that arise as social data is imbricated into the strategies of commercial actors and neglects the role of privacy and data governance law in facilitating this form of value creation. It also overlooks the potential social benefits of prediction value if cultivated in procedurally fair ways and put toward collectively determined ends.

This analysis has broad implications for other areas of the law. For example, other legal fields that, like tax law, have historically been tasked with governing value creation have legal frameworks developed around the concept of exchange value and are not achieving their normative goals when applied to prediction value. Antitrust and financial regulation are prominent examples here, as there is growing evidence to suggest these regimes are struggling to index the profit-seeking behavior of technology companies and thus achieve these legal regimes' regulatory briefs in the digital economy.[25] This understanding will also be invaluable to legal fields that, like privacy and data protection law, have not historically been seen as regimes governing value creation and that, as a result, have not

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24. This is also referred to as the "notice and choice" regime. See Neil Richards & Woodrow Hartzog, Privacy's Trust Gap: A Review, 126 Yale L.J. 1180, 1197–98 (2017) (reviewing Finn Brunton & Helen Nissenbaum, Obfuscation: A User's Guide for Privacy and Protest (2015)); Neil Richards & Woodrow Hartzog, Taking Trust Seriously in Privacy Law, 19 Stan. Tech. L. Rev. 431, 434 (2016). There are hundreds of privacy laws in the United States, and providing a systematic review of the role consent plays in each one is beyond the scope of this project. Yet, U.S. privacy laws are generally understood to derive from the Fair Information Practice Principles (FIPPs), which lay out principles for fair data processing, including meaningful individual rights of control and consent over data collection and use. Fed. Priv. Council, Fair Information Practice Principles (FIPPs), https://www.fpc.gov/resources/fipps/ [https://perma.cc/BYS2-SY4F] (last visited May 8, 2024). For some canonical examples of privacy laws that operationalize consent, see, e.g., Children's Online Privacy Protection Act (COPPA) of 1998, 15 U.S.C. §§ 6501–6506 (2018); Fair Credit Reporting Act (FCRA) of 1970, 15 U.S.C. §§ 1681–1681x; Family Educational Rights and Privacy Act (FERPA) of 1974, 20 U.S.C. § 1232g (2018); Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C. (2018));California Consumer Privacy Act (CCPA) of 2018, Cal. Civ. Code §§ 1798.100–.199.100 (2023); Biometric Information Privacy Act (BIPA), 740 Ill. Comp. Stat. Ann. 14/10, 14/15 (West 2023).

25. See Saule T. Omarova & Graham S. Steele, Banking and Antitrust, 133 Yale L.J. 1162, 1244–55 (2024) (describing the challenges faced by banking regulators striving to manage digital financial markets and financial tech companies); Sanjukta Paul, Fissuring and the Firm Exemption, 82 Law & Contemp. Probs., no. 3, 2019, at 65, 72–76 (analyzing why antitrust law has failed to adequately regulate platforms like ride-hailing firms).

developed a positive agenda for regulating prediction value. First Amendment law is a prominent example.[26]

The idea that information like social data confers power, and is thus a source of value with significant ontological, political-economic, and legal implications, is not new.[27] Others, particularly political economists of communication and historians of science, have long identified and analyzed the role of informationalism in contemporary capitalist value formation as it emerged and took on growing importance.[28] Previous work

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26. Here, the Article refers particularly to discussions of free speech and the First Amendment as a primary legal regime regulating against the discursive and democratic ills of social media platforms. Similar to the developments in privacy and data governance law discussed in Part III, free speech scholars are increasingly attentive to the role free speech law plays in structuring the platform economy and the conceptual limits of that role. See, e.g., Jack M. Balkin, To Reform Social Media, Reform Informational Capitalism, *in* Social Media, Freedom of Speech and the Future of Our Democracy 233, 233–34 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022) (arguing that, in order to restore a robust digital public sphere, people should focus on the "industrial organization of digital media and the . . . business models of social media companies" rather than focusing reform on First Amendment doctrines). There is, of course, a more general literature on free speech and the First Amendment that has argued that current free speech doctrine serves as a (Lochnerized) regulatory paradigm for economic activity. See, e.g., Amy Kapczynski, The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy, 118 Colum. L. Rev. Online 179, 179–80 (2018), https://www.columbialawreview.org/wp-content/uploads/2018/11/Kapczynski-THE_LOCHNERIZED_FIRST_AMENDMENT_AND_THE_FDA_TOWARD_A_MORE_DEMOCRATIC_POLITICAL_ECONOMY.pdf [https://perma.cc/6FZM-YZZ4]; Robert Post & Amanda Shanor, Adam Smith's First Amendment, 128 Harv. L. Rev. Forum 165, 165–67 (2015), https://harvardlawreview.org/wp-content/uploads/2015/03/vol128_PostShanor2.pdf [https://perma.cc/88XH-LXMG]; Jedidiah Purdy, Neoliberal Constitutionalism: Lochnerism for a New Economy, 77 Law & Contemp. Probs., no. 4, 2014, at 195, 202–03.

27. In 1963, Kenneth E. Boulding remarked that "[t]he very concept of a knowledge industry contains enough dynamite to blast traditional economics into orbit." Kenneth E. Boulding, The Knowledge Industry, Challenge, May 1963, at 36, 38 (reviewing Fritz Machlup, The Production and Distribution of Knowledge in the United States (1962)). Fritz Machlup was one of the first to systematically analyze the production and distribution of commoditized knowledge. See Fritz Machlup, The Production and Distribution of Knowledge in the United States 13–43 (1962) (reviewing knowledge classifications and proposing his own). In 1994, Robert E. Babe remarked on the curious need for mainstream economics to treat information as a commodity to make sense of it within the economic paradigm, a need that "obscures many essential properties of information, as well as consequences of informational exchange." Robert E. Babe, The Place of Information in Economics, *in* Information and Communication in Economics 41, 41–42 (Robert E. Babe ed., 1994).

28. See generally S.M. Amadae, Rationalizing Capitalist Democracy (2003) (describing how informational tools "led to a far-reaching and comprehensive system for defining appropriate beliefs and actions"); Manuel Castells, The Rise of the Network Society (2d ed. 2010) (describing the historical transformations leading to the creation of a network society); Dan Schiller, How to Think About Information (2007) ("Companies engaged in making and selling entertainment, banking, communications, data processing, engineering, advertising, law, and other information-intensive services have played an increasingly critical role in overall U.S. investment, employment, and international trade."). Ian Parker lays out the broad contours of this emergence: "In the 1870s, in North America,

has established the centrality of social data as a vital, even paradigmatic, factor of production under informational capitalism.[29] Others have identified the importance of behavioral monitoring and prediction to the governance capacities and challenges of the digital economy.[30] Legal scholars have also explored the legal facilitations and fallouts of the informational turn.[31]

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about 70 percent of Gross Domestic Product (GDP) was based on material commodity production, with commoditized services constituting about 30 percent of GDP." See Ian Parker, Commodities as Sign-Systems, *in* Information and Communication in Economics, supra note 27, at 69, 74. In the early 1990s, when Parker was writing about them, these percentages had reversed. See id. "The rise of the service sector" (and the decline of material commodity production or manufacturing) has been one of "the most fundamental . . . shifts" to happen across advanced capitalist nations in the latter half of the twentieth century. See id. This shift to the service sector encompasses three broad categories: increases in government expenditure associated with capitalist states' fiscal policies, the commoditization of care work and other services previously associated with social reproduction (in part a result of the integration of women into the wage-labor market), and the rapid growth of the informational economy. See id. Since around the 1970s, however, the average share of government expenditures as a portion of GDP has plateaued. This means that the continued relative growth of the sector is driven by the other two trends: the ongoing transformation of care and of information into commodities. See id.

29. See Cohen, Between Truth and Power, supra note 4, at 42 ("[P]latforms represent both horizontal and vertical strategies for extracting the surplus value of user data. Because that project requires large numbers of users generating large amounts of data, the platform['s] . . . goal is to become and remain the indispensable point of intermediation . . . in its target markets."); Nick Couldry & Ulises A. Mejias, Data Colonialism: Rethinking Big Data's Relation to the Contemporary Subject, 20 Television & New Media 336, 337 (2018) ("Just as historical colonialism over the long-run provided the essential preconditions for the emergence of industrial capitalism, . . . we can expect that data colonialism will provide the preconditions for a new stage of capitalism . . . for which the appropriation of human life through data will be central."); Jathan Sadowski, When Data Is Capital: Datafication, Accumulation, and Extraction, Big Data & Soc'y. Jan.–June 2019, at 1, 1, https://journals.sagepub.com/doi/epdf/10.1177/2053951718820549 [https://perma.cc/RBB3-8AAJ] [hereinafter Sadowski, When Data Is Capital] ("Industries focused on technology, infrastructure, finance, manufacturing, insurance, and energy are now treating data as a form of capital.").

30. See Katharina Pistor, The Code of Capital 213 (2019) ("By constantly contesting the existing boundaries of legal rules in general, and by expanding the remit of the code's modules to make them fit for ever newer asset classes, lawyers turn any of their clients' assets into capital."). See generally Shoshana Zuboff, The Age of Surveillance Capitalism (2019) [hereinafter Zuboff, Surveillance Capitalism] ("We celebrate the networked world for the many ways in which it enriches our capabilities and prospects, but it has birthed whole new territories of anxiety, danger, and violence as the sense of a predictable future slips away.").

31. See Cohen, Between Truth and Power, supra note 4, at 1 ("Networked information technologies inevitably will alter, and are already altering, the future of law . . . ."). See generally Kiel Brennan-Marquez & Daniel Susser, Knight First Amend. Inst., Privacy, Autonomy, and the Dissolution of Markets, (Aug. 11, 2022), https://s3.amazonaws.com/kfai-documents/documents/854ed7a7b7/Brennan-Marquez–Sussner—Privacy–Autonomy–and-the-Dissolution-of-Markets—08.11.22.pdf [https://perma.cc/SM73-SKQR] (describing how, with the rise of information companies, "the capacity of individuals to self-determine—and the capacity of polities to self-govern—is under threat"); Amy Kapczynski, The Law of Informational Capitalism, 129 Yale L.J. 1460 (2020) [hereinafter Kapczynski, Informational

This Article builds on that earlier work with two goals in mind. First, the Article's primary goal is to provide a granular and reasonably systematic accounting of the various ways data is used (or can be used) by platforms and other firms to produce value (and power). It takes up this goal in Part II. The Article's second goal is to provide a theoretical account of social data as a value form whose cultivation is a primary aim of digital firms—indeed, it is part of what marks the digital economy as "digital." This theoretical contribution, laid out in Part I, is in service of the primary goal: to illuminate the distinctive value proposition of data and to help explain the conceptual and normative significance of social data as a value form. Taken together, Parts I and II describe the current structure of social data production and suggest why legal scholars and regulators have had trouble grasping the implications and effects of data production under the particular conditions of the contemporary digital economy. Part III explores these legal implications directly. In addition to its two substantive goals, the Article makes a modest methodological contribution to how legal scholarship engages with law's constitution and regulation of production. Its theoretical account supplies a way of analyzing and evaluating productive activity that does not, at the conceptual level, presuppose market ordering of that activity. In doing so, the Article provides a model for similar analysis, when appropriate, for other kinds of productive activity.

I. PREDICTION VALUE AND THE DATA POLITICAL ECONOMY

This Part lays out an account of data as a material store of prediction value. The aim is to sketch out what this Article means when it uses the word "value" and why it's useful to think about value in relation to social data production. To do so, this Part explores three questions. First, *what* is prediction value? What makes it "valuable" and what makes it different from other kinds of value? Second, *why* do companies and governments cultivate and accumulate it? In other words, what is it good for, and how does it fit into current market behaviors and competitive practices? Third, if social data is so valuable, then where has it been all this time? Why are people only talking about it *now*?

A. *What Is "Value"?: A Quick Background*

Before the Article turns to social data and prediction value, it is perhaps worth saying a few words about the concept of value more generally. Nowadays, talking about the "value" of something refers to that

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Capitalism] (reviewing Cohen, Between Truth and Power, supra note 4, and Zuboff, Surveillance Capitalism, supra note 30) (discussing the inequitable impacts of informational power); Omri Marian, Taxing Data, 47 B.Y.U. L. Rev. 511 (2022) (arguing that in data-rich markets, data should form the tax base); Katharina Pistor, Rule by Data: The End of Markets?, 83 Law & Contemp. Probs., no. 2, 2020, at 101 [hereinafter Pistor, Rule by Data] (analyzing the possibility of using data to organize markets).

thing's *exchange value*: the priced, monetary value at which it can be (or could theoretically be) bought, sold, or exchanged for something else on a market.[32] This is the classic economic sense of "value": the "market value" of a house, or a painting, or a corporate merger, or a bushel of corn. Something's value in a market is a subjective, relative, and contingent measure of that item's desirability. It captures a specific or "average" buyer's "willingness to pay" (WTP) for an additional (that is, marginal) unit of said item. WTP in turn is determined by a combination of external, changing conditions (supply and demand) and internal, stable ones (the buyer's particular reasons for wanting the item). Expressed as a priced market value, WTP also captures relative desirability between goods, since buyers (or most buyers, anyway) have finite wealth and must prioritize among their desires.

This is taken to be quite distinct from "values" in an ethical or sociological sense: beliefs regarding the importance of certain things or actions that motivate individual or societal behavior. It is in this sense that one can speak of the "core values" of an institution or that someone places a "high value on honesty." Indeed, much of what makes exchange value such a useful concept in economics (and beyond) is its stated neutrality on matters of ethical or sociological value: Value is simply the price someone is willing to pay.[33] One need not inquire into why people want what they do and whether those reasons are good or bad (for example, as Adam Smith endeavored to show, "the market rewards us justly for our labours"[34]). Such questions, to the extent they are answerable at all, lie outside the purview of economic theory.

But economics began as an exploration of these exact questions. How do the individuals in a particular society put their limited time and resources toward productive activity? What does that say about what they value? What is the origin and nature of such value? Reflecting on these questions, observers distinguished exchange value from what they called

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32. In classical political economy, exchange value (or *Tauschwert*) refers to only one attribute of a commodity: the proportion at which one commodity can be traded on the market for other commodities. See Jörg Guido Hülsmann, The Value of Money, Mises Inst. (Mar. 13, 2013), https://mises.org/library/value-money-0 [https://perma.cc/62ZC-TNLL] (referring to the Mengerian concept of "inner exchange value" and "outer exchange value" as *innerer Tauschwert* and *äusserer Tauschwert*). In this understanding of the term, exchange value isn't *necessarily* money price, although a market price will generally bear at least a rough correspondence to a commodity's exchange value. See Karl Marx, 1 Capital 138–39 (Ben Fowkes trans., Penguin Books 1990) (1867). But the general adoption of marginalism in economic thought around the 1930s eliminated such distinctions: Discussions of different value-attributes fell off, and value was taken to measure how much a hypothetical buyer would desire an additional unit of said item, expressed in the form of a price. See Elder-Vass, supra note 15, at 18; Herbert Hovenkamp, Coase, Institutionalism, and the Origins of Law and Economics, 86 Ind. L.J. 499, 503 (2011).

33. David Graeber, Value: Anthropological Theories of Value, *in* A Handbook of Economic Anthropology 439, 443 (James G. Carrier ed., 2005).

34. Id.

"use" value or "natural" value: the value one gets from, say, *wearing* one's favorite coat (that is, using it as a coat), as opposed to the value that one or another would pay to *acquire* the coat.[35] These were not mere differences in the degree to which people valued things, which continues to be widely observed today. For example, any economist will point out that the decision *not* to sell something—a home, a corporate asset, or one's favorite coat—is simply a signal that one values that thing over its (current) market value. Behavioral economists have added to this observation the concept of "endowment effects"—that people systematically tend to overestimate the market value of something that they already have when compared with what they would pay to obtain it (a testament to the notion that people grow attached to things they think of as their own).[36] Both of these accounts, however, ground their explanations of such behavior in numerical difference in value—quantitative assessments of the priced value of a particular good.[37]

In contrast, early economists used the concept of use value to express a distinct *way* that a good could be valued, not simply differing degrees to which a good could be valued along the same dimension. So for example, when one enjoys the use of one's favorite coat, how one enjoys it is distinct from its price. One feels fondness for it from its familiarity, aesthetic satisfaction from its cut and drape on one's body, and the pleasure of being warm on a cool day. This all *can* be, in an abstract sense, translated into a price if someone were to offer to buy the coat. But it would be a translation:

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35. The concepts of "use value" and "exchange value" are quite old. Marx quotes Aristotle on the subject:

> For twofold is the use of every object . . . . The one is peculiar to the object as such, the other is not, as a sandal which may be worn is also exchangeable. Both are uses of the sandal, for even he who exchanges the sandal for the money or food he is in need of, makes use of the sandal as a sandal. But not in its natural way. For it has not been made for the sake of being exchanged.

Marx, supra note 32, at 179 n.3 (alteration in original) (internal quotation marks omitted) (quoting Aristotle, Republic bk. I, ch. 9) (misquotation). This quotation is properly attributed to Aristotle's *Politics*. See, e.g., Aristotle, Politics bk. I, at 41 (H.W.C. Davis, ed., Benjamin Jowett, trans., Oxford Clarendon Press 1908) (c. 350 B.C.E.). As David Graeber details, Adam Smith's famous "paradox of value" is also much older than the eighteenth century: St. Augustine argued that "'according [to] their own merits,'" "plants are clearly superior to stones, animals to plants, humans to animals," but because of humans' fallen nature, and thus "endless physical needs and desires," people value things like bread and gold over animals like mice. Graeber, supra note 33, at 441–42 (quoting St. Augustine, The City of God, bk. IX, ch. 16). To St. Augustine, this characterizes how people "come to see things through [their] own needs (use value) rather than their absolute worth" or "their position along the Great Chain of Being." Id.

36. See Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, Experimental Tests of the Endowment Effect and the Coase Theorem, 98 J. Pol. Econ. 1325, 1326–27 (1990) (overviewing empirical research displaying endowment effects).

37. Put another way, these are both instances when people are making an assessment of the current market price of such goods—deeming that price lower than what they consider the goods' exchange value.

It would leave out dimensions of what one derives from the use of one's favorite coat. Use value and exchange value thus captured distinct aspects of a good. The two concepts indexed different ways that people relate to and derive value from things, and different motivations they might have for making or obtaining things. The disaggregated notions of value thus corresponded to, or described, different aspects of "productive" or economic activity. The two were related, of course, and much of early economic thought was devoted to developing and debating various accounts for the origins of value and the formal causal or mathematical relation between use value and exchange value.[38]

There is widespread agreement that classical political economists' preoccupation with developing some "true," scientific, or systematic relationship between the different notions of value was destined for failure. The history of economic thought is marked by nonexchange conceptions of value coming into conflict with and ultimately being (albeit imperfectly and partially) transfigured into exchange value.[39] Over time, "the value of an object became increasingly indistinguishable from its price: how much potential buyers were willing to give up to acquire some product on the market."[40] And to be clear, this Article does not aim to revive these old debates, nor to argue for or defend a formal and systematic relationship between the two concepts of value.

Yet, in abandoning the study of distinct concepts of value, economics also lost its ability to fully express—and thus take seriously on their own terms—how the uses of things can motivate and explain economic activity. This was particularly true for things that were of high social or personal utility but that nonetheless had low exchange value. Or more accurately, economic thought moved on from puzzling deeply over such enduring "paradoxes" of commercial activity to providing a ready answer for resolving them. The standard line is that such things suffer from having high total utility but low marginal utility. Thus, "undervaluation" problems have, in theory, a simple solution. To properly value such things requires

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38. Early economic thought was divided into three schools: mercantilists, physiocrats, and political economists, all of whom took a different position on how value was created. Graeber, supra note 33, at 440. Mercantilists believed wealth originated from precious metals (gold, silver); physiocrats believed it originated from nature, and hence, agriculture. The classical political economists believed value was a product of human labor, that it "emerged . . . at exactly the point where our minds became a physical force in nature." Id.

39. And in turn, as economic thought permeated social thought more generally, the process of subordinating other ways of thinking about value to exchange value spread beyond economic theory. For one treatment of the normative and ethical shortcomings of this trend, see generally Elizabeth Anderson, Value in Ethics and Economics (1993). For a sociological account of how thinking of all political and social goals in terms of exchange value came to dominate policymaking, see generally Elizabeth Popp Berman, Thinking Like an Economist: How Efficiency Replaced Equality in U.S. Public Policy (2022). On the conceptual and descriptive shortcomings of contemporary theories of value, see Elder-Vass, supra note 15, at 18–24.

40. Graeber, supra note 33, at 440.

that people take the steps necessary to express their value *as* exchange value—in other words, to *create* a market (or if that isn't possible, to simulate a market) in such goods.[41]

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When thinking about value these days, it can be hard to escape the exchange value-sea everyone swims in. Saying something has "economic value" is necessarily taken to mean that this value *also* takes a particular form: exchange value. But this Part endeavors to show that it can be worth returning to the old tradition of disambiguating forms of value—not to revive the old views of value entirely[42] but to take seriously in the exploration of economic activity the distinctions between different ways of cultivating and deriving productive value, and the imperfect and messy task of transformation that occurs between forms of value.

B. *What Is Prediction Value?*

Social data production produces value from its capacity to materialize and store traces of human activity. This allows entities to catalog, analyze,

41. Here a reader could ask, "Aren't you just talking about commodification?" And the answer is, in some sense, yes. But commodification better describes the social process that *follows* from, or accompanies, the intellectual shift being described here. This shift is conceptual: how and why economics came to think of essentially all social value, and human behavior, in terms of prices and price theory to begin with. Indeed, much criticism lodged against neoclassical economics is due to its tendency to engage in "economic imperialism," casting any behavior involving scarce resources within the conceptual precepts of neoclassical price theory. For a critical account of this trend, see generally Berman, supra note 39; Don Herzog, Externalities and Other Parasites, 67 U. Chi. L. Rev. 895 (2000) (book review). For example, family planning, racial discrimination, crime, marriage, divorce, drug addiction, politics, immigration, and suicide have all been cast as problems that can be thought of—and solved—via pricing and markets. See, e.g., Richard A. Posner, A Theory of Primitive Society, With Special Reference to Law, *in* Chicago Studies in Political Economy 149, 191–205 (George J. Stigler ed., 1988) (analyzing elements of family, tort, and criminal law as systems for selling and buying legal entitlements). On specific policy suggestions, see, e.g., Eric A. Posner & E. Glen Weyl, Radical Markets: Uprooting Capitalism and Democracy for a Just Society 127–67 (2018) (proposing a market in immigration in which private citizens could bid to host immigrants in exchange for a share of the income they earn); Richard A. Posner, Sex and Reason 241–429 (1992) (developing an economic theory of sexuality and applying it to the AIDS epidemic, abortion, gay rights, surrogacy, motherhood, marital rape, date rape, sexual harassment, sexual abuse, and pornography); Elisabeth M. Landes & Richard A. Posner, The Economics of the Baby Shortage, 7 J. Legal Stud. 323, 323–48 (1978) (proposing the introduction of a market for adoption in which people may buy and sell babies). Economists Gary Becker and Julio Jorge Elías have argued for the application of markets to organ donation. See generally Gary Becker & Julio Jorge Elías, Introducing Incentives in the Market for Live and Cadaveric Organ Donations, J. Econ. Persps., Summer 2007, at 3. Becker has also written on topics like birth rates, family size, marriage, divorce, family dynamics, and child raising. See generally Gary Becker, A Treatise on the Family (1981) (applying economic theory and decisionmaking to the creation and maintenance of family units).

42. Again, this Article has no interest in wading into centuries-old fights about value theory.

aggregate, and mine such traces for insight and, in turn, to use such insights to apprehend, predict, and modify behavior. In other words, the value of social data lies in its capacity to apprehend and predict—and based on such apprehension and prediction, to manage—social behavior.[43] Both apprehension and prediction *and* the behavioral management capacities they endow have value. Apprehension and prediction can aid in planning how companies allocate resources, streamline logistics, manage risks, and enter new sectors. Companies can use data systems to affect human behavior (either directly or indirectly). For instance, they can aid workforce efficiency and other goals and help manage consumer interactions. These strategies, which companies can pursue independently or at the same time, are covered in detail in Part II below.

1. *Defining Social Data.* — Definitions of "data" and its use have a fraught and thorny history.[44] Given considerable debate regarding the accuracy or usefulness of terms like "data" or "privacy" or "personal data," it is worth saying a bit more about this Article's use of the term "social data," as well as its limits. At its simplest, this Article uses the term "social data" to mean data about people. This can include data collected directly from people—such as their movement around a city on foot or in a car, their breathing patterns and heart rate, or their cursor or eye movements across a screen.[45] It also includes data applied to make inferences about

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43. The value proposition here is that better prediction informs better strategies for action. The more an entity knows about a behavior or attribute and the effect of a proposed intervention on that behavior (or attribute), the more effectively it can convert prediction into a desired outcome (e.g., watching more Netflix, buying more products of the right kind on Amazon, driving longer hours on Lyft, being charged the highest price one is willing to pay in an ad exchange). Increased efficacy can refer to a variety of comparative advantages in modulating behavior toward a desired goal. Greater prediction value can produce interventions that are more accurate, more subtle, more widely deployed, more quickly deployed, etc. The particular usage of prediction value will depend on the setting in which it is being used and the desired goal.

44. See, e.g., Paul M. Schwartz & Daniel J. Solove, The PII Problem: Privacy and a New Concept of Personally Identifiable Information, 86 N.Y.U. L. Rev. 1814, 1828, 1832, 1841–45 (2011) (detailing competing definitions of personally identifiable information (PII), including the limitation that PII is understood as solely information about one specific person).

45. See Ifeoma Ajunwa, The Quantified Worker 139 (2023) (describing a hiring company that uses AI to analyze vocal and facial expressions such as "brow furrowing, brow raising, [and] the amount eyes widen" (internal quotation marks omitted) (quoting Ivan Manokha, How Using Facial Analysis in Job Interviews Could Reinforce Inequality, PBS News Hour: Making Sen$e (Oct. 7, 2019), https://www.pbs.org/newshour/economy/making-sense/how-using-facial-recognition-in-job-interviews-could-reinforce-inequality (on file with the *Columbia Law Review*))). See generally Annette Bernhardt, Lisa Kresge & Reem Suleiman, U.C. Berkeley Labor Ctr., Data and Algorithms at Work, The Case for Worker Technology Rights (2021), https://laborcenter.berkeley.edu/wp-content/uploads/2021/11/Data-and-Algorithms-at-Work.pdf [https://perma.cc/VX7S-QULV] (describing how employers use social data like keystroke tracking and real-time location monitoring to surveil workers).

people—such as changes in light patterns from pixels of a smart television screen or local weather data. This Article uses "social data" because it better expresses the view that data is (almost) always produced for what it can reveal about people, not individual persons.[46] It thus readily expresses the notion that data is used and is useful in the aggregate and is valued for its repurposable, aggregative, and relational properties.[47] "Social data" also avoids some semantic traps of the term "personal data," which can be defined expansively but is commonly defined far more narrowly in the many privacy laws that use it. Thus, "social data" is both more accurate and invokes the correct common intuitions about the concept.

One limitation of the term "social data" is that it may indeed be too expansive, covering many forms of data that are not obviously about people.[48] Given the pervasive issue of "personal data" definitions failing to capture relevant forms of data use, proceeding from a more expansive view may be a welcome corrective. Moreover, if "social data" covers many forms of data that are not obviously about people (until that data is used to infer or act on human behavior in a particular application), this is not a prima facie disqualifier for the term. Rather, it is a relevant feature of social data that in turn implies conceptual and normative criteria for its appropriate regulation.

Another limitation may cut the other way: The concept leaves out forms of data value that do not derive from understanding, predicting, or intervening on human behavior. Other data may be valuable for its capacity to predict things that have nothing whatsoever to do with human action. This Article takes no issue with this claim. Although such data may indeed produce value, it is at least plausible that such data production produces less social disruption and transformation, and thus its cultivation poses less salient or novel legal issues. Given that digital technology companies themselves focus on human-derived or human-applied data, and that critical, scholarly, and policy-oriented communities similarly focus

46. See Viljoen, Relational Theory, supra note 6, at 609–12; see also Natasha Singer, Just Don't Call It Privacy, N.Y. Times (Sept. 22, 2018), https://www.nytimes.com/2018/09/22/sunday-review/privacy-hearing-amazon-google.html (on file with the *Columbia Law Review*) (arguing that congressional hearings on large corporations' privacy policies should focus on how the data is used, not individual privacy concerns).

47. See Viljoen, Relational Theory, supra note 6, at 609–12.

48. One strong form of this claim is that it is unclear if any kind of modifier on "data" is needed at all. If we define "social data" as "any physical world observation rendered in datafied form that goes on to be used to derive insight regarding human action and behavior," then it becomes hard to imagine what data being produced *doesn't* fall within this definition. Or, if such data exists, that it is (economically, normatively, legally) trivial. However, showing the (plausible and interesting) proposition that the subset "social data" also contains the set "data" is not the project of this Article. For now, this Article assumes there is some subset of "data" composed of "social data," as defined above, and that it is this subset that is the Article's subject of inquiry. The authors thank Thomas Streinz for first drawing our attention to this intriguing point.

on the effects of datafication on human action and social life, this Article constrains its inquiry to human-related data.

It is also important to note that although the term is useful as an analytic category, if directly carried over into a legislative context, "social data" could easily suffer from some of the same issues that plague "personal data." This is because whether one focuses on data that is "personal" or "social," data about people is not a quality or category that is inherent to data. It is instead a determination that must be made *about* data, one that requires more information about the context, purpose, and processes that guide its collection and use.[49] In this way, determining that data is "social" is akin to legal rules whose application require fact-specific inquiries. So, whether social data qualifies as such (let alone whether it is collected and used in appropriate ways) cannot be a predetermined definitional exercise. One cannot observe different categories of information—such as TV streaming data, biometric data, locational data, household energy usage data, city water flow data, or weather data—and a priori determine which types of data, as a category, are personal or social, and which are not (although some may have greater propensity to be used as personal or social data based on what value-seeking strategies motivate their collection and use). Thus, "social data" is not an assessment of the type of data being collected alone. Social data also depends on the contexts in which it is collected and used. The reasons and the purposes of the data's collection structure how it is cultivated and stored and are informed by and constrain its use. Indeed, social data may be better understood as a category of action than as a category of object—an act that endows the thing being used (materialized stores of information) with the relevant set of properties (social insight into human behavior).

So, "social data" is a definitional shorthand for the concept that human-relevant data value (and risk) is not about persons, but about people. But there are other terms out there.[50] Ultimately, this Article is more interested in the underlying concept than any one semantic signifier

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49. This feature of "social data" is heavily influenced by Helen Nissenbaum's theory of privacy as "contextual integrity." See generally Helen Nissenbaum, Privacy in Context: Technology, Policy, and the Integrity of Social Life (2010). But while contextual integrity calls upon social context to engage in normative inquiry, we are merely interested in descriptive inquiry regarding data about people—namely, how entities cultivate it and use it to produce value. This inquiry prefigures any normative evaluation of ways data has been put toward the project of apprehending people and intervening in their actions and whether such data sharing is wrongful. "Social data" in our usage is thus a descriptive category of information, not a normative account of what makes information flows appropriate.

50. See Cohen, Between Truth and Power, supra note 4, at 48–50 (describing the data flows about people as the "biopolitical public domain"); Neil Richards, Why Privacy Matters 24–25 (2021) (favoring the term "human information" because it "refers us back to the human beings whose information is being used in some of the technologies that are the hallmark of the digital age").

for it. If the reader prefers another term for this underlying concept, then it can be substituted in.

2. *Defining Prediction Value.* — This Article uses the term *prediction value* for the specific form of use value entities derive from the systematic cultivation of social data. It indexes the value of being able to infer or more accurately predict future actions or effects. The prediction value of social data lies in the capacity of data to materialize apprehension and convert it into control: It confers upon its holder the capacity to exert a desired effect on future behavior. Capacity is not the same thing as using that capacity. Similar to power in the physical sense, prediction value, stored via social data, is a *potential* to convert into an effect (the exploitation of data's prediction value via use).

Social data is thus the material store (or medium) of prediction value. Its production materializes the latent predictive value of human activity for other human action so that it can be stored, used, reused, aggregated, and recombined with other data (other media of prediction value) across time and context, and mined for different kinds of insights and interventions.[51] Merging data with other data is a way to combine and compound prediction value. Analyzing data is a way to tap into and exploit prediction value. Artificial intelligence (AI) and machine-learning models trained on data demonstrate one significant way that companies distill prediction value into a defined (and generalizable) product.

Prediction value is derived from data's relational character. Because people are social beings who are like one another, who are the products of social formation, and who construct their self-identity in dialogue with others, datafied traces of observed actions and behaviors of the many have something meaningfully predictive to say about anyone.[52] Data stores represent a stem-cell-like proto-asset that can be reapplied and specialized to predict behavior across a variety of settings.[53]

The general observation that information produces social control, and that this in turn can be exploited for commercial gain, is not novel. What this Article calls "prediction value" builds on related concepts in prior works. Shapiro identifies how platforms engage in worker surveillance to cultivate "calculative rationalities," which platforms exploit to manage worker behavior and maximize their own gain.[54] Kean Birch,

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51. Cultivating data is less of a "harvesting" process than it is a "manufacturing" process. The "complete" picture of human activity is not replicated like some digital twin or mirror. The process is more one of an engineered, synthetic distillation of human activity that reflects the goals of data production. See, e.g., Cohen, Between Truth and Power, supra note 4, at 56 (describing data mining as generating new techniques and capabilities that distill troves of social data into "Big Data").

52. See Viljoen, Relational Theory, supra note 6, at 609–10.

53. See id. at 589–90 & n.25.

54. Aaron Shapiro, Between Autonomy and Control: Strategies of Arbitrage in the "On-Demand" Economy, 20 New Media & Soc'y 2954, 2968 (2018). Shapiro develops the notion of asymmetries in his work on "platform sabotage," a term he uses to describe

DT Cochrane, and Callum Ward detail how platforms express value from personal data indirectly to investors and other market actors through "user metrics."[55] Birch and others have written extensively on "assetization" and informational value,[56] and sociologists Thomas Beauvisage and Kevin Mellet extend this assetization account to personal data.[57] Economist Cecilia Rikap details the "intellectual monopolization" of power among the world's largest companies through the systematic concentration of knowledge and "planning capacity" that, she argues, extends these companies' power over the economy beyond their legally-owned access.[58] Niels Van Doorn and Adam Badger discuss the "speculative value" of gig platforms that configure data as a financial asset based on the expectation that data-driven analytics will later realize as efficiency gains.[59]

Mainstream economic theory has taken a renewed interest in prediction value, though economists are decidedly mixed on whether prediction value is a good thing. Jean Tirole details how "managing the flow of information about individuals' behavior" allows entities to "achieve social control," which he argues can both promote prosocial behavior and

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platforms' use of data and computation to derive value through strategically inserted inefficiencies in the market encounters they facilitate. Shapiro, Platform Sabotage, supra note 21, at 204.

55. See Kean Birch, DT Cochrane & Callum Ward, Data as Asset? The Measurement, Governance, and Valuation of Digital Personal Data by Big Tech, Big Data & Soc'y, Jan.–June 2021, at 1, 11, https://journals.sagepub.com/doi/epdf/10.1177/20539517211017308 [https://perma.cc/FKA8-ZWJW] [hereinafter Birch et al., Data as Asset?].

56. See, e.g., Ctr. for Int'l Governance Innovation, Rethinking Canada's Competition Policy in the Digital Economy (2023), https://www.cigionline.org/static/documents/2023_Rethinking_Canadas_Competition_Policy.pdf [https://perma.cc/6UZU-R2NV]; Kean Birch & Callum Ward, Assetization and the 'New Asset Geographies', 14 Dialogues in Hum. Geography 9, 9–23 (2024); Kean Birch & D.T. Cochrane, Big Tech: Four Emerging Forms of Digital Rentiership, 31 Sci. as Culture 44, 48 (2022); Kean Birch, There Are No Markets Anymore: From Neoliberalism to Big Tech, Transnat'l Inst. (Feb. 3, 2023), https://www.tni.org/en/article/there-are-no-markets-anymore [https://perma.cc/W7C3-2QWF]. Birch and others distinguish the process of assetization from commodification: Although they can be exchanged, assets are not produced for their exchange value (i.e., to be bought and sold) but instead to secure durable economic rents (investment and return) through the ownership and control of an asset. Kean Birch & Fabian Muniesa, Introduction: Assetization and Technoscientific Capitalism, *in* Assetization: Turning Things Into Assets in Technoscientific Capitalism 1, 2–3 (Kean Birch & Fabian Muniesa eds., 2020).

57. Thomas Beauvisage & Kevin Mellet, Datassets: Assetizing and Marketizing Personal Data, *in* Assetization, supra note 56, at 75, 77 ("We argue that the ability to capitalize personal data in the present is the result of a versatile and uncertain process of assetization.").

58. Cecilia Rikap, From Global Value Chains to Corporate Production and Innovation Systems: Exploring the Rise of Intellectual Monopoly Capitalism, 7 Area Dev. & Pol'y 147, 155 (2022) [hereinafter Rikap, Intellectual Monopoly Capitalism]; see also Cecilia Rikap, Capitalism as Usual?, 139 New Left Rev. 145, 159 (2023) [hereinafter Rikap, Capitalism as Usual?].

59. Niels van Doorn & Adam Badger, Platform Capitalism's Hidden Abode: Producing Data Assets in the Gig Economy, 52 Antipode 1475, 1476–77 (2020). Part II below discusses the transformation of prediction value into exchange value in greater detail.

"destroy the social fabric."[60] Glen Weyl and others argue that "free" online services lead us to systematically under-incentivize and maldistribute data value; to correct these issues, they argue for treating the market for data like a labor market.[61] Importantly, Alessandro Bonatti explores how data's relational character influences data acquisition and monetization strategies among platforms, including how they strategically use data not only to improve matches but to bolster market power.[62]

Indeed, astute observers have been developing accounts of social data's capacity to cultivate power and value for some time.[63] In her 1988 ethnography of computerizing workforces, Shoshanna Zuboff describes how these workplaces were deriving value not from automating but from "informating"—datafying worker actions rather than simply automating workers away.[64] Oscar Gandy's seminal 1993 work *The Panoptic Sort* details a "system of power" developed from social data and used to "coordinate and control [people's] access to the goods and services that define life in the modern capitalist economy."[65] Gandy detailed how tracking institutions also enacted a distinct view of social life: They are concerned not with cataloging the self-conceptions of groups or individuals but instead with identification (categorization for institutional utility),

60. Jean Tirole, Digital Dystopia, 111 Am. Econ. Rev. 2007, 2007 (2021) (emphasis added).

61. See Posner & Weyl, supra note 41, at 234–39, 246–49; Imanol Arrieta-Ibarra, Leonard Goff, Diego Jiménez-Hernández, Jaron Lanier & E. Glen Weyl, Should We Treat Data as Labor? Moving Beyond "Free", 108 Papers & Proc. Am. Econ. Ass'n 38, 40–41 (2018) ("[Large tech companies] benefit from the free or extremely cheap availability of data. . . . [U]sers aware of the value of their data would likely demand compensation in a range of settings, dramatically reducing the share of value that could be captured . . . .").

62. See Alessandro Bonatti, The Platform Dimension of Digital Privacy 22 (May 23, 2023), https://www.nber.org/system/files/chapters/c14782/c14782.pdf [https://perma.cc/W77G-KWS9] (unpublished manuscript).

63. For several older works, see supra notes 27–28. James Beniger's seminal work *The Control Revolution* came out in 1986. James R. Beniger, The Control Revolution: Technological and Economic Origins of the Information Society 89–91 (1986) (describing the evolution of social control and social production of meaning).

64. The authors thank Dan Greene, Nathan Beard, Tamara Clegg, and Erianne Weight for pointing to this example. Daniel Greene, Nathan Beard, Tamara Clegg & Erianne Weight, The Visible Body and the Invisible Organization: Information Asymmetry and College Athletics Data, Big Data & Soc'y, Jan.–June 2023, at 1, 3, https://journals-sagepub-com.ezproxy.cul.columbia.edu/doi/epdf/10.1177/20539517231179197 [https://perma.cc/HFK7-ZXPZ].

65. Oscar H. Gandy, Jr., The Panoptic Sort: A Political Economy of Personal Information 29 (2d ed. 2001) [hereinafter Gandy, Panoptic Sort]; see also Oscar H. Gandy, Jr., Coming to Terms With the Panoptic Sort, *in* Computers, Surveillance, and Privacy 132, 133 (David Lyon & Elia Zureik eds., 1996) ("The panoptic sort is a complex discriminatory technology. It is panoptic in that it considers *all* information about individual status and behavior to be potentially useful in the production of intelligence about a person's economic value.").

classification ("the panoptic sort is a difference machine"), and assessment.[66]

3. *Prediction Value* Versus *Exchange Value*. — Social data production materializes and stores value (and risk) in ways that are distinct from and not always neatly transformed into exchange value.[67] Robert Babe provided an impressively prescient distillation of the problem: Money price states how much exchange value an informational commodity "contains" but is silent regarding what he calls its "quantity of information" (a concept loosely akin to what this Article calls its prediction value).[68] Data, in other words, is different.[69]

As Babe notes, for neoclassical economic theory (although not, importantly, older traditions) to make sense of informational value, it needs to be reduced to exchange value to be indexed and to "count" as value in economic terms. But social data "does not fulfil[l] the definitional or conceptual requirements of commodit[ies]" as understood by economists of the time.[70] Moreover, attempts to translate or reduce information's prediction value into such terms "obscures many essential properties of information, as well as consequences of informational exchange."[71]

These distinct properties also suggest diverse applications in which, as a general matter, one kind of value enjoys a relative advantage over the other. Prediction value would be well spent, for example, in allocating goods for which priced market allocation might be independently wrongful.[72] For example, one may think it wrong to affix a price to hearts for transplant, but this does not mean one would not value informational mechanisms to accurately identify which operating theaters need hearts and which may supply them. The same might be true in the reverse. For example, one may think the singular quality of artistic creativity and idiosyncrasy in aesthetic taste are intrinsically valuable, so one ought to resist allocating productive resources to artistic production based on

66. Gandy, Panoptic Sort, supra note 65, at 29.

67. Babe, supra note 27, at 41, 45.

68. Id. at 45.

69. The authors thank Thomas Streinz for this succinct distillation of this section's argument.

70. Babe, supra note 27, at 42.

71. Id.

72. For a discussion of a variety of policy areas in which critics have argued that the application of pricing and market allocation to guide social policy would be wrongful, see supra note 41; see also Rahel Jaeggi, What (If Anything) Is Wrong With Capitalism?, 54 S.J. Phil. (Spindel Supp.) 44, 55 (2016) (distinguishing quantitative and qualitative accounts of what makes the market allocation and organization of certain social functions and goods normatively wrongful); Salomé Viljoen, Informationalism Beyond Managerialism 126–28 (Feb. 15, 2024) (unpublished manuscript) (on file with the authors) ("The rich data inputs and infrastructures that sustain market machines if transposed into settings with different productive logics and more democratically determined goals may offer one way around, past, or beyond managerialism as a prevailing regulatory paradigm.").

prediction. In other words, one may not want to overfit how one produces future artistic work to predictions based on what people enjoyed in the past, even if such predictions are accurate and regularly updated for changing taste.[73] Instead, one may want to preserve the societal capacity to invest in and support artistic work that breaks new ground. Investments in artistic work via exchange value are better equipped—in theory at least—with the capacity to support and reward true novelty and creative inspiration.

In some ways, prediction value is *more* general than priced exchange value.[74] Prediction value can be converted into exchange value, but it need not convert into wealth directly to exert power or control, or to drive decisions.[75] Prediction value can exert social discipline on others and enact material outcomes or moral judgment that we do not currently express as market discipline (and perhaps could not so express even if we wanted to).

In other ways, prediction value is decidedly *less* general than exchange value. Prediction value of a given data point or dataset is contingent and unpredictable in ways that are unlike a more typical asset or commodity. Prediction value is not stable across contexts[76] and—as data ages, or is combined with other data, or new analytic techniques or technical applications are developed—prediction value may shrink or grow. Prediction value is (in some general sense at least) nonrivalrous, but it's also not straightforwardly fungible and thus not readily subject to traditional forms of transfer and redistribution. Marc Porat, an early information economist, said that information was, by nature, a "heterogenous commodity" that cannot be collapsed into one sector—like mining. For economists to make sense of it, he argued, they needed to think of the production, processing, and distribution of information goods and services as an *activity* rather than as a product.[77] While a growing

73. For a discussion of Netflix using social data to guide production of new content, see infra notes 154–155 and accompanying text.

74. See Babe, supra note 67, at 42 ("[N]eoclassicists' notions of 'market,' 'price,' 'value,' 'commodity,' 'demand,' 'supply,' and 'exchange' are but specialized instances of broader communicatory phenomena."). As Kenneth Arrow explained: "The meaning of information is precisely a reduction in uncertainty." Id. at 48 (internal quotation marks omitted) (quoting Kenneth J. Arrow, The Economics of Information, *in* The Computer Age: A Twenty-Year View 306, 306 (Michael L. Dertouzos & Joel Moses eds., 1979)).

75. See infra section II.A.3 for a discussion of using prediction value to gain or exert power.

76. Naturally, problems arise when social data resources have high predictive value for a given task, but the task is one for which using such data is inappropriate. Much like its analytic value, normative analysis of when predictive value may be legitimately spent is also not stable across contexts. See Nissenbaum, supra note 49, at 129 ("[T]here is . . . great complexity and variability in the privacy constraints people expect to hold over the flow of information, but these expectations are systematically related to characteristics of the background social situation.").

77. Marc Uri Porat, U.S. Dep't of Com., The Information Economy: Definition and Measurement 24 (1977). As Babe and others note, focusing on the inputs of information

number of economists are studying prediction value, and recent work offers empirical support for the gap between traditional accounts of data's value and firm behavior, far more empirical work is needed.[78]

4. *Prediction Value* Into *Exchange Value?* — As life becomes increasingly digitized and datafied, prediction value takes on a greater economic and conceptual significance. Many of the largest companies in the world have, at least in part, gotten that way by accumulating and exploiting prediction value. This in turn puts general market pressure on *other* companies and entities to do the same thing to retain their market position against competitors.[79]

As some of the scholarship reviewed above suggests, companies face pressure to transform prediction value into exchange value, or at the very least translate prediction value into exchange-value terms for investors and, to a lesser extent, regulators. Yet not all prediction value is readily reducible to exchange value, and there are several reasons, both practical and normative, to resist attempts to do so.

Part II explores in greater detail how such transformation works: what is lost and entrenched in the process, what is the effect on the political economy of prediction value, and what are some legal issues that arise along the way. Prediction value confounds traditional approaches to regulating and apprehending value in law. This is a problem insofar as many areas of law (following the "if there's no price, there's no value" view) do not register, apprehend, or count as significant forms of value production that do not readily convert into exchange value.[80] As Part II surveys, many legally and normatively relevant decisions regarding the

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production alone (the activity) still only partially captures total prediction value. See Babe, supra note 67, at 41–42.

78. For current research into this topic, see generally Alessandro Acquisti & Hal R. Varian, Conditioning Prices on Purchase History, 24 Mktg. Sci. 367 (2005); Aileen Nielsen, Measuring Lay Reactions to Personal Data Markets, 2021 Proc. Ass'n for Computing Mach. Conf. on A.I. Ethics & Soc'y 807; Susan Athey, Christian Catalini & Catherine Tucker, The Digital Privacy Paradox: Small Money, Small Costs, Small Talk (Nat'l Bureau Econ. Rsch., Working Paper No. 23488, 2017), https://www.nber.org/system/files/working_papers/w23488/w23488.pdf [https://perma.cc/6F2M-TFY5]; Alessandro Acquisti, The Economics of Privacy at a Crossroads (July 2023), https://www.nber.org/system/files/chapters/c14785/c14785.pdf [https://perma.cc/R3AR-59AS] (unpublished manuscript); Bonatti, supra note 62; Aileen Nielsen, Whose Data, Whose Value? Simple Exercises in Data and Modeling Evaluation and Implications for Tech Law and Policy (June 7, 2023), https://ssrn.com/abstract=4434409 [https://perma.cc/SA6D-G9LJ] (unpublished manuscript); Catherine Tucker, The Economics of Privacy: An Agenda (June 10, 2023), https://www.nber.org/system/files/chapters/c14781/c14781.pdf [https://perma.cc/L86Z-NMS9] (unpublished manuscript).

79. See Sadowski, When Data Is Capital, supra note 29, at 1.

80. Ronald Coase was a very astute observer of how a great deal of firm activity and production prefigured pricing. See Sanjukta Paul, On Firms, 90 U. Chi. L. Rev. 579, 603–06 (2023) (explaining that under Coase's account, firms arise to decrease the transaction costs inherent to "the price mechanism" (internal quotation marks omitted) (quoting Coase, supra note 15, at 390)).

information economy and its effects on the social world occur well before prediction value converts into exchange value, if it ever converts at all.

C. *Why Datafy? And Why Take Data Value Seriously?*

Focusing on data's prediction value helps home in on two questions. First, *why* are companies using time, money, and energy to collect data to begin with? And second, if managing access to information has always been a source of power, why is it worth paying particular attention to prediction value, in the form of social data, *now*? These questions prefigure many of the disruptions and legal issues that result from commercial surveillance, and that have received sustained popular and scholarly attention.

Entities looking to exert influence have long used the controlled management of information to engage in worldmaking and to understand and shape human behavior.[81] But only recently has it been economically feasible to mine, store, and generate prediction value at scale.[82] In other words, it takes a particular set of conditions for the accumulation of prediction value to become an imperative of commercial competitive success. These conditions include innovations in the cultivation, storage, transfer, aggregation, and combination of social data,[83] and improvements in data science and machine-learning techniques to derive insights from large data flows and to apply them via trained models. Together, these improvements all contribute to the feasibility and utility of exploiting social data for prediction value at scale.[84]

These innovations in turn allow entities to exploit for economic value that which has long been true: People are social beings, deeply knowable and materially influenced by our relations to one another. This capacity

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81. See Sarah E. Igo, The Known Citizen: A History of Privacy in Modern America 71–83 (2018) (charting long trends of informatization and knowledge access as power, such as the development of the Social Security Board and Administration); Chris Wiggins & Matthew L. Jones, How Data Happened: A History From the Age of Reason to the Age of Algorithms, at xi–xiv (2023) (providing a historical account of data as an instrument of worldbuilding and a means of allocating power); see also Graeber & Wengrow, supra note 9, at 364–65.

82. Consider a simple analogy to energy. In its natural form, as water, lightning, sun, and wind, energy has always existed and has long been known to be a useful source of power. But it was only over the course of the nineteenth century that people developed the techniques to store and transmit energy (and obtained the necessary economic conditions to make the mass adoption of such techniques feasible). This is when energy's capacity or power to do work in the physical sense (i.e., to generate heat and light) could play a transformative role in the political economy.

83. Cohen provides an in-depth review of the rise of these historical and technological conditions. See Cohen, Between Truth and Power, supra note 4, at 8–9.

84. See David L. Rogers, The Digital Transformation Playbook: Rethink Your Business for the Digital Age 99–100 (2016) [hereinafter Rogers, The Digital Transformation Playbook] (describing how advances in chip manufacturing and data processing has made it easier to take better advantage of data analytics).

for social data to be stored, mined, and exploited for prediction value, which in turn leads to hegemonic market pressure to datafy social life for exploitation and accumulation, is what demarcates informational capitalism from its predecessors.

Here a reader might raise one plausible objection: If much of what companies claim as "prediction value" is in fact nothing more than speculation and legal maneuvering, then arguments that take the existence of this value seriously may concede too much to claims that value is, indeed, being created from the datafication of social life. The appropriate response, it follows, to the question "why datafy" is to reject the premise that datafication can produce social and economic value, and instead to emphasize and center its corrosive effects on individual autonomy and the epistemic justice issues raised by the platform economy's distortionary effects on knowledge production.

The relation between knowledge production, profit accumulation, and power preoccupies several observers. For example, Zuboff is clearly concerned with issues of epistemic justice that arise from the walled gardens and skewed paths of platform knowledge formation.[85] Others raise concerns about the challenges of cultivating self-knowledge and the capacity for self-formation in the shadow of such "surveillance empires."[86] Still others (including one of the authors of this Article) consider the impact that the private curation of social knowledge forms has on public scientific inquiry and the future of social scientific work.[87]

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85. See Shoshana Zuboff, Opinion, The Coup We Are Not Talking About, N.Y. Times (Jan. 29, 2021), https://www.nytimes.com/2021/01/29/opinion/sunday/facebook-surveillance-society-technology.html (on file with the *Columbia Law Review*) ("In an information civilization, societies are defined by questions of knowledge—how it is distributed, the authority that governs its distribution and the power that protects that authority. . . . Surveillance capitalists now hold the answers . . . though we never elected them to govern. This is the essence of the epistemic coup."); see also Lauren Jackson, Shoshana Zuboff Explains Why You Should Care About Privacy, N.Y. Times (May 21, 2021), https://www.nytimes.com/2021/05/21/technology/shoshana-zuboff-apple-google-privacy.html (on file with the *Columbia Law Review*) (last updated May 24, 2021) ("Instead of this being a golden age of the democratization of knowledge, it's turned into something very different from what any of us expected. The last 20 years have seen, especially the last decade, the wholesale destruction of privacy." (internal quotation marks omitted) (quoting Shoshana Zuboff)).

86. See, e.g., Brett Frischmann & Evan Selinger, Re-Engineering Humanity 30 (2018) ("When outsourcing becomes habitual, we become dependent on a third party for getting stuff done. At the extreme, dependency can result in deskilling. We can forget how to perform a task or become less capable of doing it. Or, we can lose the motivation to increase our knowledge and skills.").

87. See Christopher J. Morten, Gabriel Nicholas & Salomé Viljoen, Researcher Access to Social Media Data: Lessons From Clinical Trial Data Sharing, 39 Berkeley Tech. L.J. 109, 112 (2024) ("[W]hen platforms themselves wield absolute control over which researchers get access to data (and how much, and on what terms), platforms can thwart critical research and shape the literature that emerges by selectively providing access to data."); Jathan Sadowski, Salomé Viljoen & Meredith Whittaker, Everyone Should Decide How Their Digital Data Are Used—Not Just Tech Companies, 595 Nature 169, 169–70 (2021)

Strategies of social data value accumulation and knowledge economy distortion are related. After all, in the flurry of activity that accompanies the datafication of social life, companies *are* engaged in worldbuilding, creating a peculiar kind of knowledge of the social world that crowds out, destroys, and replaces others.[88] What's more, entities are acting on and enacting that knowledge back onto the world in ways that are both inscrutable and, perhaps worryingly, quite powerful. These concerns, while important, are not the central focus here. This Article is concerned with the political economic factors *driving* these developments.

Social data does not exist in the ether. It costs money to collect and store and analyze. Data centers must be rented, staffed, and kept cool.[89] Engineers and designers must be hired to design the technology environments in which data is collected. Privacy managers must be retained to bring such environments into compliance.[90] Data scientists must be hired to make sense of data and use it.[91] It is undoubtedly true that some amount of these costs invoiced against future prediction value are puffery and speculation.[92] So why are companies spending so much time, effort, and money on social data? At least part of the answer is *because* social data is indeed valuable to them, in some form or another, for some reason or another. Companies are not, as a rule, engaged in "anti-democratic" knowledge production for no reason, or due to conscious

(describing how private actors gatekeeping data interferes with researchers' ability to conduct their work).

88. For an entertaining and accessible argument that technology platforms destroy systems of meaning, erode expertise and trust, and replace knowledge with informational proxies, see generally Neil Postman, Technopoly: The Surrender of Culture to Technology (1992).

89. See Dan Greene, Landlords of the Internet: Big Data and Big Real Estate, 52 Soc. Stud. Sci. 904, 909 (2022) ("Data center landlords install, manage, maintain, and optimize tenants' servers; taking over tasks that carrier hotels leave to clients. This is the physical business arrangement for the cloud."); see also Steven Gonzalez Monserrate, The Cloud Is Material: On the Environmental Impacts of Computation and Data Storage, MIT Schwarzman Coll. of Computing (Jan. 27, 2022), https://mit-serc.pubpub.org/pub/the-cloud-is-material/release/1 [https://perma.cc/C4LV-C59D] (describing how data centers consume vast amounts of carbon, water, and electricity to cool and remain operational).

90. Ari Ezra Waldman, Industry Unbound 15–44, 101 (2021) (detailing the role of privacy compliance offers inside technology companies and the larger role of compliance in enforcing privacy law on the ground).

91. The average data scientist makes over $100,000 a year. Average Data Scientist Salary, PayScale, https://www.payscale.com/research/US/Job=Data_Scientist/Salary [https://perma.cc/4ZXT-G4VE] (last visited Feb. 19, 2024). The data analytics company Stitch identified more than 11,400 employees identified as data scientists on LinkedIn in 2015 and found that the number of data scientists in the economy had doubled from four years prior. The State of Data Science, Stitch, https://www.stitchdata.com/resources/the-state-of-data-science/ [https://perma.cc/P5VG-7UE3] (last visited Feb. 19, 2024).

92. Cf. supra note 21 and accompanying text.

malevolence.[93] Indeed, to understand those effects, it's worth thinking deeply about their causes.

* * *

Separating out the study of data's prediction value from its exchange value may prove helpful to understanding some challenges law faces in governing social data production and the political economy organized around such production.

As an initial matter, the primary project of Parts II and III is to distinguish prediction value from exchange value. This distinction helps to diagnose how and why entities go about cultivating, storing, and exploiting social data for gain, and how these activities meet, challenge, and transform legal forms. Clarifying the two modes of value production may also help index the chicanery that is, admittedly, rampant among certain corners of the digital economy, where overblown claims of how these two forms of value relate to one another may be used to obscure and befuddle.[94] Part II considers how companies translate or transform prediction value into exchange value.

II. THE BUSINESS OF SOCIAL DATA

Social data as a value form has encouraged the growth of business models and corporate behaviors that leverage prediction value to produce both wealth and power for companies and their investors. These business models and behaviors have important normative and legal implications. The capacity of existing law to grapple with those implications varies and is, in many cases, inadequate. This Part begins by cataloging three scripts that companies take when leveraging prediction value. It describes the business models and practices that have emerged as companies pursue these three scripts, which have important normative and legal implications. It then explores some of the business practices that companies use to accumulate social data—in particular, practices that focus on growth and expansion often at the expense of current profits. This Part highlights all of these business models and practices and their important normative and legal implications.

To be clear, data is important to the digital economy, but it is not the sole source of value nor is its acquisition and use the sole cause of contemporary digital firm strategies. While this Article argues that the importance of social data to business strategies has been underappreciated, it is not arguing that all value of digital companies is data value. This Part's primary aim is to provide a granular and reasonably

93. Zuboff, Surveillance Capitalism, supra note 30, at 513 ("Surveillance capitalism's antidemocratic and antiegalitarian juggernaut is best described as a market-driven coup from above.").

94. See supra note 20 and accompanying text.

systematic accounting of the various ways platforms and other firms may use data to produce value (and power). Nothing about this account should be read to suggest that data is the only driver of value in the digital economy. Indeed, it may not even be the largest driver of value; that is an empirical question beyond the scope of this Article. What this Part does argue is that data value is an important form of use value, whose cultivation prefigures several strategies to transform that value into profit. Many firms in the digital economy deploy these strategies in their various forms.

A. *The Three Scripts*

This section catalogs three scripts that companies take when attempting to leverage prediction value, as well as the business models and practices associated with those paths. These three scripts are not mutually exclusive. Companies may engage in different scripts at different points in their corporate lives. Some companies may never engage in some of the scripts. Some companies may engage in multiple scripts simultaneously. These companies may either engage in multiple scripts within a single business line or, perhaps more commonly, may operate in multiple business lines that are engaging in different scripts.

The first script is direct conversion of prediction value into exchange value.[95] This direct conversion transforms data about people into money for companies through means such as targeted advertising. The second script is indirect conversion of prediction value into exchange value by leveraging prediction value to improve products and services, reduce costs, develop new products and services, and expand into different business lines and industries.[96] The third script is not directly focused on converting prediction value into exchange value. Instead, in the third script, companies focus on transforming data about people into power for companies.[97]

1. *Script One: Directly Converting Prediction Value Into Exchange Value.* — Companies primarily achieve the first script—the direct conversion of prediction value into exchange value—either through the sale and license of social data or through targeted advertising.[98]

The sale and license of social data are the most obvious and legible way that companies can convert social data into money.[99] The data

95. See infra section II.A.1.

96. See infra section II.A.2.

97. See infra section II.A.3.

98. As discussed in the following section, the ability to predict and modify behavior that undergirds the premium charged for targeted advertising is also essential to pursuing the second script. See infra section II.A.2.

99. See Douglas B. Laney, Infonomics: How to Monetize, Manage, and Measure Information as an Asset for Competitive Advantage 13 (2018); see also Cohen, Between Truth and Power, supra note 4, at 48–74 (describing the development of the market for data about people, including data brokerage businesses); Sarah Lamdan, Data Cartels: The Companies that Control and Monopolize Our Information 12–15 (2023) (describing how

brokerage industry was valued at $247.4 billion in 2022.[100] The industry is predicted to grow to $407.5 billion by 2028.[101] The global market for location data alone was estimated to be $12 billion in 2021.[102]

While sale or license is the most apparent means of directly monetizing social data, it is not the most common means of direct monetization. The transformation of social data into an income-producing asset for companies can take many other forms.[103] In reality, targeted advertising is the largest source of direct data monetization for companies.[104]

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publishing companies like Westlaw and Lexis have transformed into data analytics companies "selling raw data, and . . . structured information made from that raw data" allowing them to "multiply[] their existing information troves"); Bruce Schneier, Data and Goliath 51–53 (2015) (summarizing the history and practices of the data brokerage industry). In addition to the sale and license of data, companies also use their data to barter with other businesses for goods and services. Laney, supra, at 29.

100. Harsha Kiran, 10 Data Broker Statistics You Need to Know, Techjury: Blog, https://techjury.net/blog/data-broker-statistics/ [https://perma.cc/UQT2-MWXG] (last updated Jan. 2, 2024).

101. Id.

102. Jon Keegan & Alfred Ng, There's a Multibillion-Dollar Market for Your Phone's Location Data, The Markup (Sept. 30, 2021), https://themarkup.org/privacy/2021/09/30/theres-a-multibillion-dollar-market-for-your-phones-location-data [https://perma.cc/FT3U-GBEP] (identifying forty-seven companies that are major players in the location data industry).

103. See Laney, supra note 99, at 11 ("Let's dispel the notion right away that information monetization . . . is just about selling your data. It's much broader than that."); Birch & Muniesa, supra note 56, at 2 (identifying the process of capitalist transformation of data into revenues as deriving "durable economic rent" from data and defining rent as "the extraction of value through the ownership and control of an asset").

104. See Duncan McCann, New Econ. Found., I-Spy: The Billion Dollar Business of Surveillance Advertising to Kids 6 (2021), https://iapp.org/media/pdf/resource_center/i_spy_the_billion_dollar_business_of_surveillance_advertising_to_kids.pdf [https://perma.cc/7R8W-7BNA] (discussing targeted advertising as the "primary business model of many digital companies"); Beauvisage & Mellet, supra note 57, at 77 ("The online marketing and advertising industries are a striking example of the dynamics of data assetization . . . ."); Viljoen, Relational Theory, supra note 6, at 586–97 (describing the ability to "predict . . . [and] influence behavior" as the biggest source of revenue for tech companies, with advertising comprising the majority of that revenue); Zuboff, Surveillance Capitalism, supra note 30, at 27–196 (tracing the beginnings of "surveillance capitalism" through Google's initial development of targeted advertising technology). As is explored in greater detail below, in reality, targeted advertising is a more complex example. See infra sections II.A.2–.3. It implicates not only the first script but a range of strategies to exploit prediction value. The intended focus here is the direct markup, or additional amount, platforms can charge advertisers for a targeted ad as opposed to an untargeted one. This markup presents (in theory) a direct exchange value amount companies are willing to pay for the superior prediction value offered by a targeted ad. Script two strategies include using prediction value to improve a platform's advertising product by nudging users or experimenting with how ads are presented to maximize the likelihood that users will click. See infra section II.A.2. And script three strategies include accumulating consumers' purchasing and other online behaviors to exert desired behavioral changes or to secure positions of market power. See infra section II.A.3.

Data about people allows companies to target their advertisements to the individuals who are most likely to be interested in the product.[105] Strollers are advertised to pregnant women but not teenage boys. Dutch ovens are advertised to avid cooks but not people who live on microwave dinners. Nicholas Negroponte presciently foresaw the potential of targeted advertising in the mid-1990s.[106] He presented the example of digital technology facilitating a person in the market for a car receiving nothing but car ads and, additionally, having those ads geographically tailored to include sales from local dealers.[107] Social data collection by companies has enabled Negroponte's predictions to come to fruition. Social media platforms like TikTok collect data not only on their users' activities on the platform but also track their movements across hundreds of thousands of other websites, thus allowing them to gauge potential purchases and offer advertisers access to users with purchase intents that match the advertisers' products.[108]

Targeted advertising is a central way in which companies are able to take the prediction value that they draw from social data and turn it into exchange value. Companies can earn money by extracting social data, analyzing that data to divide people into categories based on salient features, and then auctioning ad space at a premium based on the premise that those ads are properly targeted to the most relevant people.[109] For many tech companies, this means of leveraging prediction value constitutes the lion's share of their revenues. For example, more than seventy-five percent of Alphabet's revenues came from online advertising in 2023.[110] Even more stark is Meta Platforms, Inc., in which 98.6% of the

105. See Schneier, supra note 99, at 53–54 ("If you know exactly who wants to buy a lawn mower . . . you can target your advertising to the right person at the right time, eliminating waste. . . . And if you know details about that potential customer . . . your advertising can be even more effective."); Joseph Turow, The Daily You: How the New Advertising Industry Is Defining Your Identity and Your Worth 74–76 (2011) (explaining the development of behavioral targeting in advertising).

106. Nicholas Negroponte, Being Digital 179–80 (1995).

107. Id.

108. Shoshana Wodinsky, TikTok Will Use Your Data to Fuel Its Multibillion-Dollar Shopping Mall—Whether You Know It or Not, MarketWatch (Oct. 25, 2022), https://www.marketwatch.com/story/tiktok-will-use-your-data-to-fuel-its-multibillion-dollar-shopping-mall-whether-you-know-it-or-not-11666653414 (on file with the *Columbia Law Review*).

109. See Nick Srnicek, Platform Capitalism 56–57 (2017) (describing this process of transforming user data into advertising from targeted revenues); Zuboff, Surveillance Capitalism, supra note 30, at 63–98 ("[Google] thus created . . . an asset class of vital raw materials . . . . At first those raw materials were simply 'found' . . . . Later those assets were hunted aggressively and procured largely through surveillance. [Google] simultaneously created a new kind of marketplace in which its proprietary 'prediction products' . . . could be bought and sold."); Hal R. Varian, Online Ad Auctions, 99 Am. Econ. Rev. 430, 430 (2009) (explaining the mechanics of online advertising auctions by search engine companies).

110. Alphabet, Inc., Annual Report (Form 10-K) 11 (Jan. 31, 2024).

company's revenues came from advertising in 2023.[111] Targeted advertising directly translates prediction value into exchange value for companies. They are essentially selling to advertisers their capacity to predict which products will be most salient to specific consumers.[112]

2. *Script Two: Indirectly Converting Prediction Value Into Exchange Value*. — Companies transform data about people directly into revenue through the sale and license of data, as well as targeted advertising. But these methods of direct conversion are not the only means by which companies convert data about people into company revenues. In general, companies use social data to expand and improve their existing business operations. Through this expansion and improvement, companies will (eventually) increase revenues and profits, thus indirectly converting prediction value into exchange value. This emphasis on data accumulation and analysis is most strongly associated with Big Tech.[113] As many of the examples in this section will demonstrate, however, using prediction value to improve and expand business operations is not limited to tech companies.

This section divides the means of indirect conversion into three categories and describes some of the business practices associated with each.[114] These categories are: (a) lowering costs, (b) increasing and stabilizing revenues, and (c) expanding business operations.

a. *Lowering Costs*. — The predictive capacity of social data allows companies to lower their costs. As this section makes clear, some of these cost-lowering methods are benign while others are more controversial.

Prediction value can allow companies to identify inefficiencies in their production. As Erik Brynjolfsson and Andrew McAfee explained, "The data revolution has turned customers into unwitting business consultants,

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111. See Meta Platforms, Inc., Annual Report (Form 10-K) 60 (Feb. 2, 2024). The company acknowledges in its annual report that "[w]e generate substantially all of our revenue from advertising." Id. at 18.

112. Srnicek, supra note 109, at 57 ("What is sold to advertisers is therefore not the data themselves . . . but rather the promise that . . . software will adeptly match an advertiser with the correct users when needed.").

113. See, e.g., Michael Schrage, MIT Initiative on the Digit. Econ., Rethinking Networks: Exploring Strategies for Making Users More Valuable 1 (2016), https://ide.mit.edu/wp-content/uploads/2017/10/Rethinking-Networks_0.pdf?x19853 [https://perma.cc/S6G2-TWHB] (quoting "media infopreneur" Tim O'Reilly, who coined the term "Web 2.0," as stating that "[a] true Web 2.0 application gets better the more people use it" and explaining that "Google gets smarter every time someone clicks on an ad . . . [a]nd it immediately acts on that information to improve the experience for" others).

114. These categories and their accompanying descriptions are not meant to be exhaustive. This section highlights some of the prominent ways that companies in the digital economy use social data value, focusing on practices with particularly important legal and normative justifications. It also aims to acknowledge the existence of both harmful business practices and socially beneficial ones.

as our purchases and searches are tracked to improve everything from websites to delivery routes."[115]

By identifying and eliminating these inefficiencies, companies are able to streamline their operations and lower costs. These productivity gains are often broadly beneficial. For example, social data that allows grocery stores to more accurately predict the exact state of ripeness that consumers prefer for their bananas and to adjust their purchase and delivery timing accordingly would increase the grocery stores' sales, prevent food waste, and provide consumers with optimally delicious bananas.

The healthcare industry is one area where data analysis has been used to identify and streamline inefficiencies and achieve productivity gains.[116] Intel recently partnered with a French hospital and used big data analytics to produce fifteen-day predictions of emergency visits and hospital admissions, which then allowed the hospital to plan their staffing to meet the anticipated needs.[117] The hospitals should, therefore, be able to lower their costs by not overstaffing during slower periods. And the patient experience should be improved by ensuring adequate staffing when they receive treatment.

Companies' use of prediction value to lower costs have also led to more controversial techniques. Efforts to streamline production and maximize productivity based on social data can lead to what Zephyr Teachout refers to as "extreme Taylorism."[118] Social data applied to extreme monitoring of workers has allowed longstanding principles of worker management to be applied with a far greater degree of precision and pervasiveness. Employers can use data in real time to increase or decrease pay based on the employee's efficiency. For example, they may

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115. Erik Brynjolfsson & Andrew McAfee, The Big Data Boom Is the Innovation Story of Our Time, The Atlantic (Nov. 21, 2011), https://www.theatlantic.com/business/archive/2011/11/the-big-data-boom-is-the-innovation-story-of-our-time/248215/ (on file with the *Columbia Law Review*) (emphasis omitted).

116. See Sabyasachi Dash, Sushil Kumar Shakyawar, Mohit Sharma & Sandeep Kaushik, Big Data in Healthcare: Management, Analysis and Future Prospects, 6 J. Big Data, no. 54, 2019, at 1, 22–24 (explaining ways in which the healthcare industry is converting the potential of big data to "bolster the existing pipeline of healthcare advances").

117. Kyle Ambert, Sébastien Beaune, Adel Chaibi, Luc Briard, Amit Bhattacharjee, Venkatesh Bharadwaj, Krishna Sumanth & Kathleen Crowe, Intel, White Paper: French Hospital Uses Trusted Analytics Platform to Predict Emergency Department Visits and Hospital Admissions 1 (2016), https://www.intel.com/content/dam/www/public/us/en/documents/white-papers/french-hospital-analytics-predict-admissions-paper.pdf [https://perma.cc/35HP-763Y].

118. Zephyr Teachout, Algorithmic Personalized Wages, 51 Pol. & Soc'y 436, 442 (2023) [hereinafter Teachout, Algorithmic Personalized Wages]. Taylorism, also called "scientific management," is an approach to labor management aimed at maximizing labor productivity. See Frederick Winslow Taylor, The Principles of Scientific Management 12 (1911). Pioneered by Frederick Winslow Taylor at the end of the nineteenth century, it is associated with close monitoring of workers to deter, detect, and correct inefficiencies, and, in some cases, pay based on the worker's specific output. Id.

be able to detect multitasking and decrease pay accordingly—or even reward or penalize employees based on their attitudes, as detected by software tracking facial expressions.[119]

Extreme Taylorism is just one form of the broader controversial practice of algorithmic wage discrimination.[120] Gamification is the practice of applying behavioral science to use scoring, competition, and rewards (in place of higher wages) to motivate employees.[121] One example of gamification comes from DoorDash. DoorDash pays drivers extra if they succeed in "challenges," which typically involve completing a set number of deliveries in a set period of time, along with other possible requirements.[122] Studies have shown that these techniques induce workers to work longer hours, or attract similar numbers of workers, for lower pay overall.[123]

Behavioral price discrimination is the practice of adjusting wages based on factors unrelated to employees' productivity at work. Factors such as employees' health status, or even their credit scores, gathered outside of the workplace, could be used by companies to differentiate wages.[124]

Dynamic labor pricing is another possible means of algorithmic wage discrimination. While dynamic labor pricing is used in response to supply and demand imbalances, evidence from Veena Dubal and others suggests that companies can respond to those imbalances with real-time wage adjustments based on social data value.[125] For example, wage experimentation may be used by companies to pinpoint personalized or near-personalized reserve price wages to accomplish the highest levels of productivity for the lowest labor costs under dynamic conditions of shifting supply and demand.[126] Gamification or other behavioral techniques are

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119. Teachout, Algorithmic Personalized Wages, supra note 118, at 442.

120. Veena Dubal, On Algorithmic Wage Discrimination, 123 Colum. L. Rev. 1929, 1952–61 (2023).

121. Teachout, Algorithmic Personalized Wages, supra note 118, at 442–43.

122. How Dasher Pay Works, DoorDash, https://help.doordash.com/dashers/s/article/How-is-Dasher-pay-calculated?language=en_US (on file with the *Columbia Law Review*) (last visited Feb. 21, 2024).

123. Dubal, supra note 120, at 1952–61; Christopher L. Peterson & Marshall Steinbaum, Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy, 90 U. Chi. L. Rev. 623, 633–34 (2023) (detailing the practice of offering drivers disadvantageous rides in the context of bonus challenges, "knowing that drivers will only accept the trips to attain the bonus").

124. Teachout, Algorithmic Personalized Wages, supra note 118, at 443.

125. Id. at 443–44; see also Dubal, supra note 120, at 1934 & n.15 (simplifying Teachout's taxonomy to "wages based on productivity analysis alone," as is the case with extreme Taylorism, and "wages based on productivity, supply, demand, and other personalized data intended to minimize labor costs").

126. Teachout, Algorithmic Personalized Wages, supra note 118, at 444–45. Uber chief economist Jonathan Hall and coauthors confirmed that, at a certain point, drivers get decreasing returns from working longer hours. Dubal, supra note 120, at 1970; see also Peterson & Steinbaum, supra note 123, at 631 (detailing how in markets in which drivers

then used in concert with personalized wages to meet demand in the most cost-efficient way. By experimenting with dynamic price setting, Uber has found that it can "prod drivers into working longer and harder—and sometimes at hours and locations that are less lucrative for them."[127]

A common feature of these methods is that they are enabled by accumulating social data and applying it to predict and manage worker behavior and responsiveness. As the examples above show, evidence suggests these social data value techniques may induce labor supply even at inefficient (from the perspective of the worker) price levels. Thus, the role of social data in the context of algorithmic wage discrimination has particularly important normative and legal implications. Brishen Rogers has argued that the practices of worker surveillance that allow for algorithmic wage discrimination and accompanying reductions in overall wages result in class disempowerment.[128] And Dubal has argued that the practice of algorithmic wage discrimination goes against the norm of equal pay for equal work that serves as the basis for many of the country's antidiscrimination laws, as well as the general norm of fairness within the wage setting.[129] While these practices are currently most common in the context of the gig economy, they are moving to more traditional employment settings.[130]

Companies use prediction value to lower their costs in various ways—some beneficial, others more harmful. On the other side of the balance sheet, companies can convert prediction value to exchange value by increasing or, in some instances, stabilizing their revenues.

b. *Increasing and Stabilizing Revenues.* — Social data offers companies insights that they can use to increase or stabilize revenues.[131] Stabilizing revenues refers to avoiding a decline in revenue due to lost customers or

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were able to set their own prices in lieu of Uber, "pay for drivers increased substantially while prices charged to customers did not change").

127. Dubal, supra note 120, at 1949 (internal quotation marks omitted) (quoting Noam Scheiber, How Uber Uses Psychological Tricks to Push Its Drivers' Buttons, N.Y. Times (Apr. 2, 2017), https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html (on file with the *Columbia Law Review*)).

128. Brishen Rogers, Worker Surveillance and Class Power, LPE Project Blog (July 11, 2018), https://lpeproject.org/blog/worker-surveillance-and-class-power/ [https://perma.cc/WE75-QX3N] [hereinafter Rogers, Worker Surveillance].

129. See Dubal, supra note 120, at 1957–61. For further discussions of the legal and normative impacts of algorithmic wage discrimination, see generally Alex Rosenblat, Uberland: How Algorithms Are Rewriting the Rules of Work (2018); Peterson & Steinbaum, supra note 123.

130. Zephyr Teachout, Surveillance Wages: A Taxonomy, LPE Project Blog (Nov. 6, 2023), https://lpeproject.org/blog/surveillance-wages-a-taxonomy/ [https://perma.cc/ZQK2-NUBP].

131. See Viljoen, Relational Theory, supra note 6, at 589 (noting that techniques designed to predict behavior "point toward new avenues of growth for the data economy"); Rogers, The Digital Transformation Playbook, supra note 84, at 107–08.

a need to lower prices. Companies can indirectly convert prediction value into exchange value by utilizing both of these strategies.

Companies can apply insight from social data to optimize their business operations in ways that increase revenues. For example, by consolidating and analyzing databases, retailer Dollar General discovered a pattern of customer purchases peaking near closing time.[132] The company inferred from this that later store hours would better accommodate customer needs and saw a 9.5% increase in sales within a year.[133]

Prediction value can also result in companies increasing their revenues by accessing new streams of potential customers. Fintech is an important example of this. Fintech platforms leverage a wide array of social data and machine-learning techniques to make consumer-lending decisions.[134] The social data used by fintech companies moves beyond measures that have traditionally been used by financial institutions, such as income and credit scores, and incorporates alternative data into their lending decisions.[135] This alternative data can range from personal health information to data gleaned from social media activity.[136] The prediction value that comes from this data allows fintech companies to extend credit to borrowers who might not qualify absent this additional social data.[137] Tapping this new stream of customers increases their revenues.[138]

The examples discussed thus far are uses of prediction value to increase revenues that are mutually beneficial to companies, consumers, and at times, society more broadly. But other uses of prediction value to increase revenues can produce more ambiguous outcomes. A central example is the way that social data can enable predatory pricing behaviors.

These predatory pricing behaviors take a couple of flavors. The first is price discrimination. Economist Joseph Stiglitz explains, "Data can be used to extract consumer surplus by charging different customers different prices . . . . Companies that prosper are not those that are most efficient and that do the best job satisfying customers but those that are

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132. Laney, supra note 99, at 40.

133. Id.

134. See Christopher K. Odinet, Consumer Bitcredit and Fintech Lending, 69 Ala. L. Rev. 781, 788–90 (2018) (providing an overview of fintech lending business models).

135. Marco Di Maggio, Dimuthu Ratnadiwakara & Don Carmichael, Invisible Primes: Fintech Lending With Alternative Data 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29840, 2022), https://www.nber.org/system/files/working_papers/w29840/w29840.pdf [https://perma.cc/2XEF-6MHZ] (identifying the use of alternative data as a "key feature" of fintech business models).

136. Odinet, supra note 134, at 785.

137. Di Maggio et al., supra note 135, at 26.

138. This is also an example of reducing costs because the better decisionmaking reduces rates of default. Id.

best at exploitation, at extracting this consumer surplus."[139] Social data gives companies the capacity to predict consumer behavior in a way that allows them to charge close to the maximum amount that the consumer would be willing to pay, versus setting the same price for all consumers.[140] In *Texas v. Google*, for instance, the State alleged that Google induced advertisers to bid their true value to develop detailed predictions of each advertiser's personalized willingness to pay.[141] The company then overrode preset price floors to use advertisers' true bids against them by secretly generating unique and custom per-buyer floors based on what buyers had bid in the past.[142] While each individual transaction between customer and company under such conditions is still, in theory, locally efficient, it does mean that at least some consumers will face higher prices for identical products. Moreover, as Stigliz notes, the general practice of such price discrimination can be harmful to overall market efficiency in the longer term, especially in the context of proprietary exchange mechanisms where such prices are not subject to public scrutiny.[143]

Companies use various forms of social data to predict consumer behaviors in order to engage in price discrimination. Online consumers can be identified through a variety of means, such as cookies, which allow companies to track consumers' digital footprints. These digital footprints allow companies to predict purchasing preferences.[144] Merely knowing the physical location of the online shopper can allow for price discrimination because the online seller can tailor their price to those in local brick-and-mortar stores.[145] Amazon has the capacity to collect data on behaviors such as a consumer hovering a mouse over a product or viewing a product multiple times, which can then allow Amazon to display higher prices for the consumers it believes are most likely to purchase the product.[146] And

139. Julia Angwin, How AI Could Undermine an Efficient Market Economy, The Markup: Hellow World Newsl. (June 25, 2022), https://themarkup.org/newsletter/hello-world/how-ai-could-undermine-an-efficient-market-economy/ [https://perma.cc/9DZY-S49V] (internal quotation marks omitted) (quoting Joseph E. Stiglitz).

140. Id.; see also Andy Fitch, Different People, Different Prices: Talking to Joseph E. Stiglitz, L.A. Rev. Books (Jan. 24, 2020), https://blog.lareviewofbooks.org/interviews/different-people-different-prices-talking-joseph-e-stiglitz/ [https://perma.cc/6AQA-B4S6].

141. See Second Amended Complaint at 86, Texas v. Google LLC, No. 4:20-CV-957-SDJ (E.D. Tex. Filed Aug. 4, 2021), 2021 WL 4146613 ("Google deployed a bid optimization scheme based on predictive modeling . . . [and] [w]ith this new bid optimization, ... Google re-engineered its ability to trade ahead of its rivals.").

142. Id. at 65–66.

143. For further discussion of the impact of data and AI on market efficiency, see generally Joseph E. Stiglitz, People, Power, and Profits: Progressive Capitalism for an Age of Discontent (2019).

144. See Akiva A. Miller, What Do We Worry About When We Worry About Price Discrimination? The Law and Ethics of Using Personal Information for Pricing, 19 J. Tech. L. & Pol'y 41, 45 (2014).

145. See Fitch, supra note 140.

146. See Rory Van Loo & Nikita Aggarwal, Amazon's Pricing Paradox, 37 Harv. J.L. & Tech. 1, 27 (2023).

while evidence on this behavior is extremely limited, some have even speculated that digital companies can listen to conversations via devices like Alexa to determine the price a consumer is willing to pay for a product.[147]

Another application of targeted price discrimination is companies identifying competitors' customers and offering those customers lower prices than they offer their established customers to lure them away from their competitors.[148] This ability to use price discrimination to lure in new customers is particularly problematic given yet another element of predatory pricing—manipulating customer behavior in ways that reduce customers' ability or likelihood to exit. Amazon, for example, uses both data from customers' past purchases and data on general purchasing behaviors to dynamically manage product price and presentation to exploit customers' behavioral biases.[149] This dynamic pricing and presentation, in turn, hinders customers' ability to find the lowest-priced products available on Amazon's website and to comparison shop with other retailers.[150] This inability to comparison shop both within and outside the platform limits consumers' ability to use traditional exit mechanisms to discipline Amazon. Thus, Amazon's use of social data value to engage in personalized pricing and presentation strategies stabilizes the company's revenues but also provides more opportunities to increase revenues via price discrimination.

This section has explored just a few of the ways in which companies are able to use prediction value to increase and stabilize revenues, thus converting prediction value into exchange value. The following section explores another means of indirect conversion of prediction value into exchange value—expanding business operations.

c. *Expanding Business Operations.* — Companies can leverage prediction value to expand business operations in a few different ways.[151]

147. Christopher R. Leslie, Predatory Pricing Algorithms, 98 N.Y.U. L. Rev. 49, 70–71 (2023); see also Maurice E. Stucke & Ariel Ezrachi, How Digital Assistants Can Harm Our Economy, Privacy, and Democracy, 32 Berkeley Tech. L.J. 1239, 1265–67 (2017) ("Given its ubiquity in the home, a digital assistant will have even more personal data, more opportunities to observe how users respond . . . and more opportunities to learn the right price point for that user.").

148. Leslie, supra note 147, at 72–73.

149. See Van Loo & Aggarwal, supra note 146, at 23–29.

150. Id.

151. See Laney, supra note 99, at 68 (identifying developing new products and services as a method of monetizing data); MIT Tech. Rev. Custom, The Rise of Data Capital 2 (2016), http://files.technologyreview.com/whitepapers/MIT_Oracle+Report-The_Rise_of_Data_Capital.pdf [https://perma.cc/5YMF-88C5] ("Data is now a form of capital, on the same level as financial capital in terms of generating new digital products and services."); Sadowski, When Data Is Capital, supra note 29, at 6 (identifying "build[ing] stuff" as one of the ways that value can be derived from data capital (emphasis omitted)). For discussion of the use of big data in new products through a case study of an electronics company, see

They could use insights from social data to better cultivate new products and services in order to enter new business lines within their own industries. Or they could use social data to expand their operations into entirely new industries.

With respect to developing new products and services within their own industries, prediction value allows companies to determine which offerings will be most desirable to customers by taking into account knowledge that the companies have on their preferences and needs from analyzing social data.[152] The prediction value derived from vast amounts of social data replaces traditional product-development strategies that relied on expert intuition and smaller data-gathering activities such as focus groups. This leads to a lower-risk and higher-efficiency approach to product development.[153] The companies are then able to garner revenues through these new products and services, all while needing to price in less risk and uncertainty associated with entering a new venture—thus indirectly converting prediction value into exchange value.

There are a multitude of examples of companies using social data to effectively expand within their own industries. Netflix became a creator of entertainment content rather than simply a streaming service for third-party content. Netflix entered the world of content creation with the advantage of social data on the viewing habits of millions of its subscribers. Through this social data, Netflix was able to predict factors that would lead to the success of newly created shows, such as the appeal of different subject matters and actors.[154] Its first original series, *House of Cards*, debuted in 2013 to great success, and the company continues to leverage prediction value when creating original content.[155] Food delivery services, such as DoorDash, have moved outside of restaurant delivery into grocery delivery. When DoorDash launched DashMart in 2020, commentators highlighted that its customer data, as well as its internal data on optimizing delivery, would give DoorDash a competitive edge in providing this new type of food delivery service.[156] Fintech is another area in which using

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generally Yuanzhu Zhan, Kim Hua Tan, Yina Li & Ying Kei Tse, Unlocking the Power of Big Data in New Product Development, 270 Annals Operations Rsch. 577 (2018).

152. Zhan et al., supra note 151, at 580 ("Companies that are able to recognise customers' latent needs and to have this data inform new product features or entire products will be much more likely to develop successful novel products." (citations omitted)).

153. See Rogers, The Digital Transformation Playbook, supra note 84, at 4–9 (describing ways in which digital business models diverge from traditional models particularly by enabling a dynamic customer feedback loop to foster rapid innovation).

154. Jon Markman, Netflix Harnesses Big Data to Profit From Your Tastes, Forbes (Feb. 25, 2019), https://www.forbes.com/sites/jonmarkman/2019/02/25/netflix-harnesses-big-data-to-profit-from-your-tastes/?sh=1aa093d266f (on file with the *Columbia Law Review*) (explaining that Netflix relied on algorithmic predictions of success based on subject matter, viewership trends, and appeal of actors when contracting for *House of Cards*).

155. Id. ("Netflix is quietly transforming the entertainment industry with data.").

156. Jessica Dumont, DoorDash Launches New Online Convenience Store DashMart, RetailDive (Aug. 6, 2020), https://www.retaildive.com/news/doordash-launches-new-

social data gathered through one service has been used to develop new products. Square began as a merchant-services provider before expanding into loans for small businesses.[157] Square uses data gathered from its merchant services technology, such as a business's volume and frequency of sales, to make its lending decisions.[158]

One noteworthy example of the use of prediction value to both streamline operations and better predict and supply new products is the use of social data by the fast-fashion company Shein. Like other online retail companies, Shein collects detailed information from its website and app on what items shoppers search for; which pages they spend time on; and how they respond to similar items shown by the site—which are typically personalized suggestions based on the shopper's prior searches on Shein or other sites.[159] This data, combined with data obtained through digital advertising, informs generalized insights linking changes in shopping patterns to predictions about new and growing trends. Shein is distinct in that it uses predictions about shifts in demand far more aggressively and systematically to streamline its operations.[160] It experiments with products identified as growing trends, and it then place larger orders with manufacturers based on analysis of which products show the greatest promise.[161] Manufacturers in turn have access to systems that monitor real-time demand and signal what items are likely to be ordered next.[162] Shein's combination of detailed customer behavioral tracking with data-intensive, on-demand manufacturing techniques allows the company to transform an uptick in shopper search keywords into a responsive style available for purchase in less than two weeks.[163]

Prediction value from social data gathered in one industry can also be used by companies to gain a competitive advantage as they expand into completely different industries. For example, an airline has leveraged

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online-convenience-store-dashmart/583047/ [https://perma.cc/ZD39-K7X4]; see also Chris Albrecht, With DashMart, DoorDash Is Creating Its Own Ghost Convenience Stores, The Spoon (Aug. 5, 2020), https://thespoon.tech/with-dashmart-doordash-is-creating-its-own-ghost-convenience-stores/ [https://perma.cc/K7ND-HS7B] ("In addition to keeping all the revenue from sales through DashMart, DoorDash also gets more data around customers and purchases and can better optimize its own inventories.").

157. Molefe Choane, How Square Capital Uses Traditional and Non-Traditional Data Sources to Extend Loans to Merchants, HBS Digit. Initiative (Mar. 23, 2021), https://d3.harvard.edu/platform-digit/submission/how-square-capital-uses-traditional-and-non-traditional-data-sources-to-extend-loans-to-merchants/ [https://perma.cc/C8XD-D63W].

158. Id.

159. The 'Secret Sauce' that Helps Shein Predict the Next Hot Trend Has Nothing to Do With AI, Company Exec Says, Bus. Insider (Aug. 18, 2023), https://www.businessinsider.com/the-secret-sauce-behind-sheins-on-demand-fashion-2023-8 (on file with the *Columbia Law Review*).

160. Id.

161. Id.

162. Id.

163. Id.

prediction value stemming from social data in its loyalty program, combined with data from users' wearable devices, to expand into the insurance industry.[164] TikTok and other social media companies have attempted to integrate shopping directly into their platforms, using data on users to predict the products they are most likely to buy.[165] This business model is referred to as "social commerce."[166] Verily, a life sciences company owned by Alphabet Inc., Google's parent company, entered the data-driven life sciences space with the advantage of Google's data processing power[167] and has since used its data to expand into the health insurance market.[168] Section II.B below addresses in more detail how using prediction value to gain competitive advantage in other industries drives many aggressive merger and acquisition strategies.

Companies using social data from one industry as an opportunity to expand into entirely new industries exemplifies the stem-cell-like nature of social data discussed in Part I above. Social data's predictive capacities arm the companies that accumulate it with advantages across broad swaths of the economy. Companies use prediction value stemming from social data to lower costs, increase and stabilize revenues, and expand business operations. Each of these methods of leveraging prediction value indirectly converts prediction value into exchange value by allowing companies to earn greater profits.

3. *Script Three: Converting Prediction Value Into Economic and Political Power.* — The first two scripts both involve social data being used to generate monetary exchange value for companies. Entities following these scripts leverage prediction value to achieve business profits, albeit in ways that may raise new legal and normative concerns or amplify preexisting ones as compared to how companies have pursued value in the past. The third script is different: Power is at the center of the third script.

In a sense, script three coming last in this Article's taxonomy is a bit misleading. The prior scripts can be viewed as a suite of options for companies to convert the power of prediction value into profitmaking activity: to exploit, spend, or use the general power stored via social data

164. Alex Koster & Konrad von Szczepanski, Building a Business From Data Is Hard—Here's How the Winners Do It, Bos. Consulting Grp. (June 24, 2020), https://www.bcg.com/publications/2020/how-winners-build-business-from-data [https://perma.cc/4RPC-GPBK] (noting that the airline paired frequent-flier and wearable device data to develop its insurance offering).

165. Wodinsky, supra note 108.

166. Id.

167. Sean Captain, Google Life Sciences Rebrands as Verily, Uses Big Data to Figure Out Why We Get Sick, Fast Co. (Dec. 7, 2015), https://www.fastcompany.com/3054352/google-life-sciences-rebrands-as-verily-uses-big-data-to-figure-out-why-we-get-si [https://perma.cc/M87J-YSHW].

168. Heather Landi, Alphabet's Verily Breaks Into Stop-Loss Health Insurance Market Backed by Swiss Re, Fierce Healthcare (Aug. 25, 2020), https://www.fiercehealthcare.com/payer/alphabet-s-verily-breaks-into-stop-loss-health-insurance-market-backed-by-swiss-re [https://perma.cc/L2SC-FW3U].

toward a specific (profit-enhancing) end. But script three describes how, in its primary form, prediction value confers the power to apprehend, shape, and thus exert some measure of control over people's (or other entities') future behavior on its holder.[169] This power does not need to be converted into exchange value via one of the strategies discussed above to be valuable to a firm. In the third script, the utility of social data as a factor of production is to produce and store a form of power that prefigures any single plan for how to put that power toward wealth creation.[170] Script three thus describes both the residual form of unconverted data value and prediction value's initial form.

Script three catalogues ways that the social data value is put toward strategies of innovation to *obtain*, *hold onto*, and *make the most of* market power.[171] Companies are of course ultimately interested in generating wealth and profits. But this drives companies not only to engage in the daily activity of profitmaking, as described in scripts one and two above, but also to engage in meta-strategies meant to help hold onto and maximize those profits,[172] their market position, and the business strategies they used to obtain such profits—in other words, to cultivate and retain market power.[173] The cultivation of data power via script three gives

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169. Again, these people or entities can be the data subjects from whom data is being collected, but they don't have to be. See supra Introduction, Part I (discussing social data).

170. Some readers and other scholars upon whose work this Article draws may reject the assertion that the third script is distinct from the second script. They could argue that all companies ultimately exist to earn profits, and any delay in converting prediction to exchange value is merely a strategy to achieve greater exchange value in the future. For the reasons articulated in this section, this Article contends that power alone is a driver of company behavior. Yet, the central argument—that various legal fields are failing to properly recognize social data as a value form and that these failures pose significant potential harms—holds even in the absence of the third script being a separate driver of company behavior.

171. This Article uses the term "market power" as defined by innovation economists: the ability of a company to insulate itself from conditions of competitive pricing. On this account, market power is the capacity for a firm to extract quasi-rents, defined as prices above what would be a competitive level. See Daniel Francis & Christopher Jon Sprigman, Antitrust: Principles, Cases, and Materials 49 (2023) ("Market power is the ability of an individual supplier to charge a price that is above the competitive level . . . .").

172. On firms' rational interest in creating conditions for the capture of quasi-rents and in pursuing strategies to increase the magnitude and extend the duration of quasi-rents, see Yochai Benkler, Power and Productivity: Institutions, Ideology, and Technology in Political Economy, *in* A Political Economy of Justice 27, 38 (Danielle Allen, Yochai Benkler, Leah Downey, Rebecca Henderson & Josh Simons eds., 2022).

173. In theory, market power may be obtained via (1) productivity-enhancing innovation that allows companies to do things their competitors cannot (i.e., technical or other forms of innovation that grow the proverbial pie); (2) distribution-shifting innovation, also called "sabotage," that enables companies to weaken or erode competitive conditions, insulating them from market discipline (i.e., innovation that reallocates the existing pie); and (3) strategies to influence political and regulatory conditions that would otherwise prevent or constrain quasi-rent extraction (or interfere with some other political aim). On firms pursuing strategies of both productivity and sabotage as a means to obtain market power, see Yochai Benkler, Structure and Legitimization in Capitalism: Law, Power and

companies flexibility to choose among these various options, or even to pursue multiple at once.

Systematic evidence linking firms' usage of data with specific innovation strategies or excess profits is still being developed, and debates about what conclusions can be drawn about these behaviors are ongoing.[174] Nevertheless, evidence exists to associate companies' aggressive accumulation of data value with strategies of innovation focused

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Justice in Market Society 9–11 (Oct. 26, 2023), https://ssrn.com/abstract=4614192 [https://perma.cc/NJ8U-WU6S] (unpublished manuscript).

On the sabotage account of using data power for innovation, see Kean Birch, Margaret Chiappetta & Anna Artyushina, The Problem of Innovation in Technoscientific Capitalism: Data Rentiership and the Policy Implications of Turning Personal Digital Data Into a Private Asset, 41 Pol'y Stud. 468, 468–79 (2020) (detailing the role of data assets in allowing firms to engage in innovation strategies of "data rentiership," extracting value from data via relationships of ownership and control rather than using it to deliver new products, services, and markets); see also Shapiro, Platform Sabotage, supra note 21, at 203–15 (applying the concept of sabotage to study relationships between gig workers and gig platforms). The notion that firms are indifferent between innovation that enhances productivity and forms of "sabotage" comes from Thorstein Veblen. See Thorstein Veblen, Absentee Ownership and Business Enterprise in Recent Times 181 (1923) ("[T]he business men who control industry [must] guard against an over-supply of their industrial output,—a running balance of sabotage on production with a view to maintain prices. It is the immediate effect of a surplus output . . . to inflate prices . . . reliev[ing] the need of this businesslike sabotage . . . ."); Thorstein Veblen, On the Nature and Uses of Sabotage 8 (1919) ("And the ways and means of this necessary control of the output of industry are always and necessarily something in the nature of sabotage—something in the way of retardation, restriction, withdrawal, unemployment of plant and workmen—whereby production is kept short of productive capacity.").

174. For example, some argue that innovations from data value use should be considered a form of true productivity-enhancing technological advance, while others argue these innovations are a form of rentiership that has not improved products or services but simply structured existing relationships to better facilitate rentiership. See Evgeny Morozov, Critique of Techno-Feudal Reason, 133/134 New Left Rev. 89 (2022) (arguing against the thesis that the dominance of large technology companies that lock users and workers into relations of data extraction and dispossession herald a form of "technofeudalism" and arguing that several business tactics of large technology platforms indicate investment in genuine technological improvements characteristic of classic capitalist investment); see also Cédric Durand, Scouting Capital's Frontiers: Reply to Morozov's 'Critique of Techno-Feudal Reason', 136 New Left Rev. 29 (2022) (describing how the technofeudal hypothesis complements alternative theories such as globalization and financialization); Rikap, Capitalism as Usual?, supra note 58, at 145 (arguing that the digital sector has created novel "relations of production" such that the capitalism-as-usual model characterizes not the digital economy as usual but rather a new form: "intellectual monopoly capitalism"); Timothy Erik Ström, Capital and Cybernetics, 135 New Left Rev. 23, 24 (2022) ("[N]either Morozov's same-as-ever capitalism nor Durand's technofeudalism succeed in grasping the novel dynamics of a capitalist sector founded on networked computing-machines, tracing its conception to the US military-industrial complex."); Jodi Dean, Same as It Ever Was?, New Left Rev.: Sidecar (May 6, 2022), https://newleftreview.org/sidecar/posts/same-as-it-ever-was [https://perma.cc/9VMU-KSEW] ("[T]he ongoing process of separation is not a 'going back' to historical feudalism, as Morozov would have it, but a reflexization, such that capitalist processes long directed outward—through colonialism and imperialism—turn in upon themselves.").

on rentiership, the excess profits of market power, and the persistence of oligopolies in the digital economy.[175] Companies also use the power cultivated via prediction value to evade or influence regulation.[176]

Beginning with rentiership, Birch and his coauthors argue that firms' strategies to accumulate data value via ownership and control of data assets present a source of rent-based market power from which firms may then extract excess profits.[177] Revisiting some of the earlier examples helps to break down this claim of data rentiership as a form of market power in finer detail. Consider for example Google's sale of access to data value in the form of targeted ads discussed in the first script. The increased price Google can charge for placing a targeted ad (as opposed to the price of an untargeted ad) is a script one account of data value—data value directly converted into exchange value. But Google is separately motivated to obtain large pools of data[178] and enclose that data, to produce more accurate (and thus more valuable) prediction value than potential competitors. This aggregate data pool itself is not converted into exchange value; the "prediction service" it allows Google to offer, discussed in the first script, is.[179] The technical and legal strategies Google uses to collect and protect its data (namely, to extend ownership and control over that data) are concerned with producing and holding onto a source of market power: an innovation asset pool that (in theory) gives Google an enduring edge over its competitors not just in ad placement but for any number of applications and future innovations.

In other words, the social data value itself gives Google a competitive edge.[180] Google's store of social data value *is* a source of power, separable from various strategies the company can pursue to take advantage of that power, including strategies to convert data value into exchange value in

175. See, e.g., Majority Staff of H. Subcomm. on Antitrust, Com. & Admin. L., H. Comm. on the Judiciary, 117th Cong., Investigation of Competition in Digital Markets 145 (Comm. Print 2020) (noting that Google reported profit margins more than three times that of the average U.S. firm in nine of the previous ten years); Pierre Collin & Nicolas Colin, Task Force on Taxation of the Digital Economy 44 (2013) (Fr.), https://nebula.wsimg.com/f722d8a16e3e827b1030e7608c1ff84e?AccessKeyId=44C040F42B9648A5BD88&disposition=0&alloworigin=1 [https://perma.cc/DK6N-KZHK] (noting high profit margins for most Big Tech firms); Shivaram Rajgopal, Anup Srivastava & Rong Zhao, Do Digital Technology Firms Earn Excess Profits?, Cal. Mgmt. Rev. (Nov. 19, 2020), https://cmr.berkeley.edu/2020/11/do-digital-technology-firms-earn-excess-profits/ [https://perma.cc/E8PY-WJY2] (finding that digital firms achieve large profit margins as compared to other industries).

176. See infra notes 204–211 and accompanying text.

177. Birch et al., Data as Asset?, supra note 55, at 12–13.

178. These strategies include aggressive acquisition of would-be competitors, discussed in section II.B.

179. Zuboff, Surveillance Capitalism, supra note 30, at 97–98.

180. As noted at the beginning of Part II, data value is not the only factor in how companies produce and maintain market power; companies also deploy strategies that have little or nothing to do with social data value. This point is merely meant to distinguish the account of data value being used in direct or indirect money-making for Google from data value's role in Google's strategies to maintain market power.

the form of (possibly excessive) profits. Indeed, some argue that digital platform companies like Google, which have amassed sufficiently large datasets and monopolized access to them, have a "self-perpetuating and expanding" capacity for prediction value to beget and maintain market power.[181] Rikap explains, "Data-driven intellectual monopolies base their innovations on processing big data with this artificial intelligence (AI) approach. Data-harvesting, centralization and analysis thus foster a cumulative advantage in terms of the ability to innovate."[182]

The trend of many dominant companies achieving extremely high market values despite running losses also suggests the general value of social data even absent its conversion into exchange value. For example, when Microsoft acquired LinkedIn in 2016, the firm was a loss company.[183] But it had a "network of 433 million professionals" and a massive amount of data on those users.[184] Microsoft paid $26 billion to acquire the firm.[185] And Amazon's market capitalization rapidly rose even in periods when it was reporting regular losses.[186] In other work, Birch and D.T. Cochrane identified the delayed expectation of future high profits typical of digital firms that have achieved market dominance as a new form of rentiership, which they describe as "expected monopoly rents."[187] Relatedly, one may reasonably take investors to be making a bet that companies will eventually

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181. Rikap, Intellectual Monopoly Capitalism, supra note 58, at 151. For others arguing that data strategies feature in tech platforms' capacity to engage in enduring forms of rentiership stemming from intellectual monopolization, see Cédric Durand, Techno-Féodalisme: Critique de L'économie Numérique (2020); Cédric Durand, Predation in the Age of Algorithms: The Role of Intangible Assets, *in* Accumulating Capital Today: Contemporary Strategies of Profit and Dispossessive Policies 149, 149–62 (Marlène Benquet & Théo Bourgeron, eds., 2021); see also Malcolm Harris, Are We Living Under 'Technofeudalism'?, NY Mag.: Intelligencer (Oct. 28, 2022), https://nymag.com/intelligencer/2022/10/what-is-technofeudalism.html [https://perma.cc/3CWH-7H9U] (discussing Durand's technofeudalism thesis in English).

182. Rikap, Intellectual Monopoly Capitalism, supra note 58, at 151; see also Cecilia Rikap, Amazon: A Story of Accumulation Through Intellectual Rentiership and Predation, 26 Competition & Change 436, 437–38 (2022).

183. Kerry Flynn, LinkedIn Earnings Are Just Fine Ahead of Microsoft Merger, Mashable (Aug. 4, 2016), https://mashable.com/article/linkedin-earnings-ahead-of-microsoft-merger [https://perma.cc/4HT7-UZVJ] (reporting that LinkedIn posted losses of eighty-nine cents per share in 2016 and fifty-three cents per share in 2015).

184. Sarah McBride, Microsoft to Buy LinkedIn for $26.2 Billion in Its Largest Deal, Yahoo! Fin. (June 14, 2016), https://finance.yahoo.com/news/microsoft-buy-linkedin-26-2-001104954.html [https://perma.cc/M6BT-EJCJ].

185. Id.

186. See Lina M. Khan, Note, Amazon's Antitrust Paradox, 126 Yale L.J. 710, 748–49 (2017) [hereinafter Khan, Amazon's Antitrust Paradox] (noting the trend of increasing company stock price in the face of losses and quoting an analyst as saying "Amazon's stock price doesn't seem to be correlated to its actual experience in any way" (internal quotation marks omitted) (quoting David Streitfeld, Amazon Reports Unexpected Profit, and Stock Soars, N.Y. Times (July 23, 2015), http://www.nytimes.com/2015/07/24/technology/amazon-earnings-q2.html (on file with the *Columbia Law Review*))).

187. Birch & Cochrane, supra note 56, at 50–51.

convert such prediction value into exchange value by following one of the strategies surveyed by the first and second scripts above.

Nevertheless, the fact that exchange value is realized at the investor level but not at the firm level is an atypical result that presents important challenges for legal regimes trying to govern such companies and their market behavior.[188] From the perspective of companies, it may incentivize the cultivation and accumulation of prediction value even in the absence of clear strategies for how to convert that value into profitmaking activity. Companies can frame their users and their users' data to investors as measurable assets in a process that scholars have described as "techcraft."[189] By presenting user metrics in a way that is legible to investors, companies transform social data and the prediction value it stores into an asset that investors take into account in the market valuation of a company.[190]

A growing number of scholars link monopolized access to data not to any single profitmaking strategy but to generalized forms of market power. For example, Stiglitz argues that corporations are deriving excess power and wealth based on their ability to exploit data, leading to a host of negative implications for market competition and society more broadly.[191] Rikap similarly argues that the concentration of knowledge in a handful of companies through their possession of large quantities of data has created "intellectual monopolies"; she has warned of the power implications of these monopolies for the future of innovation, knowledge production, and global development.[192] Economist Jean Tirole identifies the "soft control" that private companies, governments, and other organizations can achieve through control over social data.[193]

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188. Exchange value is realized at the investor level but not the company level when prediction value translates into increased market capitalization of companies but does not translate into company profits. See Amanda Parsons, The Shifting Economic Allegiance of Capital Gains, 26 Fla. Tax Rev. (forthcoming 2024) (manuscript at 28–43), https://ssrn.com/abstract=4152114 [https://perma.cc/BZ4F-WCRG] [hereinafter Parsons, Shifting Economic Allegiance] (explaining this phenomenon and its implications for tax law specifically).

189. See Birch et al., Data as Asset?, supra note 55, at 2.

190. See supra notes 54–59 and accompanying text (discussing the process of assetization of data).

191. See Stiglitz, supra note 143, at 120–37.

192. See Rikap, Capitalism as Usual?, supra note 58, at 159 ("Intellectual monopoly capitalism is therefore defined by a growing appropriation of society's knowledge, which enables the monopoly to exercise power over other firms and organizations."); Rikap, Intellectual Monopoly Capitalism, supra note 58, at 149 ("[M]ore than ever knowledge (cum innovation) is power and contemporary capitalism is driven by those monopolizing it.").

193. See Tirole, supra note 60, at 2011–12.

Legal scholars are also paying greater attention to the power of prediction value.[194] Julie Cohen constructs a forceful analysis of how technology, ideology, and the law have together produced power for informational capitalism's winners in her book *Between Truth and Power*.[195] In another work, Cohen argues that the power wielded by some platform firms has potentially tipped into a form of sovereignty.[196] Frank Pasquale highlights the ways in which tech firms have used "obfuscation and secrecy to consolidate power and wealth."[197] Katharina Pistor notes the unexpected outcome of oligopolic power in the digital economy.[198] Under a Coasean framework, Pistor argues, the declining transaction costs in the digital economy should lead to the decline of the firm and a turn to

194. For further discussion in the legal academic literature of the relationship between data and power, see Kapczynski, Informational Capitalism, supra note 31, at 1515 ("Our legal order, intertwined with the architecture of digital networks, has enabled the creation of vast new firms that wield new forms of surveillance and algorithmic power, but it also has delivered us a form of neoliberal capitalism that is inclined toward monopoly, concentrated power, and inequality."); Marian, supra note 31, at 550–51 (discussing the political power firms garner from the ability to engage in political microtargeting); Maurice E. Stucke, Should We Be Concerned About Data-Opolies?, 2 Geo. L. Tech. Rev. 275, 312–23 (2018) (outlining political power of "data-opolies" and its potential harms). See generally Lina M. Khan, Sources of Tech Platform Power, 2 Geo. L. Tech. Rev. 325 (2018) [hereinafter Khan, Tech Platform Power] (discussing forms of power held by platform businesses, including "information exploitation power," and challenges for the legal system in addressing those powers).

The centrality of power is not just a matter of academic theorizing. It is embedded in the culture of informational capitalism's major corporate players. For example, in the early days of PayPal, the firm developed an app that tracked how many people opened new accounts, dinging each time a new account was opened. The firm called the app the "World Domination Index." Max Chafkin, The Contrarian: Peter Thiel and Silicon Valley's Pursuit of Power 70 (2021). The concept of a "World Domination Index" is representative of the broader project of PayPal founder Peter Thiel—a project to shift the balance of power to these companies and their owners. And Thiel's project is not an idiosyncratic one—it has expanded to influence many in Silicon Valley. Id. at 14–17. The third script described in this section is in line with this project and worldview. See Will Davies, The Road From Mont Pelerin to Silicon Valley, Pol. Econ. Rsch. Ctr. (Oct. 17, 2022), https://www.perc.org.uk/project_posts/the-road-from-mont-pelerin-to-silicon-valley/ [https://perma.cc/T4JA-Y3GU] (discussing the desire for domination among Silicon Valley founders and the resulting belief that "there is the higher-order freedom of 'founders', which is far greater than the ordinary freedom to make choices, but really the freedom to construct whole social worlds").

195. Cohen, Between Truth and Power, supra note 4.

196. Julie E. Cohen, Law for the Platform Economy, 51 U.C. Davis L. Rev. 133, 199 (2017) [hereinafter Cohen, Platform Economy] ("Dominant platforms' role in the international legal order increasingly resembles that of sovereign states. And even as they evade the obligations of domestic legal regimes, platform firms are actively participating in the ongoing construction of new transnational institutions and relationships that are more hospitable to their interests.").

197. Frank Pasquale, The Black Box Society: The Secret Algorithms that Control Money and Information 14 (2015).

198. See Pistor, Rule by Data, supra note 31, at 101–04.

markets.[199] Yet instead, a small set of "Big Tech" firms have come to dominate the digital economy. Pistor links the power that Big Tech wields to their control of data and to data's prediction value.[200] She explains:

> [I]n the world of big data controlled by Big Tech, data are not primarily objects of exchange transactions; rather, they are both the source for and the means of *control* by Big Tech and their clients over others: consumers of goods and services, workers, voters, members in organizations, or whatever other targets they might choose.[201]

Pistor further explains that "[t]he worth of data does not lie in their exchange value but in the power they confer on data controllers"[202] and links this value to data's capacity to create "asymmetries of power."[203]

Social data power can also empower companies to achieve favorable political or regulatory goals.[204] For example, consider Uber's use of a program called Greyball.[205] Beginning in 2014, Uber used Greyball (which was approved by Uber's general counsel at the time) to skirt regulatory authorities by geofencing government buildings and "greyballing" users identified as (or suspected of being) law enforcement or city officials.[206] Greyball allowed Uber to evade detection in cities like Boston, Paris, Portland, and in countries like Australia and China—all places Uber was formally restricted or banned. The aim was to evade detection long enough to rapidly grow its user base in these municipalities and gain a competitive edge against incumbent transportation providers—in violation of local laws.[207] Once enough users began using Uber, the company could point to the popularity of the service as a fait accompli to regulators, making enforcement of existing regulations banning Uber unpopular and potentially politically costly. Indeed, in many instances,

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199. See id. (outlining the Coasean theory and the patterns of firm growth in the digital economy that are incongruous with that theory).

200. See id. at 105 ("In fact, power seems a better explanation for the rise of Big Tech than the standard transaction cost arguments.").

201. Id. at 104 (emphasis added).

202. Id. at 105.

203. Id. at 103. Economist Jean Tirole reached similar conclusions to Pistor. He identifies the "soft control" that private companies, governments, and other organizations can achieve through control over social data. See Tirole, supra note 60, at 2011–12.

204. For a more systematic account of how existing law has facilitated the cultivation of power among digital platforms as well as the way these companies are now attempting to use law to protect against countermovements to their rise in power, see Cohen, Between Truth and Power, supra note 4, at 11–13, 139–41 (summarizing the two parts of Cohen's account); Cohen, Platform Economy, supra note 196, at 204.

205. Mike Isaac, How Uber Deceives the Authorities Worldwide, N.Y. Times (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html (on file with the *Columbia Law Review*) [hereinafter Isaac, How Uber Deceived]; see also Mike Isaac, Super Pumped: The Battle for Uber 21–22, 270–71 (2019).

206. Isaac, How Uber Deceived, supra note 205.

207. Id.

Uber was able to successfully reach agreements to operate in cities after using Project Greyball to flout those cities' laws.[208]

Companies can use social data power to defy regulatory aims in more subtle ways. For instance, the example discussed above, drawn from research conducted by Rory Van Loo and Nikita Aggarwal, details how Amazon satisfies the technical requirement of offering low prices to consumers while using prediction value to hinder consumers' ability to easily search for and find the lowest priced goods.[209] Again, Amazon's use of prediction value to guide which goods are shown to which customers—and for what price—describes a strategy covered under the second script: using prediction value to increase profits by imposing transaction costs on consumers with behavioral techniques that make these tactics difficult for consumers to detect or to discipline.[210] Yet in adopting this strategy, Amazon is also simultaneously using prediction value to achieve a regulatory objective: gaining the benefits of extracting excess profits while (arguably at least) hewing to the letter of antitrust law. Christopher Peterson and Marshall Steinbaum chronicle how gig companies similarly use prediction value to engage in fine-grained management and control of workplace conditions that escape regulatory scrutiny under existing consumer protection and antitrust law.[211]

There is a long history in legal scholarship and beyond of caring about market power precisely because of its close relation to political power. Within tax law, for example, the concept that controlling value resources confers power has colored debates around normative justifications for the consumption and wealth taxes as well as the corporate tax. Numerous tax scholars have argued that a person's consumption is the ideal tax base from both an efficiency and equity perspective.[212] But a frequent critique of using consumption as a tax base is that it ignores the power the mere

208. Id. (detailing how two weeks after Uber began illegally dispatching drivers in Portland, Oregon, it reached an agreement with local officials to operate legally).

209. Van Loo & Aggarwal, supra note 146, at 11–23 (demonstrating how Amazon uses informational techniques, commonly regulated under consumer protection law, to manage its pricing strategies—allowing Amazon to maintain the perception of offering low prices while ensuring such low prices are difficult for consumers to access and find).

210. Id.; see also Dana Mattioli, Amazon Used Secret 'Project Nessie' Algorithm to Raise Prices, Wall St. J. (Oct. 3, 2023), https://www.wsj.com/business/retail/amazon-used-secret-project-nessie-algorithm-to-raise-prices-6c593706 (on file with the *Columbia Law Review*).

211. Peterson & Steinbaum, supra note 123, at 637–58 (detailing how coercive practices enabled by platform informational techniques in the rideshare industry raise both consumer protection and anticompetitive concerns).

212. See, e.g., William D. Andrews, A Consumption-Type or Cash Flow Personal Income Tax, 87 Harv. L. Rev. 1113, 1165–77 (1974) (arguing for adoption of a consumption-style tax based on "considerations of fairness and efficiency," as well as "feasib[ility]"); Richard L. Doernberg, A Workable Flat Rate Consumption Tax, 70 Iowa L. Rev. 425 (1985) (analyzing proposals for a consumption-style tax); Edward J. McCaffery, The Uneasy Case for Wealth Transfer Taxation, 104 Yale L.J. 283, 326 (1994) ("[I]f efficiency were the primary concern, then the consumption tax would seem to prevail under a technical analysis involving elasticities, general equilibrium, and so on.").

possession of wealth brings with it, regardless of whether that wealth is actually consumed.[213] More recently, the power stemming from the mere possession or control of something that is valuable has been cited as a rationale for imposing a wealth tax on individuals.[214] Tempering the level of resources under the control of corporate management and the accompanying economic and political power that resource control brings has also been put forward as a justification for the corporate tax.[215] Legal scholars outside of tax law, notably scholars of market regulation, have likewise cited the link between concentrations of economic resources and power, and the potentially negative ramifications for American democracy.[216]

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The three scripts that firms follow to leverage prediction value—directly converting prediction value to exchange value, indirectly converting prediction value to exchange value, and converting prediction

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213. See, e.g., Anne L. Alstott, The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery, 51 Tax L. Rev. 363, 371 (1996) ("The unavoidable difficulty is that private wealth remains a source of current social, economic and political power that goes beyond the potential use of wealth for consumption."); Barbara H. Fried, Who Gets Utility From Bequests? The Distributive and Welfare Implications for a Consumption Tax, 51 Stan. L. Rev. 641, 653 (1999) (highlighting the theory that people accumulate wealth "for the power or status that merely being wealthy brings them"); Edward D. Kleinbard, Capital Taxation in an Age of Inequality, 90 S. Cal. L. Rev. 593, 640 (2017) (arguing that power and prestige from wealth exist even absent the ability to consume that wealth in the future).

214. See, e.g., Jeremy Bearer-Friend, The Great Democracy Initiative, Restoring Democracy Through Tax Policy 10–11 (2018), https://rooseveltinstitute.org/wp-content/uploads/2021/08/GDI_Restoring-Democracy-Through-Tax-Policy_201812.pdf [https://perma.cc/3JVG-CB9Y] (arguing for federal wealth and transfer taxes to counter "concentrated political power of economic elites"); Ari Glogower, Taxing Inequality, 93 N.Y.U. L. Rev. 1421, 1445–50, 1467–68 (2018) (describing the relative economic power theory, which states that uneven concentrations of wealth and market power lead to uneven distributions of political and social power, and presenting a combined tax on income and wealth as a means to counter inequality).

215. See, e.g., Reuven S. Avi-Yonah, Corporations, Society, and the State: A Defense of the Corporate Tax, 90 Va. L. Rev. 1193, 1233–41 (2004) (outlining the mechanisms of corporate power and the role of political and economic power stemming from control over financial resources); see also Bearer-Friend, supra note 214, at 5 ("[T]he corporate tax also protects democratic values by serving as a regulatory device to counteract the unbridled powers of large businesses.").

216. See Ganesh Sitaraman, The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic 224 (2017) ("As wealth is concentrated in the hands of elites and corporations, they use their wealth and influence to rewrite laws and regulations in ways that help them amass even greater wealth and power."); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis, 129 Yale L.J. 1784, 1788–89 (2020) ("Government enacts the policy preferences of the rich over those of the majority . . . . Citizen frustration with this intertwined and increasing concentration of economic and political power is visible on the right . . . and on the left . . . .").

value into economic and political power—have precipitated certain business models and strategies that have become prevalent in the digital economy. This section has explored many of those business models and practices. The following section describes and analyzes some other prevalent business models and practices, focusing more specifically on practices targeted at the accumulation of social data.

B. *The Business Models and Practices of the Digital Economy*

Many of the business models and practices that typify the digital economy focus on growth and expansion.[217] While in many instances these growth-focused business practices further a company's pursuit of the different scripts discussed above, a central role of growth-focused business practices is to allow companies to accumulate social data. This accumulation could take the form of building up user and customer bases, thus securing streams of social data from them. Or it could take the form of directly acquiring social data from other companies. These growth and expansion strategies typically eschew profits (at least in the short or medium term) in favor of building up social data. The firms can then leverage the prediction value stemming from this data to achieve greater profits and power in the future. This section analyzes three business models and practices frequently pursued by firms in the digital economy that allow them to accumulate social data. The first is offering free or low-cost services to build up user and customer bases. The second is creating ecosystems of products and services that capture users and customers. The third is pursuing aggressive merger and acquisition strategies.

It is important to note at the outset that the business models discussed in this subpart most obviously connect with the pursuit of script three. This is because script three involves storing prediction value as a form of market power rather than converting prediction value into exchange value. The business models discussed in this subpart center around accumulating social data as well as establishing strong networks and market dominance to accumulate more social data in the future. But as will be highlighted throughout this section, some of these growth-and-expansion-focused strategies also further the other scripts.

1. *The Business of "Free".* — Profits are not the central motivator for emerging firms in the digital economy. These firms instead prioritize building up user and customer bases with the aim of achieving market dominance.[218] While market dominance brings with it many advantages

217. The aim of this section is not to provide an exhaustive account of the business models and strategies seen within informational capitalism. Instead, the section highlights some key strategies that are both particularly prominent within informational capitalism and significant for the legal regimes tasked with regulating these businesses.

218. See Collin & Colin, supra note 175, at 28–29 (explaining how firms in the digital economy prioritize gaining new users and achieving "traction"); Vijay Govindarajan, Shivaram Rajgopal & Anup Srivastava, Why Financial Statements Don't Work for Digital Companies, Harv. Bus. Rev. (Feb. 26, 2018), https://hbr.org/2018/02/why-financial-

for companies, the opportunity to accumulate social data is one reason for this advantage. As discussed above,[219] the predictive power of social data relies on the ability to collect and analyze broad swaths of social data. Because "big" data requires systematic monitoring of large numbers of people, digital firms need to accrue large user and customer bases before they can fully realize the predictive capacity of social data. Building up a collection of data subjects is a necessary first step for firms to compete in an informational capitalist economy.

Another reason that firms prioritize building up user and customer bases over profits has to do with the importance of platform business models within the digital economy. Platforms are important to the accumulation of social data because their technologies structurally facilitate tracking of users and data collection.[220] Platform businesses use technology to connect users in a wide variety of value-creating interactions.[221] And platforms are also heavily reliant on network effects for the success of their businesses.[222] When a new platform is launched, there is little reason for a new user to join the platform because there is not an existing network of users with whom to interact. For example, one would not want to join a social network platform without a robust network of users, such as family, friends, and celebrities, with whom to interact. After a critical mass of users is reached, however, positive network effects begin to take over, which can lead to rapid growth of the platform and market dominance.[223] At the point that this critical mass is achieved, digital firms can, in theory, exploit their dominant market positions and begin to reap monetary profits.[224] As political economist Jathan Sadowski explains,

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statements-dont-work-for-digital-companies [https://perma.cc/QAR5-ADZK] (describing "achieving market leadership" as "the most important aim" for digital firms).

219. See supra notes 43–58 and accompanying text.

220. See Srnicek, supra note 109, at 42–43 (explaining that platforms emerged out of a need to "monopolise, extract, analyse, and use" data); Cohen, Platform Economy, supra note 196, at 140–43 (describing the role of platforms in "the datafication of everyday life"); Khan, Tech Platform Power, supra note 194, at 329–30 (discussing platforms' ability to gather extensive amounts of data from their users' activities).

221. See Geoffrey G. Parker, Marshall W. Van Alstyne & Sangeet Paul Choudary, Platform Revolution 108–11 (2016) (describing four forms of excess value that the platform generates for consumers, producers, and third-party providers).

222. See Carl Shapiro & Hal R. Varian, Information Rules: A Strategic Guide to the Network Economy 13–14 (1999) (discussing the role of positive feedback and network effects in the information economy); Stucke, supra note 194, at 281–83 (describing the role of network effects for Big Tech companies); Michael L. Katz & Carl Shapiro, Systems Competition and Network Effects, J. Econ. Persps., Spring 1994, at 93, 93–95 (analyzing the role of network effects in consumer decisionmaking in communications and technology systems).

223. See Jeffrey H. Rohlfs, Bandwagon Effects in High-Technology Industries 27–28 (2013) (describing the positive feedback cycle that occurs once a network has achieved a critical mass); see also Tim Wu, The Master Switch: The Rise and Fall of Information Empires 49 (2010) ("In today's automated world, the larger the network, the better it is, because you can reach more people in more places.").

224. See supra notes 171–181 and accompanying text.

"The practice of acquiring data first—indeed, of designing things for the primary purpose of data extraction—and then (hopefully) figuring out how to valorise it later is now normal for organisations following the platform model."[225]

As a result, growing a network of users and customers is essential for digital firms, both to lock in access to flows of social data and to achieve the network effects necessary to reach market dominance. To achieve this growth, digital firms eschew profits, often for very long periods of time. One way they do this is by offering free services.[226] There is no fee to run a Google search, to post a photo to Instagram, or to stream music on Spotify. Firms offering free services to one group of customers will often still earn revenues in other ways, such as by selling targeted advertising[227] or charging a fee for premium versions of their services (known as the "freemium" business model).[228] Or they might engage in predatory pricing strategies, like those discussed above, to charge below-market prices to some customers and higher prices to others.[229] Despite the existence of these strategies, profit maximization is not the central goal for these digital firms—growth and its accompanying data collection are key.[230] For example, it was not until after its 2012 initial public offering (IPO) that Facebook began to expand its advertising sales.[231] The firm already had 800 million users at the time of the IPO.[232] This strategy of favoring growth over income can also be seen in acquisitions of digital firms when companies have sold for high market values despite not

225. Jathan Sadowski, The Internet of Landlords: Digital Platforms and New Mechanisms of Rentier Capitalism, 52 Antipode 562, 572 (2020) [hereinafter Sadowski, Internet of Landlords] (citing Marion Fourcade & Kieran Healy, Seeing Like a Market, 15 Socio-Econ. Rev. 9 (2016)).

226. See Zuboff, Surveillance Capitalism, supra note 30, at 52–53 (describing the provision of free services by digital firms and the framing of data surveillance as a quid pro quo for those services); Stucke, supra note 194, at 279 ("Most of Google's and Facebook's services for consumers are ostensibly 'free.'"); see also Chris Anderson, Free: The Future of a Radical Price 20–33 (2009) [hereinafter Anderson, Free] ("[A]ll forms of Free boil down to variations of the same thing: shifting money around from product to product, person to person, between now and later, or into nonmonetary markets and back out again.").

227. See supra notes 104–111 and accompanying text.

228. Anderson, Free, supra note 226, at 26–27 (describing the freemium business model).

229. See Leslie, supra note 147, at 75.

230. See Srnicek, supra note 109, at 97 ("Unlike in manufacturing, in platforms competitiveness is not judged solely by the criterion of a maximal difference between costs and prices; data collection and analysis also contribute to how competitiveness is judged and ranked.").

231. Collin & Colin, supra note 175, at 28; Rebecca Greenfield, 2012: The Year Facebook Finally Tried to Make Some Money, The Atlantic (Dec. 14, 2012), https://www.theatlantic.com/technology/archive/2012/12/2012-year-facebook-finally-tried-make-some-money/320493/ (on file with the *Columbia Law Review*).

232. Facebook, Inc., Registration Statement (Form S-1) 1 (Feb. 1, 2012), https://www.sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1.htm#toc287954_3a [https://perma.cc/X4ES-AWMG].

earning income.[233] While providing free services can lower digital firms' bottom lines, it allows them to secure large networks and streams of social data from those network participants.

Other digital firms might not offer entirely free services to potential users and customers but will offer low-cost services designed to build up their network and social data access, often taking substantial losses in the process. Amazon's business strategy is a leading example of this. Amazon launched Amazon Prime in 2005.[234] At an initial annual cost of seventy-nine dollars, the program offered free two-day shipping for customers, and other features have been added onto the program over the years, such as streaming video services.[235] Lina Khan has written that "[t]he program has arguably been the retailer's single biggest driver of growth," but "[a]s with its other ventures, Amazon lost money on Prime to gain buy-in."[236] Khan cites an analyst who estimates that Amazon loses between $1 to $2 billion per year through the Prime program.[237] This is part of a broader historical trend of Amazon eschewing profits in favor of growth for much of its corporate life.[238] It is only in recent years, after establishing market dominance, that the firm has begun to report substantial profits.[239] Even then, the majority of those profits are derived from its cloud computing business line, with its other operations seeing lower margins or even losses.[240]

This common practice in the digital economy of businesses choosing to not maximize their profits by offering free or low-cost services for extended periods of time defies the expectations of firm behavior. Various legal regimes assume that companies will aim to maximize profits for their shareholders after a reasonable start-up period. But with the growing importance of social data as a factor of production, this assumption that is at the center of legal scaffolding no longer holds true.

2. *Building Ecosystems.* — The building of ecosystems of products and services also typifies firm behavior within the digital economy.[241] Google is

233. See supra notes 183–187 and accompanying text.

234. Khan, Amazon's Antitrust Paradox, supra note 186, at 750.

235. Id.

236. Id. at 750–51.

237. Id. at 751.

238. See id. at 747–49 (describing Amazon's history of either losses or very low profit margins).

239. See Amazon.com, Inc., Annual Report (Form 10-K) 38 (Feb. 3, 2022), https://www.sec.gov/Archives/edgar/data/1018724/000101872422000005/amzn-20211231.htm [https://perma.cc/PTQ2-9DCM] (reporting a net income of $12 billion in 2019, $21 billion in 2020, and $33 billion in 2021).

240. See id. at 24 (showing that most of Amazon's income in 2020 and 2021 was derived from Amazon Web Services).

241. See Srnicek, supra note 109, at 95–96 (describing ecosystem development by platform businesses); Birch & Cochrane, supra note 56, at 49–50 (describing ecosystem-building strategies by Big Tech companies and the ways in which those strategies create "enclave rents").

not just a search engine. The firm has created an ecosystem that includes an email service (Gmail), an online word processor (Google Docs), a web browser (Chrome), a phone and accompanying mobile operating system (Android), among many, many other products and services.[242] Apple's ecosystem ranges from hardware products, like the iPhone and Apple Watches, to services, like iCloud storage and iMessage, to apps available via the App Store.[243]

Ecosystem building is a mechanism for growth, allowing digital firms to build up user and customer bases and collect and amass social data, including its accompanying prediction value. Firms can create ecosystems in ways that lock in users to that ecosystem, such as apps that are only compatible with the firm's operating system.[244] This lock-in guarantees flows of social data.[245] Additionally, if a firm has access to more areas of a person's life, it can accumulate a greater variety of social data.[246] For example, if Amazon has a map of your home, it can better anticipate what products you might be inclined to purchase for your home.[247] In fact, creating an ecosystem spanning broad arrays of business lines is reportedly part of founder Jeff Bezos's vision to build the firm into a "'utility' that would become essential to commerce."[248] Locking users into an ecosystem, closing out competitors, self-preferencing their own products, and controlling access to the data collected from the ecosystem all contribute

242. Browse All of Google's Products and Services, About Google, https://about.google/intl/en_us/products/ [https://perma.cc/V2KY-FYEA] (last visited Feb. 20, 2024).

243. See, e.g., Thomas Ricker, First Click: Apple's Greatest Innovation Is Its Ecosystem, The Verge (Sept. 7, 2016), https://www.theverge.com/2016/9/7/12828846/apple-s-greatest-product-is-its-ecosystem [https://perma.cc/M5BT-XJT2] (describing various products and services in the Apple ecosystem); Ian Sherr, Apple's 'Walled Garden' Walls Will Get Even Higher With iOS 14, iPadOS 14 and MacOS Big Sur, CNET (July 2, 2020), https://www.cnet.com/tech/mobile/apple-walled-garden-walls-will-get-even-higher-with-ios-14-ipados-14-macos-big-sur/ [https://perma.cc/7UME-BZVX] (same).

244. See Birch & Cochrane, supra note 56, at 49 (describing the approach of Big Tech companies "locking in users to their ecosystems, both legally (e.g. contractual agreements) and technically (e.g. interoperability restrictions)").

245. See Complaint at 27, United States v. Apple Inc., No. 02:24-cv-04055 (D.N.J. filed Mar. 21, 2024), 2024 WL 1219405 (alleging that Apple sells keyword search data for one app to parties other than the app's owners as another way to increase revenue); Srnicek, supra note 109, at 96 (describing how ecosystem building creates monopolies of data access for digital firms).

246. See Srnicek, supra note 109, at 95 ("[A]ccess to a multitude of data from different areas of our life makes prediction more useful, and this stimulates centralisation of data within one platform.").

247. See Ron Knox, Amazon's Dangerous New Acquisition, The Atlantic (Aug. 21, 2022), https://www.theatlantic.com/ideas/archive/2022/08/amazon-roomba-irobot-acquisition-monopoly/671145/ (on file with the *Columbia Law Review*) (discussing Amazon's purchase of the vacuum manufacturer iRobot and the implications of the data that Amazon could gather from smart vacuums for its retail business).

248. Khan, Amazon's Antitrust Paradox, supra note 186, at 754–55 (quoting Amazon employees).

to the firm market power consolidation that is the aim of the third script.[249] By providing access to both a greater quantity and greater variety of social data, ecosystem building allows firms to cultivate greater prediction value and market power, fueling a positive feedback cycle of future growth.

In addition to generally facilitating accumulation of social data, ecosystem building can be useful for firms pursuing the second script—indirectly converting prediction value into exchange value. Ecosystem building increases and stabilizes revenues by locking customers into the system.[250] And ecosystem building is particularly helpful for companies attempting to develop new products and expand into new business lines and industries. An expansive ecosystem of products and services provides firms with the opportunities to use prediction value accrued from one part of their ecosystem and monetize it through a product or service in another part of their ecosystem. As one tech entrepreneur explained: "At large companies, sometimes we launch products not for the revenue, but for the data. We actually do that quite often . . . and we monetize the data through a different product."[251] This ability to monetize social data accumulated in one part of the company's ecosystem in another part of the ecosystem provides ample opportunity for legal arbitrage. Companies might face strict regulations around the use of social data for a particular product or service. But if they have an expansive ecosystem of products, they could monetize this social data through another product or service.

3. *Aggressive Acquisitions.* — The digital economy has brought with it an uptick in acquisitions. This can be seen particularly in the context of digital firms. Big Tech cash expenditures on acquisitions averaged $23 billion in the period between 2010 and 2019—approximately three times the average for the top 200 global firms.[252] As of April 2021, since their respective foundings, Apple had acquired 123 companies, Amazon had acquired 111, Facebook had acquired 105, and Google had acquired 268.[253]

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249. See Zuboff, Surveillance Capitalism, supra note 30, at 179 (discussing the "unprecedented concentrations of knowledge and power" that companies like Google have achieved through ecosystem building); Birch et al., Data as Asset?, supra note 55, at 2 (describing the "societal dominance" achieved by Big Tech firms through, among other factors, ecosystem governance and control over access to social data); U.N. Conf. on Trade & Dev., Trade and Development Report 2018: Power, Platforms, and the Free Trade Delusion, at VI–VII, U.N. Doc. UNCTAD/TDF/2018, Sales No. E.18.II.D.7 (2018).

250. See Complaint, supra note 245, at 44 (alleging that Apple has limited the cross-platform development of digital wallets to increase switching costs for leaving Apple's ecosystem).

251. Sadowski, Internet of Landlords, supra note 225, at 572 (internal quotation marks omitted) (quoting Stanford Graduate School of Business, Andrew Ng: Artificial Intelligence Is the New Electricity, YouTube, at 33:28 (Feb. 2, 2017), https://www.youtube.com/watch?v=21EiKfQYZXc (on file with the *Columbia Law Review*)).

252. Birch et al., Data as Asset?, supra note 55, at 11.

253. Chris Alcantara, Kevin Schaul, Gerrit De Vynck & Reed Albergotti, How Big Tech Got So Big: Hundreds of Acquisitions, Wash. Post (Apr. 21, 2021),

This business practice of aggressive acquisitions is part of the overall focus on growth and expansion within the digital economy. Commentators highlight that many of these acquisitions are largely driven by the desire to acquire data from target companies through so-called data-driven mergers.[254] Facebook's acquisition of WhatsApp has been cited as one example.[255] Google's acquisition of Waze is another.[256]

Of course, companies have other motivations for these acquisitions separate and apart from acquiring social data. These motivations might include foreclosing future competition and consolidating market dominance. But accumulating social data remains an important factor. And these other motivations may interrelate with accumulating social data. Stamping out competition is a means for companies to achieve and maintain their dominant market positions.[257] Establishing dominant market positions provides companies with access to user bases and future streams of data from those users. Acquiring other firms to gain access to their users is part of the growth strategy of building dominant market positions.[258] Microsoft's 2016 acquisition of LinkedIn is another example of the acquisition of a digital firm to gain access to a user base and their data. As discussed above,[259] LinkedIn was posting losses when Microsoft paid $26 billion to acquire it. But, as one analyst described, "[the acquisition was] a massive growth play for Microsoft."[260] Microsoft highlighted the large customer base that the deal brought, as well as the potential for user data to improve its analytics and AI capacity.[261] As part of the digital economy's overall focus on growth, aggressive acquisitions are an important business strategy for firms following all three of the digital economy's scripts.

Acquisitions are particularly useful to firms pursuing the second script, specifically those companies that aim to use social data to create

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https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/ (on file with the *Columbia Law Review*) (last updated Sept. 26, 2023).

254. See Maurice E. Stucke & Allen P. Grunes, Big Data and Competition Policy 1–3 (2016) (exploring the phenomenon of data-driven mergers and the failure of global competition policy to adequately respond to the trend).

255. Id. at 124.

256. Id. at 135.

257. See Majority Staff of H. Subcomm. on Antitrust, Com. & Admin. L., H. Comm. on the Judiciary, 117th Cong., Investigation of Competition in Digital Markets 6 (Comm. Print 2020) (detailing the trend of digital firms acquiring companies "to neutralize a competitive threat or to maintain and expand the firm's dominance"); C. Scott Hemphill & Tim Wu, Nascent Competitors, 168 U. Pa. L. Rev. 1879, 1880 (2020) (introducing the concept of nascent competition and its antitrust implications).

258. See Birch et al., Data as Asset?, supra note 55, at 11 ("[T]here are variations among Big Tech firms when it comes to acquisitions, although the core commonality of their business model is that they seek to strengthen their monopoly of users, user engagement, and access to users.").

259. See supra note 183 and accompanying text.

260. McBride, supra note 184 (quoting analyst Ted Schadler).

261. Id.

new business lines or expand into other industries. The majority of Big Tech's acquisitions have been acquisitions that expanded the firms outside of their original business lines and into new sectors. Seventy-eight percent of Apple's acquisitions, sixty-four percent of Amazon's acquisitions, seventy percent of Google's acquisitions, and seventy-three percent of Facebook's acquisitions have been of companies outside their original business lines.[262] Through these acquisitions, firms are able to take the prediction value that they have built up through collecting social data in one context and apply it in another context.

Google's acquisition of Fitbit is an example of an acquisition that allowed the company to expand into a new industry (as well as gain access to streams of social data and expand its ecosystem of products). In 2019, Google announced its intent to acquire Fitbit, a company that produces wearable fitness technology and had approximately 30 million active users and data on users' fitness and health spanning back a decade.[263] At the time, Google was attempting to pivot into the healthcare industry.[264] The merger sparked concerns from antitrust authorities across the globe about the implications of Google possessing that level of social data.[265]

Intuit's recent acquisition of Mailchimp is another useful example of this strategy. Intuit, a financial software firm, acquired Mailchimp, an email marketing platform, in 2021 for $12 billion.[266] Intuit's existing products included Credit Karma, Mint, and TurboTax, which provided the

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262. Alcantara et al., supra note 253 (breaking down all known acquisitions by Amazon, Apple, Facebook, and Google through April 2021 by original or new business line); see also Khan, Amazon's Antitrust Paradox, supra note 186, at 754 ("Another key element of Amazon's strategy—and one partly enabled by its capacity to thrive despite posting losses—has been to expand aggressively into multiple business lines. . . . For the most part, Amazon has expanded into these areas by acquiring existing firms.").

263. Lucas Griebeler Da Motta, Why We Should Be Careful About Google's Promises in the Fitbit Deal, ProMarket (Aug. 21, 2020), https://www.promarket.org/2020/08/21/why-we-should-be-careful-about-googles-promises-in-the-fitbit-deal/ [https://perma.cc/UH4H-AX59].

264. See supra notes 167–168 and accompanying text (discussing Verily).

265. See, e.g., Austl. Competition & Consumer Comm'n, Statement of Issues: Google LLC—Proposed Acquisition of Fitbit Inc 2 (2020), https://www.accc.gov.au/system/files/public-registers/documents/Google%20Fitbit%20-%20Statement%20of%20Issues%20-%2018%20June%202020.pdf [https://perma.cc/V2C4-FQ6W] ("The accumulation of additional, individual user data via this transaction in an entity which already benefits from substantial market power in multiple markets may contribute to reduced competitive outcomes in the future."); European Commission Press Release IP/20/1446, Mergers: Commission Opens In-Depth Investigation Into the Proposed Acquisition of Fitbit by Google (Aug. 4, 2020), https://ec.europa.eu/commission/presscorner/detail/nl/ip_20_1446 [https://perma.cc/VH5C-JMZY] ("The data collected via wrist-worn wearable devices appears, at this stage of the Commission's review of the transaction, to be an important advantage in the online advertising markets.").

266. Press Release, Intuit Mailchimp, Intuit Completes Acquisition of Mailchimp (Nov. 1, 2021), https://mailchimp.com/newsroom/intuit-completes-mailchimp-acquisition/ [https://perma.cc/6WL5-Q82H].

firm with data about individuals' personal finances and spending habits.[267] Quickbooks was another existing Intuit product, which provided the firm with customer sales data from small and mid-sized businesses.[268] Social data from Intuit's existing products on personal finance, spending habits, and customer sales could be used to predict and influence consumer behavior, and the firm can now use these insights to design more effective targeting of messages in an entirely new industry—email marketing.[269] As Intuit explained in an investor presentation on the acquisition, "Customer data and purchase data brought together creates actionable insights and opportunities for small business and mid-market growth."[270] Acquisitions are a means through which digital firms can convert the prediction value that they accrue through one business activity into exchange value in an entirely new industry.

Informational capitalism has brought about seismic changes to the economy. As social data has emerged as a new mode of production, prediction value has emerged as a new value form. Firms have responded to these changes by following three basic scripts: (1) directly converting prediction value to exchange value through methods such as targeted advertising, (2) indirectly converting prediction value to exchange value by using prediction value to improve upon or develop products and services, and (3) using prediction value as a means to establish power. As companies pursue these scripts, several business practices and methods have become commonplace in the modern economy. As the next Part will discuss, these scripts, and the business practices that have emerged alongisde them, run counter to many of the assumptions at the heart of a variety of legal regimes. As a result, various areas of the law are struggling to effectively govern the digital economy.

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267. Intuit: If Successfully Integrated, Credit Karma and Mailchimp Are Game Changers, Seeking Alpha (June 26, 2022), https://seekingalpha.com/article/4520384-intuit-successfully-integrated-credit-karma-mailchimp-game-changers (on file with the *Columbia Law Review*) [hereinafter Intuit: If Successfully Integrated] (identifying the types of data to which Intuit's products provide the firm access).

268. Gene Marks, On CRM: How Intuit's Purchase of Mailchimp Will Kill Your Monthly Newsletter, Forbes (Sept. 22, 2021), https://www.forbes.com/sites/quickerbettertech/2021/09/22/on-crm-how-intuits-purchase-of-mailchimp-will-kill-your-monthly-newsletter/ [https://perma.cc/88A8-PNRT].

269. See Intuit: If Successfully Integrated, supra note 267 (noting the potential for Intuit to use its existing data to improve the email marketing service provided by Mailchimp); Marks, supra note 268 (same).

270. Intuit, Inc., Investor Presentation: Intuit's Acquisition of Mailchimp 15 (2021), https://s23.q4cdn.com/935127502/files/doc_presentations/2021/Intuit%27s-Acquisition-of-Mailchimp-Presentation.pdf [https://perma.cc/2R8T-UHXL].

III. LEGAL COLLISIONS

A. *Two Camps of Legal Collisions*

The challenges of grappling with social data and prediction value creates issues across several legal regimes. This section focuses on two: tax law and privacy and data protection law. These fields represent two "camps" of legal failings in the face of informational capitalism.

This first camp consists of fields of law that have historically been tasked with governing and regulating value creation. These fields are struggling to integrate value creation from social data into their existing regulatory regimes. This Article argues that these struggles stem from the failure to recognize prediction value as a distinct and separate value form that does not readily translate into exchange value. In addition to tax law, other legal fields included in this camp include antitrust law and financial regulation.

The second camp consists of fields of law that have not historically viewed themselves as having a role in governing and regulating value creation. This Article argues that the advent of social data as a factor of production and prediction value as a key and distinct mode of value creation has made regulating value creation an imperative for these fields. But these fields are still grappling with their new role as primary governors of value creation under informational capitalism. As a result, while recent shifts in scholarly trends promise otherwise, these fields have not yet developed a positive agenda for regulating value creation. Recognizing prediction value as a form of value creation separate from exchange value can help inform this positive regulatory agenda. In addition to privacy and data governance law, other legal fields included in this camp include First Amendment law.

B. *Taxing Prediction Value*

Tax law is in the business of governing value creation. This business of governing value creation is in pursuit of three basic goals: to raise government revenues, to redistribute income and wealth, and to regulate private sector behavior.[271] In pursuit of these goals, the tax system strives to allocate burdens across taxpayers in a way that is equitable, efficient, and administrable.[272] International tax law is further tasked with ensuring

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271. Reuven S. Avi-Yonah, The Three Goals of Taxation, 60 Tax L. Rev. 1, 3 (2006) ("What are taxes for? . . . [T]axes are needed to raise revenue for necessary governmental functions . . . . Taxation can have a redistributive function . . . . Taxation also has a regulatory component: It can be used to steer private sector activity in the directions desired by governments.").

272. See id. at 26 (identifying equity, efficiency, and administrability as "the three traditional policy grounds" of tax law); Allison Christians, Introduction to Tax Policy Theory 10–11 (May 29, 2018), https://ssrn.com/abstract=3186791 [https://perma.cc/C7P9-XPKU] (unpublished manuscript) ("[M]ost tax scholarship argues that to achieve the desired

that the choice of which country is allowed to tax cross-border income is made in an equitable, efficient, and administrable manner.[273]

The digital economy and the accompanying rise of prediction value as a key value form is colliding with tax law in two distinct ways. The first is a conceptual collision. Tax law scholars and policymakers are not recognizing and understanding prediction value as a new value form distinct from exchange value and, as a result, are inappropriately attempting to address tax law's failures in the face of the digital economy through an exchange value lens. The second collision relates not to prediction value itself but to the digital economy's scripts and resulting business practices. The existing tax system produces results incongruent with the underlying goals of tax law when applied to these new and unfamiliar scripts and business practices.

1. *A Conceptual Collision.* — Modern tax law is grounded in exchange value. At the end of the day, tens of thousands of pages of code and regulations, countless judicial and administrative decisions, and thousands of bilateral treaties boil down to numbers on a tax form, and these numbers represent the monetary value of income or, in the case of estate and gift taxation, wealth.[274] The Internal Revenue Code does not contain a standard definition of "value."[275] But the hundreds of references to "value" in the code predominantly refer to fair market value—the price, or exchange value, that an asset would demand in an open market transaction.[276]

Tax law's conceptual equation of "value" with exchange value is stymying efforts to adapt tax law to the digital economy. There is widespread agreement that tax law, particularly international tax law, is

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distribution of costs and benefits through taxation, societies should be guided by three principles: equity (or fairness), economic efficiency, and administrative capacity." (emphasis omitted)).

273. See Michael J. Graetz, Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies, 26 Brook. J. Int'l L. 1357, 1392, 1406, 1410 (2001) (identifying equity, efficiency, and simplicity as considerations in designing international tax policy).

274. See Allison Christians & Laurens van Apeldoorn, Taxing Income Where Value Is Created, 22 Fla. Tax Rev. 1, 10–11 (2018) ("It is on the basis of the idea of market value or fair market value . . . that income tax systems assign income to parties in all kinds of transactions involving exchanges of tangible and intangible goods and services."); Marian, supra note 31, at 514 ("[I]ncome taxation is imposed on the aggregation of taxpayers' 'savings' and 'consumption.' Both concepts rely on our ability to identify . . . the monetary value of income." (footnote omitted)); Understanding Federal Estate and Gift Taxes, CBO (June 2021), https://www.cbo.gov/publication/57272 [https://perma.cc/9P6H-3Q7X] ("The value of the estate's assets is usually determined as the fair-market value on the owner's date of death . . . .").

275. Shu-Yi Oei, United States, *in* Taxation and Value Creation 669, 669 (Werner Haslehner & Marie Lamensch eds., 2021) ("There is no singular coherent definition of value in the Code.").

276. Id.

failing in the modern economy.[277] Assertions by politicians and governments that multinational corporations, particularly Big Tech companies, are not paying their "fair share" of taxes are common.[278] This concern over companies paying their fair share is a matter not only of the total amount of tax paid but also to which countries those taxes are paid. The need to align the place of taxation with the place of "value creation" has been a frequent refrain among politicians and policymakers.[279]

This political push to use the concept of value creation to determine which country gets to tax companies has been broadly criticized by academics.[280] Academics have described the concept of value creation as

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277. See, e.g., Collin & Colin, supra note 175, at 2 ("The failure of tax law to keep pace with economic transformation is especially obvious in the case of the digital economy."); Lilian V. Faulhaber, Taxing Tech: The Future of Digital Taxation, 39 Va. Tax Rev. 145, 149 (2019) (arguing that recent reform proposals indicate that "countries around the world believe that the international tax system is out of step with the current economy"); Mitchell Kane, A Defense of Source Rules in International Taxation, 32 Yale J. on Regul. 311, 312 (2015) ("The body of law generally labeled 'international taxation' is widely perceived to be in shambles.").

278. See, e.g., The Associated Press, The G-7 Nations Agree to Make Big Tech Companies Pay Their Fair Share of Taxes, NPR (June 5, 2021), https://www.npr.org/2021/06/05/1003563505/the-g-7-nations-have-agreed-to-make-big-tech-companies-pay-their-fair-share-of-t [https://perma.cc/J44H-9K5X] (quoting Rishi Sunak, then the Chancellor of the Exchequer, as characterizing the G-7 agreement on international tax reform as "requiring the largest multinational tech giants to pay their fair share of tax in the UK"); Richard Lough, Explainer: Macron's Quest for an International Tax on Digital Services, Reuters (Aug. 22, 2019), https://www.reuters.com/article/us-g7-summit-digital-tax-explainer/explainer-macrons-quest-for-an-international-tax-on-digital-services-idUSKCN1VC0VH (on file with the *Columbia Law Review*) (describing frustration among political leaders regarding their inability to tax tech companies on profits they believe to be derived from business activities in their countries).

279. See, e.g., Communication from the Commission to the European Parliament and the Council: Time to Establish a Modern, Fair and Efficient Taxation Standard for the Digital Economy, at 4, COM (2018) 146 final (Mar. 21, 2018), https://eur-lex.europa.eu/resource.html?uri=cellar:2bafa0d9-2dde-11e8-b5fe-01aa75ed71a1.0017.02/DOC_1&format=PDF [https://perma.cc/3LZW-QWKT] [hereinafter European Commission, Modern Taxation] (explaining that a disconnect has emerged in the digital economy "between where the value is created, and where taxes are paid" and proposing reforms to correct this disconnect); see also Werner Haslehner & Marie Lamensch, General Report on Value Creation and Taxation: Outlining the Debate, *in* Taxation and Value Creation, supra note 275, at 3, 35 ("There can be no doubt that 'taxing income where value is created' has proved to be a powerful rallying cry to instigate a global tax reform."); Andrew Hayashi & Young Ran (Christine) Kim, Taxing Digital Platforms, Va. J.L. & Tech., Spring 2023, no. 3, at 1, 10 (explaining that some recent reform proposals have been justified based on user value creation and noting that that principle is one that "countries' finance ministries, the OECD, and the EC recite and seem to endorse").

280. See Werner Haslehner, Value Creation and Income Taxation: A Coherent Framework for Reform?, *in* Taxation and Value Creation, supra note 275, at 39, 40 (describing the academic response to the concept of value creation as "generally very critical of the concept's meaning and usefulness to drive a coherent reform of the international tax system").

"a phrase that has [no] meaning in modern economics,"[281] an "unhelpful" and "fuzzy notion,"[282] and "not even conceptually coherent as a theory."[283] The conversation surrounding aligning taxation with value creation exemplifies how exchange value continues to be at the center of tax policy discussions, despite the vital role of prediction value in the modern economy. It also exemplifies the harms caused by that continued focus. The concept of value creation is arguably unhelpful, fuzzy, and incoherent when value creation is viewed exclusively through the lens of exchange value. But, if academics and policymakers expand their notion of value creation to include prediction value, the move to align the place of taxation with the place of value creation would become more conceptually coherent.

The problem is not that academics and policymakers are not recognizing the growing importance of social data in the economy. Many have noted that it is unfair for digital companies to collect and exploit data from a country's residents without being subjected to tax in those jurisdictions.[284] This perceived unfairness has led to user participation proposals: reforms that would allocate taxing authority over digital companies' income to users' jurisdictions based on their contributions of data as well as content.[285] But, while the importance of social data is being recognized, the emergence of prediction value as a new value form is not. Conversations around reform are still trying to fit prediction value into the familiar exchange value mold. Critics have cited difficulties in measuring

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281. David Quentin, Corporate Tax Reform and "Value Creation": Towards Unfettered Diagonal Re-Allocation Across the Global Inequality Chain, 7 Acct. Econ. & L., no. 20160020, 2017, at 1, 3.

282. Wolfgang Schön, Ten Questions About Why and How to Tax the Digitalized Economy, 72 Bull. for Int'l Tax'n 277, 288 (2018).

283. Allison Christians, Taxing According to Value Creation, 90 Tax Notes Int'l 1379, 1379 (2018) [hereinafter Christians, Value Creation].

284. See, e.g., European Commission, Modern Taxation, supra note 279, at 4 (citing the failure of current tax laws to acknowledge value stemming from user data as an impetus for reform); see also Collin & Colin, supra note 175, at 53–54 (explaining the centrality of data to digital business models and highlighting that although digital companies' data arises from the free labor of French users, France nonetheless is not able to tax these digital companies).

285. See, e.g., OECD/G20 Base Erosion & Profit Shifting Proj., Addressing the Tax Challenges of the Digitalisation of the Economy 9 (2019), https://web-archive.oecd.org/2019-02-19/507498-public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf [https://perma.cc/GZ4Y-K8D8] (presenting a reform proposal that would allocate taxing rights to users' jurisdictions based on their critical role in value creation for digital businesses, including through the generation of data); see also HM Treasury, Corporate Tax and the Digital Economy: Position Paper Update 10–11 (2018) (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/689240/corporate_tax_and_the_digital_economy_update_web.pdf [https://perma.cc/2T6S-64UQ] (citing creation of data as one of the ways in which user participation creates values for companies and advocating reforms to the taxation of digital businesses for whom the collection of user data is central to the businesses' value creation strategies).

and attributing income to users' data creation as a barrier to user participation proposals and taxation based on value creation more generally.[286] That difficulty of measurement stems from the conceptual incoherence of trying to translate prediction value into monetary exchange value.

Outside of the "taxing where value is created" debate, much of the discussion in policy and academic circles surrounding the appropriate taxation of the data economy is also seen through the exchange value lens. Assigning an accurate market value to data to tax it is an oft-cited challenge,[287] as is the "cashless" nature of transactions between data subjects and data collectors.[288] These discussions show a continued focus on fitting the square peg of prediction value into the round hole of the exchange-value-based tax system. A notable exception to this focus comes from Omri Marian.[289] In a 2021 article, Marian proposes moving away from trying to fit the data economy to the existing income tax system by assigning monetary value to data because, he argues, doing so is "an insurmountable, if not a logically incoherent, task."[290] On the policy level, the New York State Senate has proposed a personal consumer data excise tax that would tax data collectors based on the number of residents from

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286. See, e.g., Johannes Becker & Joachim Englisch, Taxing Where Value Is Created: What's 'User Involvement' Got to Do With It?, 47 Intertax 161, 168 (2019) (discussing difficulties surrounding valuation of user data contributions); Christians, Value Creation, supra note 283, at 1381 ("[T]he idea that a given item of income produced through international trade and commerce can be fragmented geographically plainly is not true, has never been true, and no amount of normative rhetoric surrounding valuation can make it true."); Itai Grinberg, User Participation in Value Creation, 2018 Brit. Tax Rev. 407, 420–21 (highlighting administrability issues with the U.K. user participation reform proposal).

287. See, e.g., Adam B. Thimmesch, Transacting in Data: Tax, Privacy, and the New Economy, 94 Denv. L. Rev. 145, 174 (2016) ("Perhaps the biggest barrier to applying our existing tax instruments to personal-data transactions is the problem of how to value the personal data and the digital products being traded."); Aqib Aslam & Alpa Shah, Tec(h)tonic Shifts: Taxing the "Digital Economy" 51–54 (IMF, Working Paper No. 20/76, 2020) (discussing the impact of data valuation issues on countries' approaches to taxing the digital economy).

288. Commentators have explored the possibility of these exchanges being treated as taxable barter exchanges. See, e.g., Louise Fjord Kjærsgaard & Peter Koerver Schmidt, Allocation of the Right to Tax Income From Digital Intermediary Platforms—Challenges and Possibilities for Taxation in the Jurisdiction of the User, 2018 Nordic J. Com. L. 146, 159–60; Hillel Nadler, Taxing Zero, 26 Fla. Tax Rev. (forthcoming 2024) (manuscript at 4), https://ssrn.com/abstract=4449094 [https://perma.cc/ZWF9-C3DG] ("Zero-price transactions are a form of barter exchange: consumers receive something valuable from businesses and businesses receive something valuable in return."); Thimmesch, supra note 287, at 162–63, 169 ("[A]pplication of [the market-exchange] model suggests that data aggregators should be viewed as engaging in taxable barter exchanges through which they sell access to their digital products in exchange for consumer data.").

289. Marian, supra note 31; see also Reuven Avi-Yonah, Young Ran (Christine) Kim & Karen Sam, A New Framework for Digital Taxation, 63 Harv. Int'l L.J. 279, 335-40 (2022) (commending Marian's argument and proposal and presenting an alternative reform that would also use data volume, rather than income, as a tax base).

290. Marian, supra note 31, at 561.

whom they collect data.[291] These efforts to push the tax system out of the exchange-value-based mold are commendable and exciting but unfortunately remain in the minority.

2. *Colliding With the Digital Economy's Scripts.* — Beyond the conceptual challenge of integrating prediction value into a tax system centered around exchange value, the digital economy's scripts and associated business practices are also colliding with tax law. These scripts and practices were beyond the historical imagination of the original architects of the tax system, and many of the assumptions about business practices that these lawmakers accepted no longer hold true. As a result, the existing tax system, when applied to the digital economy, precipitates tax outcomes that are inconsistent with the underlying norms and goals of taxation. This section briefly explores three examples of tax law failing in the informational capitalist environment. The first is the continued use of income as a tax base when companies focus on growth over profits. The second is the opportunity for advantageous tax deferral offered to companies who are not immediately converting prediction value into exchange value. The third is the international tax implications of prediction value manifesting as exchange value via an increase in company market capitalization compared to company profits.

a. *Income as a Tax Base.* — Firms are taxed on their income, not on the size of their user bases or the amount of social data and resulting prediction value they have amassed. Until this growth and expansion translates into exchange value, it exists outside the current tax system.[292] As explained in Part II, firms often do not earn income, instead focusing on growth through business practices such as freemium business models. Governments are unable to collect tax revenue from these digital firms despite the fact that they provide benefits and resources without which the firms would not be able to operate—benefits and resources that are funded by tax revenues. Digital firms' focus on growth over income also frustrates tax law's redistributive goals. The rise of Big Tech oligopolies has sparked concerns among various scholars, particularly regarding the concentration of prediction value and the accompanying economic and political power it brings to those firms.[293] But prediction value is not part of the tax base; therefore, the tax system cannot redistribute prediction value and temper this concentration of economic and political power. Finally, the focus on growth over income frustrates the regulatory purpose of taxation. The deductions and credits offered by the tax code as a means

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291. See Robert D. Plattner, The Virtues of a Simple Excise Tax on Personal Consumer Data, Tax Notes (Dec. 12, 2022), https://www.taxnotes.com/special-reports/digital-economy/virtues-simple-excise-tax-personal-consumer-data/2022/12/09/7ffrb [https://perma.cc/9SQE-3K5W] (describing the structure of the New York data excise tax).

292. Marian, supra note 31, at 561 (arguing that data, rather than income, should serve as the primary tax base in light of the rise of the data economy); Thimmesch, supra note 287, at 174 (chronicling the ways in which the data economy escapes taxation).

293. See supra section II.A.3.

to shape firm behavior are less effective when firms do not have significant income or tax liabilities to offset.

b. *Tax Deferral Opportunities.* — One possible argument against the concerns about the continued reliance on income as a tax base is the claim that all companies will *eventually* convert prediction value into exchange value. While social data as a factor of production tends to lead companies to defer short- or medium-term profits in favor of building up greater prediction value, a company's purpose is to earn profits for their shareholders, and it will eventually achieve this purpose. These profits might be earned through script one's direct conversion of prediction value to exchange value through means such as targeted advertising revenues. Or these profits might be earned by indirectly converting prediction value into exchange value through profits earned from the new or improved products and services companies are able to offer as a result of the prediction value they have accrued. Why does it matter that the tax system is not capturing prediction value when it will eventually be converted to exchange value, which the tax system will capture?

This argument is flawed in a couple of ways. First, it ignores the existence of the third script in which companies never fully convert prediction value into exchange value but instead use prediction value as a means to gain power—power that may or may not be used to create exchange value. As discussed in Part II above, the power that stems from merely possessing something of value usually justifies the taxation of wealth as well as the relationship between income versus consumption. This same rationale carries over to justify taxing companies pursuing the third script.[294]

Even if one rejects the idea that any company would pursue the third script and never fully monetize prediction value, this argument ignores a foundational consideration for evaluating the effectiveness of a tax system: the value to the taxpayer of deferring tax liabilities. The benefit of tax deferral is a fundamental concept taught to students in basic tax law classes.[295] If a taxpayer is able to push off their tax liability into some point in the future (either by deferring income inclusion, accelerating deductions, or both), they are able to put the amount that they would have paid in taxes to productive use in the intervening period. This concept is known as the "time value of money."[296] For example, if a taxpayer can expect a rate of return on investment of seven percent annually, $1 saved in taxes this year has a future value to the taxpayer of $1.97 in ten years.[297]

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294. See supra notes 213–214 and accompanying text.

295. See, e.g., Joseph Bankman, Daniel N. Shaviro, Kirk J. Stark & Edward D. Kleinbard, Federal Income Taxation 191–92 (18th ed. 2019) (describing the importance of tax deferral and the time value of money); Michael J. Graetz & Anne L. Alstott, Federal Income Taxation: Principles and Policies 297–303, 627 (9th ed. 2022) (same).

296. Bankman et al., supra note 295, at 191–92.

297. *Future value* = $PV(1+r)^n$. *PV* equals present value, *r* equals the interest rate, and *n* equals the number of periods the interest is held.

This benefit of tax deferral is an essential driver of tax planning. Tax expenditure policies, such as defined contribution retirement plans, use the benefits of tax deferral as a carrot to encourage individuals to save for retirement.[298] Deferral is also a key feature of many tax shelters, which are designed to artificially accelerate the timing of deductions and defer the timing of income inclusion.[299] Because tax law conceptualizes "value" in terms of exchange value,[300] the benefit of tax deferral has historically been framed in monetary terms. But the same principle applies when a taxpayer can defer tax on prediction value. When a company is allowed to build up prediction value for extended periods without forcing any type of distributive mechanism, the company benefits by being able to accrue even greater levels of prediction value and its resulting economic and political power.[301]

It is not unique to the digital economy for companies to forgo income while they build and invest in their businesses and, as a consequence, defer tax liabilities while simultaneously building economic value. But what is unique to the digital economy is the extent of this deferral. Longer periods of tax deferrals produce greater advantages to the taxpayers and greater harms to the tax system. These lengthy tax deferrals are another way in which tax law is colliding with the digital economy.

c. *International Tax Implications.* — Finally, the focus on growth over income within the digital economy often leads to prediction value manifesting as an increase in the market valuation of a company. To the extent that prediction value is reflected in the market value of a company, it is then converted into exchange value when an investor sells their shares and realizes capital gains income. The tax system is then able to tax the investor's capital gains income. This is beneficial because it allows the tax system to raise government revenues and accomplish redistributive goals. There are, however, troubling normative implications for tax law when prediction value is only taxed when it converts to exchange value in the form of capital gains income at the investor level.

One of these problems emerges in the context of international tax law, specifically the determination of *which* country will have taxing rights over the digital economy's value creation. To prevent double taxation,

298. See Graetz & Alstott, supra note 295, at 296–303 (describing the interaction between tax deferral, the time value of money, and retirement accounts).

299. See Bankman et al., supra note 295, at 504 (identifying deferral as one of the typical features of a tax shelter transaction); Stanley S. Surrey, The Tax Reform Act of 1969—Tax Deferral and Tax Shelters, 12 B.C. Indus. & Com. L. Rev. 307, 310 (1971) (explaining the central role of deferral to the tax shelter industry).

300. See supra notes 274–276 and accompanying text.

301. The exact design of a distributive mechanism for prediction value is a rich topic for future research but is beyond the scope of this Article. For further discussion, see generally Amanda Parsons, Defining the Goal of a Data Tax, Eur. L. Open Symposium Issue: Taxing Data as an Instrument of Economic Digital Constitutionalism (forthcoming 2024) (on file with the authors).

international tax law divides taxing rights over cross-border income among countries based on a system of classification and assignment.[302] This classification and assignment system was first developed by members of the League of Nations in the 1920s and has remained largely unchanged since.[303] The system generally grants taxing rights over active business income to the source country (the country in which the business operates) and taxing rights over passive investment income, including capital gains income, to the investor's residence country.[304]

This choice in the 1920s to assign taxing rights over active business income to source countries and passive investment income to residence countries was influenced by tax law's underlying normative principles, which continue to be influential today.[305] It was also influenced by assumptions about the nature of business activities that no longer apply in the digital economy.[306] One of these normative principles was the benefits principle, which justifies taxation based on the benefits and resources that a country provides to taxpayers.[307] And one of these assumptions was that any firm that increased in market value would also earn business income.[308] Under this assumption, even though only the residence country

302. See Steven A. Dean, A Constitutional Moment in Cross-Border Taxation, 1 J. on Fin. for Dev., no. 3, 2021, at 1, 1–3 (describing international tax law's classification and assignment system).

303. See Michael J. Graetz & Michael M. O'Hear, The "Original Intent" of U.S. International Taxation, 46 Duke L.J. 1021, 1023 (1997) ("Despite massive changes in the world economy in the last seventy years, the international tax regime formulated in the 1920s has survived remarkably intact."). For a thorough history of the development of these model treaties, see generally Sunita Jogarajan, Double Taxation and the League of Nations (2018).

304. See Reuven S. Avi-Yonah, All of a Piece Throughout: The Four Ages of U.S. International Taxation, 25 Va. Tax Rev. 313, 322 (2005) [hereinafter Avi-Yonah, Ages of U.S. International Taxation] (characterizing the international tax system as generally allocating active business income to the source country and passive investment income to the investor's residence country). For two model conventions, see Org. for Econ. Co-op. & Dev. [OECD], Model Tax Convention on Income and on Capital (Nov. 21, 2017), https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en#page1 [https://perma.cc/8MYD-VS5E] [hereinafter OECD, Model Tax Convention]; U.N. Dep't of Int'l Econ. & Soc. Affairs, U.N. Model Double Taxation Convention Between Developed and Developing Countries, U.N. Doc. ST/ESA/PAD/SER.E/213 (2017), https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf [https://perma.cc/JX96-A2BL].

305. See Parsons, Shifting Economic Allegiance, supra note 188 (manuscript at 12–21, 25–28) (describing the norms driving the original design of the international tax system and how current debates in international tax law reveal their continued importance).

306. See id. (manuscript at 20) (explaining the assumption of the original designers of the international tax system that "a company whose value was increasing would also be earning income in the country in which they were operating").

307. See id. (manuscript at 12–21) (detailing the influence of benefits theory on the original design of the international tax system).

308. In a seminal report commissioned by the League of Nations during the 1920s negotiations (the recommendations of which were largely followed by the original designers of the international tax system), the authors stated in their analysis of which country should

would be able to tax investors on capital gains income from the sale of shares of a successful company, the country in which the company was operating, the source country, would still be able to collect tax revenues from the company itself because that company would be earning active business income, which is generally taxed in the source country.[309] Therefore, the source country would be compensated for the resources and benefits that it provided to the company, and the benefits principle would be satisfied.

As explained in Part II above, this assumption that an increase in the value of a company will always be accompanied by income no longer holds in the digital economy under the growth- and expansion-focused business strategies of digital firms. As a result, the benefits principle goes unfilled. Countries can provide digital companies with benefits and resources that the firms rely on to achieve growth, such as infrastructure and the education of users. But, without company-level income, the source countries are unable to collect tax revenues, even when that growth is translated into exchange value when investors sell their appreciated shares. For example, Company A could have millions and millions of users in Argentina, building out its network, providing the firm with a steady stream of social data, and, in turn, contributing to a rise in the firm's market value. But when a U.S. investor in Company A goes to sell their appreciated shares, only the United States (the residence country) is able to tax that income.[310] Argentina does not get a bite at the tax apple unless Company A earns income, which it often does not under the prominent business models of the digital economy that eschew income in the short or medium term in favor of growth. This growth-without-income phenomenon and business model was beyond the historical imaginations of the original designers of the international tax system in the 1920s.[311] The business model is clashing with existing international tax law, leading to outcomes that violate the normative goals of international tax law and

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be granted taxing rights over capital gains income, "Corporate shares would, indeed, be worth nothing if the company had no earnings." Econ. & Fin. Comm., Report on Double Taxation, at 36, League of Nations Doc. E.F.S.73.F.19 (1923); see also Reuven S. Avi-Yonah, The Structure of International Taxation: A Proposal for Simplification, 74 Tex. L. Rev. 1301, 1305–07 (1996) (describing the history of the League of Nations report).

309. See OECD, Model Tax Convention, supra note 304, at M-27 (generally granting taxing rights over business profits to the source country); see also Avi-Yonah, Ages of U.S. International Taxation, supra note 304, at 322 (explaining that taxing rights over active business income are typically granted to the source country).

310. See Avi-Yonah, Ages of U.S. International Taxation, supra note 304, at 322 (explaining that taxing rights over passive investment income are typically granted to the residence country).

311. See Parsons, Shifting Economic Allegiance, supra note 188 (manuscript at 20–21) ("The imaginations of the four economists and other participants in the 1920s Compromise could not predict the rapid technological advances of past decades and the ways in which they have transformed the global economy.").

contributing to a broad sentiment that the current international tax system is unfair.[312]

This section explores the conceptual disconnect of tax law scholars and policymakers failing to recognize prediction value as a new and distinct form of value creation and then explains a few of the ways in which the unfamiliar and unexpected business practices associated with the digital economy have collided with existing tax law. These collisions have resulted in tax law's failing to achieve its underlying goals of revenue-raising, redistribution, and regulation and have raised questions about the effectiveness of tax law in the modern economy. Both a conceptual understanding of prediction value as a value form that is distinct from, and does not always translate neatly into, exchange value and an understanding of the types of business activities that prediction value has precipitated are essential first steps for tax law to adequately respond to the challenges presented by the digital economy.

C. *Governing Social Data Value*

Data privacy (and the related field of data protection law[313]) is the legal field historically focused on the project of governing social data. Indeed, privacy and data governance law is tasked with protecting individuals from the very same surveillance of an economic system that rewards—indeed depends on—that surveillance.[314] Given that data privacy law is the primary regime that regulates how data about people is collected, processed, and used, it not only guards against privacy violations but also serves as one of the primary legal regimes that regulates social data value.[315]

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312. Id. (manuscript at 21) (describing how the nature of value creation in the digital economy is causing outcomes that are in conflict with the underlying norms and goals of international tax law).

313. Note that much of what is called "data privacy" or "information privacy" in the United States also includes elements of data protection law. In the European Union, these are separate, though related, legal regimes. In this Article, "data privacy law" is generally used to refer to the broader category of both related regimes. For a discussion of the differences between privacy and data protection (and the tendency of U.S. law to favor the former), see Anupam Chander, Margot E. Kaminski & William McGeveran, Catalyzing Privacy Law, 105 Minn. L. Rev. 1733, 1747–49 (2021).

314. Cohen, Between Truth and Power, supra note 4, at 40 (noting that digital platforms are designed fundamentally for "data-based surplus extraction").

315. This depends on one's account of privacy interests and privacy law. Privacy is a "big tent" concept experiencing a high point of concept pluralism, as the past decade has seen the expansion of informational wrongs characterized within the language of privacy law wrongs. See María P. Angel & Ryan Calo, Distinguishing Privacy Law: A Critique of Privacy as Social Taxonomy, 124 Colum. L. Rev. 507, 522–29 (2024) ("[I]nformation-based discrimination and algorithmic manipulation have come to be recognized . . . as privacy problems."); María P. Angel, Privacy's Algorithmic Turn 30 B.U. J. Sci. & Tech. L. (forthcoming 2024) (manuscript at 2–4), https://ssrn.com/abstract=4602315 [https://perma.cc/PZG5-WWB9] ("In the context of the transition to artificial intelligence ('AI') and algorithmic decision-making systems, a big portion of scholars . . . have begun to

Data governance law faces the "mirror image" of tax law's challenges discussed in section III.B. The problem for data privacy law is that existing laws are not designed with the task of regulating value creation, of any kind, in mind. Data privacy law's traditional role in the commercial sphere was to grant a set of procedural guarantees: to protect individuals against personal data being collected against their will or used for purposes that exceed the boundaries of their consent.

As social data value emerges as a primary goal of production, data privacy finds itself thrust into—and grappling with—the role of regulating this value creation. This introduces a host of challenges that arise from this mismatch between data privacy's traditional role and its role structuring social data value. The result is a legal regime poorly equipped to respond programmatically to the systematic pressures placed on privacy in a surveillance-fueled economy or to develop a positive agenda for how to manage the social stakes of prediction value.

Yet data privacy law is also comparatively well positioned among legal regimes to meet this challenge. Over the past several years, scholarly work in privacy law has begun to systematically respond to these conceptual and programmatic challenges. This section argues that distinguishing between prediction value and exchange value can provide a helpful way to translate recent pioneering work in privacy law into legal action. Thinking of the relevant tasks of data privacy law in the language of exchange value and prediction value can both identify and regulate harmful practices of prediction value production as well as foster and facilitate socially beneficial uses of social data value.

1. *Privacy Law Background.* — Privacy and data governance law governs the commercial cultivation of social data value in two ways. First, private data collection is primarily governed via interpersonal, quasi-contractual relations of individual control and consent rights. Privacy law has traditionally only contemplated social concerns regarding such data's prediction value, and its capacity to coerce action and remake social relations, if or when it falls into the hands of public actors. This implicates the second way, which is the public regime governing privately collected social data: Fourth Amendment protection of a reasonable expectation of privacy against state intrusion.[316]

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consider new privacy harms."); M. Ryan Calo, The Boundaries of Privacy Harm, 86 Ind. L.J. 1131, 1139–42 (2011) (acknowledging the difficulty of conceiving a singular definition of privacy, due to the many subconcepts seemingly covered by this term, but arguing that there is still a "need for principles that delimit privacy harm").

316. This Article uses the Fourth Amendment as shorthand for both federal and several state constitutional privacy protections. While the Fourth Amendment grounds a substantial majority of public privacy law, courts also derive privacy rules from other provisions of the Constitution, and several state constitutions incorporate additional privacy rights. See William McGeveran, Privacy and Data Protection Law 3 (2016) ("The word 'privacy' does not appear in the United States Constitution. Yet concepts of private information and decisionmaking are woven through the entire document, and courts have

While the concept of privacy itself is considerably older, U.S. digital privacy law began in the 1970s as Congress passed a rash series of bills in response to the early wave of computerization.[317] The highly influential Fair Information Practice Principles (FIPPs), first laid out in a 1973 report, canonized best principles regarding information processing and deeply informed privacy statutes in the United States and abroad.[318]

These principles, as enacted in agency policies and laws, focus on proper data hygiene, data subject consent, and preventing privacy harms to individuals from which data is collected.[319] While the specifics of how the FIPPs were operationalized vary from law to law, the standard package of privacy protections they provide includes two aspects. First, negative individual rights *against* overreaches in data collection, accompanied at times by narrowly tailored inalienable data subject rights against downstream misuses of their data.[320] These elements grant data subjects their privacy rights, ensuring data is collected with their consent and that certain decisions regarding how their data is used are not undertaken without additional consent.[321] Second, privacy laws may also include

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developed a substantial jurisprudence of constitutional privacy."). For an example of a state constitutional right to privacy, see Cal. Const. art. I, § 1. Civil public data collection is of course also widespread. It is also governed by its own set of statutory requirements that impose both procedural conditions of notice and transparency regarding what data is collected as well as substantive constraints on how publicly collected data may be processed, used, and shared between and beyond public entities. See, e.g., Margaret Hu, The Ironic Privacy Act, 96 Wash. U. L. Rev. 1267, 1277–79 (2019) (describing the provisions of the Privacy Act of 1974, which sets basic limits on how the federal government collects citizens' information). While the federal provisions governing civil data processing done in the course of agency business are too many to enumerate here, the foundation and legal backbone of federal agency data collection is the Privacy Act of 1974. Id. at 1276–77; see also 5 U.S.C. § 552a (2018).

317. Several experts consider the year 1974—when Congress passed the Privacy Act—to be a turning point in U.S. privacy law. Declining to follow recommendations of the HEW Secretary's Advisory Committee to pass an all-encompassing privacy law based on the Committee's Fair Information Practice Principles (FIPPs), Congress, while maintaining FIPPs as the Privacy Act's underlying framework, limited the Act's scope to systems of records held by federal government agencies. See Dep't of Health, Educ. & Welfare, supra note 24. Congress's failure to legislate nongovernmental activity left other sectors on a path to piecemeal sectoral privacy laws operating against a backdrop of general consumer protection standards, a path already begun with sectoral statutes such as the Fair Credit Reporting Act (1970), Bank Secrecy Act (1970), and Family Educational Rights and Privacy Act (1974). For an overview of this history, see generally Daniel J. Solove & Paul M. Schwartz, Privacy Law Fundamentals 42–52 (2015).

318. Dep't of Health, Educ. & Welfare, supra note 24, at xxiii.

319. For an overview of the FIPPs, see Fair Information Practice Principles (FIPPs), Fed. Priv. Council, https://www.fpc.gov/resources/fipps/ [https://perma.cc/WS7N-KP63] (last visited Mar. 6, 2024).

320. For example, the Fair Credit Reporting Act (FCRA) prohibits credit score decisions on the basis of incorrect or out-of-date information. 15 U.S.C. § 1681 (2018).

321. See Margot E. Kaminski, The Case for Data Privacy Rights (or, Please, a Little Optimism), 97 Notre Dame L. Rev. Reflection 385, 387–88 (2022) ("[T]he core of the [Fair Information Practices (FIPs)] are its individual data privacy process rights: notice and access,

provisions that can be understood as data protection requirements.[322] These elements impose proper processing obligations onto businesses that collect and handle data to ensure that data requests are tailored to the purposes for which data is being collected, honor the intentions of the data subject in any further sharing of their data, and impose protocols to enhance the security of data resources.

In practice, much of actual privacy management (and regulation) occurs not via courts or regulators but in the private actions of entities that develop internal compliance systems in the shadow of these rarely enforced laws.[323] Users in turn are tasked with legitimizing these privacy practices via click-through consent, a legal approach Daniel Solove refers to as "privacy self-management."[324]

From the perspective of privacy law, whether social data resides with public (as opposed to private) actors is normatively and legally significant. Constitutional privacy is drawn from several portions of the document, but the "oldest and largest body of [public] privacy law" concerns use of evidence obtained in violation of the Fourth Amendment, found to violate a defendant's reasonable expectation of privacy.[325] Notable recent case law extended privacy rights against government intrusion to some privately held data, which had long been excluded from Fourth Amendment protection under the third party doctrine—a rule that defendants no longer enjoy a reasonable expectation of privacy in information they had already disclosed to third parties (including, until *Carpenter v. United States*, just about any company that collects social data).[326]

In short, data privacy law, focused as it is on protecting individuals against either interpersonal harms that may arise from improper information collection and management or state abuse of prediction value, has not traditionally understood its primary aim as that of governing and managing commercial social data value creation.[327] While the near-exclusive focus on prediction value via state surveillance in the field is

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coupled with a (limited) opportunity to be heard. The FIPs are . . . not about protecting against the gathering and circulation of substantively sensitive data." (footnote omitted)).

322. See, e.g., Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501–6506; 45 C.F.R. pts. 160, 162, 164 (2023) (HHS rule implementing HIPAA); see also Chander et al., supra note 313, at 1747–49.

323. Waldman, supra note 90, at 4–5.

324. Daniel J. Solove, Introduction: Privacy Self-Management and the Consent Dilemma, 126 Harv. L. Rev 1880, 1880 (2013).

325. McGeveran, supra note 316, at 3; see also Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

326. Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (holding that "an individual maintains a legitimate expectation of privacy[,]" for Fourth Amendment purposes, "in the record of his physical movements as captured through [cell-site location information]"). On the third-party doctrine, see, e.g., California v. Greenwood, 486 U.S. 35, 40–41 (1988).

327. Viljoen, Relational Theory, supra note 6, at 578–79.

shifting, both popular and doctrinal conceptions of socially coercive privacy harm remain focused on public, rather than private, actors.

This results in two shortcomings. First, it ignores many salient concerns regarding informational power that arise as social data is imbricated into the strategies of commercial actors canvassed in Part II and the supporting role privacy and data governance law plays in facilitating this form of value creation. Second, it marginalizes the legal task of fostering the potential social benefits of prediction value, when cultivated fairly and responsibly. Each is addressed in turn below.

2. *Data Privacy as a Value Regulation Regime.* — The basic insight that information about people confers power is not new. Social data's capacity to endow its holders with power over others has long been the central preoccupation of privacy and surveillance scholars and many other observers of the digital economy. As discussed in Part I above, several lines of scholarship across surveillance studies, communication, and privacy law proceed from the notion that social data confers a form of power onto its cultivators.[328] A growing subset of scholars in these fields also study the market imperative of social data production and the significance of this production for capitalism's informational turn.[329] Indeed, as discussed above, the capacity for digital information about people to confer power on its holder animated twentieth-century concerns over information, particularly its use for scaled and systemic social control.[330] Such concerns motivated the first rash of federal privacy laws.[331]

Yet to date, the predominance of privacy accounts (and broader accounts of surveillance and digital control) regarding the control power latent in data accumulation still focus attention on the risks of social data's *political* power, when, by coercion or contract, it falls into the hands of state actors. In this classic account, social data accumulation is a source of potential concern because it can be used to impose forms of social control and remake social relations to better suit the aims of state actors.[332]

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328. For a discussion of scholars in law as well as information and communication that have studied the power and control of information systems and their predictive capacity, see supra Part I.

329. For extended examples of scholars working on this, see supra section I.B.

330. See Beniger, supra note 63, at 16–21 (detailing how computer technologies facilitate innovations in bureaucratic organization, communication and transport infrastructure, and systemic communication by mass media, all of which produce a revolution in societal control). For a paradigmatic example of twentieth-century concerns over social control, and the perils and promise of technologies of behavioral influence, see generally B.F. Skinner, Beyond Freedom and Dignity 3–9 (1971).

331. McGeveran, supra note 316, at 619 (noting that concerns over the powerful capacity of new databases led to the passage of the 1974 Privacy Act).

332. For example, Michel Foucault's famous account of the panopticon in *Discipline and Punish* establishes the centrality of surveillance (information gathering and control) for discipline, which he defines as techniques for reordering human complexity into prosocial behavior like docility. Michel Foucault, Discipline and Punish: The Birth of the Prison 215 (1977). *Discipline and Punish* is considered a foundational text of surveillance studies.

Examples of this preoccupation with privacy harm as (risk of) public misuse in action abound. Consider *Sanchez v. Los Angeles Department of Transportation*, a recent case brought by the Northern and Southern California ACLU against the City of Los Angeles (the City) for its regulation of e-scooter and e-bike vendors like Uber and Lime.[333] The regulation in question imposes a licensing scheme on these companies that requires them to share location data with the City to ensure compliance with the Americans with Disabilities Act and with other license conditions such as maintaining an equitable distribution of scooters across neighborhoods.[334] The ACLU argued that in requiring companies to hand over scooter location data, the City's licensing scheme violates the Fourth Amendment (applying *Carpenter*).[335] This kind of litigation choice by the ACLU reflects the view that privacy harm is a matter of state interference. The privacy risk contemplated here is not that companies like Uber and Lime are collecting the very same potentially sensitive and revealing location data (and indeed, unlike the City, are readily able to link scooter location data to people via riders' registered accounts and ride histories). Instead, the moment when legally significant privacy risks are introduced is when such data crosses the private–public divide.

Popular accounts making the case against commercial surveillance also emphasize that what makes commercial surveillance harmful is the risk of private data falling into the hands of public actors. For example, the collection of location data on gaming applications poses a risk because that information could fall into the hands of U.S. Immigration and Customs Enforcement (ICE).[336] Similarly, sharing location data with prayer apps is bad because that data might fall into the hands of the military.[337] People should also be wary using fertility apps in the wake of the *Dobbs* decision because that data may be used to prosecute them for an illegal abortion.[338]

To be clear, this Part's argument is not that one ought to dismiss or ignore these examples of privacy harm, nor to abandon the argument that state actors can pose a serious threat to privacy. Instead, it is to suggest that

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333. Complaint, Sanchez v. L.A. Dep't of Transp., No. 2:20-cv-05044, 2021 WL 1220690 (C.D. Cal. Feb. 23, 2021).

334. Id. at 3–4.

335. Id. at 4–5, 16.

336. See Blest, supra note 17.

337. Joseph Cox, How the U.S. Military Buys Location Data From Ordinary Apps, Vice News (Nov. 16, 2020), https://www.vice.com/en/article/jgqm5x/us-military-location-data-xmode-locate-x [http://perma.cc/7RNC-8ZV6] (detailing how the U.S military buys location data from many sources, including a Muslim prayer app that has been downloaded over ninety-eight million times).

338. Sara Morrison, Should I Delete My Period App? And Other Post-*Roe* Privacy Questions, Vox (July 6, 2022), https://www.vox.com/recode/2022/7/6/23196809/period-apps-roe-dobbs-data-privacy-abortion [http://perma.cc/U2J8-R5SN] (arguing that if one wants to keep reproductive health data private and is worried about a criminal investigation, one should not put it in an app, especially since several apps have been subject to privacy scandals).

the prevailing account of how social data value cultivated by *private actors* may be abused is one of its potential misuse by *state actors*. Perhaps as a result, existing privacy law remains rather neutral about the same capacity for social control wielded instrumentally by commercial actors in service of private (exchange value-enhancing) ends. This overlooks the role privacy law plays in legitimating and structuring private exercises of prediction value, some of which arguably raise similar kinds of normative concerns over power that animate privacy talk about data (mis)use in public settings.

a. *Market Power and Political Power: Knitting the Two Accounts Together.* — Using social data value to exert political power can, and often does, coexist with strategies to cultivate market power (or pricing power). As the examples in Part II show, economic power and political power are not easily separated or understood in isolation from one another. What from one perspective looks purely like commercial activity can reallocate political power between groups. For example, the use of prediction value to manage workers canvassed in script two above are deployed to grow profits but also re-make workplace relations in ways that erode politically won workplace protections and reallocate workplace power from workers to employers.[339] Strategies can exist in the interplay between the two, since political agents and public entities are also market participants. For example, Meta pursuing its standard business model (placing targeted ads) but servicing political clients (politicians) can affect voter perceptions and thus the political process.[340] And yet other exercises of social data power by companies occur outside the bounds of direct commercial relationships and do not use social data to produce business profits directly but instead to secure favorable regulatory outcomes.[341]

The idea that control over something valuable brings with it power is not an unfamiliar concept in legal fields focused on wealth and market regulation, nor is the idea that people or firms might accrue valuable resources for the sake of garnering power. But to date such arguments have predominantly focused on the power conferred by monetary wealth—namely, wealth in the easily-recognized form of exchange value. The medium such power takes either is money or is easily defined in terms

339. See supra section II.A.3; supra notes 118, 120; see also Brishen Rogers, Data and Democracy at Work 2–3 (2023) [hereinafter Rogers, Data and Democracy] (arguing that "technological development and . . . the degradation of work[ ]were completely intertwined, in the sense that companies increasingly used new technologies to limit workers' power").

340. As was famously at issue in the Cambridge Analytica scandal of 2016. See, e.g., Mark Zuckerberg Testimony: Senators Question Facebook's Commitment to Privacy, N.Y. Times (Apr. 10, 2018), https://www.nytimes.com/2018/04/10/us/politics/mark-zuckerberg-testimony.html (on file with the *Columbia Law Review*); Zeynep Tufekci, Opinion, Facebook's Surveillance Machine, N.Y. Times (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/opinion/facebook-cambridge-analytica.html (on file with the *Columbia Law Review*).

341. For an example, see supra notes 205–208 and accompanying text (discussing Project Greyball); see also Isaac, How Uber Deceived, supra note 205.

of money, such as the cash in someone's bank account or a company's financial statements. So, compared to these more traditional accounts of how wealth confers power (and why that may present social and legal problems), the story of how private power is cultivated via social data is more complex from the perspective of fields like antitrust and tax law. So, the aim here is to knit these two accounts together: layering the power latent in social data accumulation with the concerns associated with how the accumulation of value confers onto private actors economic and political power.

b. *Demand-Side Versus Supply-Side Data Regulation.* — As written, none of the privacy rules canvassed above bear on the economic motivations for collecting data that place growing pressure on privacy law's system of individual rights and corporate compliance. In short, they do not address the fact that entities violate privacy and misuse data *because* they are pursuing prediction value—and indeed, face significant market pressure to do so.

Several scholars have criticized U.S. privacy law as overly focused on individual privacy rights—what can be considered the "supply" side of the social data market.[342] To be clear, imposing greater data processing requirements, or expanding liability for data misuse, should (in theory) increase the cost of cultivating data value and thus exert some effect on companies' pursuit of social data value. Existing approaches, however, are likely inadequate to constrain the market imperatives to cultivate social data value.

Scholarly criticism is warranted. Sectoral privacy laws overwhelmingly confer weak rights, operationalized by systems of private compliance, and are grossly underenforced.[343] In response, lawmakers have (understandably) enacted solutions that strengthen existing approaches: higher standards of consent, more expansive lists of data subject rights, and more robust enforcement mechanisms.[344] This approach, while

342. Sebastian Benthall & Salomé Viljoen, Data Market Discipline: From Financial Regulation to Data Governance, 8 J. Int'l & Compar. L. 459, 466 (2021) (introducing the concept of "supply side" and "demand side" data market regulation). Privacy scholars have comprehensively covered the shortcomings of current individual consent–based laws. See, e.g., Elettra Bietti, Consent as a Free Pass: Platform Power and the Limits of the Informational Turn, 40 Pace L. Rev. 310, 313 (2019); Neil M. Richards & Woodrow Hartzog, The Pathologies of Digital Consent, 96 Wash. U. L. Rev. 1461, 1463 (2019); Katherine J. Strandburg, Free Fall: The Online Market's Consumer Preference Disconnect, 2013 U. Chi. Legal F. 95, 96–97.

343. See Katherine Strandburg, Helen Nissenbaum & Salomé Viljoen, The Great Regulatory Dodge, Harv. J.L. & Tech. (forthcoming) (manuscript at 22) (on file with author) ("The [California Consumer Protection Act] imposes relatively weak limitations on information flow and use, giving consumers only a limited right to opt out of information sales and sharing for cross-contextual behavioral advertising and of certain uses of 'sensitive' data.").

344. For example, the California Consumer Protection Act (CCPA) is considered a more robust consumer-protection-style U.S. privacy law. It retains the basic package of rights

admirable, still falls short of the steps required to transform data privacy law into an effective regulator of prediction value.

In *Between Truth and Power*, Cohen uses the analogy of corn production, which will be borrowed and expanded on here to illustrate the basic point: What data privacy law currently offers is roughly akin to a set of rules ensuring that corn is properly and ethically planted, grown, and harvested.[345] While this is, in and of itself, a perfectly legitimate set of goals, such rules would be wholly inadequate to govern and regulate the commodity derivatives and futures markets that assetize corn at scale to produce billions of dollars in downstream value.[346] Moreover, such rules would be inadequate to manage the effects that such processes of accumulation have on the general landscape of corn production: the transformational market pressures of industrial scale production and engineered modification to make corn-as-commodity more predictable and stable to grow, harvest, store, transport, and refine. Such modifications make corn well suited to its role as a key input in maximizing derivatives exchange value but leave corn decidedly less suited to certain (previously central) use values: namely, as a food.[347]

One way of describing this problem is that current and proposed privacy laws still lack an explicit focus on creating "demand-side" checks on social data production—in other words, regulation that directly manages the economic incentives and motives that drive companies to want social data. Companies' excessive demand for social data is due to the (arguably artificially) low costs and cheap risks associated with surveillant practices. Entities can cultivate maximum prediction value all while externalizing the current costs and future risks of doing so.

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but expands the scope of actions and data covered by these rights, strengthens the usual individual rights beyond consent and access to information, and imposes higher and more frequent consent requirements. See Cal. Civ. Code § 1798 (West 2023). For a discussion and overview of the CCPA provisions, see Chander et al., supra note 313, at 1747–49. For an analysis of how these provisions compare to existing FIPPs-style law, see Strandburg et al., supra note 343.

345. Cohen, Between Truth and Power, supra note 4, at 67–68.

346. The corn derivatives market was valued at over $75 billion as of 2022. See Kiran Pulidindi, Industry Analysis: Corn and Corn Starch Derivatives, Market Size by Product (Corn Starch, Corn Starch Derivatives {Corn Syrup, Maltodextrin, Others}, Corn Flour, Corn Meal, Corn Protein), by Application (Pharmaceutical, F&B, Biodiesel, Textiles, Others), 2023–2032, Glob. Mkt. Insights, https://www.gminsights.com/industry-analysis/corn-and-corn-starch-derivatives-market [https://perma.cc/L7GR-655Y] (last visited Feb. 20, 2024).

347. Only one percent of corn planted in the United States is sweet corn, the kind grown to be eaten as a vegetable by people. The rest of U.S. corn is a grain, primarily used for livestock feed, ethanol production, and manufactured goods (which does not include the small portion of grain corn used for human consumption as cereal, corn starch, corn oil, and corn syrup). In Iowa, the state that produces the most corn, fifty-seven percent of corn goes to ethanol production. See Corn Facts, Iowa Corn Growers Ass'n, https://www.iowacorn.org/media-page/corn-facts [https://perma.cc/AV9N-FZ24] (last visited Feb. 20, 2024) (finding that "99 percent of corn grown in Iowa is 'Field Corn'").

In other spheres of commercial activity, regulation to address issues of excessive demand typically aims to discipline speculative behavior. Applied to social data value, such regulatory models might be adapted to address companies' (arguably excessive) accumulation of social data for "techcraft"—data held by an entity to attract investment but where the entity lacks a clear technical or business case for how and why such social data fits into a strategy to produce better products or services of general social value.[348] Other possibilities include licensing schemes that require companies to state up front their purposes for data collection or that impose obligations to share data with other stakeholders who can, in turn, exert discipline on excessive, spurious, or pernicious prediction value use.[349]

Again, this isn't to say that privacy and data protection law does not, in fact, serve as a demand-side regulation—data privacy law is necessarily a regime engaged in the regulation of social data value creation. But until privacy and data governance law addresses the economic causes behind its challenges, the pressure being placed on existing data privacy law will only grow.

Finally, the lack of systematic regulation of prediction value can also prevent frank assessment of where and how data governance law can facilitate positive cultivation and use of prediction value. As work law scholars have argued, expanding access to work-generated data, under the right circumstances, can empower workers—if workers gain not only access to existing data but rights to have a say over what aspects of the workplace are datafied, and for which purposes such workplace data are used, in addition to substantive protections against exploitative uses of social data.[350] Better regulatory means for disciplining speculative prediction value can help to ensure that social data resources are channeled towards productive uses of prediction value—tamping down on social data collection that has little social utility while fostering productive social data production. Importantly, only regulating social data prediction value when its use constitutes a form of public harm can potentially limit or constrain the capacity of more systematic regulation to foster social data value's benefits.[351]

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348. On the concept of "techcraft" as a means of attracting investment, see Birch et al., Data as Asset?. supra note 55, at 2–3.

349. See, e.g., Frank Pasquale, Licensure as Data Governance, Knight First Amend. Inst.: Data and Democracy (Sept. 28, 2021), https://knightcolumbia.org/content/licensure-as-data-governance [https://perma.cc/V99W-QSVR] (proposing a licensure regime for data and AI that "flips the presumption" of firms' data practices being presumed legal until there is evidence of wrongdoing).

350. Rogers, Data and Democracy, supra note 339, at 143–50; Dubal, supra note 120, at 44–45, 48–50 (detailing worker efforts to use existing data protection laws and experiments with data cooperatives to pool and use workplace data while also noting the importance of placing substantive bans on certain employer use of workplace data).

351. Rory Van Loo, Privacy Pretexts, 108 Cornell L. Rev. 1, 60–62 (2022) (arguing for the benefits of data management over pretextual enforcement of privacy).

3. *Promising Horizons for Regulating Social Data Value in Data Privacy (and Beyond?).* — In his excellent synthesis of recent trends in data privacy, Daniel Susser notes that while policy responses have been uneven, trends in data privacy scholarship signal growing attention to privacy law's role as a value-regulating legal regime.[352] In particular, he notes two relevant shifts. The first shift is from privacy as an individual interest, and laws to strengthen rights in that interest, to the social and relational nature of privacy and the need for structural approaches to secure privacy for everyone. The second shift is from a primary focus on public actors and a rights-based model against public overreach to growing concerns over the surveillance practices of private firms that incorporate a political economy perspective.[353]

Both of these trends signal an openness among data privacy law scholars to view the proper role of their field as that of directly regulating prediction value across the public–private divide. Taking the second trend first, data privacy scholars that focus on the business models and scripts canvassed in Part II take as their object of inquiry the economic causes of privacy erosion—namely, the market imperative to cultivate prediction value.[354] Transforming market imperatives to cultivate, accumulate, and exploit prediction value necessarily relates to the other trend canvassed by Susser: the move from individual privacy rights to structural and systemic solutions.

Distinguishing between social data's prediction value and exchange value can lend clarity to these programs. Distinguishing prediction value from exchange value can explain broad trends in what aspects of life are datafied. Social data whose prediction value is more convertible into exchange value under scripts one and two, such as data subjects' clicks on relevant advertisements or expressions of purchasing preferences, may be more extensively produced than social data whose prediction value is not as readily converted into exchange value. While this may seem rather obvious, it suggests that shifting trends in datafication may in turn hint at shifting technological capacities and business strategies to transform prediction value into exchange value.

The distinction can be particularly helpful in charting a path toward a positive agenda for prediction value regulation. At least some undercultivated social data (not readily convertible into exchange value

352. Daniel Susser, From Procedural Rights to Political Economy: New Horizons for Regulating Online Privacy, *in* The Routledge Handbook on Privacy and Social Media 281, 282 (Sabine Trepte & Philipp Masur eds., 2023).

353. Id.

354. See, e.g., Cohen, Between Truth and Power, supra note 4, at 25; Srnicek, supra note 109, at 30–31; Zuboff, Surveillance Capitalism, supra note 30, at 10 ("Surveillance capitalism's products and services are not the objects of a value exchange. They do not establish constructive producer-consumer reciprocities. Instead, they are 'hooks' that lure users into their extractive operations in which our personal experiences are scraped and packaged as the means to others' ends.").

under any script) may nevertheless be of great predictive value for certain applications. Data privacy scholars are necessarily attuned to the harms of surveillance overreach and how excessive datafication creates personal and social disruption. It is thus not surprising that data privacy scholars and activists commonly diagnose (albeit often implicitly) the problem of the digital economy as one of too much datafication.[355]

But this is perhaps not exactly right. It is true that there is almost certainly too much datafication of consumptive choices. But there is also almost certainly too little datafication of, for example, local climate data.[356] Distinguishing exchange and prediction value can home in on the maldistribution of social data resources here: One's shoe purchasing preferences are readily transformed into script-one-style or script-two-style exchange value, while citizen-collected rainwater data might not be. Nevertheless, detailed real-time rainwater data is of profound predictive value for understanding climate effects.[357]

Data privacy scholars are increasingly interested in distinguishing the good from the bad when it comes to scholarly accounts of datafication.[358] Distinguishing exchange from prediction can aid the conceptual and programmatic agenda of this shift. It can help to more precisely describe current practices and identify gaps in the task of regulating prediction value. Namely, this distinction can help not only to prevent problems of speculative and excessive social data production—which result in excessively risky or ill-gotten prediction value production—but also to identify areas that actually suffer from an under-production of prediction value.

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355. Daniel Susser, Data and the Good?, 20 Surveillance & Soc'y 297, 297 (2022) [hereinafter Susser, Data and the Good?] (finding that data privacy scholars have "an aversion . . . to articulate a positive vision" for a "data-driven society").

356. Christopher Flavelle & Rick Rojas, Vermont Floods Show Limits of America's Efforts to Adapt to Climate Change, N.Y. Times (July 11, 2023), https://www.nytimes.com/2023/07/11/climate/climate-change-floods-preparedness.html (on file with the *Columbia Law Review*) (detailing how the United States lacks a comprehensive current precipitation database that could help assess flood risks). Local rainfall data is also an excellent example of how nonhuman data—this is data about rain, after all—can still be social data, insofar as such data is used to inform how and where people may safely live.

357. In comparison to local rain levels, the EPA does collect real-time local air quality data. It makes this data available to people via AirNow, an app run by the agency that people can use to assess current air quality in their area. This information was of great predictive value to people during recent periods when smoke from Québécois wildfires drifted across large swathes of the United States. See AirNow.gov, https://www.airnow.gov [https://perma.cc/FA7V-VHDJ] (last visited Feb. 21, 2024). It helped one of the authors who lived in the affected area during the 2023 summer wildfire season.

358. See, e.g., Solow-Niederman, supra note 5, at 423 (arguing for reframing privacy governance as a network of organizational relationships to manage—not merely dataflows to constrain); Susser, Data and the Good?, supra note 355, at 298 (calling for surveillance scholars to move past critique and put forward alternative conceptions of a good digital society); Birch, supra note 56 (considering the role of data in replacing markets and neoliberalism).

This project, while promising for governing social data value, also raises questions for future work. Data privacy law's role, as traditionally conceived, is to protect individuals' interest in data collected about them and related forms of informational overreach that may arise.[359] This is rather distinct from the political, economic, and systemic focus of recent scholarship and the task of regulating social data value creation.[360] The primary question concerns the proper conceptual understanding of the relationship between these two programs.[361] While both strains index important elements of informational life, what is less clear is where the categorical fault lines lie between the "traditional" conceptual terrain and legal program of data privacy and the agenda of social data value regulation canvassed here.

Though this scholarly inquiry is far from settled, the increased focus on the causes of privacy erosion—what this Article diagnoses as the cultivation of prediction value—signals a promising conceptual shift from which to develop laws better attuned to governing the production of social data value.

CONCLUSION

This Article shows how separately analyzing data's prediction and exchange values may prove helpful to understanding the challenges law faces in governing social data production and the political economy organized around it.

Part I lays out the theoretical account of social data as a materialized store of prediction value and describes how this value form diverges from traditional conceptions of value in law and beyond. Part II develops the case for the legal (and normative) relevance of this conceptual gap. As this Article shows in Part II, distinguishing prediction and exchange value is helpful in capturing with greater precision how and why entities go about cultivating, storing, and exploiting social data for gain. Part III considers how social data value fares under current legal regimes. As it shows, both areas of law that are not typically considered regimes of value regulation (like data privacy and data protection law) and those that squarely focus on regulating value (like tax law) struggle with social data value, albeit in different ways. Part III considers how the cultivation and accumulation of social data value meets, challenges, and transforms legal forms.

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359. See supra section III.C.1.

360. To be clear, it is not this Article's contention that such rights ought not exist, or that such individual interests are not valid. It is undoubtedly the case that individuals have legal privacy interests and that privacy rights secured against public overreach remain squarely within the realm of privacy, properly understood. See supra notes 24–31 and accompanying text.

361. On the topic of tensions within data privacy's conceptual capaciousness, see supra note 315 and accompanying text.

While this Article focuses on data privacy law and tax law, its analytic approach should prove fruitful in other areas of law as well, or notably for free expression and First Amendment law, antitrust, and financial regulation. These areas are similarly grappling with the changes to economic activity that derive from the cultivation and accumulation of prediction value.[362] The Article's analytic separation of prediction value and exchange value is helpful in other ways, too.

First, distinguishing the value of social data cultivation and accumulation from priced exchange value helps lay bare how much of alleged prediction value creation is mere speculation with little behind the curtain. As Shapiro notes, when it comes to understanding the way prediction value is capitalized by platforms into market valuation, there is a considerable "gap between what platforms do and what they say they do."[363] Clarifying the two modes of value production (and how they relate to each other) thus helps regulators or other observers assess when such claims are plausible, and when they are not.

Bringing this gap into legal view is particularly important for areas of law that manage and regulate value creation. Such regimes have an interest in distinguishing between speculative and productive activity to channel social resources away from the former and toward the latter. Distinguishing between these forms of value also matters for areas of law meant to mitigate harms arising from such gaps and from the social disruptions caused by entities pursuing growth based on dubious claims of value in either form. Speculative and harmful practices escape scrutiny and continue to flourish in the digital economy when these two forms of value are confused and obscured.

Second, while it is not this Article's aim to develop a normative account of how social data production should be regulated, this Article's work to distinguish prediction and exchange value is helpful for such efforts. The Article does not engage in a normative evaluation of when (under what conditions) and why (for what reasons) the use of prediction value may be wrongful. But this is not to say that prediction value is not cultivated, hoarded, or used in wrongful ways, nor, indeed, that certain wrongful actions are not widespread among corners of the digital economy. Separating the cultivation of prediction value from its transformation into exchange value further clarifies normative critiques lodged against social data production.

Some accounts appear to critique data production insofar as it is directed by exchange value; they take issue with the commodification of social data. Reducing complex social and ethical considerations to exchange values may degrade or violate fundamental principles. For example, Rahel Jaeggi points out that child labor is considered wrong not because of the risk that children's labor is likely to be systematically

362. See supra notes 79–93 and accompanying text.

363. Shapiro, Platform Sabotage, supra note 21, at 204.

undervalued by the market (a "quantitative" harm) but because of the social conviction that making a labor market for children is itself violative (a "qualitative" harm).[364] Similarly, critics argue that a priced market in adoptions, or organs, would be wrongful even if such markets might increase allocative efficiency.[365] Some feminists make a similar point about sex and use this normative diagnosis to argue against sex work.[366] Is assigning a priced value to social data, or certain subclasses or uses of social data, wrong in the same way? The recent FTC proposal to ban Meta from monetizing children's data suggests such a theory.[367]

Other accounts appear to take issue with data production in virtue of it serving as a material store of prediction value. In other words, some argue there is something particular to the cultivation of prediction value that is, or can be, wrongful. For example, Zuboff, both in her early work on "informating" and in her later work on surveillance capitalism, suggests such a diagnosis. Philip Agre diagnosed informational harm as a process of "capture," whereby greater portions of human activity are forced into market competition with other humans through the collective project of institutions measuring them against one another.[368] Gandy's panoptic sort is a "disciplinary" system of power that, if left unchecked, can result in amplifying loops of growing mistrust and amplified surveillance in which "each cycle pushes us further from the democratic ideal."[369] Is the cultivation of material stores of predictive value independently wrongful? Legal reforms to ban outright certain forms of surveillance, such as facial recognition and other forms of biometric surveillance, suggest such a theory.[370]

Different observers may come to different conclusions. But disambiguating the two aspects of data value makes distinguishing such critiques, and the relation they bear to one another, clearer.

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364. Jaeggi, supra note 72, at 54–55.

365. For a famous example defending the allocative efficiency of nonpriced markets in altruistic goods, see generally Richard Titmuss, The Gift Relationship: From Human Blood to Social Policy (1970).

366. See, e.g., Andrea Dworkin, Prostitution and Male Supremacy, 1 Mich. J. Gender & L. 1, 3 (1993) ("Prostitution in and of itself is abuse of a woman's body.").

367. Press Release, FTC, FTC Proposes Blanket Prohibition Preventing Facebook From Monetizing Youth Data (May 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-proposes-blanket-prohibition-preventing-facebook-monetizing-youth-data [https://perma.cc/5P3R-F9JW].

368. Philip E. Agre, Surveillance and Capture: Two Models of Privacy, 10 Info. Soc'y 101, 105, 117–18 (1994). The authors thank Dan Greene, Nathan Beard, Tamara Clegg, and Erianne Weight for pointing to this example, which is cited in their recent article. See Greene et al., supra note 64, at 4.

369. Gandy, Panoptic Sort, supra note 65, at 260.

370. In 2020, the city of Boston enacted a local ban on the use of facial recognition technology, becoming the tenth U.S. city to do so. See Bos., Mass., Code § 16-62 (2020); see also S. 2963, 191st Gen. Ct. § 26 (Mass. 2020). In 2021, Massachusetts restricted the use of facial recognition by police but did not ban it. Mass. Gen. Laws Ann. ch. 6, § 220 (West 2021).

The digital economy has reshaped and remade both people's social lives and the laws that structure them. The business models and tactics of accumulation pursued for social data value have produced significant wealth and power, as well as significant social disruption. This Article's primary ambition is to provide conceptual language better tailored to the specificities of how information produces value and to in turn better equip the various legal regimes tasked with regulating that value and enacting social goals related to the direction and shape of the information economy.

NOTES

TOWARD DISTRIBUTED NATURE: THE AFFORESTATION EASEMENT AND A REGENERATIVE LAND ETHIC

*Isaac Lunt**

Anthropogenic climate change is altering humanity's relationship to the natural world. As extreme weather events become more frequent and biodiversity plummets, humankind has three responsibilities: lower carbon dioxide emissions, preserve what remains of the natural world, and generate new pockets of nature to slowly rebuild what we have destroyed.

Trees—particularly when grouped together in forests—are humanity's allies. Yet while tree planting is an often-hailed solution to climate change, few legal tools exist in the United States to foster afforestation on private land. Current federal programs directed at tree planting focus on lumber production or agriculture, with little attention to small-scale afforestation projects aimed at restoring and recreating the natural world.

This Note joins a growing body of literature suggesting that individual property owners can make a difference in the fight against climate change by supporting natural landscapes. It terms a subset of these efforts "distributed nature" and posits that incentivizing property owners to engage in distributed nature requires legal intervention. It then suggests a legal tool, the afforestation easement, which would provide individual landowners with tax benefits for donating their land for permanent afforestation. Along the way, it reimagines the concept of "conservation" to include setting aside land not only for static preservation but also for dynamic regeneration.

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"*[A] land ethic changes the role of Homo sapiens from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such.*"

— Aldo Leopold.[1]

INTRODUCTION

Humanity is the most influential species on the planet.[2] It has colonized the globe,[3] harnessed the energy of the elements,[4] and even traveled into space.[5] In its rise, however, humanity has imperiled not only its own continuing existence but also life on the very planet it inhabits. Human activities are causing the climate to change,[6] other living beings are disappearing at alarming rates,[7] and vast tracts of wilderness are being eliminated almost daily.[8] Humanity is powerful, and it is destructive.

Having demonstrated its ability to alter the planet, humanity has a responsibility to exercise that ability with care. The species itself cannot expect to survive the long-term impacts of its own destructive tendencies.[9]

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1. Aldo Leopold, An Ethic for Man-Land Relations, *in* The American Environment: Readings in the History of Conservation 105, 107 (Roderick Nash ed., 2d ed. 1976) [hereinafter Nash, The American Environment].

2. See Edward O. Wilson, Half-Earth 12 (2016) ("Here on Earth [humanity's] name is *Power*.").

3. See Craig Welch, Earth Now Has 8 Billion People—And Counting. Where Do We Go From Here?, Nat'l Geographic (Nov. 14, 2022), https://www.nationalgeographic.com/environment/article/the-world-now-has-8-billion-people (on file with the *Columbia Law Review*) (reporting that the world population, as of November 2022, likely reached eight billion).

4. See, e.g., How Does Solar Work, Off. Energy Efficiency & Renewable Energy, https://www.energy.gov/eere/solar/how-does-solar-work [https://perma.cc/QKH3-3PEL] (last visited Jan. 12, 2023) ("When the sun shines onto a solar panel, energy from the sunlight is absorbed by the [photovoltaic] cells in the panel. This energy creates electrical charges that move in response to an internal electrical field in the cell, causing electricity to flow.").

5. A to Z List of NASA Missions, NASA, https://www.nasa.gov/a-to-z-of-nasa-missions/ [https://perma.cc/3BWU-XAEC] (last visited Mar. 1, 2024) (listing all U.S. government space missions).

6. The 2022 Intergovernmental Panel on Climate Change (IPCC) report speaks of "human-induced climate change" without qualification. See IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 9 (2022) (on file with the *Columbia Law Review*) [hereinafter IPCC, Climate Change 2022].

7. See Elizabeth Kolbert, The Sixth Extinction: An Unnatural History (2014) (arguing that human activity is causing an extinction level event comparable to only five other instances in the past half-billion years); infra notes 26–31 and accompanying text (detailing the scope of current species die-off).

8. See, e.g., infra note 31 and accompanying text (describing the example of the Amazon rainforest).

9. See Wilson, supra note 2, at 13 ("[O]ur physical bodies[] have stayed as vulnerable as when we evolved millions of years ago. We remain organisms absolutely dependent on other organisms. People can live unaided by our artifacts only in bits and slivers of the biosphere, and even there we are severely constrained.").

Self-preservation—as well as a duty toward other living beings—demands that humanity begin viewing its relationship to the natural world with the eyes of stewards rather than of conquerors. Part of that stewardship is protecting those natural environments that still exist.[10] But another part is restoring what has been lost.[11]

The natural world has demonstrated a remarkable ability to regenerate when left alone or when assisted by human beings.[12] But any restoration and regeneration of the natural world requires space and time. In the United States, that means confronting the reality of private property ownership.[13] The fact that so much of America's land is privately held means that individual engagement will be a necessary element in any regenerative environmental ethic.[14]

This Note labels the regeneration of the natural world on individual property "distributed nature" and argues that the federal government—because these efforts must be nationwide to have a truly restorative impact—must implement policies that incentivize participation in the effort. To that end, legal tools must be designed to encourage private landowners to use their lands for the benefit of other living beings. This Note suggests one such tool to foster the regeneration of one of nature's most valuable resources: trees.

Tree planting is often heralded as a solution to all the climate problems facing the world.[15] While planting trees is not a silver bullet, trees are extraordinary beings with many positive qualities.[16] And tree planting is one of those rare practices that can attack both sides of the climate crisis—the need to decarbonize and the need to halt biodiversity loss[17]—in one act.

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10. See, e.g., infra note 35 (describing conservationist policies recently announced by world governments).

11. See Douglas W. Tallamy, Nature's Best Hope 24, 26 (2019) ("We need a new conservation plan, one that sustains the living systems we depend on everywhere . . . [and] create[s] landscapes that contribute to rather than degrade local ecosystem function.").

12. See id. at 26 ("[W]e are learning how rapidly the animals return to our yards, parks, open spaces, neighborhoods, and even cities when we landscape sustainably.").

13. See infra notes 41–43 and accompanying text (describing private property's deep roots in American law and tracking the extent of current private property ownership in the United States).

14. Sixty percent of the land in America is privately owned. Ruqaiyah Zarook, Map of the Week: Mapping Private vs. Public Land in the United States, Ubique, https://ubique.americangeo.org/map-of-the-week/map-of-the-week-mapping-private-vs-public-land-in-the-united-states/ [https://perma.cc/CD83-2XQC] (last visited Oct. 13, 2022). For a discussion of the ways in which individuals are already mobilized to help fight climate change, see infra notes 44–48 and accompanying text.

15. See infra notes 68–75 and accompanying text.

16. See infra notes 73–77 and accompanying text.

17. See David Wallace-Wells, Opinion, Has Climate Change Blinded Us to the Biodiversity Crisis?, N.Y. Times (Dec. 21, 2022), https://www.nytimes.com/2022/12/21/opinion/climate-change-biodiversity-crisis-cop15.html (on file with the *Columbia Law Review*) (arguing that a focus on decarbonization ignores considerations of solutions to the loss of biodiversity).

This Note adopts tree planting—and, more specifically, afforestation[18]—as both a valuable end unto itself and an example of the kind of act that could characterize a broader regenerative land ethic. The Note therefore designs a legal instrument—the afforestation easement[19]—that could prove valuable both as a tool in the distributed nature toolbox and as a model of how to adapt existing American legal structures to the needs of this moment.

This Note proceeds in three Parts. Part I details the perilous state of the world and its inhabitants, discusses the benefits of trees and forests, and outlines an ideal of afforestation. Part II examines current federal tax incentives and programs that support, or could be used to support, afforestation. And Part III suggests a new tool to fill the gaps left by those incentives and programs: the afforestation easement.

I. EARTH AND TREES

A. *State of the World*

Global climate change is here. It is causing extreme weather,[20] contributing to biodiversity loss,[21] and seeding mass hopelessness.[22] Poor nations with minimal historic contributions to the crises they now face are

18. See infra section I.C.3 and accompanying text (distinguishing afforestation from other forms of tree planting).

19. See infra Part III.

20. See IPCC, Climate Change 2022, supra note 6, at 9. For two recent headlines demonstrating the prevalence of extreme weather events, see Anna Betts & Jamie McGee, Lingering Cold Puts Millions in the South Under Harsh Conditions, N.Y. Times (Jan. 20, 2024), https://www.nytimes.com/2024/01/20/us/cold-weather-ice-wind-snow-south.html (on file with the *Columbia Law Review*); Corina Knoll & Vik Jolly, In San Diego, Furious Deluge Floods Homes and Freeways, N.Y. Times (Jan. 22, 2024), https:// www.nytimes.com/2024/01/22/us/san-diego-storm-flood.html (on file with the *Columbia Law Review*). These are, of course, isolated incidents. But the general trend follows. See Henry Fountain & Mira Rojanasakul, The Last 8 Years Were the Hottest on Record, N.Y. Times (Jan. 10, 2023), https://www.nytimes.com/interactive/2023/climate/earth-hottest-years.html (on file with the *Columbia Law Review*); Raymond Zhong & Keith Collins, See How 2023 Shattered Records to Become the Hottest Year, N.Y. Times, https://www.nytimes.com/2024/01/09/climate/2023-warmest-year-record.html (Jan. 9, 2024) (on file with the *Columbia Law Review*) (last updated Jan. 12, 2024). According to the EPA, extreme weather events will continue as a result of global climate change. Climate Change Indicators: Weather and Climate, EPA, https://www.epa.gov/climate-indicators/weather-climate [https://perma.cc/EFN4-VGAD] (last updated July 26, 2023).

21. Press Release, World Wildlife Fund, 69% Average Decline in Wildlife Populations Since 1970, Says New WWF Report (Oct. 13, 2022), https://www.worldwildlife.org/press-releases/69-average-decline-in-wildlife-populations-since-1970-says-new-wwf-report [https://perma.cc/S57E-GKDH].

22. Experts in the field are now recognizing the negative mental health effects of climate change. See, e.g., Urgent Need to Address Mental Health Effects of Climate Change, Says Report, Am. Psych. Ass'n (Nov. 4, 2021), https://www.apa.org/news/press/releases/2021/11/mental-health-effects-climate-change [https://perma.cc/P2G9-D5AL].

finding themselves on the brink of destruction.[23] The world can expect massive migrations of populations from regions that are made uninhabitable by climate change or else made indirectly so because of the ancillary effects of those changes: war, disease, and famine.[24] In short, all indications are that the future of life on the planet itself is at stake. And there is little doubt that humanity, as a species, is responsible.[25]

Widespread as suffering on the planet is and will continue to be among human beings, nonhuman populations have fared worse. A full accounting of the various lifeforms that have been extinguished due to anthropogenic climate change—and other human activities like habitat destruction, pollution, and hunting—is impossible.[26] But indications are that in the past half-century, vertebrate populations have seen a nearly seventy percent drop.[27] In that same timespan, North America lost close to three billion birds.[28] Coral reefs are in jeopardy.[29] Pollinators are in decline.[30] The great rainforests of the world are being cleared for agriculture or extraction.[31]

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23. IPCC, Climate Change 2022, supra note 6, at 9. This is happening rapidly in some parts of the world. The Indonesian capital of Jakarta, for example, is sinking into the sea, with estimates that by 2050 at least one third of the city will be under water. Indonesia's Capital Is Rapidly Sinking Into the Sea, NPR (Jan. 26, 2022), https://www.npr.org/2022/01/26/1075720551/jakarta-indonesia-sinking-into-java-sea-new-capital [https://perma.cc/B7MA-SULG].

24. See John Podesta, The Climate Crisis, Migration, and Refugees, Brookings 1–2 (2019), https://www.brookings.edu/wp-content/uploads/2019/07/Brookings_Blum_2019_climate.pdf [https://perma.cc/AAK2-3RL8] (exploring the relationship between climate change and global mass migration).

25. So compelling is the evidence of this responsibility that some scientists have suggested the world may be entering a new historical era: the Anthropocene. See Wilson, supra note 2, at 9; Raymond Zhong, For Planet Earth, This Might Be the Start of a New Age, N.Y. Times (Dec. 17, 2022), https://www.nytimes.com/2022/12/17/climate/anthropocene-age-geology.html (on file with the *Columbia Law Review*) (reporting on this phenomenon). A group of experts recently rejected this idea. See Raymond Zhong, Are We in the 'Anthropocene,' the Human Age? Nope, Scientists Say., N.Y. Times (Mar. 5, 2024), https://www.nytimes.com/2024/03/05/climate/anthropocene-epoch-vote-rejected.html (on file with the *Columbia Law Review*) (last updated Mar. 8, 2024). Still, the fact of the debate says much about humanity's impact on the climate.

26. See Wilson, supra note 2, at 19.

27. World Wildlife Fund, supra note 21.

28. See Kenneth V. Rosenberg et al., Decline of the North American Avifauna, 366 Science 120, 120 (2019) (detailing the loss of bird populations).

29. See Threats to Coral Reefs, EPA, https://www.epa.gov/coral-reefs/threats-coral-reefs [https://perma.cc/K64A-DNVU] (last updated Feb. 28, 2024).

30. Pollinators in Trouble, Nat'l Park Serv., https://www.nps.gov/subjects/pollinators/pollinators-in-trouble.htm [https://perma.cc/T8GL-YARX] ("Populations of . . . pollinators are declining around the world.") (last updated June 18, 2018); Sonny Ramaswamy, Reversing Pollinator Decline is Key to Feeding the Future, USDA (June 24, 2016), https://www.usda.gov/media/blog/2016/06/24/reversing-pollinator-decline-key-feeding-future [https://perma.cc/SUP8-ZLWV] (tying pollinator decline to food security threats); see also Tallamy, supra note 11, at 158–59 ("Four species of bumblebees have declined 96 percent just in the last twenty years . . . ." (citation omitted)).

31. See, e.g., Alex Cuadros, Has the Amazon Reached Its 'Tipping Point'?, N.Y. Times Mag. (Jan. 4, 2023), https://www.nytimes.com/2023/01/04/magazine/amazon-tipping-point.html

Humanity possesses enormous influence over the state of the physical world.[32] And, at times, it has chosen to exercise this authority to preserve large swaths of that world.[33] The preservationist impulse was a defining characteristic of the early American conservation movement[34] and continues to define the policy solutions of ecologists and governments.[35] Preservation serves as an important counterweight to the human tendency to expand, inhabit, and destroy. But preservation is not enough. The natural world is collapsing at an alarming rate, and even those areas protected by law are not immune from the effects of global climate change.[36] Many therefore suggest that humanity must not only work to preserve what is left, but must cultivate an active, *regenerative* relationship to the natural world.[37] In other words, in order to halt or reverse the devastating impacts of climate change and human activity on the planet—in order to do justice by the other living beings on this planet and ensure the continuance of the human family—human beings must not only take action to preserve those still-undisturbed parts of the natural world but also to ensure that *new* pockets of nature are established and protected.[38]

(on file with the *Columbia Law Review*) (last updated June 15, 2023) (reporting that seventeen percent of the Amazon rainforest has been cleared for croplands and pasture).

32. See Wilson, supra note 2, at 12 ("Here on Earth [humanity's] name is *Power*."); see also Elizabeth Kolbert, Under a White Sky 6–8 (2021) [hereinafter Kolbert, Under a White Sky] (collecting examples of humanity exerting its influence on the natural world, for good and bad).

33. One example is the American National Park system, which protects over eighty-five million acres of public land. See Nat'l Park Serv., Quarterly Acreage Report, Summary of Acreage: 12-31-2023 (2023), https://www.nps.gov/subjects/lwcf/upload/NPS-Acreage-12-31-2023.xlsx (on file with the *Columbia Law Review*). Worldwide, about fifteen percent of land is protected. See Press Release, Int'l Union for Conservation of Nature, The World Now Protects 15% of Its Land, But Crucial Biodiversity Zones Left Out (Sept. 3, 2016), https://www.iucn.org/news/secretariat/201609/world-now-protects-15-its-land-crucial-biodiversity-zones-left-out [https://perma.cc/3YUM-ZCTV].

34. See infra section III.B (describing that movement and its philosophy).

35. See Wilson, supra note 2, at 3 (suggesting that one half of the earth must be set aside "in reserve" to avert the worst disasters of climate change and species die-off); see also Press Release, Convention on Biological Diversity, Nations Adopt Four Goals, 23 Targets for 2030 in Landmark UN Biodiversity Agreement (Dec. 19, 2022), https://prod.drupal.www.infra.cbd.int/sites/default/files/2022-12/221219-CBD-Press Release-COP15-Final_0.pdf [https://perma.cc/X9VP-U6AA] (announcing global targets to protect thirty percent of the world's "lands, inland waters, coastal areas and oceans" by 2030); Press Release, U.S. Dep't of the Interior, Biden–Harris Administration Outlines "America the Beautiful" Initiative (May 6, 2021), https://www.doi.gov/pressreleases/biden-harris-administration-outlines-america-beautiful-initiative [https://perma.cc/AY58-TJR8] (last updated Dec. 6, 2023) (outlining a new nationwide goal to conserve thirty percent of land and water by 2030).

36. See, e.g., Incident Information System, InciWeb, https://inciweb.wildfire.gov/ [https://perma.cc/7BCW-ZBME] (last visited May 9, 2024) (showing current wildfires within the national park system in real time).

37. See, e.g., Tallamy, supra note 11, at 12–13.

38. See id. at 25–26. Humanity has long demonstrated its adeptness at nature-creation. See Kolbert, Under a White Sky, supra note 32.

B. *Distributed Nature*

The twin crises of climate change and biodiversity loss are distinctly physical and have physical solutions. That is, all proposed solutions to these problems—from wind turbines to afforestation—require one finite resource: land.[39] In the United States—which arguably contributes more to climate change and biodiversity loss than any other nation[40]—that need for land means reckoning with the reality of private property.

American arguments around land have been preeminent from the nation's beginning.[41] The lust for acquisition was a driving force in the development of the early republic and resulted in the colonization, by Americans, of what is now the continental United States.[42] Today, it is estimated that close to sixty percent of all the land in the United States—between 1.3 and 1.4 billion acres—is privately owned.[43] Any solutions to the climate crisis involving land, therefore, will inevitably bump up against the reality of private ownership. This reality of private ownership sounds in individual responsibility and the necessity of individual action. American society already enlists individuals in many efforts to mitigate the effects of climate change: distributed solar,[44] recycling,[45] energy efficiency,[46] and others.[47] And, more recently, commentators and citizens

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39. See Michael B. Gerrard, A Time for Triage, 39 Env't F. 38, 39–40 (2022) [hereinafter Gerrard, Time for Triage] (outlining the need for massive amounts of land to complete the renewable energy transition and arguing for prioritizing, in some cases, land use for clean energy growth over certain natural ecosystems).

40. See Umair Irfan, Why the US Bears the Most Responsibility for Climate Change, In One Chart, Vox, https://www.vox.com/energy-and-environment/2019/4/24/18512804/climate-change-united-states-china-emissions [https://perma.cc/DU8Z-5Q9Y] (last updated Dec. 4, 2019).

41. See, e.g., Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 589–90 (1823) (providing an early example of American thinking about the nature of private property and land use).

42. "Manifest destiny"—the idea that the United States was a chosen land whose people deserved to expand endlessly westward—characterized the continental expansion of the nineteenth century. See Julius W. Pratt, The Origin of "Manifest Destiny", 32 Am. Hist. Rev. 795, 795 (1927).

43. See Zarook, supra note 14.

44. Distributed Generation of Electricity and Its Environmental Impacts, EPA, https://www.epa.gov/energy/distributed-generation-electricity-and-its-environmental-impacts [https://perma.cc/ZDV2-L9UN] [hereinafter EPA, Distributed Generation of Electricity] (last updated May 15, 2023).

45. National Recycling Strategy, EPA, https://www.epa.gov/circulareconomy/national-recycling-strategy [https://perma.cc/3MQT-BEYQ] (last updated Feb. 21, 2024).

46. Energy Efficiency: The First Fuel of a Sustainable Global Energy System, Int'l Energy Agency, https://www.iea.org/topics/energy-efficiency [https://perma.cc/UWK8-2HM8] (last visited Jan. 11, 2023).

47. Some argue that the emphasis on individual action is at best misguided and at worst an active distraction campaign run by the true perpetrators of the climate crisis: corporations. See Michael E. Mann, The New Climate War: The Fight to Take Back Our Planet 2 (2021) ("[O]ne recent study suggests that the emphasis on small personal actions can actually undermine support for the substantive climate policies needed.").

are beginning to recognize the need for individual action to generate small-scale natural ecosystems on their own properties.[48]

If properly incentivized and dramatically expanded, these efforts could lead to what this Note calls "distributed nature": the broadscale regeneration of natural ecosystems on individual private lands.[49] Distributed nature could marry a federal legal incentive structure with local ecological knowledge and private land stewardship.[50] With the right legal tools, distributed nature could enlist private landowners in the fight against climate change, provide new habitats for threatened species, and cultivate a regenerative environmental ethic that recognizes the importance of human stewardship. It could see the harmonious cohabitation of humanity and a diversity of flora and fauna right in our own backyards. Many legal tools may be necessary to incentivize distributed nature across the many ecologies of the United States.[51] This Note begins at the federal level, where broad outlines can be sketched and basic values considered. And it will propose one such tool, targeting a specific form of distributed nature: forests.

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48. See Tallamy, supra note 11, at 25; Cara Buckley, They Fought the Lawn. And the Lawn's Done., N.Y. Times (Dec. 14, 2022), https://www.nytimes.com/2022/12/14/climate/native-plants-lawns-homeowners.html (on file with the *Columbia Law Review*) (last updated Dec. 20, 2022) (detailing one couple's fight to keep their natural ecosystem on their property in the face of pressure from their homeowner's association to replace it with a traditional lawn); see also Planting Pollinator Gardens, Am. Horticultural Soc'y, https://ahsgardening.org/gardening-resources/planting-for-pollinators/ [https://perma.cc/4SVK-78PQ] (advising gardeners on assisting pollinators) (last visited Jan. 11, 2023). This understanding has inspired Shubhendu Sharma to launch a global campaign of planting what he calls "tiny forests." Simran Sharma, Eco-Entrepreneur Shubhendu Sharma On Why Planting an Urban Forest Is the Need of the Hour, Indian Express (July 28, 2022), https://indianexpress.com/article/lifestyle/life-style/world-nature-conservation-2022-shubhendu-sharma-natural-maintenance-free-urban-forests-miyawaki-technique-8053933/ (on file with the *Columbia Law Review*). For a video of one of Sharma's projects, see Afforestt, Tiny Forest, YouTube (June 4, 2017), https://www.youtube.com/watch?v=MDSlft037gk (on file with the *Columbia Law Review*). As this Note goes to print, the trend is spreading as far as the "concrete jungle," New York City. See Cara Buckley, Coming Soon to Manhattan, a Brand-New Tiny Forest, N.Y. Times (Mar. 11, 2024), https://www.nytimes.com/2024/03/11/climate/tiny-forest-roosevelt-island.html? (on file with the *Columbia Law Review*).

49. This term is borrowed from the idea behind distributed solar: many individual property owners working in individual capacities to solve a collective problem. See EPA, Distributed Generation of Electricity, supra note 44 (explaining distributed generation).

50. See generally Tallamy, supra note 11, at 34–35 (suggesting tax incentives could be one avenue to incentivize people to turn their backyards into ecologically diverse environments).

51. See id. at 79 (describing the importance of native plants and the differences between various American biomes).

C. *The Forests and the Trees*

1. *The State of American Forests.* — It is surprisingly difficult to define the term "forest."[52] In 2015, the United Nations suggested that a "forest" is land covering 0.5 hectares (about 1.24 acres) with trees higher than five meters (about 16.4 feet) and a canopy covering more than ten percent of the land.[53] Former UN definitions had been similar,[54] demonstrating that relatively small areas of land (1.24 acres is just slightly larger than an American football field) can constitute forest if properly treed.[55] Of course, most people think of forests in grandiloquent terms appropriate for the wilderness spread across Alaska or in the jumbled ecosystems of the Amazon.[56] And in many parts of the world—including the United States[57]—those forests still exist. Despite centuries of deforestation, forests still cover close to a third of the land in the United States.[58] But between 1950 and 2018, the world lost 0.7 billion hectares of forest (about 1.7 billion acres), reducing the total of forested land in the world from forty-

52. See Robin L. Chazdon, Pedro H.S. Brancalion, Lars Laestadius, Aoife Bennett-Curry, Kathleen Buckingham, Chetan Kumar, Julian Moll-Rocek, Ima Célia Guimarães Vieira & Sarah Jane Wilson, When Is a Forest a Forest? Forest Concepts and Definitions in the Era of Forest and Landscape Restoration, 45 Ambio 538, 538 (2016) (positing that definitions differ depending on management objectives).

53. Forest Resources Assessment 2015: Terms and Definitions 3 (Food & Agric. Org., Working Paper No. 180, 2012), https://www.fao.org/3/ap862e/ap862e00.pdf [https://perma.cc/3SL8-GMS8]. The UN excludes from its definition "land that is predominantly under agricultural or urban land use." Id. It further excludes tree stands that exist primarily for production—for example, fruit tree plantations. Id.

54. See Cazdon et al., supra note 52, at 542 box 1 (2016) (listing UN definitions).

55. See Michael Kolomatsky, How Big Is an Acre, Anyway?, N.Y. Times (July 26, 2018), https://www.nytimes.com/2018/07/26/realestate/how-big-is-an-acre-anyway.html (on file with the *Columbia Law Review*) (providing the football field example).

56. See Rebecca Robbins, A Growing Need: Increasing Agricultural and Urban Forestation to Combat Climate Change, 22 Vt. J. Env't L. 69, 71 (2021) (describing the Alaskan forests); Cuadros, supra note 31 (describing the Amazon).

57. The Humboldt-Toiyabe National Forest, for example, covers 6.3 million acres across Nevada and California. See Joshua Knoll, Seven Largest National Forests, Nat'l Forest Found., https://www.nationalforests.org/blog/seven-largest-national-forests [https://perma.cc/G9BL-8DEU] (last visited Feb. 1, 2024).

58. Forest Area (% of Land Area)–United States, World Bank https://data.worldbank.org/indicator/AG.LND.FRST.ZS?locations=US [https://perma.cc/J2BD-9HXN] (last visited Oct. 15, 2022). These forests sequester an enormous amount of carbon. See Richard Birdsey, Princeton's Net-Zero Study Annex P: Past and Prospective Changes in the Net CO2 Flux of U.S. Forests 2 (2022) (estimating the rate of forest CO2 removal from the atmosphere at -600 Tg CO2 per year). Because of strong forest management policies, the carbon sequestration potential of American forests has actually *grown* over the past century. See Federico Cheever, Robert McKinstry Jr. & Robert L. Fischman, Forestry, *in* Legal Pathways to Deep Decarbonization in the United States 824 (Michael B. Gerrard & John C. Dernbach eds., 2019) [hereinafter Cheever et al., Forestry] ("[A]s a result of the adoption of sustainable forestry management, our forests are regrowing and removing [CO2 previously released by deforestation] from the atmosphere.").

four percent to thirty-eight percent.[59] In the two decades between 2001 and 2021, the United States alone lost sixteen percent of its total tree cover.[60] There is good reason to believe these declines will continue. Wildfires are consuming forests every year.[61] Urban trees are dying off in the extreme heat of American summers.[62] And the recent Princeton Net-Zero America Study predicts that the amount of carbon dioxide sequestered in American forests will decline over the next several decades due to, among other things, dying trees.[63]

Most of the forest still standing in the United States—about sixty percent—is privately owned.[64] This is particularly true of the Eastern United States, where the vast majority of forest is owned by private entities—especially corporations.[65] All told, there are currently nearly 443 million acres of privately owned forest in the United States.[66] Hundreds of millions of acres of private land are currently being put to uses other than forest.[67] But there are many who would like to see that changed.

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59. Hanna Ritchie, Forest Area, Our World in Data (Feb. 4, 2021), https://ourworldindata.org/forest-area [https://perma.cc/U5HQ-RSXD].

60. United States, Glob. Forest Watch, https://www.globalforestwatch.org/dashboards/country/USA/?map=eyJjYW5Cb3VuZCI6dHJ1ZX0%3D [https://perma.cc/6ZSR-4X6N] (last visited Jan. 11, 2023).

61. U.S. Wildfires, Nat'l Ctrs. for Env't Info., https://www.ncei.noaa.gov/access/monitoring/wildfires/month/0 [https://perma.cc/QMB9-JSP4] (last visited Jan. 11, 2023).

62. See, e.g., Manuel Valdes, As Climate Change Progresses, Trees in Cities Struggle, L.A. Times (Nov. 16, 2022), https://www.latimes.com/world-nation/story/2022-11-16/as-climate-change-progresses-trees-in-cities-struggle (on file with the *Columbia Law Review*).

63. Birdsey, supra note 58, at 6 (listing deforestation, reduced afforestation, aging forest, increasing use of wood for bioenergy, and natural disturbances such as wildfire and bark beetles as the main reasons for the declining carbon sequestration potential of U.S. forests). But Birdsey also writes that "[l]and-use change . . . is the dominant driver of [this] projected decline in net CO2 flux." Id. at 7.

64. See Who Owns America's Forests?, Nat'l Ass'n State Foresters, https://www.stateforesters.org/timber-assurance/legality/forest-ownership-statistics/ (on file with the *Columbia Law Review*) (last visited Mar. 18, 2024) (indicating that the federal government owns thirty percent of the nation's forests, that state governments own an additional ten percent, and that private owners own sixty percent); see also Cheever et al., Forestry, supra note 58, at 830 (providing similar numbers).

65. See U.S. Forest Serv., Map: Forest Ownership in the Conterminous United States (2010) (on file with the *Columbia Law Review*) ("In the East, more than [eighty] percent of forest land is privately owned.").

66. Katie Hoover & Anne A. Riddle, Cong. Rsch. Serv., R46976, U.S. Forest Ownership and Management: Background and Issues for Congress 28 (2021).

67. See Major Land Uses Summary Table 1: Major Uses of Land by Region, State, and the United States, Econ. Rsch. Serv., USDA, https://rejouer.perma.cc/replay-webpage/w/id-2b392572f380/mp_/https://www.ers.usda.gov/webdocs/DataFiles/52096/Summary_Table_1_major_uses_of_land_by_region_and_state_2012.xls?v=6328.1 (on file with the *Columbia Law Review*) (last updated Mar. 27, 2023) (indicating that the major uses of land in the United States are cropland, grassland pasture and range, forest use, special use, and to a much smaller degree, urban areas).

2. *Tree Planting and Climate Change.* — Tree planting is often suggested as a means to combat the climate crisis.[68] The benefits of trees—and, more specifically, of forests—are difficult to deny.[69] They clean water, purify air, provide shade, and serve as homes for countless living things.[70] Because of their ability to store carbon, a chief contributor to global climate change,[71] they are a critical ally in the struggle to preserve a habitable planet.[72] And apart from the services they provide others, trees are living beings themselves, capable of much that human beings are only beginning to understand.[73]

It is small wonder, then, that many—even climate change skeptics—have advocated tree planting.[74] But tree planting, beneficial as it may be, is not a one-stop solution. Trees take too long to grow, are too vulnerable, and take up too much land to bear the brunt of fighting global climate change. That burden rests squarely on humanity's shoulders. Moreover, because tree planting is an expressive act—and one with real ecological benefits—it has become characteristic of climate-harming governments and corporations to adopt the practice as an advanced form of greenwashing.[75] Greenwashing makes viewing tree planting as a solution to global climate change especially pernicious—too much belief in it can

68. See Zach St. George, Can Planting a Trillion New Trees Save the World?, N.Y. Times. Mag. (July 13, 2022), https://www.nytimes.com/2022/07/13/magazine/planting-trees-climate-change.html (on file with the *Columbia Law Review*) (last updated June 15, 2023) (detailing worldwide efforts to plant trees to combat the climate crisis).

69. See id.; see also Cheever et al., Forestry, supra note 58, at 827.

70. See Cheever et al., Forestry, supra note 58, at 823; see also Michael B. Gerrard, Heat Waves: Legal Adaptation to the Most Lethal Climate Disaster (So Far), 40 U. Ark. Little Rock L. Rev. 515, 530 (2018) (explaining the importance of urban trees in creating shade during dangerous heat waves).

71. Causes of Climate Change, EPA, https://www.epa.gov/climatechange-science/causes-climate-change [https://perma.cc/5U57-W7PJ] (last updated Apr. 25, 2023).

72. In 2022, forests stored 59.7 billion metric tons (BMT) of carbon. See Katie Hoover & Anne A. Riddle, Cong. Rsch. Serv., R46313, U.S. Forest Carbon Data: In Brief 3 (2023). To put that into perspective, in 2022, the United States emitted over six BMT of carbon dioxide. Inventory of U.S. Greenhouse Gas Emissions and Sinks, EPA https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks [https://perma.cc/BNR2-R93X] (last updated Apr. 11, 2024) ("In 2022, U.S. greenhouse gas emissions totaled 6,343 million metric tons of carbon dioxide equivalents, and 5,489 million metric tons of carbon dioxide equivalents after accounting for sequestration from the land sector.").

73. See Peter Wohlleben, The Hidden Life of Trees: What They Feel, How They Communicate 50–54 (2015) (describing the interior lives of trees and forests). In short, trees are miracles of nature and should be accorded proper awe.

74. See, e.g., Press Release, U.S. Dep't of the Interior, Trump Administration Furthers Commitment to One Trillion Trees Initiative (Oct. 13, 2020), https://www.doi.gov/pressreleases/trump-administration-furthers-commitment-one-trillion-trees-initiative [https://perma.cc/7GR7-6EXV] (last modified Sept. 29, 2021) (announcing the previous administration's intention to aggressively support tree planting).

75. See Sophia Smith Galer, 'Greenwashing': Tree-Planting Schemes Are Just Creating Tree Cemeteries, Vice (Sept. 1, 2022), https://www.vice.com/en/article/v7v75a/tree-planting-schemes-england [https://perma.cc/4VS5-NSM7]; see also St. George, supra note 68.

draw attention away from the harms done by emitters and purveyors of ecological destruction, and away, too, from other, necessary practices.

But despite its shortcomings, tree planting is a good thing and should be encouraged. Trees have myriad benefits. They offer one positive solution—albeit an incomplete one—to both carbon emissions and biodiversity loss. And planting a tree (or many trees) is an achievable individual act.[76] Trees can repair damaged landscapes.[77] Or they can transform unnatural private landscapes into thriving examples of distributed nature. Therefore, although tree planting cannot replace other necessary climate-friendly actions, this Note recognizes the value of tree planting as a legitimate goal of legal policy.

3. *Afforestation.* — Like the term "forest," "afforestation" is difficult to define. Merriam-Webster defines it as "the act or process of establishing a forest especially on land not previously forested."[78] In law, the term is hard to find. The only federal statute that uses the word "afforestation" leaves the term undefined.[79] And the only state that provides a definition is Maryland, which, in its Code of Maryland Regulations, defines the term as "the establishment of tree cover on an area from which it has always or very long been absent, or the planting of open areas which are not presently in forest cover."[80]

This definition distinguishes afforestation from the more common act of reforestation.[81] During reforestation, the land on which trees are to be planted has recently been forest and will be so again.[82] It implies that the land, as it currently exists, has known forest. "Afforestation," on the other hand, indicates that the land targeted for tree planting has not been forest

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76. A Google search for "plant trees near me" demonstrates this.

77. See Tree Planting and Ecosystem Restoration: A Crash Course, United Nations Decade on Ecosystem Restoration, https://www.decadeonrestoration.org/Interactive/tree-planting-and-ecosystem-restoration-crash-course [https://perma.cc/BP48-YSAB] (last visited Jan. 11, 2023).

78. Afforestation, Merriam-Webster, https://www.merriam-webster.com/dictionary/afforestation [https://perma.cc/63GX-R52X] (last visited Jan. 11, 2023). The Oxford English Dictionary (OED) supplies a similar definition: "the *conversion* of land into forest or woodland." Afforestation, Oxford English Dictionary, https://www.oed.com/dictionary/afforestation_n (on file with the *Columbia Law Review*) (last visited Mar. 10, 2024) (emphasis added).

79. See 16 U.S.C. § 2103a(d)(3) (2018).

80. Md. Code Regs. § 15.15.13.02(B)(1) (2023).

81. Both of these acts are distinct from normal tree planting because they seek to reach the final state of "forest," which requires many trees. See supra notes 52–55 and accompanying text.

82. See Reforestation, Merriam-Webster, https://www.merriam-webster.com/dictionary/reforestation [https://perma.cc/NR29-YU5W] (last visited Mar. 10, 2024) (defining "reforestation" as "the action of renewing forest cover"); see also 16 U.S.C. § 1601(e)(4)(A)(iii) (defining "reforestation" within the meaning of the statute as "the act of renewing tree cover"). The emphasis on renewal in both these definitions distinguishes "reforestation" from "afforestation," which is focused on the original establishment of trees in a nonforested area. See supra notes 78–79 and accompanying text.

for, to borrow the language of the Maryland regulation, a "very long" time.[83] The land has ceased to know what it is to be forest.[84] It may be a backyard or a ballfield or acres of corn. It may be a city block or a college campus or a dried-up streambed. The only thing it cannot be is forest.

D. *An Ideal of Afforestation*

Any tools designed to incentivize afforestation must consider the realities of private property, the difficulty in planting and growing trees, and the necessity of protecting trees both growing and grown. To that end, an ideal afforestation scheme would incorporate and require the following three elements: land acquisition, stewardship, and perpetuity.

Land acquisition means finding suitable land for afforestation and then using that land for afforestation. In the context of regeneration through distributed nature, it also includes finding *enough* land. Land is an obvious necessity. Trees require physical space to grow and thrive.[85] A focus on land acquisition for afforestation therefore acknowledges that much eligible land is privately owned and seeks to incentivize private landowners to use their lands for afforestation.

Stewardship is a constructive relationship between landowners and the things living on the land. This is necessary because, especially in a world of anthropogenic climate change, trees need help to grow.[86] One consistent criticism of tree planting plans conducted by corporations or governments is that they count in seeds planted, not trees grown.[87] Stewardship is also important because, like all members of individual

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83. Md. Code Regs. § 15.15.13.02(B)(1).

84. As tacitly acknowledged by Merriam-Webster and the state of Maryland, "afforestation" cannot be limited to establishing tree cover on land that has *never been* forested. When Europeans began arriving on the American continent, one billion of its acres were forested. See Cheever et al., Forestry, supra note 58, at 825. Finding land now suitable for tree planting that was *never* forest is therefore difficult.

85. Any plan that involves regenerating nature will necessarily require locking some of that land away for the slow process of natural growth. The reality is that the climate crisis will force certain land-use tradeoffs. See Gerrard, Time for Triage, supra note 39, at 38 (arguing humanity must "sacrific[e] some of what we consider precious in order to avoid far worse impacts"). Approaches based on regeneration choose to prioritize (at least in some corners of the law) the natural world. For a critique of this position in the carbon sequestration context, see Matthew Eisenson, Solar Panels Reduce CO2 Emissions More Per Acre Than Trees—And Much More Than Corn Ethanol, Climate L. Blog (Oct. 25, 2022), https://blogs.law.columbia.edu/climatechange/2022/10/25/response-to-the-new-york-times-essay-are-there-better-places-to-put-large-solar-farms-than-these-forests/ [https://perma.cc/5HFR-T6A8] (last updated Dec. 18, 2023).

86. Some have argued that expertise is overvalued in conservation work. See Tallamy, supra note 11, at 36. And, indeed, many resources exist for those wishing to use their lands to productively support natural ecosystems. See, e.g., Native Plant Finder, Nat'l Wildlife Fed'n, https://www.nwf.org/nativeplantfinder [https://perma.cc/46ER-DBYY] (last visited Jan. 13, 2023) (a database that helps people locate native plants to put in their gardens).

87. See supra note 75 and accompanying text.

ecosystems,[88] certain trees are better suited to certain environments than others.[89] Therefore, knowledge of the local ecosystem is essential to ensure that the right trees are planted in the right places. In other words, stewardship is a relationship that marries concern for the well being of the land with expertise in the land's care.

Finally, creating an afforestation regime that lasts in perpetuity guarantees that trees planted will have time to grow and will not be destroyed once grown. Legal protections for natural structures are already one of the last things standing between sprawling humanity and finite space. Recognizing ex ante that an afforestation effort will last indefinitely gives nature the time and space it needs to regenerate.

E. *An Example*

Picture Ann. Ann lives in an exurb of Philadelphia and owns roughly three acres of land. While she was raising her children, Ann kept the property clear, save for a now-decaying swing set, a fire pit, and a few shrubs. Ann's children are all adults now, and Ann is growing increasingly concerned about global climate change.[90] Ann has seen a lot of news stories recently about the benefits of tree planting and forests. She has also seen social media posts about the efficacy of small-scale forests.[91] She gets the idea of turning her acreage—limited in size though it may be[92]—into a forest.[93] Ann begins to do some research.

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88. See Tallamy, supra note 11, at 79, 139 (explaining that, in the context of designing urban ecosystems, "plant choice matters").

89. Id. at 90 ("[P]lants native to the region are almost always far better at performing local ecological roles than plants introduced from somewhere else."). One exception to this general rule may be oak trees. Id. at 144 (relaying that oaks support the food web in eighty-four percent of all U.S. counties where they are present).

90. Concern about global climate change is on the rise. See James Bell, Jacob Poushter, Moira Fagan & Christine Huang, In Response to Climate Change, Citizens in Advanced Economies Are Willing to Alter How They Live and Work, Pew Rsch. Ctr. (Sept. 14, 2021), https://www.pewresearch.org/global/2021/09/14/in-response-to-climate-change-citizens-in-advanced-economies-are-willing-to-alter-how-they-live-and-work/ [https://perma.cc/42M9-94R4]. In the afforestation context, at least one study has demonstrated that environmental attitudes may be an important factor in private landowners taking afforestation measures on their lands. Roy Brouwer, Nele Lienhoop & Frans Oosterhuis, Incentivizing Afforestation Agreements: Institutional-Economic Conditions and Motivational Drivers, 21 J. Forest Econ. 205, 207 (2015).

91. See supra note 48 and accompanying text (discussing "tiny forests" and other similar ecosystems).

92. See supra notes 52–55 and accompanying text (demonstrating that even small amounts of land can be turned into forest).

93. This is not as far-fetched as it may seem. A Google search for "turn my backyard into a forest" garners over eighty-three million results. Turn My Backyard Into a Forest, Google Search, https://www.google.com/search?q=turn+my+backyard+into+a+forest [https://perma.cc/WS3X-M8HD] (last visited Mar. 30, 2024).

II. CURRENT FEDERAL PROGRAMS

Assuming that Ann is serious about planting a forest in her backyard, her research will lead her to the following federal programs.

A. *Internal Revenue Code § 194: Treatment of Reforestation Expenditures*

Internal Revenue Code ("I.R.C.") § 194, entitled "Treatment of reforestation expenditures," appears in the Code as a subsection of "Itemized Deductions for Individuals and Corporations."[94] Under this section, individuals may deduct up to $10,000 of qualified reforestation or afforestation expenditures paid in a tax year—including seeding and planting—on a qualified timber property ("QTP").[95] A QTP is defined as "woodlots" held by the taxpayer in "significant *commercial* quantities" for "planting, caring for, and *cutting of trees for sale or use in the commercial production of timber products*."[96] The Treasury Regulations interpreting this section of the I.R.C. make it abundantly clear that the purpose of these tax incentives is to aid the commercial timber industry.[97]

I.R.C. § 194 is the only federal effort discussed in this Note that makes tree planting its sole objective.[98] This tax deduction for tree planting is a scheme to be admired. Tree planting may be an expensive proposition,[99] and compensating individuals for their efforts will be an essential part of any afforestation scheme. Therefore, I.R.C. § 194 is a useful land acquisition tool.[100]

But I.R.C. § 194 ultimately fails to provide a successful model for a federal afforestation regime. Although it provides incentive to use land a certain way, it fails to secure the rights to that land for the permanent benefit of the trees planted thereupon. Rather, the very purpose of the tax deduction offered is to incentivize the *cutting* of trees, rather than their steady, protected growth.[101] By its very terms, a property will not qualify for

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94. I.R.C. § 194 (2018).

95. Id. § 194(a), (b)(1)(B)(i). Different deductions are available to married couples. Id. § 194(b)(1)(B)(ii).

96. Id. § 194(c)(1) (emphasis added).

97. Treas. Reg. § 1.194-3(a) (1983) ("The property must be held by the taxpayer for the growing and cutting of timber which will either be sold for use in, or used by the taxpayer in, the commercial production of timber products."); see also Andrew Bosserman, Money Grows on Trees: Harvesting Tax Savings Through Timber Sales, 127 J. Tax'n 180, 183 (2017) (discussing tax incentives for the destruction of trees for timber, including I.R.C. § 194).

98. I.R.C. § 194. Although I.R.C. § 194 is concerned with "reforestation" and does not mention "afforestation," it is included in this Note because it is an important incentive to plant trees within the tax code.

99. See Robbins, supra note 56, at 76 (estimating that maintenance and watering costs about eighteen dollars annually per tree).

100. See supra section I.D (proposing the values that should underlie successful afforestation schemes). I.R.C. § 194 achieves this goal in a half-sense. While it is not a land-acquisition tool per se, it is a tool that incentivizes a certain *use* of land, which is something.

101. I.R.C. § 194(c)(1).

reimbursement unless the property is dedicated to growing trees for the express purpose of chopping them down.[102] I.R.C. § 194 does not contemplate the intentional planting and careful cultivation of new, longstanding forests. It seeks only harvest. While it provides a helpful incentive for getting seeds in the ground, it contains neither the stewardship nor the perpetuity elements that would characterize a truly useful afforestation tool.[103]

B. *Department of Agriculture Programs*

1. *Conservation Reserve Enhancement Program.* — The Conservation Reserve Enhancement Program ("CREP") operates through states, tribal governments, or certain nonprofits, private companies, and foundations, which partner with the USDA's Farm Service Administration ("FSA") to implement "practices that address high priority conservation and environmental objectives."[104] The goals of the CREP are the restoration of wildlife habitat, the improvement of grassland productivity, the reduction of soil erosion, the enhancement of air quality, the restoration of wetlands, the conservation of forest, the control of invasive species, and the reduction of floods, among others.[105] Twenty-six of the fifty states have CREP agreements in place.[106]

The CREP seeks to improve already existing ecosystems, and eligibility is restricted to active farmland.[107] Eligible landowners who enroll enter into an agreement with the state—or other qualified entity—whereby the development rights on the land are suspended and the landowner receives "an annual rental rate" and other financial benefits.[108] Landowners then

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102. Treas. Reg. § 1.194-3.

103. See supra section I.D (proposing the parameters of a successful afforestation scheme).

104. Farm Serv. Agency, USDA, Conservation Reserve Enhancement Program 1 (2021), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/Conservation/PDF/fsa_crep_factsheet_22.pdf [https://perma.cc/WS4R-Q4G8] [hereinafter FSA, CREP Fact Sheet]. In this way, it is distinct from its parent program, the Conservation Reserve Program (CRP), which is wholly administered by the FSA without the aid of the states. Farm Serv. Agency, USDA, Conservation Reserve Program, https://www.fsa.usda.gov/programs-and-services/conservation-programs/conservation-reserve-program/ [https://perma.cc/HL2C-MSKW] (last visited Oct. 13, 2022). That said, the two programs are extremely similar.

105. FSA, CREP Fact Sheet, supra note 104, at 1.

106. See Farm Serv. Agency, CREP for Producers, USDA, https://www.fsa.usda.gov/programs-and-services/conservation-programs/conservation-reserve-enhancement/crep_for_producers/index [https://perma.cc/9XQN-8QXX] (last visited Oct. 13, 2022) (listing the states with current CREP programs).

107. See FSA, CREP Fact Sheet, supra note 104, at 1 (stating that to be eligible, the land must have a "cropping history of four out of the past six years"); see also Arthur W. Allen, The Conservation Reserve Enhancement Program, U.S. Geological Surv. 115, 116 (2005) ("[T]he CREP reflects a vitally needed approach to conservation with a deliberate evolution toward addressing environmental issues on a multi-farm, landscape scale.").

108. Farm Serv. Agency, What Is the Conservation Reserve Enhancement Program?, USDA, https://www.fsa.usda.gov/programs-and-services/conservation-programs/conservation-reserve-

receive assistance instituting practices on their land consistent with the state environmental and conservation goals delineated in the CREP agreement.[109]

The CREP shares many of the goals that a strong afforestation tool would have: improvement of habitat, reduction of erosion, enhancement of air and water quality, conservation, and general restoration.[110] It employs creative methods to meet those goals, including a rental agreement structure paired with development-rights suspension that neatly ticks the land acquisition box on the individual level.[111] While it is not singularly concerned with afforestation, CREP projects may include tree planting in their goals or methods.[112] And a CREP has the added benefit of being locality-specific, tailored to state-set environmental goals.[113]

But the restrictions to the CREP make it a less-than-ideal afforestation tool. Its primary shortcoming is that eligibility is reserved for *working* lands.[114] This limitation eliminates an enormous amount of private, nonworking land, hindering the program's ability to fully meet the land acquisition prong. Further, because a CREP is a state-run program, it is limited to only those states that participate. And finally, the average length of a CREP is just a decade or fifteen years.[115] This is far short of the perpetual land rights a healthy forest requires.[116] Therefore, while the CREP has many admirable qualities,[117] it is not an ideal national afforestation tool.

2. *Environmental Quality Incentives and Conservation Stewardship Programs.* — The Environmental Quality Incentives Program ("EQIP") offers "technical and financial assistance for working lands," including nonindustrial private forestland.[118] Like a CREP, EQIP helps people fund

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enhancement/index [https://perma.cc/XRK6-4CPP] (last visited Oct. 13, 2022) [hereinafter FSA, What is CREP?]. CREP agreements vary in lifespan, but the typical contract period is ten to fifteen years. Id.

109. See FSA, CREP Fact Sheet, supra note 104, at 2.

110. See id.

111. See FSA, What is CREP?, supra note 108.

112. See Allen, supra note 107, at 130 appx. 1 (listing existing CREPs and including many that involve planting trees).

113. See FSA, CREP Fact Sheet, supra note 104, at 1.

114. See sources cited supra note 107.

115. See FSA, What is CREP?, supra note 108.

116. Trees take a long time to grow, and a forest is an ever-evolving ecosystem. See Wohlleben, supra note 73, at 31–36 ("The young trees that overcome all obstacles and continue to grow beautifully tall and slender will, however, have their patience tested yet again before another twenty years have passed. . . . The young [trees] . . . must now wait once again . . . . [It] can take many decades . . . .").

117. Its pairing of landowners with experts is an admirable example of meeting the stewardship prong, for example.

118. Nat. Res. Conservation Serv., USDA, Environmental Quality Incentives Program (EQIP): Is EQIP Right for Me? 1, https://www.nrcs.usda.gov/sites/default/files/2022-06/EQIP-Factsheet%20%282%29.pdf [https://perma.cc/N64A-XQD5] [hereinafter, NRCS, Is EQIP Right for ME?] (last visited Feb. 2, 2024).

conservation projects through a cost-sharing model, with the National Resources Conservation Service (a subdivision of the USDA) offering the technical assistance and the EQIP supplying funds.[119] EQIP is for small-scale projects to improve the health of some small segment of working land.[120] Unlike a CREP, EQIP is administered on individual lands based on the environmental goals of the landowner.[121] An EQIP contract cannot exceed ten years.[122] The Conservation Stewardship Program ("CSP") is very similar to EQIP, but it operates on the whole-property level, as opposed to targeting specific projects on a segment of the property.[123]

Like the CREP, EQIP and CSP are laudable in that they pair private landowners with resources and funding for conservation projects.[124] All three of these USDA programs go a long way toward meeting the ideal of stewardship: locality-specific expertise paired with private land. And unlike CREP, EQIP and CSP are not shackled by the need for state participation, greatly expanding the amount of land available for their use.

But EQIP and CSP suffer from similar deficiencies to CREP. EQIP and CSP are available only for the owners of working land—specifically, farmers and ranchers—restricting their effectiveness as land acquisition tools.[125] And, like CREP agreements, EQIP and CSP contracts are limited in duration, and there is nothing in the programs that mandate forests planted during that interval have a home in perpetuity. Although they may—in certain, specific situations—be useful tools for getting trees in the ground, they fall short of the markers of a successful afforestation scheme.[126]

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119. See id. at 2.

120. See Michael Happ, Inst. for Agric. & Trade Pol'y, Closed Out: How U.S. Farmers Are Denied Access to Conservation Programs 4 (2021), https://www.iatp.org/sites/default/files/2021-09/Closed%20out%20how%20us%20farmers%20are%20denied%20access%20to%20conservation%20programs_IATP.pdf [https://perma.cc/4MU7-H7CK] ("EQIP payments are intended for small, one-off projects like planting grass seed in waterways to prevent erosion . . . .").

121. See NRCS, Is EQIP Right for ME?, supra note 118, at 2 (describing the process for obtaining EQIP funding, which includes one-on-one consultation with the NRCS to determine the conservation goals and best practices).

122. Id.

123. See Nat. Res. Conservation Serv., Conservation Stewardship Program: Is CSP Right for Me?, https://www.nrcs.usda.gov/sites/default/files/2022-08/Is%20CSP%20right%20for%20me_0.pdf [https://perma.cc/LJ46-WSNJ] (last visited Feb. 2, 2024) [hereinafter NRCS, Is CSP Right for Me?] (describing the program); see also Happ, supra note 120, at 4 ("CSP is intended to help pay for whole-farm projects, bundling projects together for broader aims like erosion control, water quality or wildlife habitat enhancement.").

124. See supra section II.B.1.

125. See NRCS, Is EQIP Right for ME?, supra note 118; NRCS, Is CSP Right for Me?, supra note 123.

126. It should be noted that, among the climate-smart agriculture and forestry mitigation activities listed by NRCS as eligible for conservation incentive contracts are "Tree-Shrub Establishment" that are "plant[ed] for high carbon sequestration rate[s]." Nat'l Res. Conservation Serv., Climate-Smart Agriculture and Forestry (CSAF) Mitigation Activities

3. *Forest Stewardship and Healthy Forest Reserve Programs.* — Like the other programs discussed in this section, the Forest Stewardship Program ("FSP")[127] has merit but does not ultimately encourage effective afforestation. It is a program primarily concerned with providing resources and education to landowners,[128] which, while satisfying the stewardship prong, leaves out the all-important land-acquisition prong.[129] The FSP also relies on the "good faith" of individual landowners and does not appear to have any legally binding perpetuity requirement.[130] And, like the programs discussed above, the FSP seems largely concerned with the management of existing forest—even if that management includes new planting—and might not extend to the kind of wholesale afforestation project this Note contemplates.[131]

To its credit, eligibility for the FSP is broader than the programs discussed above.[132] But by its own terms, the FSP is less concerned with individual landowners than it is with state- or region-wide forestry practices.[133] This posture, which reflects legitimate forestry concerns,[134] does not target the specific problem identified by this Note: Individual American landowners control the resources needed to effectuate a robust afforestation regime.[135]

Finally, the Healthy Forest Reserve Program ("HFRP") is perhaps the federal program closest to the ideal afforestation regime this Note

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Listfor FY2024, at 3 (2022). But, like trees planted under the other programs discussed, there is nothing that stops the landowner from removing the trees—and destroying their carbon sequestration potential—once the EQIP or CSP expires.

127. USDA, Forest Stewardship Program National Standards and Guidelines (2022) (on file with the *Columbia Law Review*) [hereinafter USDA, FSP Guidelines].

128. See id. at 1–3.

129. Funds disbursed under the FSP are typically directed not toward individual landowners but toward state forestry departments. See id. at 5 ("The program is funded through an annual appropriation to an expanded budget line item that includes the Cooperative Forestry Assistance Act section 5: Forest Stewardship Program and section 3: Rural Forestry Assistance.").

130. D. Ramsey Russell, Jr. & Susan Stein, Planning for Forest Stewardship 4 (2002).

131. See id.; USDA, FSP Guidelines, supra note 127, at 4 (listing the FSP's priorities). In an email exchange shortly before the release of the updated 2022 guidance document, the then-head of the FSP indicated that it would "highlight to role of FSP in afforestation." See Email from Caroline Kuebler, Manager, Nat'l Forest Stewardship Program, Forest Serv., to Isaac Lunt (Dec. 2, 2022) (on file with the *Columbia Law Review*). The guidance, however, does not mention afforestation. See USDA, FSP Guidelines, supra note 127.

132. See USDA, FSP Guidelines, supra note 127, at 12.

133. See id. at 19 ("[N]ot all forest conservation issues and priorities can be effectively addressed by working with individual landowners at the single parcel level. . . . [T]he [FSP] would benefit being included in multi-stakeholder engagement at the community or landscape level.").

134. See Tallamy, supra note 11, at 38–44 (explaining the importance of forest size and connectivity to the health of creatures living in those forests).

135. See supra section I.D.

envisions.[136] The program offers four enrollment options: a ten-year restoration cost-share agreement, a thirty-year easement, a thirty-year contract (for Tribes only), or a *permanent easement*.[137] And this program, uniquely among all the programs discussed in this section, explicitly lists "enhanc[ing] carbon sequestration" in its objectives.[138] This program, better than any of the others so far discussed, satisfies the stewardship and perpetuity prongs. But the HFRP does not actively incentivize planting new trees.[139] And it therefore falls short of the most important prong of an afforestation schema: land acquisition. For the HFRP is concerned mainly with the restoration, protection, and conservation of *existing* forest. It does not—nor do any of the programs analyzed herein—display the imagination to incorporate, as part of its mission, the protection and conservation of *future* forest.

C. *Conservation Easements*

Conservation easements have exploded in popularity over the past forty years.[140] They are now, along with mortgages and real covenants, "the most ubiquitous non-possessory interest in land" in the United States.[141] According to the best data available, there are, at the time of this writing, over 200,000 conservation easements in the United States, conserving just under forty million acres of land.[142]

Conservation easements are creatures of the I.R.C.[143] They are a form of tax-deductible charitable donations in which what is donated are land rights.[144] The basic idea behind a conservation easement is straightforward: A landowner transfers a nonpossessory interest in some portion of their land to a qualified entity for a specified purpose over a designated

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136. See Nat. Res. Conservation Serv., Healthy Forest Reserve Program—How to Apply and Benefits, USDA, https://www.nrcs.usda.gov/healthy-forests-reserve-program-how-to-apply-and-benefits [https://perma.cc/E8T7-ZBEB] (last visited Jan. 11, 2023).

137. Id.

138. Id.

139. Id. (stating that the purpose of the program is to "restor[e], enhance[e] and protect[] forestland"); see also Robbins, supra note 56, at 85 ("[The HFRP] does not encourage new planting.").

140. Federico Cheever & Nancy A. McLaughlin, An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law, 1 J. L., Prop. & Soc'y 107, 109 (2015).

141. Id. at 110.

142. Nat'l Conservation Easement Database, https://www.conservationeasement.us/ [https://perma.cc/YW2E-BRD6] (last visited Mar. 7, 2024). These data are likely incomplete. The National Conservation Easement Database (NCED) relies on the holders of conservation easements—usually land trusts—to voluntarily report their holdings to the database. Cheever & McLaughlin, supra note 140, at 110 n.5 (explaining this problem).

143. I.R.C. § 170(h); see also Cheever & McLaughlin, supra note 140, at 117 ("In 1980 . . . Congress made the conservation easement deduction provision a permanent part of the [I.R.C.].").

144. I.R.C. § 170(h).

period in exchange for a tax benefit.[145] The landowner forgoes the right to develop or otherwise use that land, and the conservation easement holder maintains the land in accordance with the terms of the easement.[146]

I.R.C. § 170(h), along with its interpretation in the Treasury Regulations, set forth the requirements the donation of a conservation easement must meet in order to be deductible.[147] The land must be donated in perpetuity,[148] the donation must be made to a qualifying entity,[149] and the land in question must be donated for "conservation purposes."[150] Qualifying purposes are: habitat protection, preservation of open space (including forestland), historic preservation, and preservation of recreational opportunity.[151] The "extensive" Treasury Regulations ("Regulations") interpreting I.R.C. § 170(h) elaborate on these conservation purposes.[152] While a complete catalogue and analysis of these Regulations is beyond the scope of this Note, there are a few things worth discussing.

First, the Regulations acknowledge that human-made natural structures—dams, for example—may be worthy of preservation through a

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145. See Cheever & McLaughlin, supra note 140, at 111–12. This is a simplified account. As Professors Federico Cheever and Nancy McLaughlin point out, conservation easements can take on a variety of forms under various state and federal laws. Id. But as this Note is concerned with the basic instrument—and the federal tax code that creates it—its discussion is cabined to the standard form of conservation easements.

146. See id. This is, of course, subject to significant complication and variance. Conservation easements may take various forms, be subject to a variety of state, federal, or tribal laws, and have specifics in the easement regarding land management plans, development rights, and other details. In this way, conservation easements straddle the line dividing active land management and perpetual conservation. See id.

147. I.R.C. § 170(h); Treas. Reg. § 1.170A-14 (2023).

148. I.R.C. § 170(h)(5)(A). The perpetuity requirement has been the subject of considerable debate, with some scholars calling for its outright abolition. See, e.g., Zachary Bray, Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements, 34 Harv. Env't L. Rev. 119, 137–38 (describing the criticism of the perpetuity requirement). The perpetuity requirement draws special attention when it comes to climate change. See generally Jessica Owley, Federico Cheever, Adena R. Rissman, M. Rebecca Shaw, Barton H. Thompson, Jr. & W. William Weeks, Climate Change Challenges for Land Conservation: Rethinking Conservation Easements, Strategies, and Tools, 95 Denv. L. Rev. 727 (2018) (discussing the need for more flexible conservation easement structures in the context of climate change). The perpetuity requirement has also been the subject of litigation. See Cheever & McLaughlin, supra note 140, at 130–32 (collecting and describing these cases).

149. I.R.C. § 170(h)(3). Qualifying entities are typically governments or publicly supported charitable organizations. Id. Land trusts are common recipients of conservation easement donations. Cheever & McLaughlin, supra note 140, at 109.

150. I.R.C. § 170(h).

151. Id. § 170(h)(4)(A)(i)–(iv).

152. Treas. Reg. § 1.170A-14; Cheever & McLaughlin, supra note 140, at 121 (describing the Treasury Regulations interpreting I.R.C. § 170(h) as "extensive").

conservation easement.[153] Second, the Regulations specify that I.R.C. § 170(h) is satisfied if the conservation serves a "significant public benefit,"[154] which would seem to broaden the scope of what may be considered worthy of conservation.[155] Third, there is tacit acknowledgement within the Regulations of the difficulty in defining its own terms.[156] And finally, the Regulations specifically attempt to strike a balance between competing conservation purposes, recognizing in the process that conservation is not static and may carry within it certain contradictions.[157]

There are multiple areas of the tax code implicated by conservation easement donations—income, estate, and capital gains[158]—but this Note focuses on the income tax deduction under I.R.C. § 170(h). Under that section, a donor of a conservation easement is eligible for a deduction equal to the fair market value of the easement.[159] This deduction can be

153. See Treas. Reg. § 1.170A-14(d)(3)(i) ("The preservation of a lake formed by a man-made dam or a salt pond formed by a man-made dike would meet the conservation purposes test if the lake or pond were a natural feeding area for a wildlife community that included rare, endangered, or threatened native species."). This is particularly relevant to this Note, which argues that man-made natural structures (forests) should qualify for tax benefits under I.R.C. § 170(h).

154. Treas. Reg. § 1.170A-14(d)(4)(iv).

155. See infra section III.C.3.

156. The Regulations take a distinctly preservation-based tack to work out this thorny problem. See infra note 182. Nonetheless, there is an apparent struggle to reel in what it means to have a "conservation purpose" or provide a "significant public benefit." For a charming example, see Treas. Reg. § 1.170A-14(d)(4)(ii), which states that "scenic enjoyment" (a subsection of "preservation of open space") may be satisfied by "[t]he harmonious variety of shapes and textures" of a landscape. Id. § 1.170A-14(d)(A)(ii)(5).

157. See id. § 1.170A-14(e)(2), (3). Section (e)(2), "Inconsistent Use" explains that deductions will not be permitted where one "enumerated conservation purpose[]" would be accomplished at the expense of another. Id. § 1.170A-14(e)(2). The Regulation demonstrates this conflict by considering an example in which farmland is preserved pursuant to a state flood-control program. Id. This preservation would seem to qualify under the terms of § 1.170A-14(d)(4)(iv)(4). But this preservation would cease to be tax-deductible if, in order to accomplish that farmland preservation, a "naturally occurring ecosystem" was damaged by the use of pesticides on that farm. Id. But the next section, titled "Inconsistent Use Permitted," explains that damage to one conservation purpose will be permitted if the damaging action is "necessary" to protect the conservation purpose for which the donation was made. Id. The Regulations explain this point through the example of an easement which is donated to preserve an archeological site. Id. A deduction will still be permitted, in the example, even if excavation of that site, "consistent with sound archaeological practices . . . impair[s] a scenic view." Id. Sections (e)(2) and (e)(3) are prime examples of the complexity of conservation. In a world in which different interests compete for limited land, value judgments must be made.

158. For a comprehensive overview of those areas, see generally, Elliott G. Wolf, Note, Simultaneously Waste and Wasted Opportunity: The Inequality of Federal Tax Incentives for Conservation Easement Donations, 31 Stan. Env't L.J. 101, 103–05 (2012) (providing an overview of the federal tax incentives available for conservation easement donation).

159. Treas. Reg. § 1.170A-14(h)(1). The distinction between the IRS's focus on valuing the forgone *development* right and the gained *conservation* values is important and has been the subject of scholarly comment. See, e.g., Nancy A. McLaughlin, Increasing the Tax

extended for up to fifteen additional years if the donation is worth more than fifty percent of the donor's income.[160] In assessing the "fair market value" of the easement, donating taxpayers and their appraisers employ multiple methods.[161] One of the most common valuation methods for conservation easement donations is the "before and after" method.[162]

This method involves two value calculations: the value of the donated property immediately preceding the donation and the value after the donation.[163] Calculating the prior value (the "before-value") involves a determination of the donated land's highest and best use ("HBU").[164] This typically involves determining what development rights would be available to the owner of the land, the legal and financial feasibility of exercising those rights, and the value of the property should those rights be exercised.[165] This is a tricky, and often contested, calculation.[166] Once conducted, the value of the land after donation (the "after-value"[167]) is calculated. This calculation involves determining what development rights are retained by the taxpayer donator and valuing those in relation to the HBU.[168] The total value of the easement is the difference between these two values.[169] This valuation method puts emphasis on economic value *lost* from the encumbrance rather than on other value (e.g., public good, conservation value) *gained* from the donation of the easement.

There are many problems with conservation easements as they currently operate. They are difficult to monitor, which can lead to abuse.[170]

Incentives for Conservation Easement Donations—A Reasonable Approach, 31 Ecology L.Q. 1, 71 (2004) [hereinafter McLaughlin, Donations] (examining the shortcomings of the IRS's valuation scheme for conservation easement donations). This issue is addressed infra section III.C.4.

160. See Wolf, supra note 158, at 103–04 (describing the "carry-forward" provision of I.R.C. § 170(b)(1)(E)(ii) (2022) as it relates to conservation easements); see also id. at 104 n.10 for a helpful example.

161. See Nancy A. McLaughlin, Conservation Easements and the Valuation Conundrum, 19 Fla. Tax Rev. 225, 231–46 (2016) [hereinafter McLaughlin, Valuation] (explaining and analyzing these methods).

162. Id. at 230, 232.

163. Id. at 232–33.

164. Id. at 233.

165. See id. & nn.27–34 (collecting definitions of highest and best use from various Tax Court decisions).

166. See id. at app. C at 312–13 (collecting IRS enforcement actions against overvalued conservation easements).

167. Id. at 235.

168. Id. at 234–35.

169. Treas. Reg. § 1.170A-14(h)(3) (2023) "([A]s a general rule . . . the fair market value of a perpetual conservation restriction is equal to the difference between the fair market value of the property it encumbers before the granting of the restriction and the fair market value of the encumbered property after the granting of the restriction.").

170. See Cheever & McLaughlin, supra note 140, at 125–26 (describing this abuse).

They may feel inaccessible for certain individuals.[171] Or their specific requirements—especially the requirement of perpetuity—may be controversial.[172] To that end, there has been no shortage of suggestions for reform.[173]

Even with these problems, however, conservation easements may at first appear to be the perfect afforestation tool. They model an ideal balance of land acquisition, stewardship, and perpetuity: They compensate private landowners for perpetual donation of land to an entity dedicated to overseeing that conservation is carried out on that land. And yet for afforestation, there is one glaring problem: A conservation easement cannot be placed on land that has only *future* conservation value.[174] In other words, the conservation easement is designed only to preserve land in its current state based on its current conservation value, not to set that land aside for the regeneration of natural ecosystems like forests.

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171. See, e.g., McLaughlin, Donations, supra note 159, at 99–100 (discussing how the income-based tax incentive structure of conservation easements leaves out individuals who may have land to donate but incomes too low to make it worthwhile).

172. See Bray, supra note 148, at 137; Nancy A. McLaughlin, Rethinking the Perpetual Nature of Conservation Easements, 29 Harv. Env't L. Rev. 421, 424 (2005) (explaining why the perpetuity requirement is controversial); Owley et al., supra note 148, at 729–30 (examining the challenge of "balancing flexibility and permanence" in the context of conservation and climate change).

173. For a small sample of the articles that have been written about reforming conservation easement law in the climate change context, see, e.g., Daniel L. Aaronson & Michael B. Manuel, Conservation Easements and Climate Change, Sustainable Dev. L. & Pol'y, Winter 2008, at 27, 27 (pointing out that "the current law of conservation easements does not recognize the full potential for carbon capture resulting from land conservation"); see also Jessica E. Jay, Opportunities for Reform and Reimagining in Conservation Easement and Land Use Law: A To-Do List for Sustainable, Perpetual Land Conservation, 46 Vt. L. Rev. 387, 390–419 (2022) (suggesting reforms); James L. Olmstead, Carbon Dieting: Latent Ancillary Rights to Carbon Offsets in Conservation Easements, 29 J. Land, Res. & Env't L. 121, 134–41 (2009) (discussing the complexity of conservation easements in the context of California's carbon offset market); Owley et al., supra note 148, at 730–37 (discussing climate change's potential impact on conservation easements); Jess R. Phelps & David P. Hoffer, California Carbon Offsets and Working Forest Conservation Easements, 38 UCLA J. Env't L. & Pol'y 61, 63 (2020) (discussing the interaction of working forest conservation easements and carbon markets). This is only a small sample of the many articles that have examined conservation easements and their potential role in combating climate change.

One solution that deserves special attention is Professors Cheever and Owley's suggestion that the law should embrace options to purchase conservation easements (OPECs), which would allow entities to set aside land for future conservation on the condition that certain events occur (e.g., the migration of a bird species to that area). See Federico Cheever & Jessica Owley, Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements (OPECs), 40 Harv. Env't L. Rev 1, 5 (2016). This idea embraces the future conservation this Note finds valuable and would provide one additional alternative method to creating the afforestation easement discussed here. See infra section III.C.

174. But see infra notes 222–226 and accompanying text (arguing that, potentially, it can be).

D. *Ann Is Stuck*

After reviewing those federal programs that seem, directly or indirectly, to be targeted at helping her plant her backyard forest (and, although she may not recognize it, becoming part of an early distributed nature effort), Ann is frustrated. She thought she had found a good thing in I.R.C. § 194 but does not want to cut down her trees.[175] She liked the idea of getting help from an expert through the CREP, EQIP, or CSP, but hers is not working land.[176] She cannot understand why the FSP and HFRP do not encourage new planting.[177] She got excited when she found conservation easements, but as she explored more deeply, she realized that no land trust would accept the donation of a backyard, no matter how large, with no current conservation value on the promise that one day it would acquire conservation value. She has now exhausted her options and her tolerance for reading the Treasury Regulations. Ann needs a new tool.

III. THE AFFORESTATION EASEMENT

A. *Conservation Easements as a Model for an Afforestation Tool*

Of all the tax incentives and federal programs thus far discussed, the conservation easement provides the best model for a holistic afforestation tool.[178] The very purpose of the conservation easement is land acquisition for conservation. By providing a financial incentive, conservation easements meet the problem of private property head on. And they have been remarkably successful in getting private landowners to donate, forever, their land rights, adding vast stocks of previously private land to the public conservation effort.[179] Perpetuity is *built into* the I.R.C. and the Treasury Regulations.[180] And the qualified entities to receive the donation are, theoretically, governments or trusts whose job it is to oversee the

175. See supra section II.A.

176. See supra sections II.B.1–2.

177. See supra section II.B.3.

178. One prominent scholar of conservation easements has suggested that reform of the tool should focus on "[c]hanging the framework of conservation easements to make them more active sites of conservation work" and states, "it may be . . . desirable to enable holders [of conservation easements] to *restore* degraded habitat, *relocate* species to or from the land, or *remove* invasive flora and fauna." Jessica Owley & David Takacs, Flexible Conservation in Uncertain Times, *in* Contemporary Issues in Climate Change Law and Policy: Essays Inspired by the IPCC 65, 83 (Robin Kundis Craig & Stephen R. Miller eds., 2016) (emphasis added). In other words, experts are already thinking of the benefits of changing the nature of conservation easements from negative to affirmative. Id. at 82–83.

179. See Nat'l Conservation Easement Database, supra note 142 (showing that much acreage is already held as conservation easements).

180. I.R.C. § 170(h)(2)(C) (2023); Treas. Reg. § 1.170A-14(b)(2) (2023).

stewardship of the land.[181] Land acquisition, stewardship, perpetuity: check, check, check.

The problem with conservation easements as they pertain to afforestation is that they are focused on preservation rather than regeneration.[182] What this Note calls future conservation—the potential to grow something worth conserving on land that is not, in its present state, worth conserving—is absent from the list of conservation purposes delineated in the Regulations.[183] And while there is an argument to be made that the donation of, say, a backyard for the purpose of growing a permanent forest meets the letter of the Regulations—and, if not the letter, the spirit—it is a creative one, unlikely to convince many judges.[184]

What is needed is a new tool, drawn from the model of the conservation easement but embodying a philosophy that recognizes the imperative to acquire land for the creation and preservation of new nature, new forests.

B. *A Philosophical Shift*

Early thinkers in the American conservation movement were more focused on preservation than restoration.[185] Indeed, the high water mark of American conservation—the Progressive Era creation of the National Parks—represented a distinct commitment to this philosophy of

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181. Treas. Reg § 1.170A-14(c). Land Trusts do not always meet these standards. See Owley & Takacs, supra note 178, at 83 ("Most land trusts . . . are not well equipped currently to undertake active land management.").

182. By its plain language, § 170(h) is concerned with preservation and protection, not restoration or rehabilitation. See I.R.C § 170(h)(4)(A)(i) ("[T]he *preservation* of land areas for outdoor recreation . . . ." (emphasis added)); id. § 170(h)(4)(A)(ii) ("[T]he *protection* of a relatively natural habitat . . . ." (emphasis added)); id. § 170(h)(4)(A)(iii) ("[T]he *preservation* of open space (including farmland and forest land) where such *preservation* is [for scenic enjoyment or pursuant to a governmental purpose] . . . ." (emphasis added)); id. § 170 (h)(4)(A)(iv) ("[T]he *preservation* of an historically important land area or a certified historic structure." (emphasis added)). This is also true of the Treasury Regulations interpreting § 170(h). See Treas. Reg. § 1.170A-14(d)(1)(i) ("The *preservation* of land areas for outdoor recreation . . . ." (emphasis added)); id. § 1.170A-14(d)(1)(ii) ("The *protection* of relatively natural habitat . . . ." (emphasis added)); id. § 1.170A-14(d)(1)(iii) ("The *preservation* of certain open space . . . ." (emphasis added)); id. § 1.170A-14(d)(1)(iv) ("The *preservation* of historically important land area . . . ." (emphasis added)).

183. See Treas. Reg. § 1.170A-14(d).

184. See infra section III.C.3 (weighing the argument that the afforestation easement could arguably be found in the existing law).

185. See, e.g., George Catlin, An Artist Proposes a National Park, *in* Nash, The American Environment, supra note 1, at 5, 7 ("[E]ven in the overwhelming march of civilised improvements and refinements do we love to cherish [beautiful parts of nature's] existence, and lend our efforts to *preserve* them in their primitive rudeness." (emphasis added)); Frederick Law Olmsted, The Value and Care of Parks, *in* Nash, The American Environment, supra, at 18, 23 ("The first point to be kept in mind then is the *preservation* and maintenance *as exactly as is possible* of the natural scenery . . . ." (emphasis added)).

conservation as preservation.[186] But there have also long been voices that acknowledged the twin component of *restoration* in conservation philosophy.[187] And in the era of growing alarm over global climate change, thinkers have come to acknowledge that humanity has a unique responsibility to restore—as well as to continue to protect—the natural world.[188]

There is a tension between preservation and restoration. To preserve something means to leave it be,[189] while restoration implies a kind of change.[190] Dictionary definitions of *conservation* tend to attempt to strike a balance between these two dichotomous concepts.[191] And both ideas of conservation—as preservation and as restoration—have found their way into American law.[192] The word *conservation*, therefore, while connoting

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186. For example, Teddy Roosevelt said, famously, of the Grand Canyon, "Leave it as it is." See Theodore Roosevelt Quotes, Nat'l Park Serv., https://www.nps.gov/thro/learn/historyculture/theodore-roosevelt-quotes.htm [https://perma.cc/8BZN-A8NA] (last visited Jan. 12, 2023).

187. See, e.g., George Perkins Marsh, Man's Responsibility for the Land, *in* Nash, The American Environment, supra note 1, at 13, 17 ("Could this old world[,] [the natural world], which man has overthrown, be rebuilded [sic], could human cunning rescue its wasted hillsides and its deserted plains from solitude or mere nomad occupation, from barrenness, from nakedness, and from insalubrity, and restore the ancient fertility and healthfulness . . . .").

188. See supra notes 11–14 and accompanying text.

189. See Preserve, Oxford English Dictionary, https://www.oed.com/dictionary/preserve_v?tab=meaning_and_use#28617734 (on file with the *Columbia Law Review*) (last modified Sept. 2023) (including in its definitions both "[t]o protect" and "[t]o keep in its original or existing state").

190. See Restore, Oxford English Dictionary, https://www.oed.com/dictionary/restore_v1 (on file with the *Columbia Law Review*) (last modified Sept. 2023) (including in its definitions "[t]o set right or repair" and "[t]o bring back to a previous . . . condition"). This is especially true in the case of something like afforestation, which "restores" an environment to a state it has not inhabited in a long time, rather than, say, "restoration" of a leaky roof, which changes the nature of the roof from leaking to not leaking but leaves it, fundamentally, a roof.

191. National Geographic's resource library defines "conservation" as "the act of protecting Earth's natural resources for current and future generations." Conservation, Nat'l Geographic, https://education.nationalgeographic.org/resource/conservation-encyclopedic/ [https://perma.cc/L5MB-4A55] (last visited Jan. 11, 2023). And the Oxford English Dictionary (OED) provides several definitions, including "[(a)] [t]he action or process of conserving; preservation of life, health, perfection, etc.; (also) preservation from destructive influences, natural decay, or waste[,]" "[(b)] Preservation *of* existing conditions, institutions, rights, peace, order, etc.[,]" and "[(e)] [t]he preservation, protection, *or restoration* of the natural environment and of wildlife; the practice of seeking to prevent the wasteful use of a resource in order to ensure its continuing availability." Conservation, Oxford English Dictionary, https://www.oed.com/view/Entry/39564?redirectedFrom=conservation#eid (on file with the *Columbia Law Review*) (emphasis added) (last modified Sept. 2023).

192. Title 16 of the United States Code—helpfully entitled "Conservation"—contains many subsections and sub-definitions of the term "conservation," many of which strike the balance between preservation and restoration indicated by the dictionary definitions listed above. See 16 U.S.C. § 1362(2) (2018) ("The terms 'conservation' and 'management' mean the collection and application of biological information for the purposes of increasing and

something like *preservation* or *protection* in contemporary parlance, seems to include within it an understanding that to conserve sometimes means to change.

This understanding, however, appears not to have been incorporated into those parts of the I.R.C. and Treasury Regulations that gave rise to the modern conservation easement.[193] Those portions of American law enshrine only the static, preservation-based definition of "conservation." Conservation easements, while sometimes allowing for certain restorative

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maintaining the number of animals within species and populations of marine mammals at their optimum sustainable population. Such terms include . . . habitat acquisition and improvement."); id. § 1532(3) ("The term[] . . . 'conservation' mean[s] . . . the use of all methods . . . which are necessary to bring any endangered [or threatened] species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include . . . habitat acquisition and maintenance, propagation, live trapping, and transplantation . . . ."); id. § 1802(5) ("The term 'conservation and management' refers to all of the rules, regulations, conditions, methods, and other measures (A) which are required to *rebuild, restore, or maintain*, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment . . . ." (emphasis added)); id. § 3743(1) ("The terms 'conserve' and 'conservation' mean to use, and the use of, such methods and procedures which are necessary to ensure, to the maximum extent practicable, the well being and enhancement of fish and wildlife and their habitats . . . [including] habitat acquisition, maintenance, [and] development . . . ."); id. § 4263(2) ("The term 'conservation' means the use of methods and procedures necessary . . . including all activities associated with scientific resource management, such as conservation, protection, restoration, acquisition, and management of habitat . . . ."); id. § 5102(4) ("The term 'conservation' means the *restoring*, *rebuilding*, and maintaining of any coastal fishery resource and the marine environment, in order to assure the availability of coastal fishery resources on a long-term basis." (emphasis added)); id. § 6103(3) ("The term 'conservation' means the use of methods and procedures necessary . . . [including] maintenance, management, protection, and restoration of neotropical migratory bird habitat . . . ."); id. § 6302(2) ("The term 'conservation' . . . means the use of methods and procedures necessary to prevent the diminution of, and to sustain viable populations of, a species; and . . . includes all activities associated with wildlife management, such as . . . conservation, protection, restoration, acquisition, and management of habitat . . . ."); id. § 6415(4) ("The term 'conservation' means the use of methods and procedures necessary to preserve or sustain native corals and associated species as diverse, viable, and self-perpetuating coral reef ecosystems, including all activities associated with resource management, such as assessment, conservation, protection, restoration, sustainable use, and management of habitat . . . ."); 16 U.S.C.A § 669a(1) (West 2019) ("[T]he term 'conservation' means the use of methods and procedures necessary or desirable to sustain healthy populations of wildlife, including . . . improvement and management of habitat . . . ."); § 6602 ("The term 'conservation' means the use of all methods and procedures necessary to protect marine turtles, freshwater turtles, and tortoises, and their habitats . . . [including] protection, restoration, and management of habitats . . . ."). This lengthy sampling represents only a small fraction of the definitions of "conservation" that surely stretch across statutes, regulations, and court decisions. Fascinatingly, there is a snake-eating-its-tail element to some of them, wherein the word "conservation" is itself used, alongside words like "preservation," within a definition of "conservation" for the purposes of the statute. See, e.g., 16 U.S.C. § 4263(2).

193. See supra note 182.

practices to be conducted on donated land,[194] are fundamentally concerned with restricting development in order to leave land unchanged.[195] Land donated as a conservation easement is intended to be preserved, not reinvented.

And neither of these definitions—and none of the statutory frameworks outlined herein—go so far as to include in the definition of conservation the generation of *new* nature. For those who include restoration in their idea of conservation, planting new trees in an area that recently had many of its trees felled may look like conservation. But it is difficult to imagine that most people would seriously consider, say, turning a backyard into a forest to be "conservation" in the pure sense. The backyard is destroyed, and something new—not something "conserved"—is put in its place. Yet this is precisely the kind of practice this Note argues must be included in a holistic, effective definition of conservation in a time of global climate change. In order to truly restore the natural world to a state of relative health, drastic actions must be taken to put new nature—in this case, trees—in the ground.[196] These actions should therefore be considered restorative or conservational in the broad sense, even if they are not so in the traditional sense. For although they involve making immediate changes to specific landscapes and properties that are not themselves worthy of conservation—like backyards—they contribute to an overall restoration that will help conserve life on the planet. Therefore, this Note proposes certain changes to the I.R.C. and the Treasury Regulations that suggest that, within the context of conservation easements, "conservation" should embrace the notion that land can be set aside *in order to be changed*.[197]

C. *Building the Afforestation Easement*

1. *The Statutory Approach.* — Afforestation itself could be added as a statutorily recognized conservation purpose under the I.R.C.[198] This

194. See, e.g., Brenda Lind, Using Conservation Easements to Protect Working Forests, Land Tr. All. Exch., Spring 2001, at 10, 11. But see Owley & Takacs, supra note 178, at 82–83 (describing the negative nature of conservation easements and explaining that, often, no activity is allowed on land donated as a conservation easement).

195. See supra section II.C.

196. See Tallamy, supra note 11, at 25–26.

197. This Note does not suggest abandoning the traditional definition of conservation in its entirety, of course. Even within the context of the afforestation easement, this Note suggests that once land is set aside for afforestation, it should be protected negatively along traditional lines. See infra section III.C.

198. See I.R.C. § 170(h)(4) (2018). Others have suggested amending the I.R.C. to encompass conservation purposes that are tangential to afforestation and, if adopted, could be argued to enable the afforestation easement. See Jay, supra note 173, at 401–02 (suggesting updating the I.R.C. and Treasury Regulations to include, among other things, carbon sequestration, interconnecting trail corridors, and forestry working land, all of which could, if adopted, lead to a more positive afforestation regime); see also Aaronson & Manuel, supra note 173, at 28 (suggesting carbon capture should be a legitimate

could be accomplished with a relatively simple amendment to I.R.C. § 170(h)(4),[199] which lists the four legitimate conservation purposes. The new *§ 170(h)(4)(v)*[200] could read something like, "*active afforestation and subsequent maintenance of newly forested land.*" This simple addition would clarify that afforestation is a legitimate, deductible conservation purpose under the I.R.C. Because this would legalize the practice of donating land for future afforestation, this addition to the I.R.C. would take care of the land-acquisition prong.

The stewardship prong would require subsequent changes to the I.R.C. Because it would be unwise to allow donations of, and therefore tax breaks for, to take the earlier example, backyards to land trusts lacking the expertise and resources to ensure that the afforestation program is implemented and monitored,[201] it is sensible to restrict qualified recipients of afforestation easement donations to entities that can prove they have the requisite resources and expertise to oversee a robust afforestation scheme on a property.[202] This could be codified by adding language to I.R.C. § 170(h)(3), which lists the organizations qualified to accept a donation,[203] clarifying that "*in the case of donations made under § 170(h)(4)(v)*" any government, tribe, nonprofit, or private organization accepting the donation of an afforestation easement must prove to the IRS that it has the funds and knowledge necessary to successfully plant, grow, and maintain the new forest.[204]

The perpetuity prong is built into the I.R.C. as it is currently drafted,[205] but certain changes to § 170(h)(2) (defining "qualified property interest"), would ensure that the confusion between perpetuity and afforestation[206] is clarified in the Code. Specifically, § 170(h)(2)(C)

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conservation purpose under the I.R.C.). In line with its broader argument that conservation should include the growth of new nature, this Note takes the more direct step of suggesting afforestation be considered, in and of itself, a legitimate conservation purpose.

199. I.R.C. § 170(h)(4).

200. Suggested sections and language are in italics.

201. See Owley & Takacs, supra note 178, at 83 (explaining that land trusts often lack resources). Conservation easements in their current form are already vulnerable to fraud, misrepresentation, and a failure to keep land in accordance with the stated conservation purpose. See McLaughlin, Valuation, supra note 161, at 227.

202. By "robust afforestation scheme," this Note means one that is in line with local conditions and plant selection. See Tallamy, supra note 11, at 89. Any successful afforestation effort in the United States will likely also involve the hiring and training of more federal, state, and local foresters with a focus on restoration rather than on wood processing. See Occupational Employment and Wage Statistics, May 2022: 19-1032 Foresters, U.S. Bureau of Lab. Stats., https://www.bls.gov/oes/current/oes191032.htm [https://perma.cc/ZY2B-76F6] (last modified Apr. 25, 2023) (estimating that there are fewer than ten thousand foresters in the United States).

203. I.R.C. § 170(h)(3).

204. This would eventually lead to meeting the stewardship prong.

205. I.R.C. § 170(h)(2)(C).

206. Again, in the traditional sense, it is difficult to say that land being actively afforested is being conserved "in perpetuity" because the land itself is being changed. Perpetuity here

could be amended to read: "a restriction, *or, in the case of donations made under subsection (h)(4)(v), an affirmative obligation* (granted *or imposed* in perpetuity) on the use which may be made of the real property."[207] This addition would ensure (1) that it is understood that the afforestation easement is a legitimate property interest and (2) that the affirmative duty to plant, grow, and maintain the forest is donated—like traditional restrictions—in perpetuity.

All of these statutory changes would likely need to be supplemented by interpretations in the Treasury Regulations that would clarify how qualifying organizations would prove their trustworthiness, how the suitability of land for afforestation would be determined, what duties would be inherent in such a donation, how such donations would be monitored, and so on. Drafting these extensive regulations is beyond the scope of this Note, which is focused on how the afforestation easement could be initially created in law. But doubtless the Department of the Treasury ("Treasury"), should it have the opportunity to do so, would want to draft these regulations with an eye toward the three pillars of a successful afforestation instrument—land acquisition, stewardship, and perpetuity—outlined above.

2. *The Regulatory Approach.* — Even without direct statutory language creating the afforestation easement, one could be created through the Treasury Regulations interpreting I.R.C. § 170(h) as it already stands.[208] Again, these regulations would need to be drafted with an eye toward the three pillars of afforestation.

Like the approach in the previous section, language could be added to Treasury Regulation § 1.170A-14(d)(1), which lays out the valid conservation purposes for which easements can be donated,[209] to create the afforestation easement. This new subsection—Treasury Regulation *§ 1.170A-14(d)(1)(v)*—could mirror the statutory language proposed above: "*the active afforestation and subsequent maintenance of newly forested land.*"[210] This simple addition would create the afforestation easement and therefore satisfy the land acquisition prong.

But the Treasury Regulations differ from the I.R.C. in that they are far more detailed, providing long explanations for each of the listed

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refers to leaving the land be for the purposes of growing forest, which is different from the traditional understanding, which is leaving the land be entirely.

207. I.R.C. § 170(h)(2)(C).

208. Of course, this approach has its dangers, especially given the current Supreme Court's apparent hostility to agency actions. See West Virginia v. Env't Prot. Agency, 142 S. Ct. 2578, 2609–10 (2022) (indicating that the so-called "major questions doctrine" may become a tool by which courts can nullify agency actions).

209. Treas. Reg. § 1.170A-14(d)(1) (2023).

210. See supra section III.C.1. This mirroring would be in line with the current structure of the Treasury Regulations, which, in this subsection, mirror the language of the I.R.C. Compare I.R.C. § 170(h)(4), with Treas. Reg. § 1.170A-14(d)(1).

conservation purposes.[211] If Treasury promulgated new regulations and added the afforestation easement under § 1.170A-14(d)(1), it would likely expand upon that creation by issuing further guidance under a hypothetical *§ 1.170A-14(d)(6)*. Here, Treasury would have ample opportunity to spell out what ought to be required of afforestation easements, from the three pillars discussed above[212] to further ideal requirements, such as native tree requirements,[213] corridor requirements,[214] area requirements,[215] numerosity, height, and cover requirements,[216] maintenance requirements,[217] enforcement requirements, and any others it might think necessary to protect the integrity of the afforestation easement. *Section 1.170A-14(d)(6)* would serve as guidance on what it means to afforest, as protection against monocultures hastily planted to claim a tax benefit, and as justification for strong enforcement measures.

Section 1.170A-14(d)(6) could go a long way toward ensuring that stewardship and perpetuity are ensured, but there are also specific existing regulatory sections in which these two concerns could be addressed as well. In the case of stewardship, Treasury could add a new subsection to § 1.170A-14(c)(1) clarifying the requirements for an eligible donee of an afforestation easement.[218] Similarly, Treasury could add language to the definition of "perpetuity" in the case of afforestation easements to § 1.170A-14(b), explaining that while the donated land will not be retained in its current state in perpetuity, the new forest will be.[219]

3. *The Litigation Approach.* — There is also an argument to be made that the afforestation easement already exists within the current contours of the I.R.C. and Treasury Regulations, and that citizens could begin donating land that is not forested for the purpose of afforestation.[220] This would represent a novel approach to conservation easements and would

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211. See Treas. Reg. § 1.170A-14(d)(2)–(5).

212. See supra section I.D.

213. See Tallamy, supra note 11, at 89.

214. See id. at 41 (explaining that the larger and more connected our manmade natural ecosystems, the better).

215. See supra note 85 and accompanying text.

216. See supra note 54–56 and accompanying text.

217. See supra notes 86–89 and accompanying text.

218. See supra notes 201–206 and accompanying text.

219. See supra note 205.

220. Afforestation may appear in conservation easement agreements as a necessary step to protect and restore trees. See, e.g., John J. Delaney, Stanley D. Abrams, Frank Schnidman, Patricia E. Salkin & Julie A. Tappendorf, Handling the Land Use Case: Land Use Law, Practice & Forms app. G3 (3d ed. 2023) (providing a model for a conservation easement that includes afforestation). But this is distinct from donating an entire plot of unforested land for the *sole purpose* of afforestation. It is the difference between a means to an end and an end in itself. Indeed, the model conservation easement agreement mentioned supra seems to use afforestation in a way more similar to what this Note would label reforestation. See supra section I.C.3.

come with the risk of IRS action.[221] But some courts have taken more expansive views of qualifying donations than seem implied by the plain language of the regulations,[222] and in the absence of congressional or agency action, the courts might be a legitimate avenue through which to create the federal afforestation easement.

The afforestation easement could arguably be found in the Treasury Regulation guidance on legitimate conservation purposes.[223] The first place to look would be the subsection on protecting an environmental system.[224] Although this subsection speaks in terms of "protection"[225]—negative, rather than affirmative, language—it does countenance that a human-made natural structure could be worthy of conservation if that structure served certain wildlife purposes.[226] Theoretically, then, a human-made forest on private property could qualify so long as it met the requirements. But this is an incomplete solution because the plain language of this subsection makes clear that the natural structure must already exist before it can be conserved.[227] This subsection is therefore most useful for its statement that "[t]he fact that the habitat or environment has been altered to some extent by human activity will not result in a deduction being denied."[228] It does not, by itself, create the afforestation easement.

A similar argument can be made for the guidance on preservation of open space.[229] This is the subsection of the Treasury Regulations that explicitly deals with forest.[230] Again, this section uses the static, negative language of preservation rather than acknowledging affirmative planting as a legitimate purpose.[231] It speaks of three qualifying open space actions:

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221. There does not appear to be any evidence that a taxpayer has attempted to donate land for the purposes of creating any kind of new natural structure on that land, as this Note suggests. Indeed, this approach would seem to violate the working theory of conservation easements, which is that they are *negative* easements that rarely, if ever, contain affirmative duties toward the land. See Owley & Takacs, supra note 178, at 82–83.

222. See McLaughlin, Valuation, supra note 161, at 274–80 (discussing controversial donations of golf courses as conservation easements).

223. Treas. Reg. § 1.170A-14(d) (2023). Because the Treasury Regulations expand upon the I.R.C., this section focuses exclusively on the language contained in the Treasury Regulations.

224. Id. § 1.170A-14(d)(3)(i).

225. Id.

226. Id. ("For example, the preservation of a lake formed by a man-made dam or a salt pond formed by a man-made dike would meet the conservation purposes test if the lake or pond were a nature feeding area for a wildlife community that included rare, endangered, or threatened native species.").

227. Id. ("The donation of a qualified real property interest to protect a significant relatively natural habitat in which a fish, wildlife, or plant community . . . normally lives will meet the conservation purposes test of this section.").

228. Id.

229. Id. § 1.170A-14(d)(4).

230. Id. § 1.170A-14(d)(4)(i).

231. Id.

scenic enjoyment, government policy, and significant public benefit.[232] Because of the emphasis on "preservation" in the subsection concerning scenic enjoyment, only a weak argument could be made that afforestation would qualify.[233] The subsection is focused not on new plantings but on maintaining what already exists for its aesthetic value.[234] Perhaps an affirmative argument could be made that the possibility of *future* aesthetic value conforms with the requirements of this subsection, but this argument is somewhat attenuated and would rely on judicial open-mindedness.

Perhaps the best argument that the afforestation easement is implicit in the current Treasury Regulations is that afforestation is a significant public benefit within the meaning of § 1.170A-14(d)(4)(iv).[235] Although this, like the other subsections discussed, speaks in the language of "preservation,"[236] the illustration provided in the subsection seem to countenance the possibility—if not the explicit allowance—of a deduction being granted for the donation of land set to become a more natural environment.[237] Specifically, that subsection states that "[t]he preservation of an ordinary tract of land would not in and of itself yield a significant public benefit, but . . . [f]or example, the preservation of a vacant downtown lot . . . as a public garden would . . . yield a significant public benefit."[238] While there are counterarguments (e.g., the garden must be "public," perhaps the garden must already exist in the lot), a public garden in a downtown lot is not so different from a forest in a backyard. Both involve an ordinary piece of land transformed into a spot of natural beauty. And a more afforested America is a public benefit in the broadest sense of that ideal.[239] If the afforestation easement—or any other distributed nature tools—can be found in the current composition of the Treasury Regulations, this is the best place to begin looking.

Below the surface of the regulations are the understandings that man has a place in the creation of nature,[240] that habitats and ecosystems are worthy of protection,[241] and that at least some non-natural spaces may be

232. Id. § 1.170A-14(d)(4)(ii)–(iv).

233. Id. § 1.170A-14(d)(4)(ii)(A).

234. See, e.g., id. § 1.170A-14(d)(4)(ii)(A)(5).

235. Id. § 1.170A-14(d)(4)(iv). This argument would be made stronger if the additions to this subsection suggested by Jessica Jay were adopted. See Jay, supra note 173, at 401–03 (suggesting, for example, adding "agricultural and forestry working lands" to the open spaces provision of the Treasury Regulations).

236. Treas. Reg. § 1.170A-14(d)(4)(iv)(A).

237. Id. § 1.170A-14(d)(4)(iv)(B).

238. Id.

239. See supra Part I. The USDA, at least, seems to agree. See USDA, FSP Guidelines, supra note 127.

240. See Treas. Reg. § 1.170A-14(d)(3)(i); supra notes 226–228 and accompanying text.

241. See § 1.170A-14(d)(3); supra notes 229–232 and accompanying text.

worthy of preservation for their potential to grow natural systems.[242] It would require a creative and tenacious litigator, a willing taxpayer, and a sympathetic judge to etch that understanding into the law of conservation easements. But it is possible.

4. *Rethinking Valuation.* — Along with creating the afforestation easement, some thought should be given to how these donations would be valued. There have already been many criticisms of the valuation methodology used for calculating conservation easement deductions, along with calls for reform.[243] For one thing, the current valuation structure favors those with high incomes.[244] For another, it incentivizes considerable dishonesty in appraisals, leading to questionably high deductions.[245]

Rather than a calculation based on the difference in value between HBU and the value with a conservation easement in place, which would tend to be minimal in the case of afforestation easements made by small landowners like Ann,[246] donations made as afforestation easements should be valued based on the value of the conservation itself. This would be difficult to calculate, but it could be done at a per-tree-planted rate[247] by tying the value of afforestation projects to the social cost of carbon,[248] or by providing a flat, per-acre tax rebate. There are many ways conservation value could be calculated, taking into account geography, ecology, connectivity, and other factors.[249] But the important point is that the valuation philosophy must shift value away from valuing only what is lost in development rights to valuing instead what is gained in water quality, habitat establishment, carbon sequestration, and other environmental benefits.

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242. See § 1.170A-14(d)(4)(iv)(B); supra notes 235–237 and accompanying text.

243. See, e.g., McLaughlin, Valuation, supra note 161; Wolf, supra note 158.

244. See McLaughlin, Donations, supra note 159, at 99–100.

245. See McLaughlin, Valuation, supra note 161, at 228.

246. A backyard, or even larger properties, may not worth all that much to begin with, and thus an important financial incentive would be lost in using this valuation method in this context.

247. See Robbins, supra note 56, at 93 (suggesting this approach).

248. See Kevin Rennert, Brian C. Prest, William A. Pizer, Richard G. Newell, David Anthoff, Cora Kingdon, Lisa Rennels, Roger Cooke, Adrian E. Raferty, Hana Ševčíková & Frank Errickson, The Social Cost of Carbon: Advances in Long-Term Probabilistic Projections of Population, GDP, Emissions, and Discount Rates, Brookings Papers on Econ. Activity, Fall 2021, at 223, 224, https://www.brookings.edu/wp-content/uploads/2021/09/15985-BPEA-BPEA-FA21_WEB_Rennert-et-al.pdf [https://perma.cc/SSM4-JPM8] (explaining the social cost of carbon).

249. One idea to encourage the establishment of corridors would be to give donors who contribute to larger, connected corridors a higher incentive than those donating only small parcels, for example.

D. *Toward Distributed Nature*

If created, the afforestation easement would be one of many potential legal tools for incentivizing distributed nature and thus go a long way toward bringing private landowners into the fight against climate change and biodiversity loss by cultivating a regenerative ethic between those landowners and their lands.[250] By emphasizing the qualities of land acquisition, stewardship, and perpetuity, the afforestation easement would provide the resources necessary to (1) get people to donate their land, (2) pair them with experts to help them grow their forests, and (3) ensure that those forests are protected as they grow. The afforestation easement should not be the only tool in the distributed nature toolbox, but it stands as an example of how current legal structures, with substantive and philosophical tweaks, can be used to incentivize private participation in regenerative conservation, thus adding another mechanism with which to enlist individuals in the collective effort to combat climate change.

E. *Problems and Limitations*

The afforestation easement is a limited tool with its own shortcomings. This section attempts to address some of the objections that might be raised against it.

The first set of objections might come less from the idea of the afforestation easement than from the idea of distributed nature itself. These objections might challenge the notion that such a small natural space can really be said to constitute "nature" at all.[251] Certainly, these challengers might say, it cannot be argued that a three-acre forest has the same benefits as a "true" forest.[252] It is correct that the smaller the forest, the fewer its benefits.[253] But it is unfair to say that small parcels of nature provide *no* benefit. Trees still clean the air and purify the water; they still provide homes for those living things that find them; they still provide shade to humans; they are still extraordinary beings. Even small forests provide more benefits than no forests. And if the proper incentives are adopted and distributed nature catches on, small forests could become larger and larger forests. The afforestation easement is not an end unto

250. Although this Note has used the hypothetical of Ann's backyard, this instrument could be used for varying kinds of different lands. For example, it has been suggested that it is more efficacious, in the carbon sequestration context, to replace ethanol corn fields with trees. See Eisenson, supra note 85. The afforestation easement could be used for that purpose, or for many others as well. The backyard is simply an example.

251. The definition of "nature" has always been contested and politicized. See Jedediah Purdy, After Nature: A Politics for the Anthropocene 12 (2015). But even small pockets of natural space can be thriving with life. See generally David George Haskell, The Forest Unseen: A Year's Watch in Nature (2012) (documenting everything that occurs, over a year, in one square meter of forest).

252. See Tallamy, supra note 11, at 38–44 (explaining the importance of size and connectivity for the health of creatures living in forests).

253. See id.

itself. It is a tool that humanity—at least that portion of humanity residing in the United States—can use to begin to rebuild what it has lost.

Second, can it really be that locking valuable private real estate away in the form of growing forests is worth the federal government's time when there is housing to build, solar to install, and turbines to raise?[254] And if forests are to be given precious land in the present, is it really wise to say that future generations cannot use that land for their own purposes? These are valid concerns. But land use always involves certain tradeoffs. Human beings in America have taken a lot of space for themselves at the expense of massive populations of other living beings.[255] It is time to start building legal structures that entitle nonhuman living things to their own spaces. And in terms of dead-hand control, it is simply inevitable that the choices made today will impact the future.[256] This Note submits that some of those choices should involve safeguarding certain portions of land from the decisions of future generations who will themselves be human and prone to the human tendencies to spread, consume, and destroy.

Finally, some may object that this Note reifies private property and will inevitably lead to windfalls for wealthy landowners. Certainly, there is legitimacy to these concerns. But private property in America is a reality, and one that must be confronted in any conversation about land use, the regeneration of nature, or conservation. And while conservation easements have been abused by wealthy landowners, the afforestation easement—particularly if the valuation method is adjusted in the ways suggested[257]—would be less favorable to the wealthy. A deduction that is not tied to income level would help to solve the problem of land rich, cash poor folks for whom conservation easements have proven ineffectual.[258] If valuation is calculated based on conservation value, it will provide cash to those Americans who may have land but still lack financial stability. Further, the afforestation easement represents a means by which to separate private landowners from their perpetual land rights and transfer

254. See Gerrard, Time for Triage, supra note 39, at 41 (arguing that renewables buildout should be prioritized above other land uses); Annie Lowrey, The U.S. Needs More Housing Than Almost Anyone Can Imagine, The Atlantic (Nov. 21, 2022), https://www.theatlantic.com/ideas/archive/2022/11/us-housing-gap-cost-affordability-big-cities/672184/ (on file with the *Columbia Law Review*) (arguing the need for more housing, but also noting that most of this need is in a few large cities).

255. See supra Part I.

256. The very nature of man-made climate change demonstrates that current and past generations impact future generations: Carbon dioxide and other greenhouse gasses emitted today directly impact the living conditions of people in the future. But for a more comprehensive philosophical argument that the decisions made today impact countless theoretical future people, see Will MacAskill, What We Owe the Future 19 (2022) ("[I]f we truly care about the interests of future generations—if we recognize that they are real people, capable of happiness and suffering just like us—then we have a duty to consider how we might impact the world they inhabit.").

257. See supra section III.C.4.

258. See McLaughlin, Donations, supra note 159, at 99–100.

those rights to a public good. While private landowners may be the immediate beneficiaries of the financial incentives involved, the public—as well as countless nonhuman living beings—are the ultimate winners.

CONCLUSION

In the face of global climate change, humanity needs new ways of living with the natural world that are fundamentally regenerative, and new legal tools for doing so. One of those new ways of living could be distributed nature, an individual recognition of the responsibility to begin rebuilding the natural world on one's own private property. One way to achieve distributed nature is to encourage the planting and growth of new forests on private lands. And one tool to achieve that afforestation ideal is the afforestation easement. With the afforestation easement, Ann could receive a financial incentive to give her land over to a new forest. She could get help creating that forest. And she could be assured that the forest will still be around when her grandchildren and their children's children grow up—hopefully on a planet bursting with renewed life.

IN THE GOVERNMENT'S SHOES: ASSESSING THE LEGITIMACY OF STATE QUI TAM PROVISIONS

*Erik Ramirez**

Recently, a wave of state legislatures have enacted qui tam provisions to police citizen behavior in a variety of politically and legally contentious environments. The current literature on private enforcement views qui tam as a homogenous species of private enforcement and does little to identify any distinctions within qui tam itself. This gap in the scholarship has made it difficult to assess the legitimacy of the recently adopted state qui tam provisions. This Note adds to this literature by identifying distinctions between different forms of qui tam and creating a Taxonomy that places a qui tam provision within six distinct categories according to the nature of the underlying governmental claim, the practical effect of the provision, and the normative values underlying the provision.

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INTRODUCTION

Texas's so-called "heartbeat" abortion bill took effect on September 1, 2021,[1] and it immediately spurred a nationwide debate in the legal community[2] and the broader public.[3] The law, known as S.B. 8, bans medical providers from providing abortion care whenever an ultrasound can detect electrical activity in embryonic cells, which Texas lawmakers defined as a fetal heartbeat[4] and can appear as early as six weeks into pregnancy.[5] Importantly, the law puts forth a unique enforcement regime: It prohibits state and local officials from bringing criminal prosecutions or civil enforcement actions and instead empowers private citizens to bring

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1. Texas Heartbeat Act, S.B. 8, 87th Gen. Assemb., Reg. Sess. (Tex. 2021) (codified as amended at Tex. Health & Safety Code Ann. §§ 171.201–.212 (West 2022)).

2. See, e.g., Lauren Moxley Beatty, The Resurrection of State Nullification—And the Degradation of Constitutional Rights: SB 8 and the Blueprint for State Copycat Laws, 111 Geo L.J. Online 18, 20, 33 (2022), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2022/08/Beatty-State-Nullification.pdf [https://perma.cc/7NA7-W4MH] (arguing Texas's abortion law was an attempt to nullify a federal constitutional right and that similar attempts have traditionally failed constitutional scrutiny); Press Release, DOJ, Justice Department Sues Texas Over Senate Bill 8 (Sept. 9, 2021), https://www.justice.gov/opa/pr/justice-department-sues-texas-over-senate-bill-8 [http://perma.cc/G7XS-XFQC/] ("The Act is clearly unconstitutional under longstanding Supreme Court precedent . . . ." (internal quotation marks omitted) (quoting Attorney General Merrick Garland)).

3. See, e.g., Maggie Astor, Here's What the Texas Abortion Law Says, N.Y. Times (Sept. 9, 2021), https://www.nytimes.com/article/abortion-law-texas.html (on file with the *Columbia Law Review*) (detailing the major features of the Texas abortion law); Adam Serwer, A Strategy of Confusion, The Atlantic (Sept. 10, 2021), https://www.theatlantic.com/ideas/archive/2021/09/republicans-strategy-confusion/620029/ (on file with the *Columbia Law Review*) ("The Texas law's critics have seized on its perverse social incentive—bribing Texans to inform on one another—as potentially creating a nightmare scenario, a kind of privatized surveillance state.").

4. See Tex. Health & Safety Code Ann. § 171.201(1) (2023) (defining "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac"). Medical and reproductive health experts have said the law's references to "heartbeats" are misleading, however, because embryos at early stages of pregnancy have not developed a heart. Bethany Irvine, Why "Heartbeat Bill" Is a Misleading Name for Texas' Near-Total Abortion Ban, Tex. Tribune (Sept. 2, 2021), https://www.texastribune.org/2021/09/02/texas-abortion-heartbeat-bill/ [http://perma.cc/8AEC-AWWT/].

5. Neelam Bohra, Texas Law Banning Abortion as Early as Six Weeks Goes Into Effect as the U.S. Supreme Court Takes No Action, Tex. Tribune (Aug. 31, 2021), https://www.texastribune.org/2021/08/31/texas-abortion-law-supreme-court/ [http://perma.cc/AW3J-2KH5/] (last updated Sept. 1, 2021).

civil actions to punish statutory violations.[6] If these private enforcers prevail at trial, they are rewarded with $10,000 in statutory damages per offense and attorney's fees.[7] While the Supreme Court's decision to abandon the constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*[8] mooted many of the federal constitutional arguments against S.B. 8's restrictions,[9] the law's enforcement mechanism and its implications have commanded continued scholarly attention.[10]

In the debate over S.B. 8's legitimacy, scholars have emphasized the differences between "traditional" private enforcement regimes and the "recent" adaptations that employ similar enforcement mechanisms as S.B. 8. This Note draws on Professor Sean Farhang's definition of "private enforcement regimes" as the set of legislative decisions that determine "who has standing to sue, which parties will bear the costs of litigation, what damages will be available to winning plaintiffs, whether a judge or jury will make factual determinations and assess damages, and rules of liability, evidence, and proof."[11] Traditional private enforcement regimes include the many well-established statutes that have tasked members of the public with enforcing regulatory laws,[12] including antidiscrimination law,[13] banking regulation,[14] and consumer protection.[15] According to Professor Luke Norris, these traditional private enforcement regimes fall into one of two lanes: (1) when the private enforcer is alleging direct, individualized harm that the regulation prohibits, or (2) when the private enforcer seeks to vindicate a shared public interest.[16]

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6. Tex. Health & Safety Code Ann. § 171.207.

7. Id. § 171.208(b).

8. 142 S. Ct. 2228, 2242 (2022).

9. See Larissa Jimenez, 60 Days After *Dobbs*: State Legal Developments on Abortion, Brennan Ctr. for Just. (Aug. 24, 2022), https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion [http://perma.cc/7K68-K2NT/] (noting that the *Dobbs* decision returned the question of abortion access to the states, which has led to a patchwork of policies).

10. See Jon D. Michaels & David L. Noll, Vigilante Federalism, 108 Cornell L. Rev. 1187, 1192 (2023) [hereinafter Michaels & Noll, Vigilante Federalism] (arguing S.B. 8 falls within a larger trend of state "private subordination regimes," which seek to "suppress the rights of disfavored or marginalized individuals and groups"); Luke P. Norris, The Promise and Perils of Private Enforcement, 108 Va. L. Rev. 1483, 1485 (2022) (placing S.B. 8 at the center of the developing "legal maelstrom" over private enforcement litigation).

11. Sean Farhang, The Litigation State: Public Regulation and Private Lawsuits in the U.S. 3–4 (2010).

12. See Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, Private Enforcement, 17 Lewis & Clark L. Rev. 637, 685 (2013) ("Private enforcement of government-initiated or sanctioned policy potentially covers a virtually limitless array of policy areas . . . ."); Norris, supra note 10, at 1493.

13. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2018).

14. See Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301–5641 (2018).

15. See Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2018).

16. See Norris, supra note 10, at 1498–99.

Scholars have attacked the recent private enforcement regimes by distinguishing the statutes' targets and motivations from their traditional analogues. Professors Jon Michaels and David Noll have argued the recent enforcement regimes, which they refer to as "private subordination regimes,"[17] are both the result of improper motives by state legislatures and the "product of . . . populist outrage discourse" that has recently emerged in right-wing politics.[18] As Michaels and Noll note, these laws are frequently passed by GOP-led state legislatures.[19] Professors Stephen B. Burbank and Farhang's research shows that in the past eight years, Republican Party support for private enforcement has grown substantially, challenging the conventional wisdom that business-friendly Republicans are generally opposed to statutory provisions facilitating access to the courts.[20] Burbank and Farhang argue this contradiction represents a major realignment in party dynamics that was spurred in part by conservative distrust of the Obama administration as an adequate enforcer of the conservative rights agenda.[21] One argument against these recent enforcement regimes is that unlike traditional private enforcement regimes, which are designed to vindicate individual harms or shared public interests, the recent enforcement regimes are motivated by partisan beliefs and enforced by "culture warriors" who often have not suffered a material harm before bringing an action.[22]

While the traditional–recent distinction has helped legal commentators develop theories on how society and the federal court system should adapt to the recent enforcement regimes,[23] this distinction does little to explain how legislatures should evaluate prospective enforcement regimes. Scholars have argued that legislatures should design private enforcement regimes to fit the "particular social and legal contexts in

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17. Michaels & Noll, Vigilante Federalism, supra note 10, at 1191.

18. See Jon Michaels & David Noll, Opinion, We Are Becoming a Nation of Vigilantes, N.Y. Times (Sept. 4, 2021), https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html (on file with the *Columbia Law Review*).

19. See Michaels & Noll, Vigilante Federalism, supra note 10, at 1194.

20. Stephen B. Burbank & Sean Farhang, A New (Republican) Litigation State?, 11 U.C. Irvine L. Rev. 657, 660 (2021).

21. See id. at 686 ("[W]e found escalating Republican support for bills seeking to leverage private lawsuits to enforce rights that were primarily anti-abortion, immigrant, and tax, and pro-gun and religion.").

22. See Michaels & Noll, Vigilante Federalism, supra note 10, at 1192–93.

23. See, e.g., Beatty, supra note 2, at 19 (arguing that S.B. 8 is the first state law to successfully nullify federal law in U.S. history); Howard M. Wasserman & Charles W. "Rocky" Rhodes, Solving the Procedural Puzzles of the Texas Fetal-Heartbeat Law and Its Imitators: The Limits and Opportunities of Offensive Litigation, 71 Am. U. L. Rev. 1029, 1033–37 (2022) (documenting the substantive and procedural challenges posed by S.B. 8 and offering strategies to challenge the law); Laurence H. Tribe & Stephen I. Vladeck, Opinion, Texas Tries to Upend the Legal System With Its Abortion Law, N.Y. Times (July 19, 2021), https://www.nytimes.com/2021/07/19/opinion/texas-abortion-law-reward.html (on file with the *Columbia Law Review*) ("[S.B. 8 is] an assault on our legal system and on the idea that law enforcement is up to the government, not our neighbors.").

which [the] unremedied systemic problems arise."[24] Since the traditional–recent binary speaks in broad categories, legislatures may find this to be an unhelpful tool when forced to evaluate future private enforcement regimes in their fact-specific contexts. A more comprehensive categorization that accounts for the unique structure of the recent enforcement regimes could clarify how legislatures should view future laws that resemble the recent private enforcement regimes.

This Note argues that analyzing California's Private Attorney General Act (PAGA) alongside the recent enforcement regimes can help develop a more nuanced private enforcement framework, specifically for qui tam actions. Qui tam is a subcategory of private enforcement in which private parties, rather than suing to vindicate their individual rights, instead assume the government's role and bring claims on its behalf.[25] The California Supreme Court has described PAGA as a "type of qui tam action" that conforms to all of the traditional criteria of a qui tam provision.[26] This Note argues that the recent enforcement regimes share enough similarities with PAGA to more precisely be categorized alongside PAGA within this smaller qui tam subset of private enforcement regimes. Evaluating the recent enforcement regimes against other qui tam actions will offer more helpful insights into the laws' practical and normative shortcomings.

To assist legislatures performing this evaluation of qui tam private enforcement provisions, this Note offers a practical Taxonomy for qui tam provisions. The current literature on private enforcement views qui tam as a homogenous species of private enforcement and does little to identify any distinctions within qui tam itself.[27] This Note attempts to fill this scholarly gap by creating a Taxonomy that places a qui tam provision within six distinct categories according to the nature of the underlying governmental claim, the practical effect of the provision, and the normative values underlying the provision. This theoretical framework for qui tam draws heavily from recent scholarship on private enforcement's

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24. See Burbank et al., supra note 12, at 685.

25. See David Freeman Engstrom, Harnessing the Private Attorney General: Evidence From Qui Tam Litigation, 112 Colum. L. Rev. 1244, 1270 (2012) [hereinafter Engstrom, Harnessing the Private Attorney General] (providing an overview of the Federal False Claims Act (FCA) and noting that most enforcement efforts under the act are "initiated as private lawsuits brought pursuant to the FCA's qui tam provisions").

26. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 148 (Cal. 2014) (emphasis omitted).

27. See, e.g., Engstrom, Harnessing the Private Attorney General, supra note 25, at 1246–47 (treating the FCA's qui tam provision and qui tam generally as synonymous and interchangeable concepts); William B. Rubenstein, On What a "Private Attorney General" Is—And Why It Matters, 57 Vand. L. Rev. 2129, 2144–46 (2004) (describing all qui tam relators as "substitute attorneys general" and situating them within a larger spectrum of private attorneys general).

theoretical purposes and core rationales.[28] The framework also draws from qui tam-related scholarship and case law to present an original contribution differentiating between the public and proprietary government claims underlying the qui tam action. The purpose of this categorization effort is to give legislatures a rubric to evaluate the legitimacy of proposed qui tam actions.

Importantly, legislatures likely enacted the recent qui tam provisions not to take advantage of the administrative efficiency of qui tam provisions but rather to evade judicial review. The Texas legislature adopted S.B. 8 to insulate the measure from then-constitutional limits on abortion restrictions.[29] A state legislature looking to perform an illicit end run around judicial protection of an established constitutional right will likely not bother to evaluate the legitimacy of the provision. The law's ability to successfully violate established constitutional rights—in other words, its illegitimacy—would likely be the point of such a measure.[30] Acknowledging this reality, however, does not eliminate the potential for states to adopt public qui tam provisions in good faith. In fact, before the recent spate of S.B. 8–style enforcement regime enactments, legal academics were calling for an expansion of state qui tam provisions to solve a variety of legal problems.[31]

This Note proceeds in three parts: Part I presents the history and background of three qui tam private enforcement models this Note uses to develop its Taxonomy; Part II presents the Taxonomy and categorizes the three qui tam models accordingly; and finally, Part III argues state legislatures looking to adopt public qui tam provisions should look to the PAGA model as a more practical and normatively justifiable alternative to the recent enforcement regimes, specifically comparing PAGA to Cal. S.B. 1327, a California law that adopts S.B. 8's problematic enforcement mechanism.

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28. See Norris, supra note 10, at 1488 (putting forth a democratic theory of "popular participation" in regulatory governance).

29. See Adam Liptak, Justice Department Asks Supreme Court to Block Texas Abortion Law, N.Y. Times (Oct. 18, 2021), https://www.nytimes.com/2021/10/18/us/politics/texas-abortion-law-supreme-court.html (on file with the *Columbia Law Review*) (last updated Oct. 22, 2021) (discussing the claim that the law's drafters "have candidly acknowledged that the law was designed to deter constitutionally protected abortions while evading judicial review" (internal quotation marks omitted) (quoting acting Solicitor General, Brian Fletcher)).

30. See Michaels & Noll, Vigilante Federalism, supra note 10, at 1189–90.

31. See, e.g., Janet Cooper Alexander, To Skin a Cat: Qui Tam Actions as a State Legislative Response to *Concepcion*, 46 U. Mich. J.L. Reform 1203, 1239 (2013) (proposing state legislatures pass statutory qui tam actions to enforce civil penalties for violations of state consumer protection and employment laws); Andrew Elmore, The State Qui Tam to Enforce Employment Law, 69 DePaul L. Rev. 357, 364–65 (2020) (similar).

I. QUI TAM'S HISTORICAL AND MODERN FORMS

This Note aims to present a workable framework for understanding and identifying qui tam's variations. Therefore, before presenting the Taxonomy, this Note discusses qui tam's historical background and the development into its modern forms. This Part more formally introduces the qui tam legal device, explains how the recent private enforcement regimes and PAGA diverge from this standard account, and canvasses the recent legal scholarship to understand where and how qui tam is currently being used. By analyzing qui tam's modern forms alongside its historical analogues, this Note presents a more nuanced account of qui tam provisions than other private enforcement literature. This account will inform the Taxonomy presented in the following Part.

A. *Traditional Qui Tam and the Federal False Claims Act*

1. *Qui Tam in English Common Law and at the Founding.* — Qui tam is the accepted abbreviation for the phrase "qui tam pro domino rege, . . . quam pro seipso in hac parte sequitur,"[32] which translates to "who as well for the king as for himself sues in this matter."[33] Qui tam provisions appear to have originated in thirteenth-century English law, when private individuals began consolidating actions in the royal courts on both their own and on the Crown's behalf.[34] This dual capacity allowed royal courts, which generally heard only matters involving the Crown's interests, to hear private claims.[35] Over the next 150 years, qui tam grew in size and importance within English common law.[36] Qui tam statutes typically regulated economic activities, such as the pricing of wine and tanning leather,[37] and less frequently—but still commonly—regulated public functions and government behavior.[38]

Qui tam's popularity would not last. As these statutes became more commonplace throughout the fifteenth and sixteenth centuries, so too did the instances of abuse.[39] Several reform efforts were undertaken

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32. 3 William Blackstone, Commentaries *160 (emphasis omitted).

33. Qui Tam Action, Black's Law Dictionary (11th ed. 2019).

34. See Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 774 (2000); Note, The History and Development of Qui Tam, 1972 Wash. U. L.Q. 81, 83 [hereinafter History and Development of Qui Tam] ("A *qui tam* suit, then, involves a combination of two distinct interests; one of which is public, the other private.").

35. *Stevens*, 529 U.S. at 774.

36. See J. Randy Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, 78 N.C. L. Rev. 539, 570 (2000) ("[W]hat began as a trickle of *qui tam* statutes gradually became a flood.").

37. See id. at 571.

38. See id. at 572–73.

39. See id. at 575–76 (explaining that as the law grew in popularity, a professional class of informers, who made their living by "pursuing *qui tam* litigation throughout the country[,]" arose with it).

throughout the sixteenth century[40] before finally, in 1623, "Parliament enacted sweeping legislation to curb the informer abuses."[41] Consequently, Parliament enacted fewer qui tam statues in the seventeenth century than in previous centuries.[42] Qui tam statutes experienced a resurgence in the eighteenth and early nineteenth centuries.[43] But this resurgence was short-lived, as reliance on qui tam dramatically declined with the development of modern police departments and public prosecutors.[44] In 1951, Parliament officially abolished all qui tam regimes, ending Britain's long experiment with the enforcement device.[45]

It is important to note that the claims for abuse, which British qui tam defendants complained of throughout qui tam's history,[46] were mainly directed toward informers and not aggrieved parties. Early British qui tam provisions came in two statutory varieties: one for informers who gave information about statutory violations and the other for aggrieved parties who had suffered the harm the statute sought to prevent.[47] Frequent informers created schemes in which they brought feigned trials against friendly defendants to limit the defendant's liability in future actions brought by the Crown.[48] These informers were also the main culprits of vexatious claims, in which aggressive plaintiffs would attempt to enforce obsolete or little-known rules against unwitting defendants.[49] Informer schemes, not aggrieved party actions, created the impetus for reform that ultimately spelled qui tam's demise in British law.

This legacy of qui tam provisions carried over to the American colonies. During the colonial period, several informer statutes expressly

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40. See id. at 585–89 (detailing the British government's response to abusive qui tam enforcement).

41. History and Development of Qui Tam, supra note 34, at 90.

42. See Beck, supra note 36, at 589.

43. See id. at 591–601 (detailing two qui tam contexts that fueled this resurgence: (1) laws restricting religious dissenters and (2) laws aimed at controlling liquor sales).

44. See id. at 601.

45. See id. at 604–08; History and Development of Qui Tam, supra note 34, at 88 & n.44 (citing Common Informers Act 1951, 14 & 15 Geo. 6, c. 39 (UK)).

46. The debate over the qui tam abolition bill surfaced many of these criticisms. In those proceedings, members of Parliament described qui tam informers as "unnatural creature[s] of statute," "parasite[s] who [are] legally empowered to sue for money for which [they have] not worked," and "a form of legalised blackmail." Beck, supra note 36, at 606 (internal quotation marks omitted) (first quoting HC Deb (9 Feb. 1951) (483) col. 2097 (UK) (statement of Mr. Hughes); then quoting id. (statement of Mr. Hughes); then quoting id. at 2100 (statement of Mr. Hughes)).

47. See Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 775 (2000) (describing the two types of qui tam statues Parliament drafted); History and Development of Qui Tam, supra note 34, at 90–91.

48. See History and Development of Qui Tam, supra note 34, at 89.

49. See id.

authorized qui tam suits.[50] Similarly, the first and subsequent early Congresses authorized a considerable number of qui tam statutes.[51] The Supreme Court acknowledged as much when it stated that "[s]tatutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government."[52] Unsurprisingly, the prevalence of these early qui tam statutes also declined over the course of the nineteenth century. Most early qui tam statutes have either been repealed or remain essentially dormant.[53]

The only federal qui tam provision that remains relevant today is the Federal False Claims Act (FCA). The FCA has been described as the quintessential whistleblower statute because of its longevity and continued relevance.[54] Congress originally enacted the FCA in 1863, midway through the Civil War, to curb fraud committed against Union contractors.[55] Since then, the FCA has authorized all private citizens, whom the statute refers to as "relators," to sue on behalf of the United States to recover a portion of the compensatory damages owed to the government.[56] While the law fell out of favor for much of the twenty-first century,[57] the 1986 amendment to the FCA reinvigorated the Act's qui tam framework and elevated its profile and use.[58]

2. *The Modern FCA*. — Since Congress enacted these amendments, FCA qui tam claims have become the standard legal vehicle for enforcing claims of fraud against the government. FCA qui tam filings have grown

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50. See, e.g., *Stevens*, 529 U.S. at 776 (citing Act of Sept. 10, 1692, ch. 21, 1692 N.Y. Laws 10, reprinted in 1 The Colonial Laws of New York From the Year 1664 to the Revolution 279, 281 (Albany, James B. Lyon 1894)).

51. See Evan Caminker, Comment, The Constitutionality of Qui Tam Actions, 99 Yale L.J. 341, 342 n.3 (1989) (listing several qui tam statutes—"in various forms and contexts"—authorized by early Congresses).

52. Marvin v. Trout, 199 U.S. 212, 225 (1905).

53. Caminker, supra note 51, at 342.

54. See, e.g., Elmore, supra note 31, at 369 & n.48 ("The quintessential whistleblower qui tam statute is the False Claims Act . . . .").

55. See Engstrom, Harnessing the Private Attorney General, supra note 25, at 1270 (explaining the historical background of the FCA); Anna Mae Walsh Burke, Qui Tam: Blowing the Whistle for Uncle Sam, 21 Nova L. Rev. 869, 871 & n.7 (1997) (same).

56. See supra notes 20–24 and accompanying text.

57. See Caminker, supra note 51, at 343 (noting that "[r]estrictive statutory amendments and judicial interpretations of the Act drove *qui tam* actions into a period of desuetude").

58. See id. at 343–44; Elmore, supra note 31, at 369–70 (noting that in fiscal year 2017, $3.4 billion of the $3.7 billion in fraud settlements and judgments paid to the government were filed by FCA relators). For further empirical analysis of modern FCA claims, see Engstrom, Harnessing the Private Attorney General, supra note 25, at 1270–71; Walsh Burke, supra note 55, at 870–71.

from only a few dozen in 1987[59] to nearly 600 in 2021.[60] In fiscal year 2021, the DOJ reported $5.6 billion in settlements and judgments under the FCA,[61] $1.6 billion of which arose from lawsuits filed by qui tam relators—the private citizens who brought government claims.[62] Qui tam relators comprise a significant percentage of the FCA cases won by the government,[63] even though the FCA allows the DOJ to independently prosecute violators and intervene in any qui tam claim filed.[64] Two related reasons explain this trend. First, the requirement that relators be an "original source" to the alleged fraud limits frivolous claims and encourages true insiders to come forward.[65] The second reason is that much fraud is hidden from the government's view and the information costs of effectively policing fraud only through public enforcers would be exorbitantly high.[66]

Additionally, meritorious claims are likely driving this growth in qui tam relator suits. Professor David Freeman Engstrom's empirical analysis of FCA qui tam claims showed a "steady maturation" rather than a "gold rush."[67] Specifically, Engstrom found that qui tam's per-filing "efficiency" did not appreciably decline between 1986 and 2014, even as high-dollar, high-publicity settlements have grown more common.[68] This evidence points away from widespread claims that the FCA has led to an inefficient explosion of qui tam enforcement.[69] Engstrom was less

59. See Engstrom, Harnessing the Private Attorney General, supra note 25, at 1270.

60. See Press Release, DOJ, Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021 (Feb. 1, 2022), https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year [https://perma.cc/K454-Y23Z] [hereinafter DOJ, False Claims Act Settlements and Judgments].

61. Id. The vast majority of this amount, about $5 billion, was related to health care fraud. Id.

62. Id.

63. Id.

64. See 31 U.S.C. § 3730 (2018). Independent prosecution and intervention have been described as the FCA's gatekeeper functions. See David Freeman Engstrom, Agencies as Litigation Gatekeepers, 123 Yale L.J. 616, 620 (2013) [hereinafter Engstrom, Agencies as Litigation Gatekeepers] ("While the specific institutional designs vary, these proposals share a common aim: regulating private litigation efforts by granting agencies what I call litigation 'gatekeeper' authority.").

65. 31 U.S.C. § 3730(e)(4); see also Pamela H. Bucy, Private Justice and the Constitution, 69 Tenn. L. Rev. 939, 947–49 (2002) [hereinafter Bucy, Private Justice] (explaining that Congress viewed "helpful" relators as those who brought information the government did not already know).

66. See Engstrom, Harnessing the Private Attorney General, supra note 25, at 1270 n.87.

67. See David Freeman Engstrom, Private Enforcement's Pathways: Lessons From Qui Tam Litigation, 114 Colum. L. Rev. 1913, 1996 (2014) [hereinafter Engstrom, Private Enforcement's Pathways].

68. Id. at 1960 & fig.6 (defining efficiency as the "average success rate or dollar return to the federal fisc per qui tam case filed").

69. Id. at 1963.

conclusive, however, in explaining why this was so. Engstrom qualified his empirical analysis with additional anecdotal evidence that pointed toward qui tam relator claims increasing in scale and scope, filling gaps left by political gridlock, and potentially taking advantage of a more relaxed DOJ.[70] Even with these uncertainties in mind, qui tam's importance to the FCA's enforcement scheme is unquestioned. By crafting thorough jurisdictional and administrative controls, Congress transformed a once-forgotten statute into a major enforcement vehicle.

B. *Recent Private Enforcement Regimes*

Central to this Note's argument is the notion that S.B. 8 is not an idiosyncratic event but one point in a larger trend.[71] Since 2021, states across the country have enacted dozens of laws that utilize what Michaels and Noll call the "private subordination" enforcement model.[72] These laws include those that directly copy S.B. 8's enforcement mechanism to restrict abortion access,[73] laws that look to ban transgender students from using the bathrooms of their choice,[74] and laws that restrict educators from referencing sexual orientation.[75] Though the majority of the recent bounty enforcement acts have come from conservative state legislatures,[76] progressive lawmakers in California and Illinois have also pushed bounty enforcement regimes that seek to restrict access to firearms.[77]

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70. Id. at 1996.

71. See Michaels & Noll, Vigilante Federalism, supra note 10, at 1190 ("S.B. 8 is merely one example of a broader trend among state legislatures to use private rights of action to penalize and suppress highly personal and often constitutionally protected activities . . . ."); Norris, supra note 10, at 1486 ("S.B. 8 is part of a new wave of private causes of action . . . .").

72. See Michaels & Noll, Vigilante Federalism, supra note 10, at 1194–211 (canvassing the private bounty landscape and finding state regimes have largely concentrated in three main legislative areas: (1) educational gag laws, (2) erasure of LGBTQ people, and (3) eliminating access to legal abortion).

73. Fetal Heartbeat Preborn Child Protection Act, Idaho Code §§ 18-8801 to -8808 (2024).

74. Tennessee Accommodations for All Children Act, Tenn. Code. Ann. §§ 49-2-801 to 805 (2024).

75. Parental Rights in Education Act, Fla. Stat. Ann. § 1001.42(8)(c) (West 2024).

76. See Michaels & Noll, Vigilante Federalism, supra note 10, at 1224 ("Today's [bounty enforcement] regimes cannot be divorced from modern right-wing movements in America.").

77. See S.B. 1327, 2022 Cal. Stat. 146 (codified at Cal. Bus. & Prof. Code §§ 22949.60–22949.71 (2024) & Cal. Code Civ. Proc. § 1021.11 (2024)) (authorizing "[a]ny person, other than an officer or employee of a state or local governmental entity in this state" to bring a private action against any manufacturers, distributors, transporters, or importers of an enumerated firearm, setting damages at $10,000 per weapon or firearm precursor part); Firearms Dealer and Importer Liability Act, H.B. 4156, 102 Gen. Assemb. (Ill. 2022) (similar).

The Supreme Court's decision in *Whole Woman's Health v. Jackson*[78] has exacerbated this trend. There, the Court dismissed a Texas abortion provider's pre-enforcement action seeking to enjoin several state officials, a state court judge, a state court clerk, and a private individual from enforcing S.B. 8, allowing its claims to go forward only against a group of state medical licensing officials.[79] The Court relied heavily on the law's decentralized enforcement regime. It held that even if the law gave government officials some enforcement authority, an injunction against their enforcement could not bind all of the unnamed private persons who might also bring S.B. 8 suits.[80] At the time of the decision, court observers noted that the exception for licensing officials offered little consolation because the law intentionally relies on private citizens for enforcement.[81] The Court's decision left S.B. 8 largely intact, essentially nullifying a constitutional right.[82] In the months following *Whole Woman's Health*, the S.B. 8–style enforcement regime model predictably[83] increased in popularity.[84]

While not all recent enforcement regimes use identical language,[85] scholars have noted several broad characteristics that define the category. Three main structural features identify the recent enforcement regimes: (1) they grant broad standing to ensure community enforcement of the underlying social policy, (2) they severely limit—or completely eliminate—state and local officials' roles in furthering or enforcing the law's mandates, and (3) they regulate behavior in politically contentious areas.[86]

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78. 142 S. Ct. 522 (2021).

79. Id. at 531–37.

80. Id. at 535 ("[A] federal court exercising its equitable authority may enjoin *named* defendants from taking specified actions. But under traditional equitable principles, no court may . . . purport to enjoin challenged 'laws themselves . . . .'" (quoting Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021)) (emphasis added)).

81. See Amy Howe, Court Leaves Texas' Six-Week Abortion Ban in Effect and Narrows Abortion Providers' Challenges, SCOTUSblog (Dec. 10, 2021), https://www.scotusblog.com/2021/12/court-leaves-texas-six-week-abortion-ban-in-effect-and-narrows-abortion-providers-challenge/ [https://perma.cc/LJ2M-24E4].

82. See Michaels & Noll, Vigilante Federalism, supra note 10, at 1222 ("The practical effect of the Supreme Court's non-decisions and the Fifth Circuit's interventions in the district court's proceedings was to leave S.B. 8 free to operate, eliminating access to legal abortions after the sixth week of pregnancy in the nation's second largest state.").

83. See *Whole Women's Health*, 142 S. Ct. at 551 (Sotomayor, J., concurring in the judgment in part and dissenting in part) ("[B]y foreclosing suit against state-court officials and the state attorney general, the Court clears the way for States to reprise and perfect Texas' scheme in the future to target the exercise of any right recognized by this Court with which they disagree.").

84. See Beatty, supra note 2, at 42–44 (noting that the Court's logic allowed states to copy the exact verbiage limiting executive official enforcement authority to avoid judicial review); supra notes 71–77 and accompanying text.

85. See Michaels & Noll, Vigilante Federalism, supra note 10, at 1192 (stating that the recent private enforcement regimes vary on several dimensions).

86. See id. at 1196–97 (defining recent enforcement regimes).

First, the recent enforcement regimes grant broad standing. For example, Texas's S.B. 8 and California's S.B. 1327 grant standing to "any person" other than a state or government official to pursue a civil action.[87] Some regimes grant standing to a narrower subset of plaintiffs, such as the Tennessee Accommodations for All Children Act, which first requires schools to make reasonable accommodations to people who object to the presence of transgender people in public restrooms at public school-sponsored events and then grants any "person" who has requested an accommodation a private right of action to recover damages for violations.[88] But even this narrower subset of plaintiffs is broad enough to encompass most of the community. The Act grants standing to people with a tangential connection to the school who "for any reason" are unwilling to share spaces with transgender people.[89] Many recent enforcement regimes that regulate behavior in schools mirror the Tennessee law.[90] So an essential component across the spectrum of recent enforcement regimes is broad standing requirements that enable community enforcement of the substantive social policy.

Second, the recent enforcement regimes limit the involvement of state officials. S.B. 1327 and S.B. 8 both exemplify this feature. Each law contains a clause expressly prohibiting state official enforcement.[91] Other laws go even further. For example, Ohio's H.B. 68—which seemingly allows any person (e.g., opposing coaches, parents, fans) to dispute a high school athlete's gender—prohibits state agencies as well as private, state-affiliated organizations from playing any role in enforcing the law.[92] As the Supreme Court's ruling in *Whole Women's Health* showed, limiting state actors' involvement can insulate laws from pre-enforcement challenges.[93] *Whole Women's Health* demonstrates that even the most constitutionally suspect laws can survive pre-enforcement challenges this way. As these laws often operate on the margins of constitutional rights, limiting state involvement is a central design feature.

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87. Cal. Bus. & Prof. Code § 22949.65(a) (2024); Tex. Health & Safety Code Ann. § 171.208 (West 2023).

88. See Tenn. Code. Ann. §§ 49-2-803(a), -804 (2024).

89. Id. § 49-2-803(a)(1).

90. See Michaels & Noll, Vigilante Federalism, supra note 10, at 1198–207 (canvassing recent trans-exclusionary and "anti-CRT" state public education statutes).

91. See Cal. Bus. & Prof. Code § 22949.64(a) ("No enforcement of this chapter may be taken or threatened by this state, a political subdivision, a district or county or city attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person . . . ."); Tex. Health & Safety Code Ann. § 171.207 (using nearly identical text).

92. See Saving Ohio Adolescents From Experimentation Act, Ohio Rev. Code Ann. § 3313.5320(D) (2024) ("No agency or political subdivision of the state and no accrediting organization or athletic association that operates or has business activities in this state shall process a complaint, begin an investigation, or take any other adverse action . . . .").

93. See supra notes 78–82 and accompanying text.

Third, these laws are often responding to contentious political debates. The laws discussed so far have dealt with access to abortion care, gun safety, transgender rights, and critical race theory. Each has a more pronounced political dimension than other government regulations like food safety or utility rates. Michaels and Noll argue that these recent enforcement regimes are the latest invention of a surging Christian nationalist movement that has previously transformed federal statutory protections for civil rights and installed reactionary conservative judges throughout the federal judiciary.[94] But one does not have to believe that these laws are part of a larger right-wing plot to acknowledge they almost exclusively touch on culture-war flash points.[95]

These recent enforcement regimes are also not cabined to conservative states, as illustrated by California's S.B. 1327.[96] The law was introduced in the wake of the *Whole Woman's Health* decision and explicitly borrowed S.B. 8's language to create a private enforcement regime regulating the manufacture and distribution of certain firearms within the state.[97] Like S.B. 8, the law explicitly precludes enforcement by state and local governments and is enforced solely through private litigation.[98] Also like S.B. 8, the law incentivizes these private enforcers with a $10,000 prize for successful enforcement actions.[99] The law's authors acknowledged these similarities, noting that they attempted to utilize S.B. 8's "flawed logic" to try to address what they felt was a significant issue in California.[100]

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94. Michaels & Noll, Vigilante Federalism, supra note 10, at 1214–17.

95. See Hannah Natanson, Clara Ence Morse, Anu Narayanswamy & Christina Brause, An Explosion of Culture War Laws Is Changing Schools. Here's How., Wash. Post (Oct. 18, 2022), https://www.washingtonpost.com/education/2022/10/18/education-laws-culture-war/ (on file with the *Columbia Law Review*); Claire Suddath, The Culture Wars Playing Out in Legislation Near You, Bloomberg (Feb. 24, 2022), https://www.bloomberg.com/news/newsletters/2022-02-24/-don-t-say-gay-bill-and-other-culture-war-laws-have-chilling-effect (on file with the *Columbia Law Review*).

96. S.B. 1327, 2022 Cal. Stat. 146 (codified at Cal. Bus. & Prof. Code §§ 22949.60–22949.71).

97. Andrew Willinger, California's New 'Bounty-Hunter' Gun Law, Bloomberg L. (Aug. 15, 2022), https://news.bloomberglaw.com/us-law-week/californias-new-bounty-hunter-gun-law (on file with the *Columbia Law Review*) (reporting that California's passed S.B. 1327, which created a private enforcement regime, was modeled after S.B. 8).

98. Bus. & Prof. § 22949.65(a); see also Willinger, supra note 97.

99. Bus. & Prof. § 22949.65(b)(2)(A)(i). This Note focuses on the financial incentives S.B. 1327 provides private enforcers and does not discuss the law's attorney-fee-shifting provision for actions challenging the law's constitutionality. The attorney-fee-shifting provision states that parties seeking "declaratory or injunctive relief to prevent this state, a political subdivision, a governmental entity or public official in this state, or a person in this state from enforcing any . . . law that regulates or restricts firearms" will be "jointly and severally liable to pay the attorney's fees of the prevailing party." Cal. Civ. Proc. Code § 1021.11(a) (2024). In a recent decision, a federal district court enjoined the provision's enforcement, holding that § 1021.11 "severely chills both First Amendment rights and Second Amendment rights." Miller v. Bonta, 646 F. Supp. 3d 1218, 1224 (S.D. Cal. 2022).

100. See Shilpi Agarwal, How California's Proposed "Gun Safety" Law Threatens to Erode Constitutional Rights for All, ACLU Cal. Action (May 2, 2022), https://aclucalaction.org/

Notwithstanding these similarities, S.B. 1327 can be distinguished from S.B. 8 in certain respects. The major distinction is the status of the constitutional right the two laws implicate. When S.B. 8 was passed, *Roe v. Wade* and *Planned Parenthood v. Casey* were still good law. As discussed above, S.B. 8 was a brazen attempt by the Texas legislature to create an end run around the constitutional right to abortion. By comparison, gun regulations are more of an open question. While the Supreme Court's decision in *New York State Pistol & Rifle Ass'n v. Bruen* may have signaled the Court's hostility toward firearm regulations, the majority opinion does not make clear exactly which types of gun regulations are constitutionally prohibited.[101] S.B. 1327 then operated on the margins of the constitutional right, while S.B. 8 explicitly flouted established rights.

Even though S.B. 1327 and S.B. 8 do not operate on identical legal and cultural backgrounds, read together they still represent a significant departure from how qui tam has primarily operated in the United States. The previous section's discussion of the FCA makes clear that qui tam in the United States is most recognizable when government funds are at issue.[102] The government's proprietary interest in the funds it places within the market animates every FCA claim.[103] Even for those claims in which the FCA is used to vindicate statutory rights created to further a social goal or policy,[104] the FCA's availability as an enforcement vehicle is predicated on there being a material, false claim against the government. The Supreme Court has recently held that the FCA should not be interpreted as a "vehicle for punishing garden-variety . . . regulatory violations."[105] In many FCA cases that implicate public programs, the Court's analysis primarily focuses on vindicating the government's proprietary interest in reclaiming fraudulently acquired funds rather than furthering the public purpose of the program the suit is based on.[106]

2022/05/how-californias-proposed-gun-safety-law-threatens-to-erode-constitutional-rights-for-all/ [https://perma.cc/SU22-KYTK] ("Indeed, one of the authors of [S.B. 1327] has touted it as taking advantage of the 'flawed logic' of SB 8, to try to address what is certainly a significant problem in our state: the proliferation of illegal guns.").

101. See 142 S. Ct. 2111, 2132 (2022) ("[W]e do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment . . . .").

102. See supra section I.A.

103. See supra notes 59–66 and accompanying text.

104. See, e.g., United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 668 F. Supp. 2d 548, 570–71 (S.D.N.Y. 2009) (ruling in favor of an FCA qui tam relator suit that sought to enforce fair housing obligations).

105. Universal Health Servs., Inc. v. United States, 136 S. Ct. 1989, 2003 (2016).

106. See, e.g., Allison Engine Co. v. United States ex rel. Sanders, 553 U.S. 662, 671 (2008) (holding that for fraudulent military contractor claims "[w]hat [the FCA] demands is . . . that the defendant made a false record or statement for the purpose of getting 'a false or fraudulent claim *paid* or approved by the Government'" (emphasis added) (quoting 31 U.S.C. § 3729(a)(2) (2006))); United States ex rel. Longhi v. United States, 575 F.3d 458, 467 (5th Cir. 2009) (establishing that for claims implicating the Small Business Innovation Research program, the FCA attaches liability "not to the underlying fraudulent activity or

In contrast, S.B. 1327 and S.B. 8 operate specifically to vindicate the public policy purposes behind the law. Both S.B. 1327 and S.B. 8 begin with declarations by the legislature expressing the importance of regulating the private behavior.[107] Neither are predicated on the government's proprietary interest like the FCA, and yet each grants standing to private parties to enforce public regulations—and vindicate public injuries—without any showing of a particularized injury to the private enforcer. S.B. 1327, S.B. 8, and the other recent enforcement regimes thus employ some of the familiar elements of qui tam enforcement while diverging from contemporary qui tam's focus on government funds.

C. *California's Private Attorney General Act*

PAGA allows aggrieved employees to file civil actions against their employers for violations of California's labor code.[108] PAGA claimants bring these civil actions as an "alternative" to civil enforcement actions that could have been brought by California's Labor and Workforce Development Agency (LWDA).[109] If successful, PAGA claimants recover twenty-five percent of any civil penalties defined in the labor code, with the remaining seventy-five percent distributed to the LWDA.[110] PAGA therefore shares several features with traditional qui tam provisions. Both the FCA and PAGA allow for private civil actions in place of government enforcement, limit the private citizen's award to a fraction of the total recovery, and primarily benefit the general public, not the party bringing the action.[111] This is why

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to the government's wrongful payment, but to the claim for payment" (internal quotation marks omitted) (quoting Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999))); United States ex rel. Lee v. N. Metro. Found. for Healthcare, Inc., No. 13-CV-4933(EK)(RER), 2021 WL 3774185, at *14 (E.D.N.Y. Aug. 25, 2021) (rejecting the proposition that all civil rights violations related to housing necessarily give rise to FCA liability).

107. See S.B. 1327, 2022 Cal. Stat. 146 (codified at Cal. Bus. & Prof. Code §§ 22949.60–.71 (2024)) ("The Legislature hereby finds and declares that the proliferation of assault weapons, .50 BMG rifles, and unserialized firearms poses a threat to the health, safety, and security of all residents of, and visitors to, this state."); Texas Heartbeat Act, S.B. 8, 87th Gen. Assemb., Reg. Sess. § 2 (Tex. 2021) (codified at Tex. Health & Safety Code Ann. §§ 171.201–.212 (West 2023)) ("The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger.").

108. See Cal. Lab. Code § 2699(a) (2024).

109. Id.

110. Id. § 2699(i).

111. See Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 786 (2000) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981))); Kim v. Reins Int'l Cal., Inc., 459 P.3d 1123, 1127 (Cal. 2020) ("Relief under PAGA is designed primarily to benefit the general public, not the party bringing the action.").

the California Supreme Court has stated PAGA is "a type of qui tam action."[112]

PAGA's structure differs from the recent enforcement regimes in three key aspects: (1) PAGA supplements, rather than creates, a new regulatory regime, (2) PAGA grants standing to a narrower group of private parties, and (3) PAGA preserves an agency gatekeeper function.

First, PAGA's legislative history makes it clear that, unlike S.B. 8, the California legislature passed PAGA to supplement an already existing enforcement regime. Specifically, the California legislature sought to address two problems with the enforcement of California's Labor Code: (1) several labor code violations were essentially unenforced because they were punishable only by criminal misdemeanor, rather than civil penalty or other sanction; and (2) there was a shortage of government resources to pursue enforcement of labor code violations when a civil penalty was identified.[113] In the committee report published before PAGA's enactment, the California Assembly Committee on Labor and Employment noted that in 2001, the Division of Labor Standards Enforcement (DSLE) was issuing fewer than 100 wage citations per year throughout the state, despite evidence from the DOL indicating there were over 33,000 ongoing wage violations in Los Angeles's garment district alone.[114] The committee also noted that between 1980 and 2000, the DSLE's budget grew by twenty-seven percent, while the California workforce grew forty-eight percent over that same period.[115] While S.B. 8's crafters utilized qui tam to avoid judicial review and provide an end run around the constitutional right to an abortion, PAGA was adopted to supplement a pre-existing regulatory scheme that failed to adequately enforce protections for workers within the state.[116]

PAGA also differs from the recent enforcement regimes by specifically defining the qui tam claimant's eligibility or standing to sue. As previously stated, PAGA enables an aggrieved employee to bring civil actions against employers in violation of the labor code.[117] The Act defines an aggrieved employee as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed."[118] Conversely, S.B. 8 and other copycat enforcement regimes allow for either "any person" or a slightly narrower class of enforcers (that are still representative of the entire community) to bring civil actions to enforce

112. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 148 (Cal. 2014) (emphasis omitted).

113. See id. at 146 (reviewing the legislators' stated purposes for PAGA enactment).

114. Assemb. Comm. on Lab. & Emp., B. Analysis of S.B. 796, 2003–2004 Reg. Sess., at 3 (Cal. 2003).

115. Id. at 4.

116. See *Iskanian*, 327 P.3d at 146 (citing underenforcement as a reason the legislature passed PAGA).

117. Cal. Lab. Code § 2699(a) (2024).

118. Id. § 2699(c).

statutory violations.[119] PAGA's sponsors specifically included the aggrieved employee provision to decrease the risk of frivolous claims brought by persons who suffered no harm from the alleged wrongful act.[120]

PAGA also preserves a role for the state agency by defining a set of procedures claimants must follow before asserting their claim. An employee seeking to file a PAGA claim must notify the employer and the LDWA of the specific violations alleged, including facts to support the allegation and a modest filing fee.[121] If the agency does not investigate, issue a citation, or respond to the notice within sixty-five days, the employee is free to sue.[122] California courts have interpreted this notice requirement to allow state agencies "to decide whether to allocate scarce resources to an investigation."[123] Similar to the FCA, PAGA claimants divide the damages and penalties with the LWDA, with the latter receiving three-fourths of the total damages and penalties entered against the defendant.[124]

While these differences certainly distinguish PAGA from the recent enforcement regimes, there are similarities between the two models that support seeing them as qui tam variations that are not completely distinct from each other. The most significant similarity is the character of the underlying government claim.[125] While the legislative history describes PAGA as establishing a "private right of action,"[126] the California Supreme Court has interpreted the law as being designed primarily to benefit the general public, not the party bringing the action.[127] That Court emphasized that PAGA claims are fundamentally a law enforcement action designed to protect the public because claimants bring PAGA actions for statutorily defined civil penalties rather than compensatory damages.[128] The California Supreme Court has also held that PAGA claims do not grant a private right of action because the "government entity on whose behalf the plaintiff files suit is always the real party in interest."[129] Similarly, the

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119. See supra notes 87–90 and accompanying text.

120. See Assemb. Comm. on Lab. & Emp., B. Analysis of S.B. 796, 2003–2004 Reg. Sess., at 7 (Cal. 2003) ("The sponsors . . . have attempted to craft a private right of action that will not be subject to . . . abuse . . . .").

121. Cal. Lab. Code § 2699.3(a)(1)(A)–(B).

122. Id. § 2699.3(a)(2).

123. Williams v. Superior Ct., 398 P.3d 69, 79 (Cal. 2017).

124. Cal. Lab. Code § 2699.3(i).

125. See supra notes 24–28 and accompanying text.

126. See Assemb. Comm. on Lab. & Emp., B. Analysis of S.B. 796, 2003–2004 Reg. Sess., at 7 (Cal. 2003).

127. See Arias v. Superior Ct., 209 P.3d 923, 933–34 (Cal. 2009).

128. Id.

129. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 147–48 (Cal. 2014); see also Kim v. Reins Int'l Cal., Inc., 459 P.3d 1123, 1130 (Cal. 2020) ("[C]ivil penalties recovered on the state's behalf are intended to 'remediate present violations and deter future ones' *not* to redress employees' injuries." (quoting Williams v. Superior Ct., 398 P.3d 69, 79 (Cal. 2017))).

recent enforcement regimes do not purport to primarily benefit the party bringing the suit, as the broad standing offered to private enforcers in S.B. 1327 and S.B. 8 demonstrates.[130]

Another notable commonality is that PAGA and some of the recent enforcement regimes provide similar remedies. As previously stated, PAGA claimants who successfully bring enforcement actions are rewarded with a portion of the civil penalties exacted against the defendants. That PAGA restricts claimant remedies to the civil penalties defined in the statute and does not allow compensatory damages further supports the notion that PAGA claimants are not bringing their own claims and are merely stepping into the government's shoes. Similarly, the recent enforcement regimes that exclusively reward private enforcers with the statutory sanctions levied against defendants resemble criminal enforcement[131] and make clear that the government is the true party in interest. Both PAGA and the recent enforcement regimes arguably authorize private citizens to bring what amounts to a law enforcement action against violators.

II. A PRACTICAL TAXONOMY FOR EVALUATING QUI TAM ENFORCEMENT PROVISIONS

Comparing the form and function of the FCA, PAGA, and the recent enforcement regimes reveals important features of qui tam enforcement that recent discussions have missed. The conversation around S.B. 8 and similar private enforcement regimes has largely focused on the differences between the recent enforcement regimes and traditional private enforcement regimes like the citizen suit provisions in federal environmental and antidiscrimination laws.[132] These accounts very helpfully diagnose the normative shortcomings of the recent enforcement regimes but fail to provide legislators with much instruction on how to evaluate future iterations. As illustrated in Part I, the FCA, PAGA, and the recent enforcement regimes are all variations of qui tam enforcement because each allows private citizens to step into the shoes of the government and bring claims on its behalf. Part I also laid out how the qui tam provision's structural components—the grant of standing, the available remedies, and the connection to other regulatory enforcement—vary between the models. But there is more to say about the theoretical distinctions between these qui tam models and how one should assess their practical and normative effects.

This Part discusses these theoretical distinctions as follows. First, it considers the differences between the types of government claims

130. See supra notes 86–89 and accompanying text.

131. See Guha Krishnamurthi, SB 8's Fines Are Criminal, Yale J. on Regul.: Notice & Comment (Sept. 11, 2022), https://www.yalejreg.com/nc/sb8-fines-criminal/ [https://perma.cc/393D-ZM3B] (arguing S.B. 8 penalties are more accurately described as criminal sanctions).

132. See supra notes 12–17 and accompanying text.

brought under each qui tam model and puts forth a novel categorization distinguishing between public and private qui tam claims. Next, it discusses qui tam's normative and practical purposes and presents criteria for assessing each. Finally, it synthesizes and distills this information into a practical Taxonomy for qui tam to help legislators distinguish between legitimate and illegitimate bills.

A. *The Public–Private Distinction*

This Note argues qui tam provisions can be distinguished at a high level by the character of the underlying government claim the qui tam provision is enforcing. As the discussion in the previous Part highlights, the government claims underlying qui tam provisions can be public or private in nature.

The FCA and PAGA provide useful examples of this distinction. As previously stated, the FCA seeks to protect the government's proprietary interest in the funds it places in the market.[133] The government's proprietary interest in these funds animates every FCA claim. Also, the fact that FCA relators' claims are connected to government programs is often inconsequential since a court's analysis regularly turns on the materiality of the fraudulent claims, not their connection to the underlying social policy.[134] Any market participant can bring this type of restitution claim when they are a victim of fraud. Accordingly, the underlying government claim in FCA relator suits can be thought of as a private qui tam action.

PAGA and the recent enforcement regimes are different. While the FCA aims to recover funds allocated through fraud when the government acts as a market participant, PAGA and the recent enforcement regimes' purpose is to enforce statutory regulations on private behavior. These regulatory enforcement actions resemble criminal sanctions,[135] and they are the types of claims normally reserved for government officials. Put differently, PAGA and the recent enforcement regimes can be described as public qui tam models because the underlying claim is of the sort typically brought by a public actor (e.g., a prosecutor or agency regulator).

Congress's definition for inherently governmental activity in the Federal Activities Inventory Reform Act (FAIR Act) offers a helpful analogue for understanding the public–private qui tam concept.[136] The FAIR Act defines an activity as inherently governmental when it is so "intimately related to the public interest" as to mandate performance by federal employees.[137] The OMB has issued guidance establishing the "nature of the function" test for determining inherently governmental

133. See supra notes 102–106 and accompanying text.

134. See supra notes 102–106 and accompanying text.

135. See supra notes 125–130 and accompanying text.

136. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382, 2384 (codified at 31 U.S.C. § 501 note (2018)).

137. Id.

functions.[138] The nature of the function test asks whether the function involves the exercise of "sovereign powers," which are "governmental by their very nature."[139]

Claims brought under PAGA or the recent enforcement regimes clearly satisfy the nature of the function test as they are governmental by their nature. Both models authorize claimants to levy civil penalties against statute violators. Imposing statutory penalties that are not tied to any recoupment of government funds serves a distinctly punitive function.[140] This punitive imposition falls squarely within the police powers of a state and is by nature an exercise of sovereign authority.[141] This is not to say that the federal standard just described has any legal significance for how these state laws operate or are interpreted. But it does suggest that PAGA and the recent enforcement regimes are operating in areas that can be described, at least on this account, as inherently governmental, or what this Note refers to as public.

The state government transferring its standing to PAGA or recent enforcement regime claimants to bring claims that are inherently governmental raises important questions about the claimants' qualifications. If these qui tam models are operating in public areas, then the claimants are bringing claims that are normally reserved for government officials. It is akin to the government allowing private citizens to prosecute each other for criminal violations. These types of claims are normally reserved for government officials precisely because private motivations may not properly consider the effects on the public. A critical question that arises from this analysis is: When is deputizing private citizens in this way appropriate or beneficial? This question is addressed more fully in following sections.[142]

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138. Publ'n of the Off. of Fed. Procurement Pol'y, OFPP Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56237 (Sept. 12, 2011). The guidance also established the "exercise of discretion" test, which states that a function is inherently governmental when it requires the exercise of discretion that commits the government to "a course of action where two or more alternative courses of action exist," and the decisionmaking is not limited by other policies or guidance. Id. If either of the tests are met, the activity is considered an inherently governmental function. Since the PAGA and recent enforcement regime qui tam models satisfy the nature of the function test, and the nature of the function test is a more helpful tool for explaining the public–private distinction, this Note will not discuss the exercise of discretion test further.

139. Id.

140. See United States v. Halper, 490 U.S. 435, 448–49 (1989) (holding that a civil sanction that serves the goals of punishment, like deterrence or retribution, is a punishment).

141. See Francis C. Amendola et al., 16A Corpus Juris Secundum: Constitutional Law § 699, Westlaw (database updated Mar. 2024) ("Police power is the exercise of the sovereign right of a government to protect lives, promote public safety, health, morals, and the general welfare of society.").

142. See infra section II.B.

In sum, qui tam models can first be categorized based on whether the underlying government claim is of a public or private nature. While every qui tam action can be thought of as a public claim in the sense it is brought on behalf of the government, the discussion above highlights how the government's relationship to the defendant affects the character of the suit. In the FCA context, the government seeks to be made whole from the defendant's fraudulent actions. The government's relationship to the defendant is then equivalent to any normal market participant seeking remedial action for a private wrong. This is a private qui tam action. But the government's relationship to the defendant is much different in the PAGA or recent enforcement regime context. Under those models, the government is looking to impose sanctions pursuant to its sovereign right to promote public safety and the general welfare of society. This can be described as an inherently governmental function and what this Note calls a public qui tam action.

B. *Qui Tam's Practical and Normative Objectives*

While the public–private distinction is theoretically valuable for identifying the different qui tam models, it sheds little light on whether the deputization is appropriate or how lawmakers should view proposed qui tam provisions. That assessment requires an accounting of the practical and normative objectives of qui tam. By taking these underlying aims into consideration, lawmakers will be able to assess the legitimacy of proposed qui tam actions.

This Note relies heavily on Professor Norris's article, *The Promise and Perils of Private Enforcement*, to frame qui tam's core principles.[143] In that article, Norris recounts the rationales that supported popular participation in regulatory enforcement. Specifically, Norris argues that early twentieth-century debates surrounding the adoption of the modern regulatory state are particularly helpful in framing current discussions of private enforcement regimes.[144] Following the Industrial Revolution, these debates asked critical questions about how society should be regulated in an evolving context and who should enforce those regulations.[145] Drawing from this history, Norris articulates three core rationales to explain why popular participation in regulatory governance (i.e., private enforcement in courts) could be democratically valuable: Private enforcement can (1) reduce power imbalances; (2) allow affected persons and communities to bring the experience of expertise to crafting, interpreting, and enforcing regulatory norms; and (3) fuel deliberation.[146] Norris puts forth a convincing theoretical framework for judging a private enforcement regime's democratic value. In addition to the public–private distinction

143. Norris, supra note 10.

144. See id. at 1508.

145. See id.

146. Id. at 1509–15.

laid out above, this Note's Taxonomy incorporates a version of these rationales to assist lawmakers in judging the efficacy and democratic legitimacy of proposed qui tam actions.

This Note, however, uses the popular participation core principles differently than Norris's article. To simplify the analysis, this Note places the three core principles into practical and normative buckets. Whereas Norris's analysis viewed these principles as factors in a holistic evaluation,[147] this Note argues that the factors can be more readily operationalized if their description incorporates their effect on the evaluation of the qui tam provision. Accordingly, the first factor, reducing structural imbalances, and the third factor, fueling deliberation, can best be described as normative factors because they are relevant to what the qui tam provision should achieve. The second factor, leveraging expertise and allowing for regulatory dynamism, however, is better described as a practical factor because it is relevant to how the qui tam provision should function. The Taxonomy therefore relies heavily on Norris's theoretical framework, while modifying it to better serve its purpose to help legislators evaluate prospective qui tam provisions.

The Taxonomy also differs from Norris's account by offering an additional practical factor legislators should bear in mind when considering "private" qui tam provisions. In private qui tam, the private party brings claims that are analogous to what an ordinary private citizen could bring against another market participant who had defrauded them in a market transaction. These private qui tam provisions are not regulating behavior but seeking redress for past wrongs. For this reason, Norris's participatory democracy theory—which, as described above, draws its analytical force from the debates surrounding the enactment of the modern regulatory regime—is less applicable to private qui tam provisions. To account for this, the Taxonomy offers different criteria for private and public qui tam provisions when determining if they fulfill their practical purpose. To determine the practicality of public qui tam, legislators should ask whether the provision satisfies Norris's second core principle: Does the provision allow affected persons to leverage the expertise of experience to inform when to trigger an enforcement action? To determine the practicality of private qui tam, legislators should instead ask whether the provision effectively plays a structural, gap-filling role in regulatory governance.

The scholarship on qui tam enforcement and the lessons from the FCA's revival support using regulatory gap-filling as the criteria for determining private qui tam practicality. The gap-filling role is the most prominently featured defense of the utility and functionality of private qui tam.[148] The importance of the gap-filling theory for private qui tam

147. See id. at 1490–91.

148. See, e.g., Alexandra Lahav, In Praise of Litigation 40–41 (2017) ("When the government fails to regulate, private litigation fills the breach. . . . [L]itigation works as a

provisions is also apparent in the 1986 FCA amendments. Scholars have noted that one of the most significant changes made by the 1986 amendment was its alteration of the Act's jurisdictional bar that allowed relators to go forward whenever they were an original source of information about the fraud.[149] Congress's rationale behind the jurisdictional bar was to limit the potential relators to those individuals who could offer helpful information to the government, the thought being that relators should not share in the government's compensatory damages if the government already knew about the fraud being disclosed or if the information disclosed did not make the government's case stronger.[150] This history and scholarship suggest the structural, gap-filling role can be an effective means for determining the practicality of a private qui tam provision.

The Taxonomy also differs from Norris's framework by giving increased weight to the factors that affect the operation of the provision. As a tool for legislatures, the Taxonomy prioritizes whether a provision satisfies qui tam's practical purposes over its normative purposes. Generally speaking, legislatures enact statutes to improve their constituents' material conditions and to promote the general welfare pursuant to their police powers. It follows then that a qui tam provision that does not enable effective enforcement of federal or state laws[151] frustrates this

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complement to other types of enforcement."); Zachary D. Clopton, Redundant Public-Private Enforcement, 69 Vand. L. Rev. 285, 290 (2016) (arguing that private enforcement can respond to public enforcement "errors, resource constraints, information problems, [and] agency costs"); Engstrom, Agencies as Litigation Gatekeepers, supra note 64, at 632 ("In regulatory regimes where information about wrongdoing remains hidden—and so is prohibitively costly for public enforcers to discover or dislodge—there will be little or no enforcement at all unless private parties can be induced to surface information about wrongdoing."); Myriam Gilles, The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans, 86 Fordham L. Rev. 2223, 2228 (2018) ("[S]tate consumer and labor law . . . goes underenforced when private attorneys general are disempowered . . . .").

149. 31 U.S.C. § 3730(e)(4) (2018); see also Bucy, Private Justice, supra note 65, at 947–48 (highlighting how the altered jurisdictional bar contributed to an increased volume in FCA claims following the amendments' enactment).

150. See Pamela Bucy, White Collar Practice: Cases and Materials 488–89 (3d ed. 2005) (noting that the jurisdictional bar was originally included "in an effort to ensure that relators do not simply file an FCA action that re-packages information which government relators already know about"); see also United States ex rel. Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir. 1991) ("[T]he principal intent[] [of the 1986 amendments] was to have the *qui tam* suit provision operate somewhere between . . . unrestrained permissiveness . . . and the restrictiveness of the post–1943 cases, which precluded suit even by original sources."); United States ex rel. Wisconsin v. Dean, 729 F.2d 1100, 1103 (7th Cir. 1984) (reversing a lower court decision allowing the State of Wisconsin to maintain an FCA action because the information was already in the federal government's possession).

151. What counts as effective enforcement depends on the action the government is seeking to regulate and the level of enforcement they are seeking to implement. See Engstrom, Harnessing the Private Attorney General, supra note 25, at 1253–54 (arguing that optimal private enforcement design requires lawmakers to consider how they will harness

larger legislative goal. To put it plainly, an impractical qui tam provision may not be worth the paper it's printed on.

Lawmakers drafting or evaluating qui tam provisions can determine whether a qui tam provision will enable effective enforcement by checking if the provision satisfies the respective practical functions of public and private qui tam. Public qui tam satisfies its practical function when it allows affected persons and communities to leverage the expertise of experience when enforcing the law. Private qui tam does so when it effectively performs a structural, gap-filling function. When either of those provisions fails to satisfy its function, the qui tam provision may be outsourcing enforcement to parties without the requisite experience or knowledge to do so.[152] This could lead to "[w]asteful overdeterrence and unnecessary expenditure of social resources."[153] For these reasons, the Taxonomy treats the practical purpose of qui tam as a threshold factor for legislative determinations of a qui tam provision's legitimacy.

C. *Establishing a Practical Framework*

When these different elements come together, a framework begins to emerge. The Taxonomy first asks whether the qui tam claimant's underlying governmental claim is best categorized as public or private.[154] From this starting point, the Taxonomy lays out three tiers a qui tam provision may fall under: (1) qui tam that fulfills its practical and normative purpose; (2) qui tam that fulfills its practical purpose but fails to live up to its normative purposes; and (3) qui tam that fails to accomplish either its practical or normative purposes.[155] The table below lays out these distinctions and presents the six categories of qui tam provisions the Taxonomy contemplates.

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private enforcers to sufficiently incentivize them to bring suits and to constrain them from bringing nonmeritorious claims).

152. Norris, supra note 10, at 1512–14 ("The man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied." (internal quotation marks omitted) (quoting John Dewey, The Public and Its Problems 154 (1927))).

153. Engstrom, Harnessing the Private Attorney General, supra note 25, at 1254.

154. See supra section II.A.

155. See supra section II.B.

TABLE 1.

Practical Taxonomy for Qui Tam Enforcement			
	(1)	(2)	(3)
Public	Leverages expertise of affected individuals/ communities and fulfills normative purposes	Leverages expertise of affected individuals/ communities but fails to live up to normative purposes	Fails to satisfy the practical purpose
Private	Fills regulatory gaps by effectively incentivizing private parties to bring claims forward and fulfills normative purposes	Fills regulatory gaps by effectively incentivizing private parties to bring claims forward but fails to live up to normative purposes	

Within this structure, a qui tam provision is only legitimate if it fulfills its practical purpose: either allowing affected persons and communities to bring their expertise of experience to interpreting and enforcing regulatory norms or constructing a claimant pool that incentivizes helpful informants to come forward.[156] Conversely, qui tam provisions in the third tier that fail to fulfill this practical purpose would be illegitimate per se. Qui tam provisions in the second tier will be a closer call, and their legitimacy will depend on weighing the normative factors Norris proposes in his theory of democratic participation.

The following Part revisits the qui tam models discussed above and orients them within the Taxonomy to illustrate its use.

III. HOW STATE LEGISLATURES SHOULD VIEW QUI TAM PROVISIONS MOVING FORWARD

A. *Employing the Taxonomy*

Before analyzing the qui tam models under this Taxonomy, it is important to first acknowledge a limitation of using these laws as illustrations. The Taxonomy is designed to help legislatures distinguish between legitimate and illegitimate qui tam provisions when they are proposed. The Taxonomy's goal then is to answer the question posited earlier: whether deputizing citizens to enforce statutory obligations through a qui tam provision is both appropriate and beneficial in a specific

156. See supra notes 150–153 and accompanying text.

context. The following sections analyze qui tam provisions discussed earlier, at times using empirical data and anecdotal observations to evaluate whether the statutes satisfy the Taxonomy's criteria. Since the Taxonomy is developed to provide an ex ante framework for evaluating proposed statutes, using ex post enforcement data seems inappropriate for this task. It is important then to emphasize that the foregoing analysis is merely an illustration of how one can employ the Taxonomy. In practice, the analysis would rely on projections and predicted effects rather than concrete data. And while this Taxonomy could be adapted to evaluate a host of provisions that are already in effect, that is beyond the scope of this Note.

1. *Private Qui Tam—The FCA*. — The FCA is a first-tier private qui tam provision under the Taxonomy because it satisfies both the practical and normative purposes of private qui tam. Starting with the practical purpose, the FCA plays a vital gap-filling role in the government's enforcement of fraud claims. In an influential article on private attorneys general, Professor William Rubenstein described qui tam relators under the FCA as "substitute attorneys general" who literally fill in for the Attorney General's office.[157] Scholars have noted that the DOJ relies on qui tam relators to "test the waters" in federal court before the agency chooses to spend its reputational capital and resources.[158] The DOJ has also acknowledged the practical effect FCA relators have on recovering fraud against the government, saying in a press release that "[t]he False Claims Act is one of the most important tools available to the department both to deter and to hold accountable those who seek to misuse public funds."[159] The FCA model therefore easily satisfies private qui tam's practical purpose as it offers an effective incentive for private parties to bring claims, and those claims are sufficiently supported by agency gatekeepers.[160]

The FCA also satisfies the normative purposes the Taxonomy considers. First, the FCA minimizes power imbalances by providing members of the public with a direct role in arguing against violations of regulatory

157. See Rubenstein, supra note 27, at 2143–46 ("[FCA relators] literally perform the exact functions of the attorney general's office though they themselves are not attorneys general.").

158. See Engstrom, Private Enforcement's Pathways, supra note 67, at 1986–87 (describing the DOJ's reliance on FCA relators as a product of being "resource constrained and risk-averse").

159. DOJ, False Claims Act Settlements and Judgments, supra note 60 (internal quotation marks omitted) (quoting Acting Assistant Attorney General Boynton).

160. See Jill E. Fisch, Class Action Reform, Qui Tam, and the Role of the Plaintiff, 60 Law & Contemp. Probs. 167, 199–200 (1997) ("[T]he *qui tam* model offers a unified structure combining the incentives of private litigation with the benefits of government supervision and monitoring."). Successful FCA enforcement has led commentators to urge expanding the FCA qui tam models to other areas. See Barry M. Landy, Note, Deterring Fraud to Increase Public Confidence: Why Congress Should Allow Government Employees to File Qui Tam Lawsuits, 94 Minn. L. Rev. 1239, 1264–68 (2010) (urging Congress to amend the FCA to explicitly grant public employees standing to serve as relators).

norms.[161] Particularly, the FCA's structure has enabled the development of a highly specialized relators bar who continuously bring successful claims on behalf of individual relators.[162] The availability of this relators bar has resulted in average relators reclaiming substantially larger impositions than business competitors and also gaining DOJ intervention on their claims at a higher rate.[163] Second, the FCA increases deliberation. Scholars have noted that the availability of qui tam relators has sometimes shaped enforcement priorities as private relators put forward claims not initially considered by agency enforcers.[164] And while there is some evidence that qui tam relators have pushed FCA enforcement into statutory ambiguities,[165] some argue that this statutory drift is necessary to combat agency capture and regulatory stagnation.[166] The FCA clearly satisfies both of private enforcement's normative purposes since it is structured in a way that minimizes power imbalances while increasing deliberation. It is no mystery then why the FCA has been such a regulatory success story.[167]

2. *Public Qui Tam—PAGA.* — PAGA is also a first-tier qui tam provision. As previously discussed, the nature of the underlying government claim places PAGA within the "public" qui tam category.[168] That means the practical purpose is satisfied only if the Act allows affected individuals and communities to leverage their expertise of experience to determine when to trigger enforcement actions. PAGA satisfies this requirement because it limits its grant of standing to aggrieved employees directly affected by labor code violations.[169] Norris argues that people who are subject to regulated behavior often satisfy private enforcement's practical purpose

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161. See Norris, supra note 10, at 1520–21.

162. See Engstrom, Private Enforcement's Pathways, supra note 67, at 1995 ("[T]he rapid emergence of a highly specialized relators' bar has given the DOJ access to a ready pool of repeat-play private enforcers with strong reputational incentives to toe the government line and predict, rather than force, agency enforcement priorities.").

163. See Engstrom, Harnessing Private Enforcement, supra note 67, at 1295–98 (comparing success rates and DOJ intervention rates between insider and outsider qui tam litigants).

164. See Engstrom, Private Enforcement's Pathways, supra note 67, at 1986 (noting the DOJ increased its activity in policing healthcare fraud in the early 2000s after intervening in a qui tam action); David A. Hyman, Health Care Fraud and Abuse: Market Change, Social Norms, and the Trust "Reposed in the Workmen", 30 J. Legal Stud. 531, 565 (2001) ("The availability of qui tam proceedings has also influenced enforcement priorities.").

165. See Engstrom, Private Enforcement's Pathways, supra note 67, at 2000–01 ("[A] qui tam regime may, relative to a cash-for-information approach, prove more susceptible to statutory 'drift' that is largely outside of public control as private enforcers rush to exploit regulatory ambiguities . . . .").

166. See id. at 2003–04 ("[P]rivately driven legal innovations . . . can improve, rather than degrade, democratic politics by offering a salutary counterweight to 'capture' and other patterns of political control within the legislative or administrative process.").

167. See Bucy, Private Justice, supra note 65, at 948 (describing the FCA as an "extraordinarily successful" regulatory tool).

168. See supra notes 120–130 and accompanying text.

169. See supra note 117 and accompanying text.

because they have both the information and the dignitary interest to trigger regulatory enforcement.[170] And while ex-post data is not necessary for this analysis, the data on PAGA claims supports this notion. In 2019 alone, California collected over $88 million in PAGA claims.[171] An analysis of these claims showed that PAGA claimants generate high-quality complaints and regularly bring forward labor violations that would otherwise have gone unenforced.[172] Additionally, PAGA has become the only legal recourse for millions of California employees who have signed arbitration agreements.[173] PAGA enables these workers to highlight labor violations that would otherwise be relegated to the arbitration system.[174] PAGA claimants then, having been personally affected by the regulated entity, have the information and interest necessary to bring quality claims against their employers. PAGA clearly satisfies the practical purpose of public qui tam.

PAGA also satisfies the normative purposes of public qui tam. There is no question whether the Act minimizes power imbalances. It allows employees to enforce the state's labor code against their employers. The employer–employee relationship is perhaps the quintessential example of a power imbalance and one of the first targets of the burgeoning regulatory state in the early twentieth century.[175] Despite almost a century of federal legislation regulating labor law, power imbalances between employers and workers persist today and by some accounts are worse than they have ever been.[176] PAGA operates against this backdrop, and while it does not remove half a century of hostility toward labor law,[177] it does offer employees additional power to hold employers accountable for labor code

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170. See Norris, supra note 10, at 1523.

171. See Rachel Deutsch, Ray Fuentes & Tia Koonse, California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions From Lawbreaking Corporations 8 (2020), https://www.labor.ucla.edu/wp-content/uploads/2020/02/UCLA-Labor-Center-Report_WEB.pdf [https://perma.cc/5DA5-G6UJ].

172. Id. at 9.

173. See id.

174. See Andrea Cann Chandrasekher & David Horton, Arbitration Nation: Data From Four Providers, 107 Calif. L. Rev. 1, 9 (2019) (finding that businesses that arbitrate often in a single arbitration provider "perform particularly well within that institution").

175. See Hiba Hafiz, Structural Labor Rights, 119 Mich. L. Rev. 651, 655 (2021) (describing the National Labor Relations Act's passage in 1935 as a turning point in American labor history and arguing the act was designed to overcome the power disparity between employers and their workers).

176. See id. at 656 ("[W]hile *employers* retain rights to integrate, disintegrate, consolidate, or tacitly coordinate their power to their advantage under corporate, antitrust, contract, and property law, *workers'* collective rights have eroded to the point where they lack any substantive ability to function as *counter* structure—as effective countervailing power against employers." (footnote omitted)).

177. See Marion Crane & Ken Matheny, Beyond Unions, Notwithstanding Labor Law, 4 U.C. Irvine L. Rev. 561, 578 (2014) ("Broad public support for labor law and unionism with its ideology of collectivism has declined since the New Deal era, and labor law is seen as 'out of sync' with a legal architecture premised on individual rights." (footnote omitted)).

violations. PAGA also increases deliberation on the issues of worker protection and labor law in California. PAGA claims have nudged California corporations to shift their practices and adopt a culture inching closer to compliance.[178] Due to PAGA, human resource professionals have strongly urged employers to increase investment in efforts to comply with the labor code.[179] Additionally, the LDWA's annual average recovery of $42 million in civil penalties and filing fees from PAGA claims goes toward enhancing business education and compliance efforts.[180] In addition to satisfying the practical purposes, PAGA also satisfies both of the normative purposes underlying public qui tam enforcement. PAGA can then be categorized as a first-tier (and thus legitimate) public qui tam provision within the Taxonomy.

B. *Reevaluating Recent Enforcement Regimes*

One major takeaway from the previous section is that PAGA has proven to be a practically and normatively acceptable enforcement mechanism for California's labor code. But, despite its success, few states have proposed their own PAGA provisions, and besides California, none have put the model into effect.[181] On the other hand, many states, both conservative and liberal, have enacted statutes that fall within the recent enforcement regime model.[182] While an analysis of each of these statutes could further refine the Taxonomy's categorization method, that is beyond this Note's scope. Instead, this Part compares PAGA, which was analyzed in the previous section, with S.B. 1327, California's gun safety statute that was briefly discussed in section I.B. Comparing these two California statutes can draw a sharper distinction between the PAGA qui tam model and the recent enforcement regime model without having to discuss every variation the recent enforcement regime model may take. This section will then draw on this comparison to argue that states should

178. See Deutsch et al., supra note 171, at 7.

179. See id.

180. See Cal. Lab. Code § 2699(j) (2024) ("Civil penalties . . . shall be distributed to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code . . . ."); Deutsch et al., supra note 171, at 8 (noting the LDWA's annual average recovery).

181. See Labor of Law: Ruling Could Slow Push for Laws Allowing Workers to Sue on Behalf of Government, Am. Law. (Apr. 7, 2022), https://plus.lexis.com/api/permalink/8b9c134c-8e65-40d0-b432-92b5ef5a55c6/?context=1530671 (on file with the *Columbia Law Review*) (reporting that Colorado, Connecticut, Illinois, Massachusetts, New Jersey, New York, Oregon, and Washington have proposed or considered laws similar to PAGA, but none have actually passed).

182. See supra notes 71–77 and accompanying text; see also supra notes 85–95 and accompanying text (describing the three common characteristics across the recent enforcement regimes: (1) broad standing (2) little to no government oversight, and (3) a focus on contentious political issues).

reverse their current trend and explore implementing the PAGA qui tam model instead of the recent bounty regime.

The Taxonomy put forth in Part II is a useful starting point to compare PAGA and S.B. 1327. Like PAGA, S.B. 1327 is a public qui tam provision because the underlying claim is akin to a criminal proceeding against statute violators.[183] But, unlike PAGA, for the reasons explained below, S.B. 1327 fails to satisfy either of the Taxonomy's criteria for a legitimate public qui tam provision. In other words, S.B. 1327 is neither practically nor normatively justified.

First, S.B. 1327 fails the practical purpose test because it does not center affected individuals and communities within its enforcement scheme. The statute allows "[a]ny person, other than an officer or employee of a state or local governmental entity," to bring civil actions enforcing the statute's prohibitions on manufacturing and distributing certain firearms.[184] This broad grant of standing is not sufficiently narrowed to put the qui tam enforcers in a better position than government officials to enforce the statute. The enforcers in this scheme, just like S.B. 8 (which this law copies directly from), do not have the information or interest to trigger regulatory enforcement in any even-handed or impartial way.[185] The statute does not require the enforcers to be victims of gun violence or to have inside information on a ghost-gun-manufacturing operation, either of which would focus the enforcer pool. It simply requires them not to be connected to the state to insulate the law from pre-enforcement review.[186] Without this particularized interest, there is no practical value in allowing private citizens to bring what amount to criminal enforcement actions.[187]

In the Taxonomy, failing the public qui tam practical purpose test places the statute in the per se illegitimate third tier of qui tam provisions. But notwithstanding this placement, determining whether S.B. 1327 fulfills the normative objectives can draw out the distinctions between it and PAGA even further. First, it is unclear whether the statute exacerbates or minimizes power imbalances. In a recent study, nearly one in four Californians reported that they or someone in their household owned at least one firearm.[188] Of the 19.9 million firearms owned in California, only five percent were described as the assault-type weapons regulated by

183. See supra section I.B.

184. Cal. Bus. & Prof. Code § 22949.65(a) (2024).

185. See Norris, supra note 10, at 1512–15 (providing the rationale behind this Taxonomy's practicality requirement).

186. See supra notes 91–93 and accompanying text.

187. See supra section II.A.

188. See Nicole Kravitz-Wirtz, Rocco Pallin, Matthew Miller, Deborah Azrael & Garen J. Wintemute, Firearm Ownership and Acquisition in California: Findings From the 2018 California Safety and Well-Being Survey, 26 Inj. Prevention 516, 517 (2019).

S.B. 1327.[189] Such small ownership numbers would seem to cut against arguments that S.B. 1327 exacerbates power imbalances, but it is also relevant to consider who owns these weapons. That same study found that the vast majority of assault-type weapons were owned by people who own ten or more firearms,[190] a group that tends to be whiter, older, and more male than other gun owner groups.[191] To further complicate the matter, the statute also addresses the sale and distribution of unserialized or "ghost guns," which community violence-reduction workers say have had an outsized harm on socioeconomically marginalized communities throughout California.[192] Untangling these threads to come to a definitive answer on this point is beyond the scope of this Note. For now, it is enough to say that the effect that S.B. 1327's prohibitions on the sale or distribution of assault-type weapons and ghost guns has on pre-existing power imbalances is still unclear.

The other normative factor, increasing deliberation, more clearly cuts against S.B. 1327. The Act is designed in many ways to chill behavior and limit deliberation. For example, the Act removes a defendant's ability to defend against an enforcement action by asserting nonmutual issue and claim preclusion.[193] This means winning on one claim would not stop other enforcers from bringing actions on the same matter, even if the issues had already been litigated. Under S.B. 1327, the defendant also cannot claim that the law violates the constitutional rights of a third party,[194] even though the gun distributor can argue that their right to sell these weapons is interdependent with their customers' Second Amendment rights.[195] Much like S.B. 8 then, the law aims to chill behavior by threatening limitless private lawsuits and removing avenues for challenging the law's constitutionality. California Governor Gavin Newsom proclaimed as much when he tweeted "[i]f the most efficient way to keep

189. Id. (noting that assault-type weapons made up 8.9% of the long guns, which in turn made up 55.3% of the total firearms reported, so assault-type weapons made up 4.92% of the total firearms reported).

190. Id.

191. See id. online supplementary app. 3.

192. See Abené Clayton, Ordered Online, Assembled at Home: The Deadly Toll of California's 'Ghost Guns', The Guardian (May 18, 2021), https://www.theguardian.com/us-news/2021/may/18/california-ghost-guns-deadly-toll [https://perma.cc/CRU6-NNCW].

193. Cal. Bus. & Prof. Code § 22949.65(f)(5) (2024).

194. Id. § 22949.66(a) ("A defendant against whom an action is brought under Section 22949.65 [generally] does not have standing to assert the right of another individual to keep and bear arms under the Second Amendment to the United States Constitution as a defense to liability under that section . . . .").

195. See Craig v. Boren, 429 U.S. 190, 196 (1976) (finding third-party standing where continued enforcement of a statute would "materially impair the ability of" third parties to engage in constitutional behavior (internal quotation marks omitted) (quoting Eisenstadt v. Baird, 405 U.S. 438, 446 (1972))).

these devastating weapons off our streets is to add the threat of private lawsuits, we should do just that."[196]

The above analysis illustrates the benefits of adopting a PAGA qui tam model rather than the recent enforcement regime model. PAGA is more practical than S.B. 1327 because it limits enforcement to those who are directly affected by the regulated behavior. This narrower grant of standing helps to ensure enforcement actions have a sufficient informational basis and are in line with the public interest. PAGA is also more normatively justifiable than S.B. 1327. While S.B. 1327's impact on preexisting power imbalances is unclear, it has a severe chilling effect on behavior and was specifically crafted to decrease deliberation. Conversely, PAGA has given workers a means to collectively hold employers accountable for labor code violations, and the majority of its proceeds have gone to increasing enforcement and education efforts. PAGA outperforms S.B. 1327 on each of the Taxonomy's criteria. It is a more practical and normatively justifiable qui tam enforcement regime.

C. *The PAGA Model's Uncertain Future*

The comparison above, and PAGA's regulatory success,[197] raises the question of whether states are overlooking the PAGA qui tam model as an enforcement vehicle. Some scholars have argued that the PAGA qui tam model should be employed in more states but caution against applying the model outside of the employment law context.[198] Other scholars have argued that PAGA provides a workable mechanism outside of its original context and that states can utilize the model to hold defendants accountable for all mass harms (e.g., consumer protection) without being vulnerable to FAA preemption under *AT&T Mobility LLC v. Concepcion*.[199] Some have also considered adopting PAGA qui tam models for regulatory areas other than labor and consumer protection.[200] These scholars believe

196. Office of the Governor of California (@CAgovernor), Twitter (Dec. 11, 2021), https://twitter.com/Cagovernor/status/1469865007517089798 [https://perma.cc/3W3N-VADQ] (internal quotation marks omitted).

197. See supra notes 171–174 and accompanying text.

198. See Elmore, supra note 31, at 411 (arguing the risks of qui tam legislation generally could be minimized by using agency oversight to account for the interests of affected employees or by cabining the PAGA model to only allowing designated nonprofits to bring employee claims).

199. 563 U.S. 333, 341 (2011); see also Alexander, supra note 31, at 1234 ("A statute similar to PAGA that created a mechanism for private plaintiffs to sue to enforce statutory penalties in a *qui tam* action could offer a way for states to obtain private enforcement of state law in standardized transactions involving harm to large numbers of people . . . ."); Gilles, supra note 148, at 2237 ("[T]he public nature of the qui tam action and the penalty structure should allow enabling legislation [like PAGA] to elude FAA preemption under *Concepcion* and its progeny.").

200. See, e.g., James Fisher, Ellen Harshman, William Gillespie, Henry Ordower, Leland Ware & Frederick Yeager, Privatising Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries, 8 J. Fin. Crime 305, 314 (2001) (assessing the

PAGA offers a creative solution to a variety of administrative and regulatory issues, so why have states been slow to adopt PAGA models themselves?

One potential explanation is the PAGA qui tam provisions are politically difficult to create. As Professor Myriam Gilles points out, the PAGA model requires the state legislature to pass an enabling statute which can be a "perilous, uncertain, lengthy, and frustrating process."[201] For example, despite intense lobbying by labor activists and organizations,[202] New York's Empowering People in Rights Enforcement (EMPIRE) Act, which would create a PAGA-like qui tam enforcement vehicle for New York workers, has been stuck in committee for the last seven years.[203]

Another potential explanation for the PAGA model's limited reach could be the Supreme Court's recent posture on PAGA-related cases. In *Viking River Cruises, Inc. v. Moriana*, the Supreme Court overruled the California Supreme Court and held that a PAGA claimant may be compelled to arbitrate the "individual" component of their PAGA claim.[204] The court's ruling also suggested that PAGA's standing requirements did not give a PAGA claimant the ability to bring a representative claim after their individual claim had been resolved through compelled arbitration.[205] And in *Forwardline Financial, LLC v. Ahlmann*, the Supreme Court vacated a California Court of Appeal's decision rejecting a company's attempt to compel arbitration of an employee's PAGA claims and remanded the matter in light of *Viking River Cruises*.[206] Notably, the Supreme Court did not take the opportunity to reexamine the scope of their *Viking River Cruises* decision, instead choosing to issue a one paragraph memorandum opinion.[207] The California Supreme Court subsequently reaffirmed PAGA's future in *Adolph v. Uber Technologies, Inc.*, in which it held that under state law an order compelling arbitration of individual claims does not "strip the plaintiff of standing to litigate non-individual claims in

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feasibility of using state qui tam to regulate the financial services industry); Alex Ellefson, Note, Landlord Bounty Hunters: Qui Tam as an Effective Tool for Housing Code Enforcement, 29 J.L. & Pol'y 460, 463 (2021) (arguing for using qui tam amendments to enforce the housing code).

201. Gilles, supra note 148, at 2238.

202. Id. at 2239.

203. See Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act, Assemb. 7958, 2017–2018 Leg., Reg. Sess. (N.Y. 2017); Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act, S. 6553, 2017–2018 Leg., Reg. Sess. (N.Y. 2017).

204. 142 S. Ct. 1906, 1924–25 (2022) ("Viking [is] entitled to enforce the [arbitration] agreement insofar as it mandated arbitration of Moriana's individual PAGA claim.").

205. Id. at 1925 ("PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding.").

206. 143 S. Ct. 522, 522 (2022) (mem.).

207. Id.

court."[208] Even with these positive developments, *Viking River Cruises* has made PAGA's long-term viability uncertain. This uncertainty, combined with the large political lift to enact a PAGA-style model enabling statute, may be discouraging states from pushing forward on adopting PAGA qui tam models.

But, if this is the case, states may be being overly cautious. An interesting wrinkle to the Supreme Court's decision in *Viking River Cruises*, which the California Supreme Court focused on in *Adolph*, was the Court's second holding that, on state law grounds, PAGA's standing requirements did not give a PAGA claimant the ability to bring a representative claim after they were forced to arbitrate their individual claims.[209] Even without *Adolph*'s favorable interpretation, the California legislature could amend the statute to explicitly give aggrieved employees standing for representative PAGA claims after being forced to arbitrate their individual claims. Combined, these judicial and legislative solutions would greatly limit *Viking River Cruises*'s impact.[210] They would also create a blueprint for other states to adopt PAGA qui tam models that are structured to avoid this pitfall. Additionally, PAGA qui tam models that regulate outside of the consumer protection and labor contexts may completely avoid these issues if arbitration is a less prominent feature in that regulatory area. So, while the Supreme Court may put further restrictions on PAGA,[211] for now, other states have a viable path forward to adopt PAGA-style qui tam models of their own.

CONCLUSION

As more states turn to private enforcement for their political and administrative advantages, the Taxonomy outlined in this Note can offer legislatures a valuable framework for evaluating prospective qui tam provisions. The Taxonomy places qui tam provisions within six discernable categories according to the underlying nature of the government's claim and the provision's practical effect and normative impact. State legislatures should use this Taxonomy to distinguish between legitimate qui tam provisions, which should be embraced, and illegitimate qui tam provisions, which should be avoided. Additionally, as state legislatures increasingly look to implement private enforcement regimes for public claims—claims that are usually brought by the government—they should

208. 532 P.3d 682, 692 (Cal. 2023) (holding that this interpretation of PAGA "best effectuates the statute's purpose, which is to ensure effective code enforcement" (internal quotation marks omitted) (quoting Galarsa v. Dolgen California, LLC, 305 Cal. Rptr. 3d 15, 26 (Cal. Ct. App. 2023))).

209. See *Viking River Cruises*, 142 S. Ct. at 1925.

210. See Gregory Knopp, Aileen McGrath, Donna Mezias & Jonathan Slowik, California Supreme Court May Address Questions Left From *Viking River Cruises* in 2023, JD Supra (Aug. 9, 2022), https://www.jdsupra.com/legalnews/california-supreme-court-may-address-6411593/ [https://perma.cc/TV94-NZRV].

211. See supra notes 199–204 and accompanying text.

more thoroughly consider the PAGA qui tam model. The PAGA qui tam model is a more practically and normatively justifiable alternative to some of the recent enforcement regimes that state legislatures have adopted across the country.

FRAUD AND FEDERALISM: HOW THE MODERN COURT HAS USED THE MEANING OF "PROPERTY" TO RESHAPE FEDERAL FRAUD JURISPRUDENCE

*Benjamin G. Smith**

For the past several decades, the Supreme Court has repeatedly sought to reinterpret the meaning of "property" within federal fraud statutes to limit the degree to which federal prosecutors can regulate state official misconduct. While the Court's renewed interest in the federal fraud statutes has drawn varying degrees of praise and criticism from different sides of the legal community, this Note seeks to assess—in an apolitical, value-neutral fashion—whether the Court's doctrinal approach is effective in furthering the stated goal of drawing boundaries between federal and state actors in corruption cases. The Note first undertakes a deep-dive analysis of the evolution of the Court's mail and wire fraud jurisprudence. It then shows how even the most faithful applications of the Court's fraud doctrine lead to inconsistent outcomes and fail to provide lower courts or prosecutors with clear guidance on exactly what types of misconduct can fall within the purview of the fraud statutes. Concluding that the dissonance between the Court's clearly stated ideological objectives and the actual black-letter law of fraud jurisprudence is unsustainable, this Note explores alternative doctrinal approaches that might fix the current state of fraud jurisprudence. This Note contributes to the existing body of scholarship by not only offering a detailed accounting of the current state of fraud jurisprudence, but also providing a lens to analyze Supreme Court decisions that can be applied well beyond the fraud statutes themselves.

* J.D. Candidate 2024, Columbia Law School. I am indebted to Professor Daniel Richman for his consistently invaluable insights and guidance. Special thanks also to Sahil Soni for his thoughtful feedback throughout the drafting process and to the staff of the *Columbia Law Review* for their meticulous editorial support. All remaining errors are my own.

INTRODUCTION

In federal criminal law, the meaning of "fraud" is at a crossroads. In *Ciminelli v. United States*, the Supreme Court considered a complex scheme to secure a billion-dollar contract with the State of New York.[1] The defendants, a mix of private actors and state officials, rigged the bidding process in their favor.[2] Crucially, this case did not hinge on the wrongdoing itself, but instead focused on whether the government's theory of fraud was compatible with the Court's conception of "property" as defined in its fraud jurisprudence.[3] The government's theory, rooted in the Second Circuit's "right to control" conception of property fraud, was that the defendants deprived New York of the right to valuable economic information needed to make discretionary economic decisions.[4] In a unanimous opinion, the Court rejected this theory of property and

1. 143 S. Ct. 1121, 1125 (2023).
2. Id. at 1125.
3. Id.
4. Id.

reversed the defendants' convictions. This result is neither surprising nor unprecedented; *Ciminelli* is but the latest in a line of cases to reverse fraud convictions despite obvious "wrongdoing[,] deception, corruption, [and] abuse of power"[5] by the defendants. Although predictable, this reversal continues a trend of troubling cases that have generated scholarly debate for decades.[6]

On one hand, the federal mail and wire fraud statutes remain one of the most versatile and valued tools in the white-collar prosecutor's arsenal.[7] During much of the twentieth century,[8] the Supreme Court rarely reviewed mail fraud convictions,[9] and it even more rarely reversed appellate decisions for substantive error.[10] During this era, the federal government found increasingly novel applications for the mail fraud statute.[11] Even in recent years, prosecutors have secured fraud convictions in such varied cases as the "Dieselgate" emissions scandals,[12] the use of state money for private campaign activities,[13] the "Varsity Blues" college admissions scandal,[14] the bribery of college athletes,[15] and countless other applications.[16]

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5. Kelly v. United States, 140 S. Ct. 1565, 1568 (2020).

6. See infra notes 22–23.

7. See, e.g., Craig M. Bradley, Federalism and the Federal Criminal Law, 55 Hastings L.J. 573, 574 (2004) (calling mail fraud one of "'[t]he Four Horsemen of the Apocalypse' of federal criminal law"); Jed S. Rakoff, The Federal Mail Fraud Statute (pt. 1), 18 Duq. L. Rev. 771, 771 (1980) ("[T]he mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love.").

8. Congress enacted the original mail fraud statute in 1872. See Act of June 8, 1872, ch. 335 § 302, 17 Stat. 323 (codified as amended at 18 U.S.C. § 1341 (2018)).

9. See infra section I.A.

10. See infra section I.A. For examples of instances in which the Supreme Court did reverse on a substantive fraud issue, see Neder v. United States, 527 U.S. 1, 23–24 (1999) (addressing whether the term "defraud" imposes a materiality requirement, that is, that a misstatement or omission must be material for the deception to be criminal under the current mail fraud statute, 18 U.S.C. § 1341); Fasulo v. United States, 272 U.S. 620, 626–29 (1926) (reversing a fraud conviction when there were in fact no "false or fraudulent" misrepresentations but instead outright threats of violence and noting that threats and "intimidation" are not "anything in the nature of deceit or fraud . . . as generally understood").

11. See infra section I.A.

12. See United States v. Palma, 58 F.4th 246, 252 (6th Cir. 2023); see also infra section II.B.2.

13. See, e.g., United States v. Shelton, 997 F.3d 749, 774–75 (7th Cir. 2021).

14. See, e.g., United States v. McGlashan, 78 F.4th 1, 7–8 (1st Cir. 2023); United States v. Khoury, No. 20-cr-10177-DJC, 2021 WL 2784835, at *1–2 (D. Mass. July 2, 2021); United States v. Ernst, 502 F. Supp. 3d 637, 643–44 (D. Mass. 2020); United States v. Sidoo, 468 F. Supp. 3d 428, 434–36 (D. Mass. 2020).

15. See, e.g., United States v. Gatto, 986 F.3d 104, 116 (2d Cir. 2021); see also infra section II.B.1.

16. See, e.g., United States v. Berroa, 856 F.3d 141, 151–53 (1st Cir. 2017) (exam cheating scheme); United States v. Chastain, No. 22-CR-305 (JMF), 2023 WL 2966643, at *1 (S.D.N.Y. Apr. 17, 2023) (scheme to front-run nonfungible tokens). For additional

On the other hand, fraud prosecutions have faced intense scrutiny from the Supreme Court in recent decades, particularly in cases that implicate states.[17] Since the 1980s, the Supreme Court reversed lower courts in four of the six cases in which the meaning of "property" was at issue.[18] Each reversal exhibited three important characteristics: (1) the purported victim (or defendant) was a state actor;[19] (2) the scheme did not have a "property interest" as its aim;[20] and (3) the opinion was motivated in part by the Court's announced desire to preserve state–federal divisions by limiting creative theories of fraud prosecution.[21]

The ideological considerations underlying the Supreme Court's modern case law have sparked intense debate. Detractors have criticized these decisions as hindering the federal government's ability to punish otherwise hard-to-reach instances of state corruption,[22] while supporters have defended the Court's decisions as a necessary prophylactic that protects against federal overreach into state affairs.[23] Rather than joining

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discussion of the front-running scheme in *Chastain*, see Kevin J. Harnisch, Andrew James Lom, Mayling C. Blanco, Rachael Browndorf & Matthew Niss, First NFT "Insider Trading" Trial Ends in Criminal Conviction Based on Novel Theory, Norton Rose Fulbright (May 2023), https://www.nortonrosefulbright.com/en-us/knowledge/publications/ce029848/first-nft-insider-trading-trial-ends-in-criminal-conviction-based-on-novel-theory/ [https://perma.cc/XK49-CTT3].

17. See infra sections I.A.2–.B.

18. See infra sections I.A.2–.B.

19. See infra sections I.A.2–.B.

20. See infra sections I.A.2–.B.

21. See infra sections I.A.2–.B; see also McNally v. United States, 483 U.S. 350, 360 (1987) ("[T]he Federal Government [should not] set[] standards of disclosure and good government for local and state officials . . . .").

22. See Ciara Torres-Spelliscy, Elegy for Anti-Corruption Law: How the Bridgegate Case Could Crush Corruption Prosecutions and Boost Liars, 69 Am. U. L. Rev. 1689, 1711 (2020) ("[The Supreme Court's recent cases will] broaden the parameter of acceptable lying by elected and appointed government officials."); see also George D. Brown, Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-*Lopez* Analysis, 82 Cornell L. Rev. 225, 299–300 (1997) (arguing, prior to *Cleveland*, for an incorporation of state law into federal prosecutions as a way of overcoming federalism concerns rather than limiting federal prosecutions outright); cf. Daniel C. Richman, Navigating Between "Politics as Usual" and Sacks of Cash, 133 Yale L.J. Forum 564, 566 (2023), https://www.yalelawjournal.org/pdf/RichmanYLJForumEssay_nwinm3th.pdf [https://perma.cc/K3UQ-F7PN] [hereinafter Richman, Politics as Usual] (arguing that there is a "federal interest in pursuing corrupt arrangements far more nuanced than the exchange of sacks of cash for official favor[s]" and that the Court must "confront the tension between its fears of . . . partisan targeting . . . and its ostensible commitment to statutory text").

23. See, e.g., United States v. Porat, 76 F.4th 213, 224–25 (3d Cir. 2023) (Krause, J., concurring) ("[This] era should have come to a grinding halt thirty-six years ago . . . . Yet federal prosecutors have continued to proffer novel theories of liability that run afoul of [Supreme Court] dictates, each time requiring the Supreme Court to step in and overturn the conviction."); George D. Brown, Defending Bridgegate, 77 Wash. & Lee L. Rev. Online 141, 176–77 (2020), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1134&context=wlulr-online [https://perma.cc/AGY9-HEYP] ("The extent to which federalism is a significant constitutional principle or a canon of construction is an important

the already-crowded debate as to the correctness of the Court's ideological views, this Note critically examines the *effectiveness* of the modern fraud doctrine relative to the Court's stated federalist agenda.

This Note argues that at the heart of the Court's modern fraud doctrine lies a vague, superficially simple "property-or-not" test that leads to paradoxical outcomes.[24] Originally rooted in cases that interpreted federal fraud to *require* property as a necessary element of the crime, the modern test defines property differently based on both the identity of the victim[25] and the extent to which the right or interest at issue was considered property under early common law.[26] In practice, the modern mutation of the property-or-not test creates outcomes in which the same fundamental right or interest might be a "property interest" in the hands of a private party while simultaneously constituting a nonproperty "regulatory interest" in the hands of a state. This Note argues that the doctrine's reliance on the meaning of property is not only practically and analytically unworkable, but also fundamentally fails to further the Court's ideal division between the federal and state balance of criminal power.

This Note proceeds in three parts: Part I first traces the expansion and contraction of mail and wire fraud jurisprudence and explains that the modern doctrinal shift toward property as a limiting principle was driven by the Supreme Court's renewed interest in federalist principles. It then examines the incremental evolution of the Court's property-or-not test from 1987 to the present day.

Part II explains how this doctrine fails to achieve the Court's stated policy goals. Section II.A first demonstrates that the property-or-not test fails to provide lower courts a workable test in day-to-day applications. II.B then provides specific examples to illustrate how the modern property fraud doctrine fails to meaningfully prevent prosecutors from intervening in state misconduct, concluding that property fraud jurisprudence amounts to little more than a handful of technical pleading requirements.

Finally, Part III considers different methods to unravel the "property paradox" created by the current doctrine. This Part ultimately concludes that to develop a fraud doctrine that truly limits prosecutors' ability to

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question. *Kelly* leads to this kind of questioning and rethinking. For this reason, it should be celebrated . . . ."); see also John C. Coffee, Jr., Hush!: The Criminal Status of Confidential Information After *McNally* and *Carpenter* and the Enduring Problem of Overcriminalization, 26 Am. Crim. L. Rev. 121, 130–31 (1988) (arguing that intangible property rights like information should not be within the scope of property fraud); Ellen S. Podgor, Mail Fraud: Opening Letters, 43 S.C. L. Rev. 223, 225 (1992) (characterizing mail fraud prior to *Cleveland* as "moving further from its roots" and "permit[ting] its haphazard application to a wide spectrum of criminal conduct"); cf. Miriam H. Baer, Square-Peg Frauds, 118 Nw. U. L. Rev. 1, 7–10 (2023) (arguing that use of the fraud statutes to punish misconduct like that seen in the Varsity Blues scandal is actually harmful in that it discourages legislators from making more systematic reforms).

24. See infra Part II.

25. See infra Part II.

26. See infra sections I.B.2–.3.

convict certain types of state-level wrongdoing, the Court must abandon its property-centric approach to fraud entirely. By systematically deconstructing the modern fraud doctrine and reimagining it from the ground up, this Note raises novel observations about the Court's ideological and doctrinal approaches to federal criminal jurisprudence. These observations are not only immediately useful to the federal criminal practitioner but also carry implications about the Court's jurisprudence that reach well beyond the fraud statutes themselves.

I. THE EVOLUTION OF "PROPERTY" IN MAIL AND WIRE FRAUD

While this Note focuses on mail fraud and wire fraud (hereinafter, the "fraud statutes"), both statutes—along with other types of federal fraud[27]—are frequently treated the same for the purposes of defining "property."[28] The fraud statutes both begin with the same crucial twenty-nine words: "Whoever, having devised or intending to devise any scheme or artifice to defraud, *or for obtaining money or property* by means of false or fraudulent pretenses, representations, or promises . . . ."[29]

As an inchoate crime, fraud requires an intent to scheme a victim out of property.[30] Perhaps because other elements of fraud are relatively simple to prove,[31] most modern case law focuses on whether a given fraud

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27. See, e.g., 18 U.S.C. § 1344 (2018) (bank fraud); id. § 371 (conspiracy to defraud the United States).

28. See Neder v. United States, 527 U.S. 1, 20–21 (1999) ("Although the mail fraud and wire fraud statutes contain different jurisdictional elements . . . they both prohibit, in pertinent part, 'any scheme or artifice to defraud' or to obtain money or property 'by means of false or fraudulent pretenses, representations, or promises.'" (quoting 18 U.S.C. §§ 1341, 1343)).

29. 18 U.S.C. §§ 1341, 1343 (emphasis added). The statutes differ on the "jurisdictional element," or manner in which the fraud is furthered. Compare id. § 1343 ("transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce"), with id. § 1341 ("places . . . or deposits or causes to be deposited any matter or thing whatever to be sent . . . by the Postal Service, or . . . by any private or commercial interstate carrier"). The mail fraud statute also contains language that prohibits counterfeiting. See id. Neither the jurisdictional elements nor the counterfeiting language is a focus of this Note.

30. See Rakoff, supra note 7, at 777 ("[T]he crime of mail fraud can (at least in theory) transpire almost entirely in the mind of the defendant and never manifest itself beyond the causing of the single use of the mails . . . .").

31. See Charles Doyle, Cong. Rsch. Serv., R41930, Mail and Wire Fraud: A Brief Overview of Federal Criminal Law 3 (2019) (describing the elements of property fraud as the "use of either mail or wire communications . . . [for] a scheme and intent to defraud another of . . . property . . . involving a material deception"); see also Tai H. Park, The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime, 43 Cardozo L. Rev. 135, 148 (2021) ("[The inchoate nature of fraud means] actual loss need [not] be proven as long as the defendant had the unlawful scheme or intent in mind, and indeed, the offense could theoretically be doubly inchoate, for the statute targets anyone merely '*intending* to devise any scheme or artifice to defraud.'" (quoting 18 U.S.C. §§ 1341, 1343)). But see infra section II.B (discussing circuit splits on certain elements).

involves "money or property."[32] But this money-or-property element derives from a statutory clause that didn't even exist when the statute was first written[33] and was arguably intended to expand—rather than limit—the definition of fraud.[34] Moreover, it took another fifty years after this clause was inserted—years in which the lower courts largely ignored the statutory text—before the Supreme Court formally declared mail fraud to be "property" fraud.[35]

This Part explains both how and why property became the focus of fraud jurisprudence. Section I.A summarizes the "early" era of fraud as a flexible doctrine that was heavily influenced by a moralist and nationalist conception of federal criminal law. It also highlights the shift in both the modern Court's more state-centric federalism ideology and the accompanying change in doctrine. Section I.B then explains how the Court's modern cases have purported to refine the new property-or-not test to create the modern fraud doctrine as seen today.

A. *A Tale of Two Eras: Fraud Prosecutions and Changing Supreme Court Ideologies*

Broadly speaking, there are two schools of thought concerning the first century of federal fraud doctrine. Some scholars have argued that the original statute from 1872 had humble origins "as a means of preventing 'city slickers' from using the mail to cheat guileless 'country folks.'"[36] Proponents of this view tend to assert that twentieth-century prosecutors inappropriately stretched the statute far beyond its original limits. According to this narrative, lower courts indulged extravagant definitions of fraud put forward by the federal government, and the Court's modern jurisprudence merely represents a necessary counterbalance.[37] Others have convincingly argued that even in the nineteenth century, the statute

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32. See infra section I.A.2–I.B.

33. See Act of June 8, 1872, ch. 335 § 301, 17 Stat. 283, 323 (codified as amended at 18 U.S.C. § 1341) ("That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person . . . [extensively describing what activities would constitute use of the mails].").

34. See infra section I.A.1.

35. See Act of March 4, 1909, ch. 321 § 215, 35 Stat. 1088, 1130 (codified at 18 U.S.C. § 1341); see also infra section I.A.2.

36. Doyle, supra note 31, at 1. For an extensive analysis of the evolution of fraud and efforts to combat it, see generally Edward J. Balleisen, Fraud: An American History From Barnum to Madoff (2017).

37. See generally John C. Coffee, Jr., The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime, 21 Am. Crim. L. Rev. 1 (1983) (critiquing expansive theories of fraud such as the right to control); Park, supra note 31 (similar); see also Parmida Enkeshafi, Note, Universalizing Fraud, 18 Duke J. Const. L. & Pub. Pol'y Sidebar 47, 49 (2022), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1220&context=djclpp_sidebar [https://perma.cc/Z7EQ-AF2U] (arguing that fraud case law had a "morality" focus that complicated the doctrine).

signaled relative "novelty and breadth" compared to other laws of its day.[38] Thus, any prosecutorial creativity was an intentional byproduct of the statute's broad text.[39] Both accounts draw on the same fundamental ideological and doctrinal touchstones to frame the development of fraud jurisprudence over the course of 150 years.

1. *Nationalism and Moralism as Guiding Principles in Early Fraud Jurisprudence.* — The Supreme Court in 1999 opined that the original fraud statutes didn't *need* to specify that "money or property" was a necessary element of fraud because "both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud and bank fraud statutes, actionable 'fraud' had a well-settled meaning at common law."[40] But as early as 1896, the Supreme Court in *Durland v. United States* had broken away from the classic common law definition of fraud.[41] In *Durland*, the defendant issued bonds for a company that became insolvent before the interest had been repaid to the bondholders.[42] The defendant argued that "fraud" at common law went only to deceits involving present or past facts, while the common law crime of "false pretenses" applied to misrepresentations about what might occur in the future.[43] While the Court acknowledged the distinction between the two crimes at common law, it declared that mail fraud should be construed in light of the "evil sought to be remedied."[44] Accordingly, the Court held that mail fraud covered *any* scheme involving misrepresentations, so long as the "intent and purpose" was to deceive a victim.[45] Finding that "the moral element" of the defendant's guilt was established, the Court affirmed the conviction.[46] Thus, within years of its inception, mail fraud had already adopted a flexible and moralistic inquiry that exceeded its common law roots.

The Court's opinion in *Durland* is emblematic of the nationalist and moralist tilt of early twentieth-century courts' values.[47] When Congress

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38. See Rakoff, supra note 7, at 779 (describing the complexities that the mail fraud statute's breadth uniquely created for courts and Congress).

39. See, e.g., United States v. Maze, 414 U.S. 395, 405–06 (1974) (Burger, J., dissenting) (arguing that the fraud statutes worked as a stopgap for novel schemes until Congress could pass more specific legislation).

40. Neder v. United States, 527 U.S. 1, 22 (1999). In the original mail fraud statute, the phrase "any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses*" didn't yet exist. Compare 18 U.S.C. § 1341, with supra note 33.

41. 161 U.S. 306 (1896). For a discussion of the different approaches lower courts took to assessing mail fraud prior to *Durland*—ranging from broad conceptions of fraud to a "strict constructionist" approach—see Rakoff, supra note 7, at 790–95.

42. *Durland*, 161 U.S. at 312.

43. Id.

44. Id. at 313.

45. Id.

46. Id. at 312, 315.

47. See Daniel C. Richman, Kate Stith & William J. Stuntz, Defining Federal Crimes 4 (2d ed. 2015) ("[In the early twentieth century,] Congress was no longer concerned simply

amended the fraud statute to include the current "for obtaining money or property" clause in 1909,[48] it was viewed as merely codifying *Durland*'s more expansive conception of fraud.[49] The Court seemed to share this broad view: One year after the mail fraud amendment, the Court declared that the crime of "Conspiracy to . . . defraud [the] United States"[50] included "any conspiracy which is calculated to obstruct or impair [the government's] efficiency," confirming that "it is *not* essential to charge or prove an actual financial or property loss."[51] Although the Court did not explicitly extend this to the mail fraud statute, it also did not distinguish it. Indeed, except to offer technical corrections as to what "use of the mails" entailed,[52] the Court was largely silent on mail fraud through much of the twentieth century. Lower courts, armed with a perceived mandate to likewise give wide discretion to federal prosecutions, adopted a more flexible and moralistic approach to fraud.[53]

The "intangible rights" doctrine was born against this backdrop of broadly conceived federal criminal law. Under the doctrine, the statutory phrase "to defraud" meant only to "deprive . . . of a right."[54] These rights

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with . . . misuse of federal assets. Instead, federal legislators showed that they were just as committed as their state brethren to . . . [addressing] the moral crusades of the day . . . through [prosecution].").

48. See Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130 (codified at 18 U.S.C. § 1341 (2018)).

49. See Rakoff, supra note 7, at 794 ("[When] Congress finally [amended the fraud statute,] there was no viable body of case law applying a narrow interpretation of the term 'scheme to defraud,' but only decisions giving it a broad construction."); Daniel C. Richman, Defining Crime, Delegating Authority—How Different Are Administrative Crimes?, 39 Yale J. on Regul. 304, 324 (2021) [hereinafter Richman, Defining Crime] ("Congress's response to *Durland* was to codify it in 1909."); see also McNally v. United States, 483 U.S. 350, 357 n.6 (1987) (noting the same); Norman Abrams, Uncovering the Legislative Histories of the Early Mail Fraud Statutes: The Origin of Federal Auxiliary Crimes Jurisdiction, 2021 Utah L. Rev. 1079, 1082 (arguing that the 1909 amendments to the mail fraud statute marked a "significant historic legislative change" that "enabled the crime of mail fraud to be used to prosecute conduct far removed from typical fraud").

50. Codified at 18 U.S.C. § 371.

51. Haas v. Henkel, 216 U.S. 462, 479 (1910) (emphasis added). This broad meaning was reaffirmed fourteen years later. See Hammerschmidt v. United States, 265 U.S. 182, 187–88 (1924) (rejecting the need for property requirements and instead defining fraud as "the deprivation of something of value by trick, deceit, chicane or overreaching," including interference with "a lawful function of the government").

52. See United States v. Maze, 414 U.S. 395, 398 (1974) (reversing conviction, not on the basis of whether the scheme amounted to fraud, but rather on the basis that the "use of the mails" was too attenuated to support a mail fraud charge); Kann v. United States, 323 U.S. 88, 94–95 (1944) (similar); but see Schmuck v. United States, 489 U.S. 705, 710–11 (1989) (reiterating that use of the mails "need not be an essential element" of a fraud as long as it is at least incidental to the underlying scheme).

53. See Rakoff, supra note 7, at 796 (noting that even before *Durland*, some courts viewed the mail fraud statute as broadly conveying a duty to "keep the mails 'pure,' 'untainted,' and 'unsullied'" from "any fraudulent design").

54. United States v. Horman, 118 F. 780, 781–82 (S.D. Ohio 1901), aff'd, 116 F. 350 (6th Cir. 1901).

encompassed the right of the public to fair dealing by government officials, as well as rights created by fiduciary duties.[55] Crucially, the insertion of the money-or-property clause in 1909 was rarely invoked as a limiting principle.[56] Rather, the jurisprudence of this era was marked by increasingly creative criminalization of acts that "failed to measure up to accepted moral standards and notions of honesty and fair play," or even of those that ran "contrary to public policy."[57] Simply put, the presiding courts during the early years of property fraud did not exhibit the same federalism concerns as seen later in the Rehnquist and Roberts courts.[58]

2. McNally*: The Crystallization of Property Fraud and New Normative Values*. — The nationalist conception of federal fraud met an abrupt end in 1983, when the Court's opinion in *McNally v. United States* seemingly heralded the end of the doctrine's flexibility.[59] The defendants were James Gray, an ex-public official of Kentucky, and Charles McNally, a private citizen.[60] Gray, McNally, and others operated a lucrative self-dealing scheme in which they gave Kentucky's state insurance contracts out to firms in which they retained an ownership interest.[61] They never disclosed

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55. See, e.g., United States v. Bronston, 658 F.2d 920, 926–27 (2d Cir. 1981) (holding that some violations of fiduciary duties are offenses under the fraud statutes); United States v. Bohonus, 628 F.2d 1167, 1170 (9th Cir. 1980) (sustaining fraud convictions on the basis of "(1) [the victim's] right to have its business conducted honestly; (2) its right to honest and loyal and disinterested services of its employee; and (3) its right to the secret profits obtained by its employee"); United States v. Isaacs, 493 F.2d 1124, 1144, 1150–51 (7th Cir. 1974) (affirming convictions when prosecution alleged a scheme to "defraud the State of Illinois and its citizens of their right to have the administration and execution of its laws free from corruption and fraud"); Shushan v. United States, 117 F.2d 110, 114–15 (5th Cir. 1941) (defining fraud as "a purpose to do wrong which is inconsistent with moral uprightness").

56. See, e.g., *Isaacs*, 493 F.2d at 1149–50 ("The mail fraud statute is not restricted in its application to cases in which the victim has suffered actual monetary or property loss."); cf. Rakoff, supra note 7, at 801 ("[W]here the fraud was substantial, [few] judges, whatever their attitude toward federalism, [were] persuaded to free the accused on the ground that prosecution would infringe on the rights of the states.").

57. Marilyn L. Byington, Note, Criminal Law—Mail Fraud Requires Loss of Property or Money, 10 U. Ark. Little Rock L. Rev. 773, 777–79 (1988). Scholars have observed that this stems from fraud's long-running roots, its origins as a primarily civil remedy, and the inherent ambiguity of the term, which led judges to struggle with the boundaries between civil and criminal fraud. See Ellen S. Podgor, Criminal Fraud, 48 Am. U. L. Rev. 729, 736–40 (1999) [hereinafter Podgor, Criminal Fraud].

58. See generally Christopher P. Banks & John C. Blakeman, The U.S. Supreme Court and New Federalism: From the Rehnquist to the Roberts Court (2012) (observing that from the New Deal era until well into the Burger Court, federalism was a fairly limited normative priority in the Supreme Court). Some scholars have observed that lower courts were beginning to express skepticism with the breadth of fraud prior to *McNally*. See, e.g., Richman, Politics as Usual, supra note 22, at 566 (arguing that the origins of the modern fraud movement began with "Second Circuit Judge Ralph Winter's 1982 dissent in *United States v. Margiotta*." (citing 688 F.2d 108, 139 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part))).

59. 483 U.S. 350 (1987).

60. See id. at 352.

61. See id. at 353–54.

their ownership stakes in the bidding process, and the resulting contracts generated hundreds of thousands of dollars in commissions.[62] The government charged the defendants on a theory that this scheme deprived Kentuckians of their "right to honest government" by means of "false pretenses and the concealment of material facts."[63] The Sixth Circuit had affirmed the convictions, citing cases from the Second, Fourth, Fifth, Seventh, and Eighth Circuits for the proposition that "[c]ourts have long interpreted the mail fraud statute . . . as proscribing schemes to defraud . . . citizens of their intangible rights."[64] Despite the apparent longstanding recognition of this theory of prosecution in the several circuits, the Supreme Court rejected the intangible rights doctrine in its entirety and reversed.[65]

The Court laid bare its ideological justifications for ending its hands-off approach to the fraud statutes. Justice White's opinion for a seven-Justice majority rejected the moralistic focus of prior case law, instead raising concern over the statute's ambiguous "outer boundaries."[66] The opinion clearly stated its guiding principles, namely that "the Federal Government [should not be] setting standards of disclosure and good government for local and state officials."[67] The Court further distinguished past fraud precedent that had adopted a broader construction—primarily for frauds committed against the United States, as discussed above[68]—on the cursory grounds that such a "broad construction . . . [was] based on a consideration not applicable to the mail fraud statute," which presumably meant that federalism concerns were not present in such cases.[69] Thus, *McNally* served to illustrate a new guiding principle of fraud jurisprudence: Nationalist conceptions of federal criminal law were

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62. See id.

63. Id. at 353–54 & n.3.

64. United States v. Gray, 790 F.2d 1290, 1294 (6th Cir. 1986) (citing United States v. Von Barta, 635 F.2d 999, 1005–06 (2d Cir. 1980); United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), aff'd in relevant part, 602 F.2d 653 (4th Cir. 1979) (en banc); United States v. Keane, 522 F.2d 534 (7th Cir. 1975); United States v. States, 488 F.2d 761, 766 (8th Cir. 1973); Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941)), rev'd, *McNally*, 483 U.S. 350 (1987).

65. *McNally*, 483 U.S. at 361.

66. Id. at 360.

67. Id. *McNally* further reiterated the shift in doctrine by rejecting the interpretive methods that justified the broad-ranging prosecutions seen in prior years. For example, some lower courts had specifically interpreted the mail fraud statute's wording "to defraud *or* for obtaining money or property" as being disjunctive—thus, to "defraud" had a different and broader meaning than "obtaining property or money." See, e.g., United States v. Clapps, 732 F.2d 1148, 1152 (3d Cir. 1984); *States*, 488 F.2d at 764. In *McNally*, the Court instead interpreted the statutes as not being written in the disjunctive but rather that "obtaining money or property by means of false . . . pretenses" was merely an explanation of what "any scheme or artifice to defraud" meant. 483 U.S. at 357–59 (quoting Act of March 4, 1909, ch. 321 § 215, 35 Stat. 1088, 1130 (codified at 18 U.S.C. § 1341 (2018)).

68. See supra notes 50–53 and accompanying text.

69. *McNally*, 483 U.S. at 358 n.8.

subordinated when federalist conceptions of state autonomy were jeopardized.[70]

Policy concerns aside, the *McNally* opinion reflected a renewed focus on the common law origin of fraud and the plain text of the fraud statutes. The Court began by portraying the "sparse legislative history" of the fraud statutes as targeting "'thieves, forgers, and rapscallions generally . . . [from] deceiving and fleecing the innocent people in the country' . . . of their money or property" rather than for use against government officials.[71] The Court then asserted that the common law conception of fraud had always been limited to "wronging one in his *property* rights by dishonest methods or schemes."[72] Similarly the majority contended that *Durland* merely made clear that any deceit in pursuit of obtaining *property* (but nothing more) was covered by the fraud statute.[73] With this narrative in mind, the *McNally* Court then turned to the text of the statute—and set the groundwork for the entire modern property fraud doctrine.

The Court acknowledged that the plain text of the statute, as amended after *Durland*, appeared in the disjunctive: "'to defraud' *or* 'for obtaining money or property.'"[74] The majority further conceded that this "arguable" interpretation supported the lower courts' view that money-or-property fraud and intangible-rights fraud were two distinct theories.[75] But the Court rejected this approach, holding that it would "depart[] from [the] common understanding" of fraud.[76] Instead, the Court held that "or" was to be interpreted conjunctively and merely combined the common law crimes of fraud and false pretenses when such schemes involved money or property.[77] Referencing its federalism and lenity concerns, the Court concluded its statutory analysis with a declaration that "[i]f Congress desires to go further, it must speak more clearly than it has."[78]

In a single move construing the meaning of a two-letter conjunction, the Court stripped away decades of lower-court jurisprudence rooted in theories of morality and public policy and replaced it with a seemingly

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70. The Court also buttressed this point by invoking the rule of lenity. See *McNally*, 483 U.S. at 359–60 ("[When there are] two rational readings of [the] statute, [the Court should choose the harsher reading] only when Congress has spoken in clear and definite language." (citing United States v. Bass, 404 U.S. 336, 347 (1971); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952))).

71. Id. at 356 (quoting Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth)).

72. Id. at 358 (emphasis added) (internal quotation marks omitted) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

73. Id. at 356–58.

74. Id. at 358 (emphasis added) (citing 18 U.S.C. § 1341).

75. See id. (citing United States v. Clapps, 732 F.2d 1148, 1152 (3d Cir. 1984); United States v. States, 488 F.2d 761, 764 (8th Cir. 1973)).

76. Id. at 359.

77. See id. at 358–60.

78. Id. at 360.

simple test: Was the objective of a given fraud to obtain *property*? Applying this property-or-not test to the facts, the Court found that the intangible rights to good government are not property rights.[79] And because the government had failed to allege specific property loss to the Commonwealth of Kentucky, the convictions were reversed.[80]

The property-or-not interpretation of the fraud statutes serves as the bedrock for most fraud prosecutions today. Congress moved quickly to abrogate *McNally* and a year later responded with a statute that restored the government's ability to prosecute schemes that "deprive another of the intangible right of honest services."[81] This new statute bifurcated fraud jurisprudence into two categories: traditional "property" fraud and "honest services" fraud.[82] For the purposes of this Note—which focuses on property fraud[83]—the holding and reasoning of *McNally* is alive and well.

B. *Post-*McNally *Jurisprudence and the Rise of the Property Paradox*

Since 1987, the Supreme Court has heard five cases that attempt to clarify *McNally*'s property-or-not test: *Carpenter*,[84] *Cleveland*,[85] *Pasquantino*,[86]

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79. Id. at 356.

80. Id. at 360–61.

81. 18 U.S.C. § 1346 (2018).

82. See, e.g., Doyle, supra note 31, at 6–8 (distinguishing mail and wire fraud charges that rely on a theory of fraud "to obtain money or property" from charges that rely on a theory of fraud rooted in "honest services").

83. Honest services fraud doctrine has mirrored the Court's property fraud jurisprudence in many ways. In 2010, the Court in *Skilling v. United States* ultimately cabined this new statute to schemes involving "bribes or kickbacks supplied by a third party who had not been deceived." 561 U.S. 358, 404 (2010). *Skilling* heavily relied on reasoning—both analytical and ideological—similar to that of *McNally*. See, e.g., id. at 401–03 (detailing the history of the intangible rights' doctrine and emphasizing *McNally*'s admonition that the federal government should not "set[] standards of disclosure and good government for local and state officials" (internal quotation marks omitted) (quoting *McNally*, 483 U.S. at 360)).

For additional academic commentary on modern honest services fraud and its relationship to property fraud, see generally Pamela Mathy, Honest Services Fraud After *Skilling*, 42 St. Mary's L.J. 645 (2011); Michelle V. Barone, Note, Honest Services Fraud: Construing the Contours of Section 1346 in the Corporate Realm, 38 Del. J. Corp. L. 571 (2013); Teresa M. Becvar, Note, When Does Sleaze Become a Crime? Redefining Honest Services Fraud After *Skilling v. United States*, 88 Chi.-Kent L. Rev. 593 (2013); Nicholas J. Wagoner, Comment, Honest-Services Fraud: The Supreme Court Defuses the Government's Weapon of Mass Discretion in *Skilling v. United States*, 51 S. Tex. L. Rev. 1087 (2010). The Court's decision to limit the scope of honest services fraud has arguably led to the proliferation of increasingly technical theories of property fraud as discussed in Part II, infra. For an example of such a proposal post-*Skilling*, see generally Brette M. Tannenbaum, Note, Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud After *Skilling*, 112 Colum. L. Rev. 359 (2012).

84. Carpenter v. United States, 484 U.S. 19 (1987).

85. Cleveland v. United States, 531 U.S. 12 (2000).

86. Pasquantino v. United States, 544 U.S. 349 (2005).

Kelly,[87] and *Ciminelli*.[88] This section addresses these cases in chronological order to show the incremental development of the doctrine over time. A few key points to bear in mind at a high level: *Carpenter* and *Pasquantino* are the only cases in which the Supreme Court affirmed fraud convictions. In *Carpenter*, both the defendant and the victim were private actors,[89] and in *Pasquantino*, the interest at stake was money—a "traditional" property interest.[90] *Cleveland*, *Kelly*, and *Ciminelli*, on the other hand, all dealt with cases in which the defendant or victim of the fraud was a state actor or state entity, and the right or interest at stake was not money or real (tangible) property.[91] These differences ultimately played a role in influencing both the Court's doctrinal approach, as well as how (and whether) the Court buttressed its doctrinal holdings with federalism concerns.

1. *Early Refinements to the* McNally *Property Test.* — Less than six months after *McNally*, the Court in *Carpenter v. United States* confronted the question of whether intangible rights could *ever* pass the property-or-not test.[92] Timothy Carpenter—a reporter for the Wall Street Journal—had access to confidential information from companies as a byproduct of his employment.[93] According to the government's theory, Carpenter misused that information for personal gain by trading on it before the news went public.[94] Justice White, now writing for a unanimous court, affirmed the conviction in a resounding opinion—"intangible rights" doctrine may not satisfy the fraud statutes, but intangible *property* rights certainly do.[95]

Carpenter was significant in that the Court explicitly rejected the notion that "monetary loss" was a prerequisite to a fraud prosecution, holding instead that the property-or-not test was satisfied when the Journal lost its right to "exclusive[ly] use" and "keep[] [the information] confidential."[96] The Court made this conclusion based on prior property jurisprudence outside of the fraud context—namely *International News Service v. Associated Press*, which treated news information as "quasi-property" as a matter of federal common law.[97] In reaching this conclusion, the Court was silent on the ideological concerns that it had expressed in *McNally*. In fact, nowhere in the opinion does Justice White

87. Kelly v. United States, 140 S. Ct. 1565 (2020).

88. Ciminelli v. United States, 143 S. Ct. 1121 (2023).

89. See infra section I.B.1.

90. See infra section I.B.2.

91. See infra sections I.B.1–.2. This Note uses the "tangible" property above as shorthand for straightforward property rights in things like real estate or chattels. As this Note illustrates below, intangible property is a significantly more amorphous concept in the fraud context. See infra Part II.

92. See Carpenter v. United States, 484 U.S. 19, 23 (1987).

93. Id. at 22–23.

94. Id.

95. Id. at 25–27.

96. Id. at 26.

97. Id. (citing Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918)).

mention federalism concerns. In sum, while *McNally* rejected "ethereal" nonproperty rights like "honest and faithful service," *Carpenter* ensured that intangible property rights are still fully protected within the meaning of the fraud statute.[98]

Cleveland v. United States added another layer of complexity to the Court's property fraud analysis.[99] Like *McNally*, *Cleveland* dealt with a situation in which the state was the purported victim of a fraud.[100] Unlike *McNally*, there was no state actor participation in the *Cleveland* scheme.[101] Here, the defendant was a private party who had falsified portions of an application to operate poker machines in the state of Louisiana.[102] The Court unanimously reversed, declaring that poker machine licenses (and *all* state-issued licenses) are not property within the meaning of the fraud statutes.[103]

In reaching this conclusion, the Court made a subtle-yet-crucial addition to the property-or-not test: The objective of a fraud must be "property *in the hands of the victim*."[104] This novel "hands of the victim" requirement was significant because it shifted the *McNally* test toward a victim-specific conception of property. Instead of adhering to a universal definition of property—for example, conceptions of property as rooted in a "right to exclude"[105]—the *Cleveland* test looks at the relationship between the "right" itself and the possessor of the right (the "victim").[106] Applying this new version of the property-or-not test, the Court went on to hold that state licenses are not property interests in a state's hands, but rather "regulatory" interests.[107]

The Court first rejected the argument that a license has "economic value" to a state, observing that while the *Cleveland* defendants had deceived the state to obtain the application, they nevertheless paid the state all required processing fees: "Tellingly . . . the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled by law."[108] Accordingly, the Court found that the defendants'

98. Id. at 25–26.

99. 531 U.S. 12 (2000).

100. See id. at 15–17.

101. The government had separately pursued charges against Cleveland and other defendants for a related scheme "to bribe state legislators to vote in a manner favorable to the video poker industry." Id. at 16. But these charges were not at issue on appeal. Id. at 16–18.

102. See id. at 15–17.

103. See id. at 18.

104. Id. at 15 (emphasis added).

105. See, e.g., Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 731 (1998) (arguing that the core defining feature of property is the right to exclude others); see also Francisco J. Morales, Comment, The Property Matrix: An Analytical Tool to Answer the Question, "Is This Property?", 161 U. Pa. L. Rev. 1125, 1127 (2013) (analyzing different conceptions of property through a factor-based matrix approach).

106. See *Cleveland*, 531 U.S. at 15.

107. Id. at 21–22.

108. Id. at 22.

deception was not intended to deprive the state of any "economic" interest that might satisfy the traditional money-or-property conception of fraud.[109]

Cleveland went on to reject the idea that the state has an intangible property interest—such as the interest in *Carpenter*—based on the state's "rights of allocation, exclusion and control," concluding that these intangible rights derive from "sovereign power to regulate" rather than from property.[110] *Cleveland* distinguished these "sovereign" rights as distinct from the long recognized property rights of confidential business information in *Carpenter*.[111] The Court buttressed this distinction with federalism principles, observing that (1) the issuance of licenses is an activity typically reserved for "state and local authorities,"[112] (2) the state already assigns criminal penalties for lying on applications,[113] and, perhaps most importantly, (3) allowing federal prosecutors to criminalize licensing fraud would "significantly change[] the federal-state balance in prosecution of crimes."[114] The upshot to *Cleveland* is that unlike in *Carpenter*, the presence of a state victim revived the ideological concerns of the *McNally* Court—the federal–state balance of criminal law—and led to an even more scrutinizing property-or-not test for fraud prosecutions.

2. *The Relationship Between Property, Tradition, and Economic Value. — Pasquantino v. United States*, in contrast, recognized an example of a property right in the hands of a state victim.[115] The government alleged that the defendants had schemed to smuggle liquor into the United States from Canada, thereby defrauding Canada by depriving it of tax revenues.[116] The Court, reasoning through syllogism that property means "something of value," affirmed the conviction[117]: It found that unpaid tax revenues were clearly an "economic interest" and thus something of value.[118] In so doing, the Court rejected the notion that the right to collect taxes was a "sovereign" interest like that seen in *Cleveland*, instead observing that "[t]he right to be paid money has long been thought to be a species of property."[119] Thus, *Pasquantino* stands for the proposition that states *can* have property interests that satisfy the property

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109. Id.

110. Id. at 23.

111. Id. at 23 (citing Carpenter v. United States, 484 U.S. 19, 26 (1987)).

112. Id. at 24.

113. Id. at 24–25 (citing La. Stat. Ann. § 27:309(A) (2000)).

114. Id. at 25 (internal quotation marks omitted) (quoting Jones v. United States, 529 U.S. 848, 858 (2000)).

115. 544 U.S. 349, 355–56 (2005).

116. Id. at 353–55.

117. Id. at 355 (internal quotation marks omitted) (citing McNally v. United States, 483 U.S. 350, 358 (1987)).

118. Id. at 356–57 ("Valuable entitlements like these are 'property' as that term ordinarily is employed.").

119. Id. at 356.

test so long as they are either "traditional" property interests like those at issue in *Carpenter* or interests with "economic value."

The more recent case of *Kelly v. United States*[120] was fraught with political intrigue[121] but seems to add little new to property fraud jurisprudence. *Kelly* considered property fraud charges against New Jersey Port Authority officials who schemed to cause a days-long traffic jam under the guise of a "traffic study."[122] While recognizing that the study was a sham, and that the real goal of the scheme was political retaliation against the mayor of Fort Lee,[123] the Court nevertheless reversed.[124] In a straightforward application of precedent, the Court first rejected the government's theory that by fraudulently realigning the traffic lanes, the defendants deprived the Port Authority of control over its property. This determination ostensibly fell within the type of "allocation, exclusion, and control" that *Cleveland* defined as state regulatory interests.[125]

The prosecution's second theory gave the Court more pause. The government sought to distinguish *Kelly* from *Cleveland* by arguing that the scheme required payment of overtime wages and that those wages were property within the meaning of the fraud test.[126] The Court, citing *Pasquantino*, agreed that wages were indeed property in the Port Authority's hands.[127] The Court nevertheless rejected the theory on the grounds that the employee wages weren't the "object[ive]" of the fraud:[128] "[A] property fraud conviction cannot stand" when, as here, "the loss to the victim is only an incidental byproduct of the scheme."[129] The Court justified this conclusion purely on pragmatism and *McNally*-esque ideological concerns alone: To hold otherwise would allow prosecutors to "end-run *Cleveland* just by pointing to . . . incidental costs" and "enforce (its view of) integrity in broad swaths of state and local policymaking."[130]

Kelly could be intended as a mandate to lower courts to take a harder look at prosecutors' theories of fraud. Or it could be viewed as a one-off anomaly that reaffirms the distinction between sovereignty in *Cleveland* and property in *Pasquantino* and simply reverses convictions in a sui generis finding of factual inadequacy. The extent to which the Court

120. 140 S. Ct. 1565 (2020).

121. See, e.g., Elie Mystal, The Bridgegate Trial Has Become the Most New Jersey Thing Ever, Above the Law (Nov. 3, 2016), https://abovethelaw.com/2016/11/the-bridgegate-trial-has-become-the-most-new-jersey-thing-ever/ [https://perma.cc/2HVQ-U9WA] (discussing the political motivations behind Bridgegate and the *Kelly* case).

122. *Kelly*, 140 S. Ct. at 1574.

123. Id. at 1568–69.

124. Id.

125. See id. at 1572–73 (quoting Cleveland v. United States, 531 U.S. 12, 23 (2000)).

126. See id. at 1573.

127. See id. (quoting Pasquantino v. United States, 544 U.S. 349, 357 (2005)).

128. Id.

129. Id.

130. Id. at 1574.

intended to put forth a new rule of fraud jurisprudence is still unclear, but lower courts have not seemed to enforce the "incidental byproduct" requirement rigorously.[131]

Most recently, the Supreme Court decided *Ciminelli v. United States*.[132] The defendants—comprising both private actors and public officials—were convicted of property fraud after scheming to rig the bidding processes for construction projects worth hundreds of millions of dollars.[133] While the government claimed at oral argument that they could have plausibly convicted under a traditional property theory alleging that the defendants deprived the state of economic value,[134] they ultimately proceeded on a "right to control" theory that was well-accepted in the Second Circuit.[135] The *Ciminelli* Court unanimously rejected the right to control theory, stating that "schemes to deprive the victim of 'potentially valuable economic information'" did not implicate a "traditional property interest[]" like the information in *Carpenter*.[136] The Court emphasized once again that "'absent a clear statement by Congress,' courts should 'not read the . . . fraud statutes to place under federal superintendence a vast array of conduct traditionally policed by the States.'"[137]

There are two key takeaways from *Ciminelli*. The first is doctrinal: Fraud prosecutions pass the property-or-not test only if the right at issue

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131. See infra note 211.

132. 143 S. Ct. 1121 (2023).

133. See id. at 1125.

134. See id.

135. See Transcript of Oral Argument at 3–5, *Ciminelli*, 143 S. Ct. 1121 (No. 21-1170), 2022 WL 22297206; Brief for United States at 8, *Ciminelli*, 143 S. Ct. 1121 (No. 21-1170), 2022 WL 10224977 (arguing that under the right to control theory, "[p]roperty includes intangible interests such as the right to control the use of one's assets . . . [such that] depriv[ations] of potentially valuable economic information" would constitute a property fraud (first alteration in original) (quoting Joint Appendix at 41, *Ciminelli*, 143 S. Ct. 1121 (No. 21-1170), 2022 WL 3999814)).

136. *Ciminelli*, 143 S. Ct. at 1124, 1128.

137. Id. at 1128 (alteration in original) (citing Cleveland v. United States, 531 U.S. 12, 27 (2000)). During oral arguments, the Court seemed to recognize that sovereign entities might have *some* intangible property interests similar to those in *Carpenter*. While the Court expressed an eagerness to dispel this right to control theory of property when *information* was the property interest at play, it was explicit in its desire to ensure that other "rights to control" such as deception in contracting or fraudulent inducement (in ways that implicate property with real economic value) would not be affected. See, e.g., Transcript of Oral Argument at 38, 40, 41–42, *Ciminelli*, 143 S. Ct. 1121 (No. 21-1170), 2022 WL 22297206 (statement of Gorsuch, J.) (remarking the Justices were "all in radical agreement" about limiting the holding to only the right to control theory at issue in the case, and not limiting the government's ability to prosecute other deception such as "pedigree fraud"). This colloquy did not seem to influence the final opinion, which made no mention of pedigree fraud or other longstanding fraud theories, but pedigree fraud continues to be upheld in courts. See, e.g., United States v. Kousisis, 82 F.4th 230, 240–41 (3d Cir. 2023) (upholding conviction for falsely obtaining a business certification to secure contracts with a state); United States v. Porat, 76 F.4th 213, 218–219 (3d Cir. 2023) (upholding conviction for falsely inflating university rankings to attract students).

has "traditionally" been recognized as a property right. The second is more ideological: The same core federalism concerns that influenced the Rehnquist Court in *McNally* are just as alive in today's Roberts Court.

3. *Property or Not? The Modern Doctrine Summarized.* — To summarize the doctrine as it stands today: *McNally* held that only deception aimed at obtaining money or property falls within the purview of the fraud statutes and distinguished between "property rights" and other "intangible rights."[138] *Cleveland* further required that the rights at issue be property rights "in the hands of the victim."[139] *Carpenter* emphasized that some intangible rights—such as confidential business information—may be property rights,[140] and both *Pasquantino* and *Ciminelli* suggest that rights that carry economic value or which have "long been recognized" as property rights will satisfy the property-or-not test.[141] But under *Ciminelli*, "potentially valuable economic information" is not a property right.[142] Lastly, *Kelly* seems to require that these rights *actually* be the objective of the fraudulent scheme rather than a mere "incidental byproduct."[143]

This paragraph may rightfully seem confusing. While any one fraud case may establish a fairly straightforward rule of law, the jurisprudence as a whole creates seemingly contradictory mandates for lower courts. At the same time, however, post-*McNally* jurisprudence has set forth a clear *normative* guideline for lower courts: scrutinize fraud prosecutions when states are involved. But does the Court's ideological rhetoric translate into a workable doctrine?

II. EVALUATING PROPERTY FRAUD

This Part evaluates the Supreme Court's modern fraud jurisprudence as a function of its stated ideological interests. Taking as given the Court's articulation that the fraud statutes should be read to limit federal intervention in state affairs,[144] an effective doctrine would provide clear rules by which lower courts can rebuke government efforts to prosecute apparent state misconduct. But the doctrine also reflects the Court's reluctance to limit prosecutors' ability to punish "traditional" forms of property fraud.[145] Accordingly, lower courts must not limit prosecutors'

138. See supra section I.A.2.

139. See supra section I.B.1.

140. See supra section I.B.1.

141. See supra section I.B.2.

142. See supra section I.B.2.

143. See supra section I.B.2.

144. It is again worth noting that this Note does not directly comment on whether these federalism concerns are normatively "good" ideals on which to build the doctrine—instead, it engages with the doctrine in a purely analytical fashion.

145. See supra text accompanying notes 140–141.

ability to pursue charges when a private party is defrauded of intangible property rights.[146]

When evaluated against this standard, this Part shows that modern fraud doctrine fails on its own terms: The property-or-not test is not only inherently challenging for lower courts to apply consistently but is also readily satisfied in many federal fraud cases. Section II.A illustrates the "property paradox" that makes applying the Supreme Court's jurisprudence so difficult—namely, the challenge of differentiating between "property interests" in private hands and the "regulatory interests" in sovereign hands. Section II.B illustrates how prosecutors can craft (and have crafted) indictments that satisfy the Court's property tests even when state actors are involved. This Part concludes that because of these flaws, modern fraud jurisprudence amounts to little more than vague interpretive guidelines that fail to meaningfully protect state sovereignty.

A. *The Property Paradox: Delineating Between State Property and State Sovereignty*

The property-or-not test becomes most challenging to implement when the purported property interest is in the hands of a state actor. As a doctrinal matter, the factors that inform lower courts' application of the test—that things "of value," that are "long . . . thought to be a species of property," or that "would qualify as an economic loss" can be property[147]—still leave wide swaths of intangible property rights uncategorized.[148] The recent cases of *United States v. Blaszczak* ("*Blaszczak I*"[149] and "*Blaszczak II*"[150]) illustrate this point.

In *Blaszczak I*, the Second Circuit upheld wire fraud convictions on an "information-as-property" theory. The defendants, all private individuals, obtained unauthorized confidential information about reimbursement rates from the Center for Medicare and Medicaid Services (CMS), a federal agency.[151] In finding that the CMS information was property, the court compared the holdings of *Cleveland* and *Carpenter*.[152] Ultimately analogizing to *Carpenter*, the court found that CMS possessed a "right to exclude" others from its confidential reimbursement rate information,[153] and further observed that the right to exclude was a "traditional" property

146. See supra text accompanying note 140.

147. See supra sections I.B.1–.2.

148. Cf. Morales, supra note 105, at 1134–35 (evaluating property using "descriptive" factors like "rights of a person over a given thing," "in rem" rights, and rights that "attach to the thing," as well as "normative" factors like the "right to exclude," a "bundle of rights," "autonomous interests," and "economic interests").

149. Blaszczak v. United States (*Blaszczak I*), 947 F.3d 19 (2d. Cir. 2019).

150. Blaszczak v. United States (*Blaszczak II*), 56 F.4th 230 (2d. Cir. 2022).

151. *Blaszczak I*, 947 F.3d at 26–28.

152. See id. at 32–34.

153. Id. at 33 (internal quotation marks omitted) (quoting Carpenter v. United States, 484 U.S. 19, 26 (1987)).

interest that had long been recognized at common law.[154] The court then determined that CMS also had an economic interest in the information, as the agency had invested significant "time and resources" to "generat[e] and maintain[] the [information's] confidentiality."[155] It reasoned that the defendants' disclosure of the information led to operational harms that effectively "devalued" CMS's economic interest by increasing costs and procedural requirements necessary to protect future information.[156] Thus, even though *Blaszczack I* was decided before *Kelly* and *Ciminelli*, the Second Circuit seemed to give full weight to the Supreme Court's property-or-not test and weighed the relevant factors offered in *Carpenter*, *Cleveland*, and *Pasquantino* before reaching its conclusion.[157]

Without commenting on the original opinion, the Supreme Court vacated and remanded *Blaszczak I* at the request of the Solicitor General.[158] On remand, taking the cue of the Solicitor General's Office, the Second Circuit reached the opposite conclusion and reversed the convictions.[159] Noting that the government had abandoned its position that the CMS information was a property right, the court this time emphasized that the reimbursement information represented an "exercise of regulatory power."[160] The opinion made no reference to the "right to exclude" theory

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154. See id. ("Like the private news company in *Carpenter*, CMS has a 'property right in keeping confidential and making exclusive use' of its nonpublic predecisional information." (quoting *Carpenter*, 484 U.S. at 26)).

155. Id.

156. Id. The court based this opinion on a finding of fact:

> As former CMS Director Dr. Jonathan Blum testified, leaks of confidential information could result in unbalanced lobbying efforts, which would in turn impede the agency's efficient functioning by making it "more difficult to manage the process flow and to convince [Blum's] superiors of the right course for the Medicare program." Leaks may also require the agency to "tighten up" its internal information-sharing processes, again with the result that the agency would become less efficient.

Id. (alteration in original) (citations omitted).

157. See Pasquantino v. United States, 544 U.S. 349, 356 (2005) (defining property as "something of value" that, if the fraud were effected, would cause the victim economic harm); Cleveland v. United States, 531 U.S. 12, 21 (2000) (defining property by distinguishing between economic and regulatory interests); Carpenter v. United States, 484 U.S. 19, 23 (1987) (distinguishing between intangible rights and intangible property rights); see also Ciminelli v. United States, 143 S. Ct. 1121, 1127 (2023) (reiterating that property fraud should be interpreted with respect to historical conceptions of property); Kelly v. United States, 140 S. Ct. 1565, 1568 (2020) (reiterating the difference between economic and regulatory interest); supra sections 1.B.1–.2.

158. See Olan v. United States, 141 S. Ct. 1040 (2021) (mem.). In requesting that the opinion be vacated and remanded, the Solicitor General confessed error in the government's arguments in *Blaszczak I*. See *Blaszczak II*, 56 F.4th 230, 241 (2d Cir. 2019).

159. The majority opinion was authored by Judge Kearse, who had previously dissented in *Blaszczak I*. See *Blaszczak II*, 56 F.4th at 233. Similarly, Judge Sullivan had written the opinion for *Blaszczak I* and now dissented in *Blaszczak II*. See id. at 250 (Sullivan, J., dissenting).

160. Id. at 243 (majority opinion) (citation omitted).

of property, and rejected the notion that the information had economic value to CMS on the basis that "disclosure has no direct impact on the government's fisc."[161]

The *Blaszczak II* majority at first seemed to soundly reject the idea that regulatory agencies can have a property interest in confidential information, reasoning that unlike a "commercial entity," the government does not "offer . . . a service or a product" that would give the information intrinsic value.[162] But the court stopped short of a bright-line rule, instead maintaining that at least *some* government information may still be a "thing of value" within the meaning of *Pasquantino*'s jurisprudence.[163] In support of this proposition, the court cited the earlier Second Circuit case of *United States v. Girard*.[164]

Girard was cited in *Blaszczak I* for the proposition that "the Government has a property interest in certain . . . private records."[165] The majority in *Blaszczak II* asserted that this was still true, because the information at issue in *Girard* included a list of Drug Enforcement Administration (DEA) informants in ongoing investigations. The court distinguished the DEA informant list from the CMS rate information by observing that the DEA's disclosure would "interfere with . . . operations" or "imperil[] the well-being of the [government] agents."[166] This, the *Blaszczak II* majority reasoned, gave the DEA's information "inherent value" that the "regulatory information" in the hands of CMS simply lacked.[167]

The dueling *Blaszczak* opinions showcase the Property Paradox in two ways. First, the disparate treatment of CMS and DEA information in *Blaszczak II* has little basis in the Supreme Court's property-or-not test. If the *Blaszczak II* CMS analysis is correct that the risk of "operational harms" from disclosing information carries no economic value, then there is no basis in the Supreme Court's jurisprudence to treat the DEA information differently.[168] Similarly, if the majority's DEA analysis correctly assigns economic value to their operational risks, then there is no clear reason

161. Id. at 243–44.

162. Id. at 243.

163. See id. at 244.

164. 601 F.2d 69, 71 (2d Cir. 1979).

165. See *Blaszczak I*, 947 F.3d 19, 33 (2d Cir. 2019) (alteration in original) (citing *Girard*, 601 F.2d at 71).

166. *Blaszczak II*, 56 F.4th at 244.

167. Id.

168. See id. at 255–56 (Sullivan, J., dissenting) ("[T]his case and *Girard* [both] concern whether the government has a property interest in . . . [confidential information] . . . . [T]he majority . . . deems [DEA information] to have 'inherent value['] . . . [but] the reimbursement rates here were integral to CMS's administration . . . ." (quoting id. at 244 (majority opinion))).

why the CMS analysis in *Blaszczak I* was wrongly decided.[169] In order to cut through these contradictory outcomes, the *Blaszczak II* majority invents an entirely new sub-doctrine by relying on (1) the right in question and (2) the victim, and *additionally* (3) the level of harm brought by the perpetrator—a standard that the Supreme Court has never required. And even *if* the Supreme Court approved the reasoning in *Blaszczak II* and decided to incorporate the third prong into the existing property-or-not test, it is unclear how *that* test would be operationalized in a principled way in future cases. In other words, this holding would simply restart the Property Paradox all over again. This is not a criticism of the *Blaszczak II* majority's approach, which is a reasonable application of the law given the Court's overtly federalist dicta and the Solicitor General's decision to abandon the case, but instead is a critique of the property fraud doctrine itself.

The *Blaszczak* opinions highlight a second flaw in property fraud jurisprudence: Lower courts can apply the *exact same* doctrine to substantially similar facts and (reasonably) reach opposite results. The *Blaszczak I* majority began its analysis by asking whether the CMS had either (1) a right to exclude (similar to *Carpenter*) or (2) an interest that carried economic value (similar to *Pasquantino*). Finding that it did, it did not need to ask whether the information was a regulatory interest. *Blaszczak II*, in contrast, began first by emphasizing the "regulatory" nature of the CMS information, and only then determined that the regulatory nature of the information subordinates any arguably economic interest that CMS may have. Far from drawing a clear rule, the standards set forth by *McNally* and its progeny require judges to take a case-by-case approach to every fraud prosecution in which a sovereign entity is the purported victim.

This problem is not limited to the facts of *Blaszczak*. Consider two Fifth Circuit cases in the tax context: *United States v. Griffin* held that federal tax credits were not property when held in the hands of the Texas Department of Housing and Community Affairs (TDHCA).[170] Fifteen years later, the Fifth Circuit in *United States v. Hoffman* held that Louisiana state tax credits were property in the state's hands.[171] The *Hoffman* court distinguished the two cases on narrow grounds, reasoning that while Louisiana had a clear economic interest in its state tax credits under *Pasquantino*, the "unique nature" in which TDHCA "merely allocated *federal* tax credits" meant that the TDHCA interest was purely regulatory.[172] This pair of cases from the

169. Cf. id. at 256 (Sullivan, J., dissenting) ("[J]ust as the 'theft [of the informant records in *Girard*] would interfere with [the DEA's] operations,' the pre-publication leak of CMS's reimbursement rates here would 'risk[] hampering the agency's decision-making process' . . . ." (second, third, and fourth alterations in original) (citation omitted) (first quoting id. at 244 (majority opinion); then quoting *Blaszczak I*, 947 F.3d at 33)).

170. 324 F.3d 330, 338–41 (5th Cir. 2003).

171. 901 F.3d 523, 537 (5th Cir. 2018).

172. Id. at 539 (emphasis added).

same circuit demonstrates that prosecutors may face inconsistent outcomes even when the same fundamental "interest"—here, tax credits—is in the hands of different sovereign entities. It is hard to say the fraud doctrine does any work to preserve federal–state criminal balance—especially as seen here, when the federal prosecution was unable to pursue a theory of *federal* tax credit fraud but could nonetheless sustain a conviction against *state* tax credit fraud.

These examples—and others[173]—illustrate how the Court's property-or-not test can lead to different, and even contrary, outcomes. Some courts, like those in *Blaszczak II* and *Griffin*, might find that a regulatory interest predominates over any potential economic interests. Other courts may find that the economic interest trumps sovereign interests, as in *Hoffman*—even if the economic interest is attenuated, as in *Blaszczak I*. At any rate, these cases show that the property-or-not test does little to further the Supreme Court's ideal state–federal balance of power. Far from the bright-line rule that *McNally* attempted to establish with the property-or-not test, the modern doctrine often leaves the definition of property—and by implication, the federal–state balance of power—entirely up to the facts of the case and the judge's own intuition.

B. *Form Over Substance: Satisfying the Property-or-Not Test*

The shortcomings of the property-or-not test in the lower courts should be reason enough for the Supreme Court to revisit its approach to fraud. But as the Court in *Kelly* acknowledged,[174] and subsequent circuit cases have proven out,[175] there is an entirely separate problem as well: The property-or-not test can almost *always* be satisfied in some form or another. While the Supreme Court's jurisprudence would ideally set a bright-line rule on prosecutorial discretion, in practice it presents merely a set of technical pleading requirements. This section illustrates this grand irony of the court's federalism-focused doctrine: The lack of a functional bright-line rule against federal overreach renders the doctrine pointless. Fraud jurisprudence limits prosecutorial discretion only insofar as prosecutors are actually willing to defer to the Court's ideological dicta.

This phenomenon first appeared in *Kelly*. As discussed in Part I, the government alleged that the *Kelly* defendants' scheme necessarily

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173. One such example is United States v. Hird, 913 F.3d 332 (3d Cir. 2019). In *Hird*, the Third Circuit held that traffic tickets were a property interest. The court first acknowledged that traffic tickets themselves "would seem . . . to have no intrinsic *economic* value" given that they "implicate[] the Government's role as sovereign." Id. at 342 (first citing Cleveland v. United States, 531 U.S. 12 (2000); then quoting id. at 24). Despite this, the court ultimately concluded that because at least some of the traffic tickets would *probably* generate "fines and costs" for the state, the traffic tickets overall had enough economic value sufficient to satisfy the property-or-not test. Id. at 345.

174. See Kelly v. United States, 140 S. Ct. 1565, 1574 (2020) (noting the possibility of "end-running" the property-or-not test); see also infra text accompanying notes 177–178.

175. See infra note 211.

intended to deprive the Port Authority of overtime wages.[176] Unwilling to overturn *Pasquantino* and reject the notion that things of "economic value" such as "time and labor . . . can undergird a property fraud prosecution,"[177] the Court instead went wholly outside its prior property-or-not jurisprudence by declaring that "property must play more than some bit part in a scheme: It must be an 'object of the fraud.'"[178] The Court decided that the wages were *not* an object of the defendant's fraud, largely because "[t]o rule otherwise would . . . [allow] prosecutors [to] end-run *Cleveland* just by pointing to the regulation's incidental costs."[179] But while the Court admonished the government to refrain from interfering with "state and local policymaking,"[180] this part of the holding carries little weight beyond *Kelly* itself.

This part of *Kelly* carries little weight because it relates to a question of fact rather than of law. To explain, recall that federal property fraud is an inchoate crime.[181] As an inchoate crime, the key element is whether the fraudster *intends* to defraud. Thus, the government must allege in its indictment only that the fraudster *intended* to "obtain[] money or property by means of false or fraudulent pretenses, representations, or promises."[182] Intent is a question of fact for the jury, and juries may infer intent from circumstantial evidence.[183] Lower courts are obligated to consider the sufficiency of the indictment or the jury's findings of facts "in the light most favorable to the prosecution."[184] This deference extends to any inferences that can be plausibly (or reasonably or legitimately) drawn from the evidence.[185] Thus, prosecutors need only specify that a defendant *intended* to obtain something from a state victim that is unequivocally "property," like the wages in *Kelly*, to have a watertight theory of prosecution that complies with existing property fraud jurisprudence.[186]

176. See Brief for the United States at 46–47, *Kelly*, 140 S. Ct. 1565 (No. 18-1059), 2019 WL 6324152 ("The scheme in this case required the Port Authority to pay additional wages, . . . all to the benefit of Kelly[,] . . . [and] was effectuated by means of a lie . . . . The scheme was, therefore, . . . in violation of federal law.").

177. See *Kelly*, 140 S. Ct. at 1573.

178. Id. (quoting Pasquantino v. United States, 544 U.S. 349, 355 (2005)).

179. Id. at 1574.

180. Id.

181. See supra note 30 and accompanying text.

182. 18 U.S.C. §§ 1341, 1343 (2018).

183. See, e.g., 75A Am. Jur. 2d Trial § 669 (2024); 1 Stephen E. Arthur & Robert S. Hunter, Federal Trial Handbook: Criminal § 10:21 (2023).

184. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

185. See, e.g., United States v. Doe, 921 F.2d 340, 343 (1st Cir. 1990) (describing the standard as "including reasonable inferences"); United States v. Smith, 680 F.2d 255, 259 (1st Cir. 1982) (articulating a standard of considering evidence inclusive of "all legitimate inferences").

186. While *Kelly* rejected the government's wage-deprivation theory on appeal, the Court did so in a conclusory manner without reference to specific facts—further, the Court did not suggest an intention to modify the "sufficiency of the evidence" standard. See Kelly v. United States, 140 S. Ct. 1565, 1568–69 (2020) ("The question presented is whether the

Given the deferential standard of review, and given federal prosecutors' impressive conviction rates at trial,[187] it is very likely that a meticulous United States Attorney could craft an indictment that would satisfy the property-or-not test and thereby render the Court's modern fraud doctrine largely meaningless.

1. United States v. Gatto *and Allegations of Specific Intent.* — This is not just an exercise in theory. Recent prosecutions have demonstrated that carefully crafted indictments can and do pass the property-or-not-test. In *United States v. Gatto*,[188] the Second Circuit affirmed a fraud conviction when the defendants—Adidas employees—made secret payments to college basketball athletes in exchange for attending specific schools.[189] The prosecution alleged that the "object of the fraud" was to deprive the universities of their financial aid.[190] The defendants insisted that they had no interest whatsoever in the universities' financial aid and simply wanted these players to attend Adidas-sponsored schools.[191] A commonsense understanding of the scheme would support this point: Absent discovery of the scheme, the students, Adidas, *and* the "victim" universities all arguably *benefit* from the payments, and it makes little sense that the defendants would pay student athletes with the specific intent of depriving the school of its financial aid.[192] But the Second Circuit didn't give this

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defendants committed property fraud. The evidence . . . no doubt shows wrongdoing . . . . [But] the employees' labor was just the incidental cost of . . . regulation."). The Court's silence on its standard of review is particularly interesting given that the government vigorously argued for factual sufficiency. See, e.g., Brief for the United States at I, *Kelly*, 140 S. Ct. 1565 (No. 18-1059), 2019 WL 6324152 ("Question Presented: Whether the evidence that defendants repeatedly lied . . . is sufficient to sustain their convictions for wire fraud . . . ."). But the government did not specifically argue in its brief that there was sufficient evidence that the object of the fraud was the Port Authority's wages, which may explain why the matter was not addressed in the Court's opinion. See id. at 46 (focusing on the alleged property interest at stake and the lie employed to commandeer it).

187. See, e.g., John Gramlich, Only 2% of Federal Criminal Defendants Went to Trial in 2018, and Most Who Did Were Found Guilty, Pew Rsch. Ctr. (June 11, 2019), https://www.pewresearch.org/short-reads/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/2988-N4BR] (observing a roughly eighty-three percent conviction rate of all federal cases that went to trial in 2018).

188. 986 F.3d 104 (2d Cir. 2021).

189. Id. at 109–10.

190. These payments violated NCAA rules and, if disclosed, would have rendered the players ineligible to compete; thus, as alleged, the fraud was to deprive universities of aid that would have gone to eligible players. See id. at 110–11.

191. See id. at 117 ("Defendants argue that this testimony would have proven that they intended to help, not harm, the schools when they paid the Recruits' families to entice the Recruits to attend Adidas-sponsored schools.").

192. See, e.g., David Byrne, The Cost of Bribery and Corruption in the NCAA, Medium (June 24, 2019), https://medium.com/@david_37223/the-cost-of-bribery-and-corruption-in-the-ncaa-2fa97437246 [https://perma.cc/2LDD-69GR] (observing that the universities and brands like Adidas entered into lucrative and mutually beneficial partnerships and that students in the scheme would have been otherwise unpaid for their athletic performance regardless of which school they attended).

argument weight. Instead, it simply concluded that "a rational trier of fact [could] find that the Universities' athletic-based aid was 'an object' of [the defendants'] scheme" under a sufficiency of the evidence standard.[193] *Gatto* proves that it is at least *possible* for prosecutors to craft an indictment that is insulated from the scrutiny of the property-or-not test.

Subsequent cases further confirm that the *Gatto* approach can pass the property-or-not test even when a state entity is involved. In *United States v. Kousisis*, for example, defendants were convicted for making misrepresentations to have their company classified as a "disadvantaged business enterprise" (DBE) and secure lucrative contracts with the Pennsylvania Department of Transportation (PennDOT).[194] The defendants argued that the government had failed to prove property fraud because (1) the DBE certification was not a property interest, but an "intangible" interest in the state's hands, and (2) the companies actually did the work that PennDOT paid them to do—in other words, their misrepresentation was to obtain a state designation like that in *Cleveland*, rather than to obtain money or property.[195] The court rejected this argument, holding that "those false certifications were merely incidental to the true purpose of the fraudulent agreement—obtaining millions of dollars from PennDOT."[196] In other words, the government successfully articulated a theory of fraud that focused on a "traditional" property interest (money) while downplaying the state-owned intangible rights at play. Thus, what *Gatto* proved to be possible may become the default mode of government pleading to maximize compliance with the mandates of *McNally*, *Cleveland*, *Kelly*, and *Ciminelli*.[197]

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193. *Gatto*, 986 F.3d at 115 (quoting Kelly v. United States, 140 S. Ct. 1565, 1573 (2020)). It is also worth noting that *Gatto*'s purported victims—North Carolina State University, the University of Kansas, and the University of Louisville—are all public universities, but the *Gatto* court did not give any indication that being a state-funded university would result in different factual standards than being a private university. See id. at 110.

194. See United States v. Kousisis, 82 F.4th 230, 233–34 (3d Cir. 2023) ("[D]isadvantaged business enterprise [designations] . . . [are] intended to promote the participation of minority and disadvantaged businesses in . . . federally financed [DOT] contracts.").

195. See id. at 236.

196. Id. at 240.

197. *Ciminelli* in particular does little to add rigor to the technical requirements established in *Kelly*. *Kousisis*, for example, dispensed with *Ciminelli*'s "traditional property interests" requirement in a footnote, simply noting that "the basis of the wire fraud conviction is not PennDOT's frustrated interest in DBE participation. Rather, it is the actual money paid." Id. at 240 n.63. See also United States v. Griffin, 76 F.4th 724, 738 (7th Cir. 2023) ("[T]he Government did not pursue a right-to-control theory of fraud in this case; rather, the Government's allegations focused explicitly on the defendants' attempts to deprive the SBA of loan guarantees and the millions of dollars the SBA lost paying out on these loan guarantees.").

In another case, the government secured a conviction against an employee at Temple University who lied to *U.S. News and World Report* to artificially inflate the rankings of the university's online business program. See United States v. Porat, 76 F.4th 213, 215–18 (3d

2. United States v. Palma *and Identifying a Nonstate Victim.* — Even in a world in which the Court's property-or-not doctrine was wholly watertight, the loophole presented by *Gatto* would still exist. Assuming that *any* interest held in a state's hands was beyond the reach of the fraud statutes, prosecutors could still end-run *McNally*'s property-or-not test: If the government can identify a valid theory of property to sustain a conviction, what would stop it from carefully identifying a victim?

In the "Dieselgate" scandal case *United States v. Palma*, the government charged Emanuele Palma, an engineer for Fiat Chrysler, with wire fraud, alleging that Palma had "fraudulently calibrated the emissions control systems" on several models of vehicles so that they could pass environmental regulatory tests.[198] In the original indictment, the government argued that this scheme intentionally made "false and misleading representations" to regulators and "cause[d] [regulators] to make false and misleading representations to [the public]."[199] Palma moved to dismiss, arguing that the government was "repackaging" a scheme to deceive regulators into issuing a certification in an attempt to end-run *Kelly*.[200] The district court agreed and dismissed the charges.[201]

But the government tried again, revising its indictment to include "new consumer-focused allegations."[202] These new allegations heavily deemphasized the role of regulators, alleging that scheme intended "to obtain money and property . . . through the production and sale of . . . [v]ehicles that they knew did not comply with . . . regulations governing emissions."[203] By deceiving regulators, they argued that defendants were able to market their products as "EcoDiesel engine[s] that reduced emissions and were environmentally-friendly"[204] and scam consumers out of their money. The district court again dismissed the charges, holding that this was still "insufficient to establish a causal link between the alleged

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Cir. 2023). On appeal, the defendant tried to argue that "rankings are not property." Id. at 219 (internal quotation marks omitted) (quoting Brief for Defendant-Appellant and Appendix Volume I of II at 25, *Porat*, 76 F.4th 213 (No. 22-1560), 2022 WL 2349266). The court rejected this as an "attempt to redirect focus to the rankings" instead simply reiterating that "[the defendant] was not convicted on the theory that he deprived students of rankings; he was convicted for depriving them of *tuition money*." Id. This further shows the relative ease by which the government can craft a theory which places a traditional property interest at the heart of a scheme, rather than as an incidental byproduct. But see infra notes 208–209 and accompanying text.

198. United States v. Palma, No. 19-20626, 2020 WL 6743144, at *2 (E.D. Mich. Nov. 17, 2020).

199. Id.

200. Id. at *3.

201. Id. at *4.

202. United States v. Palma, No. 19-20626, 2021 WL 5040326, at *3 (E.D. Mich. Oct. 28, 2021), rev'd, 58 F.4th 246 (6th Cir. 2023).

203. Id. at *2.

204. Id. (alteration in original) (internal quotation marks omitted).

fraud and the loss of property or money" under *Kelly*.[205] But on appeal, the Sixth Circuit reversed.[206] Observing that "the government need only allege facts showing that the [fraud] had the object of using deception to deprive consumers of property," the circuit concluded that "[this] case at bar is clearly about property. And it is plausible that the scheme's goal was not merely to deceive regulators but also to sell the resulting products to consumers."[207]

To be sure, the approach in *Palma* might not work every time.[208] Prosecutors may heed the normative proclamations of the Court and decline to bring cases even when they might formally comply with the law. And even if they forge onward, each circuit has its own unique approach to the nonproperty elements of fraud jurisprudence that the Supreme Court has never addressed.[209] Accordingly, some circuits may have an

205. Id. at *4.

206. *Palma*, 58 F.4th at 250.

207. Id. at 250–51.

208. For example, courts have expressed skepticism in government indictments which allege that an employee-defendant's wages were the object of the fraud, largely on the grounds that this is too close to the honest services theory of fraud rejected in *McNally*. See United States v. Guertin, 67 F.4th 445, 451 (D.C. Cir. 2023) (rejecting the government's theory "that whenever an employee lies about a specific, concrete condition of employment—here, Guertin's suitability for security clearance—the employer is defrauded of 'money or property' by paying the employee's salary"); United States v. Yates, 16 F.4th 256, 266 (9th Cir. 2021) ("[T]here is a difference between a scheme whose object is to obtain a new or higher salary and a scheme whose object is to deceive an employer while continuing to draw an existing salary—essentially, avoiding being fired.").

209. One such circuit split is whether the government must specifically allege that the object of the fraud was to obtain property or whether it may merely contemplate a deprivation of property. See, e.g., Porcelli v. United States, 404 F.3d 157, 162 (2d Cir. 2005) ("[A] defendant does not need to literally 'obtain' money or property to violate the statute."); United States v. Hedaithy, 392 F.3d 580, 602 n.21 (3d Cir. 2004) ("[A] mail fraud violation may be sufficiently found where the defendant has merely deprived another of a property right."); Monterey Plaza Hotel Ltd. P'ship v. Local 483 of the Hotel Emps. & Rest. Emps. Union, 215 F.3d 923, 926–27 (9th Cir. 2000) ("[The fraud statutes] explicitly require an intent to *obtain* 'money or property[']. . . . The[ir] purpose . . . is to punish wrongful *transfers* of property from the victim to the wrongdoer . . . ." (emphasis added) (quoting 18 U.S.C. §§ 1341, 1344 (2018))); see also United States v. Shulick, 18 F.4th 91, 109 (3d Cir. 2021) ("*Kelly* did not announce a 'benefit' rule[] that . . . [fraud] may never occur unless the defendant converted property for his benefit . . . .").

Another such possible split is whether there must be "convergence" between the fraud and the victim's property—that is, whether the party that is deceived by the fraud must also be the party that is harmed by the scheme. Most courts currently do not have a convergence requirement. See, e.g., United States v. Greenberg, 835 F.3d 295, 306 (2d Cir. 2016) ("Nothing in these statutory texts, moreover, suggests that the scheme to defraud must involve the deception of the same person or entity whose money or property is the object of the scheme."); United States v. Seidling, 737 F.3d 1155, 1161 (7th Cir. 2013) ("[T]his Court does not interpret the mail fraud statute as requiring convergence between the misrepresentations and the defrauded victims." (citing United States v. Cosentino, 869 F.2d 301 (7th Cir. 1989)); United States v. McMillan, 600 F.3d 434, 450 (5th Cir. 2010) ("The Government was not required to prove that misrepresentations were made directly to any of the victims."); United States v. Blumeyer, 114 F.3d 758, 768 (8th Cir. 1997) ("[A]

approach more like the district court in *Palma* and conclude that such theories are too attenuated.[210] But this only reinforces the more critical point: Just as before the modern property-or-not test existed, circuit-by-circuit variance and prosecutorial practice plays a significant role in the doctrine's effectiveness. Thus, standing alone, the property-or-not test is a poor means by which to prevent the government from prosecuting state-actor misconduct.[211]

Because the property-or-not test fails sometimes, it fails all the time. While the Supreme Court has reversed a conviction every few years over the past several decades, the federal government prosecutes over 4,000 white-collar crime cases annually.[212] The Court simply cannot keep up with the sheer volume of fraud cases: If even a small fraction of federal prosecutors have the wherewithal to craft an indictment that complies with modern jurisprudence, the current fraud doctrine simply fails (save the occasional reversal) to prevent the government from policing state actors. Far from *McNally*'s vision of a bright-line rule that restricts the cases that

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defendant who makes false representations to a regulatory agency in order to forestall regulatory action that threatens to impede the defendant's scheme to obtain money or property from others is guilty of [fraud] . . . ."). But some circuits may be changing that approach. Compare United States v. Berroa, 856 F.3d 141, 151–53 (1st Cir. 2017) (reversing fraud convictions on the grounds that a scheme to cheat on medical exams lacked a "causal nexus" to alleged harm to patients that later paid for the fraudster's medical services), with United States v. Christopher, 142 F.3d 46, 54 (1st Cir. 1998) ("We see no reason to read into the statutes an invariable requirement that the person deceived be the same person deprived of the money or property by the fraud.").

A final circuit split is the extent to which defendants may assert that their conduct was not fraudulent because the alleged victim received the "benefit of the bargain." Compare United States v. Kousisis, 82 F.4th 230, 243 (3d Cir. 2023) ("PennDOT was partially deprived of the benefit of its bargain when it paid the full contract price because of a false pretense."), with *Guertin*, 67 F.4th at 451 ("If an employee's untruths do not deprive the employer of the benefit of its bargain, the employer is not meaningfully defrauded of 'money or property' when it pays the employee his or her salary.").

210. See supra notes 198–202 and accompanying text.

211. Furthermore, none of the thirty circuit cases that cite *Kelly* at the time of drafting have overturned a fraud conviction on the basis that property played only "a bit part in the scheme." See, e.g., *Shulick*, 18 F.4th at 110–13 (holding that the government's allegations "unquestionably" satisfied property fraud because the "aim [was] to obtain money" when applying harmless error review in a case in which a private defendant allegedly defrauded the state school system of contractual services (alteration in original) (citation omitted)); United States v. Shelton, 997 F.3d 749, 774–75 (7th Cir. 2021) (holding that a public official's use of office resources to run a reelection campaign satisfied the property test and was "a viable legal claim as charged and as the government argued it at trial"). This suggests that circuits themselves are not going to adopt a stricter standard of review for property fraud cases without further input from the Supreme Court.

212. See, e.g., Glenn R. Schmitt & Lindsey Jeralds, U.S. Sentencing Comm'n, Overview of Federal Criminal Cases, Fiscal Year 2021, at 5 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/D4NK-CUZ7] (reporting that the federal government managed 4,571 fraud, embezzlement, and theft cases in fiscal year 2021).

federal prosecutors can and cannot pursue, the modern fraud doctrine fails to protect state sovereignty in any meaningful way.

In sum, property fraud doctrine fails to advance the Court's conception of a proper federalist balance in criminal law. As a matter of black-letter law, it fails; as a matter of placing limits on the federal government, it fails. Of course, the Supreme Court could continue to redefine the meaning of "property" and make incremental changes, or grant certiorari to reverse one-off convictions it found particularly distasteful à la *Kelly*. But that approach will never truly achieve the ends that the Court seeks. To the extent that property is a constantly evolving concept,[213] unscrupulous fraudsters constantly devise new schemes,[214] and the government constantly develops new theories of criminality, trying to fix property fraud through the meaning of "property" risks becoming an endlessly futile endeavor.

III. UNRAVELING THE PROPERTY PARADOX: PROPOSALS TO FIX FRAUD JURISPRUDENCE

If property fraud is a broken doctrine, how can it be fixed? Perhaps by legislation—but despite calls for intervention,[215] it is unclear whether Congress will engage in the near term. And to the extent that fraud is a common law offense,[216] it is perhaps the Court's prerogative to update it as it sees fit.[217] If the Court insists on insulating states from federal

213. Cf. Merrill, supra note 105, at 751–52 (observing the challenges of reconciling new forms of property with existing principles such as the right to exclude). This is compounded by the fact that intangible property under *Carpenter* is also still alive and well in the private fraud context. See United States v. Shin, 73 F.4th 1077, 1101 (9th Cir. 2023) (rejecting an argument that *Ciminelli* protected a defendant who obtained "confidential information" through fraud on the grounds that *Carpenter* upheld such information as property).

214. See supra note 39 and accompanying text.

215. See, e.g., Sloan Renfro, Note, The Need for a Clear Statement After "Bridgegate": Combatting SCOTUS's Narrowing View of Corruption With an "Abuse of Functions" Offense, 59 Am. Crim. L. Rev. 197, 220 (2022) (proposing that Congress adopt "a new criminal statute that more broadly captures a public officials' abuses of functions"). For an overview of the honest services fraud context, see generally Andrew J. Fishman, Note, Enforcement of Honest Services Fraud Post–*Kelly v. United States*, 63 B.C. L. Rev. 2349 (2022). For a similar proposal for legislative intervention in honest services fraud, see Michael J. Morgan, Note, Bridging the Gap: Assessing the State of Federal Corruption Law After *Kelly v. United States*, 89 Fordham L. Rev. 2339, 2370 (2021) (defining honest services fraud with reference to state law).

216. See supra note 40.

217. Cf. Richman, Politics as Usual, supra note 22, at 577 ("*Kelly* . . . did not turn on textual analysis. Rather, . . . the Supreme Court took the statutory reference to 'property,' . . . and applied its own restrictive analysis. . . . [T]he authoritative text came from the Court's own precedents, not Congress."). The Court has also updated other "common law" statutes in other contexts, such as the Sherman Act in antitrust. See Richman, Defining Crime, supra note 49, at 325, 335 (first noting that the Court's approach to property fraud is somewhat anomalous compared to its treatment of other fraud statutes,

intervention, it needs to do more to fraud jurisprudence than simply redefine property. This Note offers an unexpected but highly effective solution to the Property Paradox: To most effectively further the federalism ideals articulated by the Court in *McNally*, the modern court must overrule *McNally* itself.

This Part illustrates two potential methods to fix fraud jurisprudence and endorses one as a novel and practical solution.[218] The first proposal attempts to salvage current property fraud doctrine by both strengthening the bright-line nature of the property-or-not test and making other elements of the fraud doctrine harder to satisfy. After exploring the complexities and potential unintended ramifications these changes may have, the Note does not endorse this approach. Instead, this Note proposes a new look at an old problem: reconsider *McNally*, and in so doing, address the core flaw of the modern doctrine—interpreting "to defraud" *or* "for obtaining money or property" as conjunctive and making "property" the key turning point of the legal analysis. This Note concludes that revisiting this interpretation—and reevaluating the fraud statutes with respect to the meaning of "fraud" rather than the meaning of "property"—will result in a clearer jurisprudence that draws a genuine boundary between federal and state criminal authority.

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then observing that "the Court has largely dropped the pretense of statutory interpretation" in the context of antitrust law and instead interprets it to establish "delegated criminal lawmaking authority"). This has been justified as a necessary component of modernizing federal law to comport with contemporary economic understandings of fair competition. See Daniel M. Tracer, Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute, 12 DePaul Bus. & Com. L.J. 1, 35 (2013). Such an approach comports with the principle of statutory construction that presumes Congress generally legislates in a way that incorporates common law language. See Anita S. Krishnakumar, The Common Law as Statutory Backdrop, 136 Harv. L. Rev. 608, 611 (2022) (pointing out that the Court stated that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses" (internal quotation marks omitted) (quoting Sekhar v. United States, 570 U.S. 729, 732 (2013))).

218. In some sense, neither of these proposals can be fairly said to be truly "novel." In 1999—before the *Cleveland* court had even established the property-or-not test with reference to state actors—Professor Ellen Podgor argued that defining the crime of fraud was inherently challenging and proposed several solutions. See Podgor, Criminal Fraud, supra note 57, at 760–68. Among those solutions were a proposal to limit the range of prosecutable objects of the fraud and to limit the definition of "fraud" to specific contexts—for example, obtaining and trafficking in passwords under the computer fraud statute. See id. While the proposals in this Note focus more specifically on refining the modern property-or-not test rather than fraud as a whole—and on doing so in a purely judicial manner without legislative intervention—it is worth noting that these proposals in prior fraud scholarship like Professor Podgor's could also address the same problems observed by this Note in a more holistic way.

A. *The Incremental Approach: A Harder Look at Both Property and Other Elements of Fraud*

In order to realize the ideal balance of state–federal power envisioned in *McNally* while still retaining the "property" core of modern fraud case law, the meaning of property in states' hands first needs to be completely watertight—put bluntly, there can be no such thing as "property" in a state's hands.[219] This approach to the property-or-not test would categorically reject even frauds involving money—like the taxes in *Pasquantino*—so long as a state is the purported victim. While this would require overruling *Pasquantino*, as well as much of the dicta in many post-*McNally* cases, it would present a workable bright-line distinction for lower courts to apply. But while this change alone would certainly send a much firmer message to the federal government—and make it harder for overzealous prosecutors to intervene in state affairs—it would not be enough to curb federal discretion entirely.

As discussed in Part II, prosecutors could end-run even a bright-line property rule if they can identify a nonstate victim.[220] The Supreme Court would need to not only revise the property-or-not test, but also wade into the other elements of property fraud. The Court has only briefly touched this area in the past. *Pasquantino* made a passing reference to two elements of property fraud: "that the defendant engage in a scheme or artifice to defraud," and that the "object of the fraud . . . be money or property in the victim's hands."[221] *Kelly* went only slightly further, holding that an "object of the fraud" cannot be merely an "incidental byproduct of the scheme."[222] In the absence of clear Supreme Court guidance, the lower courts have developed myriad formulations of the elements of property fraud, with disagreements ranging from whether a fraud must intend to "obtain" property or merely "deprive" a victim of property to requirements of "convergence" or a "causal nexus" between a misrepresentation and the victim's property.[223] To address this, the Court would need to review cases like *Palma*, in which the Sixth Circuit adopted a permissive construction of the "convergence" requirement between the misrepresentation made and the ultimate victim,[224] and instead impose rigid formulations of fraud that limits prosecutors' ability to develop new theories when states are involved. After enough incremental refinements to the entire fraud doctrine, this approach could finally provide maximal insulation between state and federal criminal affairs.

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219. See supra section II.B.2.

220. See supra section II.B.2.

221. Pasquantino v. United States, 544 U.S. 349, 355 (2005) (internal quotation marks and brackets omitted).

222. Kelly v. United States, 140 S. Ct. 1565, 1573 (2020) (internal quotations marks omitted).

223. See supra note 209 and accompanying text.

224. See supra section II.B.2.

But this approach is inadvisable for several reasons. First, this would prove challenging to reconcile with other jurisprudence beyond the mail and wire fraud statutes. In the bank fraud context,[225] for example, the Court rejected the requirement that a fraudster needs to specifically deceive the bank itself, holding that bank fraud requires only that a scheme intend to deprive the bank of some type of property and that *some* misrepresentation occur as part of the fraud.[226] The Court has often treated these "adjacent" fraud statutes as synonymous with mail and wire fraud jurisprudence;[227] thus, any doctrinal changes would also need to explicitly extend (or not extend) to other statutes as well, or else risk causing an unintended consequence (such as limiting prosecutors' ability to charge bank fraud).

Additionally, the Court would likely need to revisit its jurisprudence with respect to "Capital S" State actors. As discussed in Part II, even the current property doctrine can lead to outcomes that preclude the federal government from prosecuting frauds that implicate its own tax credits.[228] A "maximalist" property doctrine would only exacerbate these concerns. Assuming *McNally*'s reasoning was chiefly intended to protect the states—and not limit the federal government's ability to reach frauds against the federal government itself—the Court would need to delineate between state sovereigns, the federal government, and perhaps even other nations.

In sum, it is possible, but not advisable, to reform the existing property fraud jurisprudence into a doctrine that protects state sovereignty. If the rest of the fraud elements are anything like the property-or-not test, it would take years before the Court could wrangle the broader fraud doctrine into alignment with its views. Even then, the Court would still have to contend with a potentially overbroad doctrine that limits federal prosecutors' ability to pursue criminal charges in wholly appropriate scenarios. Because this approach would be so inherently challenging and would already result in significant doctrinal upheaval, this Note proposes that the Court would be better off scrapping *McNally*'s property-centric doctrine entirely.

B. *The Last Paradox: Abandoning Reliance on Property to Fix Property Fraud*

This section illustrates why construing "to defraud" to mean more than just "obtaining money or property" will actually promote, rather than hinder, the Court's view of federal–state balance. As discussed in Part I, *McNally* held that the 1909 amendment to the fraud statute "simply made

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225. See 18 U.S.C. § 1344 (2018).

226. See Loughrin v. United States, 573 U.S. 351, 363–64 (2014) (holding that a criminal must "acquire (or attempt to acquire) bank property 'by means of' the misrepresentation" (quoting 18 U.S.C. § 1344(2))).

227. See supra notes 27–28 and accompanying text.

228. This is precisely what occurred in the cases of *Griffin* and *Hoffman*. See supra notes 170–172 and accompanying text.

it unmistakable that the statute reached [schemes] . . . involving money or property."[229] The Court claimed that this interpretation was compulsory: The rule of lenity and a federalist disinclination toward interference in state and local affairs precluded broader interpretations.[230] But just because the statute had to be narrowed did not mean it must be narrowed with respect to *property*: *McNally* could have narrowed the federal common law meaning of fraud to protect states. This proposal would establish a bright-line definition of fraud that is even simpler than the property test in *McNally*: The federal meaning of "fraud" does not extend to cases that implicate a state's internal affairs or sovereign powers.

This conception of fraud would adequately address almost every instance of prosecutorial overreach that the Court's modern jurisprudence has reviewed. In cases like *McNally* or *Kelly* that involve state actors as defendants, for example,[231] such a rule would automatically foreclose all avenues to federal prosecution; any indictment that accuses state officials of misconduct would be dismissed. Prosecutions that allege a state victim, such as *Cleveland* or *Ciminelli*, would likewise never make it past the indictment stage. Further—and perhaps most importantly—this conception of fraud would also close the loopholes seen in *Gatto* and *Palma*. Unlike those cases (in which prosecutors carefully skirted the property doctrine by emphasizing facts that suggested property was in the hands of private victims rather than states) courts would again have standing doctrinal orders to dismiss any case that implicated the sovereign powers of a state as a victim *or* as the target of misinformation.

This doctrine would also be substantially easier for lower courts to apply than the current property-or-not test. Given the fact that the Court has never overruled *Carpenter*,[232] it seems clear that the Court's narrow conceptions of property are chiefly designed to protect states. Under a state-centric definition of fraud, rather than property, the Court could permit more expansive conceptions of property such as one rooted in the right to exclude.[233] This model of fraud simultaneously preserves state sovereignty while still allowing the fraud statutes to serve as a "stopgap device to deal on a temporary basis . . . with the new varieties of fraud that the ever-inventive American 'con artist' is sure to develop."[234] In private-party fraud settings, courts and prosecutors would no longer have to grapple with *Cleveland*'s victim analysis or *Pasquantino*'s "long recognized as property" test, thus ensuring that even the latest and most insidious

229. McNally v. United States, 483 U.S. 350, 359 (1987).

230. Id. at 360; see also supra section I.A.2.

231. See supra sections I.A.2, I.B.2.

232. Cf. Ciminelli v. United States, 143 S. Ct. 1121, 1127 (2023) (invoking *Carpenter* for the proposition that interests which have "long been recognized as property" would still satisfy the fraud statute (internal quotation marks omitted) (quoting Carpenter v. United States, 484 U.S. 19, 26 (1987))).

233. See supra note 105.

234. United States v. Maze, 414 U.S. 395, 406–07 (1974) (Burger, J., dissenting).

schemes *could* be addressed, whether by the states themselves or at the federal level.[235]

A bright-line rule of fraud, though analytically tempting in its simplicity, comes with many risks and trade-offs. Stare decisis, for example, heavily cautions against overturning precedent absent a "special justification."[236] This is especially true in matters of statutory construction.[237] Here, the Court would be going beyond overruling a single case—this approach could (if done maximally) erase fifty years of precedent. But at the same time, past Supreme Courts have been more willing to revisit old interpretations of so-called "common law" statutes,[238] and the Court has previously considered the fraud statutes to be common law statutes.[239] Moreover, the current Supreme Court has been particularly willing to overlook decades of stare decisis and judicial stability in the name of achieving its ideological goals.[240] In light of the property doctrine's inability to advance federalism interests, it would be comparatively straightforward for the Court to justify taking a new tack toward fraud jurisprudence.

A change of this magnitude would implicate considerations beyond stare decisis as well. For example, such drastic change could draw the ire of Congress and be overruled by statute—but that has not previously stopped the Court from rendering what it deems a sensible decision.[241] Similarly, a maximalist approach to state sovereignty, with no "safety valve" for federal intervention, might result in unchecked corruption at the state

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235. Cf. Cleveland v. United States, 531 U.S. 12, 21 (2000) (justifying its interpretation of the property fraud statute in part on the fact that the state was statutorily authorized to prosecute the types of deception at issue); see also supra notes 106–111 and accompanying text.

236. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) (declining to overturn Court precedent that a particular antidiscrimination statute reached private conduct despite several Justices' view that the precedent was "decided incorrectly").

237. See id. For an argument that frequent departures from the principle of stare decisis tend to produce legal uncertainty and disrupt the development of the law, see Stephen G. Gilles, The Supreme Court and Legal Uncertainty, 60 DePaul L. Rev. 311, 315 (2011). For an argument that rigid adherence to stare decisis may itself ossify untenable exceptions to a broader regulatory scheme, see Tracer, supra note 217, at 35.

238. See Krishnakumar, supra note 217, at 656 (discussing the "significant judicial discretion" involved in judges' use of the common law to interpret statutes).

239. See supra note 40 and accompanying text.

240. See Mark A. Lemley, The Imperial Supreme Court, 136 Harv. L. Rev. Forum 97, 112–15 (2022), https://harvardlawreview.org/wp-content/uploads/2022/11/136-Harv.-L.-Rev.-F.-97.pdf [https://perma.cc/84MF-F75A] (observing instances in which the Court has expressly overruled longstanding precedent).

241. This is exactly what happened after *McNally*. See supra notes 81–83 and accompanying text. For a discussion of the interplay between congressional updating of the fraud statutes and pronouncements by the Court, see Blair A. Rotert, Note, Was "Varsity Blues" Actually a Crime? The Supreme Court's Crusade Against the Federal Mail and Wire Fraud Statutes, 64 B.C. L. Rev. 415, 434 (2023).

level.[242] And it is worth asking whether it truly would respect state sovereignty to strip them of federal prosecutorial resources in this area. But the Supreme Court has not acknowledged these concerns in its previous decisions.[243] These considerations—and countless others—ought to factor in when deciding whether or not to change the existing approach to fraud jurisprudence. But external considerations aside, this much is clear: If the Court's primary motivation in its property fraud jurisprudence is to truly achieve its ideal conception of federalism, then it needs to make a change.

CONCLUSION

This Note began by declaring that the meaning of federal fraud is at a crossroads. This is still true. Relative to the ends that it purportedly seeks to achieve, property fraud jurisprudence is demonstrably broken. But in a broader sense, it is the Supreme Court that is at a crossroads. The modern Court has been willing to overturn long-standing precedent,[244] apply novel methods of statutory interpretation,[245] and articulate entirely new doctrines[246] in the name of limiting federal power. If it so chooses, the Court may exercise nearly uncontestable power to rewrite criminal fraud jurisprudence in conformity with its definition of the proper federal–state balance.

The Court must now ask itself if the reform is truly worth the risk: If the Court decides to prioritize state sovereignty over federal anticorruption efforts—and perhaps all else—this Note has proposed novel and pragmatic ways to do so. If the Court concludes that the jurisprudential upheaval is not worth the marginal benefit of yet another federalism-first doctrine, it should give more grace to the lower courts and prosecutors

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242. See Torres-Spelliscy, supra note 22, at 1705–08 (arguing that further narrowing of anticorruption laws such as the fraud statutes will adversely affect political systems). For further discussion of the corrosive impact of local corruption on the political process, see Thomas M. DiBlagio, Federal Public Corruption Statutes Targeting State and Local Officials: Understanding the Core Legal Element and the Government's Burden of Proving a Corrupt Intent After *McDonnell*, 7 U. Denv. Crim. L. Rev. 47, 47–48 (2017).

243. See, e.g., supra note 235. For "tentative support" of states' abilities to self-regulate anticorruption, see Ben Covington, Comment, State Official Misconduct Statutes and Anticorruption Federalism After *Kelly v. United States*, 121 Colum. L. Rev. Forum 273, 276 (2021), https://www.columbialawreview.org/wp-content/uploads/2021/12/Covington-State_Official_Misconduct_Statutes_And_Anticorrupted_Federalism_After_Kelly_v_United_States-1.pdf [https://perma.cc/8UYX-T7NK].

244. See supra note 240 and accompanying text.

245. See William N. Eskridge, Jr. & Victoria F. Nourse, Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism, 96 N.Y.U. L. Rev. 1718, 1761–63 (2021) (commenting that the "dogmatic" New Textualist approach of the current Court has led to "cherry-picking" statutes to achieve certain interpretive outcomes).

246. See, e.g., Mila Sohoni, The Major Questions Quartet, 136 Harv. L. Rev. 262, 276 (2022) (arguing that the Court's recently developed "major questions" doctrine limits both executive and congressional power).

who deal with corruption and wrongdoing on a day-to-day basis. This Note does not pretend to know the answer to that question, but it does make one thing clear: Regardless of the Supreme Court's decision, adopting half-measures and incremental refinements to the meaning of "property" is the wrong approach. As the Supreme Court so frequently seems to advise the political branches of government—if it "desires to go further, it must speak more clearly than it has."[247]

247. McNally v. United States, 483 U.S. 350, 360 (1987).

ESSAY

THE NEW OUTLAWRY

Jacob D. Charles & Darrell A.H. Miller***

From subtle shifts in the procedural mechanics of self-defense doctrine to substantive expansions of justified lethal force, legislatures are delegating larger amounts of "violence work" to the private sphere. These regulatory innovations layer on top of existing rules that broadly authorize private violence—both defensive and offensive—for self-protection and the ostensible maintenance of law and order. Yet such significant authority for private violence, and the values it projects, can have tragic real-world consequences, especially for marginalized communities and people of color.

We argue that these expansions of private violence tap into an ancient form of social control—outlawry: the removal of the sovereign's protection from a person and the empowerment of private violence in service of law enforcement and punishment. Indeed, we argue that regulatory innovations in the law of self-defense, defense of property, and citizen's arrest form a species of "New Outlawry" that test constitutional boundaries and raise profound questions about law and violence, private and public action.

Simultaneously, we use the New Outlawry as a frame to explore connections between several constitutional doctrines heretofore considered distinct. Whether limits on authorized private violence fall under the state action doctrine, the private nondelegation doctrine, due process or equal protection, or the republican form of government guarantee, experimentation with the New Outlawry provides an opportunity to explore how these different doctrinal categories share common jurisprudential and normative roots in the state's monopoly over legitimate violence.

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** Melvin G. Shimm Professor of Law, Duke Law School. For excellent research assistance, we are grateful to Amelia Boland (Pepperdine), Nadia Brenden (Pepperdine), Lauren Carrasco (Pepperdine), Zane Martin (Duke), and Zeke Tobin (Duke). Kerstin Leistner of the Pepperdine Law Library was also extremely helpful in tracking down source material. Thanks to Joseph Blocher, Sam Buell, Jade Craig, Brandon Garrett, Aziz Huq, Jon Michaels, David Noll, Alice Ristroph, Caprice Roberts, Eric Ruben, Susanna Siegel, and Malcolm Thorburn. Thanks also to the attendees at the December 5, 2023, University of Chicago Law School workshop and the January 6, 2024, Association of American Law Schools Remedies Section workshop.

INTRODUCTION

From subtle shifts in the procedural mechanics of self-defense doctrine[1] to substantive expansions of justified lethal force,[2] many red-state legislatures across the country are delegating larger amounts of "violence work"[3] to the private sphere. In the wake of antiracism protests in summer 2020, Republican-dominated legislatures proposed a slew of such measures.[4] The measures provide private citizens greater license to

1. See Eric Ruben, Self-Defense Exceptionalism and the Immunization of Private Violence, 96 S. Cal. L. Rev. 509, 523–528 (2023) [hereinafter Ruben, Self-Defense Exceptionalism] (exploring the shifts in self-defense doctrine).

2. See infra Part II.

3. Micol Seigel, Violence Work: State Power and the Limits of Police 12 (2018) (discussing the range of public and private actors who act as "channels for violence condoned by the state").

4. See, e.g., Reid J. Epstein & Patricia Mazzei, G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them), N.Y. Times (Apr. 21, 2021), https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html (on file with the *Columbia Law*

engage in violence to protect themselves from perceived threats and, supposedly, to contribute to the public maintenance of law and order.[5]

Some proposals have been drastic, potentially upsetting what previously had been thought settled practice and doctrine. New Hampshire lawmakers proposed authorizing deadly force against someone who is "likely to use *any* unlawful force in the commission of riot."[6] Arizona legislators wanted to authorize deadly force whenever a property owner reasonably believed it necessary "to prevent the other's commission of criminal damage" to the property.[7] Missouri lawmakers sought to create a statutory presumption that any interpersonal violence was justified by self-defense, entitling an actor to presumptive immunity from arrest, prosecution, and conviction.[8] Florida Governor Ron DeSantis proposed a measure that would permit private deadly force to prevent looting, criminal mischief, or arson that disrupts a business operation.[9]

Review) (last updated June 23, 2023) (describing measures that were "part of a wave of new anti-protest legislation, sponsored and supported by Republicans, in the 11 months since Black Lives Matter protests swept the country following the death of George Floyd"); see also Jon Michaels & David Noll, Vigilante Democracy (forthcoming 2024) (manuscript at 10–12) (on file with the *Columbia Law Review*) (arguing that the Charlottesville protests leading to the death of Heather Heyer demonstrated a power to silence political speech through political violence "that could be wielded by a highly motivated and weaponized group of true believers, willing to do what was necessary to Make America Great Again").

5. See infra Part II (explaining both kinds of greater liberalization); see also Rafi Reznik, Taking a Break from Self-Defense, 32 S. Cal. Interdisc. L.J. 19, 22 (2022) ("[F]ollowing their historical precursors who used private violence to conserve a political and economic order that put them atop the social hierarchy, contemporary vigilantes can claim both self-defense and 'law and order' on their side.").

6. HB 197 (2021): Allow Deadly Force Defending a Person in a Vehicle, Citizens Count, https://www.citizenscount.org/bills/hb-197-2021/ [https://perma.cc/9FV6-KLZS] (last visited Jan. 29, 2024) (emphasis added); see also US Protest Law Tracker, Int'l Ctr. for Not-For-Profit L., https://www.icnl.org/usprotestlawtracker/ [https://perma.cc/NML5-RLHA] (last visited Jan. 29, 2024).

7. S. 1650, 55th Leg., 2d Reg. Sess. (Ariz. 2022) (emphasis omitted). The proposed bill referred to "criminal damage under section 13-1602, subsection A, paragraph 7," but the relevant section of the Arizona Code appears to only have six paragraphs in subsection A. See Ariz. Rev. Stat. Ann. § 13-1602(a) (2024). In a similar vein, one Arizona legislator was reported to have introduced a bill loosening the ability to use lethal force against suspected undocumented immigrants who trespass on private property. See Leah Britton, GOP Bill Would Make It Easier for AZ Ranchers to Shoot and Kill Border-Crossers on Their Property, AZ Mirror (Feb. 23, 2024), https://azmirror.com/2024/02/23/republican-bill-would-let-az-ranchers-shoot-and-kill-border-crossers-on-their-property/ [https://perma.cc/CZX2-GHG6]. A legislative supporter of the bill called it "a great Second Amendment bill." Id. (internal quotation marks omitted).

8. See infra section II.B. The law was referred to as the "Make Murder Legal Act" by law enforcement groups and was narrowly defeated in committee. See Gregg Palermo, Missouri Bill Dubbed 'Make Murder Legal Act' Dies in Senate Committee, Fox2now (Feb. 10, 2022), https://fox2now.com/news/missouri-bill-dubbed-make-murder-legal-act-dies-in-senate-committee [https://perma.cc/8N6B-NPVD]. For more on the operation of this law, see infra text accompanying notes 232–243.

9. Erik Ortiz, "Stand Your Ground" in Florida Could Be Expanded Under DeSantis' "Anti-Mob" Proposal, NBC News (Nov. 12, 2020), https://www.nbcnews.com/news/us-

These proposals capture a cultural zeitgeist that increasingly condones violence, especially directed at those perceived as outsiders or political antagonists.[10] Some measures have gone beyond mere proposals. Numerous states have relaxed their rules for civilian use of force, authorizing private citizens to mete out violence in a greater number of situations.[11] In 2018, for example, Idaho passed a law expanding its justifiable homicide statute to permit deadly force in defense of "a place of business or employment" against anyone who "manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the . . . place of business or employment."[12] Professor Cynthia Lee documents how states have expanded the defense of habitation—the traditional right to use deadly force to defend one's home—to many more places than the dwelling.[13] As Professor Mary Anne Franks writes, laws like these are "a significant departure from the long-held belief that the use of deadly force should not be used to protect mere property."[14]

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news/stand-your-ground-florida-could-be-expanded-under-desantis-anti-n1247555/ [https://perma.cc/45QH-JCN3].

10. See Anthony Michael Kreis, The New Redeemers, 55 Ga. L. Rev. 1483, 1488–89 (2021) ("After four years, the American right's full-throated embrace of grievance politics at the behest of Donald Trump created a tinderbox. This period was nothing short of a slow burning Second Redemption." (footnote omitted)); see also Nicole Hemmer, Opinion, Jason Aldean Can't Rewrite the History His Song Depends on, CNN, https://www.cnn.com/2023/07/20/opinions/opinion-jason-aldean-video-cmt-vigilantism-hemmer/index.html [https://perma.cc/A396-HWVE] (last updated July 20, 2023) (describing the "toxic message" behind Jason Aldean's song "Try That in a Small Town" in which he threatens that "those who step out of line . . . —whether they 'cuss out a cop' or 'stomp on a flag'—will find themselves facing down 'the gun that my granddad gave me'" (quoting Jason Aldean, Try That in a Small Town (BBR Music Grp. 2023))).

11. See infra Part II.

12. Act of Mar. 21, 2018, ch. 222, § 1, 2018 Idaho Sess. Laws 500–501 (codified at Idaho Code § 18-4009 (2024)). The statute says such force is only justified if the intruder entered for the purpose of "offering violence," but the new amendment provides that "a person who unlawfully and by force or by stealth enters or attempts to enter a . . . place of business or employment . . . is presumed to be doing so with the intent to commit a felony." Id. The year prior, Iowa also created a presumption that a person reasonably believed deadly force was necessary when they used that force against one who was "[u]nlawfully entering the . . . place of business or employment . . . of the person using force by force or stealth, or has unlawfully entered by force or stealth and remains within the . . . place of business or employment." Act of Apr. 13, 2017, ch. 69, § 39, 2017 Iowa Acts 177 (codified at Iowa Code § 704.2A (2024)).

13. See Cynthia Lee, Firearms and the Homeowner: Defending the Castle, the Curtilage, and Beyond, 108 Minn. L. Rev. (forthcoming 2024) (manuscript at 4–5) (on file with the *Columbia Law Review*).

14. See Mary Anne Franks, Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege, 68 U. Mia. L. Rev. 1099, 1106 (2014).

Journalist Alex Pareene also chronicles an uptick in legislation immunizing drivers who run over protesters.[15] Iowa, for instance, provides civil immunity to drivers who, while "exercising due care," run over protesters blocking public highways.[16] And Oklahoma provides civil and criminal immunity for persons who unintentionally injure another if they reasonably believe they must flee a riot in their vehicle and exercise due care.[17] Not coincidentally, legislative interest in these laws picked up after the protests arising from George Floyd's 2020 murder.[18]

These regulatory innovations layer on top of existing rules that broadly authorize private violence, like expansive stand-your-ground and citizen's arrest laws. Stand-your-ground laws give citizens the right to use deadly force even when they could safely leave an encounter.[19] In doing so, they provide private actors the prerogative of police, who also owe no duty to retreat from a potentially deadly scenario.[20] Yet "this transformation of citizen into cop," argues Professor Kimberly Ferzan, "is practically redundant because little-known citizen's arrest laws already do just that."[21] Citizen's arrest laws grant private citizens the right to

15. See Alex Pareene, The Right to Crash Cars Into People, New Repub. (Apr. 24, 2021), https://newrepublic.com/article/162163/republicans-anti-riot-laws-cars/ [https://perma.cc/N2BW-667T].

16. See Iowa Code § 321.366A (conferring immunity from civil liability for "[t]he driver of a vehicle who is exercising due care and who injures another person who is participating in a protest, demonstration, riot, or unlawful assembly or who is engaging in disorderly conduct and is blocking traffic in a public street").

17. Okla. Stat. tit. 21, § 1320.11 (2024).

18. See U.S. Current Trend: Bills Provide Immunity to Drivers Who Hit Protesters, Int'l Ctr. for Not-For-Profit L. (Sept. 2021), https://www.icnl.org/post/analysis/bills-provide-immunity-to-drivers-who-hit-protesters/ [https://perma.cc/AZ53-2H8D]; see also Nancy C. Marcus, When "Riot" Is in the Eye of the Beholder: The Critical Need for Constitutional Clarity in Riot Laws, 60 Am. Crim. L. Rev. 281, 300–01 (2023) (discussing how "riot" designation can be pivotal in these driver immunity statutes); Epstein & Mazzei, supra note 4. The timing of these laws, in response to heightened attention about inequality, should come as no surprise. See Seigel, supra note 3, at 182 (arguing that "the more unequal are social relations, the more violence is required to preserve social hierarchies, and a cycle of exacerbated inequality and correspondingly greater violence can ensue as elites attempt to keep other people from leaving or revolting").

19. See, e.g., Wyatt Holliday, Comment, "The Answer to Criminal Aggression is Retaliation": Stand-Your-Ground Laws and the Liberalization of Self-Defense, 43 U. Tol. L. Rev. 407, 418–20 (2012) (explaining Florida's permissive self-defense laws, which largely eliminate any duty to retreat if attacked); see also Ann Marie Cavazos, Unintended Lawlessness of Stand Your Ground: Justitia Fiat Coelum Ruat, 61 Wayne L. Rev. 221, 222 (2016) (describing the "castle law," which is the "general idea that a man will be excused for using force to defend his home").

20. Kimberly Kessler Ferzan, Response, Stand Your Ground, *in* The Palgrave Handbook of Applied Ethics and the Criminal Law 731, 742 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019).

21. Kimberly Kessler Ferzan, Response, Taking Aim at Pointing Guns? Start with Citizen's Arrest, Not Stand Your Ground, 100 Tex. L. Rev. Online 1, 8 (2021), https://texaslawreview.org/wp-content/uploads/2021/09/Ferzan.Publication.pdf [https://perma.cc/L4HA-JU4F] [hereinafter Ferzan, Taking Aim].

coercively capture and detain suspected wrongdoers, often with little to no training and few to none of the constitutional protections that circumscribe police-initiated arrests.[22] When these citizen's arrest privileges are coupled with expansive stand-your-ground immunities, private citizens obtain powers to use violence that equal—and sometimes exceed—the powers of professional law enforcement.[23]

Such broad authority for private violence workers—and its expressive effects—can have disastrous real-world consequences. The stories are familiar and harrowing. Ahmaud Arbery, a twenty-five-year-old African American man, was simply out for a jog when three men chased him down in a vehicle and shot him. The killers claimed to be engaging in armed civilian policing in response to a series of recent break-ins in the neighborhood.[24] But for the fact that one individual recorded the homicide, a criminal case against the three men may never have been brought. At trial, the defendants claimed both a right to engage in citizen's arrest and a right to self-defense.[25] On his own initiative, Kyle Rittenhouse traveled interstate to Kenosha, Wisconsin, to provide volunteer security services amid racial justice protests in the city and ended up killing two men.[26] Daniel Perry ran a red light, drove into protesters at a racial justice rally, and then shot and killed a legally armed protester who approached his vehicle.[27] Perry had previously texted a friend that he "might go to

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22. See infra section II.A.

23. They may even exceed the power available to members of the military. See ABA, National Task Force on Stand Your Ground Laws: Final Report and Recommendations 5–6 (2015) ("Texas law provides a more lenient rule for a civilian's use of a firearm than is available to a police officer or even a [soldier] at war, notwithstanding the fact that police officers and military officers receive extensive firearms and defensive training."); id. at 22 (quoting Christopher Jenks, a Texas law professor and former U.S. military member, as saying that it's "troubling that under Stand Your Ground, there are less restrictions imposed on U.S. service members using deadly force when they return to the United States than when they are deployed in a combat environment").

24. Joseph Margulies, How the Law Killed Ahmaud Arbery, Bos. Rev. (July 7, 2020), https://www.bostonreview.net/articles/joseph-margulies-arbery-shooting/ [https://perma.cc/FA75-QK3C].

25. Clare Hymes, Closing Arguments in Trial for Ahmaud Arbery's Killing Focus on Citizens' Arrest Law and Claim of Self-Defense, CBS News, https://www.cbsnews.com/live-updates/ahmaud-arbery-murder-trial-closing-arguments-day-1/ [https://perma.cc/YXK8-7RG3] (last updated Nov. 23, 2021).

26. See Ruben, Self-Defense Exceptionalism, supra note 1, at 510–12 (discussing Rittenhouse's case from a self-defense perspective); Paige Williams, Kyle Rittenhouse, American Vigilante, New Yorker (June 28, 2021), https://www.newyorker.com/magazine/2021/07/05/kyle-rittenhouse-american-vigilante/ (on file with the *Columbia Law Review*) ("[T]hanks to the opportunists who have seized on the Rittenhouse drama, the case has been framed as the broadest possible referendum on the Second Amendment. No other legal case presents such a vivid metaphor for the country's polarization.").

27. Eric Levenson, Lucy Kafanov & Nouran Salahieh, Daniel Perry, Army Sergeant Convicted of Murder for Shooting Black Lives Matter Protester, Asks for 10 Years in Prison, CNN, https://www.cnn.com/2023/05/09/us/daniel-perry-texas-sentencing/index.html [https://perma.cc/S8ZQ-6RCP] (last updated May 10, 2023).

Dallas to shoot looters."[28] Some of these men were convicted of crimes. Others were not.[29]

These permissive laws and the constitutional and policy questions they raise are not entirely novel. After all, as Professor Farah Peterson reminds, "There are more than enough signs, for those looking to find them, that violence has been an integral part of the American system of government from the Founding era."[30] Indeed, "[v]iolence is the double-edged sword of democracy."[31] It has been used to secure safety and freedom since the beginning but also used to undermine democratic institutions and to subordinate people. Recent events, legislative experimentation with ever-expansive spheres of private authority,[32] and a growing public distrust of governing institutions and fellow citizens make questions about authorized private violence newly urgent.[33]

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28. Jim Vertuno, Man Guilty in Texas Protest Killing Posted 'I Am a Racist', Associated Press (May 9, 2023), https://apnews.com/article/black-lives-matter-protest-shooting-texas-sentence-04abb51c52d41fa259b2f2ed8ee72f37/ [https://perma.cc/2RFQ-KV2V] (internal quotation marks omitted).

29. See, e.g., Andrea A. Amoa, Comment, Texas Issues a Formidable License to Kill: A Critical Analysis of the Joe Horn Shootings and the Castle Doctrine, 33 T. Marshall L. Rev. 293, 296–97, 313 (2008) (describing the case of Joe Horn, who was not indicted after shooting and killing two men who had burglarized his neighbor's home, despite the 911 operator telling him that property is not worth killing over).

30. Farah Peterson, Our Constitutionalism of Force, 122 Colum. L. Rev. 1539, 1548 (2022); see also Jared A. Goldstein, Real Americans: National Identity, Violence, and the Constitution 184 (2022) (describing what he calls the "Violent Constitution" and tracing "recent movements that rely on the Constitution as justification for antigovernment violence"); Robert M. Cover, Violence and the Word, 95 Yale L.J. 1601, 1610 n.22 (explaining the centrality of violence to "the practice of law and government"). As Robert Cover says, "[R]ead the Constitution. Nowhere does it state, as a general principle, the obvious—that the government thereby ordained and established has the power to practice violence over its people. That, as a general proposition, need not be stated, for it is understood in the very idea of government." Id.

31. Kellie Carter Jackson, Force and Freedom: Black Abolitionists and the Politics of Violence 4 (2019).

32. See Jon D. Michaels & David L. Noll, Vigilante Federalism, 107 Cornell L. Rev. 1187, 1191 (2023) [hereinafter Michaels & Noll, Vigilante Federalism] (exploring "the nascent surge in private subordination regimes and understand[ing] it as both a symptom and an accelerant of today's dominant legal, cultural, and political movements").

33. See id. at 1190–91 (studying a related "broader trend among state legislatures to use private rights of action to penalize and suppress highly personal and often constitutionally protected activities"); Peterson, supra note 30, at 1548 (discussing how the post–January 6, 2021, era should affect the analysis of violence and governance). We recognize that the effect of these kinds of laws raise empirical questions. This project, however, should be conceived of as one of spotting a trend and surfacing the issues that arise from them, perhaps before any demonstrable impact on homicides, racial violence, or other metrics can be assessed. We are also cognizant that even small but salient effects of privatized violence can have important behavioral impacts on other margins. For example, unpunished—and often approved—white supremacist terror in the South had a century-long impact on the political composition of the national government. See Richard White, The Republic for Which It Stands 622 (2017) (finding that by 1888, "[s]outhern fraud and violence ensured that every white vote in the South was worth two Northern votes in presidential elections").

This Essay builds on our prior work outlining the limits of the state's authority to delegate violence[34] and makes two primary contributions to debates about delegation,[35] privatization,[36] and violence.[37]

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34. See Jacob D. Charles & Darrell A.H. Miller, Violence and Nondelegation, 135 Harv. L. Rev. Forum 463, 472 (2022), https://harvardlawreview.org/wp-content/uploads/2022/06/135-Harv.-L.-Rev.-F.-463.pdf [https://perma.cc/V5ZT-QV9J]; see also David M. Lawrence, Private Exercise of Governmental Power, 61 Ind. L.J. 647, 647 (1986) [hereinafter Lawrence, Private Exercise] (recognizing that "[t]he transfer of governmental powers raises the issue of to what extent it is constitutionally permissible to delegate those powers to private actors").

35. Many of these debates are about intergovernmental power. See generally F. Andrew Hessick & Carissa Byrne Hessick, Nondelegation and Criminal Law, 107 Va. L. Rev. 281 (2021) (adding to the debate concerning the level of delegation that should be permitted in criminal law and arguing criminal courts should permit less delegation than in other areas of law); Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277 (2021) (making an originalist argument against constitutional nondelegation); Nicholas R. Parrillo, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence From the Federal Tax on Private Real Estate in the 1790s, 130 Yale L.J. 1288 (2021) (arguing in favor of the permissibility of congressional delegation by looking to acts of Congress from 1789–1800); Ilan Wurman, Nondelegation at the Founding, 130 Yale L.J. 1490 (2021) (arguing that, during the Founding Era, a nondelegation doctrine existed that did not permit delegation of important issues from Congress to the Executive).

But there is also a rich and burgeoning literature about private delegation and even delegations in the context of coercive government powers. See, e.g., Robert Craig & andré douglas pond cummings, Abolishing Private Prisons: A Constitutional and Moral Imperative, 49 U. Balt. L. Rev. 261, 282–83 (2020) (discussing private nondelegation in the context of for-profit incarceration); Paul J. Larkin, Jr., The Private Delegation Doctrine, 73 Fla. L. Rev. 31, 50 (2021) (discussing the history of private nondelegation doctrine); Richard Primus & Roderick M. Hills, Jr., Suspect Spheres, Not Enumerated Powers: A Guide for Leaving the Lamppost, 119 Mich. L. Rev. 1431, 1470 (2021) (articulating a "corporate nondelegation doctrine" limiting government delegation to private corporations); Clifford J. Rosky, Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States, 36 Conn. L. Rev. 879, 969–70 (2004) (discussing and critiquing force privatization as a form of delegation); Alexander Volokh, The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges, 37 Harv. J.L. & Pub. Pol'y 931, 955 (2014) (discussing both federal and state nondelegation doctrine and distinguishing them from due process concerns).

36. See, e.g., Chiara Cordelli, The Privatized State 9 (2020) (arguing that the most significant wrong of privatization is that it "consists in the creation of an institutional arrangement—the privatized state—that denies, to those subject to it, equal freedom, understood not as mere noninterference but rather as a relationship of reciprocal independence") [hereinafter Cordelli, The Privatized State]; Catherine M. Donnelly, Delegation of Governmental Power to Private Parties: A Comparative Perspective 1 (2007) ("In the complex and managerial context of modern government, private non-governmental actors exercise delegated legislative and executive powers as a matter of regularity, and not uncommonly, they exercise judicial power too."); Jon D. Michaels, Constitutional Coup: Privatization's Threat to the American Republic 4 (2017) [hereinafter Michaels, Constitutional Coup] (discussing the constitutional dimensions of broad privatization of government functions in a number of spheres); Paul R. Verkuil, Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It 1 (2007) ("The government exercises sovereign powers. When those powers are delegated to outsiders, the capacity to govern is

First, this Essay reframes the authorization and toleration of private violence from a libertarian model to one that better reflects Anglo-American political and legal traditions. This reframing exposes these efforts as less about expanding negative liberty and more about implementing an affirmative program of social control, especially targeting marginalized communities.[38] The Essay then affixes a label to this phenomenon, calling it the "New Outlawry." The New Outlawry shares features with the ancient practice of outlawry, in which the sovereign removed the protection of the law from designated individuals and left them vulnerable to the plenary use of private violence by any other person.[39] Like traditional outlawry, the state leverages its monopoly on legitimate violence by dispersing it, empowering and immunizing private violence for public ends. Unlike traditional outlawry, however, the New Outlawry minimizes or abandons the ex ante procedural controls on who is exiled from the protection of the law; and it operates in ways that are (1) both more and less particularized, and (2) both more and less temporally contingent. The New Outlawry also operates in ways in which racialized preconceptions and biases are covert but no less fatal.

Second, this Essay uses the New Outlawry as a vehicle to explore constitutional limitations on empowerment of private force wielders. Many discrete constitutional domains—state action doctrine, the private nondelegation doctrine, due process and equal protection, and the republican form of government guarantee—rely on an intuition that there are constitutional boundaries to delegation to private parties, especially

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undermined"); Chiara Cordelli, The Wrong of Privatization: A Kantian Account, *in* The Cambridge Handbook of Privatization 21, 21 (Avihay Dorfman & Alon Harel eds., 2021) ("[E]ven if privatization could facilitate the achievement of socially desirable goals, there would still be non-instrumental reasons to object to it (or, at least, to many of its instances)."); Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1501–02 (2003) (exploring accountability mechanisms for private delegation).

37. See supra notes 19–23. There have been some scholarly explorations of the limits of violence delegation, but these generally cover only one aspect of the problem and were written before the current environment and escalating legal permissions called for new attention. See, e.g., F. Patrick Hubbard, The Value of Life: Constitutional Limits on Citizens' Use of Deadly Force, 21 Geo. Mason L. Rev. 623, 623–24 (2014) (proposing a strict-scrutiny-like tailoring regime for private uses of deadly force); Rosky, supra note 35, at 966–70 (discussing privatized force in the context of political liberalism); John L. Watts, Tyranny by Proxy: State Action and the Private Use of Deadly Force, 89 Notre Dame L. Rev. 1237, 1242 (2014) (outlining deadly force as a nondelegable government function).

38. See Sean A. Hill II, The Right to Violence 6–8 (Ohio State Legal Stud. Rsch. Paper No. 811, 2023), https://ssrn.com/abstract=4634278 [https://perma.cc/US7Z-T5AR] (drawing attention to the way that a de facto right to engage in violence accrues to white people and stands at its apex when used to subordinate racial minorities); see also Shawn E. Fields, Neighborhood Watch: Policing White Spaces in America 5 (2022) (exploring how racial fear drives private policing of Black people, including "by exacting vigilante justice through extrajudicial killing under the guise of self-defense and standing one's ground").

39. It should not come as a surprise that many of these laws are enacted in jurisdictions sympathetic to an ideology that Professor Anthony Michael Kreis calls the "Second Redemption." See Kreis, supra note 10, at 1488–89.

with respect to violence. But as of yet, few scholars have discussed how these doctrinal areas are linked. State experimentation with the New Outlawry provides an opportunity to explore how these different doctrinal categories share common jurisprudential and normative roots.

The following analysis builds on open questions in this debate. As one scholar recently underscored, "[L]ittle contemporary work has been done examining when governments may permissibly authorize deadly force apart from self-defense"[40]—or, one should add, on the limits of that authorization even when characterized as self-defense. Many scholars who have written about private policing focus on the professional, institutional, paid private security guards patrolling malls, gated communities, retail stores, and similar venues.[41] Other studies of privatized violence focus on the outsourcing of national security efforts to private military contractors.[42]

This Essay focuses on the unpaid, "volunteer," noninstitutionalized, domestic private policers who do not wear uniforms (at least not the retail kind) or answer to corporate decisionmakers. Despite differences with their formalized and professional peers—both public and corporate

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40. Robert Leider, Taming Self-Defense: Using Deadly Force to Prevent Escapes, 70 Fla. L. Rev. 971, 1008 (2018) [hereinafter Leider, Taming Self-Defense].

41. See, e.g., Wilbur R. Miller, A History of Private Policing in the United States 1 (2020) [hereinafter Miller, A History of Private Policing] (exploring the provision of "order maintenance, detection and prevention of crime" by private companies in the commercial, residence, and leisure sectors); Elizabeth E. Joh, The Paradox of Private Policing, 95 J. Crim. L. & Criminology 49, 55 (2004) [hereinafter Joh, Paradox of Private Policing] (defining "private policing" for her purposes as "the various lawful forms of organized, for-profit personnel services whose primary objectives include the control of crime, the protection of property and life, and the maintenance of order" (emphasis omitted)); Hans-Bernd Schäfer & Michael Fehling, Privatization of the Police, *in* The Cambridge Handbook of Privatization 206, 206–07 (Avihay Dorfman & Alon Harel eds., 2021) (examining "civilian private security in relation to public police"); David A. Sklansky, The Private Police, 46 UCLA L. Rev. 1165, 1166–68 (1999) (discussing private police "to demonstrate why private policing deserves more attention from legal scholars, to suggest what forms that attention should take, and to draw some tentative lessons from the little we already know"); Comment, Private Police Forces: Legal Powers and Limitations, 38 U. Chi. L. Rev. 555, 556 (1971) [hereinafter Private Police Forces] ("Although private police perform numerous functions, including the provision of armored car, patrol, and investigation services, they are used most extensively as uniformed guards in industrial and retail settings."); see also Ric Simmons, Private Criminal Justice, 42 Wake Forest L. Rev. 911, 919 (2007) (noting that "[t]he degree to which private entities have taken over law enforcement functions in this country is extraordinary" and describing the ubiquity of private police).

42. See, e.g., Maryam Jamshidi, The Private Enforcement of National Security, 108 Cornell L. Rev. 739, 741–42 (2023) (seeking to "analyze national security's private enforcement for the first time"); Herbert Wulf, The Privatization of Violence: A Challenge to State-Building and the Monopoly on Force, 18 Brown J. World Affs. 137, 137–38 (2011) (examining the "privatization of traditionally military and police functions" as one "strateg[y] . . . to tackle the security dilemma"); see also Jon D. Michaels, Deputizing Homeland Security, 88 Tex. L. Rev. 1435, 1437 (2010) (discussing the "deputization" of a "new cadre of private snoops, data crunchers, and . . . vigilantes" that purport to assist in homeland security).

ones[43]—these private actors are also imbued with significant authority.[44] And this Essay argues that, at least in some circumstances, the state should be responsible when it delegates power to private parties to deal out violence, especially violence that the state itself could not lawfully engage in.[45] The object in this Essay is to surface and scrutinize the deep legal and theoretical issues that arise when the state decides to delegate violence work to private parties—whether by express authorization, tacit permission, post-hoc immunization, or other means.

The topic is pressing. Lawmakers are actively proposing and passing legislation. Experiments in one sector of a state's "ecology of violence"[46] are wreaking unintended consequences in another. Forces of both the left and the right are questioning foundational notions of the state as legitimate violence monopolist and the constitutional doctrines that reflect that role, whether those challenges arise in the form of police abolition or expanded rights to carry and use firearms.[47]

The Essay proceeds in four Parts. Part I describes the traditional forms of outlawry and highlights its features as a form of social control. From even before the Norman Conquest, Anglo-Saxon law recognized a form of legal action in which a person could be declared an outlaw—placed outside the protection of the law and subject to the lethal violence of any

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43. See Joh, Paradox of Private Policing, supra note 41, at 112 (explaining the ways in which professional private police are different from ordinary citizens who perform policing tasks).

44. Michaels & Noll, Vigilante Federalism, supra note 32, at 1193 (discussing the increasing ways that legislatures are authorizing private subordination, in what the authors term "legal vigilantism").

45. See Private Police Forces, supra note 41, at 581 ("The routine participation of private police in certain areas of law enforcement may sometimes supplant the public police, and to this extent private police are performing a public function." (footnote omitted)).

46. Cf. Eric C. Schneider, The Ecology of Homicide: Race, Place, and Space in Postwar Philadelphia 7 (2020) (using this term to describe how individuals both influence and are shaped by their environments with respect to the relationship between systemic inequality and murder cases in Philadelphia). This Essay conceives of this ecology as having a number of features. For example, distrust in the state's official violence workers may give rise to other non-state-authorized violence work. A state experiment with loosened stand-your-ground laws may occur at the same time a city therein undertakes significant policing reform.

47. See, e.g., Robert J. Cottrol & Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Geo. L.J. 309, 314 (1991) (identifying an individual rights theory of the Second Amendment as ensuring "an armed citizenry in order to prevent potential tyranny by a government empowered and perhaps emboldened by a monopoly of force"); Benjamin Levin, What's Wrong with Police Unions?, 120 Colum. L. Rev. 1333, 1339 (2020) ("Adopting this understanding of the critiques would speak to a radical vision of police reform—the problem is not that police are unionized but that they have so much power by virtue of constitutional doctrine, their monopoly on state violence, and so forth."); Karl T. Muth, The Panther Declawed: How Blue Mayors Disarmed Black Men, 37 Harv. BlackLetter L.J. 7, 11 (2021) ("Without the Second Amendment, the tyrannical state enjoys a total monopoly on violence; the downtrodden populace serves at such a government's heel and bends to its whim." (footnotes omitted)).

other citizen.[48] Over time, this severe judgment grew less harsh and submitted to greater exceptions and qualifications.[49] After briefly remaining in the states after independence, it was abolished for most people in U.S. jurisdictions in the nineteenth century.[50] Nevertheless, vestiges of outlawry remained in America, especially as applied to African Americans (both enslaved and free), and formed the basis for a type of racialized social control that relied on the authorization and immunization of private violence.

Building on this groundwork, Part II describes what this Essay refers to as the New Outlawry. Although the New Outlawry differs in context, operation, and effect, this web of proposed and enacted laws nevertheless serves a function similar to traditional outlawry.[51] First, the New Outlawry designates certain persons, under certain conditions, as having forfeited their right to protection of the state (or as lacking any legitimate claim to protection at all); second, it authorizes private actors to judge the violence necessary to incapacitate or punish these persons; third, the express or implicit purpose of these laws is to enlist, empower, deputize, and immunize private parties to deploy violence in service of social control, often in ways the state itself legally cannot.[52]

Next, Part III explores how the New Outlawry represents a departure from basic assumptions of the state that form the best account of Anglo-American political and legal traditions. It then describes how these assumptions undergird a set of seemingly disparate constitutional doctrines: those dealing with state action, private delegation, due process, equal protection, and guarantees of republican government.

Part IV discusses the implications of the New Outlawry with respect to these doctrines and theories, exploring how courts and policymakers may respond to accelerated experimentation with violence delegations.

I. TRADITIONAL OUTLAWRY: A BRIEF HISTORY

This Part sketches the traditional forms of outlawry in medieval England as well as its migration and alteration in the United States. Section

48. See Ralph B. Pugh, Early Registers of English Outlaws, 27 Am. J. Legal Hist. 319, 319 (1983) (noting that outlawry had been imported from Scandinavia the century before and "was a flourishing concept at the Norman Conquest"); H. Erle Richards, Is Outlawry Obsolete?, 18 Law Q. Rev. 297, 298 (1902) (noting that outlawry is "one of the oldest weapons" of the English common law, predating even the Norman Conquest).

49. See G.S. Rowe, Outlawry in Pennsylvania, 1782–1788 and the Achievement of an Independent State Judiciary, 20 Am. J. Legal Hist. 227, 229 (1976) (describing the increasing ways that outlawry was made less harsh).

50. See, e.g., Mark DeWolfe Howe, The Process of Outlawry in New York: A Study of the Selective Reception of English Law, 23 Cornell L.Q. 559, 572 (1938) (discussing New York's repeal of its outlawry statutes in 1828).

51. See Rowe, supra note 49, at 228 (describing how outlawry in medieval England functioned "as a declaration of war by the state against an offending member").

52. See infra Part II.

I.A describes the English roots of outlawry, its basic structural features, and its eventual decline. Section I.B describes how outlawry migrated to the colonies and transmuted into a form of racialized social control from the antebellum period through Jim Crow. This history supplies context for what Part II describes as the New Outlawry: a form of privatized violence for ostensibly public ends that shares the basic function, but not the procedural particulars, of the old outlawry.

A. *English Practice*

In its earliest iterations, outlawry was akin to a default judgment against an accused offender who failed to appear to answer the charges made against them.[53] The accused's flight from justice was taken as admission of guilt, and, since the crime for which they were accused was frequently punishable by death, a judgment of outlawry permitted other citizens to lawfully kill them.[54] At common law, an outlaw was described as one with a wolf's head—*caput lupinum*: "a hateful beast which it was the duty of every man to exterminate."[55] As with a wolf, there was no prohibition against killing an outlaw.[56] Quite the contrary, "in the strictest sense of the law, it appears rather to have been the duty of every man to do so."[57] Outlawry, in effect, put the accused back into the state of nature, in a war against all and an enemy of all.[58]

The outlaw was deemed "friendless,"[59] and those who harbored an outlaw were subject to the same punishment as the outlaw.[60] Those who excluded, captured, or killed an outlaw were performing a public service and contributing to the overall maintenance of law and order. During a period in which long terms of imprisonment were impracticable, the

53. See Richards, supra note 48, at 298 ("It was in substance a process by which punishment could be inflicted on criminals who fled from justice: their flight was regarded as an admission of guilt, and they were outlawed in their absence without trial.").

54. Id.; Jane Y. Chong, Note, Targeting the Twenty-First Century Outlaw, 122 Yale L.J. 724, 744 (2012) ("Their flight amounted to a confession of guilt for the crime charged, and in their absence they were outlawed and subject to execution without trial.").

55. Richards, supra note 48, at 298.

56. Id.

57. Id.

58. See Deborah A. Rosen, Slavery, Race, and Outlawry: The Concept of the Outlaw in Nineteenth-Century Abolitionist Rhetoric, 58 Am. J. Legal Hist. 126, 127 (2018) ("[B]ecause the outlaw had absconded in order to evade the criminal justice system, he was seen as having 'broken his part of the original contract between king and people . . . .'" (quoting 4 William Blackstone, Commentaries *375)); 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 471 (Liberty Fund 2010) (1895) ("He who breaks the law has gone to war with the community; the community goes to war with him.").

59. 2 Henry of Bratton, On the Laws and Customs of England 361 (George Woodbine ed., Samuel E. Thorne trans., President & Fellows of Harvard Coll. 2003) (n.d.).

60. Id. ("Hence if anyone wittingly feeds [an outlaw] after his outlawry and expulsion, or harbours him or communicates with him in some way or hides or keeps him, he ought to receive the same punishment as the outlaw . . . ." (footnotes omitted).

penalties associated with outlawry were thought a mechanism to incapacitate criminals and to prevent crime.[61]

The practice changed significantly over time.[62] In 1215, Magna Carta established that outlawry could only be imposed consistent with a proceeding that afforded some minimum level of process, prescribing that it be done according to the "law of the land."[63] Later, there developed a fairly laborious practice of serial demands for the miscreant's appearance before he could be formally outlawed.[64] The penalties also gradually grew less severe. English law eventually prohibited private citizens from killing an outlaw at will, although private summary executions of outlaws still occurred.[65] Because of the harshness of the punishment, formal outlawry judgments began to be overturned routinely based on even the smallest technical errors, like spelling mistakes.[66] And the form, nature, and consequences of an outlawry declaration varied widely depending on factors like the type of proceeding and underlying offense.[67] By the

61. See Susan Stewart, Outlawry as an Instrument of Justice in the Thirteenth Century, *in* Outlaws in Medieval and Early Modern England: Crime, Government and Society, c.1066–c.1600, at 37, 52–53 (John C. Appleby & Paul Dalton eds., 2009); see also J.E.A. Jolliffe, The Constitutional History of Medieval England From the English Settlement to 1485, at 107–08 (1961) (noting that the king began to extend his special peace over the realm and used outlawry as a "common process of coercive procedure, and a penalty for many offences of violence"); Anthony Musson, Social Exclusivity or Justice for All? Access to Justice in Fourteenth-Century England, *in* Pragmatic Utopias: Ideals and Communities, 1200–1630, at 136, 150 (Rosemary Horrox & Sarah Rees Jones eds., 2001) ("[Outlawry's] effectiveness derived from its use of the sanction of exclusion as a means of preventing crime.").

62. John Bellamy, Crime and Public Order in England in the Later Middle Ages 105 (1973) ("By the later fifteenth century to be outlawed was much less of a calamity than it had been even a century before."); Chong, supra note 54, at 746–47 (detailing changes over the centuries).

63. Nat'l Archives & Recs. Admin., Magna Carta Translation 4 (Nicholas Vincent trans., Sotheby's Inc. 1985) (1215), https://www.archives.gov/files/press/press-kits/magna-carta/magna-carta-translation.pdf [https://perma.cc/768C-KLEA].

64. Bellamy, supra note 62, at 105.

65. Id. (discussing the exoneration of a Lincolnshire man and his associates for the arrest and execution of a man suspected of being an outlaw); Chong, supra note 54, at 746.

66. Chong, supra note 54, at 747 & n.105; see also Theodore F.T. Plucknett, A Concise History of the Common Law 397 (1956) ("[Outlawry's] traditional machinery was slow, but crushing. When it was felt that it was too severe, reform took the shape . . . insisting upon extraordinary accuracy in every detail of the outlawry procedure."); Howe, supra note 50, at 565 (describing how the unfairness of outlaw proceedings led judges to "protect the rights of outlawed defendants by means of artificial technicalities").

67. Chong, supra note 54, at 746 ("Changes to outlawry proceedings over time suggest some sensitivity to outlawry's fairness as a legal judgment. For example, murder, arson, rape, maiming, and larceny were among the thirteenth-century felonies that warranted outlawry and execution.").

nineteenth century, England had abolished outlawry in civil proceedings, and the practice became moribund in criminal actions.[68]

B. *American Practice*

Despite claims that "[t]here is no such thing as legal outlawry in our American jurisprudence,"[69] the practice was in fact transplanted to America.[70] Pennsylvania and North Carolina, for example, adopted forms of outlawry—and were among the last states to abandon the practice.[71] In Pennsylvania, if a defendant failed to appear in court before trial, the state supreme court could declare the person an outlaw, rendering a conviction and sentence itself.[72] If the person was outlawed for treason or other serious crimes, the President of the Pennsylvania Executive Council was in charge of ensuring that an execution was carried out.[73]

North Carolina adopted the English tradition of outlawry for felonies.[74] While Pennsylvania charged a specified government official with carrying out executions based on outlawry, North Carolina's statute retained a greater role for private citizens.[75] It provided that "any citizen of the State may capture, arrest, and bring [an outlaw] to justice, and in case of flight or resistance by him after being called on and warned to surrender, may slay him without accusation of any crime."[76] In that respect, "North Carolina was the last state to declare a fugitive from justice an outlaw executable upon sight."[77]

North Carolina's outlawry statute endured until modern times. In 1974, a man who had been declared an outlaw pursuant to the statute surrendered to authorities and brought suit in federal court to invalidate

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68. Bobby G. Deaver, Note, Outlawry: Another "Gothic Column" in North Carolina, 41 N.C. L. Rev. 634, 639 (1963). The last writ of outlawry was issued by an English court in 1855. Id. at 640.

69. Harlow v. Carroll, 6 App. D.C. 128, 133 (D.C. Cir. 1895); see also Howe, supra note 50, at 566 (collecting these common but incorrect statements).

70. See United States v. Hall, 198 F.2d 726, 727–28 (2d Cir. 1952) ("Apparently outlawry was imported into our criminal law with some early vigor, but during the nineteenth century was either abolished or fell into disuse." (footnote omitted)); see also Green v. United States, 356 U.S. 165, 171 (1958), overruled on other grounds by Bloom v. Illinois, 391 U.S. 194 (1968) (stating that "the severe remedy of outlawry . . . fell into early disuse in the state courts").

71. Rosen, supra note 58, at 127.

72. Chong, supra note 54, at 748.

73. Id. The Executive Council was colonial Pennsylvania's executive branch of government from 1777–1790. Supreme Executive Counsel of Pennsylvania, Hist. Soc'y of Penn., http://digitalhistory.hsp.org/pafrm/org/supreme-executive-council-pennsylvania/ (on file with the *Columbia Law Review*) (last visited Feb. 26, 2024).

74. See Chong, supra note 54, at 749–50; Deaver, supra note 68, at 642.

75. Chong, supra note 54, at 750.

76. N.C. Gen. Stat. § 15-48 (repealed 1997), reprinted in Autry v. Mitchell, 420 F.Supp. 967, 968 n.1 (E.D.N.C. 1976).

77. Chong, supra note 54, at 749–50.

the law.[78] As discussed in more detail in section II.A below, a three-judge district court struck down the statute.[79] "The effect of the proclamation" of outlawry, said the court, "is to license the public to kill the accused felon if he runs after being called on to surrender."[80] The court concluded that the statute violated both the Due Process and the Equal Protection Clauses.[81] It also stated, without deciding, that if the statute were construed as imposing a penalty, it would violate the Eighth Amendment's bar on cruel and unusual punishment:

> If the statute is viewed as a penal one, we would have little difficulty in concluding that authorizing citizens to slay an outlawed person with impunity is so disproportionate to the underlying status of accused felon as to be cruel in its excessiveness and unusual in its character and inconsistent with evolving standards of decency that mark the progress of a maturing society.[82]

Unlike limitations in the state's then-existing citizen's arrest statute or the restrictions on law enforcement's use of deadly force, the outlawry statute empowered "armed citizens—not in uniform" to kill an accused felon fleeing out of fright.[83] "The extreme remedy granted the citizenry infringes, we think, a fundamental right: that one not be denied life, or be wounded, except by due process of law."[84]

While outlawry gradually ebbed for the majority of the populace in America, it remained a potent legal and political fixture as applied to enslaved and free Black people.[85] Colonial slave codes in function, purpose, and occasionally even terminology maintained a system of outlawry, placing Black people outside the law's protection and subject to the private judgment and violence of any citizen they encountered. A South Carolina colonial regulation "effectively turned the entire white population into a community police force" authorized to capture fugitives "dead or alive."[86] Virginia, like South Carolina, immunized the murder of

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78. See Autry v. Mitchell, 420 F. Supp. 967, 968 (E.D.N.C. 1976).

79. See Id. at 969.

80. See id. at 970.

81. See id. at 969.

82. See id. at 969 n.2 (citing Trop v. Dulles, 356 U.S. 86, 101, 102 (1958)).

83. Id. at 971.

84. Id. at 971. The state did not officially repeal the statute until 1997. See Act of May 22, 1997, ch. 80, § 10, 1997 N.C. Sess. Laws 158, 162.

85. For a discussion of the racialized nature of the authority to use violence, see generally Hill, supra note 38 ("Not only did legal institutions generate and enforce a right to violence against enslaved people; the state also took affirmative steps—whether conditioning enslavement on the status of the mother or prohibiting the testimony of enslaved victims—in order to shield white perpetrators from prosecution and punishment.").

86. Sally E. Hadden, Slave Patrols: Law and Violence in Virginia and the Carolinas 17–18 (2001); see also An Act for the Better Ordering of Slaves, No. 57, § 1 (1690), reprinted in 7 The Statutes at Large of South Carolina 343, 347 (David J. McCord ed., 1840)

escaped slaves who resisted re-enslavement.[87] North Carolina authorized parties to kill fugitives from slavery who had been declared fugitives by proclamation of a justice of the peace.[88]

After independence, some states maintained their colonial customs, rendering fugitive slaves unprotected and subject to private violence.[89] North Carolina's statute allowed citizens to "kill and destroy such slave or slaves, by such ways and means as he shall think fit."[90] Outlawry declarations against fugitives appeared in North Carolina newspapers well into 1856.[91] Tennessee had a similar law.[92] Even in states with statutes less express than in North Carolina or Tennessee, enslaved people were still treated as outside of the law's protection, absent extraordinary situations.[93] As one court put it, "The power of the master must be absolute, to render the submission of the slave perfect."[94] Said another southern court, the enslaved person "is subject to despotism" and the untrammeled will of the master.[95]

(immunizing private individuals who killed a slave attempting to escape capture "any law, custom or usage to the contrary notwithstanding").

87. An Act Concerning Servants and Slaves § 34 (1705), reprinted in 2 Slavery in the United States: A Social, Political, and Historical Encyclopedia 535, 540 (Junius Rodriguez ed., 2007) (providing that owners who killed a person for resisting his enslavement should be acquitted "as if such accident had never happened").

88. Rosen, supra note 58, at 128 n.5; see also Act of Apr. 4, 1741, ch. 24, 1741 N.C. Acts § 45, reprinted in 23 The State Records of North Carolina 191, 201–02 (Walter Clark ed., 1905) ("And if any Slave . . . against whom Proclamation hath been . . . issued . . . do not immediately return home, it shall be lawful for any Person . . . whatsoever to kill and destroy such Slave . . . by such Ways and Means as [they] shall think fit, without Accusation or Impeachment of any Crime for the same."); Act of 1715, ch. 46, 1715 N.C. Acts § 9, reprinted in 23 The State Records of North Carolina 62, 63–64 (Walter Clark ed., 1905) ("And if any person or persons shall kill any Runaway Slave that hath lyen out two months such person or persons shall not be called to answer for the same if he give Oath that he could not apprehend such Slave but was constrained to kill him.").

89. Rosen, supra note 58, at 128–30.

90. Id. at 129 (quoting Act of 1831, ch. 111, 1831 N.C. Acts § 22, reprinted in 1 The Revised Statutes of the State of North Carolina, Passed by the General Assembly at the Session of 1836–7, at 571, 577–78 (James Iredell & William H. Battle eds., 1837)).

91. Rosen, supra note 58, at 128.

92. Act of Oct. 23, 1799, ch. 9, 1799 N.C. Acts § 2, reprinted in Public Acts of the General Assembly of North-Carolina and Tennessee, Enacted From 1715 to 1813, in Force in Tennessee 300, 300–01 (3d ed. 1815) (excepting from the crime of murder the "killing [of] any slave outlawed by virtue of an act of general assembly[,]" or the killing of a slave attempting to resist an owner or after "moderate correction").

93. Rosen, supra note 58, at 136–37. Professor Sean Hill distinguishes between the protection from private violence afforded to Black people when they were understood to be chattel or labor as opposed to protection from private violence on the basis of being a member of the political community or an agent deserving protection in their own right. See Hill, supra note 38, at 18–36.

94. See State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829).

95. See Ex parte Boylston, 33. S.C.L. (2 Strob.) 41, 43 (Ct. App. L. 1847); see also Darren Lenard Hutchinson, "Continually Reminded of Their Inferior Position": Social

Abolitionists of the time often seized on this arbitrariness to explain how slavery had reduced Black people to the status of outlaws, even without the formal procedural mechanisms of outlawry. They quoted from contemporary advertisements offering bounties to anyone "who would 'kill and destroy'" outlawed runaways.[96] As historian Deborah Rosen notes, lawyers sympathetic to the abolitionist movement "observed that in practice no official declaration was necessary" to make runaways outlaws, because southerners would treat any act of violence against a fugitive as justified.[97]

Even after universal emancipation with the Thirteenth Amendment, outlawry retained a vestigial presence when it came to the social control of freedmen and free African Americans. In the immediate post–Civil War South, Carl Schurz, a German immigrant, Union soldier, journalist, and eventual U.S. Senator, conducted a tour of the southern states. He remarked how southern society attempted to reconstruct the slave system through the empowerment of private law.[98] Describing one set of laws, he observed that the state had essentially "place[d] the freedmen under a sort of permanent martial law" because it had "invest[ed] every white man with the power and authority of a police officer as against every black man."[99] The legislation, to Schurz, was "a striking embodiment of the idea that although the former owner has lost his individual right of property in the former slave, 'the blacks at large belong to the whites at large.'"[100]

The long period of Jim Crow relied upon the basic structure of outlawry to enforce racial subordination and white supremacy. Ida B. Wells, for example, argued that the widespread tolerance of lynching of Black people in the post–Civil War era continued this tradition.[101] And the practice of rendition in the Jim Crow era, which historian Margaret Burnham skillfully describes, similarly left many Black people subject to wanton violence.[102] The "quotidian violence that shaped routine

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Dominance, Implicit Bias, Criminality, and Race, 46 Wash. U. J.L. & Pol'y 23, 74–75 (2014) (describing other similar examples).

96. Rosen, supra note 58, at 132.

97. Id. at 134.

98. Report on the Condition of the South (1865), reprinted in 1 Carl Schurz, Speeches, Correspondence and Political Papers of Carl Schurz 279, 326 (Frederic Bancroft ed., 1913). For more on this phenomenon, see Aziz Z. Huq, The Private Suppression of Constitutional Rights, 101 Tex. L. Rev. 1259, 1270–1288 (2023).

99. Schurz, supra note 98, at 326 (Frederic Bancroft ed., 1913).

100. See id.

101. David Squires, Outlawry: Ida B. Wells and Lynch Law, 67 Am. Q. 141, 142 (2015); see also Hill, supra note 38, at 36 (explaining how unpunished white violence against African Americans in the form of massacres and lynching assured a racialized right to commit violence based on the racial identity of the perpetrator and the victim).

102. See Margaret Burnham, By Hands Now Known: Jim Crow's Legal Executioners 3 (2022) ("Though the rendition cases read as a twentieth-century archive about states' rights and Black citizenship, the roots of these laws and legal practices lie in antebellum fugitive slave laws.").

experiences" in the Jim Crow South, she argues, kept Black Americans from the promise of full citizenship.[103] Private actors were key to maintaining this system. "Conflating private and public authority, and immunizing whites who served as unofficial policemen . . . Jim Crow blurred the lines between formal law and informal enforcement."[104]

* * *

Outlawry's procedural components as a legal practice may have changed over time, but at its root, outlawry retained essential features from the medieval period to the early twentieth century. First, the designation formally or functionally rendered a subject outside the law's protection. Second, it empowered private parties to engage in violence against these outlaws. Third, private violence directed against the outlaw was understood as performing a public function, whether that be prevention or punishment of crime, reclamation of private property rights in human beings, or enforcement of racialized social norms.

II. THE NEW OUTLAWRY

The state has long legitimated private violence.[105] Yet, this legitimation warrants examination, given how governments are attempting to exploit criminal law and private violence to obtain the purported benefits of physical coercion without the corresponding limitations, a phenomenon we call the New Outlawry.

This New Outlawry performs functions similar to the traditional form of outlawry: It leverages the power of the state as the legitimate violence monopolist and sets the outlaw outside the state's protection; it empowers and immunizes private violence against that outlaw; and it does so for the express or tacit purpose of social control and crime prevention.[106]

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103. See id. at xii.

104. Id. at xiii; see also Peterson, supra note 30, at 1619 (criticizing the notion that "there will be clear lines between constitutional violence and private crime" and noting that this "naiveté . . . has never really been available to the Black citizen, for whom, in many places and across generations, the police force has blended imperceptibly into the vigilante posse comitatus"); Hill, supra note 38, at 46–47 (observing how both violence by both private and public actors maintained a system of white supremacy).

105. See Daniel D. Polsby, Reflections on Violence, Guns, and the Defensive Use of Lethal Force, 49 Law & Contemp. Probs. 89, 89 (1986) ("That individuals may legally employ lethal force under certain circumstances seems so intuitively obvious that it is seldom questioned."); Lance K. Stell, Close Encounters of the Lethal Kind: The Use of Deadly Force in Self-Defense, 49 Law & Contemp. Probs. 113, 113 (1986) (noting the view that "it would be inconsistent, if not perverse, to affirm the right to life but refuse to permit the use of means reasonably thought necessary to repel aggressive threats to self-preservation").

106. This is not, of course, to say all legal permissions for violence are problematic. A state should no more prohibit self-defense than allow it on the merest pretext of insult. It is only to highlight that there are limits to how permissive those laws can rightly be, and to surface the sources of public legitimacy that make such acts of violence something more than the imposition of despotic dominion over another. See infra Parts III–IV.

Where the New Outlawry diverges from its common law roots is in context, operation, and effect. In context, the New Outlawry arose after the rights revolution of the latter half of the twentieth century.[107] Compared to medieval England, or even the early twentieth century, modern constitutional restraints on public action and public agents are much thicker and more legally cognizable.[108] Further, the distinction in legal doctrine between private and public action is far more rigid in the twenty-first century than it was historically.[109] This new context provides temptations for governments to legislate in ways that seek to obtain all the social effects of law enforcement and crime control, including reinforcement of status hierarchies, without any of the constitutional or regulatory costs associated with public action.

In operation, the New Outlawry uses few procedural controls to determine who is exiled from the protection of the law and under what circumstances. Instead, decisions about who has put themselves "at war" with the community—and, hence, at risk of lethal violence—are entrusted to the discernment and armament of individual violence workers, often unaided by any training or process.[110] No public official makes the specific determination to make someone an outlaw; private individuals are allocated that power. The result is a system that diverges from the old outlawry in its generality and temporality. An entire group may become presumptive outlaws by implicit bias and threat perception, although no overt legal designation of that group has occurred. At other times, a single person may become an outlaw when engaging in certain conduct; but such outlawry does not extend beyond the temporal limits of the conduct. The consequence is a form of outlawry whose boundaries and subjects are difficult to identify in advance but whose consequences are no less lethal.

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107. See Jack M. Balkin, The Roots of the Living Constitution, 92 B.U. L. Rev. 1129, 1152 (2012) (describing this phenomenon). But see Eric J. Miller, The Warren Court's Regulatory Revolution in Criminal Procedure, 43 Conn. L. Rev. 1, 5–6 (2010) (critiquing this account because it "turned progressive attention away from the vital and difficult task of generating a positive doctrinal and political account of policing: its justification, intrinsic limits, and proper means of regulation").

108. See infra Part III.

109. There are some signs, however, of that beginning to relax. Cf. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022) ("Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say."). And there is, to be sure, still "fuzziness at the edges" in the current dichotomy. Lawrence, Private Exercise, supra note 34, at 648.

110. Like old outlawry, the New Outlawry places some people outside the law's protective force and subject to the "inconveniences" reminiscent of a Lockean state of nature, in which each person served as "both judge and executioner of the law of nature." John Locke, Two Treatises of Government 127, 184 (Thomas I. Cook ed., Hafner Publishing 1947) (1690) [hereinafter Locke, Two Treatises]; see also V.F. Nourse, Reconceptualizing Criminal Law Defenses, 151 U. Pa. L. Rev. 1691, 1705 (2003) ("If we allow any defendant to exempt himself from the rules and challenge the state's monopoly on violence, we fear that he will enforce the law in ways that are excessive or partial.").

In effect, the New Outlawry reinforces social domination. But it does so through indifference to—or acquiescence in—the private biases and motivations of potential violence workers. African Americans in particular already have to account for the potential for police-empowered violence. In those states experimenting with the New Outlawry, the potential sources of authorized threat increase.[111] Those who are the objects of the New Outlawry must price the additional risk into their daily lives. What are the chances of immunized private violence associated with my attending this political march? Where shall I run the last quarter mile of my jog, given the scope of citizen's arrest, public carry, and stand-your-ground laws in this state? Will I have to negotiate a phalanx of privately armed individuals, empowered by state law, who have decided to patrol my voting precinct this November? What is the likelihood that any private violence used against me will be presumed to be a crime rather than a justified use of force?

Racial minorities have long been subject to the law's restraints but enjoyed little of its protections, and the New Outlawry widens rather than narrows this gap. In none of the modern laws we discuss are race or ethnicity explicit, but the New Outlawry operates—perhaps even assumes—a de facto world in which private judgments about the necessity, justification, and use of private violence will track racialized assumptions about who gets to use violence and when, which injuries are condemned and which are tolerated. In fact, the very lack of the old outlawry's particularized designation is what makes the New Outlawry so insidious: Marginalized groups must navigate a world in which they are subject to a kind of stochastic outlawry that is arbitrary, status reinforcing, and (at least ostensibly) constitutionally invisible.[112]

This Part focuses on a few exemplary categories of legally sanctioned private violence: (1) violence to advance the state's ends, like *anticipatory violence* to prevent or deter crime and *reactive violence* to apprehend or detain lawbreakers;[113] and (2) violence for putatively private ends, like *defensive violence* used in self-defense, defense of others, and defense of

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111. Ekow N. Yankah, Deputization and Privileged White Violence, 77 Stan. L. Rev. (forthcoming 2025) (manuscript at 4–5) (on file with the *Columbia Law Review*) (highlighting the increased risk from broadly privileging private violence, especially the increased risks to Black people).

112. We're grateful to Professor Susanna Siegel for the term "stochastic outlawry." We discuss the potential constitutional implications in Part III. And, as Professor Nadia Banteka uncovers, even public police officers can sometimes escape accountability for constitutional violations by "identity shopping" and successfully arguing their violence occurred in their private capacity. Nadia Banteka, Police Vigilantism, 110 Va. L. Rev. (forthcoming 2024) (manuscript at 4), https://ssrn.com/abstract=4723241 [https://perma.cc/4LXY-MTX6].

113. Defensive violence can also be anticipatory or reactive in nature, but these shorthand descriptions seem to us to express a distinction between violence used offensively for crime-control purposes and to defend private interests; but the lines are not bright and, as we discuss, defensive rhetoric increasingly dominates as justification for all kinds of violence.

property.[114] This Part traces how existing and expanding authorizations for private violence recreate and transform the basic features of outlawry, forming what this Essay calls the New Outlawry.

Part III then explains why this New Outlawry should be of constitutional concern, discusses how it reveals fundamental assumptions about the state, and outlines the potential doctrinal responses to jurisdictions that continue to test the limits of private delegations of violence.[115]

A. *Violence for the State: Anticipatory and Reactive Violence*

Although the expansion of self-defense law receives the lion's share of scholarly and public commentary, what is in fact "percolating to the top of the cultural conversation is not the language of defense—it is the language of aggression."[116] As Professor Kimberly Ferzan underscores, stand-your-ground laws attract the most attention, but "[c]itizens' arrests, and more generally the idea of using violence *in the name of the state*, is where the action is."[117] This section explores how the state categorizes and

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114. See Darrell A. H. Miller, Self-Defense, Defense of Others, and the State, 80 Law & Contemp. Probs. 85, 90 (2017) [hereinafter Miller, Self-Defense] ("The legal distinction between homicide on behalf of the sovereign and homicide as a private act of self-preservation persisted even as theories of natural law came to influence English treatise writers in the seventeenth and eighteenth centuries."); id at 91 ("[T]he distinction between justified self-defense and excusable self-defense at common law only makes conceptual sense if one understands that the homicide is justified when the slayer acts in some sense on behalf of the state. It is merely excused when the slayer acts solely on his own behalf."). The lines between these kinds of violence can be thin and will often blur in reality (is shooting a carjacker self-defense/defense of property, or is it lethal force to prevent a crime, or both?), but the conceptual categories can help clarify the scope and limits of private force. At common law, the carjacker-type example would likely have been treated as violence for the state's purposes, not self-defense. See Michael Foster, Crown Cases 270 (3d ed. 1792) (describing it as coincidental that self-defense and duty to apprehend a felon occur simultaneously when one uses lethal force to repel a robber or assailant).

115. See Malcolm Thorburn, Reinventing the Night-Watchman State?, 60 U. Toronto L.J. 425, 426 (2010) (arguing that state functions like "the use of force in preventing the commission of an offence or in making an arrest, or the invasion of privacy when performing a search and seizure[,] . . . may not be privatized without undermining . . . the most basic assumptions of the modern liberal political order") [hereinafter Thorburn, Reinventing]. In the United States, these practices have long been used along axes of race. See Burnham, supra note 102, at xxi ("Lawless police acting on behalf of the state has defined how Black people experienced American law for two centuries, and concomitantly, Black struggles for citizenship and meaningful democratic participation have always included radical demands for relief from such state violence.").

116. Ferzan, Taking Aim, supra note 21, at 8. It is also, we contend, the language of domination.

117. See id.

defines legal rules and then licenses private actors to enforce those rules.[118]

Crime is a socially constructed category of conduct that a community deems harmful or abnormal, for which it will deploy coercive force to condemn and punish.[119] Crime and punishment establish society's rules. Professor Malcolm Thorburn argues that all modern states claim a "right to rule"—the exclusive authority to create legal rules for a given jurisdiction.[120] Breaches of the right to rule, he argues, demand a remedy, which, in the modern state, takes the form of criminal punishment.[121] In this model, serious criminal activity is an attempt by offenders to impose a law different than that established by the sovereign. Therefore, offenders must be punished to reassert the state's exclusive right to rule.[122] Enforcing the law and punishing infractions are thus fundamental to what it means to be a modern state.[123]

The project of law enforcement was long a cooperative endeavor, with a permeable division between public and private action.[124] Prior to the rise

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118. See Michaels, Constitutional Coup, supra note 36, at 24 (noting how "the history of the United States is itself replete with private actors tasked with carrying out sundry State functions").

119. See David Garland, The Culture of Control: Crime and Social Order in Contemporary Society 5 (2001) ("Th[e] crime control field is characterized by two interlocking and mutually conditioning patterns of action: the formal controls exercised by the state's criminal justice agencies and the informal social controls that are embedded in the everyday activities and interactions of civil society."); Seigel, supra note 3, at 6–7 (deconstructing the notion of crime); Henry M. Hart, Jr., The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401, 405 (1958) (describing the distinctions between criminal and civil wrongs and describing a "crime" as "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community").

120. See Malcolm Thorburn, Criminal Punishment and the Right to Rule, 70 U. Toronto L.J. 44, 46 (2020).

121. See id. at 46–47.

122. Id. at 48; see also Leider, Taming Self-Defense, supra note 40, at 1003 (arguing that the corollary to the state's monopoly on violence is that "the government can use deadly force against those who stubbornly resist the most basic legal institutions"); Wulf, supra note 42, at 140 ("A modern state functions in its ideal form when governmental institutions rule over a given territory, a legal system exists, and the state has the capacity to implement its policies.").

123. See Seigel, supra note 3, at 10 (arguing that violence is essential to the notion of the state). Part of the reason to resist this private violence is also that, as Thorburn argues and Peterson shows, society can be reshaped if unlawful force is unchecked. See Peterson, supra note 30, at 1625 ("The danger of violent movements like the one the rioters brought to the Capitol on January 6 is not simply that they threaten to destabilize our treasured institutions; it is that they have the potential to remake them, to create a new order that conforms to their demands.").

124. Jonathan Obert, The Six-Shooter State: Public and Private Violence in American Politics 5 (2018) (discussing the "early American tradition of citizenship in which private actors self-consciously supported the state in law enforcement activities"); Seigel, supra note 3, at 53 (highlighting the overlap between civilian, policing, and military roles); Sklansky, supra note 41, at 1205 ("Colonial towns, like their English counterparts, relied on the

of organized police departments and professional law enforcement, private individuals and communities were tasked with policing obligations.[125] Many of the enforcement practices in the early United States were inherited from England's practices—the hue and cry, posse comitatus, watch and ward.[126] "[F]or much of early common law history," notes Thorburn, "policing was almost entirely provided by ordinary (private) citizens."[127] Yet these citizens were exercising legal duties, not personal initiatives, and the tasks individuals undertook in their policing roles were public responsibilities. Citizens enforced the state's code, not their own. Failure to fulfill law-enforcing duties in fact exposed citizens to their own criminal liability.[128] From the very earliest times of medieval state building, these methods "brought crime more firmly under the state's control."[129] Crucially, in doing so, they "removed communities' ability to decide both what was a crime and who would be punished."[130] Those decisions would be the state's to make.[131]

In early England, for example, community members were obligated to raise the hue and cry—literally make an announcement (such as "Out! Out!")—when happening upon a felony.[132] Blackstone described it as "the

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medieval institutions of the constable, the night watch, and the hue and cry—institutions that 'drew no clear lines between public and private.'" (footnote omitted) (quoting Lawrence M. Friedman, Crime and Punishment in American History 28–29 (1993))).

125. Obert, supra note 124, at 5.

126. Erik H. Monkkonen, History of Urban Police, 15 Crime & Just. 547, 549 (1992) (noting that "[t]he night watch and the day constable" dated "from the Middle Ages"); Thorburn, Reinventing, supra note 115, at 434 ("[T]he colonial United States relied on the same medieval law-enforcement institutions as England – the constable, the night watch, and the hue and cry . . . ." (citing Lawrence M. Friedman, Crime and Punishment in American History 29 (1993))); see also Kenneth F. Duggan, The Hue and Cry in Thirteenth-Century England, *in* Thirteenth Century England XVI: Proceedings of the Cambridge Conference, 2015, at 153, 159 (Andrew M. Spencer & Carl Watkins eds., 2017) ("Localities had a duty to protect themselves through the watch and ward, which by royal command required every village to keep watch throughout the night by at least four men who would try to arrest – or at least raise the hue and cry on – any stranger they saw.").

127. See Thorburn, Reinventing, supra note 115, at 427; see also Peterson, supra note 30, at 1578 ("In eighteenth-century colonies, law and policing were managed by communities through posse comitatus, the militia, and eventually, the summoning of the local grand jury to indict offenders.").

128. Obert, supra note 124, at 26 ("Refusing to cooperate with a *posse* was itself a crime, and the institution was, like the militia or town watch, considered a civic duty for all able-bodied male citizens.").

129. Duggan, supra note 126, at 171.

130. Id.

131. The transition was not always easy to demarcate. See Sir Frederick Pollock, The King's Peace in the Middle Ages, 13 Harv. L. Rev. 177, 177 (1899) ("All existing civilized communities appear to have gone through a stage in which it was impossible to say where private vengeance for injuries ended and public retribution for offences began, or rather the two notions were hardly distinguished.").

132. 2 Pollock & Maitland, supra note 58, at 607. Or individuals may have yelled other things, like "Thieves! Thieves!" or "Strike! Strike!," as English law appears to have required no precise wording. Duggan, supra note 126 at 156.

old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another."[133] By law, neighbors had to turn out to pursue the suspect.[134] Early on, if the wrongdoer was caught in the act (or with the goods), he would be brought before a hastily convened court, "and without being allowed to say one word in self-defence, he [would] be promptly hanged, beheaded or precipitated from a cliff, and the owner of the stolen goods [would] perhaps act as an amateur executioner."[135] This summary justice, as Professors Frederick Pollock and Frederic Maitland wrote, developed from the practice of outlawry—from a notion that one found red-handed was not entitled to the law's protection.[136]

English law, then, imposed a duty on private citizens to participate in pursuing serious lawbreakers and assisting in their arrest. Certainly, when the hue and cry was raised, "every Man may and must arrest the Offender upon whom it [was] levied," and failing to pursue the offender subjected a person to punishment.[137] According to Sir Matthew Hale, "Persons [who were] present at the committing of a Felony [had to] use their endeavours to apprehend the Offender."[138] If they failed to make this attempt, "they [were] to be fined and imprisoned."[139] Anyone who killed a person "upon Hue-and-Cry, or otherwise, to arrest a Felon that flies" committed no felony.[140] Importantly, these kinds of community law enforcement actions were not conceived of as personal acts of self-defense; they were actions taken by privately constituted public authority for the benefit of the public.[141]

Slave patrols in antebellum America built on these English common law institutions.[142] "Slave patrols had significant and unfettered power

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133. See 2 William Blackstone, Commentaries *293.

134. 2 Pollock & Maitland, supra note 58, at 607.

135. Id. at 608.

136. See id. at 609 ("There is hardly room for doubt that this process [of killing a criminal in the act of committing a crime] had its origin in days when the criminal taken in the act was *ipso facto* an outlaw.").

137. 1 Matthew Hale, Pleas of the Crown 90 (London, J.N. Assignee of Edw. Sayer, 5th ed. 1716).

138. See id. at 89.

139. Id.

140. Id. at 36.

141. See Michael Foster, A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry 270 (London, 3d ed. 1792) (describing "[h]omicide in advancement of justice" as justified because "the ends of government will be totally defeated" unless a person can be made "[amenable] to justice").

142. Hadden, supra note 86, at 3 (citing the hue and cry and posse comitatus and writing that "[p]atrols were not created in a vacuum, but owed much to European institutions that served as the slave patrol's institutional forebears"). As the Civil War Amendments formally ended facially racist law enforcement, the slave patrol's functions did not cease but instead splintered among a mix of public and private actors. Id. at 4 ("[Slave patrols'] law-enforcing aspects—checking suspicious persons, limiting nighttime

within their communities" and were deputized "to terrorize enslaved Blacks to deter revolts, capture and return enslaved Blacks trying to escape, and discipline those who violated any plantation rules."[143]

More contemporary citizen's arrest laws also grew out of these earlier English practices.[144] For felony offenses, the law authorized (and in most states still authorizes) a private person to arrest anyone who committed the offense in the arrester's presence or anyone whom the arrester had probable cause to believe had committed the offense.[145] For lesser offenses, private persons could only effect an arrest if the crime were committed in their presence.[146]

Just as external security in America transitioned from a citizen militia to professional soldiery over the course of the nineteenth century,[147] internal security gradually transitioned from citizen-enforcers to professional law enforcement in roughly the same period.[148] As professional, full-time, state-employed law enforcement institutions arrived and spread in the late nineteenth century,[149] the responsibilities of private citizens turned from duties to permissions. No longer would citizens be legally mandated to hazard their safety by pursuing wrongdoers upon a cry for help.[150]

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movement—became the duties of Southern police forces, while their lawless, violent aspects were taken up by vigilante groups like the Ku Klux Klan.").

143. Brandon Hasbrouck, Abolishing Racist Policing With the Thirteenth Amendment, 67 UCLA L. Rev. 1108, 1114 (2020).

144. Note, The Law of Citizen's Arrest, 65 Colum. L. Rev. 502, 502 & n.3 (1965) ("The role of the private person in the apprehension of criminals is defined by the law of citizen's arrest—an outgrowth of stagnated common-law rules that were derived from English practices of the Middle Ages."); cf. Private Police Forces, supra note 41, at 557 ("Every citizen possesses certain common law and statutory powers of arrest, search and seizure, and self-defense. The private policeman enjoys these powers no less than any other individual." (footnotes omitted)).

145. Alvin Stauber, Citizen's Arrest: Rights and Responsibilities, 18 Midwest L. Rev. 31, 31 (2002) (noting that private citizens could arrest wrongdoers who committed a "breach of the peace" in their presence); see also Colby v. Jackson, 12 N.H. 526, 530 (Super. Ct. 1842) ("[I]t is well settled at common law, that a private person, without warrant, may lawfully seize and detain another, in certain cases.").

146. Stauber, supra note 145, at 31; Note, The Law of Citizen's Arrest, supra note 144, at 504.

147. On the Founding generation's general distrust of professionalized military forces and standing armies, see Noah Shusterman, Armed Citizens: The Road From Ancient Rome to the Second Amendment 6–11 (2020).

148. See Obert, supra note 124, at 4–5 (describing the evolution); Seigel, supra note 3, at 74 (noting that "private policing preceded the public version, founded to support colonial ventures"). To be sure, in the Founding Era, citizen militias also provided internal protection. See Shusterman, supra note 147, at 8 (stating that militias in eighteenth century America "were best at being repressive domestic forces").

149. See Cynthia A. Brown, *Utah v. Strieff*: Sound the Hue and Cry, 45 S.U. L. Rev. 1, 8–10 (2017) (discussing the shift to professional forces).

150. See Chad Flanders, Raina Brooks, Jack Compton & Lyz Riley, The Puzzling Persistence of Citizen's Arrest Laws and the Need to Revisit Them, 64 How. L.J. 161, 175

But, as legal command turned to legal assent, a growing fissure in the rules of justification emerged. As the next Part discusses, constitutional prohibitions restrict public law enforcement's use of force to capture fleeing felons but typically not private citizens.[151] Therefore, formal state actors can be held responsible for violating constitutional rights by using force, but nonstate actors have historically not been so accountable.[152] This creates a troubling "arbitraging opportunity" for government to outsource its functions to private parties who "act relatively unencumbered by the laws that more stringently regulate government agents."[153] Despite these fissures, citizen's arrest laws have puzzlingly persisted for decades, little changed from their common law roots.[154] In some ways, in fact, there has been a recent "expansion of the right of private citizens to detain offenders who are suspected of violating the law."[155]

The continued authorization for private policing in these laws makes them a dangerous weapon in the modern era. That hazard is all the more true given the absence of the very constitutional[156] (or even in some cases

(2020) (stating that after the rise of professional police forces, "[i]t could no longer be plausibly maintained that citizens had the *duty* to arrest").

151. See State v. Cooney, 463 S.E.2d 597, 599 (S.C. 1995) (stating that the Supreme Court's limitation on the use of deadly force to capture fleeing felons "does not apply to seizures by private persons and does not change the State's criminal law with respect to citizens using force in apprehending a fleeing felon" (citing People v. Couch, 461 N.W.2d 683 (Mich. 1990))); Sharon Finegan, Watching the Watchers: The Growing Privatization of Criminal Law Enforcement and the Need for Limits on Neighborhood Watch Associations, 8 U. Mass. L. Rev. 88, 106–07 (2013) (discussing how private actors can be authorized to engage in policing without the restrictions of public actors); Nicholas A. Serrano, Vigilante Justice at the Home Depot: The Civilian Use of Deadly Force Under Michigan's Common Law Fleeing-Felon Rule, 11 Charleston L. Rev. 159, 161 (2017) (describing Michigan's authorization to use deadly force to stop a fleeing felon, even when the underlying offense is not dangerous or violent); Private Police Forces, supra note 41, at 567 (arguing in the Fourth Amendment context that, "since the public police are intended to be society's primary law enforcers, the limitations on public police search should set the upper boundaries of allowable search by private police").

152. See United States v. Cruikshank, 92 U.S. 542, 553 (1876) (dismissing an indictment against individuals for violating constitutional rights on the grounds that the Constitution does not govern the conduct of private parties).

153. Michaels, Constitutional Coup, supra note 37, at 108.

154. Flanders, et al., supra note 150, at 163; Private Police Forces, supra note 41, at 561 ("Although many states have expanded the arrest powers of public police officers, the scope of permissible citizen's arrest, and the attendant powers of force and detention, have remained relatively constant [since the common law days]." (footnote omitted)).

155. Stauber, supra note 145, at 38.

156. See infra Part III.

statutory[157]) limitations that constrain public officials.[158] The risk of experiments with the New Outlawry is that vigilantism and private violence (ostensibly for public ends) become normalized but without any of the ex ante or ex post controls on public forms of violence. As one of us has written, the threat from private policing in this fashion (especially under the banner of constitutional or statutory rights) is that you end up with

> individuals [who] don't have to abide by constitutional limitations on deadly force. They can't be made to wear body cameras, don't have to learn de-escalation techniques or undergo de-bias training, and don't file reports when they use their weapons. They aren't subject to investigation for engaging in an unconstitutional pattern or practice and they can't be forced to enter into a consent decree when they abuse their power. They aren't beholden to any politically responsive institution and they can't be fired.[159]

In other words, this kind of "[s]tate power passed through private conduits becomes much harder for the rest of civil society to monitor and challenge."[160] Relying on after-the-fact criminal punishment to prevent excesses is already a risky proposition. That behavioral check deteriorates all the more rapidly once legislatures experimenting with the New Outlawry begin expanding immunities for violence.

Ahmaud Arbery's 2020 murder in Georgia is a case in point. Arbery, an innocent jogger, was chased by private citizens who suspected him in a series of break-ins. They stopped him and ultimately shot him dead. Law enforcement officials initially refused to arrest the killers, chalking up their actions to a legally sanctioned citizen's arrest and lawful self-

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157. Flanders et al., supra note 150, at 172 ("[I]n some states, because of reforms to law enforcement officer's use of force laws, citizens sometimes have a *greater* ability to use force than police officers do in certain circumstances."). In other ways, private citizens may have more restrictive statutory authority. See People v. Page, 149 N.E.3d 905, 914 (N.Y. 2020) (Fahey, J., dissenting) (collecting sources limiting private actors and noting that "[a]s the English common law developed in tandem with greater urbanization and the expansion of police forces, distinctions arose between arrests performed by a private citizen and those performed by a police or peace officer").

158. It is true that, in some ways, "private citizens are more accountable under law for improper uses of force." Robert Leider, The State's Monopoly of Force and the Right to Bear Arms, 116 Nw. U. L. Rev. 35, 76 (2021) [hereinafter Leider, State's Monopoly]. After all, as Robert Leider writes, "Police officers are clothed with many civil and criminal immunities, including broader arrest authority based on probable cause alone, more power to use force, and qualified immunity for mistaken judgments." Id. This all assumes that the existing role of torts, criminal law, and immunity remain unchanged—changes the New Outlawry specifically contemplates.

159. Darrell A.H. Miller, Opinion, A Simplistic Interpretation of "Defund the Police" May Embolden Vigilantes, Newsday (June 20, 2020), https://www.newsday.com/opinion/commentary/defund-the-police-protests-george-floyd-police-brutality-a93508/ (on file with the *Columbia Law Review*) [hereinafter Miller, Simplistic Interpretation].

160. Michaels, Constitutional Coup, supra note 37, at 131; see also Joh, Paradox of Private Policing, supra note 41, at 60 (noting the "high degree of legal regulation," including numerous constitutional limitations, on the actions of public police).

defense.[161] One of the prosecutors initially on the case said, "[The men appeared to be] following, in 'hot pursuit', a burglary suspect, with solid first hand probable cause, in their neighborhood, and asking/ telling him to stop. It appears their intent was to stop and hold this criminal suspect until law enforcement arrived."[162] And that, he underscored, "is perfectly legal" under Georgia law.[163]

That same year, a self-styled militia in Michigan hatched a plan to kidnap the state's governor, Gretchen Whitmer.[164] Perhaps emboldened by an armed gun-rights rally and chafing at what they considered pandemic-related overreach by Michigan officials, some of those charged for the kidnapping claimed a citizen's arrest authority to detain the governor and hand her over to sympathetic local sheriffs.[165] Legal scholars have charted many similar stories of the harmful effects of privatized policing that citizen's arrest laws authorize.[166]

As these recent episodes show, growing polarization, political extremism, distrust of institutions, and social fragmentation are normalizing resorting to violence.[167] Gun rights advocates and

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161. Letter from George E. Barnhill, Dist. Att'y, Waycross Jud. Cir., to Tom Jump, Captain, Glynn Cnty. Police Dep't (Feb. 23, 2020), https://int.nyt.com/data/documenthelper/6916-george-barnhill-letter-to-glyn/b52fa09cdc974b970b79/optimized/full.pdf [perma.cc/39QP-KTUN].

162. See id. at 2.

163. See id. Georgia has since repealed its citizen's arrest law. See Act of May 10, 2021, § 2, 2021 Ga. Laws 625, 626.

164. The Co-Leader of a Plot to Kidnap Michigan's Governor Gets 16 Years in Prison, NPR (Dec. 27, 2022), https://www.npr.org/2022/12/27/1145632535/michigan-governor-kidnap-plot-adam-fox-sentencing/ [https://perma.cc/E9HP-FGFN]; see also Joseph Blocher & Reva B. Siegel, When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under *Heller*, 116 Nw. U. L. Rev. 139, 153 (2021).

165. Darcie Moran & Joe Guillen, Whitmer Kidnap Plot: Possible Citizen's Arrest Mentioned in March, Prosecutor Says, Det. Free Press (Oct. 23, 2020), https://www.freep.com/story/news/local/michigan/2020/10/23/whitmer-kidnap-plot-suspect-citizens-arrest/6010264002/ [https://perma.cc/UV8B-9V4G]. Others charged in the plot seemed to have more anarchic and murderous plans. See Dustin Dwyer, Federal Trial to Begin Against Men Accused of Plotting to Kidnap Whitmer. Here's What to Know, Mich. Pub. Radio (Mar. 7, 2022), https://www.michiganradio.org/criminal-justice-legal-system/2022-03-07/federal-trial-to-begin-against-men-accused-of-plotting-to-kidnap-whitmer-heres-what-to-know/ [https://perma.cc/CP6V-APDC] (noting that one person charged in the plot was recorded stating, "I'm going to do some of the most nasty, disgusting things that you have ever read about in the history of your life" (internal quotation marks omitted) (quoting Barry Croft)).

166. See Flanders et al., supra note 150, at 166–69 (describing recent incidents in California, Georgia, Indiana, Missouri, and Montana); Serrano, supra note 151, at 161 (describing a Michigan incident).

167. See Rachel Kleinfeld, The Rise of Political Violence in the United States, 32 J. Democracy 160, 160 (2021) ("From death threats against previously anonymous bureaucrats and public-health officials to a plot to kidnap Michigan's governor and the 6 January 2021 attack on the U.S. Capitol, acts of political violence in the United States have skyrocketed in the last five years."); Nelson Lund, The Future of the Second Amendment in a Time of Lawless Violence, 116 Nw. U. L. Rev. 81, 99 (2021) (arguing that in today's environment the

organizations have helped propel the New Outlawry's official sanction of private violence for public ends. They have been instrumental in inculcating a mindset that not only sanctions violent conduct but also valorizes it. Heroic gun owners are envisioned as the sheepdogs who police the community to protect the sheep from wolves.[168] They are, in the words of sociologist Jennifer Carlson, the "citizen-protectors" who enforce law and order in a world perceived as increasingly dangerous.[169] Political scientists have traced the ascent of an intentionally incubated gun-rights ideology and gun-owner identity over the last several decades.[170] These developments coincide with a turn in gun ownership that focuses less on hunting and recreation and more on protection against perceived individual and societal threats.[171]

Law enforcement has grown more tolerant of this trend. Some law enforcement officers even see guns in the hands of the "right" kinds of people as a cooperative benefit, aiding police in maintaining order.[172] As

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right to bear arms "has more importance in protecting us from criminal violence because government has become more aggressive in restricting our freedom to arm ourselves against this threat"); cf. Mugambi Jouet, Guns, Identity, and Nationhood, Palgrave Commc'ns, Nov. 5, 2019, at 1, 3 ("The radicalization of the gun rights movement parallels a paradigm shift in American conservatism.").

168. Jacob D. Charles, Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution, 120 Mich. L. Rev. 581, 641 (2022) [hereinafter Charles, Securing Gun Rights] ("In the language of the gun-rights movement, everyone is either a wolf, a sheepdog, or a sheep—a threat, a protector, or someone who needs protecting."); see also Hayley N. Lawrence, Toxic Masculinity and Gender-Based Gun Violence in America: A Way Forward, 26 J. Gender, Race & Just. 33, 54 (2023) ("Gun owners, the majority of whom are men, tend to view their social role as that of the sheepdog: bound by duty to protect the defenseless herd of sheep against menacing wolves. Many . . . view themselves as fulfilling some sort of civic duty by carrying a firearm in public spaces." (footnotes omitted)); Susanna Siegel & Caroline Light, Opinion, 'Warrior Mindset' Can Get People Killed, Tampa Bay Times (Dec. 18, 2020), https://www.tampabay.com/opinion/2020/12/18/warrior-mindset-can-get-people-killed-column/ [https://perma.cc/74KH-GG6X] (arguing that this sorting problematically "replaces care and discernment with baseless fear and misdirected aggression").

169. See Jennifer Carlson, Citizen-Protectors: The Everyday Politics of Guns in an Age of Decline 19–24 (2015); see also Trent Steidley, Sharing the Monopoly on Violence? Shall-Issue Concealed Handgun License Laws and Responsibilization, 62 Socio. Persps. 929, 930 (2019) ("Doubts about the efficacy of the state to provide collective security may motivate many to seek crime protection on their own.").

170. See Matthew J. Lacombe, Firepower: How the NRA Turned Gun Owners Into a Political Force 6, 9–14 (2021) (arguing that the NRA has used "ideational resources" to cultivate an "engaged[] and powerful constituency").

171. See David Yamane, Gun Culture 2.0: The Evolution and Contours of Defensive Gun Ownership in America, 704 Annals Am. Acad. Pol. & Soc. Sci. 20, 21 (2022) (noting that "by 2010, armed self-defense had clearly become the core of American gun culture").

172. See Jennifer Carlson, Policing the Second Amendment: Guns, Law Enforcement, and the Politics of Race 107 (2020) ("[P]olice are not as invested in a strict monopoly on legitimate violence as accounts of gun militarism might suggest. Instead, they tend to accommodate the reality [of and benefit from] widely armed populace[s], sympathizing with legal gun carriers and even understanding them as productive of social order.").

a result, "as citizen's arrest cases are percolating to the surface of our public consciousness, we need to stop worrying about the people who only use guns on the defense and start thinking about how the law is authorizing civilian gun usage to go on the offense."[173]

Both during and in the aftermath of the racial justice protests in 2020, some commentators praised gun-toting private citizens and their superior ability to fight back against "rioting and looting" when formal law enforcement stood down.[174] Individuals like Kyle Rittenhouse viewed their task as supplementing formal law enforcement in upholding the law, sometimes to tragic effect.[175] And while progressive jurisdictions (mostly municipal) propose substantial police reform, up to and including abolition,[176] conservative policymakers (mostly at the state level) propose

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173. Ferzan, Taking Aim, supra note 21, at 5.

174. See, e.g., David E. Bernstein, The Right to Armed Self-Defense in Light of Law Enforcement Abdication, 19 Geo. J.L. & Pub. Pol'y 177, 180 (2021) (claiming that, in light of orders for the police to "stand down" in response to protests in 2020, "[t]he argument against the individual right to bear arms for self-defense purposes significantly weakens when, for political reasons, police are prohibited from enforcing any semblance of law and order"); Leider, State's Monopoly, supra note 158, at 42 ("[T]he American system of decentralized violence remains preferable to the government having a complete monopoly of force, particularly in times of emergency and civil unrest."); Lund, supra note 167, at 84 (arguing, in the context of "sustained and repeated riots[,]" that "[a]rmed citizens take responsibility for their own safety, thereby exhibiting and cultivating the self-reliance and vigorous spirit that are ultimately indispensable for genuine self-government").

175. See, e.g., Michael Tarm, Scott Bauer & Kathleen Foody, Rittenhouse: 'I Didn't Do Anything Wrong. I Defended Myself', Associated Press (Nov. 10, 2021), https://apnews.com/article/kyle-rittenhouse-george-floyd-racial-injustice-kenosha-shootings-f92074af4f2668313e258aa2faf74b1c/ [https://perma.cc/QE3E-77Y9] (noting Kyle Rittenhouse's testimony that he had armed himself to attend the Kenosha, Wisconsin, police brutality protests in an effort to protect local businesses and property after seeing violence there on previous nights).

176. See, e.g., Allegra M. McLeod, Envisioning Abolition Democracy, 132 Harv. L. Rev. 1613, 1635 (2019) ("BYP100 Chicago is spearheading an organizing campaign for a participatory city-budgeting process in which the public is empowered to defund police and reinvest resources by 'setting a living wage and by fully funding healthcare, social services, public schools, and sustainable economic development projects.'" (quoting Ctr. for Popular Democracy, L. for Black Lives & Black Youth Project 100, Freedom to Thrive: Reimagining Safety & Security in Our Communities 20 (2017), https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf [https://perma.cc/36T3-LM7X])); Solomon Gustavo, What We Know (and Don't Know) So Far About the Effort to Dismantle the Minneapolis Police Department, Minn. Post (July 9, 2020), https://www.minnpost.com/metro/2020/07/what-we-know-and-dont-know-so-far-about-the-effort-to-dismantle-the-minneapolis-police-department/ [https://perma.cc/799B-X3XM] ("The new proposal would amend the charter to allow the city to disband the police department, do away with other charter mandates regarding city policing . . . , and put a new public safety department under the supervision of the city council."). Some of the disbanding of police appears financial as opposed to ideological. See Trisha Ahmed & Jim Salter, America's Small Towns are Disbanding Police Forces, Citing Hiring Woes, L.A. Times (Sept. 5, 2023), https://www.latimes.com/world-nation/story/2023-09-05/americas-small-towns-are-disbanding-police-forces-citing-hiring-woes/ [https://perma.cc/5FD7-TKAH].

and enact policies that would expand private prerogatives to exercise violence in ways prohibited to the state.[177]

For example, Florida responded to the 2020 antiracism protests with an "anti-riot" law—the Combating Public Disorder Act[178]—that Governor Ron DeSantis called "the strongest anti-rioting, pro-law enforcement piece of legislation in the country."[179] That law broadened what constituted an unlawful "riot" under Florida law, prompting a federal judge to enjoin enforcement of this part of the statute as unconstitutionally vague and overbroad.[180] Among its other provisions, the law provided civil immunity in some situations when Floridians used vehicles to ram protesters.[181] "The bill doesn't exactly make it legal to run someone over," wrote one reporter, "but it does shield drivers from civil liability if they injure or kill protesters on Florida roads."[182]

And Florida was not alone in creating what Pareene called "the right to crash cars into people."[183] Over the last few years, legislators in other states too "have been trying to make it easier for certain people to run over certain other people."[184] These laws are both responding to and feeding violent vigilantism.[185] The legislation "comes after an alarming surge of vehicle-ramming attacks against protesters across the country."[186] In just a

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177. See John Dehn, The U.S. Constitution and Limits on Detention and Use of Force in Handling Civil Unrest, Just Sec. (June 3, 2020), https://www.justsecurity.org/70535/the-u-s-constitution-and-limits-on-detention-and-use-of-force-in-handling-civil-unrest/ [https://perma.cc/NQ9J-B4EZ] (discussing limits on state actors' use of force during civil unrest).

178. Combating Public Disorder Act, ch. 2021-6, 2021 Fla. Laws 60 (codified in scattered sections of Fla. Stat. Ann. (West 2024)).

179. Gray Rohrer & Steven Lemongello, DeSantis Signs 'Anti-Riot' Bill Into Law, Sparking Outcry From Democrats, Civil Rights Groups, Orlando Sentinel (Apr. 19, 2021), https://www.orlandosentinel.com/2021/04/19/desantis-signs-anti-riot-bill-into-law-sparking-outcry-from-democrats-civil-rights-groups/ (on file with the *Columbia Law Review*) (last updated Apr. 21, 2021).

180. See Dream Defs. v. DeSantis, 559 F. Supp. 3d 1238, 1281–83 (N.D. Fla. 2021).

181. See Pareene, supra note 15 ("The car . . . is now just openly also a literal weapon used by the state to prevent people from protest and dissent.").

182. See id. (cleaned up).

183. See id.

184. Id.

185. See Ari Weil, Opinion, Protesters Hit by Cars Recently Highlight a Dangerous Far-Right Trend in America, NBC News (July 12, 2020), https://www.nbcnews.com/think/opinion/seattle-protester-hit-car-latest-casualty-dangerous-far-right-trend-ncna1233525/ [https://perma.cc/BBH4-DLRT] ("GOP state legislators also attempted to make it harder to punish drivers. In 2017, bills were proposed in six states that would shield drivers who hit protesters. None became law, but they made an impression on the right."); cf. Michaels & Noll, Vigilante Federalism, supra note 32, at 1228 (describing how corrosive private enforcement schemes "are both the *product* of anti-democratic, White Christian nationalist politics and an effort to affirmatively *create* and *amplify* it").

186. Tess Owen, Florida 'Anti-Rioting' Law Will Make It Much Easier to Run Over Protesters With Cars, Vice News (Apr. 19, 2021), https://www.vice.com/en/article/

six-month period starting in the summer of 2020, researchers documented more than one hundred episodes in which vehicles were driven into crowds, "about half of which were confirmed to be intentional."[187]

Notably, these are not instances of mere defensive violence. They are not about people defending themselves from unlawful aggression. Instead, the laws are designed to allow private citizens to enforce law and order and uphold existing social structures. And they are not unrelated to broader efforts to enlist citizens in the law-enforcing business, the way Rittenhouse viewed himself.[188] As Pareene writes,

> There's something very telling about how the car (or police cruiser, or truck, or SUV) has been enshrined into law as an instrument of state-sanctioned violence. American conservatives are creating, really, a sort of Second Amendment for cars. Not the Second Amendment in terms of the literal text in the Constitution, but the Second Amendment as existing doctrine. The legal framework conservative politicians and jurists spent years crafting and refining to facilitate politicized and racialized gun violence in this country is now expanding to another of America's omnipresent and deadly institutions.[189]

In other words, just as the citizen-protectors wielding guns to deter and prevent crime had the blessing of the law, so too are drivers permitted by these authorizations to inflict violence on those they perceive as responsible for disorder.[190]

In myriad other ways, some subtle and others less so, recent proposals have devolved the violence prerogative to private citizens to maintain social order. Legislators have extended the right to use deadly force to protect one's business property.[191] They have authorized deadly force to prevent looting or damage to commercial enterprises.[192] For the past several years, a Mississippi legislator has introduced "The Combating Violence, Disorder and Looting and Law Enforcement Protection Act of Mississippi."[193] Among other things, the Act would modify the state's

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88n95a/florida-anti-rioting-law-will-make-it-much-easier-to-run-over-protesters-with-cars/ [https://perma.cc/5CCW-EUQH].

187. Id.

188. Pareene, supra note 15.

189. Id.

190. See id. ("Just as the heavily armed patriot is encouraged to consider himself deputized to carry out violence on behalf of the police (the only legitimate arm of the state in his eyes anyway), now certain drivers are permitted to harm certain people in defense of the social order.").

191. See supra notes 11–14 and accompanying text; see also Richard A. Posner, Killing or Wounding to Protect a Property Interest, 14 J.L. & Econ. 201, 202 (1971) (noting that a privilege to use deadly force to protect property "presents interesting questions concerning the allocation of law enforcement authority between the public and private sectors").

192. See supra notes 11–14 and accompanying text.

193. See H.R. 34, 2023 Leg., Reg. Sess. (Miss. 2023); H.R. 613, 2022 Leg., Reg. Sess. (Miss. 2022); H.R. 83, 2021 Leg., Reg. Sess. (Miss. 2021).

homicide statute to justify a killing "[w]hen necessarily committed in lawful defense of one's own business, where there is rioting, looting or other activity" defined in the statute.[194]

Though many of these proposals have failed (for now), they capture the cultural shift in many places where lethal force, administered on the ground, in real time, by private citizens, is seen as a legitimate response to disorder.[195] Moreover, these proposals are articulated as a reaction to actual or perceived deficiencies in official law enforcement. The result is a violence ecology in which private parties are empowered to exercise lethal force in many of the circumstances that official law enforcement could not.[196] When that kind of conduct obtains legal license, it predictably places some people outside the law's protective force, creating a new and insidious form of outlawry.[197] Though it doesn't mirror old outlawry in all its particularities, and certainly not in its procedural protections, the New Outlawry shares the basic features of authorizing, encouraging, and immunizing private violence against others for purposes of social control.

B. *Violence for the Self: Defensive Violence*

Just as legal rules have increasingly placed power in the hands of private actors to affirmatively seek out lawbreakers and mete out punishment, legislation has increasingly expanded an individual's right to use defensive force. That kind of modern shift marks an even bigger break from how self-defense was treated in Anglo-American history.

The common law was notoriously jealous of the right to use violence.[198] As the prior section discussed, the state compelled community members to engage in policing for its own purposes but strictly limited

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194. See H.R. 34, 2023 Leg., Reg. Sess. § 6(j) (Miss. 2023).

195. A recent stir over a country song about how small towns enforce social norms epitomizes the shift. Emily Olson, How Jason Aldean's 'Try That in a Small Town' Became a Political Controversy, NPR, https://www.npr.org/2023/07/20/1188966935/jason-aldean-try-that-in-a-small-town-song-video/ [https://perma.cc/4QXH-6Q4G] (last updated July 20, 2023) (describing how the song's lyrics include "a list of crimes that might happen in urban settings" and suggest how small towns handle those outsiders, with a bonus ode to gun rights). As one commentator wrote, "[A]n explicit message of this song is that if you light a flag on fire or cuss at a cop, it's okay and actually good for people to shoot you." Jay Willis (@jaywillis), Twitter (July 17, 2023), https://twitter.com/jaywillis/status/1681009802535907328/ [https://perma.cc/8MPL-78YA].

196. Even if one disagrees with this as a descriptive matter, given the difficulties of punishing or deterring police violence through criminal law or civil liability, it still stands that the radically decentralized immunization of violence makes political accountability for misuse of violence substantially more difficult to achieve. See Miller, Simplistic Interpretation, supra 159.

197. See Peterson, supra note 30, at 1586–87 (noting how a right to violence has long been a tool in the hands white people, often to enforce racial hierarchies).

198. See Eric Ruben, An Unstable Core: Self-Defense and the Second Amendment, 108 Calif. L. Rev. 63, 83 (2020) [hereinafter Ruben, Unstable Core] (detailing authorities for this notion).

violence to defend private interests.[199] The forms of offensive violence—to prevent crime and catch lawbreakers—were done on behalf of the state. Individuals were pressed into the service of the sovereign.[200] They were not engaged in self-help to vindicate private rights.[201]

As Pollock and Maitland explain, "at a fairly early stage in its history" English law severely restricted the use of self-help remedies.[202] Justifiable homicides at common law were extremely limited, and the circumstances in which they occurred—for example, apprehending a manifest thief or an outlaw—"would have been regarded less as cases of legitimate self-defence than as executions."[203] "So fierce is" early English law "against self-help," they note, "that it can hardly be induced to find a place even for self-defence."[204] For centuries, the rules for self-defense were much more restrictive than those for violence used in policing functions.[205]

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199. Benjamin Levin, Note, A Defensible Defense?: Reexamining Castle Doctrine Statutes, 47 Harv. J. on Legis. 523, 528 (2010) (noting that at common law, self-defense was less protected and "[t]he only justifiable homicide . . . was one committed under the auspices of the state, or at least in clear furtherance of the state's interests").

200. See Miller, Self-Defense, supra note 114, at 86 ("Early self-defense law in the Anglo-American tradition presumed that homicide—even in self-defense—required the pardon of the sovereign. Only those slayers who killed as an actual or constructive agent of the state were completely innocent."); Stell, supra note 105, at 115 ("Commentators were careful to distinguish between a person who killed merely for the sake of his own skin, and a person who, in killing a felon, was performing a public benefit.").

201. See Stell, supra note 105, at 115 (noting that, with respect to violence for crime prevention and apprehension, "[n]ot only was there no duty to retreat, there was an affirmative obligation to use deadly force if the alternative were leaving a murderous felon at liberty").

202. 2 Pollock & Maitland, supra note 58, at 602.

203. See id. at 502 ("The man who commits homicide by misadventure or in self-defence deserves but needs a pardon."); see also Joseph H. Beale Jr., Retreat From a Murderous Assault, 16 Harv. L. Rev. 567, 568 (1903) ("The line between homicide in execution of the law and homicide by misadventure or *se defendendo* was not yet clearly defined; but the distinction was well established."); Rollin M. Perkins, Self-Defense Re-Examined, 1 UCLA L. Rev. 133, 142 (1954) ("Homicide was not justifiable unless it was commanded or authorized by law.").

204. 2 Pollock & Maitland, supra note 58, at 602. See also 4 Albert H. Putney, Torts, Damages, Domestic Relations 46 n.50 (1908) ("[I]n case of homicide the ancient doctrine was that self-defense was not a good plea. The man who was so unfortunate as to have to slay another to save himself was required to surrender and was remitted to jail, where he might hope to receive royal clemency." (quoting 1 Thomas Atkins Street, The Foundations of Legal Liability 7 (1906))).

205. See Richard Maxwell Brown, No Duty To Retreat: Violence and Values in American History and Society 4 (1991) [hereinafter Brown, No Duty] (contrasting justifiable homicide from excusable homicide in English common law); Ruben, Unstable Core, supra note 198, at 83 ("[H]istorically, homicide was justified only under limited circumstances, such as the prevention of a small number of specified felonies, in which a person 'acted as an actual or implicit agent of the sovereign.' Killing purely in private self-defense . . . was only excusable, requiring a sovereign pardon after trial and conviction." (footnote omitted) (quoting Miller, Self-Defense, supra note 114, at 89)). Of course, these neat theoretical lines are often not so tidy in practice. See Miller, Self-Defense, supra note 114, at 89 ("In practice, the facts

Famously, English law at the time of the American Founding, which transferred to these shores, required retreat before resorting to deadly force in self-defense.[206] The castle doctrine provided a limited exception to the retreat rule, excusing people from retreating from their own homes before using deadly force.[207] The logic behind the retreat rule, writes historian Richard Maxwell Brown, "was that the state—the Crown—wished to retain a monopoly of the resolution of conflict at the level of dispute between individuals."[208]

Many jurisdictions in the United States eroded—and then eventually eliminated—the retreat requirement during the course of the nineteenth century.[209] Of course, there was much more variation by jurisdiction here than in England: Individual states could make their own decisions about the exact parameters of self-defense law. Still, on the whole, "[t]he centuries-long English legal severity against homicide was replaced in our country by a proud new tolerance for killing in situations where it might have been avoided by obeying a legal duty to retreat."[210] As with the rules for violence on behalf of the state, the "metaphorical and symbolic impact" of the expanding rules for private self-defense—how they affect culture and understandings of permissible violence—can also be immense.[211] In some ways those broader effects blur the distinction between offensive and defensive violence; as legal theorist Rafi Reznik writes, in the modern United States "self-defense has become a tool of aggression."[212]

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that distinguished private vengeance, excusable self-defense, and justifiable killing remained, as they are today, notoriously fuzzy and contingent.").

206. Brown, No Duty, supra note 205, at 3; Miller, A History of Private Policing, supra note 41, at 11; Miller, Self-Defense, supra note 114, at 92–93.

207. Brown, No Duty, supra note 205, at 3. There was also certainly a desire to minimize violence, which American self-defense law no longer appears to maintain. See Polsby, supra note 105, at 93 ("[T]he law of lethal self-help . . . bears no regular symmetry with the law of punishment or with the presumptions of innocence that the law of punishment provides. It grants a surprisingly broad right, but does not rigidly circumscribe that right with incentives to keep conduct as harmless as possible.").

208. Brown, No Duty, supra note 205, at 4.

209. Id. at 5 ("[O]ne of the most important transformations in American legal and social history occurred in the nineteenth century when the nation . . . repudiated the English common-law tradition in favor of the American theme of no duty to retreat: that one was legally justified in standing one's ground to kill in self-defense."); Cynthia V. Ward, "Stand Your Ground" and Self-Defense, 42 Am. J. Crim. L. 89, 99–100 (2015) ("In the mid-to-late nineteenth century, . . . the American approach [to self-defense doctrine] changed as homegrown legal commentators, influential state supreme courts, and United States Supreme Court opinions developed a more robust Stand Your Ground doctrine . . . ." (footnote omitted)).

210. Brown, No Duty, supra note 205, at 5.

211. Id. at 6; see also Reznik, supra note 5, at 22 (arguing that "self-defense is a public institution that conveys grave social meanings and sets key terms of collective life").

212. Reznik, supra note 5, at 25.

The story of the modern Stand-Your-Ground movement and its ties to gun-rights associations has been told before.[213] But the roots of that movement trace back further still into American history. And at inflection points in the story, often those arising from anxieties over race and crime, self-defense has been used as a justification for anticipatory violence, as well as grounds to broaden protections for individual self-defense against perceived criminal threats.

For example, the arming of African American militia members during Reconstruction sparked a white backlash of terror and violence that perpetrators and enablers specifically defended on grounds of community policing, self-defense, and defense of others.[214] As one former Confederate put it, the Klan was founded on "[t]he instinct of self-protection . . . ; the sense of insecurity and danger" among whites, especially in areas in which African Americans predominated.[215] For over a century, white supremacist terrorism by privately armed individuals has routinely been defended by apologists as order-restoring, justified acts of self-defense.[216]

For another particularly striking example, consider Nebraska's first statutory protection for self-defense, which had previously been governed by common law doctrine. In the late 1960s, the Nebraska legislature codified the state's self-defense justification for the first time, and in so

213. See, e.g., Caroline Light, Stand Your Ground 2 (2017) ("[R]oughly coincident with the turn of the millennium, our admiration for defensive militarism has transformed into a pressing call for individual, do-it-yourself (DIY)-security citizenship. The defensively armed citizen has become, in some quarters, the paragon of patriotism."); Brown, No Duty, supra note 205, at vi ("[N]o duty to retreat is much more than a legal technicality. It is an expression of a characteristically American approach to life.").

214. Transcript of Record, United States v. Mitchell, 26 F. Cas. 1283 (C.C.D.S.C. 1871), as reprinted in Proceedings in the Ku Klux Trials at Columbia, S.C. in the United States–Circuit Court, November Term, 1871, at 150–51, 425–26 (Benn Pitman & Louis Freeland Post eds., Columbia, S.C., Republican Printing 1872) (defending Klan behavior on the grounds that African Americans were better armed than whites); H.R. Rep. No. 42-22, pt. 1, at 452 (1872) (quoting John B. Gordon, a Ku Klux Klan member who called the Klan "nothing more and nothing less . . . [than] an organization . . . [of] the peaceable, law-abiding citizens of the State, for self-protection").

215. H.R. Rep. No. 42-22, pt. 1, at 452; see also id. at 439 (lamenting that while African Americans occupy law enforcement positions "the white men are denied the right to bear arms or to organize, even as militia, for the protection of their homes, their property, or the persons of their wives and their children").

216. Jared A. Goldstein, The Klan's Constitution, 9 Ala. C.R. & C.L. L. Rev. 285, 315 (2018) ("Klan ideology declared that violence against African Americans and Republicans were justifiable acts of self-defense."). The consistency is remarkable: In the 1870s, Klan terrorists articulated their acts as legitimate self-defense; in the 1960s, they defended their terror as "self-defense for our homes, our families, our nation and Christian Civilization." Id. at 354 (internal quotation marks omitted) (quoting White Knights KKK Miss., Special Greenwood, LeFlore County Edition, Klan Ledger, Summer 1966, at 2).

doing eroded the traditional common law limitations.[217] That law provided in relevant part that "[n]o person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting, *by any means necessary*, himself, his family, or his real or personal property."[218] The statute contained no explicit reasonableness, proportionality, or imminence requirements, the traditional foundations of self-defense law.[219] In fact, the legislature had twice defeated amendments to revise the statute to restrict force to "*reasonable* means."[220]

Among the reasons for legislative support for the bill was the increasing salience of violent crime and racial unrest in the volatile 1960s. As one legislator said of the statute in a hearing two years later, it was "passed in the midst of an almost irrational climate of emotion, passion and fear."[221] He recounted how several of the legislators who voted for the law "admitted to me that they were actually afraid to vote against that bill because they were afraid they would be tagged as being pro-criminal or soft on law and order."[222]

Some had referred to that bill, another legislator said, as the "Kill Your Neighbor Law."[223] In his veto message (a veto the legislature overrode to pass the bill), the Governor had warned that the law troublingly allowed "the unreasonable use of force to repel minimal non-deadly force" and "implement[ed] a system of vigilante law enforcement, a system long ago proved to be destructive of civilized society."[224]

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217. See State v. Ryan, 543 N.W.2d 128, 146 (Neb. 1996) (Gerrard, J., dissenting) (outlining the statutory changes to Nebraska's self-defense doctrine), overruled by State v. Burlison, 583 N.W.2d 31 (Neb. 1998).

218. See Self Defense Act, ch. 233, 1969 Neb. Laws 862, 862 (emphasis added) (repealed 1971), invalidated by State v. Goodseal, 183 N.W.2d 258 (Neb. 1971). It also provided for a defense of others justification, forbidding prosecution for use of force based on a person "coming to the aid of another who is in imminent danger of or the victim of aggravated assault, armed robbery, holdup, rape, murder, or any other heinous crime." Id.

219. See Ruben, Unstable Core, supra note 198, at 83–84 ("Lawful self-defense still requires a showing of necessity and proportionality.").

220. *Goodseal*, 183 N.W.2d at 262 (emphasis added) (internal quotation marks omitted).

221. See Minutes of Committee on Judiciary: Hearing on LB 184, LB 149, and LB 187 Before the Comm. on Judiciary, 82d Leg., 1st Sess. 33 (Neb. 1971) (statement of Sen. Luedtke).

222. See id. This tough-on-crime approach was not a phenomenon just among rural conservatives. The impulse also had a civil rights and race-pride component to it in places where African Americans controlled the levers of political power, like in Washington D.C., as James Forman Jr. has well documented. See generally James Forman Jr., Locking Up Our Own: Crime and Punishment in Black America 10–11 (2017) (documenting responses and attitudes by Black officials to problems such as gun violence and drug use in Black communities).

223. 88th Nebraska Legislature, Floor Debate Transcripts 1167 (Mar. 2, 1983), https://nebraskalegislature.gov/transcripts/view_page.php?page=01167&leg=88 [https://perma.cc/GR57-LLRF] (statement of Sen. DeCamp).

224. Message From the Governor, 80 Leg. J. 2272–73 (Neb. May 28, 1969).

Legislators soon had to confront what they unleashed. In a notable case—in which the Nebraska Supreme Court ended up declaring the law unconstitutionally broad—a defendant charged with murder argued that the Act did indeed license unbounded force.[225] She argued that the law "provide[d] that a person may use *unlimited force* in repelling an aggressor and that the common law rule that one may use only reasonable force ha[d] been abrogated by the act."[226] The court agreed that the legislature did expressly decline to include a reasonableness requirement but rejected the defendant's suggestion that necessary force included unlimited force.[227] Still, the court held, the state had unconstitutionally expanded the right to self-defense.

By making the defendant the sole judge of the force necessary to use in any given situation, "the Legislature has delegated the fixing of the punishment to the person asserting self-defense which it cannot do."[228] Echoing Thorburn's right-to-rule concept (and Lockean concerns with private judgment), the court emphasized that defining crimes and setting punishment lie in the exclusive province of the state.[229] "Any attempt to delegate either of such powers to private persons with the excesses that naturally follow when crime or punishment are placed elsewhere than with the state, is violative of the powers placed exclusively with the Legislature by our state Constitution."[230]

Just as the broad Nebraska law had been dubbed the "Kill Your Neighbor Law" for licensing such broad discretion,[231] some modern laws have been characterized similarly. In 2022, Missouri legislators proposed an expansion of self-defense law that critics dubbed the "Make Murder Legal Act."[232] The bill, numbered Senate Bill 666,[233] would have eliminated the existing requirement that a criminal defendant bear "the

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225. See *Goodseal*, 183 N.W.2d at 262. The defendant was a sex worker who killed a man she said forced himself on her; the gender and social dynamics are an inescapable subtext in the opinion. See id. at 260–61 (noting that the defendant "did not testify to making an outcry or to any attempt to open the car door or to leave the car" during the alleged sexual assault); id. at 263 ("The character of the defendant and the fact of her engaging in prostitution did not deprive her of the right of self-defense, but they were circumstances to be considered by the jury, along with all other facts and circumstances shown by the evidence . . . .").

226. Id. at 262 (emphasis added).

227. See id.

228. Id. at 263.

229. See id.; see also Jennifer A. Brobst, Perilous Private Enforcement Strategies: From Posses and Citizen's Arrest to Texas Heartbeat Statutes, 14 ConLawNOW, no. 1, 2022, at 11, 14 ("Without enough guidance or accountability, private citizens have a tendency toward excess, especially when they feel they are on a mission.").

230. *Goodseal*, 183 N.W.2d at 263. This Essay returns to this case when discussing the constitutional avenues for accountability for the New Outlawry.

231. See supra note 223 and accompanying text.

232. See Palermo, supra note 8.

233. S.B. 666, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

burden of injecting the issue of justification" into a criminal trial.[234] It would have instead created "a presumption of reasonableness under this section that the defendant believed such force was necessary to defend himself or herself or a third person from what he or she believed to be the use or imminent use of unlawful force by another person."[235]

This aspect was particularly concerning to some critics of the proposal: It would, they claimed, "shift[] the burden of injecting the issue of self-defense from the defense to a presumption that every single assault that ever occurs in the entire State of Missouri is a result of self-defense."[236] The bill also created presumptive immunity from arrest, detention, and trial and introduced a pretrial immunity hearing at which the government would have to convince a judge that the conduct was unlawful by clear and convincing evidence to even get to a jury.[237] Exempting "defendants from the ordinary criminal process is profound" and a rare immunity in the history of criminal law.[238]

At a hearing on the bill, witnesses against the legislation outweighed those in favor five to one.[239] Those in favor included former Senate candidate and convicted gun offender Mark McCloskey.[240] The opponents were a diverse group of clergy, community organizations, and crime fighters. Law enforcement witnesses argued that "the proposal would allow criminals to cry self-defense, and possibly get away with murder."[241] In a letter to the committee, dozens of law enforcement officials entreated the legislators to reject the bill.[242] It failed to pass out of committee on a narrow 4-3 vote.[243]

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234. Mo. Ann. Stat. § 563.031 (West 2023); see also S.B. 666.

235. Id.

236. Letter from Law Enforcement Cmty. of Se. Mo. to Hon. Jason Bean 1 (Jan. 28, 2022), https://s3.documentcloud.org/documents/21195357/senate-bill-666-letter-to-jason-bean-final.pdf [https://perma.cc/9ZQT-2N8E] [hereinafter Law Enforcement Letter].

237. See S.B. 666, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

238. Ruben, Self-Defense Exceptionalism, supra note 1, at 514. It's worth pointing out that, as the Court's attention in constitutional cases has turned to venerate history and tradition, this liberalization is entirely alien to that history and tradition. See id. at 520 ("The notion that self-defense could be adjudicated by a judge before trial thus has no basis in the common law tradition imported from England and implemented in America.").

239. Senate Committee Minutes: Hearing on S.B. 666 Before the Comm. on Transp., Infrastructure & Pub. Safety, 101st Gen. Assemb., 2nd Reg. Sess. (Mo. 2022) [hereinafter Senate Committee Minutes].

240. Id.; see also Brad Dress, Mark McCloskey, Who Waved Gun at Protesters, Garners Just 3 Percent of GOP Senate Primary Vote, The Hill (Aug. 3, 2022), https://thehill.com/homenews/campaign/3586336-mark-mccloskey-who-waved-gun-at-protesters-garners-just-3-percent-of-vote-in-gop-senate-primary/ [https://perma.cc/YXF3-ZCDA].

241. Marsha Heller, Mo. SB 666, Dubbed 'Make Murder Legal Act', Fails to Pass Committee, KFVS12 (Feb. 10, 2022), https://www.kfvs12.com/2022/02/10/mo-sb-666-dubbed-make-murder-legal-act-fails-pass-committee/ [https://perma.cc/FYY7-THRZ].

242. Law Enforcement Letter, supra note 236, at 1.

243. Senate Committee Minutes, supra note 239.

The Missouri example is extreme, but that state is not alone among legislators working to license and protect greater amounts of private violence. Professor Eric Ruben has documented how novel procedural changes—in the form of self-defense immunity—have insulated force wielders.[244] In more than a quarter of the country, states have granted immunity to proclaimed self-defenders in an attempt to preclude a criminal trial and erase the jury's historic role in deciding the legality of self-defense in a given situation.[245]

The development of this procedural protection is just as important as the substantive expansion of the circumstances when deadly force can be used. As Ruben writes, "[W]hile Stand Your Ground has garnered the most attention, advocates—and especially gun rights advocates—have pursued a deeper goal: insulating defensive gun use from legal oversight to the greatest extent possible."[246] And, as with the substantive expansion,[247] this procedural innovation has real and symbolic effects.[248] "The message that self-defense immunity sends is troubling: that people can engage in defensive violence that *they believe* is lawful with less legal oversight."[249]

Studies of expansive substantive permission to use deadly force in stand-your-ground jurisdictions bear out these worries. The RAND Corporation, a nonpartisan research organization, has for years compiled information about the empirical evidence concerning various gun policies. After reviewing the research that met its stringent requirements for showing causal effects, the organization gave stand-your-ground laws its highest rating for increasing firearm homicides.[250]

And the harms this regime imposes are distributionally stratified. Evidence suggests that the benefits of stand-your-ground laws accrue less to women and nonwhite men, and the harms often flow their way

244. See Ruben, Self-Defense Exceptionalism, supra note 1, at 512.

245. Id. at 515.

246. See id.

247. Mary Anne Franks, The Cult of the Constitution 98 (2019) ("It is quite clear that many people *believe* that stand-your-ground laws give them the right to use deadly force in a wide variety of situations and act accordingly."); Light, supra note 213, at 155 ("In addition to their powerful legal implications, the laws have had a profound effect on the nation's culture, reinforcing the belief that a good, law-abiding citizen is an armed citizen.").

248. See Ruben, Self-Defense Exceptionalism, supra note 1, at 541 (arguing that "immunizing self-defense can lead to more unlawful violence with less legal oversight; diminish the jury, thereby inviting less accurate and less legitimate outcomes; and introduce inefficiency into the criminal justice process").

249. Id.

250. What Science Tells Us About the Effects of Gun Policies, Rand Corp. (Mar. 2, 2018), https://www.rand.org/research/gun-policy/key-findings/what-science-tells-us-about-the-effects-of-gun-policies.html [https://perma.cc/EV4Y-Q7NZ] (last updated Jan. 10, 2023).

instead.[251] There is a vast literature on threat perception and its racially disparate effects.[252] Racial minorities, and African Americans in particular, appear more likely to be mistakenly shot based on threat perception.[253] Training in use of deadly force (as is required for professional law enforcement but not for private individuals in most cases) can possibly diminish, but not eliminate, this risk.[254] As Professor Alice Ristroph writes, these types of violence-empowering laws "may decrease the risks of violence to some persons but increase the risks that others—persons likely to be perceived as threatening—will suffer harm."[255]

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251. See Charles, Securing Gun Rights, supra note 168, at 623–24 (describing and collecting evidence); Miller, A History of Private Policing, supra note 41, at 20 (documenting data).

252. This is not to say there isn't controversy over these studies. Compare John Paul Wilson, Kurt Hugenberg & Nicholas O. Rule, Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat, 113 J. Personality & Soc. Psych. 59, 60 (2017) (discussing studies that found people perceive young Black men as larger and more physically threatening than young white men), with Stephen P. Garvey, Implicit Racial Attitudes and Self-Defense, 37 Notre Dame J.L. Ethics & Pub. Pol'y 201, 246 (2023) (expressing skepticism that studies are conclusive).

253. Isabel Bilotta, Abby Corrington, Saaid A. Mendoza, Ivy Watson & Eden King, How Subtle Bias Infects the Law, 15 Ann. Rev. L. & Soc. Sci. 227, 230 (2019) ("[P]roviding participants with a 630-ms deadline results in a biased pattern of errors, such that unarmed Blacks are more likely to be incorrectly shot than their White counterparts and armed Whites are less likely to be shot than armed Black targets." (citations omitted)); Michael C. Gearhart, Kristen A. Berg, Courtney Jones & Sharon D. Johnson, Fear of Crime, Racial Bias, and Gun Ownership, 44 Health & Soc. Work 246, 246 (2019) ("Our findings indicate that . . . vigilance is more likely to be directed toward racial and ethnic minorities. Shooter bias studies suggest that this hypervigilance toward racial and ethnic minorities is associated with an increased likelihood of shooting at a person who is a racial or ethnic minority." (citations omitted)); Yara Mekawi & Konrad Bresin, Is the Evidence From Racial Bias Shooting Task Studies a Smoking Gun? Results From a Meta-Analysis, 61 J. Experimental Soc. Psych. 120, 123 (2015) (conducting a meta-analysis of 43 studies and finding that "[r]elative to White targets, participants were quicker to shoot armed Black targets, slower to not shoot unarmed Black targets, and more likely to have a liberal shooting threshold for Black targets").

254. Compare Joshua Correll, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals, 83 J. Personality & Soc. Psych. 1314, 1315 (2002) (finding that forty untrained undergraduate students' interpretations of a target as dangerous and the associated decision to shoot varied based on a function of the target's ethnicity), with Joshua Correll, Bernadette Park, Charles M. Judd, Bernd Wittenbrink, Melody S. Sadler & Tracie Keesee, Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot, 92 J. Personality & Soc. Psych. 1006, 1021 (2007) ("We suggest, then, that police training and on-the-job experience in complex encounters may allow officers to more effectively exert executive control in the shoot/don't-shoot task, essentially overriding response tendencies that stem from racial stereotypes.").

255. See Alice Ristroph, The Constitution of Police Violence, 64 UCLA L. Rev. 1182, 1189 (2017). Professor Hill sees this as an instantiation of the critique that "coercion proceeds along two overlapping tracks: wherein the state not only actively targets Black people for coercive measures but also relies upon criminal laws to authorize private activity that aligns with or fortifies their subjugation." Hill, supra note 38, at 62.

The authority of private persons to engage in defensive force has migrated far from the restrictive days of English common law. That authority is expanding around the country today, and much of the rhetoric around self-defense is explicitly tied to guns. According to these narratives, broad authorization for self-defense is needed to protect law-abiding gun owners, and guns are necessary instruments for law-abiding citizens to exercise self-defense.

* * *

In dealing with both types of violence—that which furthers the state's interests and that which secures private defense (and supposedly greater public safety)—American law has grown alarmingly lax. But recent developments make that liberality even more troubling. Coupled with the deterioration of social and civic ties, and distrust in official forms of law enforcement, states have been gradually entrusting more violence work to private citizens. Laws empower individuals to act aggressively to enforce law and order and react forcefully to any perceived threat.[256] The result is an uncoordinated, but unmistakable, lurch toward decentralized violence that purports to inure to the benefits of the society and each individual. Much of this license extends beyond the bounds of what state actors could lawfully do and is articulated in the language of individual right. The next Part breaks down the conceptual and doctrinal limits of this turn.

III. LIMITATIONS ON DELEGATING VIOLENCE

The New Outlawry, in the various forms outlined in Part II, represents a departure from the basic contractarian model of liberal political theory. Briefly put, in the state of nature, everyone is formally equal in their insecurity. In exchange for some measure of protection by all, the executive judgment of each to decide what is just is surrendered to officials that act on behalf of everyone.[257] Although greatly simplified, this is the basic reciprocal agreement in the Western political tradition: Each surrenders private vengeance and equal insecurity for the security provided by the state.[258] In return, each agrees to submit to the judgment

256. Professor Aziz Huq theorizes that "legal systems of private suppression typically are a dominant group's response to new, exogenous threats to economic interests and status hierarchies." See Huq, supra note 98, at 1301. Hence, it should come as no surprise that private delegations of violence such as the type described here arise in those jurisdictions and among those groups who feel their economic and political power most threatened by demographic change.

257. Locke, Two Treatises, supra note 110, at 190 ("[M]en give up all their natural power to the society which they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws . . . .").

258. See Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America 113 (2006) (quoting the prosecutors in the 1806 *Selfridge* case concerning self-defense and the duty to retreat as arguing that "[a]ll men are bound to

of the whole. The New Outlawry represents a departure from this basic agreement. In some not insignificant number of applications, it attempts to replace the judgment of the whole with the judgment of the individual.

Of course, to characterize something as a departure depends on what constitutes the baseline. The notion of a "delegation" of violence is unintelligible without a conception of the default distribution of authority to inflict violence.[259] Although some criticize the premise that the state possesses a monopoly on legitimate violence both descriptively and normatively,[260] we think it represents the best account of Western liberal political theory and Anglo-American legal tradition from the early modern period to the present. And that thesis has implications for the authority of the state to wash its hands of the violence it enlists private actors to perform.

Additionally, as explained below, the monopolization thesis helps rationalize a number of features of American constitutional practice—including some aspects of state action doctrine, the private nondelegation doctrine, the state-created-danger theory of due process liability, the meaning of equal *protection* of the law, and the minimum guarantees of the Republican Form of Government Clause. Jurisdictional experiments with the New Outlawry test the boundaries of these discrete doctrinal concepts and reveal jurisprudential and normative assumptions that connect them.

Section III.A explains and defends the monopoly thesis as the best account of Anglo-American political theory and history. Sections III.B and III.C then explore the constitutional limits on the state's authority to license violence, given its monopoly.

A. *The State's Violence Monopoly*

The notion that a state—for that concept to have any meaning—must monopolize all legitimate force is an idea over four hundred years old and

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surrender their natural rights upon entering into civil society, and the law become the guardians of the equal rights of all men" (internal quotation marks omitted)).

259. Although this Essay argues that there's a good descriptive account of the monopoly on legitimate violence as a matter of American political and legal history, we recognize that the selection of this baseline is not free from normative choice. See generally Cordelli, The Privatized State, supra note 36, at 24–25 (describing different sorts of baselines in referring to privatization and noting that "the very concept of privatization conceptually presupposes a baseline against which the idea of public functions must be specified"); Jack M. Beermann & Joseph William Singer, Baseline Questions in Legal Reasoning: The Example of Property in Jobs, 23 Ga. L. Rev. 911, 916 (1989) (recognizing that "[b]aselines embody important moral and political choices" but that this normative aspect is often obscured in legal argument).

260. See, e.g., Leider, State's Monopoly, supra note 158, at 41 ("This premise [of the state's monopoly of force], however, runs counter to a centuries-long tradition of Anglo-American law decentralizing the use of force." (emphasis omitted)).

shared by theorists across numerous disciplines.[261] Historians,[262] philosophers,[263] peace researchers,[264] and other scholars recognize how this concept makes sense of the nature of the modern state. The term "monopoly of legitimate violence" (sometimes translated as "monopoly of legitimate force") was coined by German sociologist and historian Max Weber in *Politics as a Vocation*,[265] but its predicates extend far back into the Early Modern period and continue to the present day.

Philosopher Baruch Spinoza spoke of the impossibility of "preserv[ing] peace unless individuals abdicate their right of acting entirely on their own judgment."[266] German Enlightenment philosopher Immanuel Kant conceived of the state as that entity with the "power to crush all inner resistance."[267] English philosophers Thomas Hobbes and John Locke both recognized that a state must be capable of monopolizing legitimate violence to resolve the paralyzing insecurity (or, in Locke's term, "inconvenience") that each will execute his self-interested judgment upon all others.[268] As Kant wrote: "[B]efore a public lawful condition is

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261. See Rosky, supra note 35, at 886 ("For four centuries, [the 'monopoly thesis'] has been widely accepted and articulated, in one form or another, by philosophers, political scientists, sociologists, historians, and economists—both liberal and non-liberal alike."); Schäfer & Fehling, supra note 41, at 207 ("Nearly all states under the rule of law respect the state monopoly on the legitimate use of violence, although the scope differs.").

262. See, e.g., Susan Reynolds, There Were States in Medieval Europe: A Response to Rees Davies, 16 J. Hist. Soc. 550, 551 (2003) (modifying the Weberian definition slightly and defining a state as "an organization of human society within a more or less fixed area in which the ruler or governing body more or less successfully controls the legitimate use of physical force").

263. See, e.g., Mark Dsouza, Retreat, Submission, and the Private Use of Force, 35 Oxford J. Legal Stud. 727, 729 n.5 (2015) (observing that the notion of the state's monopoly on legitimate force is "almost universally accepted as a foundational principle of state amongst modern liberal states").

264. See, e.g., Wulf, supra note 42, at 147–48 ("The key to the modern Westphalian nation-state is a monopoly on legitimate and organized force. This is one of the main achievements of a civilized society.").

265. Max Weber, Politics as a Vocation (Jan. 28, 1919), *in* The Vocation Lectures 32, 33 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004) (emphasis omitted).

266. Baruch Spinoza, Theologico-Political Treatise (R.H.M. Elwes trans. 1906) (1670), reprinted in The European Philosophers from Descartes to Nietzsche 227, 229 (Monroe C. Beardsley ed., 2002).

267. See Immanuel Kant, On the Old Saw: That May Be Right in Theory but It Won't Work in Practice 67 (E.B. Ashton trans., 1974) (1793).

268. See Thomas Hobbes, Leviathan 97 (Oxford Univ. Press 1952) (1651) (arguing that in the state of nature, each is in "continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short"); Locke, Two Treatises, supra note 110, at 127. Professor James Whitman argues that it's a mistake to conflate the social contract theory of English philosophers and the monopoly of violence thesis of Weber. His argument is that the former is about contracting for self-defense; the latter is about the social management of vengeance. See James Q. Whitman, Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence, 39 Tulsa L. Rev. 901, 922–23 (2004). For this Essay's purposes, we can elide the distinction, since both self-defense and vengeance are instantiations of an individual's decision to execute their own moral judgment through

established individual human beings, peoples, and states can never be secure against violence from one another, since each has its own right to do what seems right and good to it and not to be dependent upon another's opinion about this."[269]

In the modern era, Professor John Rawls operated from a baseline of violence monopolization, writing that "political power is always coercive—backed by the government's monopoly of legal force."[270] So justification through public reason was essential, for coercive power is also public power—"the power of free and equal citizens as a corporate body."[271]

Rawls's philosophical foil, the libertarian scholar Robert Nozick, shared this monopolist premise, noting that the state "claims a monopoly on deciding who may use force when" as well as the sole authority to decide "who may use force and under what conditions."[272] The state possesses sole authority "to pass on the legitimacy and permissibility of any use of force within its boundaries" and a corollary right to "to punish all those who violate its claimed monopoly."[273] The ability to monopolize violence and punish those who use violence without its permission is the sine qua non of even the minimalist state in Nozick's conception.[274] Contemporary philosopher Philip Pettit also assumes the state is that entity with the monopoly on legitimate violence.[275] It is for this reason, according to Pettit, that democratization[276] and a republican tradition of

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violence on another. See Kimberly Kessler Ferzan, Self-Defense and the State, 5 Ohio St. J. Crim. L. 449, 463 n.80 (2008) ("Because I am considering precisely the argument that the social contract is one that gives the state a monopoly on violence, and without the contract, different types of violence are indistinguishable, I am intentionally conflating these two versions of the social contract."). These same problems of private judgment recur in discussions about corporatized private police. See Elizabeth E. Joh, Conceptualizing the Private Police, 2005 Utah L. Rev. 573, 578 [hereinafter Joh, Conceptualizing the Private Police] ("[W]hat counts as deviant or disorderly behavior for private police is defined not in moral terms but instrumentally, by a client's particular aims: a pleasant shopping experience, a safe parking area, or an orderly corporate campus.").

269. Immanuel Kant, Metaphysical First Principles of the Doctrine of Right (1797), reprinted in The Metaphysics of Morals 98 (Mary J. Gregor ed., Mary Gregor trans., Cambridge Univ. Press 2017) (emphasis omitted).

270. See John Rawls, Justice as Fairness: A Restatement 90 (Erin Kelly ed., 2001).

271. Id.; see also Matthew A. Shapiro, Delegating Procedure, 118 Colum. L. Rev. 983, 1044 (2018) (describing Rawls as recognizing the "doubly public" nature of political power: "As coercive power, it's vested with the state, per the monopoly of physical force; and as democratic power, it's collectively authorized by the political community, per the social contract").

272. See Robert Nozick, Anarchy, State and Utopia 23 (1974).

273. Id.

274. Id. at 24.

275. See Philip Pettit, A Theory of Freedom: From the Psychology to the Politics of Agency 155 (2001) ("Assuming a monopoly of legitimate force in its territory, the state has a coercive power of charging members a fee . . . . And not only is the state coercive . . . ; it is also inescapable.").

276. See id. at 156.

nonsubjugation[277] must operate when evaluating the exercise of force by this collective.

The "monopoly thesis" is borne out in Anglo-American history too.[278] As Sir Frederick Pollock, the grandee of English legal history, has written, after a period of fluidity between private and public violence, almost all communities converge on a system which "stay[s] . . . the private avenger's hand" and in which "the repression of crime [is] by direct application of the power at the disposal of the State."[279] So, as the common law historians chronicle, what began as a system of dispute resolution through feuding, blood money, and localized custom was gradually replaced by a comprehensive "king's peace" that covered "all times, the whole realm, [and] all men."[280]

Of particular seriousness were those acts that flouted the sovereign's monopoly on violence, such as the unauthorized use of public arms, which "could be taken as a claim to governing authority and a challenge to the crown."[281] So, for instance, dueling—perhaps the most structured form of interpersonal violence—was castigated by Blackstone's contemporaries as an affront to the sovereign. "He who takes upon him to decide his private quarrels by private Force," wrote one commentator, "puts himself in the place of an independent Sovereign."[282] Another spoke of the "depraved custom" of dueling as "an insult against the King's power and

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277. See Philip Pettit, Freedom as Antipower, 106 Ethics 576, 577 (1996) [hereinafter Pettit, Freedom as Antipower] ("[Under] the republican tradition . . . the antonym of freedom [is] . . . subjugation, defenseless susceptibility to interference, rather than actual interference." (footnote omitted)). Thank you to Aziz Huq for directing us to this work.

278. See Rosky, supra note 35, at 886.

279. See Frederick Pollock, The King's Peace in the Middle Ages, 13 Harv. L. Rev. 177, 177 (1899); see also Jolliffe, supra note 61, at 107 (observing that between 900 and 1066, "the king, once no more than the avenger of the law in the last recourse, was becoming its arbiter" by granting his "personally given peace" and "by taking over . . . the coercive force of outlawry").

280. F. W. Maitland, The Forms of Action at Common Law 10 (A.H. Chaytor & W.J. Whittaker eds., 1979); see also Pollock, supra note 279, at 178 (noting that eventually, "pursuit of serious crime was taken away from the old local courts and came under the control of the king's judges and officers"). Something similar happened on the continent as well when the Holy Roman Emperor used the concept of *Landfrieden* as a way to limit private enforcement of property rights and eliminate feuds. Some of these laws included weapon regulation. See Kristoffel Grechenig & Martin Kolmar, The State's Enforcement Monopoly and the Private Protection of Property, 170 J. Institutional & Theoretical Econ. 5, 6 (2014).

281. Guyora Binder & Robert Weisberg, What Is Criminal Law About?, 114 Mich. L. Rev. 1173, 1183 (2016).

282. See Richard Hay, A Dissertation on Duelling 50 (London, William Smith 2d ed. 1801) (1784). The writer remarked on the absurdity of each asserting "the privilege of settling disputes by the Sword or Pistol," in which case there would be a crowd of "independ[e]nt Sovereigns, without Subjects." See id. at 51. Having "given up all claim to Protection from the civil power," these independent sovereigns were fit only to live in the woods "till they should die a natural death, by Famine, by wild Beasts, or by the hands of each other." Id. at 51 (emphasis omitted).

authority."[283] As Professor Don Herzog summarizes, "Private violence becomes intolerable when the sovereign is supposed to have exclusive power to rule."[284]

Because the peace of the sovereign supplanted all other forms of individual judgment and self-help, offenses against others were not merely private wrongs; they were offenses to the sovereign as the violence monopolist.[285] So, pleas in criminal cases are styled as on behalf of the sovereign because the sovereign is the figure, as Blackstone wrote, "in whom centers the majesty of the whole community, [and who] is supposed by the law to be the person injured by every infraction of the public rights belonging to that community."[286]

This notion of the king's peace did not expire with the American Revolution. Instead, the caption in criminal proceedings simply republicanized, substituting the sovereign state, commonwealth, or people for the monarch.[287] As historian Laura Edwards has extensively documented, a gradual and un-self-reflective process in America followed the "logic of Revolutionary ideology: once free people replaced the Crown as sovereign members of the polity," crimes against Americans "became, in theory, 'public wrongs.'"[288]

The development of the Anglo-American common law of self-defense is consonant with this violence monopolist model. As the prior Part outlined, at common law in England, there was no such thing as justifiable killing in pure self-defense; the deliberate killing of another human being was the sole province of the sovereign. Homicides could be justified if they were done pursuant to the sovereign's writ, in apprehending a "manifest felon[]" or when visiting a judgment on those deemed outlaws.[289] What made these kinds of killings justifiable was that they were "committed in execution of the law."[290] They were more akin to a state-sanctioned execution than anything one would recognize as an act of personal self-defense.[291] All other forms of homicide, including homicide in self-

283. See Don Herzog, Sovereignty, RIP 44 (2020) (internal quotation marks omitted) (quoting Sir Francis Bacon).

284. See id. at 43.

285. Binder & Weisberg, supra note 281, at 1183 ("In medieval and early-modern law, crimes were not conceived as injuries to interests of individuals. Instead, they were breaches of a duty of political loyalty to a lord.").

286. See 4 William Blackstone, Commentaries *2.

287. Saul Cornell, The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace, 80 Law & Contemp. Probs. 11, 14 (2017) ("The American Revolution republicanized the concept of the King's Peace by transmuting it into the people's peace . . . .").

288. See Laura Edwards, The People and Their Peace 98 (2009).

289. Beale, supra note 203, at 567–68.

290. Id. at 568.

291. See 2 Pollock & Maitland, supra note 58, at 479; see also Rollin M. Perkins, A Re-Examination of Malice Aforethought, 43 Yale L.J. 537, 539 (1934) [hereinafter Perkins,

defense,[292] were understood as committed in derogation of the sovereign's sole authority to dispense death and judgment and consequently required royal pardon.[293] Matthew Hale confirmed the monopoly thesis, writing that "private persons are not trusted to take capital revenge [on each other]."[294]

Although the sovereign's pardon—essentially a ratification of a killing in self-defense—became routine early in English history,[295] the imposition of the state's special permission persisted well into the nineteenth century. This is why the lawbooks of the sixteenth, seventeenth, and eighteenth centuries insist on a distinction between justifiable and excusable homicide.[296] Justifiable homicides are killings performed on behalf of the sovereign; excusable homicides (including self-defense) are killings which the sovereign will tolerate on the basis of necessity—but in either case, the sovereign, not the killer, decides the propriety of the killing.[297]

Whether viewed from Western philosophy or Anglo-American law, the monopoly thesis prevails. As Professor Clifford Rosky aptly stated, "[N]o matter who tells the tale, or how it is told, the state-of-nature story always ends with the same basic punchline: The state has, must have, or should have a monopoly of force."[298]

The monopoly thesis has three interrelated concepts that are worth unpacking: violence, monopoly, and legitimacy.

1. *Violence*. — When we use the term violence, we mean the threat or application of unconsented-to physical force.[299] There are more

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Malice Aforethought] ("According to the ancient common law of England, only those homicides were innocent which were caused in the enforcement of justice . . . .").

292. Perkins, Malice Aforethought, supra note 291, at 540 ("He who had caused the death of another . . . in the necessary defense of his own life . . . had no legal defense." (footnotes omitted)).

293. 2 Henry of Bratton, supra note 59, at 732–73; 2 Pollock & Maitland, supra note 58, at 502 ("The man who commits homicide by misadventure or in self-defence deserves but needs a pardon."); cf. Binder & Weisberg, supra note 281, at 1183 (noting that excuse defenses for criminal charges at common law "included infancy, insanity, and duress—but also self-defense, seen as a justification today").

294. See 1 Hale, supra note 137, at 481.

295. See Killing a Thief Act of 1532, 24 Hen. 8, c. 5 (Eng.).

296. See Claire O. Finkelstein, Self-Defense as a Rational Excuse, 57 U. Pitt. L. Rev. 621, 637 (1996) ("Exoneration for killings committed *se defendendo* and *per infortunium* remained a matter of pardon until relatively late in the history of Anglo-American law.").

297. Beale, supra note 203, at 572 ("Self-defense merely was no excuse, but ground for pardon; but it was an excuse in equity, and the equitable defense was at last accepted at law. Killing in due execution of law was justifiable." (footnote omitted)).

298. Rosky, supra note 35, at 885.

299. See Robert Paul Wolff, On Violence, 66 J. Phil. 601, 606 (1969) ("Strictly speaking, violence is the illegitimate or unauthorized use of force to effect decisions against the will or desire of others." (emphasis omitted)). We disagree with Wolff that the definition of violence includes illegitimacy. For our purposes, we separate out the descriptive from the normative when we speak of violence, recognizing as Professor Alice Ristroph does, that separating the two may obscure some important features. See Alice Ristroph, Criminal Law

comprehensive definitions of violence, of course.[300] But the unmediated threat or application of physical force by another individual is exceptional and deserving of exceptional treatment when it is deployed. It is exceptional because to be threatened with or suffer physical harm by another goes to the very heart of human dignity. A person who is subject to the threat or reality of physical coercion by another private party is no longer being treated as a being with agency but as an object or instrument of another's will.[301] *State v. Mann* is rightfully reviled because it states with absolute candor that it is the unappealable, despotic fact of *physical* coercion by one private party over another that separates freedom from slavery.[302]

2. *Monopoly.* — As Professor Ralf Poscher has written, the idea of the state possessing a "monopoly" on violence is a bit misleading. Murder, terrorism, theft, and other forms of violence do occur as a matter of social reality. Hence, "even the modern state has no *factual* monopoly on the use of force."[303] Instead, what the state asserts is to have a monopoly on *superior* force.[304] Because only with the capacity to overpower any other force can

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in the Shadow of Violence, 62 Ala. L. Rev. 571, 574–75 (2011) (noting that scholars often focus solely on the descriptive, material aspect of violence and argue its legitimacy should be a separate inquiry but that "the dual dimensions of violence sometimes run seamlessly into one another").

300. See James P. Lynch & Lynn A. Addington, Crime Trends and the Elasticity of Evil: Has a Broadening View of Violence Affected Our Statistical Indicators?, 44 Crime & Just. 297, 298 (2015) ("As civility increases, the cultural and legal definitions of criminal violence expand. Relatively minor incivilities not previously defined as violent are considered so, and violence that did not rise to illegal behavior becomes classified as criminal.").

301. See Julian A. Sempill, Ruler's Sword, Citizen's Shield: The Rule of Law & the Constitution of Power, 31 J.L. & Pol. 333, 365 (2016) ("If people are simply coerced, or tricked, rather than being offered genuinely good reasons to give their allegiance to a constitutional order, then they are reduced to the status of objects of manipulation, mere means or instruments, to be used according to the convenience of those wielding power."); see also Pettit, Freedom as Antipower, supra note 277, at 595 (observing that the principle of antipower, as opposed to subjugation, is that "[y]ou do not have to live either in fear of that other . . . or in deference to the other . . . [:] You are a somebody in relation to them, not a nobody").

302. State v. Mann, 13 N.C. (2 Dev.) 263, 267 (1829) ("The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God."); see also Eric L. Muller, Judging Thomas Ruffin and the Hindsight Defense, 87 N.C. L. Rev. 757, 761–62 (2009) (describing *Mann* as "perhaps the coldest and starkest defense of the physical violence inherent in slavery that ever appeared in an American judicial opinion"); Pettit, Freedom as Antipower, supra note 277, at 576–77 (explaining how American republican tradition saw slavery as subjugation, the "defenseless susceptibility to interference").

303. Ralf Poscher, The Ultimate Force of the Law: On the Essence and Precariousness of the Monopoly on Legitimate Force, 29 Ratio Juris 311, 312 (2016); see also Robert C. Ellickson, Forceful Self-Help and Private Voice: How Schauer and McAdams Exaggerate a State's Ability to Monopolize Violence and Expression, 42 Law & Soc. Inquiry 49, 51 (2017) ("[M]onopoly implies a degree of control over the use of force that a state in practice can never attain." (emphasis omitted)).

304. Poscher, supra note 303, at 314.

the law transform "potentially violent social conflicts" into legal ones.[305] Without the capacity to overawe all other force, the "juridification" of violence through a sovereign-empowered dispute resolution system becomes advisory, a "next-to-last strategy" for resolving conflict.[306] No reasonable recourse to private violence can remain for a state to function according to law: "The law must be capable of overpowering every other force that might potentially resist it."[307] Poscher's formulation is consonant with Professor Robert Ellickson's refinement of the monopolist thesis. Because actual monopolization is impossible, Ellickson proposes that a better restatement would be something along the following: First, every society contains individuals who will use violence to "prey on others' persons and property;" second, those attacked, and perhaps witnesses, are "inherently prone to use self-help measures" including violence "to ward off or punish these acts of predation;" third, because the state is "unable wholly to prevent the two forms of private violence," it "invariably attempts to regulate both forms."[308]

What these formulations share is the notion that the state's monopoly is over legitimate violence, or over what one might call the *legitimation* of violence. The state sets itself up, not as the only entity that ever uses violence, but as the entity with the ultimate power to sanction violence. "The state," in other words, "has the prerogative to distinguish between legitimate and illegitimate violence."[309] For our purposes, the upshot is that the state's monopoly is over the power to pass on the propriety of every act of violence in its jurisdiction.[310]

3. *Legitimacy.* — The final feature of the monopoly on violence thesis is that the state monopolizes *legitimate* or *lawful* violence. As acknowledged above, as a matter of social reality, violence occurs without the state's permission. And the monopoly thesis does not mean that any actual violence that goes undetected or unpunished is implicitly sanctioned by the state. Instead, legitimacy presupposes a demarcation between that violence that the state inflicts or sanctions; that violence that the state does not inflict or sanction, but for other reasons does not detect or punish;

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305. Id.

306. Id.

307. Id.

308. See Ellickson, supra note 303, at 52. Ellickson contemplates that the state often regulates violence ex post, but that does not necessarily imply the inability to regulate ex ante. Cf. Poscher, supra note 303, at 314 (discussing the role that the state's monopoly on superior force plays in legitimating violence regulation through sovereign-empowered dispute resolution).

309. Jennifer Carlson, Revisiting the Weberian Presumption: Gun Militarism, Gun Populism, and the Racial Politics of Legitimate Violence in Policing, 125 Am. J. Socio. 633, 633 (2019).

310. See Nozick, supra note 272, at 23 ("A state claims a monopoly on deciding who may use force when; . . . it reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries; furthermore it claims the right to punish all those who violate its claimed monopoly.").

and that violence that the state will inflict and sanction and will use its superior power to detect and punish.

Of course, it is possible that the state can "subcontract" violence to other parties and allow them to utilize violence.[311] But this subcontracting isn't the same as surrendering the monopoly. The violence subcontracted to others must be understood as ultimately advancing the goals and purposes of the violence monopolist. Much of the delegation of private policing discussed in the prior Part is in this vein. Violence permitted for the state's end in preventing and deterring crime, as well as apprehending offenders, is consistent with the state's monopoly.[312] Self-defense doctrine, too, is entirely consistent with the state's monopoly, as the state sets the parameters around when violence to protect private interests is justified.[313] So, for example, in Professor Malcolm Thorburn's assessment, the legitimacy of policing and punishment comes not from individualistic rights to self-help and self-preservation but derives from the legitimacy of the whole.[314]

We think that the monopolization thesis provides the best account of Western political theory and Anglo-American common law traditions. There are, of course, profound disagreements about whether this baseline is normatively desirable; but we are confident that this is the best descriptive account of American social and political practice and the common assumptions that undergird a number of seemingly disparate features of American jurisprudence.[315] Assuming this account of the monopolization thesis is descriptively true, it provides the baseline that explains the ex ante distribution of authority in American jurisprudence:

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311. Alice Ristroph, The Second Amendment in a Carceral State, 116 Nw. U. L. Rev. 203, 213 (2021) ("Weber apparently contemplated that a monopolist could subcontract some of the work of violence; he allowed that the state may designate as legitimate some uses of force by private citizens." (citing Max Weber, The Theory of Social and Economic Organization 156 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1947))).

312. Indeed, such a mechanism of accountability may be required by the state as a principle of antipower. See Pettit, Freedom as Antipower, supra note 277, at 590. To surrender one person to the unchecked, arbitrary coercive power of another is to facilitate domination, not to expand freedom. See id. at 599 (arguing that for the Framers, "freedom require[d] an absence of exposure to the arbitrary interference of others, in particular, the absence of exposure guaranteed under a proper rule of law").

313. T. Markus Funk, Rethinking Self-Defence: The 'Ancient Right's' Rationale Disentangled 19–25 (2021) (explaining how self-defense law can serve monopolist values); Miller, Self-Defense, supra note 114, at 86 (noting that self-defense law has always been "heavily conditioned and constructed by the state"); see also Whitman, supra note 268, at 913 ("[O]ur right of self-defense has not typically been understood to license any violence beyond what is strictly necessary to preserve our physical well-being.").

314. See Thorburn, Reinventing, supra note 115, at 426 (arguing that policing conduct "is legitimate only insofar as it is performed by someone who can plausibly be said to be acting in the name of the polity as a whole, and not in some narrower private interest").

315. Cf. Metzger, supra note 36, at 1375 (exploring how privatization and delegation should be understood and noting that the Supreme Court has failed "to link the private delegation and state action analyses").

a fixed position to judge whether powers have been retained or delegated, when a party has acted or refrained from acting, and other basic features of constitutional jurisprudence, as explained more fully below.[316]

B. *State Action and Delegation*

Courts recognize the sovereign's monopolization of legitimate violence in a number of discrete areas, but one of the most emblematic is in the state action context. State action remains a "conceptual disaster area,"[317] but the doctrine sets the outer boundaries of what kind of activity can be ascribed to the state as a legal matter.[318] This activity falls into roughly four categories: those actions that have been traditionally and exclusively public functions,[319] those circumstances "when the government has outsourced one of its constitutional obligations to a private entity,"[320] those situations in which government and private parties act jointly, and those acts a government compels a private actor to perform.[321] This section focuses on the first two as most relevant.

1. *Traditional and Exclusive Public Functions*. — Traditional and exclusive public functions are few[322] and largely undefined by the Supreme Court.[323] But the ones that the Court cites as paradigmatic are illuminating. Many of these cases involve functions and activities deeply enmeshed in notions of democratic legitimacy and accountability. As the Court described them, they are functions "traditionally associated with

316. Some commentators reject the notion that the right to engage in self-defense is delegated or granted by the state and instead insist that it is an inherent or natural right that individuals never give up when entering civil society. See Funk, supra note 313, at 22 (discussing this view). Whatever its precise source or nature, we agree with the widespread view that once there is a state, "there must be *some* limits on self-defence." See id. at 24; see also id. at 24–25 ("[T]here is general agreement that some boundaries on defensive force are both appropriate and required.").

317. Charles L. Black, Jr., The Supreme Court, 1966 Term: Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 95 (1967).

318. Cf. Joh, Paradox of Private Policing, supra note 41, at 93 (noting that "the Supreme Court and the lower courts have repeatedly rejected claims that the federal constitutional constraints placed on public police should also apply to the private police").

319. See Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928–29 (2019) ("[T]o qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally and exclusively performed the function.").

320. Id. at 1928–29, 1929 n.1. The *Halleck* Court characterized this scenario as related to the "traditional and exclusive" public function test, see id., but it strikes us as being conceptually distinct.

321. Id. (describing government compulsion as a ground for finding state action).

322. See id. at 1928–29 ("The Court has stressed that 'very few' functions fall into that category." (quoting Flagg Bros. v. Brooks, 436 U.S. 149, 158 (1978))).

323. See Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 578 (2000) ("The Court has never identified those functions it considers 'associated with sovereignty.'" (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974))).

sovereignty."[324] Actors that purport to be private become agents of the state when they engage in these kinds of activities.[325]

Take *Marsh v. Alabama*.[326] In *Marsh*, the Gulf Shipbuilding Corporation owned and operated a town called Chickasaw, Alabama, in the suburbs of Mobile. Except for its ownership, "it ha[d] all the characteristics of any other American town."[327] It had sewers, a business district, public streets, and a Mobile deputy sheriff, who "serve[d] as the town's policeman."[328] Grace Marsh, a Jehovah's Witness, was arrested for trespassing after being asked to stop distributing religious tracts on the streets of Chickasaw. Citing its free speech precedent, it was clear to the Court that "had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks,"[329] any government they formed to manage their disparate ownership could not have prevented a person from passing out religious literature. That ownership of Chickasaw's property was concentrated in one private corporate entity was irrelevant for purposes of constitutional analysis. "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."[330] Speech was of such importance to the foundations of free government that its severe constraint—even by an ostensible private property owner—could not be tolerated.[331] Crucially, the Court characterized this as a form of delegation, remarking that the fact the corporation is a private property owner "is not sufficient to justify the State's *permitting a corporation to govern a community of citizens* so as to restrict their fundamental liberties."[332]

Or consider the administration of elections. In a series of cases having to do with the right to vote in party primaries, the Court repeatedly said the activities related to administering an election are traditionally and exclusively governmental. In *Smith v. Allwright*, the Texas Democratic Party, at the time held in thrall to white supremacists, refused an African American voter access to a ballot. Texas law treated the party as a private,

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324. *Jackson*, 419 U.S. at 353.

325. Smith v. Allwright, 321 U.S. 649, 660 (1944) ("[S]tate delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state.").

326. 326 U.S. 501 (1946).

327. Id. at 502.

328. Id.

329. See id. at 505.

330. Id. at 507.

331. See id. at 509 ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.").

332. Id. (emphasis added); see also Private Police Forces, supra note 41, at 581 (arguing that "although private police perform only limited public functions, the rationale of *Marsh* suggests that when the state permits private police activities, it may endow these activities with state action").

voluntary association.[333] The Court rejected this characterization of the party: "The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party."[334] A constitutional democracy like the United States could not tolerate the capacity for free choice to be "nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election."[335]

Courts repeatedly refer to the power to condemn property by eminent domain as a feature of sovereign authority.[336] In a related context, the power of eminent domain tends to be one factor that tips an ostensibly special-purpose governmental entity—for which there is no equal protection one-person, one-vote rule—into a "general government" for which the one-person, one-vote rule applies.[337] In sum, the ability to dispossess a person of property—especially for ostensibly public purposes—is an aspect of coercion that courts routinely treat as uniquely governmental and accordingly subject to political and constitutional accountability.

Incarceration and criminal punishment are also functions courts have insisted are traditionally and exclusively public.[338] Although the Supreme Court has yet to directly rule on the issue, the idea that there is an irreducible public aspect to punishment is borne out by judicial enforcement of constitutional claims in the private prison context.[339] As

333. 321 U.S. 649, 654 (1944).

334. Id. at 663.

335. Id. at 664.

336. See Jackson v. Metro. Edison Co., 419 U.S. 345, 352–53 (1974) ("If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."); Cox v. Ohio, No. 3:16CV1826, 2016 WL 4507779, at *7 (N.D. Ohio Aug. 29, 2016) ("Because Kinder Morgan[,] [a private pipeline construction company,] is exercising the State of Ohio's eminent-domain powers, it is a state actor under the 'public functions' test.").

337. See, e.g., Hadley v. Junior Coll. Dist., 397 U.S. 50, 53–54 (1970) (explaining that the ability to condemn property, along with other exercises of power, was sufficiently general and signficant to trigger constitutional protections).

338. See Horvath v. Westport Libr. Ass'n, 362 F.3d 147, 151 (2d Cir. 2004) ("[O]nly the State may legitimately imprison individuals as punishment for the commission of crimes."); Giron v. Corr. Corp. of Am., 14 F. Supp. 2d 1245, 1249 (D.N.M. 1998) ("The function of incarcerating people, whether done publicly or privately, is the exclusive prerogative of the state.").

339. 1 Steven H. Steinglass, Section 1983 Litigation in State and Federal Courts § 2:15 (2023–2024 ed. 2023) ("[Lower courts] typically treat the confinement of wrongdoers to be a function that is traditionally the exclusive prerogative of the state, thus subjecting state-contracting private prison management companies and their employees as subject to suit under § 1983."); see also Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991) (per curiam) ("As a [private] detention center, Pri–Cor is no doubt performing a public function traditionally reserved to the state."); Gabriel v. Corr. Corp. of Am., 211 F. Supp. 2d 132, 137 (D.D.C. 2002) (holding that "[a] private corporation that provides services normally

one Fifth Circuit case declared: "Clearly, confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function."[340]

Policing too, has been described by the Supreme Court as "one of the basic functions of government,"[341] although it has expressly declined to detail under what circumstances the state may "delegate to private parties the performance of such functions" to avoid constitutional strictures.[342] The picture in the lower courts is mixed, with some courts finding that private parties delegated with broad law enforcement capabilities are exercising an exclusive public function[343] and others rejecting the proposition.[344] The Sixth Circuit encapsulated the principle on the side of an exclusive government function when it said, "[W]hen the state delegates a power traditionally reserved to it alone—the police power—to private actors in order that they may provide police services to institutions

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provided by municipalities" is a state actor). But see Holly v. Scott, 434 F.3d 287, 292 n.3 (4th Cir. 2006) ("It is an open question in this circuit whether § 1983 imposes liability upon employees of a private prison facility under contract with a state.").

340. See Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) (per curiam); see also 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 16.2 (5th ed. 2012) (arguing that modern state action analysis indicates that "any private corporation or private individual who supervised prisoners pursuant to a contract with a local state or federal government agency should be found to be performing a public function, and subject to constitutional limitations concerning the treatment of government prisoners").

341. Foley v. Connelie, 435 U.S. 291, 297 (1978).

342. Flagg Bros. v. Brooks, 436 U.S. 149, 163–64 (1978).

343. See, e.g., Romanski v. Detroit Ent., L.L.C., 428 F.3d 629, 637 (6th Cir. 2005) ("Where private security guards are endowed by law with plenary police powers such that they are *de facto* police officers, they may qualify as state actors under the public function test."); Rodriguez v. Smithfield Packing Co., 338 F.3d 348, 354–55 (4th Cir. 2003) (holding that an auxiliary deputy sheriff working as head of security at a meat-packing plant was a state actor because by arresting plaintiffs, he was exercising a "core, sovereign power" (quoting Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 342 (4th Cir. 2000))); Payton v. Rush–Presbyterian–St. Luke's Med. Ctr., 184 F.3d 623, 629 (7th Cir. 1999) ("[I]f the state cloaks private individuals with virtually the same power as public police officers, and the private actors allegedly abuse that power to violate a plaintiff's civil rights, that plaintiff's ability to claim relief under § 1983 should be unaffected."); Henderson v. Fisher, 631 F.2d 1115, 1118 (3d Cir. 1980) ("[T]he delegation of police powers, a government function, to the campus police buttresses the conclusion that the campus police act under color of state authority."); Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 24 (2d Cir. 1979) (holding that a volunteer fire team that had the authority to "direct any person to leave any building or place in the vicinity of a fire on penalty of fine or imprisonment" had taken on some of the trappings of sovereignty because fire protection constitutes a public function).

344. See, e.g., United States v. Day, 591 F.3d 679, 689 (4th Cir. 2010) (holding that defendant security guards were not engaged in a public function because they "were not endowed with plenary arrest authority, but rather were 'permitted to exercise only what were in effect citizens' arrests.'" (quoting *Romanski*, 428 F.3d at 639)).

that need it, a 'plaintiff's ability to claim relief under § 1983 [for abuses of that power] should be unaffected.'"[345]

Although the doctrinal picture is hazy, the functions that are most often described as traditionally and exclusively governmental also tend to be those most closely associated with the basic functions of a self-governing representative democracy: maintenance of order, punishment of crime, and the selection of governing elites.[346]

2. *Outsourcing Constitutional Duties*. — The state is also responsible for nominally private actors when it engages in an enterprise that triggers constitutional obligations but attempts to evade those obligations by enlisting private agents to perform the tasks. This outsourcing doctrine shares features with the traditional and exclusive public function test. The two are often conflated in the case law, but they are conceptually distinct.

The exclusive public function test tends to categorize a set of government tasks that no private party can engage in independently—conducting an election for public office or performing an execution, for example. There is no parallel election or execution market that competes with the government. The outsourcing doctrine, by contrast, is subtly different in that there may be private market actors supplying a similar or identical service, but when the government engages in the service, it takes on constitutional obligations that cannot be evaded by off-loading performance onto private parties.

The paradigmatic case is *West v. Atkins*.[347] In *West*, an inmate in a correctional facility in North Carolina sued a private physician under contract with the prison system for his deliberate indifference to the inmate's need for orthopedic surgery.[348] The physician defended the case on the grounds that he was not a state actor.[349] A unanimous Supreme Court disagreed.[350] "Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody," the Court reasoned.[351] North Carolina operated a prison and was under a constitutional obligation to provide medical care to its inmates. Contracting out that duty to private physicians "does not

345. See *Romanski*, 428 F.3d at 637 (alteration in original) (quoting *Payton*, 184 F.3d at 629).

346. See Elizabeth E. Joh, The Forgotten Threat: Private Policing and the State, 13 Ind. J. Glob. Legal Stud. 357, 359–60 (2006) ("Whether it encourages by inaction, or discourages through legislation and public critique, the state is always implicated in the development of private policing.").

347. 487 U.S. 42 (1988).

348. See id. at 43–45.

349. See id.

350. See id. at 58.

351. See id. at 56.

deprive the State's prisoners of the means to vindicate their Eighth Amendment rights."[352]

But it would be wrong to understand *West* as just a "prison" case. As Justice Sotomayor has written recently in dissent, the doctrine does not just concern those kinds of functions that are traditionally and exclusively public; nor does it require a scenario in which the government is the only available provider in the marketplace. "Governments are . . . not constitutionally required to open prisons or public forums, but once they do either of these things, constitutional obligations attach. The rule that a government may not evade the Constitution by substituting a private administrator . . . is not a prison-specific rule."[353]

Hence, just as a government could not operate a public park but then delegate all its constitutional obligations to nominally "private" agents,[354] so by extension a state could not provide policing or law enforcement services and then populate its entire force with unaccountable private security personnel.[355] State action would apply in this circumstance, even if one accepts that provision of security—even armed security—is not a traditional and exclusive government function.[356]

C. *Independent Constitutional Limits on Delegation*

Even when the actions of private parties cannot be ascribed to the state in the form of state action, there still may be freestanding constitutional limits on the government's act of delegation.[357] In this scenario, it is not the case that the state becomes responsible for the acts

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352. Id.; see also Lemoine v. New Horizons Ranch & Ctr., Inc., 990 F. Supp. 498, 503 (N.D. Tex. 1998) (discussing the state action of a medical provider in a twenty-four-hour juvenile detention center). As Professors Kate Crawford and Jason Schultz note, the fact that there are other private suppliers of medical services is not relevant to whether in the case of operating a prison, the state can outsource its Eighth Amendment obligations. See Kate Crawford & Jason Schultz, AI Systems as State Actors, 119 Colum. L. Rev. 1941, 1961 (2019).

353. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1940 n.8 (2019) (Sotomayor, J., dissenting).

354. Cf. Evans v. Newton, 382 U.S. 296, 302 (1966) (finding that a city that transferred title to a public park to a private entity could not divest itself of the obligation to comply with the Fourteenth Amendment).

355. When a New Jersey borough tried to outsource its policing functions to a private security force, a state court ruled it illegal, writing that "the traditional role of government . . . has always been to provide for the public safety, and that role simply cannot be delegated to a private agency." Joh, Conceptualizing the Private Police, supra note 268, at 614 n.230 (alteration in original) (quoting Brian T. Murray, Private Security Force in Sussex Ruled Illegal, "Dangerous" by Judge, Star-Ledger (Newark), July 31, 1993, at 1).

356. Cf. Peterson, supra note 30, at 1618 (arguing that, in "seeking out our constitutionalism of force in the historical record," it is not "useful to attempt to distinguish private and 'official' conduct" because the lines are often murky).

357. Metzger, supra note 36, at 1396 (arguing that "the powers exercised by private entities as a result of privatization often represent forms of government authority, and that a core dynamic of privatization is the way that it can delegate government power to private hands").

of its de facto agents; it is that the state is prohibited from delegating the task in the first instance.[358] Alternatively, sometimes when the state decides not to act in a sovereign capacity as a violence monopolist it is penalized for its *inaction* in preventing the harm caused by a third party.[359]

1. *Private Delegation (or Nondelegation) Doctrine.* — Even without state action, there could be independent constitutional limitations on delegating violence work to private parties. The nondelegation doctrine has been experiencing an uptick in interest in recent years.[360] Typically, this involves separation of powers concerns—as when Congress delegates some function to the executive branch.[361]

In a handful of the Supreme Court's early nondelegation cases, however, the justices have articulated a distinct "private delegation" doctrine that limits the government's ability to repose certain types of power in private parties.[362] This type of impermissible delegation is most pertinent for the kind of violence work the New Outlawry attempts to empower. And, as Professor Gillian Metzger has noted, it represents a sort of "road not taken" in existing efforts to hold the exercise of government power in private hands to constitutional standards.[363] To be sure, much of the case law this Essay discusses concerns the *federal* nondelegation doctrine applicable to branches of the federal government, but some states

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358. Kimberly N. Brown, Government by Contract and the Structural Constitution, 87 Notre Dame L. Rev. 491, 504 (2011) (explaining the differences between state action doctrine and the limits of private delegation); Metzger, supra note 36, at 1437 (explaining how a private delegation doctrine can provide accountability that state action doctrine cannot).

359. Pettit's idea of antipower also contemplates this kind of responsibility for inaction. See Pettit, Freedom as Antipower, supra note 277, at 579 (suggesting that forms of omission can count as a form of coercion); see also Peterson, supra note 30, at 1619 n.493 ("We must see such arenas of conflict, suppression, and violence in which the state regularly withholds its power, surveillance, and protection for what they are: not the absence of law, but rather, consigned to governance by means other than institutions and text.").

360. See Brandon J. Johnson, The Accountability-Accessibility Disconnect, 58 Wake Forest L. Rev. 65, 78 (2023) ("With the addition of Justices Gorsuch and Kavanaugh to the Court . . . the number of justices willing to question the status quo of the nondelegation doctrine increased to a majority of the Court." (footnote omitted)).

361. See Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) (plurality opinion) (focusing on the relationship between Congress and the executive branch).

362. Freeman, supra note 323, at 583–84. The source of the constitutional barrier to this delegation is important. As Professor Calvin Massey has observed, "A conclusion that the non-delegation doctrine bars delegations of authority to private parties, even pursuant to intelligible standards set by Congress, affects only federal power." Calvin R. Massey, The Non-Delegation Doctrine and Private Parties, 17 Green Bag 2d 157, 165 (2014). But "[g]rounding the principle in due process would also bar state legislatures from delegating state power to private entities." Id. For a skeptical view of the private nondelegation doctrine, see Alexander Volokh, The Myth of the Federal Private Nondelegation Doctrine, 99 Notre Dame L. Rev. 203, 229 (2023) ("Nothing in the Article I Nondelegation Doctrine bars private delegations.").

363. See Metzger, supra note 36, at 1411.

share similar or broader nondelegation doctrines, and some principles of federal constitutional law may also constrain state decisionmakers.[364]

The Supreme Court's early private nondelegation cases tended to involve delegations of public power and their effects on property rights. In 1912, in *Eubank v. City of Richmond*, the Court considered a challenge to a Richmond ordinance that delegated zoning authority to private parties.[365] By ordinance, the City of Richmond authorized those who owned two-thirds of the property on a street to impose a housing moratorium past a certain line and to require modification of existing homes to conform to the line.[366] A homeowner challenged the law, saying it deprived him of due process and equal protection.[367] The Court struck down the ordinance as surrendering a police power to the caprice and potential self-interest of the private property owners.[368]

Sixteen years later, in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, the Court considered a similar delegation: This time, a trustee wanted to build an elderly home for the poor but was stymied by neighbors empowered by Seattle's law that required two-thirds agreement of all landowners within four hundred feet of the proposed home.[369] The Court, citing *Eubank*, held that the regulation violated due process.[370] The private property owners "are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice."[371]

Then again, in 1933, during the height of the Court's skepticism of delegation, it reiterated that governmental power could not be delegated to private parties. The Bituminous Coal Conservation Act of 1935 empowered district boards in coal producing areas to fix minimum and maximum prices;[372] in another section, private producers and mine workers could set wage and hour agreements that would bind all producers covered by the act.[373] The Court rejected the structure as

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364. See Jonathan L. Marshfield, America's Other Separation of Powers Tradition, 73 Duke L.J. 545, 629 n.457 (2023) ("State courts have a long tradition of more rigorously scrutinizing delegations of public power to private entities because of concerns regarding democratic accountability."); Benjamin Silver, Nondelegation in the States, 75 Vand. L. Rev. 1211, 1242 (2022) (stating that "state supreme courts have routinely held delegations to private entities to be invalid").

365. 226 U.S. 137, 140 (1912).

366. Id. at 141–42.

367. Id. at 140.

368. See id. at 143–44 ("The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised . . . .").

369. 278 U.S. 116, 117–19 (1928).

370. Id. at 122 (citing *Eubank*, 226 U.S. at 143).

371. Id.

372. Bituminous Coal Conservation Act of 1935, ch. 824 § 4 pt. II, 49 Stat. 991, 995–1001 (repealed 1937).

373. Id. § 4 pt. III(g), at 1002.

unconstitutional: "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[374] Production of coal may be private, but regulation of its production was "necessarily a governmental function, since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor."[375]

The Court has never expressly overruled its private delegation cases, although it has certainly become more forgiving of such delegations in a post-*Lochner* world.[376] However, the present Justices have taken an increased interest in Article I nondelegation; in one such case, Justice Samuel Alito, in a concurring opinion, appeared to endorse the continued soundness of the private nondelegation principle.[377]

As attorney Paul Larkin observes, one reason the private delegation doctrine is not completely repudiated is a concern that government will "turn[] over to private parties a decision that the government could not make free from legal restraints."[378] He describes this risk as the "mirror image . . . of declaring someone an 'outlaw' at common law": The government delegates an unconstitutional act to a private party and can disclaim any responsibility for it.[379]

Thinking about power to inflict violence for public ends as nondelegable reinforces two intuitions that animate the due process aspects of the private delegation doctrine. First, there's the concern that delegations to private entities always risk arbitrary or self-interested decisionmaking.[380] The Court's concern with biased or arbitrary decisionmaking runs through the private nondelegation doctrine cases of

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374. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936). In coming to this conclusion, the Court cited its prior private delegation decisions: "The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." Id. (citing, inter alia, Eubank v. City of Richmond, 226 U.S. at 143, and *Roberge*, 278 U.S. at 121–22).

375. Id. at 311.

376. Larkin, supra note 35, at 52–53 (speculating that the "private delegation doctrine" has not seen much activity because "the Court has decided to group *Eubank*, *Roberge*, and *Carter Coal* into other pre-New Deal Era decisions . . . that unlawfully intruded on a legislature's power to define what is in the public interest").

377. See Dep't of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 57 (2015) (Alito, J., concurring) ("One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern.").

378. See Larkin, supra note 35, at 74.

379. See id.

380. Lawrence, Private Exercise, supra note 34, at 659 (remarking that the core concern with private delegation "is that governmental power—power coercive in nature—will be used to further the private interests of the private actor, as opposed to some different public interest").

Eubank, *Roberge*, and *Carter*. Those cases had to do with delegations of decisionmaking over property. They seem just as applicable—perhaps even more so—when dealing with matters of violence, liberty, and life. Delegating violence in this way tests any person's mettle, because "self-interested individuals are incapable of exercising the objectivity, restraint, and discretion" necessary to make just decisions.[381] Private parties are apt to use violence in ways that are mistaken or biased as to the justification for the violence, the degree of violence necessary, and the circumstances that give rise to the violence.[382]

Second, the private delegation doctrine also taps into the intuition that underpins the traditional and exclusive government function test for state action—that there is a set of government functions that can *only* be performed by government officials subject to legal restraints.[383] Attempts to delegate these functions to private entities must be scrutinized to ensure they are not an attempt at constitutional evasion.[384] This intuition is different from the concern about bias or self-interest. No matter how efficiently private actors may perform such functions, no matter how neutral or disinterested the private party may claim to be, this strand of the nondelegation doctrine corresponds to the strong intuition that there are a set of tasks that must be performed by agents of representative government and not private parties.[385]

2. *Due Process and the "State-Created Danger" Doctrine*. — Due process can also act as an independent restriction on private delegation. Although *DeShaney v. Winnebago County* stands for the broad proposition that there is no due process violation for government's failure to protect a person from private violence, there are limits to *DeShaney*.[386] The most relevant to

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381. Watts, supra note 37, at 1270 (citing John Locke, The Second Treatise of Civil Government, reprinted in The Second Treatise of Civil Government and a Letter Concerning Tolerance 3, 63 (J.W. Gough ed., 1948) (1690)); see also Nourse, supra note 110, at 1705 ("If we allow any defendant to exempt himself from the rules and challenge the state's monopoly on violence, we fear that he will enforce the law in ways that are excessive or partial.").

382. See Watts, supra note 37, at 1270.

383. This is akin to what Benjamin Silver calls the "Sovereignty theory" of nondelegation. See Silver, supra note 364, at 1241 ("The Sovereignty theory can succinctly be summarized as the view that certain governmental functions must be exercised by public officials acting in their official capacities.").

384. See Larkin, supra note 35, at 59–60 (arguing that the privatization of government functions could "weaken public norms such as the commitment to equality").

385. Although space does not permit further discussion here, the widespread resistance to private militias during the late 1800s and early 1900s exhibits this same instinct. See Darrell A.H. Miller, Prohibitions on Private Armies in Seven State Constitutions, *in* New Histories of Gun Rights and Regulation: Essays on the Place of Guns in American Law and Society 263, 268–73 (Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller eds., 2023) (describing resistance to Pinkertons and private armed groups as rooted in concerns over the dangers of arming individual actors).

386. See Deshaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) ("[N]othing in the language of the Due Process Clause itself requires the State to protect

the New Outlawry is the "state-created danger" theory of liability, which is "a means by which state actors may be held constitutionally liable for acts of *private violence* under prescribed circumstances."[387]

Government actors can be liable for a due process violation when their action or lack of action leaves a person more vulnerable to harms caused by third parties. The state-created danger doctrine has various formulations but usually requires (1) foreseeable harm, (2) a mens rea beyond simple negligence (sometimes expressed as "conscience-shocking"), (3) some foreseeability that the plaintiff would be a victim of the state actor's acts or failure to act, or (4) the state actor to have aggravated the risk of harm to the victim.[388]

There are a number of cases in which the government's shocking lack of attention to the risk posed by others generates government liability. In one case, a woman experiencing a psychotic episode at Midway Airport in Chicago was eventually released by the officers into a particularly dangerous part of the city.[389] Despite efforts by some good Samaritans in the neighborhood to assist her, she was nonetheless sexually assaulted in an apartment and suffered traumatic head injuries in her effort to escape out of a seventh floor window.[390] In another case, a state trooper arrested a drunk driver and impounded the car, abandoning the passenger on the side of the road in a high-crime area in the early morning.[391] The passenger was subsequently raped by a person who offered to give her a ride.[392]

In some cases, it is not the executive actions (or inactions) of a government official but the official policy or informal custom of the municipal government that creates the danger. The litigation surrounding Seattle's "Capitol Hill Autonomous Zone" is a pertinent example. Following racial justice protests in Seattle in 2020, staff at the East Precinct

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the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation . . . , not as a guarantee of certain minimal levels of safety and security.").

387. Gray v. Univ. of Colo. Hosp. Auth., 672 F.3d 909, 917 (10th Cir. 2012).

388. See, e.g., Lipman v. Budish, 974 F.3d 726, 744 (6th Cir. 2020) ("[The] plaintiff must show: 1) an affirmative act by the state . . . ; 2) a . . . danger . . . wherein the state's actions placed the plaintiff . . . at risk . . .; and 3) the state knew . . . that its actions specifically endangered the plaintiff." (internal quotation marks omitted) (quoting Cartwright v. City of Marine City, 336 F.3d 487, 493 (6th Cir. 2003))); Waugh v. Dow, 617 F. App'x 867, 871 (10th Cir. 2015) ("(1) [T]he charged state . . . actor[] created the danger . . . ; (2) plaintiff was a member of a limited and specifically identifiable group; (3) defendant's conduct put plaintiff at substantial risk . . . ; (4) the risk was obvious or known; (5) defendant[] acted recklessly . . . ; and (6) such conduct . . . is conscience shocking." (second, third, and sixth alterations in original) (internal quotation marks omitted) (quoting Estate of B.I.C. v. Gillen, 761 F.3d 1099, 1105 (10th Cir. 2014)); Bright v. Westmoreland County, 443 F.3d 276, 281 (3d Cir. 2006) (outlining similar elements).

389. See Paine v. Cason, 678 F.3d 500, 504 (7th Cir. 2012).

390. Id. at 506.

391. Wood v. Ostrander, 879 F.2d 583, 586 (9th Cir. 1989).

392. Id.

of the Seattle Police Department "abruptly deserted" their posts.[393] Almost immediately thereafter, private parties set up barricades, blocked off access, and formed their own patrols and security apparatus. Eventually, approximately sixteen blocks of Seattle became the "Capitol Hill Autonomous Zone," a "no-cop" area where private parties performed security within the zone.[394]

Plaintiffs alleged that the resulting property and violent crime, and the City's policy of permitting private security rather than official government-provided policing, amounted to the City's creation of a "state-created danger" sufficient to rise to the level of a due process violation.[395] Although the plaintiffs eventually lost at summary judgment, had they been able to produce facts that the harm was particularized to them and the City had shown deliberate indifference to their risk of injury, they may have prevailed at least in sending the case to a jury.[396]

It is true that existing case law in the lower courts generally fails to find statutes or general policies to be a permissible basis for invoking the state-created danger doctrine, even when they might make identifiable groups less safe.[397] A Pennsylvania appellate court, for example, rejected use of the state-created danger theory in a challenge to the state's firearms preemption law and the additional danger it allegedly created for residents most at risk for gun violence in Philadelphia and Pittsburgh.[398] We think the experiments with the New Outlawry may generate reconsideration of a bright-line rule that exempts statutes and requires plaintiffs to show individualized danger.

3. *Equal Protection of the Law.* — The Fourteenth Amendment forbids states from denying "any person within its jurisdiction the equal protection of the laws."[399] The equal protection doctrine has developed over many

393. Hunters Cap. LLC v. City of Seattle, 499 F. Supp. 3d 888, 893 (W.D. Wash. 2020).

394. Id. (internal quotation marks omitted). The area was also known as the "Capitol Hill Organized Protest," "Capitol Hill Occupying Protest," or "CHOP." Id.

395. The plaintiffs in *Hunters Capital LLC* eventually lost on a motion for summary judgment. See Hunters Cap., LLC v. City of Seattle, 650 F. Supp. 3d 1187, 1205–08 (W.D. Wash. 2023). While the plaintiffs had produced sufficient evidence that "the City's actions in response to [the formation of the Autonomous Zone] increased criminal activity in the . . . area," they failed to provide sufficient evidence on the other elements, including that they had suffered a "an actual, particularized danger that they would not otherwise have faced" or that the city had "acted with deliberate indifference to expose Plaintiffs to certain unreasonable risks." Id. at 1200–02.

396. See id. at 1201–02.

397. See, e.g., Gray v. Univ. of Colo. Hosp. Auth., 672 F.3d 909, 926 (10th Cir. 2012) (describing why general policies and customs typically do not satisfy the state-created danger exception); Kallstrom v. City of Columbus, 136 F.3d 1055, 1067 (6th Cir. 1998) (noting that a city policy of releasing the personnel files of undercover agents in response to public records requests "placed the officers and their family members in 'special danger' by substantially increasing the likelihood that a private actor would deprive them of their liberty interest in personal security").

398. See Crawford v. Commonwealth, 277 A.3d 649, 668–69 (Pa. Commw. Ct. 2022).

399. U.S. Const. amend. XIV, § 1.

generations, but one aspect of the Clause is worth recovering: It is about *protection*.

The authors of the Fourteenth Amendment operated upon a backdrop of American contractarian political theory that began a century earlier. The Framers of the 1787 Constitution were steeped in a contractarian tradition that, in exchange for obedience, the state must protect one's life, liberty, and property from the violence of others.[400] Liberty and order were not antonyms to them; order was what was *required* for liberty. Liberty, wrote John Locke, "is to be free from restraint and violence from others, which cannot be where there is not law . . . . [F]or who could be free, when every other man's humour might domineer over him?"[401] Law must not only provide remedies and punish wrongs, but also prevent wrongs (i.e., protect) for liberty to flourish.[402]

This right to protection extended into the nineteenth century, influencing antebellum and Reconstruction thought.[403] Abolitionists railed at a system of slavery that they understood to allow unfettered discretion to harm others with legal impunity.[404] As early as 1835, attendees at the National Negro Convention were urged to petition for protection as one of the basic rights of national citizenship as well as being a basic obligation of government.[405] Twenty years later, a participant at a convention of African Americans in Sacramento, California, exclaimed that "[a]s it is, the law is to us a dead letter, a broken staff to lean upon. The oath that should protect life, liberty, and property . . . is denied us. Now we have no protection, and stand as nothing."[406]

After the abolition of slavery in 1865, members of the Joint Committee on Reconstruction became keenly aware that the problem was not only, or even primarily, that freedmen were not getting *equal* protection from private violence; they were receiving *no* protection from

400. For extended discussions, see generally Evan D. Bernick, Antisubjugation and the Equal Protection of the Laws, 110 Geo L.J. 1 (2021) (arguing that the Fourteenth Amendment secures positive rights, guaranteeing both nondiscriminatory laws and their nondiscriminatory enforcement); Steven J. Heyman, The First Duty of Government: Protection, Liberty and the Fourteenth Amendment, 41 Duke L. J. 507 (1991) ("[T]he Fourteenth Amendment was understood to incorporate the right to protection, as that right was understood in the classical tradition, into the Federal Constitution.").

401. Locke, Two Treatises, supra note 110, at 148.

402. See Heyman, supra note 400, at 529 ("[I]n contrast to a negative conception of liberty, which perceives law solely as a limitation on individual freedom, classical liberalism regarded law as essential to liberty.").

403. Bernick, supra note 400, at 25.

404. Id. at 25–26.

405. James W. Fox, The Constitution of Black Abolitionism: Reframing the Second Founding, 23 U. Pa. J. Const. L. 267, 287 (2021).

406. Proceedings of the First State Convention of the Colored Citizens of the State of California 13 (Adam S. Eterovich ed., Saratoga, R & E Rsch. Assocs., 1969) (1855) (quoting the remarks of David Lewis).

private violence.[407] A Freedman's Bureau official in North Carolina testified,

> Of the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me, and of the very many cases of similar treatment of Union citizens in North Carolina, I have never yet known a single case in which the local authorities or police or citizens made any attempt . . . to redress any of these wrongs or to protect such persons.[408]

Debates on the Ku Klux Klan Act—which should be remembered is officially titled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes"[409]—confirm this purpose of the Fourteenth Amendment as guaranteeing through equal protection some minimum protection from private violence.

Representative William Stoughton declared, "It is a fundamental principle of law that while the citizen owes allegiance to the Government he has a right to expect and demand protection for life, person, and property."[410] Senator John Pool echoed this sentiment: "The right to personal liberty or personal security can be protected only by the execution of the laws upon those who violate such rights. A failure to punish the offender is not only to deny to the person injured the protection of the laws, but to deprive him, in effect, of the rights themselves."[411]

These conceptions of equal protection manifest themselves in those parts of the Ku Klux Klan Act directed at the *failure* of government officials to keep the peace or prevent private violence. In large part, these approaches were modeled on much older riot laws, going back to the Statute of Winchester in England that imposed collective liability for unchecked private violence.[412] Although the most muscular form of this kind of liability—municipal liability under federal law for harm caused by private groups "riotously and tumultuously assembled"—failed to pass in Congress, a different version did provide some remedy for failure to

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407. Jack M. Balkin, The Reconstruction Power, 85 N.Y.U. L. Rev. 1801, 1847 (2010) ("The majority of the injustices reported were examples of private violence and the failure of states to protect blacks and white unionists from this violence."); Laurent B. Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L.J. 1353, 1354 (1964) (discussing how the legislative record shows "a pervasive pattern of private wrongs, motivated by popular prejudice and hostility" aimed at African Americans, and to some degree Northern whites and Southern Unionists).

408. S. Rep. No. 39-30, pt. 2, at 209 (1866).

409. Enforcement Act of 1871, ch. 22, 17 Stat. 13 (codified as amended in scattered sections of 42 U.S.C. (2018)).

410. See Cong. Globe, 42d Cong., 1st Sess. 322 (1871) (statement of Rep. Stoughton).

411. See id. at 608 (statement of Sen. Pool).

412. See Heyman, supra note 400, at 542 (noting the Statute of Winchester and the 1714 Riot Act imposed liability on communities for failing to apprehend thieves or for tolerating riots within their jurisdictions).

protect.[413] Section 2 of the Act, now codified at 42 U.S.C. § 1985, spells out a long list of conspiracies to engage in politically motivated terrorism.[414] Section 6, now codified at 42 U.S.C. § 1986, imposes liability on those who know, and are empowered to stop, such conspiracies but fail to do so:

> That any person or persons, having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse to do so, and such wrongful act shall be committed, such person or persons shall be liable to the person injured . . . for all damages caused by any such wrongful act which such first-named person or persons by reasonable diligence, could have prevented . . . .[415]

Lower court cases construing § 1986 are limited but, as Professor William Carter has explained, can be reduced to the following propositions: (1) "any person" means both state actors and nonstate actors; (2) bystanders to private violence of which the bystander has knowledge and the power to prevent can be liable for injuries; (3) those with knowledge and power to prevent a conspiracy can be liable for negligently failing to prevent the harm; (4) one need not share or be sympathetic to the conspirator's goals to be liable; (5) those who have knowledge of a conspiracy must take some affirmative steps to prevent it, whether that is by intervening, alerting law enforcement, or other lawful means.[416] Therefore, there could be avenues under existing civil rights statutes to hold government officials accountable when they are aware of conspiracies to use private violence to thwart constitutional guarantees protectable from private threats and fail to prevent them.[417]

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413. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 664 (1978) (internal quotation marks omitted) (quoting Cong. Globe, 42d Cong., 1st Sess. 749 (1871) (statement of Rep. Shellabarger)) (discussing failures of the "Sherman Amendment"); see also Susan S. Kuo, Bringing in the State: Toward A Constitutional Duty to Protect From Mob Violence, 79 Ind. L.J. 177, 202 (2004) ("Although Congress eventually passed a second substitute to the Sherman Amendment, the alternate bill restricted liability to individuals who had knowledge of the impending crime and the ability to prevent it, and who had neglected or refused to aid or intervene.").

414. 42 U.S.C. § 1985.

415. Enforcement Act of 1871, ch. 22, § 6, 17 Stat. 13, 15 (codified as amended at 42 U.S.C. § 1986).

416. See William M. Carter, Jr., The Anti-Klan Act in the Twenty-First Century, 136 Harv. L. Rev. Forum 251, 276–77 (2023), https://harvardlawreview.org/wp-content/uploads/2023/02/136-Harv.-L.-Rev.-F.-251.pdf [https://perma.cc/DGJ4-CVJW]; see also Park v. City of Atlanta, 120 F.3d 1157, 1160 (11th Cir. 1997); Clark v. Clabaugh, 20 F.3d 1290, 1298 (3d Cir. 1994); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1007–08 (S.D. Tex. 1981).

417. We acknowledge that the existing law would require that the underlying private conspiracy to which the government has knowledge, but does not act, be class based and targeted at some kind of right protected from private interference, like the right to travel or the right to vote. See Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267–68 (1993) (explaining that to prove a private conspiracy under § 1985(3) a plaintiff must show

More broadly, perhaps, the New Outlawry could force courts to better develop a theory of equal protection of the law, one more consonant with constitutional history.[418] This newer thinking about the Fourteenth Amendment could push the doctrine in a more positive direction, one that may require some minimum, equitable, and enforceable right to the affirmative protection of the people.[419]

4. *Republican Form of Government.* — Finally, Article IV, Section 4 of the Constitution guarantees all states a republican form of government.[420] Generally, the clause is thought to be a nonjusticiable political question.[421] Indeed, the first case to so hold involved violence as between two factions fighting over which was the legitimate government of the state of Rhode Island.[422] But that does not mean that it has no constitutional content that can give context to the acts (or failure to act) of other government entities, including Congress, the President, and state and local officials.[423]

At the Founding Era, Madison and many of his contemporaries were particularly concerned with the threat that armed and militaristic minorities posed to republican forms of government. "[F]act and experience," wrote Madison, had proven that "a minority may in an appeal to force, be an overmatch for the majority," especially in the circumstances when "the minority happen[s] to . . . possess the skill and habits of military

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(1) discriminatory animus and (2) that the conspiracy aimed at rights protected against private and official encroachment); League of United Latin Am. Citizens–Richmond Region Council 4614 v. Pub. Int. Legal Found., No. 1:18-CV-00423, 2018 WL 3848404, at *6 (E.D. Va. Aug. 13, 2018) (finding that "Plaintiffs have stated a claim under the 'support and advocacy' clause of Section 1985(3), which unlike the equal protection part of Section 1985(3) does not require allegations of a race or class-based, invidiously discriminatory animus or violation of a separate substantive right").

418. See Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit 20 (2021) ("Restoring the original meaning of the [Fourteenth Amendment would require] . . . judicial recognition of an affirmative duty on the part of states to provide protection against violence by 'private' actors."). The New Outlawry could also force courts to devise a doctrine more consonant with the theory of the state. Professor Brandon del Pozo, for instance, argues that the monopoly thesis is best fleshed out as the government's monopoly on the *duty* to provide protection. Brandon del Pozo, The Police and the State: Security, Social Cooperation, and the Public Good 32 (2022).

419. Hill, supra note 38, at 56; see also Michael J. Gerhardt, The Ripple Effects of *Slaughter-House*: A Critique of a Negative Rights View of the Constitution, 43 Vand. L. Rev. 409, 429 (1990) ("A less restrictive reading of the fourteenth amendment by the Court would have imposed an affirmative duty on the states to develop common law, construct statutes, or tailor services that protect fundamental rights against encroachment from the states themselves or from private action.").

420. U.S. Const. art. IV, § 4.

421. See Luther v. Borden, 48 U.S. (7 How.) 1, 47 (1849).

422. See id. at 2.

423. Some states have analogs or references to the republican form of government guarantee in their state constitutions. See Idaho Const. art. IX, § 1; Tex. Const. art. I, § 2.

life."[424] Guarantees of republican forms of government and suppression of lawless violence were intertwined in these Founders' minds.[425]

These concerns about violence and preservation of republican guarantees of protection returned during Reconstruction. Again, the debates over the Ku Klux Klan Act are illuminating. Representative Austin Blair tethered his argument for the Act to the national government's Article IV duties: "The object of the Constitution was to protect the people of the States from lawless violence, and to that end it provided in article four, section four, that—'The United States shall guarant[ee] to every State in this Union a republican form of Government . . . .'"[426]

Occasionally, the Reconstruction congressmembers bolstered their positions with basic theories of constitutional government and contractarian political theory, animated more by the Constitution's spirit than the letter of any particular provision. As Representative George McKee argued, "*Salus populi suprema est lex*—the safety of the people should be the supreme law . . . ."[427] Representative John Bingham, considered the James Madison of the Fourteenth Amendment, argued that "[t]he Government owes high and solemn duties to every citizen of the country. It is bound to protect him in his most important rights."[428] Representative Robert Elliot thought it "the great paramount duty of the Republic to protect its citizens[,]" and that "when you abolish or weaken the right to protection you destroy or diminish the duty of allegiance. I am bound to obey my country and her laws because I am by them protected. When they cease to protect me I can rightly cease to obey them."[429]

Put simply, mob rule is not republican rule.[430] A government that radically decentralizes violence in the hope that the invisible hand in this "marketplace of violence" will lead to desirable ends or that attempts to enlist private parties, animated by private biases and vengeances, with the end of allowing private parties to pursue violence for public ends, is not complying with its obligations of the social compact.

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424. See James Madison, Vices of the Political System of the United States (1787), reprinted in 9 The Papers of James Madison 345, 350–51 (J.C.A. Stagg ed., 2010).

425. Ryan C. Williams, The "Guarantee" Clause, 132 Harv. L. Rev. 602, 648 (2018) (explaining the "perceived connection between violence and the threat to republicanism" in the Founders' thinking).

426. Cong. Globe, 42d Cong., 1st Sess. app. at 72 (1871) (statement of Rep. Blair) (quoting U.S. Const. art. IV, § 4).

427. Id. at 427 (statement of Rep. McKee).

428. Id. at app. 85 (statement of Rep. Bingham) (internal quotation marks omitted) (quoting Daniel Webster, The Constitution Not a Compact Between Sovereign States 17 (New York, Bergen & Tripp 1861) (1833)).

429. Id. at 390 (statement of Rep. Elliot).

430. Cf. Hoxie Sch. Dist. No. 46 v. Brewer, 137 F. Supp. 364, 366–67 (E.D. Ark. 1956), aff'd, 238 F.2d 91 (8th Cir. 1956) (finding that the Republican Form of Government Clause was implicated when defendants sought to "compel a rescission of the order of desegregation by intimidation and force").

IV. IMPLICATIONS

The New Outlawry tests, and in some cases seems to exceed, the limits on the government's delegation of violence to private parties. Although the existing legal boundaries that constrain government delegations of violence are fuzzy and take many doctrinal forms, they exist. As Part III illustrated, case law governing several discrete areas of law reveals strong intuitions that governments do not have unchecked discretion to permit private violence, even if they believe such violence will redound to the public benefit. There's definitely a line, although its contours remain indistinct. The upshot is that, even here, the state can become responsible for what it allows people to do. It can expand self-defense too far, and it can license too much private violence in citizen policing.

This Essay does not attempt to lay out the precise line, but only endeavors to show that the concern is one of constitutional import. And the way states are legislating makes deciphering the limits all the more important. To the extent that jurisdictions continue on the path of experimentation with new forms of outlawry and press the envelope of what kinds of private violence they will sanction or enable, these lines may become sharper and their doctrinal aspects more concrete. But this Essay can offer some thoughts now, based on the observed trends.

On the judicial level, it is possible, for example, that courts will evaluate excessive delegations of violence to private parties under a state action rubric and begin to subject "de facto" private policers to the same constraints that federal and state constitutions place upon official state employees empowered to use threats and use of force in service of crime control. An approach like this would repudiate the path taken by courts like the South Carolina Supreme Court in *State v. Cooney*[431] and instead create commensurate constitutional restrictions on public and private arresters.

In *Cooney*, two men whose business had been repeatedly burgled hid out to find the thief.[432] Armed with pistols, they confronted a man returning to the scene and, after he reportedly confessed to the crime, told him they were going to take him to the police.[433] He tried to run away.[434] They shot and killed the man.[435] One of the business owners raised citizen's arrest as a defense to the subsequent murder charge.[436] The trial court understood the United States Supreme Court's decision in *Tennessee v. Garner*[437] to restrict the use of force because the Court had held that the Fourth Amendment does not permit the use of deadly force to catch a

431. 463 S.E.2d 597 (S.C. 1995).
432. Id. at 598.
433. Id.
434. Id.
435. Id.
436. Id.
437. 471 U.S. 1 (1985).

fleeing felon who poses no immediate risk.[438] The South Carolina Supreme Court, however, disagreed, stating that the owner "was acting free of State influence when he attempted to arrest" the suspect.[439] Thus, it said, "[T]he holding in *Garner* does not apply to seizures by private persons and does not change the State's criminal law with respect to citizens using force in apprehending a fleeing felon."[440]

Alternatively, or additionally, a court may consider an excessive delegation under a due process lens. The district court's ruling in *Autry v. Mitchell*,[441] discussed in section I.B above, is an example of how this approach might work. There, the court addressed a broad delegation of private violence: North Carolina's outlawry statute, which permitted private citizens to capture and kill anyone declared an outlaw in the state because they fled from criminal charges.[442] The court contrasted the limited right of public law enforcement's authority to use deadly force with "the danger put upon the outlawed accused felon: [I]f he should become fearful of armed citizens—not in uniform—and should run, he may be slain 'without accusation of any crime.'"[443] "The extreme remedy granted [to] the citizenry," said the court, "infringes, we think, a fundamental right: that one not be denied life, or be wounded, except by due process of law."[444] In other words, the law delegated too great an unchecked authority to private citizens to violate the right to life.

Alternatively, a court could use a due process lens and hold that removing the legal strictures against private violence is a form of "state-created danger" that forms the outer boundary of the *DeShaney* case.[445] As with the Capitol Hill Autonomous Zone case,[446] surrendering an entire area, or a select group of people, to the private security—or private vengeances—of a self-appointed security detail may run afoul of the state-created danger theory for people within that area.

A court could similarly invalidate a broad delegation under a private nondelegation rubric. The Nebraska Supreme Court's approach to the broad self-defense statute enacted in the 1960s is a prime example of how this approach would work. As discussed in Part II, the court ruled it unconstitutional for the legislature to authorize private citizens to decide for themselves when force is necessary.[447] Despite not grounding the ruling in the federal Due Process Clause or formal private nondelegation doctrine, the court was clear that "the Legislature has delegated the fixing

438. See *Cooney*, 463 S.E.2d at 598.
439. Id. at 599.
440. Id.
441. 420 F. Supp. 967 (E.D.N.C. 1976).
442. Id. at 970.
443. See id. at 971 (quoting N.C. Gen. Stat. § 15-48 (repealed 1997)).
444. See id.
445. See supra section III.C.2.
446. See supra notes 393–396 and accompanying text.
447. See State v. Goodseal, 183 N.W.2d 258, 263 (Neb. 1971).

of the punishment to the person asserting self-defense which it cannot do."[448] Delegating that power "to private persons . . . is violative of the powers placed exclusively with the Legislature by our state Constitution."[449]

Some of these experiments in violence delegation may expose officials to liability under provisions of the Ku Klux Klan Act, especially in contexts in which private parties conspire to violate constitutional privileges that public actors would have to respect. Nonenforcement against conspiracies to engage in private racialized violence, voter intimidation, or retaliation against grand or petit jurors may generate this kind of liability.

And these types of remedies are based only on federal law. There could be state constitutional remedies under equivalent state constitutional provisions, which need not be read in lockstep with federal constitutional guarantees.[450] There could also be other constitutional remedies. Professor Metzger, for example, argues that instead of imposing the same obligations on private parties who exercise government powers as those that apply to public officials, courts should insist on adequate accountability mechanisms to ensure compliance with constitutional limits.[451] So, instead of making private parties liable for constitutional violations, courts could "requir[e] that the government create such [accountability] mechanisms as the constitutionally-imposed price of delegating government power to private hands."[452]

Outside the courts, further experiments with the New Outlawry may stimulate federal executive or legislative action. Currently, the national government spends billions of dollars to support state and local law enforcement.[453] These expenditures may come under more scrutiny to the extent that state and local governments begin to delegate the basic tasks of law enforcement to private, less politically accountable people within the jurisdiction.

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448. See id.

449. Id.

450. See, e.g., State v. Schmid, 423 A.2d 615, 628 (N.J. 1980) ("[T]he rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well."); see also Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 174 (2018) (expressing skepticism that state constitutional doctrine on individual rights should follow the federal constitution in all respects).

451. Metzger, supra note 36, at 1374.

452. Id.

453. Brian Naylor, How Federal Dollars Fund Local Police, NPR (June 9, 2020), https://www.npr.org/2020/06/09/872387351/how-federal-dollars-fund-local-police/ [https://perma.cc/S7EX-VQ92].

CONCLUSION

In recent years, states have accelerated an alarming trend of devolving greater amounts of authority for private parties to engage in lawful violence. In fact, despite concerns about criminal violence, many recent episodes of socially harmful and communally destructive violence have been state-sanctioned or at least found legal under expansive state laws. Collectively, these moves form a New Outlawry that enlists private citizens to inflict state-sanctioned private violence on those the law deems outside the state's protection.

And yet, because of the state's monopoly on violence, this Essay argues that there are limits on how far a state can go in licensing private violence. Whether those limits are enforced by state action rules, private delegation, due process and equal protection doctrines, or the Republican Form of Government Clause, the Constitution is not silent when states attempt to skirt limitations on the use of force by their own employees. To the extent that policymakers, often in response to their most shrill and uncompromising constituencies, continue to push the envelope on empowerment of private violence for public ends, the constitutional implications of these delegations will become clearer, as will their consequences.

Columbia Law Review. ISSN 0010-1958.

Published by Columbia Law School students monthly except for February, July, August, and September. Printed in Hanover, Pennsylvania. Editorial Office, 435 West 116th Street, New York, New York 10027. For issues prior to volume 118 inquire of William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209-1987, 1-800-828-7571, https://www.wshein.com. Back issues are also available in PDF format through Hein Online, https://www.heinonline.org. For current and recent printed issues, please send an email to business@columbialawreview.org.

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VOL. 124, NO. 4 COLUMBIA LAW REVIEW Pages 887 to 1268 MAY 2024