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ABSTRACTS

LECTURE

The Columbia Law Review *launched its Karl Llewellyn Lecture series on March 19, 2024, celebrating pioneers in the law who have innovated and challenged legal theory. The inaugural Lecture was delivered by Judge Guido Calabresi who spoke on the promise and peril of "Law and . . ." disciplines, such as Law and Economics, Law and Philosophy, and Law and History. A transcript of Judge Calabresi's Lecture is published in this Issue.*

ARTICLES

It is conventional wisdom that the states are free—within wide constitutional parameters—to structure their governments as they want. This Article challenges that received wisdom and argues that the Supreme Court has drawn on an eclectic set of constitutional provisions to develop a broader body of federal constitutional rules of state structure than previously understood.

This Article gathers and systemizes that body of law. It first locates the expected and unexpected constitutional openings onto which federal courts have seized to rule on questions of state structure. The Article then distills the haphazard, often conflicting, and sometimes even bizarre approaches federal courts have used to decide when and why the federal Constitution constrains state structural discretion and what state governance structures it endorses. The Article finally turns to the implications of this body of doctrine for both federalism and federal structural constitutional law. It develops a vocabulary to understand both why these cases have not been incorporated into the federalism canon and the institutional design choices and values they implicate.

Ours is a system of layered constitutionalism, but not one in which each government's constitutionally chartered structures operate discretely. It is one that contains structural interdependencies between the federal and state constitutional structures. The challenge is to locate structural interdependencies in ways that preserve the values of our

ways that some commentators imagine. Even if criminal law somehow could advance some of the redistributive ends that proponents suggest, our criminal system would remain objectionable. The oppressive and inhumane aspects of the carceral state still would be oppressive and inhumane, even if the identity of the defendants or the politics associated with the institutions shifted.

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LECTURE

THE PROMISE AND PERIL OF "LAW AND . . ."

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The Columbia Law Review *launched its Karl Llewellyn Lecture series on March 19, 2024, celebrating pioneers in the law who have innovated and challenged legal theory. The inaugural Lecture was delivered by Judge Guido Calabresi who spoke on the promise and peril of "Law and . . ." disciplines, such as Law and Economics, Law and Philosophy, and Law and History. A transcript of Judge Calabresi's Lecture is published in this Issue.*

INTRODUCTION

For over a hundred years, American law has been characterized by an explicit reliance on fields of learning outside of law to examine and criticize governing legal rules, and thereby bring about reform in those rules. Rejecting the notion that law is an independent, self-contained system, this external examination of law—leveraging a perspective from outside law to offer a critique of legal rules—has and continues to bring about salutary changes in law. Such an approach to law is neither only American nor particularly new.[1] Nevertheless, its explicit recognition and use since around 1900 in the United States,[2] and its gradual acceptance in

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1. English philosopher and jurist Jeremy Bentham, for example, was doing this long before in England. See, e.g., Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1996) (1789) (outlining Bentham's moral theory of utility as a possible basis for the English penal system). For contemporaneous criticism of Bentham's approach, see John Stuart Mill, Bentham, *in* Mill on Bentham and Coleridge 39, 39–98 (F.R. Leavis ed., 1980).

2. Professor Herbert Hovenkamp, for instance, suggests legal academics first began to incorporate economic concepts into their thinking about the law during the 1880s in the Progressive Era. See Herbert Hovenkamp, The First Great Law & Economics Movement, 42 Stan. L. Rev. 993, 993 (1990).

other countries that for a time and for important reasons adhered to a view of law as a self-contained and unchanging system,[3] has been the dominant form of legal scholarship in the last century.[4]

Not surprisingly, the criticisms of existing law and the proposals for reform derived from the use of outside fields have had their effect on lawmakers. Whether from the perspective of legislatures enacting statutes, administrative agencies drafting regulations, or, perhaps most dramatically, the courts, what outside fields have suggested the law should be has had and continues to have significant effect. And, by and large, outside fields are a good influence on law, as worn-out rules, based on past power relations and even plain incorrect judgments, have been overcome. Indeed, I have been a strong proponent and employer of one outside field, economics, as a basis for advocating for legal reform.[5]

That said, looking at law from the standpoint of any given outside field—what I call a "Law and . . ." approach—is not without its perils. And it is on two of these that I would like to focus. The first derives from a confusion between the role of the legal scholars who develop these outside fields and the role of lawmakers. The second, which will be the principal topic of this Lecture, is the possibility that, attracted to outside fields as a cure for law's ills, law forgets to question the validity of theories developed by outside fields. And, in doing so, law overlooks that much as it can use outside fields to question existing paradigms in law, law can and should also force outside fields to question their own underlying assumptions.

Let me address briefly the first of these perils. When scholars, of whatever field, write articles that seem to demonstrate that existing law is incorrect or even immoral, the answer of the lawmaker should often be: "Perhaps, but let's move slowly." You have heard it said that lawmakers should "let justice be done though the heavens fall." But that is nonsense. A lawmaker, whether a judge, or legislator or an administrator, who caused the heavens to fall would be kicked out, and extremely quickly. Scholars, the developers of the "Law and . . ." theories I will be discussing, instead

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3. For example, for a discussion of the historical reluctance of Italian legal scholarship to adopt this view, see Guido Calabresi, Two Functions of Formalism: In Memory of Guido Tedeschi, 67 U. Chi. L. Rev. 479, 481–82 (2000) (discussing especially how this reluctance was used to counter Fascist-sponsored changes in the law).

4. For an overview of the origins of "Law and . . ." and its relationship with other approaches to legal thought, including doctrinalism, legal process, and law and status, see generally Guido Calabresi, An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts, 55 Stan. L. Rev. 2113 (2003) [hereinafter Calabresi, Legal Thought].

5. See, e.g., Guido Calabresi, The Cost of Accidents: A Legal and Economic Analysis 15 (1970) [hereinafter Calabresi, The Cost of Accidents] (determining the goals of the system of accident law by discussing "what systems are best suited for dealing with combinations of goals, and what systems are most suitable in areas where one goal predominates" through a Law and Economics lens); Guido Calabresi, The Future of Law & Economics: Essays in Reform and Recollection 17 (2016) [hereinafter Calabresi, Future of Law and Economics].

have the job of writing, the duty to say, what they believe to be true and to do so, "though the heavens fall." They can and must do so, precisely because lawmakers may and usually read such scholarship with skepticism and caution. The heavens don't fall, and the scholar can write what might cause the heavens to fall, because the lawmaker in the first instance says "it sounds good, but he never ran anything, or she never met a payroll."

Law (and hence lawmakers) is and should in this sense be conservative—not in an ideological sense of the word—but in the sense of moving slowly.[6] The fact that major changes in law—even if correct, and so demonstrated to be by scholars of fields outside law—are deeply disruptive of people's lives is a very good reason for law to react to what such scholars have written with caution. When lawmakers act too rapidly they may do egregious harm, even if in the long run radical change is warranted.

Scholars often don't like the fact that wise lawmakers treat their work skeptically. They don't realize that their freedom to write and propose radical change exists exactly because they are often, in the first instance, ignored. My own reaction—when some of my early writings in Law and Economics and Torts were accepted, and quickly, by courts—was the opposite. I thought then, and think now, that what I wrote was correct. But I worried that too early and quick adoption of what I proposed might do more harm than good.

This, then, is the first peril of the "Law and . . ." approach. Lawmakers, even if convinced that the outside field has correctly demonstrated errors in the law, must move to update the law slowly so that the heavens do not fall. Too often, lawmakers move too fast. Law *must* adapt and *change* in response to proper criticism, but it must do so always keeping in mind the disruptions that change—even in some sense ultimately just change—brings about.

My main focus in this Lecture, however, is on the second peril of law's reliance on fields outside of law. That is, that law and lawmakers must always question the validity of the outside field's theory. The fact that the law does not conform to the outside theory may be because the law is wrong. But it may also be because the outside theory is incomplete, limited, or insufficiently nuanced.[7]

"Law and . . ." should operate as a two-way street, leaving no paradigm, whether in law or an outside field, unquestioned. This peril is

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6. Much in the same way as some argued that formalism or doctrinalism was "conservative," not in an ideological sense, but in its reticence to embrace change. See Calabresi, Legal Thought, supra note 4, at 2116. And, indeed, "Law and . . ." arose, in part, as a response to the perceived inertia of formalism. Id. at 2119.

7. Unquestioning application of an outside field's theory or methods, in other words, should not itself become another instance of "mechanical jurisprudence." Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605, 606–07 (1908) (describing the need for scholars continually to question the "unsound conclusions" of "departed masters," even when their methods appear sound).

the same, I think, regardless of whether the outside field is economics, philosophy, or history—to choose three particularly dominant "Law and . . ." approaches.[8] The manifestation and effect of this peril on legal rules—its "legal process" operation—differs according to the particular outside field employed.[9] The recognition of the peril, however, has not been as explicit as to all of these "Law and . . ." approaches.

In this Lecture, I will begin by discussing this second peril as it has manifested itself in Law and Economics. I do this as it is here that the peril has been most clearly criticized.[10] I then move on to examine what I believe to be the same, but perhaps less recognized, peril in Law and Philosophy, and Law and History.

I. THE PERIL OF LAW AND ECONOMICS

When a structure, whether a set of legal rules or a market arrangement, does not comply with what economic theory would prescribe, economists—and by extension, economic analysts of law—may call the rules or the arrangement inefficient, or even—using a very strong word—irrational.[11] This, for example, may properly describe what the early work of the greatest of contemporary economic analysts of law,

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8. My treatment of these three disciplines as separate iterations of "Law and . . ." reflects the specialization and disaggregation of "Law and . . ." into specific fields, like Law and Economics or Law and Philosophy. By contrast, in the early twentieth century, advocates of "Law and . . ." invoked a variety of different disciplines (albeit primarily in the social sciences) indifferently to make claims about the law. In fact, one of the claimed strengths of "Law and . . ." was its potential for bringing generalized interdisciplinarity into law. See Calabresi, Legal Thought, supra note 4, at 2120.

9. By "legal process" operation, I refer to the choice of which institutional actor should react to an outside field's suggestions that existing legal norms be amended. See id. at 2123.

10. Perhaps because of the close relationship between the two fields, or perhaps because of the writings of as great a scholar as Economist and Professor Ronald Coase, economics has also been more conscious about the implications of Law and Economics for economics as a discipline. See, e.g., Ronald Coase, Economics and Contiguous Disciplines, 7 J. Legal Stud. 201, 210 (1978).

11. This is consistent with the view that the task of economics "explores and tests the implications of the assumption that man is a rational maximizer of his ends in life," that economic analysis assumes that the common law tends toward efficient outcomes, and that inefficient norms are likely to be questioned and overturned over time. See Richard Posner, Economic Analysis of Law 3 (1973); see also Gary S. Becker, The Economic Approach to Human Behavior 14 (1976) ("[H]uman behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets."); A. Mitchell Polinsky, An Introduction to Law and Economics 7 (5th ed. 2019) ("The attractiveness of efficiency as a goal is that, under some circumstances . . . everyone can be made better off if society is organized in an efficient manner."). For an example highlighting the "irrationality" of legal actors, see W. Kip Viscusi, Jurors, Judges, and the Mistreatment of Risk by the Courts, 30 J. Legal Stud. 107, 109 (2001) (examining the irrationality of juror and judge behavior).

Richard Posner, was taken by his followers to do.[12] And on that basis any number of legal rules and market arrangements have been radically changed.[13]

When that criticism was addressed to courts, rather complex legal process moves had to be made to permit courts to make law adhere to what economic analysts contended economic theory said was most efficient or rational. Perhaps the most successful of these moves was in the reform of how courts applied statutory antitrust law to do what economic theory allegedly demanded. And the legal process analysis employed was Professor Robert Bork's brilliant, if misguided, position that for courts to read the relevant statutes in any way other than to further economic efficiency was to give courts jobs they were incapable of doing.[14]

Still, for several reasons, the peril in the use of economic theory to "rationalize" law has been widely recognized. The argument that law must be changed to adhere to the dominant economic theory continues to be made, but it is frequently met by powerful counterarguments.[15] Its perils

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12. Posner's studies of specific substantive fields, for example, set out to "question to what extent [a given area of law] can be explained as a means for promoting efficient allocation of resources." See William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. Legal Stud. 325, 325 (1989).

13. With, as I further note below, significant effects especially on antitrust law. See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977) (overturning a rule mandating that certain vertical restrictions were per se violations of the Sherman Act, and returning to a more flexible standard); United States v. General Dynamics Corp., 415 U.S. 486, 501, 503–04 (1974) (affirming that courts, when assessing violations of § 7 of the Clayton Act, may consider a variety of factors pertinent to the economic dynamics of a given industry); E. Thomas Sullivan, Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years, 58 Notre Dame L. Rev. 1, 1 (1982) (noting the Burger Court's reliance on efficiency-based rationales in its antitrust jurisprudence). Even at the time, however, some questioned whether changing political trends, or other factors besides the application of economic theory, were responsible for doctrinal shifts in antitrust. See Louis Kaplow, Antitrust, Law & Economics, and the Courts, 50 Law & Contemp. Probs. 181, 182–83 (1987) ("Although law and economics has been applied to virtually all areas of law, and although some parallel developments do reflect more of an economic approach, it would be extremely difficult to make the case that the broad changes in Supreme Court doctrine are primarily or even substantially explained by these phenomena." (footnotes omitted) (citing R. Posner, Economic Analysis of Law (3d ed. 1986); Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976))).

14. See Robert Bork, The Antitrust Paradox 6–7 (1978) [hereinafter Bork, The Antitrust Paradox] (discussing how the Supreme Court's contemporary approach to antitrust law fails to take adequately into account economic theory—the concept of business efficiency in particular—and as a result has "skewed legal doctrine disastrously"); Robert H. Bork, Antitrust and Monopoly: The Goals of Antitrust Policy, 57 Am. Econ. Rev. 242, 243–44 (1967) (discussing that lawyers "are properly concerned . . . with models of how they ought to behave" and that the consumer welfare model "is the only legitimate goal of antitrust").

15. See Calabresi, Future of Law and Economics, supra note 5, at 1–21 (contrasting the "Economic Analysis of Law," which utilizes "economic theory to criticize and correct law," with "Law and Economics," which both employs economics to critique law and "use[s] law to suggest changes and alterations in economic theory"). These long-standing criticisms

now laid bare, Law and Economics may prove today less dangerous than in earlier times.

The first reason for the prevalence of this significant skepticism lies in the fact that the broad use of economics to critique law was relatively new. As a general "Law and . . ." approach it is usually linked to Ronald Coase's and my writings in the 1960s.[16] Criticizing law on the basis of economic theory, especially when employed in areas often far removed from predominantly financial arrangements, was sufficiently novel that despite its force it immediately aroused criticism and doubt.[17] This doubt was made easier because both Coase (dramatically and early on) and I worked from the assumption that when law did not "fit" economic theory, it was more than possible that it was the economic *theory* rather than the law that was inadequate and had to be reformed. Coase's Theory of the Firm in the 1930s demonstrated that unequivocally.[18]

More recently, I have written explicitly making the same point: If a "legal reality discloses rules and practices that economic theory cannot explain," then Law and Economics should ask whether the prevailing economic theory has missed something.[19] And a whole field of economic theory, Law and Behavioral Economics, has been developed to explain, analyze, and occasionally justify conduct or legal norms that at one time had been described and criticized as irrational.[20]

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might include empirical observations, countering economic analysis of law's assumption that economic actors uniformly behaved as rational actors, see, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1476–80 (1998), or more philosophical critiques, regarding the normative value of "efficiency" or "wealth maximization," see, e.g., Ronald M. Dworkin, Is Wealth a Value?, 9 J. Legal Stud. 191, 194 (1980). For a collection of early criticisms, see Jules L. Coleman, Markets, Morals, and the Law (1998).

16. E.g., Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499 (1961); R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960). For a historical overview, see George Priest, The Rise of Law and Economics: A Memoir of the Early Years, *in* The Origins of Law and Economics: Essays by the Founding Fathers 350, 350–82 (Francesco Parisi & Charles Rowley eds., 2005).

17. See, e.g., C. Edwin Baker, The Ideology of the Economic Analysis of Law, 5 Phil. & Pub. Affs. 3, 47 (1975) (providing three reasons why "economic efficiency is not an adequate basis from which to assess and make suggestions concerning the law"); Jules L. Coleman, Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law, 94 Ethics 649, 661–79 (1984) ("[E]conomic efficiency is normatively prejudiced in a particularly insidious way: namely, it turns out that what is efficient depends on what people are willing to pay, and what people are willing to pay in turn depends on what they are capable of paying."); Mark G. Kelman, Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics", 33 J. Legal Educ. 274, 277–84 (1983).

18. R. H. Coase, The Nature of the Firm, 4 Economica 386 (1937).

19. Calabresi, Future of Law and Economics, supra note 5, at 3–4.

20. See id. at 90–116 (discussing, for example, altruistic behavior and asking "[i]f self-interest is more effective at producing the goods we want, why do we, in fact, have so much altruism, so much beneficence, and so many not-for-profit structures in the world" (emphasis omitted)); Jolls et al., supra note 15, at 1473 (developing "a systematic framework for a behavioral approach to economic analysis of law").

Despite this, the peril remains. And even here the desire to analyze law on this basis of a given outside economic theory, rather than recognizing that all "Law and . . ." must be a two-way street, remains prevalent. The move away from Economic Analysis of Law to Law and Economics is, however, growing. And it is now well recognized that when economics fails to explain law it indeed may be law that is outdated or failing, but it may instead be that economic theory that is wanting. If that is so, the use of economics as a way of examining law may come to fulfill its promise while avoiding its peril.

II. THE PERIL OF LAW AND PHILOSOPHY

I do not believe the peril has been sufficiently recognized when philosophy is used as the outside field to criticize and correct law. I would like to speculate as to why this is so while making some quite general references to the use of philosophy in tort law.[21]

Unlike economics, philosophy has long been used, allegedly, to explain existing legal rules and institutional arrangements.[22] In practice, however, like other "Law and . . ." approaches, Law and Philosophy has also been deployed to reform law. These philosophical critiques often begin by identifying a point of "incoherence" in a particular area of substantive law. The step from there to a finding that the supposed "outlier" rules are themselves normatively unjustified is a small one. And the further step, to use normative concepts like desert, wrongdoing, just burdens, or corrective justice explicitly as ways of "fixing" these outlier rules is, again, very short.[23]

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21. The most recent prominent example can be found in the works of John Goldberg and Bejamin Zipursky. See John C.P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs (2020) [hereinafter Goldberg & Zipursky, Recognizing Wrongs].

22. "Explaining" the "nature of law," of course, is the primary purpose of general or "analytical" jurisprudence, a field of as long a vintage as law itself. See David Plunkett & Scott Shapiro, Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry, 128 Ethics 37, 39 (2017) (arguing that the goal of analytical jurisprudence is to "explain how legal thought and talk . . . fit into reality overall"). See generally Andrei Marmor & Alexander Sarch, The Nature of Law, Stanford Encyc. of Phil. (May 27, 2001), https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/ [https://perma.cc/A94F-ZU5G] (last updated Aug. 22, 2019). To be clear, here, I do not seek to examine the merits of analytical jurisprudence as a discipline of philosophy, but rather, the use of philosophy to critique legal norms and practice—what is sometimes referred to as "normative" jurisprudence. See Plunkett and Shapiro, supra, at 45. These normative critiques could well come from developments in analytical jurisprudence, but are equally if not more likely to come from other subfields within philosophy, most obviously moral and political philosophy but also cognate areas like epistemology and philosophy of language. See, e.g., Hrafn Asgeirsson, On the Instrumental Value of Vagueness in Law, 125 Ethics 425, 426 (2015) (applying philosophy of language to distinguish between vagueness and "incommensurate multidimensionality," and arguing that the latter, more so than the former, is valuable to law).

23. This is one way of characterizing Professor Ronald Dworkin's approach to legal philosophy, which self-consciously blended analytical and normative jurisprudence

Still, I believe the explicit use of a philosophical theory to demand that specific legal rules or arrangements be changed has not been met with the same skepticism that the Posnerian use of economics has encountered. Because philosophy was viewed traditionally almost as part of law, the significance and effect of a "Law and . . ." approach here was not as clear as it was for Law and Economics.

All this was made stronger—and more dangerous—by the claims that while other outside fields like economics spoke to the public side of law, private law is necessarily about regulating interpersonal behavior and, for this reason, must reflect norms of interpersonal morality.[24] As a result, deviations from what these philosophical theories deemed correct from the perspective of interpersonal morality could easily be termed as destructive of "private law" itself.[25]

This, I would suggest, is nonsense. All law is public, and all law is private.[26] Torts is about the relationships between an injurer and a victim,

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together. See Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 1–37 (1996); Ronald Dworkin, Law's Empire 1–44 (1986). For examples in the domain of tort law, see generally Arthur Ripstein, Private Wrongs (2016); George P. Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972); John Gardner, What is Tort Law For? Part 1. The Place of Corrective Justice, 30 Law & Phil. 1 (2011); Stephen R. Perry, The Moral Foundations of Tort Law, 77 Iowa L. Rev. 449 (1992); Ernest J. Weinrib, Toward a Moral Theory of Negligence Law, 2 Law & Phil. 37 (1983).

24. See Ernest J. Weinrib, The Idea of Private Law 2, 56 (1995) ("Aristotle's account of corrective justice is the earliest—and in many respects, still the definitive—description of the form of the private law relationship." (footnote omitted)).

25. See id.

26. See Daniel A. Farber & Philip P. Frickey, In the Shadow of the Legislature: The Common Law in the Age of the New Public Law, 89 Mich. L. Rev. 875, 887 (1991) ("If the private law/public law distinction retains any vitality after the realist critique, the line between the two is at best elusive."); Morton J. Horwitz, The History of the Public/Private Distinction, 130 U. Pa. L. Rev. 1423, 1426–28 (1982) (describing the contemporary erosion of the public/private distinction in many areas of legal doctrine); Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U. Pa. L. Rev. 1349, 1357 (1982) ("Following out these lines of similarity and difference, one simply loses one's ability to take the public/private distinction seriously as a description, as an explanation, or as a justification of anything."); Douglas A Kysar, The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism, 9 Eur. J. Risk Regul. 48, 50–51 (2018) (arguing that the tort law system's capability to "hold[] open a forum for the self-presentation of grievances and the declaration of norms of right and responsibility which rest on reason, principle, precedent, and evidence" may prove beneficial in regulating the risk of broader complex issues such as climate change); Michael P. Vandenbergh, The Private Life of Public Law, 105 Colum. L Rev. 2029, 2030 (2005) (arguing that the regulatory administrative state is influenced by "agreements entered into between regulated firms and other private actors in the shadow of public regulations"). Some, like Goldberg and Zipursky, have arguably described a "new private law" in terms that suggest that private law and public power may be deeply interconnected. E.g., John C.P. Goldberg, Introduction: Pragmatism and Private Law, 125 Harv. L. Rev. 1640 (2012); Benjamin C. Zipursky, *Palsgraf*, Punitive Damages, and Preemption, 125 Harv. L. Rev. 1757 (2012). For a specific critique of Goldberg and Zipursky's characterization of the relationship between private and public law, see Guido Calabresi & Spencer Smith, On Tort Law's Dualisms, 135 Harv. L. Rev. Forum 184 (2022),

but it is also about the numbers and bearers of accidental harms a society ordains, and thus it is about both deterrence and compensation.[27] The definition of what is wrong and merits discouragement or punishment, or reversal or correction, is neither public nor private; it is both. And the merits of a philosophical theory that commands one approach over the other must be analyzed with the same respect and skepticism that attends an economic theory.

Here too, on occasion, the primacy of what a philosophical theory must require courts to do has been linked to a misguided legal process notion. Thus, philosophers of law, like John Goldberg and Benjamin Zipursky, have argued that courts should not attend to issues like the quantity of accident costs brought about by tort rules.[28] This, they contend, is beyond the scope of what courts may properly do.[29] Such a move is curiously the reverse analogue of that made by Bork in antitrust law.[30] And it is just as wrong. Common law courts have always looked to such "public" effects in making law, even in so-called "private law" areas. And in New York, for example, the duty of courts to do just that has been explicitly ordained by its highest court.[31] But my object today is not to take issue with

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https://harvardlawreview.org/wp-content/uploads/2022/02/135-Harv.-L.-Rev.-F.-184.pdf%20 [https://perma.cc/3UPK-TDNR].

27. Calabresi, The Cost of Accidents, supra note 5, at 26 (stating that "the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents" and that this is accomplished, in part, by a "reduction in the number and severity of accidents"); Guido Calabresi, Civil Recourse Theory's Reductionism, 88 Ind. L.J. 449, 451 (2013) ("I further think, however, that, in any given case, torts is also about giving someone compensation from somewhere, somehow, because that someone 'deserves' compensation, that is, has a corrective justice right to it."); Guido Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U. Chi. L. Rev. 69, 73–91 (1975) (explaining the relationship between causation and the four goals of tort law: two "compensation goals" (spreading and distributional equity) and two "deterrence goals" (specific or collective deterrence and general or market deterrence)); Guido Calabresi, Torts—The Law of the Mixed Society, 56 Tex. L. Rev. 519, 521–26 (1978) (describing the nature of tort law as one that is the product of a mixed society, employing mixed collective and atomistic approaches).

28. Goldberg & Zipursky, Recognizing Wrongs, supra note 21, at 246–47.

29. See John C.P. Goldberg & Benjamin C. Zipursky, Thoroughly Modern Tort Theory, 134 Harv. L. Rev. Forum 184, 191 n.45 (2021), https://harvardlawreview.org/wp-content/uploads/2021/02/134-Harv.-L.-Rev.-F.-184.pdf%20 [https://perma.cc/RE3K-JJ8R] ("[A]ny invitation for judges to deploy cheapest cost avoider analysis — given the indeterminacy of that concept, the structure of tort litigation, rules limiting the admissibility of evidence, judicial competence to engage in policy analysis, and various other factors — is an invitation for them to make stuff up.").

30. Bork, The Antitrust Paradox, supra note 14, 408–18.

31. The New York Court of Appeals has expressly stated that:

> To discern whether a duty exists, the court must not engage in a simple weighing of equities, for a legal duty does not arise "when [ever] symmetry and sympathy would so seem to be best served" . . . Rather, the court must settle upon the most reasonable allocation of risks, burdens and costs among the parties and within society, accounting for the economic impact of a duty, pertinent scientific information, the relationship between the

this legal process move, misguided though it is. My point is rather to indicate that having made such move, philosophers of law will often say that cases, decisions, and approaches to torts that do not comport with what their normative theory requires are either wrong or not torts.[32]

And here two things need to be said. The first is that just as economic theory—even at its best—may not be adequate to explain or justify entire areas of law, neither will philosophical theories at their best do so. There are ways of describing and analyzing that stretch any given "and" too far. Of course, economics can be stretched through the broadest of utilitarian reasonings so it could, in theory, cope with any individual victim/injurer relationship. And so, more easily perhaps, could philosophical theories entertain all that, say, economic theory or any other outside field focuses on. But to do that requires using language in uncomfortable ways and makes the relevant outside field of knowledge and its practitioners deal with topics in ways that are inconsistent or in tension with the core focus of that given field.[33]

Often, as when Coase made economics take the costs of markets into account, what law showed to be true could be readily incorporated into the outside field that was being used to analyze law.[34] But at times, the

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> parties, the identity of the person or entity best positioned to avoid the harm in question, the public policy served by the presence or absence of a duty and the logical basis of a duty.

In re N.Y.C. Asbestos Litig., 59 N.E.3d 458, 469 (N.Y. 2016) (citations omitted) (quoting De Angelis v. Lutheran Med. Ctr., 449 N.E.2d 406, 407–08 (N.Y. 1983)). See also Lauer v. City of New York, 733 N.E.2d 184, 188 (N.Y. 2000) (holding that the court must balance both general duties to society and the specific duty to the plaintiff).

32. See, e.g., Goldberg & Zipursky, Recognizing Wrongs, supra note 21, at 209–31 (critiquing various approaches identifying why certain ways of treating others count as torts and why others do not).

33. Which is not to say that, for example, legal scholarship anchored in economic analysis cannot successfully consider more philosophical questions of fairness or distributional justice. See, e.g., Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 Harv. L. Rev. 961, 970–71 (2001) ("We next identify which legal rules are best according to welfare economics and which are best according to the principles of fairness that seem naturally relevant . . . ."). Or that legal scholars may not seek to incorporate insights from both economic analysis and legal philosophy to formulate hybrid or "mixed theories" of, for example, tort law. See, e.g., Gary T. Schwartz, Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice, 75 Tex. L. Rev. 1801, 1802 (1997) (discussing how a view of deterrence as compassionate and meant to prevent injustice can justify an approach that is a mix of economic and justice approaches).

34. The evident effectiveness of Coase's writings, for example, pushed economists to revisit the role of institutions and legal norms in defining market behavior and was, in part, responsible for the rise of the New Institutional Economics. See Ronald H. Coase, The New Institutional Economics, 140 J. Institutional & Theoretical Econ. 229, 230–32 (1984) (arguing that institutional economic theory should concern itself "within the constraints imposed by real institutions" and not "what would happen in an ideal state"); Douglass C. North, The New Institutional Economics, 142 J. Institutional & Theoretical Econ. 230, 230 (1986) (arguing that modern institutional economics "should be capable of integrating neo-classical theory with an analysis of the way institutions modify the choice set available to human beings" and that it should "build upon the basic determinants of institutions" to

discontinuity between law and any given outside field is not adequately cured by changing the outside field somewhat. Rather, at such times the discontinuity is best explained and analyzed by recognizing that another or various other fields of knowledge, outside of law, are best suited to shed light on what law is doing.

The second thing worth saying is that even within one "Law and . . ." approach, many variants may coexist.[35] A traditional—let's call it Chicago—economic theory may fail to explain or justify a set of legal rules while another economic theory—whatever its overall merits—may do so very well. Accordingly, the fact that tort law does not adhere to all that, say, Goldberg and Zipursky's "civil recourse" philosophy would dictate does not mean that a different, perhaps more sophisticated or perhaps wrongheaded, philosophical approach can explain and justify quite clearly what the law is doing.[36] For example, returning people to their previous status quo—the essence of many philosophical approaches to tort law—is not without its powerful, philosophical critics.[37]

Let me be clear. I am not for a moment suggesting that looking at legal rules in the way Goldberg and Zipursky do, or in the way that philosophers of law more generally do (whether Aristotelian or Dworkinian), is wrongheaded. Far from it. Asking what complex notions of merit, of right and wrong behavior, justify is surely worth doing.[38] What I am suggesting is that here too, if the law does not do what those notions would indicate should be done, one should not assume that the law is wrong and must be changed. It may be that the law is wrong. But it may also be that the philosophical theory has not been applied in a fully sophisticated fashion, that another, perhaps as yet undefined,

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analyze the way in which institutions change); Oliver E. Williamson, The Institutions of Governance, 88 Am. Econ. Rev. 75, 75 (1998) (describing much of the contemporary work of the new institutional economics as finding its origins in Coase's work). For an examination of the relationship of Ronald Coase's thought to neoclassicism and institutionalism, see generally Herbert Hovenkamp, Coase, Institutionalism, and the Origins of Law and Economics, 86 Ind. L.J. 499 (2011).

35. For a sampling of different contemporary philosophical views, see generally Philosophical Foundations of the Law of Torts (John Oberdiek ed., 2014).

36. See supra note 27 and accompanying text.

37. Some critics point out, for example, that restoring an injured party to the status quo reproduces and perhaps intensifies preexisting social inequalities. See, e.g., Richard L. Abel, A Critique of Torts, 37 UCLA L. Rev. 785, 798–806 (1990) (finding that tort damages that focus only on injury not only fail to provide adequate compensation but also reinforce and obscure real inequalities); Leslie Bender, Overview of Feminist Torts Scholarship, 78 Cornell L. Rev. 575, 577–79 (1993) ("Even though the 'emotional' harms resulted in interferences with physical integrity, like miscarriage or premature birth, they were shunted off into a separate injury classification. Tort law thus marginalized women's injuries by taking them out of the realm of compensable physical harms." (footnote omitted) (citing Martha Chamallas & Linda Kerber, Women, Mothers, and the Law of Fright: A History, 88 Mich. L. Rev. 814, 833–34 (1990))).

38. Indeed, I have stressed the value of such work. Calabresi, Future of Law and Economics, supra note 5, at 24–89 (discussing "merit goods").

philosophical theory has been what has influenced the law. Or perhaps it is that what the law is doing in that area responds best to what is optimally analyzed in terms of a totally different "Law and . . ." approach, a totally different outside field of knowledge.

The discontinuity asks for an explanation. But the explanation need not be that law is wrong. As with Law and Economics, as with seemingly "inefficient" legal rules, I believe proper Law and Philosophy should be a two-way street. And so, it may be that law pushes us to reconsider what truly constitutes or how we should identify the good or the just.[39]

III. THE PERIL OF LAW AND HISTORY

Perhaps the contemporaneously most interesting and most perilous use of "Law and . . ." to analyze and criticize existing legal rules has been the invocation of history. To begin, we must distinguish different ways in which law and history can interact. First, historians of law have sought to trace the development of certain legal doctrines or practices over time. Their goal is to offer what one may describe as a genealogy of law.[40] Second, legal historians may turn to law, including court cases, but also other materials like legal treatises, as a window into the social or political history of a given moment in time. Law, from this perspective, offers an archive for understanding the broader history of a period.[41] Neither of these first two frameworks makes explicit normative claims as to what law should be, although, implicitly, historians writing from within these frameworks may suggest that a particular legal doctrine or practice emerged out of a time with regrettable social or political dynamics which our contemporary society may not wish to emulate.[42]

My interest, however, is in two other practices that explicitly claim to make normative arguments about what law should look like based on

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39. At a conference at Harvard Law School, honoring Professor Emeritus Frank Michelman on his retirement, distinguished philosophers presented papers. Several of them, while praising Michelman's contributions, seemed puzzled that on more than one occasion where the philosophical theory Michelman was applying did not fully support a legal doctrine, Michelman, nonetheless, adhered to pre-existing legal rules. What they did not realize was that Michelman, a truly great legal scholar, was treating Law and Philosophy as a two-way street and was questioning philosophical theory on the basis of what law suggested. Robert Post, correctly, referred to Michelman's writing as "so wise and perfectly tactful." See Lewis Rice, A Career of "Reflective Equilibrium": Celebrating Frank Michelman, Harv. L. Bull. (July 1, 2012), https://hls.harvard.edu/today/a-career-of-reflective-equilibrium-celebrating-frank-michelman/ [https://perma.cc/2LBQ-LUFG] (internal quotation marks omitted).

40. For classic examples of this practice, see Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy (1992); Morton Horwitz, The Transformation of American Law, 1780–1860 (1977).

41. See Hendrik Hartog, Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870 (1983).

42. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 543 (1896) (upholding racial segregation).

history. On the one hand, some argue that history can, like any other social science, provide data points for understanding where law should go next. History might, for instance, help elucidate how law has, over time, failed to resolve the social mischief it was designed to redress.[43] On the other hand, the more recent trend, espoused primarily by those who use the label "originalism," seeks to use history to define what law should be.[44] Adherents to "originalism" seek to determine the meaning of the law by turning to "original intent," "original public meaning," "original expectations," or even "history and tradition."[45] And if the legal rule under scrutiny fails to fit, it is assailed and quite often set aside. It is, in effect, deemed the equivalent of irrational and, hence, requiring change. This form of legal antiquarianism, thus, sees law as an entity whose meaning was forged in the past.

Let me, again, be clear. I am not in this Lecture criticizing originalism—whatever its problems or limits may be,[46] and I am certainly

43. This approach has been taken, for example, by historians who have submitted amicus briefs making historical claims without making the argument that only historical sources can elucidate the proper meaning of a given constitutional or statutory provision. See, e.g., Reva B. Siegel, Serena Mayeri & Melissa Murray, Equal Protection in *Dobbs* and Beyond: How States Protect Life Inside and Outside of the Abortion Context, 43 Colum. J. Gender & L. 67, 91–93 (2023) ("Our brief . . . show[s] that abortion bans are rooted in a history of state-sponsored reproductive control that has targeted individuals and communities based on characteristics now considered constitutionally suspect.").

44. For overviews of originalism, see generally Originalism: A Quarter-Century Debate (Steven G. Calabresi ed., 2007); Ilan Wurman, A Debt Against the Living: An Introduction to Originalism (2017).

45. See, e.g., Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 9 (2d. ed. 1997) (stating that the inquiry into "original intention" must involve asking "what did the framers mean to accomplish, what did the words they used mean to them" and not "what we should like the words to mean in the light of current exigencies or changed ideals"); Robert H. Bork, The Tempting of America: The Political Seduction of the Law 143 (1990) ("In truth, only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy."). For other methods of originalist determinations of the meaning of a law, see generally, Randy E. Barnett, Restoring the Lost Constitution (2003) (arguing that original meaning originalism "avoids the prominent objections leveled at originalism"); John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution (2013) (advocating that under both original intent and original public meaning, the Constitution's meaning should be interpreted based on the applicable interpretive rules of the time); Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997) (advocating for constitutional interpretation which is concerned with the original meaning of the text, not what the original draftsmen may have intended); Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review (1999) (advocating for an originalist interpretation that adheres to the discoverable intentions of the Founders); William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349 (2015) (describing the methods that an original meaning originalist must employ).

46. For critiques of originalism, see, e.g., Erwin Chemerinsky, Worse Than Nothing: The Dangerous Fallacy of Originalism 207 (2022) ("[Originalism] is a rhetorical shield that conservatives use to pretend they are not making value judgments, when that is exactly what they are doing."); Eric J. Segall, Originalism as Faith 193 (2018) ("What most originalists do

not criticizing the use of history as an outside field to be used in analyzing, understanding, and correcting current law. I could hardly be a former clerk, and mentee, of Hugo Black and do that.[47] And history has done at least as good a job as economics and philosophy in telling us where law has gone astray or become outdated. Indeed, as to the former, history may tell us more than any other outside field.

What I mean to do in this Lecture is to suggest that the peril of using an outside discipline's seeming requirements to judge current legal rules, followed by a willingness to consider existing legal rules as necessarily wrong if they don't adhere to what the outside discipline dictates, is today especially strong in this "Law and . . ." approach.

One sees this tendency—relying on historical claims to call for the displacement of current legal norms—both in statutory and constitutional analysis. First, existing law as it has "come to be" is examined. Second, the meaning of what the writers of the given statute or constitutional provision intended to do is asserted through claims predicated on some historical sources. Third, a lack of fit is found, and then the law is changed even in the face, indeed precisely, in the face, of long-standing precedent, of long-standing legal development.

Again, changing existing legal norms in light of history may well be correct. Justice Black frequently made an argument of that sort. He did it, for example, with respect to double jeopardy.[48] He began with the language the Framers used; he adverted to its meaning and historical context, including its particular meaning when trials in different

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have in common is the faith that some combination of text, originalist-era evidence, and history can constrain Supreme Court decision making. But the words of the Constitution are too unclear, and their history too contested, for that to work."); Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 231 (1980) (arguing that "strict intentionalism produces a highly unstable constitutional order" and that moderate originalism's "constraints are illusory and counterproductive"); Jamal Greene, Originalism's Race Problem, 88 Denv. U. L. Rev. 517, 522 (2011) ("A racially-sensitive constitutionalism must always, therefore, hold out the possibility of legitimate dissent from history. Originalism denies that possibility . . . ."); Robert Post & Reva Siegel, Originalism as Political Practice: The Right's Living Constitution, 75 Fordham L. Rev. 545, 572 (2006) ("The originalist vision of the Constitution is thin enough to conjoin many distinct conservative perspectives that share only a common repudiation of the menacing encroachments of modernity.").

47. For discussions of Justice Black's reliance on history, see Philip Bobbitt, Constitutional Fate: Theory of the Constitution 34 (1982) ("Of course, Justice Black did not rely on textual arguments to the exclusion of all others; his *Adamson* dissent, in which he argues that the Fourteenth Amendment extends the Bill of Rights to the states, is well known." (footnote omitted)); Bruce Ackerman, The Living Constitution, 120 Harv. L. Rev. 1737, 1799 (2007) (characterizing Justice Black as "the original originalist on the modern Supreme Court"); Jack M. Balkin, Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time, 98 Tex. L. Rev. 215, 251 n.132 (2019) (describing Justice Black as "the most famous liberal originalist, exemplif[ying] liberals' turn to history both before and during the Warren Court era").

48. Bartkus v. Illinois, 359 U.S. 121, 150 (1959) (Black, J., dissenting).

jurisdictions were involved.[49] He then pointed out how far from those meanings contemporary law was. In other words, how Law and History pointed out a lack of fit.[50]

But interestingly, he would do two other things as well. First, he would be skeptical of any claims that "history" was clear and certain. Thus, he made me examine in excruciating detail the historical record. He even made me go back and read the original of a statute from Tudor times to see why one seeming exception to his historical conclusion really supported his view as to what history dictated as to double jeopardy.[51] In other words—unlike many "Law and . . ." scholars, whether economists, philosophers, or historians, he did not stop questioning the conclusions of the outside discipline simply because the lack of fit supported a reform to his preferred outcome.

But beyond this, he would also examine how law had come to deviate from what he concluded was what history dictated. He would ask whether the historical requirement was itself wrong because of what other outside fields or even, in an odd sense, law itself had come to tell us was correct. He would, in other words, while being very much sympathetic to an argument from Law and History, both question whether his history was correct and whether there were reasons to look beyond history—say, to philosophy or economics or even law itself to explain, and perhaps justify, the deviation.[52]

It is this kind of important, but also skeptical, use of history as an outside field for advancing changes in legal norms that I would like to further in this Lecture. It is this approach that I think is often missing today in Law and History. And it is this gap that is making the use of Law and History particularly perilous today.

Let me suggest three reasons why this peril is so great in this area. The first is the particular legal process grounds that are being used to make Law and History dominant. The second is that, because history as a field is far more complex and uncertain than economics, or even philosophy, what history actually dictates is anything but easily discerned. The third is the wish, common to every "Law and . . ." approach, to justify what is really primarily one's own desired legal outcome and reform by citing the purported conclusions of an outside field.

Let me turn first to the legal process move made, especially by judges, to justify the new-found dominance of historical arguments. It is as elegant, and as wrong, as Bork's move to make economic theory primary in

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49. Id. at 152.

50. Id. at 159–61.

51. For a more detailed account of this moment and the impact it had on my perspective on the judicial role, see Norman I. Silber, Outside In: An Oral History of Guido Calabresi 273–75 (2023).

52. *Bartkus*, 359 U.S. at 158–62 (Black, J., dissenting).

antitrust, and Goldberg and Zipursky's to do the same for philosophy in tort law.

Here one should distinguish between history, or "original meaning," as applied to statutes and as applied to constitutional provisions. Let me start with statutes. The argument is often made that any deviation from the intent (and by some, the language) of a statute is undemocratic,[53] and hence prohibited to courts.[54] Note the similarity with Bork's and Goldberg and Zipursky's arguments as to what courts can properly do.[55]

It is surely true that at least in one sense "interpretation" of a statute must be backward looking. After all, the word interpretation suggests as much. One must ask, historically, what a statute and its enactors meant. And whether one should, in doing this, look primarily to the language of the statute, to its context, to the mischief the statute was designed to correct, to legislative statements during its passage, or to any other indications of historical meaning, is something as to which I—like most scholars—have strong views.[56] But these are not germane to this Lecture. Rather, the question, which goes to the propriety of looking beyond historical meaning, is whether it is undemocratic, and "therefore" always wrong, for courts to look beyond that historical meaning, whatever it was. Can courts, when reading statutes, properly consider factors beyond the time of passage and not be fully retrospective?

The answer is, of course, courts do and have always, on occasion, done just that. It is manifest that courts do look beyond that past meaning

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53. In this context, for some, "intent" refers to legislative intent—that is, the purpose of legislators in enacting a statute, as discerned through legislative history; for others, "intent" is the expected application of a particular statute, as discerned by the public meaning of particular terms used by the legislature at the time of the statute's enactment. Compare Bostock v. Clayton County, 140 S. Ct. 1731, 1776–77 (2020) (Alito, J., dissenting) ("Many Justices of this Court, both past and present, have not espoused or practiced a method of statutory interpretation that is limited to the analysis of statutory text. Instead, when there is ambiguity in the terms of a statute, they have found it appropriate to look to other evidence of 'congressional intent,' including legislative history."), with id. at 1739 (majority opinion) ("The question isn't just what 'sex' meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions 'because of' sex. . . . So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law.").

54. See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 4 (1980) (noting that a "comparative attraction of an interpretivist approach . . . derives from the obvious difficulties its opposite number encounters in trying to reconcile itself with the underlying democratic theory of our government"); Scalia, supra note 45, at 22 ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

55. See Bork, The Antitrust Paradox, supra note 14, at 5; Goldberg & Zipursky, Recognizing Wrongs, supra note 21, at 9.

56. See, e.g., United States v. Nelson, 277 F.3d 164, 186–91 (2d Cir. 2002) (Calabresi, J.); Guido Calabresi, Common Law for the Age of Statutes 31–43 (1982) [hereinafter Calabresi, Common Law].

frequently.[57] Some have still called it interpretation (and have used maxims of interpretation to justify it).[58] Some—I for one—call it construction and have used rules—like avoidance of constitutional issues—to explain what the courts were doing.[59] Some have simply done it.[60] But the fact of the matter is that courts have, in fact, on occasion when it seemed correct to do so, looked beyond the past, beyond historical meaning when dealing with statutes.

My point today, though, is not to rework those arguments but simply to suggest that at the statutory level, it is no more "undemocratic" for courts to do this, than it is for courts to violate Bork's legal process maxim or Goldberg and Zipursky's contrary one. Democracy does not demand that past statutory writings govern judicial behavior. The question of whether only a legislature may update past enactments, or whether and when courts or administrative agencies should do so, is an immensely complex one.[61] But as long as democratically elected legislatures can overturn court or administrative decisions such rulings do not raise serious issues of democratic governance. In other words, there is nothing in democratic theory that requires us to keep courts from looking beyond and override history in doing their job when dealing with statutes.

A second legal process argument for relying on history and what a statute *meant* when originally written is that such a view limits lawmakers, and especially courts, and keeps them from simply doing what they want. This might be a strong argument if it were valid. But it seems to me obvious—empirically obvious—that those who adhere to the view that statutes mean only what the enacting legislators meant have been as free to impose their meaning on what was meant as those who believe that statutes grow. Judges, properly criticized, as result oriented, or activist, are as frequent among those who claim to follow original meaning as among those who admit reasons for statutory construction. This process argument, even if believed in by its proponents, is nonsense. It doesn't do what it is supposed to do.

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57. See, e.g., *Bostock*, 140 S. Ct. at 1748–53.

58. Id. at 1753.

59. See Calabresi, Common Law, supra note 56, at 120–62 (describing the factors affecting how a rule fits within the legal landscape and the choice of judicial techniques courts may employ when they have decided that an old rule is out of phase); see also Henderson v. Immigr. & Naturalization Serv., 157 F.3d 106, 118–19 (2d Cir. 1998) (Calabresi, J.) (applying principles of construction to analyze the impact of the 1996 amendments to the Immigration and Nationality Act).

60. Calabresi, Common Law, supra note 56, at 33–34 (noting examples where courts have updated statutes "[o]nly by ignoring legislative language and intent, and its own prior interpretations").

61. For a discussion of the relative merits of administrative, legislative, or structural responses to anachronistic statutes, see Calabresi, Common Law, supra note 56, at 44–80; see also William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution 29–74 (2010).

Again, let me be clear. I am not here arguing that history is not important and should not often, or usually, inform an outcome. I am simply saying that as with economics or philosophy the fact that our law—even court-made law—on more than one occasion deviated from what a historical meaning would seem to suggest does not necessarily make that deviation improper, let alone undemocratic. The move to an absolute legal process mandate to the particular "Law and . . ." theory applied, is just as misguided here as it is in Bork's, and Goldberg and Zipursky's use of it. In all three it is simply an ipse dixit.

The issue becomes more complicated when the question is not the interpretation of a statutory mandate but the meaning of a constitutional provision. For here it can be said that any deviation from what was originally required breaches a fundamental governmental structure and cannot (in some sense) constitutionally be done. Once more, my goal today is not to take sides in this argument. There surely has been plenty of writing (not to mention judicial opinions by judicial giants) countering the argument that only what the Framers intended must govern.[62] And it is certainly the case that constitutional law has, in fact, deviated dramatically in area after area from what the Framers intended and continues to do so.[63] Moreover, the often-made argument that only a reliance on original intent can limit judges and keep them from imposing their policy views is just as manifestly wrong here, as it is with statutory analysis. The indefiniteness of history, of original intent, is—as will shortly be discussed—so great (as has been seen, both recently and in the past), that originalism as a way of restraining judges is sheer nonsense.[64] Only honesty and good faith can do that.

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62. A notable example is *Brown*'s rejection of the relevance of history and original intent. See Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation."). Originalists, thereafter, have spilled much ink seeking to reconcile *Brown* with originalism. See, e.g., Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 1140 (1995) (asserting that "school segregation was understood during Reconstruction to violate the principles of equality of the Fourteenth Amendment").

63. It is, of course, more than dubious that the Framers embraced originalism. See H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 948 (1985) (arguing that the historical evidence indicates that the Framers would not have interpreted the constitution in an originalist way).

64. For commentary questioning whether originalism is, in fact, a form of judicial restraint, see, e.g., Richard H. Fallon, Jr., Selective Originalism and Judicial Role Morality, 102 Tex. L. Rev. 221, 223–24 (2023) (discussing the selectiveness of the Court's reliance on originalist analysis and maintaining that "[i]n large swathes of cases," "the Justices make little or no effort to justify their rulings by reference to original constitutional meanings" and instead rely principally on their own precedents as grounds for decision); Reva B. Siegel, Memory Games: *Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance, 101 Tex. L. Rev. 1127, 1131 (2023) (probing claims that originalist methods promote values of judicial constraint); David A. Strauss, Originalism, Conservatism, and Judicial Restraint, 34 Harv. J.L. & Pub. Pol'y 137, 139–45 (2011)

But certainly, the legal process claim, that courts should look to history when engaging in interpretation, has more weight when it is made with respect to constitutional questions than when made as to statutory analysis. And with this in mind, I will turn to the second, and more fundamental, problem with simply "following" what Law and History dictates—the indefiniteness, the uncertainty of even the best historical analysis. I will begin by pointing out the special problem that occurs, when judges, not historians, rely on that analysis. This too is not new, but it must be emphasized now, for it is only recently that so dramatic a use of Law and History has been made to nullify what the law had come to mandate.[65] And I will do this by starting with a silly story.

When I was clerking, I proposed, as a joke, to Justice Frankfurter (who had come to like me even though I was Justice Black's clerk), an "interpretation" of a constitutional provision that seemed to apply to him and to me. It was the constitutional requirement that only a natural-born citizen of the United States could serve as President. My absurd, but perhaps slightly linguistically possible, proposed reading of the clause was that if one were Naturally Born (that is, illegitimate), to become President, one had to be a citizen of the United States at birth. This of course would be impossible as to the Framers since the United States did not exist when they were born. But its effect (if read that way) would be to bar only one Framer, for only one was illegitimate, Alexander Hamilton. And on that basis—fear of a Hamiltonian presidency—I added a "policy" reason to explain my (ridiculous) historical reading of the clause.

The point of the story, however, is not my joke, but Frankfurter's reaction. He wrote me back: "*I'll* buy that" (remember, like me, he was born a non-citizen and hence was precluded by that clause, as ordinarily read, from the Presidency). "And anyway, *it's as good as most of what goes for history on this Court*!"[66]

In other words, that great scholar and traditionalist judge, some sixty-five years ago was saying one should not trust historical "findings" by Supreme Court Justices. He was seeing both the temptation, and the lack of capacity to do the job, that attends Law and History, in the hands of the category of people who became justices (and, I would add, judges generally). And he was pointing that danger out, as to a court that was relying on history far less than occurs today. Moreover, he was doing this

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(discussing the difficulties of ascertaining the "original understandings" and arguing that even with good faith approaches to original materials, "many different originalist conclusions will all seem plausible" with no criteria "that dictate a choice among them" and therefore will tempt judges to read in their own views). For the claim that originalism is an exercise in judicial restraint, see, e.g., William Baude, Originalism as a Constraint on Judges, 84 U. Chi. L. Rev. 2213, 2213 (2018) ("[O]riginalism was centrally a way, the best way, to constrain judicial decisionmaking . . . .").

65. Recent examples include Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), and District of Columbia v. Heller, 554 U.S. 570 (2008).

66. Personal recollections of the author.

with respect to a Court whose membership, for various reasons, was much more broadly based (and, as a result, perhaps somewhat more capable of doing historical analysis) than today's.[67].

The point is a broader one than when history is the outside field employed in "Law and . . ." analysis. Judges, and justices, are not historians, economists, or philosophers. As a result, a simplistic reliance on what the outside field "requires," (in addition to all the limits of that discipline, as discussed above), is misguided due to the undisputed fact that judges and justices will frequently get wrong what the outside discipline in fact says.[68] And this, by itself, should make judges hesitant to follow the dictates of the outside field, rather than what the law has come to mean and require. After all, it is as to the latter's task—pure legal analysis—that one has the right to expect significant knowledge and ability from those named to high courts.

But, putting aside this fundamental problem, and assuming for the moment that judges and justices can become adequate historians (or economists or philosophers) when aided by scholarly briefs and articles by the best practitioners of a given outside field, the peril of simple reliance on history to justify change in existing law remains enormous. What was meant, what was intended, what was understood, when our Constitutional provisions were written is all too often deeply uncertain. This is so because, as historians themselves are the first to tell us, historical truth is—to put it mildly—very hard to come by.[69] What any given economic or philosophical theory—whatever the merits and limits of that theory—stands for is on the whole definite. What actually was the historically correct basis of a constitutional requirement is far less certain.

Just consider for a moment a few that have been at the heart of recent cases: dual sovereignty and double jeopardy, habeas relief for the incarcerated but innocent, the Second Amendment's statement as to the right to bear arms, the meaning of race discrimination in the Fourteenth Amendment, the grant of power to state legislatures in federal elections.

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67. Contrast today's Court, which is composed almost entirely of former federal appellate judges, with the Warren Court, which included, at one point, Justices who had previously served as a state governor (Warren), a Senator (Black), an academic (Frankfurter), the head of an administrative agency (Douglas), a former state supreme court justice (Brennan), a lawyer in the Justice Department (Clark), and only three judges who had served, briefly, as federal appellate judges (Whittaker, Harlan, and Stewart) after longer careers as corporate lawyers or trial judges.

68. I am just speculating, but in this respect, the temptation for judges to believe that they know and can speak to what an outside field requires seems to be greater with respect to history, and perhaps philosophy, than economics.

69. This, of course, does not mean that there can be no "objective" search for historical facts, but that process entails more than developing a broad theory on the basis of some words in a dusty tome. See, e.g., Mark Bevir, Objectivity in History, 33 Hist. & Theory 328, 329 (1994) ("I will offer an account of historical objectivity which relies on criteria of comparison, not on our having access to a given past. . . . [T]o deny that we have access to a given past is not to show the impossibility of historical objectivity.").

In each of these, serious scholars have made powerful arguments that are based on totally different historical "facts."[70] For this, if for no other reasons, one would think that courts would be reluctant to rely on any given "historical" requirement before overturning what the law, in its complex way, has come to require.

The indefiniteness of history, moreover, carries with it a particular danger. Finding a plausible historical meaning that is coherent with one's desired "policy" result is all too easy. And the fact of the matter is that far from limiting judges and justices, the use of history, even "good history," has given them an amazing degree of freedom to further their own policy goals—however good these may be.[71] Justice Scalia correctly criticized the simplistic use of the legislative record in statutory interpretation because one could too readily find a legislator who described the given statute as doing just what the "interpreting" jurist wanted it to do.[72] But, I suggest, that danger is just as great as to the existence of a historical fact and meaning.

The problem exists to some degree, with all "Law and . . ." approaches. Each, because it enables jurists to question what the law should be, gives courts power. The way in which this power may be used to

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70. A prominent example is, of course, the long-standing debate over the original meaning of the Second Amendment, and whether it was designed to protect individual or collective rights. See generally Don B. Kates, A Modern Historiography of the Second Amendment, 56 UCLA L. Rev. 1211 (2009) (describing the changing trends in historical and legal scholarship on the Second Amendment).

71. Indeed, among conservatives, and even originalists, there has emerged a growing concern over the indefiniteness of "history and tradition." In the aftermath of *Dobbs*, for example, some conservatives, and one concurrence, expressed frustration with the majority's willingness to preserve substantive due process, with protected rights defined by "history and tradition," instead of turning to the "original public meaning" of the Privileges and Immunities Clause. See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2300 (2022) (Thomas, J., concurring). Some conservatives have viewed the turn to "tradition" as raising the same challenges around indefiniteness and judicial activism that originalists chastise from "living constitutionalism." See Randy E. Barnett & Lawrence B. Solum, Originalism After *Dobbs*, *Bruen*, and *Kennedy*: The Role of History and Tradition, 118 Nw. U. L. Rev. 433, 478 (2023) (labeling "conservative variations on Constitutional Pluralism" as "nonoriginalist" because the approach "permits them to support outcomes that are inconsistent with the constitutional text"); Sherif Girgis, Living Traditionalism, 98 N.Y.U. L. Rev. 1477, 1481 (2023) ("Originalists might . . . try to marry the living part of living traditionalism with the commitment to fixity that makes them originalists. The fruit of that union would be a chimera—the fixation of constitutional norms not at ratification, but at some arbitrary later point: the dead hand of the middle-past."); Adam Liptak, A Conservative Judge's Critique of the Supreme Court's Reliance on Tradition, N.Y. Times (Feb. 26, 2024), https://www.nytimes.com/2024/02/26/us/supreme-court-originalism-tradition-conservative.html (on file with the *Columbia Law Review*) (quoting a range of judges, including Eleventh Circuit Judge Kevin Newsom and Justice Amy Coney Barrett, and scholars, including Sherif Girgis, describing traditionalism as vague and open to manipulation).

72. See Scalia, supra note 45, 29–37 (discussing his belief that legislative history "should not be used as an authoritative indication of a statute's meaning" because "it is much more likely to produce a false or contrived legislative intent than a genuine one").

further one's own policies differs somewhat with respect to the specific "Law and . . ." approach used. In economics and philosophy, it goes most often to the *theory* employed to analyze. With respect to history, it tends instead to focus on what the history allegedly shows. But what is the same is that using a particular outside field, the Court can say: what law has come to be is wrong, and what law *is* (or should be) is what *we* want it to be, which also happens to be what the economic or philosophical theory, or a historical fact, we use, commands.

Again, let me be clear. Law has often come to be quite wrong. And *all* "Law and . . ." approaches are as important as they are because they are appropriate bases for correcting past errors. The inherent conservatism of law as a self-contained independent subject that cannot be changed *is* unacceptable. It leads either to stagnation and continuation of past wrongs,[73] or to revolutionary change,[74] or to total simplistic majoritarian dominance.[75] The fact that law—as a self-contained subject made *reform*, even radical reform, based on serious analysis and criticism almost impossible was the reason for the development and current dominance of "Law and . . ." approaches, whether Benthamite or modern. But the current use of "Law and . . ."—whether by Economic Analysts of Law, Philosophers of Law, or Historicizers of Law—has also demonstrated manifest dangers.

IV. OVERCOMING THE PERIL OF "LAW AND . . ."

What then should one do? I firmly believe that scholars and lawmakers should not hesitate to use "Law and . . ." analysis to examine and criticize any and all legal rules. Asking how coherent those rules are

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73. Legal rules developed at times when caste or class relations, totally unacceptable today, gave rise to values that are reflected in those legal rules. These rules, accordingly, continue to further such relations long after they have been deemed misguided by a polity. Laws that appear to be neutral today may have been tainted originally by a discriminatory intent. And other laws that appear to be facially neutral may well have been enacted by legislatures which meant to disenfranchise or otherwise exclude particular groups.

74. If too many legal rules that support relations that a polity deems misguided come to be viewed as governing a polity, and if the law cannot be criticized or updated, the call for revolution and a total change in the law is not infrequently a reaction. *Écrasez l'infâme*—destroy the unjust past as reflected in law—becomes the cry. And—after a revolution—a new set of legal rules comes to be established, with its own set of unchanging and perhaps unjust values and relationships.

75. If law cannot be criticized and updated by scholarly work, a polity may nonetheless avoid stagnation or revolution by giving its legislators or its elected officials the power to change the law. New laws take the place of the old in response to political reactions to perceived injustices. This is both common and appropriate. But it should also be obvious that laws new and old that are enacted in answer to particular (often dramatic) events may themselves be inefficient or unjust. What the majority desires and enacts at any given moment through certainly significant, is not the same as what is true and just. It too must be subject to criticism; the inertia, which characterizes our Constitutional structure—the impediments to what one of our founders, James Wilson, called (pejoratively) "Legisferation"—reflect precisely this concern. See Silber, supra note 51, at 391.

with important, and importantly relevant, other fields of learning, is essential if law is to do its job of ordering current society justly. Law often has come to be—and at times was even when initially developed—unjust in any of many proper ways of defining "unjustness." The absolute conservatism inherent in treating law as a self-defining field, separate from what other fields of knowledge would suggest are correct relationships cannot stand.

But when analysis of existing legal rules—whether common law, statutory, or constitutional ones—shows a problem (that is, a lack of fit with the outside discipline that has been used to examine the legal rule), one should realize that that is only the beginning of the task.

One should then, first, ask whether one has described correctly the governing legal rule that did not fit. Was it as it was commonly described or is the practical effect of the legal rule more complex? And, if more complex, does *that* "legal rule" in fact fit, with the requirements of the outside discipline used to analyze the law? The seeming, but in fact nonexistent, lack of fit at the core of the so-called fourth rule discussed in my Cathedral article is an easy example of a false lack of coherence.[76]

If after such an examination a serious lack of fit endures, one must refrain from immediately concluding that the law, as it has come to be, should be changed. Is there a gap, or something missing that can be made part of, and improve, the outside field employed? And when that gap is filled, is what current law does readily explained? Coase's foundational article, *The Nature of the Firm*, illustrates how examining the nature of law can lead to improvements in theories from other fields.[77]

This same approach essentially asks whether the outside field, when that field is fully understood and improved as a result of its encounter with law, really suggests lack of fit. This method operates in a slightly different, but at heart not that dissimilar, way when the outside field employed is history rather than economics or philosophy. If the law as it has come to be does not fit with what is suggested are the historical facts, one must begin by questioning the accuracy of those asserted historical facts. The willingness to question the completeness or sophistication of an economic or philosophical theory that would deem a legal rule "irrational" is the analogue of the willingness to ask whether the description of history as inconsistent with a legal rule is *in fact* the correct view of history. And just as even longstanding economic or philosophical theories must be questioned and reworked to see if then they in fact fit with the law, so must

76. Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1116–17 (1972). For a discussion of the significance of "Rule 4" and its possible rarity, see Henry E. Smith, Exclusion and Property Rules in the Law of Nuisance, 90 Va. L. Rev. 965, 1007–20 (2004).

77. R. H. Coase, The Nature of the Firm, 4 Economica 386 (1937). For a discussion of Coase's goals in writing the article, see R. H. Coase, The Nature of the Firm: Meaning, 4 J.L. Econ. & Org. 19, 19–20 (1988).

even broadly accepted historical facts be reexamined to see if other views of what was historically true explain what the law is or has come to be.

If that is done and the law still does not fit, a serious case for reform, for changing or abandoning existing legal rules has been made. The use of a "Law and . . ." approach will have done its job and have shown that Law must be updated. Whether that updating is best done by the courts, legislators or agency administrators is beyond the scope of this piece. And how quickly that updating can occur remains a crucial question for wise lawmakers. My point here is simply that when the outside field employed seems to offer solidly based insights, and the underlying problem with how the law has come to be is then properly seen, reform—even radical reform—may *in due course* be justified. And that is as true when history is the outside field invoked as when economics or philosophy is used.

But often, when one examines how a legal rule came to be, and the reasons given for it today in the face of a tension between law and an outside field, one finds a far more complex story. It is often a story that asks us to question the appropriateness of the outside field employed to analyze the legal rule. That is, even "at its best" and as "best improved" by its encounter with law, when economic theory reveals a lack of fit with a dominant legal rule, an examination of the source and force of the legal rule may tell us to look, at least in part, to *another* outside discipline to explain and perhaps justify the law.

And this is as true when the outside discipline employed is history as when it is economic or philosophical analysis. A statute meant something when it was enacted. But over the years it has been read to do something quite different. Why? What does philosophy or economics tell us about the change? And what does that say about the proper endurance of the current law, regardless of its historical lack of fit?

What I am saying is that legal rules come to be what they are in response to a wide variety of reasons. And these reasons are often best reflected in the analysis made by widely different fields outside of law. Before one deems what the law ordains to be inefficient, irrational, or unmoored, on account of its lack of fit either with its historical sources or with any given outside discipline (whether economics, philosophy, or any number of other outside fields not discussed in this Lecture), one must look to other possible sources of justification for the governing rule. And one must be aware that sometimes the justification or explanation may lie in a mixture of outside fields that our definition of "Law and . . ." approaches does not recognize as such. Law—in its development—draws from where it wishes and may rely on a combination of approaches that even the most sophisticated interdisciplinary doctoral programs fail to imagine.

If, of course, one is committed to a single given outside discipline as holder of the truth; or if one is committed to historical context as dominating over any other reason in determining what law should be, one

will fail to undertake this last type of analysis. But one would be wrong. Our legal rules—in practice—demonstrably are not so simplistic. And legal process attempts to make them so are misguided. And equally misguided is the desire, by relying on one given outside field, even historical context, to limit the power of lawmakers (and of judges in particular). As one of the earliest (and perhaps greatest) proponents of "Law and . . ." analysis, Arthur Corbin, said in his farewell address to the Yale Law School faculty, the truth does not lie in any given field defined by humans.[78] And *that* is what makes law and legal analysis so challenging and interesting.

CONCLUSION

"Law and . . ." gives those who would alter the law great power. This power, in our legal system, is often judicial power. And, as Alex Bickel toward the end of his life clearly saw, such power cannot be contained or controlled by theoretical limitations. Once a devotee of Frankfurtian nominal restraint and a fierce critic of Blackian linguistic and historical constraints, he came to realize that neither approach worked in practice.[79]

The moment one gives—as one must—lawmakers, including courts, the power to update legal rules on the basis of what an outside field tells us, the power to read that field to further one's own policy interests is there. But failure to give that power is also unacceptable. That means we must rely, as best we can, on demanding honesty and transparency on the part of lawmakers in their use of outside fields. And, most important, it means that as scholars, *we* must make use of "Law and . . ." analyses to point out, fiercely, when legal actors—and perhaps especially judges—have made wrong use of an outside field. This, moreover, is so whether they have done so out of lack of proper analysis or, and especially, out of a desire to achieve their own preferred results. If we, as scholars, do this well, and we, as lawmakers, aware that this will be done, apply the insights of an outside field properly; the promise of "Law and . . ." will be fulfilled. And its greatest peril avoided!

78. Arthur Corbin, Farewell Letter to Yale Law School Faculty, *in* Calabresi, Future of Law and Economics, supra note 15, at 173, 173–76.

79. For Bickel's early calls for nominal restraints, see Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 111–98 (1962); Alexander Bickel, The Supreme Court 1960 Term–Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 55–56 (1961). By contrast, for Bickel's later critique, calling for more strict limitations on judicial review, see Alexander M. Bickel, The Supreme Court and the Idea of Progress 175 (1970). For an overview (and critique) of shifts in Bickel's thought, see J. Skelly Wright, Professor Bickel, the Scholarly Tradition, and the Supreme Court, 84 Harv. L. Rev. 769, 772 (1971).

ARTICLES

LAYERED CONSTITUTIONALISM

Z. Payvand Ahdout & Bridget Fahey***

It is conventional wisdom that the states are free—within wide constitutional parameters—to structure their governments as they want. This Article challenges that received wisdom and argues that the Supreme Court has drawn on an eclectic set of constitutional provisions to develop a broader body of federal constitutional rules of state structure than previously understood.

This Article gathers and systemizes that body of law. It first locates the expected and unexpected constitutional openings onto which federal courts have seized to rule on questions of state structure. The Article then distills the haphazard, often conflicting, and sometimes even bizarre approaches federal courts have used to decide when and why the federal Constitution constrains state structural discretion and what state governance structures it endorses. The Article finally turns to the implications of this body of doctrine for both federalism and federal structural constitutional law. It develops a vocabulary to understand both why these cases have not been incorporated into the federalism canon and the institutional design choices and values they implicate.

Ours is a system of layered constitutionalism, but not one in which each government's constitutionally chartered structures operate discretely. It is one that contains structural interdependencies between the federal and state constitutional structures. The challenge is to locate structural interdependencies in ways that preserve the values of our system of layered constitutionalism—a challenge, this Article shows, that the Court has not yet met.

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INTRODUCTION

Structural disputes are ubiquitous in constitutional law. Constitutions provide a blueprint for government—charting institutions, allocating authority, facilitating coordination, and engineering friction. And although the federal Constitution and all fifty state constitutions establish systems of divided power, they also envision interdependence between their governmental departments—like lawmaking through bicameralism and presentment—which invites both coordination and contestation.

It is therefore unremarkable for the United States Supreme Court to settle a dispute over the scope of executive power or the boundaries between presidential and congressional authority.[1] And it is likewise

1. See, e.g., Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2224 (2020) (holding the CFPB's for-cause removal structure violates the Executive's removal authority); Zivotofsky v. Kerry, 576 U.S. 1, 31–32 (2015) (settling a dispute between President's

unremarkable for a state high court to resolve a disagreement between its legislature and governor.[2] That structural disputes typically play out within the jurisdiction in which they arise is for good reason: How a people structure their own government is one of their most intimate and foundational choices. Indeed, it is a widely accepted principle of American federalism—stated time and again[3]—that the states are free to structure their governments as they see fit, subject to several settled constitutional parameters.[4] For those reasons, the conventional wisdom goes, it would be unusual for a question about the internal structure of Colorado's or Kansas's or Oregon's government to be adjudicated by a federal court, according to federal law, instead of by that state's own court and guided by its own constitutional plan.

This Article shows, however, that in many different substantive areas, the Supreme Court has elaborated a body of *federal* constitutional rules that directly and indirectly govern *state* structure—a set of doctrinal rules more pervasive than previously understood. Indeed, state structural questions play a defining role in a striking range of Supreme Court cases.

To name just a few: *Hollingsworth v. Perry*[5] set up a ruling on the constitutionality of state laws prohibiting same-sex marriage. But the Court instead dismissed the case for lack of standing, reasoning that, as a matter of federal constitutional law, the state had not authorized initiative

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recognition power and Congress's passport power); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585–87 (1952) (articulating the power framework when President acts without congressional authority).

2. See, e.g., Brewer v. Burns, 213 P.3d 671, 673 (Ariz. 2009) (resolving a dispute brought by governor to compel legislature to present budget bills); Nate v. Denney, 464 P.3d 287, 288 (Idaho 2017) (resolving a dispute brought by the legislature to compel the secretary of state to certify a state bill); Op. of the Justs., 123 A.3d 494, 497 (Me. 2015) (providing an advisory opinion sought by governor as to legal effect of certain bills); In re Request of Governor Janklow, 615 N.W.2d 618, 619 (S.D. 2000) (providing an advisory opinion sought regarding the effect of gubernatorial vetoes); In re Turner, 627 S.W.3d 654, 656 (Tex. 2021) (resolving a dispute brought by state legislature over governor's veto power).

3. This longstanding principle was expressed at the time of the Founding. See Federalist No. 43, at 275 (James Madison) (Clinton Rossiter ed., 1961) ("States may choose to substitute other republican forms . . . . The only restriction imposed on them is that they shall not exchange republican for antirepublican Constitutions."), and continues to be expressed by the Supreme Court. See, e.g., Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2197 (2022) ("Within wide constitutional bounds, States are free to structure themselves as they wish."); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Through the structure of its government . . . a State defines itself as a sovereign.").

4. Specifically, states cannot structure their governments in manners that violate their residents' federal constitutional rights; they cannot shield their courts from enforcing federal law consistent with the Supremacy Clause; and they cannot (at least in theory) depart from a basic "republican form of government," although the constitutional provision imposing that limitation is rarely used. See infra notes 269–271. Part III discusses these exceptions at greater length.

5. 570 U.S. 693 (2013).

proponents to represent "the state" in federal court.[6] Just last term, by contrast, in *Biden v. Nebraska*,[7] the Court allowed a challenge to the President's student loan discharge policy to proceed, concluding that the state of Missouri could claim fiscal injuries suffered by a quasi-public corporation as "the state's"—notwithstanding the corporation's own decision to remain out of the lawsuit.[8] Last term, too, the Court decided *Moore v. Harper*[9] by resolving a percolating ambiguity about how the federal Constitution understands the role of state "legislatures" in regulating elections.

But state structural questions also arise in unexpected places: Over the decades, the Court has shaped the course of Eighth Amendment jurisprudence on a matter as significant as the constitutionality of capital punishment. Eighth Amendment "cruel and unusual punishment" doctrine instructs courts to consider whether a punishment conflicts with "the evolving standards of decency that mark the progress of a maturing society."[10] The Court has disproportionally relied on statutes enacted by state legislatures to give content to those evolving views, while dismissing or minimizing the relevance of views expressed through other state actors who—pursuant to state constitutional or statutory law—also express state policy on questions of punishment.[11] And the cases about state structure that this Article identifies reach broader still, to areas ranging from sovereign immunity, to constitutional amendments, to how the Court decides who speaks for the state on the shadow docket.

These cases do not merely nod to state structure on the way to reaching (or, in some cases, not reaching) questions of substantive constitutional law. They pronounce upon basic state structural questions that are ordinarily the province of state constitutional drafters.[12] These cases have not yet been drawn together or scrutinized as a common body of doctrine—a form of federal constitutional regulation of state structure. Once this body of federal doctrine of state structure is made visible, its substantive import is clear: How a government is structured and

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6. Id. at 701.

7. 143 S. Ct. 2355 (2023).

8. Id. at 2366.

9. 143 S. Ct. 2065 (2023).

10. Furman v. Georgia, 408 U.S. 238, 269–70 (1972) (Brennan, J., concurring) (internal quotation marks omitted) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

11. See infra section II.B.

12. Among others, this Article collects federal rules related to who speaks for the state, how power is allocated among a state's coordinate branches, what constraints (from lawmaking by bicameralism and presentment to judicial review) those branches are subject to, and what internal form state institutions must take (from the role of referenda and initiatives in state legislative processes, to the committees and commissions legislatures can encompass, to the role of the governor in the lawmaking process).

decisionmaking authority is diffused—in other words, institutional design—determines substantive law and substantive outcomes.

This Article uses the terms "regulate" and "rule" to capture the broad ways in which the Court has found the Constitution to speak to state structure. These rules of state structure include mandates (requiring state institutions to function in a federally preferred way), prohibitions (barring states from operating in a federally unpreferred way), taxes (raising the cost of state structural choices), and conditions (conditioning state participation in a federal activity on particular state structural choices).

The Supreme Court's siloed and often sui generis treatment of these cases accounts in substantial measure for the lack of coherence to this body of law. Although these rules taken together make up a significant thread of federalism doctrine (and, in turn, shape the federalism dynamic between and among our governments), the Court has never treated them as such, generally omitting considered discussion (and sometimes omitting *any* discussion) of their federalism stakes.[13]

This Article, then, tells both a story about the eclectic and unexpected ways that federal constitutional law regulates and speaks to state structural choices and a story about how, in diffuse and often siloed ways, that body of law came to be—how the Constitution creates openings, how the Supreme Court has seized upon them, and how it has embedded often consequential judgments about state structure in plain sight.

Part I shows that a wide range of constitutional provisions create openings—through spare mentions of "the states"; unelaborated invocations of state "legislatures," "executives," and "judges"; and provisions governing broad topics like Article III standing and cruel and unusual punishment that seem facially to have little or no connection to federalism or state structure—that the Court has seized to develop doctrine that directly and indirectly regulates state structure.

Part II considers the resulting doctrine together for the first time. It shows that because the constitutional spaces described in Part I do not articulate clear and affirmative constraints on state structure (indeed, many do not seem to speak to state structure at all), the rules the Court

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13. For perspective, prominent branches of federalism doctrine have encompassed just a handful of cases and yet invited significant critique and assessment. For example, the anticommandeering rule, a doctrine viewed as highly significant in the federalism world, has been elaborated through just five major cases since it was first recognized in 1992. See New York v. United States, 505 U.S. 144, 161 (1992) (first recognizing the anticommandeering principle); see also Haaland v. Brackeen, 143 S. Ct. 1609, 1641 (2023) (holding that the Indian Child Welfare Act does not violate Tenth Amendment's anticommandeering principle); Murphy v. NCAA, 138 S. Ct. 1461, 1475 (2018) (holding that a federal law prohibiting sports gambling violated the anticommandeering principle); Reno v. Condon, 528 U.S. 141, 151 (2000) (holding that the Driver's Privacy Protection Act does not violate the anticommandeering principle); Printz v. United States, 521 U.S. 898, 993 (1997) (holding that Congress could not commandeer state actors to administer background checks during firearm sales).

has elaborated instead regulate state structure more circuitously by adopting various (sometimes inconsistent) ways to understand the federal Constitution to define what "the state" is, how states must allocate and distribute power, and which institutions count as the state and for what purpose. To that end, the Court has set out constitutional conceptions of the state—and structural blueprints to which its institutions must conform for certain federal purposes—using several techniques.

It analogizes the states to *generic republics* (that is, to what a federal court believes a state should look like) and then taxes states that do not conform to that template. It requires states to embrace agency relationships common in *private organizations* even when a state constitution embraces a different representative framework. It conceptualizes states as *federal adjuncts*, detaching them from their state constitutional contexts when performing certain functions and rendering them arms of the federal system (or, in some cases, declining to do so). It attempts a kind of *modified deference*, mixing together respect for how states have structured their governments with coordinate rules that restrict state discretion. And, at times, it adopts a posture of *nonintervention*, refusing to take a position on intrastate structural disputes—like who can legally speak for the state—but, in so doing, shaping state structure nonetheless.[14]

Considered together, these cases yield an untidy, inconsistent, and sometimes haphazard conception of "the state" and of the legal tenets that ground its structure. And because, as Part II further reveals, the Court frequently lacks a vocabulary for expounding the federalism stakes of this form of state structural regulation, these cases are peppered with undefended assumptions and unjustified references to federalism-orienting principles.

Part III places this body of rules in context and begins to frame its implications for federalism and for federal structural constitutional law. Federalism doctrine and scholarship tend to focus on three design features of our federalist system: its boundaries, its jurisdictional distributions, and (more recently) its "rules of engagement."[15] The rules collected here relate to a different design choice: how to legally organize our system's internal governments. Federalist regimes can, and do, organize their internal governments as administrative organs of the central government, as federal constitutional departments, through corporate charters, or—as in our system—through separate, self-determined constitutions. This Part argues that the choice to structure our constitutional system in the latter manner—to establish what we call a system of *layered constitutionalism*—deserves more attention.

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14. See infra Part II.

15. See infra section III.A. Federalism scholarship, of course, also engages a vivid federalism world that exists outside of doctrinal reach that documents the many subconstitutional forms of federal–state engagement. See sources cited infra notes 277–283.

The implications of that choice for individual rights have been amply plumbed.[16] But constitutions do not just grant rights; they also chart structures. And the structural implications of America's layered constitutionalism—which the doctrinal rules this paper implicate—have received far less attention. Most importantly, in our system of layered constitutionalism, those layers are not crisply separated; instead, the rules collected here form what we call *structural interdependencies*. State institutions are shaped not just by their own constitutions but by the terms and doctrines of the federal Constitution. The question that Part III begins to explore is how deeply these structural interdependencies should run and whether federal courts are suited to the task of making those determinations. It argues that across diverse values that inform the design of a federalist system, state constitutional autonomy serves important functions.[17] If one subscribes (as the Supreme Court has) to traditional federalism values—such as dual sovereignty—then the value of outwardly reasoning and considering state structural autonomy is self-evident.

But for contemporary federalism scholarship, the argument is perhaps surprising. Contemporary federalism, in a wide range of other areas—from politics, to joint programs, to cross-governmental acts of lawmaking and rulemaking—celebrates the porousness and intermeshing of federal and state governments.[18] This Article argues that even for those scholars (one of us among them) who would "shear[] [federalism] of sovereignty"[19]—and allow the states and federal government to energetically negotiate and renegotiate their policy jurisdiction—constitutional autonomy is the formalist *in*dependence that these many forms of functional *inter*dependence need to flourish.[20]

This body of constitutional law also has implications for questions about federal structural constitutional law, namely in conversations about the Court's institutional role in designing a body of intersystemic constitutional law through a system of dispute resolution. In forging federal constitutional rules of state structure, the Supreme Court operates at the intersection of two institutionally sensitive areas: federalism and the separation of powers. Through its involvement in what are often heated state political matters—contests between governors and legislatures, state

16. Justice William Brennan was widely credited with reinvigorating interest in state constitutions as a second layer of protection for individual rights, see William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 503 (1977) [hereinafter Brennan, State Constitutions], which spawned—in turn—an enormous body of scholarship. See sources cited infra notes 240 & 242.

17. See infra section III.B.

18. See infra section III.B.2.

19. Heather K. Gerken, The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4, 14 (2010) (internal quotation marks omitted).

20. See Bridget A. Fahey, Federalism by Contract, 129 Yale L.J. 2326, 2415–16 (2020) [hereinafter Fahey, Federalism by Contract] ("There are good reasons to 'shear' federalism of the reflexive sovereignty-as-separation recited over and again in Supreme Court cases.").

high courts and state agencies—the Court assumes a role of umpire-from-without, blurring the lines between the federal and state systems of government and issuing judgments that choose political winners and losers, not just in the state before the Court but also potentially many others.[21] The Court's failure to produce a consistent and reasoned body of law in this complex structural terrain suggests that it has yet to develop the tools necessary to manage the sensitivities of this distinctive intersystemic structural intersection.

I. FEDERAL CONSTITUTIONAL OPENINGS

This Part begins with a bird's-eye view of the textual and doctrinal architectures that provide openings for the Supreme Court to articulate federal constitutional doctrine that speaks to state structure. Before getting there, it is worth noting three express and settled federal constitutional rules of state structure. First, the Constitution's Supremacy Clause requires state judges to enforce federal law.[22] As Paul Kahn observed, and California Supreme Court Justice Goodwin Liu recently reiterated, when "state courts interpret the Federal Constitution, they are acting as 'an instrumentality of federal authority' that is unquestionably subordinate to the Supreme Court."[23] Second, the federal Constitution shapes state structure by requiring compliance with federal constitutional rights. This well-known federalism dynamic applies irrespective of the governmental actor who would intrude upon them. Third, the Constitution contemplates that each state's structure will be of a particular governmental type by directing the federal government to "guarantee to every State in this Union a Republican Form of Government."[24] Those overt federal regulations of state structure are not our concern here.

Our concern instead is the covert federal regulations of state structure that have arisen in less direct ways and through less obvious constitutional openings.[25] Although the Supreme Court regularly draws conclusions about state structure from a range of provisions, it rarely views them as a set, instead treating cases that arise under them as either completely or partially sui generis, making a degree of systemization a worthy endeavor. This Part offers a basic account of the federal Constitution's references to states and to their internal structuring, both explicit and implicit.

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21. See infra Part II.

22. U.S. Const. art. VI, § 2 ("This Constitution, and the Laws . . . ; and all Treaties . . . of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."); see also Testa v. Katt, 330 U.S. 386, 389 (1947) (holding that state courts must hear federal claims when they would hear analogous state claims).

23. Goodwin Liu, State Constitutions and the Protection of Individual Rights: A Reappraisal, 92 N.Y.U. L. Rev. 1307, 1329 (2017) (quoting Paul W. Kahn, Interpretation and Authority in State Constitutionalism, 106 Harv. L. Rev. 1147, 1165 (1993)).

24. U.S. Const. art. IV, § 4.

25. See supra note 4.

A. *"The States"*

To start, several provisions of the federal Constitution mention states as discrete legal entities by referring to "the states," "each state," or components that comprise "the United States." "The States," for instance, are authorized to enter into compacts or agreements with one another[26] and regulate "the Militia" (today, the National Guard) by appointing officers and training troops.[27] "[E]ach State" is obligated to give "Full Faith and Credit . . . to the public Acts, Records, and judicial Proceedings of every other State."[28] And no "one of the United States" may be subjected to suit by the "Citizens of another State," a right of sovereign immunity that courts have extended beyond its plain text.[29]

How do these provisions, which refer to the states as unified legal entities, raise internal state structural questions? States are *theys*, not *its*:[30] They are composed of agencies, institutions, subdivisions, and more, each of which has a different incentive and entitlement under state law to claim to be (or not to be) "the state" for a given purpose. For instance, an elaborate body of constitutional doctrine guides federal courts in evaluating whether a state agency, state-chartered committee, or state subdivision is sufficiently "the state" to assert a state's sovereign immunity in court.[31] For that reason, even bare references to "the states" can require

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26. U.S. Const. art. I, § 10 (contemplating that the "State" could, with "the consent of Congress[,]" "enter into" an "Agreement or Compact with another State").

27. Id. art. I § 8, cl. 16 (allocating to Congress the power of "organizing, arming, and disciplining, the Militia" but "reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress").

28. Id. art. IV, § 1.

29. Id. amend. XI; see also Alden v. Maine, 527 U.S. 706, 728 (1999) (noting that sovereign immunity extends further than the cases mentioned in the Eleventh Amendment because immunity from suit also derives "from the structure of the original Constitution itself").

30. See Anthony Johnstone, A State Is a "They," Not an "It": Intrastate Conflicts in Multistate Challenges to the Affordable Care Act, 2019 B.Y.U. L. Rev. 1471, 1472 ("Each state contains its own separation of powers among the legislative, executive, and judicial branches."); see also Bridget A. Fahey, Consent Procedures and American Federalism, 128 Harv. L. Rev. 1561, 1564 (2015) [hereinafter Fahey, Consent Procedures] (explaining that "states are not monolithic actors" because "many officials, acting through many different political processes, could conceivably speak for the state"); Roderick M. Hills, Jr., Dissecting the State: The Use of Federal Law to Free State and Local Officials From State Legislatures' Control, 97 Mich. L. Rev. 1201, 1201 (1999) ("[A] 'state' actually incorporates a bundle of different subdivisions, branches, and agencies controlled by politicians who often compete with each other for electoral success and governmental power.").

31. E.g., Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002) (recognizing the role of the state attorney general in waiving sovereign immunity through the decision to remove to federal court); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding that a state agency's participation in a federal scheme did not waive sovereign immunity); Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) (explaining that municipalities do not exercise the sovereign immunity of the state).

structural judgments about who is empowered to do what within the confines of that legal entity.

B. *State "Legislatures," "Executives," and "Judges"*

The federal Constitution also refers expressly to particular state institutions and articulates the powers they possess—provisions similar to those present in every state constitution. As one might expect, the federal Constitution repeatedly refers to state institutions that exist solely for federal purposes—like each state's electors to the Electoral College, who meet "in their respective states" to cast their votes for President,[32] and each state's delegation to the House of Representatives, which, among other things, steps in to cast a vote for the state in the presidential election process under certain circumstances.[33]

But the federal Constitution also contains a handful of textual references to state institutions that perform more workaday governance activities. The Constitution, for instance, specifies that each state's "*executive* authority" may request the extradition of a person charged "with Treason, Felony, or other Crime, who shall flee from Justice" to a sister state.[34] It allows the "[*e*]*xecutive* (when the Legislature cannot be convened)" to solicit federal help in suppressing "domestic Violence."[35] And it singles out state judges: The Supremacy Clause specifies that the "*Judges* in every State" are "bound" by the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This reference has justified the exclusion of state judges from the protections of the anticommandeering rule, one of our system's central protections for state autonomy.[36]

The most common state institution identified by name in the federal Constitution, though, is state legislatures. A dozen clauses in the constitution mention state legislatures, describing powers that "the state" and the "legislature thereof," "the legislatures of the states," or the "state legislature" (the formulations are numerous) can exercise by acts that

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32. U.S. Const. art. II, § 1, cl. 3; id. amend. XII.

33. Id. amend. XII (providing that if no presidential candidate receives a majority of the electors appointed to the Electoral College, the state's delegation to the House of Representatives shall vote as a unit—with "each state having one vote"—to select the President).

34. Id. art. IV, § 2, cl. 2 (emphasis added).

35. Id. art. IV, § 4 (emphasis added).

36. Id. art. VI, cl. 2 (emphasis added); see also Printz v. United States, 521 U.S. 898, 928 (1997) (explaining that the "terms of the Supremacy Clause" justify the exclusion of state courts from the anticommandeering rule, which otherwise prohibits federal efforts to require states to administer federal law).

range from "cho[o]sing," "consent[ing]," "direct[ing]," and "apply[ing]" a specified power to a proscribed end.[37]

These provisions undoubtedly speak to state structure—they confer powers and obligations on particular state institutions. But they also introduce a range of structural ambiguities. Most obviously, what counts as the "legislature" of the state (or, for that matter, the "executive")? The Supreme Court considered a variant of this question in the 2015 election law case *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[38] namely whether citizen referenda—which some state constitutions deem a part of the legislative process by permitting referenda to require passage, override, and review of acts passed by a state's representative chambers—count as a part of the "legislature." The Supreme Court said "yes," employing a form of deferential reasoning: The federal Constitution's reference to "'the Legislature' [of the state] comprises the referendum," for both are paths through which the people of a state legislate.[39]

The simplicity of the Constitution's reference to "legislatures" (and other state institutions) also conceals significant ambiguity about what process a state "legislature" operating under the federal constitutional ambit may use to conduct its business. Every state constitution specifies

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37. See U.S. Const. art. I, § 2, cl. 1 ("[For members of the House of Representatives,] the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); id. § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote."), amended by id. amend. XVII; id. art. I, § 3, cl. 2 ("[I]f Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies."), amended by id. amend. XVII; id. art. I, § 8, cl. 17 ("The Congress shall have Power . . . to exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings . . . ."); id. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ."); id. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . . ."); id. § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."); id. art. V ("The Congress . . . shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid . . . when ratified by the Legislatures of three fourths of the several States . . . ."); id. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

38. 576 U.S. 787 (2015).

39. Id. at 808. This form of deferential reasoning is discussed in greater depth below. See infra section II.D.

how a legislature legislates when performing state functions. But the federal Constitution says nothing about how state legislatures must discharge the duties mentioned therein.

For instance, most state constitutions require state legislatures to act through a constitutionally specified lawmaking process that generally resembles bicameralism and presentment: To become law, an enactment must pass the state's representative chambers and be signed by the governor.[40] When the federal Constitution allocates power to a state "legislature," does it incorporate the ordinary process specified in the state constitution? Does it intend the state legislature to follow a separate federal process (perhaps defined by analogy to Congress, or some other generic legislature)? Or should the legislature instead act as a discrete and independent institution—a body that exists for the specified federal purpose alone and subject only to its self-created rules of decision? In *Smiley v. Holm*,[41] the Court considered whether state laws regulating federal elections (passed pursuant to the federal Elections Clause, which singles out state legislatures) can be vetoed by the state's governor, as with any ordinary legislation. And in *Moore v. Harper*,[42] the Court considered whether such laws are subject to substantive constraints set out in state constitutions (in *Moore*, a state law rule against partisan gerrymandering)—a question with enormous stakes. In each case, the Court said "yes," as elaborated below.[43]

C. *State Structure Implied*

And then there are constitutional provisions that do not expressly refer to states, state institutions, or state structure, but still implicate state structure. Across a range of substantive contexts, courts have found themselves confronting—and, in some cases, locating—state structural questions even absent an express textual invitation to do so.

Some of these cases concern constitutional provisions that refer to activities that states participate in, though the states and state institutions are not mentioned by name. For instance, consider Article III's limitation of the judicial power to the enumerated classes of "Cases" and "Controversies"—a provision that requires litigants in federal court to demonstrate that they have standing to sue.[44] As frequent litigants in federal courts, states can point to a range of harms to their laws,

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40. 53 The Council of State Gov'ts, The Book of the States 70–73 (2021), https://issuu.com/csg.publications/docs/bos_2021_issuu (on file with the *Columbia Law Review*).

41. 285 U.S. 355 (1932).

42. 143 S. Ct. 2065 (2023).

43. See infra section II.B.

44. See U.S. Const. art. III, § 2; Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (articulating that a federal plaintiff must establish injury in fact, causation, and redressability).

institutions, and citizens that satisfy that standing requirement.[45] Such cases do not obviously require federal courts to consider questions of state structure. But periodically cases arise in which standing turns on whether a particular institution purporting to represent "the state" can claim the mantle of some injury suffered by it—or, conversely, whether "the state" can claim the mantle of an injury suffered by a public or quasi-public institution therein. In *Hollingsworth v. Perry*,[46] for instance, the substantive question was whether a state could constitutionally prohibit same-sex marriage, but the antecedent—and, in the end, dispositive—question was whether the private proponents of the state referendum at issue could claim the state's public injury on appeal.[47] Conversely, in last term's *Biden v. Nebraska*,[48] a case about the legality of President Biden's student loan forgiveness plan, the Court had to first confront the antecedent question of whether the state of Missouri could claim as its own an asserted financial injury borne by a state-chartered corporation—an entity that had declined to participate in the litigation.[49] In each case, the Supreme Court found itself grappling with complex questions of state structure—even absent a textual hook or, indeed, textual standards to apply. In each of these cases, the Court must make a judgment about how to classify a state's structural choices for federal judicial review. This, in turn, speaks to the effect of those choices in the first instance.

But there are also provisions of the federal Constitution that do not mention the states, do not mention specific state institutions, and do not mention activities in which the states might engage—but nevertheless position federal courts to make important judgments about state structure.

Consider—perhaps unexpectedly—the Eighth Amendment. The Amendment prohibits "cruel" and "unusual" punishment,[50] a prohibition to which state structure is not immediately relevant. But the Court's doctrinal framework for giving content to those terms imbues them with "the evolving standards of decency that mark the progress of a maturing society."[51] In search of what it deems an "objective" indicator of the nation's consensus standards of decency, the Court has alighted upon the laws passed by state legislatures, using them as the "most reliable" evidence in its canonical cases to determine whether a particular form of

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45. See Seth Davis, The New Public Standing, 71 Stan. L. Rev. 1229, 1233–34 (2019) (exploring the public and private harms that states suffer).

46. 570 U.S. 693 (2013).

47. See id. at 700–01 (concluding that the proponents could not claim the state's injury).

48. 143 S. Ct. 2355 (2023).

49. See id. at 2365–68 (concluding that the state could claim the corporation's injury).

50. U.S. Const. amend. VIII.

51. Furman v. Georgia, 408 U.S. 238, 269–70 (1972) (Brennan, J., concurring) (internal quotation marks omitted) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); see also sources cited infra note 117.

punishment is constitutional or not.[52] But in many states, it is not the legislature alone but also the governor, elected judges, and elected county prosecutors who are empowered to express voter preferences on the death penalty.[53] This line of case law, in other words, turns on an implicit judgment about state structure—on which state actors give voice to its citizens' "standards of decency." And the Eighth Amendment is not alone: In a wide range of cases, as Roderick Hills has catalogued,[54] ranging from the Sixth Amendment right to a jury trial to the Fifth Amendment substantive due process right, the Court counts state legislative enactments to measure national consensus. In doing so, it makes an implicit decision about which state institutions matter for federal purposes, and which do not.

In constitutional doctrine, in short, opportunities lurk for federal courts to make judgments about state structure—including, as in the Eighth Amendment context, impressing state legislatures to speak to the citizens' values even when other state actors are charged with that role. As the next Part discusses, the choices courts make in weighing those questions matter: If, for instance, the Court conducted its search for popular "standards of decency" by respecting how states themselves have allocated power over questions of punishment, the result in cases about the death penalty's constitutionality could significantly shift.[55] But in the Eighth Amendment context, the Court has not attempted to justify its structural judgments by reference to states' own choices about their structure—or, for that matter, by reference to broader principles of federalism.

D. *Supreme Court Practice*

A final way that questions of state structure come to be litigated before federal courts—primarily, to our knowledge, the Supreme Court—is entirely within the Court's control. With some frequency, the Court must confront ambiguity about who is authorized to represent the state before the Court as a matter of court procedural rules. These intrastate disputes unfold in "letter briefing" on the Court's shadow docket[56] and pit one state official against the other—each claiming to lawfully represent the state or

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52. Penry v. Lynaugh, 492 U.S. 302, 331 (1989) ("In discerning those 'evolving standards,' we have looked to objective evidence of how our society views a particular punishment today."), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002); see also *Atkins*, 536 U.S. at 312 ("[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (quoting *Penry*, 492 U.S. at 331)).

53. See infra notes 131–136 and accompanying text.

54. Roderick M. Hills, Jr., Counting States, 32 Harv. J.L. & Pub. Pol'y 17 (2009).

55. See infra note 117.

56. See William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1 (2015) (introducing the term "shadow docket").

its interests, and typically claiming that the adverse state official lacks the representative authority it asserts. In these cases, too, the Court must determine who genuinely speaks for the State—or, as elaborated below, avoid answering that question altogether.

* * *

In working in these constitutional spaces and operating without a wide-angle lens and common grounding principles, the Court has developed a body of federal doctrine that speaks to state structure. But because these cases are not treated as a set, by either commentators or the Court, little is known about how the Court confronts their unique sensitivities. The next Part turns to those questions.

II. CRAFTING FEDERAL CONSTITUTIONAL RULES OF STATE STRUCTURE

The provisions laid out in the last section create openings for the Supreme Court to craft federal constitutional doctrine of state structure outside the constitutional passages that overtly contemplate state structure. These rules are not, for example, the product of the Guarantee Clause, which instructs the federal government to "guarantee to every State in this Union a Republican Form of Government."[57] Nor are they means to vindicate federal constitutional rights by requiring states' government structures to respect them. They instead create entry points in spare text and from constitutional provisions that do not mention the states for courts to elaborate doctrine grounded in other constitutional objectives about the distribution of power among state institutions, the procedures through which those institutions can lawfully act, and the push and pull between them.

This Part draws together that federal constitutional law of state structure. By looking across cases, it takes stock of how the Court performs the sensitive role of making state structural judgments and asks whether this body of law is characterized by coherent orienting principles or consistent doctrine. It is not. Instead, the Court uses untidy, inconsistent, and sometimes strange analytical strategies to decide whether and where the federal Constitution speaks to state structure, what the Constitution's preferred state structures are in those areas, and how the Court's intervention will affect its institutional interests. Our account draws doctrine from across many areas of law, including Article III standing, the Elections and Electors Clauses, Article V constitutional amendments, sovereign immunity, and the Eighth Amendment.

This Article distills five approaches the Court has used to craft federal constitutional rules of state structure and lays out the content of the resulting rules. Because these rules of state structure are not overtly expressed—and sometimes not even discernibly hinted at in the

57. U.S. Const. art. IV, § 4.

Constitution—the Court arrives at them in diverse and convoluted ways and uses them to accomplish a variety of goals. Sometimes it announces an overtly regulatory rule of state structure: by, for example, clarifying the structural predicates a state must meet to engage in a federal constitutional activity. Other times, it specifies which state actor can speak for the state for a particular constitutional purpose, taxing the voices of those who do not conform. In still others, it announces a rule of disregard, which allows constraints on, or harms to, state structure to proceed unabated. So, too, the Court sometimes arrives at those rules by granting certiorari on a question that crisply tees up the federal constitutional significance of a state's structural choice. Other times, the Court elaborates a rule of state structure incidental to, or embedded within, a wholly different constitutional question. Those paths, circuitous though they sometimes are, are worth describing in some detail because they provide a telling lens onto how the Court—in both its intellectual and institutional capacities—regards the states and their constitutional plans.

First, the Court analogizes states to *private corporations*, recognizing agents as the states' lawful representatives for a particular constitutional purpose only if they conform to private law agency templates. Second, it views states as *federal adjuncts*, removing state institutions from their own constitutional systems of government and attaching them instead to the federal government and the federal system. Third, it analogizes states to *generic republics* and specifies institutional structures for them that deviate from their own constitutional plans and conform instead to the Court's simplified view of "republics" and "democratic societies." Fourth, it attempts *deference* to the states' own constitutional structures but only accomplishes it in part, pairing elements of regard for state structural self-determination with elements of federal control. Finally, it adopts a strategy of *nonintervention*, attempting to dodge or remain neutral to questions of state structure in ways that shape state structure nevertheless.[58]

The Part concludes by drawing three conclusions from these cases. *First*, and most obviously, the Court has seized the openings mentioned in Part I to regulate state structure in a range of constitutional areas—and in the service of constitutional goals beyond the vindication of federal rights, the republican guarantee, and federal supremacy. To take this doctrine seriously means to understand the federal Constitution to require states to conform their governments to many distinct structural templates in different areas and contexts.

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58. These are, of course, federal questions—they interpret the federal Constitution and announce rules of federal law. But the federal Constitution can be understood to defer to, or incorporate, the states as they have chosen to structure themselves. Or, in mentioning the states, or contemplating action by the states, it could instead be understood to express a distinctly federal view about what should count as the state, how its institutions should interact with one another, and through which voices it should speak. Through these strategies, the Court has largely held the latter and largely done so without justification.

Second, although courts have not hesitated to craft constitutional rules that speak to state structure—providing, for instance, that state agencies may claim the mantle of the state only if they conform to agency principles, or that state judgments "count" for federal purposes only if rendered through certain procedures—they often do so only in passing, not justifying the regulations they are creating by reference to first principles or, in many cases, acknowledging they are creating federal regulations at all. Put differently, the way the federal Constitution regulates state structure—and *that* it regulates state structure at all—is sometimes plainly stated in these cases, but it is more often conceptually obscured by the lack of clear vocabulary for describing the type of state structural rules that this Article collects. Our project, then, is not to collect constitutional regulations that are all similarly labeled or characterized. Instead, it is to notice and bring into dialogue doctrines that share the function of regulating state structure, but do not always disclose or clearly characterize that fact.

Finally, although in some cases courts acknowledge the structural choices that the states have made in their own constitutions, in general those structures are either subordinated to a perceived federal structural rule or ignored entirely. That should come as a surprise: The state constitution is the durable source for a state's structure and, indeed, its identity. In nearly every case, the Court could have adopted a rule of deference to the state's own structural self-definition. It could have held that when the federal Constitution references "states" or state "legislatures," "executives," or "judges," for example, it means to allow each state to decide by its own constitutional plan who counts as the state and what counts as each of those named state institutions. But, as discussed in Part III, it has largely declined to take that deferential path.

A. *States as Private Organizations*

This Part begins with the Court's use of analogies to private entities in making judgments about state structure—most notably in *Hollingsworth v. Perry*.[59] Substantively, the case was notable for presenting the constitutionality of state laws barring same-sex marriage. Ultimately, however, the case turned on state structure: whether the proponents of a state initiative had standing to defend that initiative on appeal in federal court.[60] What is interesting is the method the Court used to answer that question and what it signals about how the Court understands the role of state structure in our system of federalism.

Although the federal Constitution does not provide for direct democracy, nearly half of the states have referenda or initiative processes.[61] Referenda and initiatives are most influential when the state government

59. 570 U.S. 693 (2013).

60. See supra notes 46–47 and accompanying text.

61. M. Dane Waters, Initiative and Referendum Almanac 12–13 (2d ed. 2018).

is unlikely or unable to enact particular legislation. A number of political and structural factors, including legislative timing, malapportionment, and party control can create a situation in which initiatives pass over the objection of state elected officials, and the state attorney general, as a result, may refuse to defend the subsequently enacted law in state court.[62] When that happens, the initiative can be effectively nullified by legal challenge. Whether the challenge is right or wrong, strong or weak, the Attorney General can simply let the law be invalidated by declining to defend it.[63] To remedy that problem, some states empower the proponents of a successful initiative to defend the resulting law in court. In federal court, however, parties (even defendants pursuing an appeal) must meet Article III standing's requirements and must maintain standing through all stages of the litigation.[64] If a state law is challenged in federal court, that state will always have standing to defend it. Official initiative proponents, however, are not state officers for any other purposes. But if a state empowers them to defend the law they helped pass, can they claim the mantle of the state's standing?

That was the question in *Hollingsworth*. In answering it, the Supreme Court used one of the most unusual external heuristics canvassed here: private law principles of agency. Harkening back to a style reminiscent of that employed in *Swift v. Tyson*,[65] the Supreme Court looked to a kind of general law to determine whether initiative proponents have standing to defend a state statute in federal court.

In 2008, California voters passed a popular initiative, Proposition 8, that banned same-sex marriage—directly teeing up federal equal protection and due process challenges. Embracing enforcement and nondefense,[66] state officials—including, among others, California's governor and attorney general—declined to defend the law in federal court.[67] The district court thus allowed the proponents of the initiative to intervene and defend its constitutionality. When they lost, state officials declined to appeal and the official proponents appealed in their stead.

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62. See, e.g., *Hollingsworth*, 570 U.S. at 702; Arizonans for Official English v. Arizona, 520 U.S. 43, 49–53 (1997); Don't Bankrupt Wash. Comm. v. Cont'l Ill. Nat'l Bank & Tr. Co., 460 U.S. 1077, 1077 (1983) (mem.) (dismissing an appeal by initiative proponents for "want of jurisdiction it appearing appellant lacks standing").

63. For a comprehensive discussion of state practice on this issue, see generally Katherine Shaw, Constitutional Nondefense in the States, 114 Colum. L. Rev. 213 (2014).

64. See Already, LLC v. Nike, Inc., 568 U.S. 85, 90–91 (2013).

65. 41 U.S. (16 Pet.) 1, 19 (1842) (holding that the case should be governed by "general principles"), overruled by Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

66. See generally Neal Devins & Saikrishna Prakash, The Indefensible Duty to Defend, 112 Colum. L. Rev. 507 (2012) (exploring differing state regimes that charge attorneys general with differing amounts of discretion in defending the constitutionality of state law); Shaw, supra note 63 (surveying different approaches states have taken in wielding the executive nondefense power).

67. See Shaw, supra note 63, at 239.

The Ninth Circuit then certified the question to the California Supreme Court whether the initiative proponents had authority under state law to represent the state in the appeal.[68] The California Supreme Court held that the initiative proponents did, explaining that under California law, initiative proponents are authorized "to appear and assert the state's interest" in suits challenging an initiative's validity.[69] That was enough for the Ninth Circuit: If it is California's interests at stake in the case, that court reasoned, then it is for California to determine how, and by whom, those interests are defended. Allowing the suit to proceed, the Ninth Circuit affirmed and the initiative proponents appealed to the U.S. Supreme Court.

But the Supreme Court reversed, dismissing the Ninth Circuit's view that California's understanding of state law was entitled to deference.[70] Instead, the Court held that the Constitution endorsed a freestanding theory of state structuring, to which any state litigating in federal court must conform. Entities seeking to advance a state's interests do not just need to be selected and endorsed by the state, the Court reasoned; they must also bear an "agency relationship" to the state.[71] Citing the Restatement (Third) of Agency—one compilation of the private law of agency—the Court noted that the state "never described petitioners as 'agents of the people,' or of anyone else,"[72] and the "basic features" of an agency relationship were missing: The principal could not control the agent's actions,[73] the agents owed no fiduciary obligations to the principal, and the principal was not responsible for the agent's attorneys' fees.[74]

Justice Anthony Kennedy, writing in dissent, found that odd. State governments, the dissent explained, embrace all sorts of representative relationships in designing institutions and processes—not just those that reflect the private law of agency.[75] Indeed, designating official proponents to defend the state's resulting law in court is an important design feature of referenda and initiatives. The dissent reasoned that it "is for California, not this Court, to determine whether and to what extent" the proponents have authority "to assert the State's interest in postenactment judicial

68. See Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (9th Cir. 2011).

69. Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011).

70. Hollingsworth v. Perry, 570 U.S. 693, 712 (2013).

71. Id. at 713.

72. Id. at 712.

73. Id. at 713 (citing Restatement (Third) of Agency § 101 cmt. f (Am. L. Inst. 2005)).

74. Id. at 713–14 ("[I]t is hornbook law that 'a principal has a duty to indemnify the agent against expenses and other losses incurred by the agent in defending against actions brought by third parties if the agent acted with actual authority in taking the action challenged by the third party's suit.'" (quoting Restatement (Third) of Agency § 8.14 cmt. D (Am. L. Inst. 2005))).

75. Id. at 717 (Kennedy, J., dissenting).

proceedings."[76] The federal Constitution, the dissent argued, has nothing to say about whether a state can eschew "a conventional agency relationship" as inconsistent with the "purpose of the initiative process."[77]

In the end, the Court effectively conditioned a state's participation in a crucial federal function—the defense of its law in federal court—on the state's conformity to a structural template that the Court located in the federal Constitution. Consequently, the Court significantly weakened the potency of direct democracy within the states. When someone successfully challenges an initiative in federal court[78] and state officials decline to defend the law on appeal, there is no appeal. This is a steep tax on direct democracy: A state must either establish a full agency relationship with proponents (including indemnity) or else accept a weakened system of direct democracy in the areas of greatest need—friction between the public and its representatives.

The Court's identification of a federal rule—that state institutions must bear an agency relationship to the state to stand in the state's shoes in federal court—is particularly noteworthy when set next to its treatment of structural issues in another case argued the next day: *United States v. Windsor*, a case about same-sex marriage within the federal (rather than the state) government.[79] When the DOJ declined to defend the federal Defense of Marriage Act, which defined marriage, for federal purposes, to include only marriages between different-sex spouses, a House of Representatives leadership group known as the Bipartisan Legal Advisory Group ("BLAG") sought to step in and defend the law itself.[80] Rather than resort to a private law agency framework to evaluate BLAG's relationship to the United States and thus its standing to defend the law, the Court—recognizing the complexity of that question—found creative ways to avoid it. That is not surprising: Federal structural questions are often considered hard or delicate, whereas state structural questions are considered simple or irrelevant.[81]

B. *States as Federal Adjuncts*

This section turns to a more complex strategy the Court has employed in a handful of contexts—and that litigants have pressed in others, including in the recent *Moore v. Harper* decision.[82] Recall that in almost a dozen locations, the federal Constitution mentions specific state

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76. Id.

77. Id. at 721.

78. These suits, of course, cannot be transferred to state court (where federal standing rules do not apply).

79. 570 U.S. 744 (2013).

80. Id. at 753–55.

81. Id.

82. 143 S. Ct. 2065 (2023).

institutions: State "legislatures" pass election codes pursuant to the Elections Clause, they ratify constitutional amendments in Article V, and they decide whether to cede state lands under the Enclaves Clause (among other things); state "executive authorities" may seek the federal help guaranteed by the Domestic Violence Clause; state "judges" must comply with the Supremacy Clause, and so on.[83]

Scholars have elaborated the significant variation in how states have structured their legislatures, executives, and judiciaries going back to the Founding period.[84] At a minimum, then, it is not a surprise that the states have chosen a variety of differently structured institutions to discharge the functions mentioned in constitutional provisions that name those state branches. But in several areas of law, the Court has addressed questions about how the appearance of those named branches of state government in the text of the federal Constitution shapes the choices states have in structuring, empowering, and constraining their three branches of government.

This section shows how the Court came to effectively federalize named state institutions in some but not all of those contexts—detaching them from their state constitutional ecosystem and treating them as federal adjuncts when performing the functions contemplated in the federal Constitution. This form of state structural regulation is most apparent in the Court's elaboration of Article V of the Constitution, which governs the amendment process. After an amendment is proposed, "the Legislatures of three fourths of the several States, or by Conventions in three fourths" must ratify it.[85] All states commit aspects of the legislative power not just to their state house, senate, and governor but also to the people directly through popular initiative (by which the people can enact laws) and popular referenda (through which they can veto laws).[86]

The Eighteenth Amendment—which prohibited the "manufacture, sale, or transportation" of alcohol[87]—provides an example of how state legislative structure influences federal constitutional amendment. Consider Ohio. In defining the structure of its "legislative" branch, Ohio's then-operative constitution established a bicameral General Assembly, consisting of a House and Senate. But it also created a formal role for "the

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83. See supra section I.B.

84. See sources cited infra notes 236; see also Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 264–73 (Rita Kimber & Robert Kimber trans., Rowman & Littlefield Publishers, Inc. 2001) (1973).

85. U.S. Const. art. V.

86. Jessica Bulman-Pozen & Miriam Seifter, The Democracy Principle in State Constitutions, 119 Mich. L. Rev. 859, 876–78 (2021) (noting that "twenty-four states have an initiative process" and "[e]very state provides for the legislative referendum, which allows the legislature (or sometimes another government actor) to place a measure on the ballot for popular approval by a majority of voters").

87. U.S. Const. amend. XVIII, § 1.

people" acting through popular referenda to veto most acts of the Assembly, including its ratification of federal constitutional amendments.[88] After the Ohio Assembly voted to ratify the Eighteenth Amendment, the people pressed a veto.[89] The U.S. Supreme Court, in *Hawke v. Smith*, held that citizen override effort federally unconstitutional, though it was specifically provided for in the state constitution.[90]

The Court, to its credit, acknowledged the argument for deference to each state's decision about how to structure its legislative process—that the term "legislature" might simply refer to "legislative action" taken in whatever "medium" the state constitution specifies.[91] But it rejected that idea by reasoning that Article V effectively federalizes state legislatures: Although it "is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state," the "power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution."[92] When acting to ratify constitutional amendments, in the Court's view, the state legislature acts as a federal body—and the "choice of means of ratification [is] wisely withheld from . . . the several states."[93] The stakes, in short, of federalizing state bodies acting pursuant to constitutional references to them is to allocate to the federal Supreme Court, rather than state Supreme Courts or state constitutions, the capacity to decide what institutional forms those bodies must take. And here the federal Court concluded that Article V imagines state legislatures as only "the representative body which made the laws of the people," and not the people acting in their popular legislative capacity.[94]

That conception of the "legislature" is not invented out of whole cloth; it is—conveniently—the theory of legislative action embraced by the federal Constitution in Article I's blueprint for Congress, which makes no provision for popular initiative or referenda. But it is also strikingly divergent from the conception of legislative power in the fifty states, all of which, to some measure, allow popular participation in the legislative process.[95] The Court, in short, did little to explain why the Constitution extracts state legislatures from their local structural ecosystem or why it

88. Ohio Const. art. II, § 1 (amended 1953) (defining the "Legislative" department but also establishing that "[t]he people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States").

89. David E. Pozen & Thomas P. Schmidt, The Puzzles and Possibilities of Article V, 121 Colum. L. Rev. 2317, 2355 (2021) ("The people of Ohio . . . narrowly rejected the Eighteenth Amendment in a referendum . . . ." (emphasis omitted)).

90. 253 U.S. 221, 231 (1920).

91. Id. at 229.

92. Id. at 230.

93. Id.

94. Id. at 227. That reasoning also bears markers of the "generic republic" cases discussed below. See infra section II.C.

95. Bulman-Pozen & Seifter, supra note 86, at 876–78.

requires them to act according to the framework of legislative activity crafted for Congress with different text, structure, and purpose. But it seems that to be appended to the federal system means acting by a federally dictated institutional logic.

Although the Court limited its holding in *Hawke* to the context of constitutional amendments, that approach to state structure proved influential, prompting efforts by federal and state courts to federalize other tasks reserved to state "legislatures" by the federal Constitution. In 1931, the Minnesota Supreme Court cited *Hawke*'s reasoning in interpreting the federal Elections Clause[96]—which empowers "the Legislature" of the states to establish the state laws that govern the "Times, Places and Manner of holding" federal elections subject to congressional override.[97]

Article IV of the Minnesota Constitution, which describes the "legislature," requires all laws to be passed by both chambers of the legislature and "presented to the governor."[98] This is an approach to lawmaking that also exists in the federal Constitution's system of bicameralism and presentment. But Minnesota's House and Senate leaders argued that the federal Elections Clause overrode that state constitutional rule when the state house and senate passed laws regulating federal elections. The Minnesota Supreme Court agreed, echoing *Hawke*: The Elections Clause envisions the state legislature "serving primarily the federal government" and acting as a "*mere agency* [thereof] to discharge" its election law duties.[99] The "Governor's veto," the court elaborated, "has no relation to such matters; that power pertains, under the state Constitution, exclusively to state affairs."[100]

Perhaps surprisingly, the U.S. Supreme Court reversed, limiting *Hawke*'s federalization of the state legislature to the Article V amendment context. When ratifying constitutional amendments, the Court reasoned in *Smiley*, the "nature" of the state legislative act is federal.[101] By contrast, when passing election codes—even for federal elections—the state legislature "mak[es] laws *for the state*."[102] "[I]t follows," therefore, "that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments."[103] The Court's basic logic is that the federal Constitution sometimes federalizes and sometimes

96. See State ex rel. Smiley v. Holm, 238 N.W. 495, 499 (Minn. 1931).

97. See U.S. Const. art. I, § 4, cl. 1. For a list of other mentions of state institutions, see supra section I.B.

98. Smiley v. Holm, 285 U.S. 355, 363 (1932) (citing Minn. Const. art. IV, § 1).

99. Id. at 364 (emphasis added).

100. Id. at 364–65.

101. Id. at 366–67.

102. See id. at 367 (emphasis added).

103. Id. at 367–68.

defers to states in structuring their legislative processes for activities contemplated in the text of the federal Constitution.

But the decision in *Smiley* did not put an end to efforts to federalize state legislatures. Chief Justice William Rehnquist would return to that form of federal regulation of state structure in his influential concurrence in *Bush v. Gore*.[104]

Florida's razor-tight margin in the 2000 election prompted the Florida Supreme Court to order the infamous recount of "hanging chads."[105] On December 12, 2000, thirty-four days after that year's presidential election, the U.S. Supreme Court ended that recount on equal protection grounds.[106] Rehnquist concurred to explain that he would have separately resolved the case on the grounds that the Florida Supreme Court lacked the authority under the federal Constitution's Electors Clause to order a recount. (The Electors Clause is often paired with the Elections Clause and empowers state "legislatures" to select delegates to the Electoral College.)[107]

The Florida Legislature had enacted a law specifying that Florida's delegates to the Electoral College would assign the winner of the state's popular vote. It further specified a procedure and statutory deadline for resolving issues tallying those votes.[108] In Rehnquist's view, the Florida Supreme Court had misinterpreted state law: By ordering the recount, the Florida Supreme Court "plainly departed from the legislative scheme."[109]

What authority would allow the U.S. Supreme Court to interpret the laws enacted by the Florida legislature contrary to the interpretation given by the state's high court? In Rehnquist's view, the Electors Clause federalized state legislatures and their respective election codes in at least two respects. First, the Electors Clause is one of the "few" instances (according to Rehnquist) in which the federal Constitution confers power on state legislatures.[110] In turn, he reasoned, because the "text of the election law" is the unalloyed voice of the legislature acting pursuant to that federal authority, it "takes on independent significance," separate from "interpretation by the courts of the States," which exercise no federal power under the Clause.[111] The election laws enacted by state legislatures are federal law at least for this purpose. Second, "[w]hile presidential electors are not officers or agents of the federal government, they exercise

104. 531 U.S. 98 (2000) (per curiam).

105. See id. at 102 (describing the procedural history of the case); Gore v. Harris, 772 So. 2d 1243, 1247–48 (Fla. 2000).

106. *Bush*, 531 U.S. at 103.

107. U.S. Const. art. II, § 1, cl. 2.

108. See *Bush*, 531 U.S. at 113–14 (Rehnquist, C.J., concurring).

109. Id. at 118–120.

110. Id. at 112. But see supra section I.B (cataloguing numerous ways the federal Constitution speaks to state legislatures).

111. See *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

federal functions," which infuses a federal character into the state legislative processes used to select them.[112]

Rehnquist's concurring opinion has continued to exert influence. Early on the long and windy road that yielded *Moore*, Justice Samuel Alito (joined by Justices Clarence Thomas and Neil Gorsuch) issued a separate opinion dissenting from the Court's decision not to grant a stay pending appeal to North Carolina legislators—relying heavily on Rehnquist's concurrence.[113] Indeed, Rehnquist's theory that in acting pursuant to the Electors Clause, state legislatures exist not in a state-level constitutional habitat but instead in a federal constitutional space, inspired the so-called "independent state legislature theory" at the heart of *Moore* itself.

In that case, the North Carolina legislature had drawn congressional districts pursuant to the Elections Clause, which the state Supreme Court found to affect a partisan gerrymander in violation of several state constitutional rights.[114] The Speaker of the North Carolina House and others pressed an extreme version of the federal adjunct theory: When enacting laws pursuant to the Elections Clause, they argued, state legislatures serve a "*federal* function governed and limited by the *federal* Constitution," with the "clear" implication that "*only the federal* [*C*]*onstitution* can limit the federal function of regulating federal elections."[115] Put differently: When passing state laws that regulate the conduct of federal elections, state legislatures act "independent[ly]" of their state constitutional context and are subject only to the restrictions of the federal Constitution. But the Court again rejected the attempt to extend *Hawke*'s approach of federalizing state processes and institutions beyond Article V. Instead, it employed a form of hybrid reasoning discussed in greater detail in section II.D.

* * *

These two approaches to federal constitutional rules of state structure are prescriptive: A state that did not follow the Court's preferred agency relationship simply could not press its case in federal court. And a state that did not use the Court's preferred legislative process simply would not have its ratification decision recognized. They also adopted distinct and inconsistent analogies when deciding what structural arrangements the federal Constitution specified for the states—in the former, arrangements

112. See id. at 112 (internal quotation marks omitted) (quoting Burroughs v. United States, 290 U.S. 534, 545 (1934)).

113. Moore v. Harper, 142 S. Ct. 1089, 1090–91 (2022) (Alito, J., dissenting from the denial of an application for a stay) (citing *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring)).

114. N.C. Const. art. I, § 10; see also Moore v. Harper, 143 S. Ct. 2065, 2074–75 (2023) ("The North Carolina Supreme Court reversed, holding that the legislative defendants violated state law . . . ." (citing Harper v. Hall, 868 S.E.2d 499, 528 (N.C. 2022))).

115. Brief for Petitioners at 22, *Moore*, 143 S. Ct. 2065 (No. 21-1271), 2022 WL 4084287.

similar to the private law of agency; in the latter, arrangements similar to the federal government's own structural plan. The next section turns to a less prescriptive way that the federal Constitution speaks to state structure: by conditioning a state's "voice" in the creation of federal constitutional meaning on its decision to channel citizens' preferences through the Court's preferred institutional channels. In doing so, the Court offers yet another analogy for sketching the structural arrangements to which the federal Constitution requires the states to conform.

C. *States as "Generic Republics"*

This section identifies a more complicated and less prescriptive, but still consequential way the Court makes judgments about state structure. And it reveals a third template the Court uses to decide what its preferred state structures are: The states should embody the principles of what we call a "generic republic"—an imagined and idealized "democratic" regime.

The Eighth Amendment's Cruel and Unusual Punishment Clause would not seem to be an area with significant state structural stakes.[116] But modern Eighth Amendment doctrine does not just require state and federal governments to respect individual rights; it also gives the people of the states—speaking primarily through state *legislatures*—a meaning-giving role in defining what constitutes punishment that is impermissibly "cruel" or "unusual."

For more than fifty years, the Court has held that the words of the Amendment "must draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society."[117] To do that, the Court relies on metrics that it sees as "objective" and that demonstrate a "national consensus" that the punishment in question is impermissible.[118] Although it has unevenly considered a range of indicators in looking for that kind of consensus, the Court has long preferred state legislatures as its most influential indicator.[119] By tallying the acts of state legislatures that

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116. U.S. Const. amend. VIII.

117. Furman v. Georgia, 408 U.S. 238, 269–70 (1972) (Brennan, J., concurring) (internal quotation marks omitted) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Reciting the principle of evolution is standard in Eighth Amendment cases. E.g., Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1048 (2017) (citing "evolving standards of decency" in its Eighth Amendment analysis); see also Roper v. Simmons, 543 U.S. 551, 561 (2005) (quoting *Trop*, 356 U.S. at 101)); Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (same); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (same).

118. Penry v. Lynaugh, 492 U.S. 302, 331–34 (1989), abrogated by Atkins v. Virginia, 536 U.S. 304 (2002).

119. McCleskey v. Kemp, 481 U.S. 279, 300 (1987) ("In assessing contemporary values, we have eschewed subjective judgment, and instead have sought to ascertain 'objective indicia that reflect the public attitude toward a given sanction.' First among these indicia are the decisions of state legislatures, 'because the . . . legislative judgment weighs heavily in ascertaining' contemporary standards." (alteration in original) (first quoting Gregg v.

either authorize or prohibit a particular form of punishment, the Court produces what it sees as an impartial measure of "the moral values of the people."[120] Because the Court has tethered the meaning of the Amendment to the moral values of contemporary populations, in short, its own doctrine has required it to identify institutions through which to measure the expression of those values. And it has, in many high-profile cases, given weight to state legislatures over other state representative institutions even when state law allocates the authority to articulate punishment policy to other actors as well.

For just a few examples of the many influential uses of state-legislative tallying: After a Court plurality declared a moratorium on the death penalty in *Furman*,[121] the Court used the legislative counting methodology to reinstitute the death penalty four years later.[122] Legislative tallying was a centerpiece of the Court's finding that imposing the death penalty for the crime of rape was cruel and unusual in *Coker v. Georgia*.[123] It was deployed to find the death penalty unconstitutional for accomplices participating in robbery felony murders (people like the driver of a getaway car in a robbery gone wrong)[124] but also to qualify that holding several years later and permit the death penalty in other cases of felony murder.[125] The Court tallied legislative enactments to sustain the death penalty's constitutionality for defendants with intellectual disabilities in 1989.[126] And it did

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Georgia, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); then quoting id. at 175)); see also *Atkins*, 536 U.S. at 312 ("[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (quoting *Penry*, 492 U.S. at 331)).

120. *Atkins*, 536 U.S. at 323 (Rehnquist, C.J., dissenting) (internal quotation marks omitted) (quoting *Gregg*, 428 U.S. at 175–76 (joint opinion of Stewart, Powell, and Stevens, JJ.)); see also *Furman*, 408 U.S. at 383 (Burger, C.J., dissenting); Gore v. United States, 357 U.S. 386, 393 (1958).

121. 408 U.S. at 239–40 (majority opinion) ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

122. *Gregg*, 428 U.S. at 179–80 & n.23 ("The most marked indication of society's endorsement of the death penalty . . . is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person." (footnote omitted)).

123. 433 U.S. 584, 594–95 (1977).

124. See Enmund v. Florida, 458 U.S. 782, 792–93 (1982) (rejecting the death penalty for accomplices who "did not take life, attempt to take it, or intend to take life"); id. at 792–93 ("While the current legislative judgment with respect to [this] imposition of the death penalty . . . is neither 'wholly unanimous among state legislatures,' nor as compelling as the legislative judgments considered in *Coker*, it nevertheless weighs on the side of rejecting capital punishment for the crime at issue." (quoting *Coker*, 433 U.S. at 596)).

125. See Tison v. Arizona, 481 U.S. 137, 152–54 (1987) (tallying legislatures that permit the death penalty for felony murders in which the defendant's participation was substantial enough that they could have "acted with reckless indifference to human life").

126. Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (sustaining the death penalty for defendants with intellectual disabilities, in part based on legislative enactments).

the same to find the death penalty unconstitutional as applied to intellectually disabled defendants thirteen years later.[127] It used legislative approval to first sustain the death penalty's application to juveniles, and legislative disapproval to later reject it.[128]

That choice might be sensible if legislatures were the states' exclusive institutional channel for expressing voter preferences about forms of punishment. But in recent decades, scholars and litigants have increasingly challenged the idea that state legislatures are the only structural conduit that states elect for conveying the "the moral values of the people" on death penalty questions.[129] In many states, other officials are legally empowered, and often obligated, to exercise independent judgment about forms of appropriate punishment.[130]

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127. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (abrogating *Penry* and rejecting the death penalty for defendants with intellectual disabilities); id. at 312 (noting that legislative enactments are the "clearest and most reliable objective evidence of contemporary values" (quoting *Penry*, 492 U.S. at 331)). In *Atkins*, as in some other cases, the Court also acknowledged additional indicators of popular views of the death penalty (including use in practice, opinion polls, and the views of professional organizations), but it continued its "first among equals" posture toward state legislatures by signaling that the additional "factors are by no means dispositive" and were relevant because "their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue." Id. at 316–17 n.21. Notably, however, the Court has found legislative tallying logically inapposite (even on its own terms) in some Eighth Amendment inquiries. In Miller v. Alabama, 567 U.S. 460, 465 (2012), for example, the Court held unconstitutional the mandatory imposition of life without parole for juveniles. At the time, in a large number of states, a "confluence of state laws" operating together made it possible that a juvenile could be subjected to mandatory life without parole for certain crimes. Id. at 485–86. Specifically, instead of expressly and clearly making life without parole a mandatory punishment for juveniles convicted of certain crimes, states permitted juveniles to be transferred to adult court where they were then vulnerable to whatever mandatory sentencing was applicable to adult offenders. See id. The Court declined to rely on a tally of the states whose systems in effect permitted mandatory juvenile life without parole because it found too high a likelihood that such a result was inadvertent given its indirect mode of accomplishment. Id. at 483–84. The dissent disagreed, pressing the Court to make a legislative tally. See id. at 494 (Roberts, C.J., dissenting).

128. Compare Stanford v. Kentucky, 492 U.S. 361, 370–71 (1989) (noting that "'first' among the 'objective indicia that reflect the public attitude toward a given sanction' are statutes passed by society's elected representatives" and that the tally "does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual" (quoting McCleskey v. Kemp, 481 U.S. 279, 300 (1987)), with Roper v. Simmons, 543 U.S. 551, 564 (2005) (noting that "[thirty] States prohibit the juvenile death penalty" and relying on that tally to find that application unconstitutional).

129. See Miriam Seifter, Countermajoritarian Legislatures, 121 Colum. L. Rev. 1733, 1735 (2021) (noting the "democratic romanticism" that has informed a received "understanding that state legislatures are 'the people's representatives'" (quoting Democratic Nat'l Comm. v. Wis. State Leg., 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring))); id. at 1762–77 (arguing that legislatures are frequently less majoritarian than other state elected offices).

130. See, e.g., Brandon L. Garrett, Local Evidence in Constitutional Interpretation, 104 Cornell L. Rev. 855, 865 (2019) (describing the role state judges play in imposing the death

One alternative conduit through which these moral views might be expressed on death penalty questions is through the office of the state's governor. In many states, governors have a constitutionally specified, and sometimes exclusive, right to grant clemency in capital cases,[131] which many have exercised to impose outright moratoria on the death penalty—a broad, prospective, and generally applicable action characteristic of lawmaking.[132] And a significant number of governors in such states have used their powers to grant mass clemency to all prisoners then on death row or all defendants sentenced to death during their term in office.[133]

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penalty); Joseph Landau, New Majoritarian Constitutionalism, 103 Iowa L. Rev. 1033, 1073 (2018) ("In total, there are 39 jurisdictions . . . that have either abolished the death penalty or have carried out so few executions . . . that they are likely considered functionally abolitionist, at least under new majoritarian analysis."); David Niven & Aliza Plener Cover, The Arbiters of Decency: A Study of Legislators' Eighth Amendment Role, 93 Wash. L. Rev. 1397, 1433 (2018) ("The data we collected . . . suggest that state legislation is an imperfect indicator of 'evolving standards of decency.'"); Robert J. Smith, Bidish J. Sarma & Sophie Cull, The Way the Court Gauges Consensus (and How to Do It Better), 35 Cardozo L. Rev. 2397, 2423–28 (2014) ("The question for both [prosecutors and juries] is how infrequently they exercise their discretion to impose the death penalty.").

131. See Michael Heise, Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure, 89 Va. L. Rev. 239, 255 (2003) ("[M]any states assign to their governors sole clemency decisionmaking authority.").

132. See, e.g., Off. of Governor John W. Hickenlooper, Executive Order D-2013-006, Death Sentence Reprieve (May 22, 2013); Pennsylvania Governor Declares Moratorium on Death Penalty, ABA (June 1, 2015), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2015/summer/pennsylvania-governor-declares-moratorium-on-death-penalty/ (on file with the *Columbia Law Review*); Press Release, Governor John Kitzhaber, Governor Kitzhaber Statement on Capital Punishment (Nov. 22, 2011), https://media.oregonlive.com/pacific-northwest-news/other/Microsoft%20Word%20-%20Final%20Final%20JK%20Statement%20on%20the%20Death%20Penalty.pdf [https://perma.cc/62U2-96F2]; Press Release, Off. of Governor Gavin Newsom, Governor Gavin Newsom Orders a Halt to the Death Penalty in California (Mar. 13, 2019), https://www.gov.ca.gov/2019/03/13/governor-gavin-newsom-orders-a-halt-to-the-death-penalty-in-california/ [https://perma.cc/VN4T-QLJ6]; Press Release, Wash. Governor Jay Inslee, Gov. Jay Inslee Announces Capital Punishment Moratorium (Feb. 11, 2014), https://governor.wa.gov/news/2014/gov-jay-inslee-announces-capital-punishment-moratorium [https://perma.cc/A3FK-HCXB].

133. See, e.g., Richard E. Meyer, Governor Calls Practice 'Anti-God': Anaya Spares All Inmates on New Mexico Death Row, L.A. Times (Nov. 27, 1986), https://www.latimes.com/archives/la-xpm-1986-11-27-mn-13558-story.html (on file with the *Columbia Law Review*); Julia Shumway, Oregon Gov. Kate Brown Commutes 17 Death Sentences, Ending Death Row, Or. Cap. Chron. (Dec. 13, 2022), https://oregoncapitalchronicle.com/2022/12/13/oregon-gov-kate-brown-commutes-17-death-sentences-ending-death-row/ (on file with the *Columbia Law Review*); Eric Slater, Illinois Governor Commutes All Death Row Cases, L.A. Times (Jan. 2, 2003), https://www.latimes.com/archives/la-xpm-2003-jan-12-na-commute12-story.html (on file with the *Columbia Law Review*). Earlier in the twentieth century, Governor Winthrop Rockefeller of Arkansas, Frank Clement of Tennessee, Lee Cruce of Oklahoma, and others likewise issued mass clemencies for prisoners on death row. See Arkansas Spares All on Death Row: Outgoing Gov. Rockefeller Commutes 15 Sentences, N.Y. Times, Dec. 30, 1970, at 26; Gov. Clement Saves 5 From Death Chair, N.Y. Times, Mar. 20, 1965, at 1; Lee Cruce Dead; Former Governor: Second State Executive of Oklahoma Was a Pioneer of

Sometimes it is the case, moreover, that full death penalty repeals entail legislative–executive action in the form of prospective bans by the legislature and retroactive clemencies by governors.[134]

County-level officials—especially elected prosecutors and judges—also exercise great power over the death penalty.[135] In the five years preceding *Glossip v. Gross*, a significant method-of-execution case, "just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide," even as—in the Court's legislative tally when the case was decided—twenty-seven states continued to authorize capital punishment.[136]

This suggests that if the Court looked to institutions beyond legislatures to ascertain our moral intuitions on forms of punishment and measured those judgments at the county level, the death penalty would shift from being a close call (in the legislative tally) to highly disfavored (in the county tally).[137] Yet the Court has never seriously considered centering prosecutors as a barometer of the people's preferences on forms

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Indian Territory: A Lawyer and Banker: Consistently Refused to Enforce the Death Penalty During His Administration, N.Y. Times, Jan. 17, 1933, at 22.

134. Ray Long, Quinn Signs Death Penalty Ban, Commutes 15 Death Row Sentences to Life, Chi. Trib. (Mar. 9, 2011), https://newsblogs.chicagotribune.com/clout_st/2011/03/quinn-signs-death-penalty-ban-commutes-15-death-row-sentences-to-life.html (on file with the *Columbia Law Review*); Jeremy W. Peters, Corzine Signs Bill Ending Executions, Then Commutes Sentences of Eight, N.Y. Times (Dec. 18, 2007), https://www.nytimes.com/2007/12/18/nyregion/18death.html (on file with the *Columbia Law Review*); John Wagner, Gov. O'Malley to Commute Sentences of Maryland's Remaining Death-Row Inmates, Wash. Post (Dec. 31, 2014), https://www.washingtonpost.com/local/md-politics/gov-omalley-commutes-sentences-of-marylands-remaining-death-row-inmates/2014/12/31/044b553a-90ff-11e4-a412-4b735edc7175_story.html (on file with the *Columbia Law Review*) (describing mass commutation two years after the state legislatively abolished the death penalty); Press Release, Colo. Governor Jared Polis, Gov. Polis Signs Death Penalty Repeal Bill, Commutes Death Row Sentences to Life in Prison Without Parole (Mar. 23, 2020), https://www.colorado.gov/governor/news/gov-polis-signs-death-penalty-repeal-bill-commutes-death-row-sentences-life-prison-without [https://perma.cc/Y7B6-L2J2].

135. Glossip v. Gross, 576 U.S. 863, 918–19 (2015) (Breyer, J., dissenting) (citing Robert J. Smith, The Geography of the Death Penalty and Its Ramifications, 92 B.U. L. Rev. 227, 231–32 (2012)); Lee Kovarsky, Muscle Memory and the Local Concentration of Capital Punishment, 66 Duke L.J. 259, 264 (2016); see also Richard C. Dieter, The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All, Death Penalty Info. Ctr. (2013), https://files.deathpenaltyinfo.org/legacy/documents/TwoPercentReport.pdf [https://perma.cc/MUV3-MMDH]; Garrett, supra note 130, at 865.

136. *Glossip*, 576 U.S. at 919 (citing Robert J. Smith, The Geography of the Death Penalty and Its Ramifications, 92 B.U. L. Rev. 227, 231–32 (2012)).

137. In a 2020 report, the Bureau of Justice Statistics indicated that twenty-eight states legislatively authorized the death penalty, though only five of those states held an execution during that year. Tracy L. Snell, Capital Punishment, 2020—Statistical Tables, Bureau of Just. Stat. 1 (2021). In 2021, Virginia legislatively banned the death penalty, making the current tally twenty-seven legislatively authorized states. See Samantha O'Connell, Virginia Becomes First Southern State to Abolish the Death Penalty, ABA (Mar. 24, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/virginia-death-penalty-repeal/ [https://perma.cc/5577-E8MK].

of punishment—though specialist prosecutors, much more than generalist legislators, would be expected to run on their views on forms of punishment.

It should matter, then, whether states have chosen to authorize their legislatures to make exclusive judgments about punishment or have spread the authority to make such judgments across multiple representative officers.[138] As even the brief account above suggests, it does not appear that most states have chosen to grant their legislatures either exclusive or even dominant authority in this area.

Those institutional choices demonstrate how the Supreme Court can indirectly regulate state structure in plain sight. States that choose to allocate powers over other institutional actors who are *also* responsible for expressing citizen preferences are not counted, or play only a supportive role, in the Court's tally. Legislative tallying operates here as a tax on the voices of citizens in states that use a plurality of means to express views on capital punishment. The more exclusively a state uses its legislature, the less risk that its constituents' judgments will be misconstrued, misunderstood, or ignored.

Why rely so heavily on legislative enactments? The Court has rarely tried to justify this posture. But Rehnquist, writing in dissent in *Atkins*, offered the following explanation:

> The reason we ascribe primacy to legislative enactments follows from the *constitutional role legislatures play in expressing policy of a State*. [I]n a *democratic society* legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people. And because the specifications of punishments are *peculiarly questions of legislative policy*, our cases have cautioned against using the aegis of the Cruel and Unusual Punishment Clause to cut off the *normal democratic processes*.[139]

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138. This choice is not a question of institutional competency. In *Lawrence v. Texas*, for example, the Court considered expressly whether and how states enforced their antisodomy statutes in determining that Bowers v. Hardwick, 478 U.S. 186 (1986), was a deficient precedent. 539 U.S. 558, 573–74 (2003).

139. Atkins v. Virginia, 536 U.S. 304, 323 (2002) (Rehnquist, C.J., dissenting) (alteration in original) (emphasis added) (internal citations and quotation marks omitted) (first quoting Gregg v. Georgia, 428 U.S. 153, 175–76 (1976) (joint opinion of Stewart, Powell & Stevens, JJ.); then quoting Gore v. United States, 357 U.S. 386, 393 (1958); then quoting *Gregg*, 428 U.S. at 176). These ideas arise in other passages in the Court's death penalty opinions. See, e.g., Weems v. United States, 217 U.S. 349, 379 (1910) ("The function of the legislature is primary, its exercise fortified by presumptions of right and legality . . . ."); id. (referring to the primacy of legislatures as among the "elementary truths"). One reason for focusing on legislatures appears to be a federally centric idea that it is the job of elected officials, not courts, to channel the will of the people. See Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) ("The reason for insistence on legislative primacy is obvious and fundamental: '[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'" (quoting *Gregg*, 428 U.S. at 175–76). Because many states elect their supreme court judges, that idea may have more structural force in the federal system of appointment and lifetime tenure.

Although this passage initially hints at an answer rooted in the role of courts in constitutional analysis, it quickly shifts to a simplified "generic republic" analogy. This passage doesn't specify *which* constitution—federal or state—sets out the role a "legislature[] play[s] in expressing [the] policy of a State." Does Rehnquist mean the federal Constitution? Under that account, the idea would be that the "evolving standards of decency" standard embedded in the Eighth Amendment *itself* requires the Court to consider the views primarily of state legislatures, rather than the many forms of popular expression each state has itself elected. Given how much more crisply Rehnquist could have articulated that argument had he wanted it, it is perhaps more likely that he meant to express the more basic intuition that *state* constitutions give state legislatures a central role in expressing the policies of a state. That's certainly true to an extent, but, in structural separation-of-powers questions, the devil is in the details.

State constitutions, as this Article and others have discussed, are structurally diverse.[140] It is a kind of category error for the Court to assume—as it appears to do in this context—that state legislatures are the sole institution that reflect "the people's" moral views on punishment questions in all fifty states. Indeed, any assumption, without evidence, that each of our fifty constitutionally chartered states makes the same choices about how to allocate power should be a red flag.

Perhaps for that reason, Rehnquist quickly pivots away from a descriptive legal claim about the allocations of power state constitutions proscribe and toward an appeal to the "normal democratic processes" in "democratic societies." He ends, then, with a more general statement about how generic republics, which American states are presumed to be, would express voter sentiments on forms of punishment.

D. *Partial Deference*

The Court does sometimes attempt the approach to these questions that is perhaps most intuitive: interpret the federal Constitution merely to incorporate the states' own institutional choices. From this vantage, when the federal Constitution uses the term "state legislature," it means to refer to the legislature as defined by the state. And when it says "state," the federal Constitution means the state acting and speaking through mechanisms the state itself has constitutionally organized for the relevant task. Want to know whether a speaker who purports to represent the state does in fact? Consult state law. Under this account, when confronted with federal constitutional openings that refer to the state or its institutions (or that implicitly incorporate questions of state structure), the Court should defer to the states' own way of organizing power and use state law as the indicator of those choices.

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140. See discussion infra notes 232–236.

But where the Court has gestured at a strategy of deference, it has been a qualified one in which the Court cites approvingly a state's right to decide how it will organize itself but also limits or constrains that deference in one of several ways. In some cases, the Court pairs a degree of deference with the "generic republic" analogy mentioned above. In *Moore v. Harper*,[141] and in an important predecessor case, *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[142] the Court declined to read into the federal Elections Clause a definition of state "legislature" that would have been discordant with the ways that many states structure their governments. But even as the Court took seriously each state's own constitutional structure, it also tempered its deference by noting that the state's structural choices corresponded to what the Court viewed as a kind of federally approved form of republican government.[143] That fainthearted deference did not prevent the Court from giving effect to the constitutional structures of the state in those cases, but future cases could force the Court to choose between treating the states deferentially and treating them more like generic republics. As we discuss next, in other cases, the Court has paired a degree of deference with an anticircumvention constraint intended to prevent the state from altering its structures (or claiming different structures than it has) to take advantage of a federal constitutional benefit (like sovereign immunity). That choice grants the states a degree of latitude, but still places them under federal supervision.

1. *Deference and Generic Republics.* — First, consider *Arizona*. The 2015 case was a blockbuster—and commentators noted its potential to dramatically shape how many states conduct federal elections.[144] And supporters of election reform generally praised Justice Ruth Bader Ginsburg's opinion for the Court.[145] Although the opinion looks deferential on the surface, the Court tempered that deference with the kind of "generic republic" analogy that has been used to constrain state choices and could be used to constrain future state choices in the Elections Clause context.

After a decennial census, state "legislatures" must redraw federal electoral districts to account for population shifts, which is often a partisan

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141. 143 S. Ct. 2065 (2023).

142. 576 U.S. 787 (2015).

143. See id. at 795–96 (noting how the Arizona Constitution's legislative charter maps onto provisions from the federal Constitution).

144. See, e.g., Reid Wilson, Supreme Court Takes Up Highly Political Arizona Redistricting Case, Wash. Post (Mar. 2, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/02/supreme-court-takes-up-highly-political-arizona-redistricting-case/ (on file with the *Columbia Law Review*).

145. See, e.g., Adam Liptak, Supreme Court Rebuffs Lawmakers Over Independent Redistricting Panel, N.Y. Times (June 29, 2015), https://www.nytimes.com/2015/06/30/us/supreme-court-upholds-creation-of-arizona-redistricting-commission.html (on file with the *Columbia Law Review*).

exercise.[146] In 2000, Arizona amended its constitution by popular initiative to create institutional structures that would reduce partisan gerrymandering.[147] The amendment reallocated authority to draw districts from the Arizona House and Senate to the newly created Independent Redistricting Commission.[148] The question before the Court was whether that nonpartisan redistricting commission complied with the Elections Clause, which requires that election regulations be "prescribed in each State by the Legislature thereof."[149]

The Court began by articulating a principle of deference, explaining that "it is characteristic of our federal system that States retain autonomy to establish their own governmental processes"[150] and gesturing at a simple, deferential way of resolving the case: Arizona placed the Independent Redistricting Commission's "redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority."[151] Although the Court did not express it in exactly this way, the implication was that the state, in effect, had created a tricameral legislature, consisting of a House, a Senate, and an Independent Redistricting Commission. What business was it of the Court's to question the way Arizona structured its legislative branch? The answer the Court gestured at was both elegant and noninterventionist: none. So long as the state regulates elections through an institution that it considers legislative, no federal question remains.

But the Court did not wholeheartedly embrace that view. In other parts of the opinion, it characterized the Commission, contrary to Arizona's constitutional framework, as "operating independently of the state legislature."[152] And the Court spent most of the opinion developing an alternative theory. Recall that Arizona had created the Commission by using a popular initiative to amend the constitution. The Court seized on that fact to hold that a voter initiative is itself an exercise of "legislative" power that, it seems, transitively infuses the institutions created by such an initiative with a legislative character. Even if the Commission were not itself part of the state legislature, the idea goes, its creation through a legislative constitutional amendment made it legislative for federal constitutional purposes.

What's more, to establish the "legislative" character of the voter initiative, the Court relied on the kinds of sources and reasoning

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146. See Bruce E. Cain, Redistricting Commissions: A Better Political Buffer?, 121 Yale L.J. 1808, 1817–18 (2012) (describing the problem of "legislators drawing district lines that they ultimately have to run in" as a form of "legislative conflict of interest").

147. *Arizona State Legislature*, 576 U.S. at 791.

148. Id. at 792.

149. U.S. Const. art. I, § 4, cl. 1.

150. *Arizona State Legislature*, 576 U.S. at 816.

151. Id. at 817 (citing Ariz. Const. art. IV).

152. Id. at 813.

characteristic of the "generic republic" analogy. It cited dictionary definitions of the word "legislature," relied on concepts of "people's ultimate sovereignty" as "expressed by John Locke in 1690," and it spoke in broad terms about the "genius of republican liberty" articulated by James Madison and the "true principle of a republic" expressed by Alexander Hamilton.[153] The use of referenda was "in full harmony with the Constitution's conception of the people as the font of governmental power."[154]

In the end, the Court's opinion is a puzzle: It employs the language of deference, but it simultaneously suggests that there are federal constitutional principles with which state structures must be "in full harmony."[155]

Here, the Court's generic conception of legislative power is thin and only modestly justified. Most importantly, it does not deal with the fact that many features of state legislative design (with which it does not engage) are at least arguably in disharmony with the structure of the federal Constitution or Lockean forms of representation. Do state "legislatures" act in harmony with constitutional conceptions of legislative power when they delegate election-related tasks to administrative agencies? When they use a legislative veto to oversee election-related regulations? When they act with or without presentment to the governor? What about, for example, when they create nonpartisan redistricting commissions without the popular initiative that transitively imbued Arizona's commission with legislative power? Such commissions are a distinctly modern form of constitutional design with no clear corollary in Founding Era thought. Often called "fourth branches" or "guarantor institutions," moreover, the

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153. Id. at 813, 819–20 (first citing John Locke, Two Treatises of Government 385 (P. Laslett ed., 1964) (1690); then quoting Federalist No. 37, at 223 (James Madison); then quoting Powell v. McCormack, 395 U.S. 486, 540–41 (1969) (invoking a famous part of Federalist No. 61, penned by Alexander Hamilton, to make the point that the Constitution fixed how representatives would be elected).

154. Id. at 819.

155. Id. A charitable reading of the Court's strategy might be to see it as attempting something like the "patterning" that Thomas Merrill has advocated for in the constitutional property context. Thomas W. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 952 (2000). The Constitution mentions "property" several times, but property is traditionally regulated by state law. See id. at 886–87. To give meaning to the Constitution's references to property, then, the Supreme Court must decide whether to find some independent constitutional content, incorporate the definitions of "property" in state and federal positive and common law, or do a bit of both. Merrill suggests the latter course: To define "property," the Court should identify within the Constitution "general criteria that serve to differentiate property rights from other types of interests," but it should also consult "independent sources such as state law" to determine the kinds of property interests that in fact exist within those federal criteria. Id. at 952–54. Perhaps here the Court is trying to delineate some "general criteria" that define legislative power but also incorporate into its definition of legislature the ways states have applied those criteria in practice. If that is what the Court is trying to do, it is not doing it well—something that will come as no surprise to advocates of patterning in the property context because, as Merrill shows, courts might gesture at patterning there, but they do not rigorously do it in practice. See id. at 998–99.

underlying goal of these institutions is precisely to insulate governmental actors from the kind of popular control the Court so embraces.[156] The Court does not seem to anticipate, and does not grapple with, those complexities.

This most recent Term, the Court reprised the same blend of deferential language and the generic republic analogy in *Moore v. Harper*.[157] The North Carolina legislature drew districts that the state supreme court found to violate a provision of the state constitution prohibiting partisan gerrymandering.[158] After significant litigation, North Carolina's legislative leaders appealed to the U.S. Supreme Court, arguing—channeling Rehnquist's *Bush v. Gore* concur-rence—that because it performed a federal function when regulating elections pursuant to the Elections Clause, it was not subject to the constraints of the state constitution or even the judicial review of the North Carolina Supreme Court.[159] Whereas *Arizona* asked what state institutions counted as the state "legislature," *Moore* asked what state-level constitutional constraints the state "legislature" could be subjected to.

Although *Moore* ultimately rejected the legislators' attempt to wholly federalize the legislature and employed some deference to state constitutional design, the Court also veered into reasoning that suggests that there were limits to that federal deference. The core intellectual work of the opinion, for instance, is an extensive elaboration of the importance of judicial review from a kind of first-principles perspective. Citing the judiciary's significance within the federal system and within several states (including North Carolina), as well as generalized principles of good governance, the Court concluded by endorsing Chief Justice John Marshall's statement on the subject in *Marbury v. Madison*: that judicial review is "one of the fundamental principles of our society."[160]

Reasoning about the benefits of judicial review seems all to the good and hardly harmful. But the strategy of pairing the language of deference with statements about "harmony" between the state's choices and consistency with "fundamental principles" could have hidden costs. Some state structural innovations—like, for example, the "guarantor institutions" discussed above—will not be consistent with a traditional republican blueprint precisely because they are designed to *remedy* perceived defects in that blueprint. Other state choices will be discordant with federal structural trends and so, perhaps too, with the "republican" blueprints that federal judges conjure out of their generalized knowledge.

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156. See infra note 239 (reviewing the literature on the innovation, and deviation from past practice, that so-called "Fourth Branch" institutions like nonpartisan districting commissions represent).

157. 143 S. Ct. 2065, 2080–81 (2023).

158. Id. at 2074–76.

159. Id. at 2080.

160. Id. at 2081 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803)).

Consider an Elections Clause problem that some expect to drive the next set of legal challenges in this context.[161] Many state constitutions are friendlier to the delegation of legislative powers than is the federal Constitution.[162] And there is a long history of delegation in the election context. Legislatures delegate election regulation and administration authority to governors, secretaries of state, local election officials, courts, and others.[163]

But some have challenged these entities' exercise of delegated authority, including by reference to the intellectual traditions of the Founding period from which the generic republic analogy is often drawn.[164] A challenge of that sort could test the tension between the Court's invocation of deference and its discussion of the benefits of generic republics. Will a state legislature that delegates significant election powers to state agencies be structuring its legislature as it sees fit, consistent with the deference parts of *Arizona* and *Moore*? Or will such action be deemed "nonlegislative" under the Court's more general sense of what constitutes "legislative power" and what design choices are consistent with "fundamental principles"?

2. *Deference, Bad Faith, and Circumvention.* — *Moore* ends with a weighty suggestion. Although state courts may perform their standard judicial review of statutes passed pursuant to the elections clause—and "apply state constitutional restraints" to those codes—federal courts can step in and halt that review if the state court's actions "so exceed the bounds of ordinary judicial review as to unconstitutionally intrude" on the role of the legislatures.[165] In short, if the state court reviews election laws in a manner that is qualitatively different from the way it treats laws in any other context, the Supreme Court may conclude that the state court is not acting in good faith and pull back on its posture of deference. The suggestion appears to be to defer to states unless they seem to be acting in bad faith.

This echoes an approach the Court uses in another structural context—one that embraces deference most overtly. The Eleventh

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161. See Mark S. Krass, Debunking the Nondelegation Doctrine for State Regulation of Federal Elections, 108 Va. L. Rev. 1091, 1094 n.12, 1109–11 (2022) (describing literature and judicial challenges arguing for Elections Clause constraints on state statutes that delegate election administration authority to executive branch and local officials).

162. See, e.g., Derek Clinger & Miriam Seifter, State Democracy Rsch. Initiative, Unpacking State Legislative Vetoes 12–14 (2023), https://uwmadison.app.box.com/s/hl6eyasw6yrc5i4k9futlzi09pk9ofau (on file with the *Columbia Law Review*) (describing states that allow a legislature to delegate legislative power to just one of its chambers or to a legislative committee—popularly known as a legislative veto—notwithstanding its unconstitutionality in the federal system).

163. See id.

164. See, e.g., Gundy v. United States, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting) (articulating such principles).

165. *Moore*, 143 S. Ct. at 2089–90.

Amendment guarantees to "the state" sovereign immunity, which shields states from suit in federal courts when that immunity applies.[166] What institutions, then, count as "the state"?

To answer that question, courts have developed a body of rules—known as the "arm of the state" doctrine—that is broadly deferential but contains exceptions meant in part to capture the possibility that institutions will attempt to circumvent the rules to claim broader immunity. The touchstone of the Court's inquiry in the arm-of-state context is the "provisions of state law that define the agency's character."[167] Each state may define its relationship to entities that sit at the boundary of "the state"—universities, public corporations, and interstate organizations like the Port Authority—differently. Such entities may, therefore, be part of "the state" in California, but not in Colorado.

But defining "the state" for sovereign immunity purposes is not quite as simple as deferring to how a state has structured its government and situated the would-be arm of the state. Sometimes formal law does not capture the full functional relationship. Imagine an entity that is characterized in the state's legal code, for instance, as a state agency, but functions sufficiently independently that it does not seem that the state really treats the agency as its own. Put differently, formally characterizing an entity as a state agency or state instrumentality is cheap, but treating the entity as functionally part of the state by funding it, indemnifying it, and overseeing it is a resource-intensive endeavor.

The Port Authority, for instance, was described by the states of New York and New Jersey as a "joint or common [state] agency" and a "body corporate and politic."[168] It is also run by commissioners selected by each of its participating states and subject to the veto of each state's governor and the regulation of both states' legislatures.[169] Functionally, however, the Port Authority is structured to insulate the states from its hazards. Most importantly, it is (mostly) financially independent of its participating states.[170] When asked to decide in a 1994 case whether the Authority was an arm of the state, the U.S. Supreme Court thus considered multiple factors that are designed to encompass how the state speaks through both its formal characterizations and its functional structuring choices. In the

166. See U.S. Const. amend. XI; supra section I.A (discussing this amendment).

167. Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 n.5 (1997).

168. Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J., 819 F.2d 413, 415 (3d Cir. 1987) (internal quotation marks omitted) (quoting Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 689–90 n.53 (1978)), abrogated by Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994); see also N.J. Stat. Ann. 32:1–4 (West 1963); N.Y. Unconsol. Laws §§ 6401, 6404 (McKinney 1979).

169. *Hess*, 513 U.S. at 36.

170. Id. at 37.

end, it concluded the Port Authority was not part of its founding states and not able to assert their sovereign immunity.[171]

Arm-of-the-state doctrine thus, in some sense, reflects the features and limitations of a regime of deference to a state's structuring choices and the choices that courts have when they elect to defer. Courts can certify a question to the state supreme court and defer to its answer, as the Ninth Circuit did in *Hollingsworth*. But if it fears that a state will have incentive to expansively or narrowly characterize what counts as "the state," it can instead look to various functional indicators—generally drawn from the state's own law—rather than just accept a state's characterization in litigation documents or its formal statements about the would-be agency.

These considerations arise in contexts outside sovereign immunity. In *Biden v. Nebraska*, a case decided last term, the U.S. Supreme Court considered a similar question in a standing case, asking whether a state could claim as its own an injury suffered by an institution that was arguably part of the state and arguably not.[172] Six states sued the federal Secretary of Education over his decision to discharge student loan debt. The Court concluded that just one of those states, Missouri, had suffered sufficient harm to continue its suit.[173]

Missouri's standing story, however, was fairly intricate. Decades before, the state had established a nonprofit public corporation to service student loan debts known as MOHELA, the Missouri Higher Education Loan Authority.[174] MOHELA's involvement in the student loan market meant that the announced changes in federal student loan policies would at least arguably have harmed its bottom line, granting it the kind of injury sufficient to establish standing in federal court. But MOHELA not only declined to press its own lawsuit: it resisted Missouri's effort.[175] Missouri was thus in the awkward position of arguing that a nonprofit corporation that wanted nothing to do with the lawsuit was, in fact, sufficiently a part of the state that the state could claim its alleged harms as the state's own.

The majority agreed, reasoning that MOHELA's formal connection to the state was sufficient to permit the state to claim its injury as its own: "It was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State."[176] The dissent, however, emphasized that because

171. Id. at 32–33.

172. 143 S. Ct. 2355 (2023).

173. Id. at 2366.

174. Mo. Rev. Stat. § 173.360 (2023) (originally enacted as Missouri Higher Education Loan Authority Act, L. H.B. 326, 1981 Mo. Laws. 338, 340–41).

175. *Biden*, 143 S. Ct. at 2387 (Kagan, J., dissenting) (explaining that "MOHELA did not cooperate with the Attorney General's efforts" to develop the lawsuit). Indeed, when Missouri's Attorney General wanted documents from MOHELA to support its suit, the Attorney General had to file a formal sunshine law demand on the entity. Id.

176. Id. at 2366 (majority opinion).

MOHELA was a public corporation, it had the power to sue and be sued.[177] And so, the dissent's reasoning goes, federal courts should assume that the state had intended (before this litigation) that MOHELA would assert and defend its own interests in litigation, not have them mediated through the state as a unified entity. In the dissent's frame, the Court's emphasis on formal factors allowed the state to make a claim about state structure in bad faith—claiming MOHELA as its own when for standing purposes but disclaiming MOHELA when, for instance, the corporation is sued and the state does not wish to defend it. Under that account, federal courts should not only defer to states' stated preferences but to their revealed preferences as well.

E. *Nonintervention*

The last four sections have traced the Court's development of federal constitutional rules of state by acts of commission—by formulating doctrine that affirmatively speaks to state structural discretion. This section argues that federal courts can also influence state structural discretion by acts of omission—by declining to prevent unrelated legal principles, or the Court's own rules, from overriding or interfering with state structural choices. In these cases, the Court adopts a stated posture of nonintervention in a state structural dispute that arises incidentally to another constitutional question. But in declining to intervene, the Court ends up resolving the state question—as in many constitutional avoidance cases, the Court here cannot avoid impacting state structure, even as it tries to dodge, hedge, or sidestep it.

Consider the strange case of *Virginia Office for Protection and Advocacy* (*VOPA*) *v. Stewart*.[178] In that case, the Court acknowledged, but declined to create a doctrinal home for, a novel state structural interest implicated by state sovereign immunity doctrine and its *Ex parte Young* exception.[179] *Young* rests on the longstanding idea that because state laws that violate federal law are void, an individual who enforces them is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct" such that "[t]he state has no power to impart to him any immunity."[180]

Ordinarily, the plaintiff in such a lawsuit is a private individual or entity. But *VOPA* was unusual precisely because the plaintiff was not an individual, but one of the state's own agencies: the Virginia Office for Protection and Advocacy. The state had created the agency as part of a federal–state program in which, as a condition of receiving federal funds to support intellectually disabled individuals, the state agreed to either

177. Id. at 2387 (Kagan, J., dissenting) (citing Mo. Rev. Stat. § 173.385.1(3) (2016)).

178. 563 U.S. 247 (2011).

179. See id. at 260–61 (declining to find novelty).

180. Ex parte Young, 209 U.S. 123, 159–60 (1908).

create a state agency or authorize a private entity to (among other things) advocate for the interests of those individuals in court.[181] Virginia created VOPA, a state agency, for that purpose, and VOPA, in turn, filed suit against the commissioner of a different state agency—the Virginia Department of Behavioral Health and Developmental Services—for discovery in VOPA's investigation of the alleged violation of the rights of two patients in a state-run hospital.[182] In short, the case had an odd posture: one state agency suing another state agency in federal court (pursuant to federal law).

The case generated three separate opinions, each of which agreed that the suit was strange. Justice Antonin Scalia, writing the majority opinion allowing the suit to continue, acknowledged that the rarity with which federal courts assumed a role of hearing "lawsuits brought by state agencies against other state officials . . . gave [them] us pause" about allowing the suit to proceed.[183] But he nonetheless was dismissive of the stakes, writing, "[W]e do not understand how a State's stature could be diminished to any greater degree when *its own agency* polices its officers' compliance with their federal obligations, than when a *private person* hales those officers into federal court for that same purpose."[184] Kennedy, concurring, expressed more serious concerns: "Permitting a state agency like VOPA to sue officials of the same State," he wrote, "does implicate the State's important sovereign interest in using its own courts to control the distribution of power among its own agents."[185] The dissenting Justices, for their part, agreed that the state had a structural (or, in the dissent's language, "sovereign") interest in not being made to "turn . . . against itself" in a federal court.[186]

When one state agency can sue another in federal court, the state loses the ability to control how disputes among its own agencies are resolved—a basic question of governmental design. In some instances, for example, a state may wish to have competing interests within the state sue one another in state court. (This happens, of course, in the federal system, too, when Congress sues an executive official in federal court.[187]) Or when, as here, the two state institutions are executive in nature, the state may

181. See *VOPA*, 563 U.S. at 250–51 (citing Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15001 (2006); Protection and Advocacy for Individuals With Mental Illness Act, 42 U.S.C. § 10801 (2006)).

182. Id. at 251–52.

183. Id. at 260.

184. Id. at 257–58.

185. Id. at 263 (Kennedy, J., concurring).

186. Id. at 271 (Roberts, C.J., dissenting).

187. Even this is not without its structural issues in the federal system. See Z. Payvand Ahdout, Separation-of-Powers Avoidance, 132 Yale L.J. 2360, 2368 (2023) [hereinafter Ahdout, Separation-of-Powers Avoidance] (uncovering the careful measures federal courts take to avoid mediating direct disputes between Congress and the Executive as parties).

wish to resolve their dispute through managerial techniques—like having the governor simply direct one agency to give way to the other.

The difficulty for this case was how (and whether) to address those agreed-upon structural concerns. The dissent argued, in effect, for a new restriction on the application of *Ex parte Young*, limiting its use in cases in which state "dignitary" interests, like the structural concerns described above, are at play.[188] As in the standing context,[189] the dissent aimed to cognize a difference between public and private plaintiffs based on institutional and structural concerns. The majority, though, evaded those concerns. It conceded that "there are limits on the Federal Government's power to affect the internal operations of a State" but thought the *Ex parte Young* framework—which has historically focused on the identity of the defendant (a state official, not the state itself) rather than the identity of the plaintiff—was not the right place to accommodate those interests.[190] In our view, both intuitions are fair. That *Young* may not be the right home for these concerns is reasonable. So too is the dissent's if-not-here-then-where worry. Since an alternative vehicle to *Young* does not exist, to evade the question, as the Court did, is to deny the interest and to tax state structural choices in ways that matter, at least to the state involved. Immediately after this decision, Virginia did away with VOPA and instead opted to charge a private advocate with responsibility for representing the interests of intellectually disabled individuals in court.[191]

The Court's evasive posture in *VOPA* is not out of character. This Part has canvassed many cases in which the state structural interest is under-contemplated and under-conceptualized. But even when the Court has had total discretion to fix that problem, it has instead used a strategy of evasion. Consider, for instance, how the Court has exercised its authority to manage its own docket. There, on the Court's shadow docket and for the most part out of sight, state officials have fought in letters to the Court over who is lawfully empowered to speak for the state before the Court itself. And the Court has generally resisted any effort to resolve those disputes, instead adopting a kind of all-comers approach.

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188. *VOPA*, 563 U.S. at 269 (Roberts, C.J., dissenting).

189. See, e.g., Z. Payvand Ahdout, Enforcement Lawmaking and Judicial Review, 135 Harv. L. Rev. 937, 984–87 (2022) [hereinafter Ahdout, Enforcement Lawmaking and Judicial Review] (exploring federal judicial approaches to public and private plaintiffs in the standing context); Aziz Z. Huq, Standing for the Structural Constitution, 99 Va. L. Rev. 1435, 1438 (2013) (questioning what types of plaintiffs ought to have standing to vindicate structural constitutional values).

190. *VOPA*, 563 U.S. at 260.

191. See Va. Code Ann. § 51.5-39.1 (2024) (repealing code provisions establishing VOPA with effective date January 1, 2014); id. § 51.5-3913 (converting VOPA to a nonprofit entity).

This issue arose in *Moore v. Texas*, a death penalty case that came before the Court several times.[192] Moore had argued that he was ineligible for the death penalty because of his intellectual disability, and in *Moore I*, the Court agreed, finding Texas's framework for assessing intellectual disability claims infirm and remanding his case to the Texas Court of Criminal Appeals—the state's highest criminal tribunal—with instructions to adopt a constitutionally compliant methodology.[193] Purporting to apply a new methodology, the Texas criminal court reaffirmed its initial finding that Moore was not intellectually disabled, prompting Moore to return to the Supreme Court and seek summary reversal.[194] By that time, though, the Harris County District Attorney, the state prosecutor assigned to Moore's case, had decided that Moore was right: He did have a qualifying intellectual disability.[195] The prosecution said as much in its brief responding to Moore's petition for certiorari seeking summary reversal.[196]

That might have made the case an easy one in that even the prosecutor wanted Moore's conviction reversed. But, to complicate matters, the Texas Attorney General sought to intervene before the Court and "defend[] the decision below."[197] The problem was that the Attorney General was not authorized under Texas law to make decisions adverse to prosecutors in criminal cases before state or federal courts.[198] The Supreme Court thus had to decide—in the posture of an unusual intervention motion filed for the first time before the Court itself—who could lawfully represent the state.

Instead of consulting state law, however—which supports the position of the Harris County District Attorney and not the Attorney General—or deciding *who* actually represents the state, the Court hedged: It simply proceeded with the case and allowed the Attorney General to appear as an

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192. See Moore v. Texas (*Moore II*), 139 S. Ct. 666 (2019) (per curiam); Moore v. Texas (*Moore I*), 137 S. Ct. 1039 (2017).

193. *Moore I*, 137 S. Ct. at 1053 (citing Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004)).

194. Ex parte Moore, 548 S.W.3d 552 (Tex. Crim. App. 2018), cert. granted, judgment rev'd sub nom. *Moore II*, 139 S. Ct. 666.

195. *Moore II*, 139 S. Ct. at 670 (citing the prosecutor's statements).

196. Brief in Opposition at 9, *Moore II*, 139 S. Ct. 666 (No. 18-443), 2018 WL 5876925 (expressing "agree[ment] with the petitioner that he is intellectually disabled and cannot be executed").

197. Opposition of Petitioner to Motion of the Attorney General of Texas for Leave to Intervene as a Respondent at 3, *Moore II*, 139 S. Ct. 666 (No. 18-443), 2018 WL 6064848.

198. See Saldano v. State, 70 S.W.3d 873, 880 (Tex. Crim. App. 2002) ("The [Texas] Constitution gives the county attorneys and district attorneys authority to represent the State in criminal cases."); see also Tex. Gov't Code Ann. § 402.02 (West 2023) (authorizing the Attorney General to "assist[] the district or county attorney" but only "upon request"); Tex. Crim. Proc. Code Ann. art. 2.01 (West 2023).

amicus curiae.[199] The Court's evasion of the state law issue, by declining to render judgment about which of the two diverging state actors spoke for the state in court, was not without consequence. Although many interested parties write amicus briefs to the Supreme Court, research suggests that amicus briefs by states are particularly influential.[200] Here, moreover, the Court's evasion was potentially in tension with its own rules. The Court can grant certiorari without a brief in opposition, "except in a capital case."[201] As the Texas Attorney General pointed out, there is at least a plausible question whether a brief that agrees with the petitioner, even if styled as a brief in opposition, satisfies that rule.[202]

A similar issue arose in the October 2015 Term, when Illinois Governor Bruce Rauner filed an amicus brief in a case about the constitutionality of "agency fees" in public-sector unions. The brief explained that Rauner was "the Governor of the State of Illinois" and that "facts . . . he encountered upon being sworn in as Governor on January 12, 2015" drove his keen interest in the case.[203] The amicus brief proceeded to offer, from the governor's own perspective, "several salient examples from Illinois['s] experience with public-sector collective bargaining."[204] The brief prompted the Illinois Attorney General to file a letter with the court indicating that, under Illinois law, the state speaks with just one unified voice and the elected official who determines the positions voiced by the state is the attorney general, not the governor.[205] The Governor's attorneys filed a response letter of their own—indicating that the Governor was speaking in his individual, not his official, capacity—and

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199. Supreme Court of the United States, Dkt. 18-443 (Feb. 19, 2019) ("Motion of Attorney General of Texas for leave to intervene as a respondent DENIED. The Court has considered this filing as an amicus brief.").

200. See Ahdout, Enforcement Lawmaking and Judicial Review, supra note 189, at 967, 989; Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content, 49 Law & Soc. Rev. 917, 936 (2015) (finding based on "computer assisted content analysis" that "the [J]ustices are more likely to embrace information from amicus briefs filed by state governments and elite organizational interests"); id. at 926 ("[L]aw clerks have identified state amicus briefs as second only to those filed by the U.S. Solicitor General in terms of receiving special consideration . . . .").

201. Sup. Ct. R. 15 ("A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case, but is not mandatory except in a capital case . . . .").

202. See Opposition of Petitioner to Motion of the Attorney General of Texas for Leave to Intervene as a Respondent, supra note 197, at 6–7.

203. Brief of Bruce Rauner, Governor of Illinois, and Kaneland, Illinois; Unified School District # 302 Administrative Support Staff at 1, Friedrichs v. Cal. Teachers Assoc., 578 U.S. 1 (2016) (No. 14-915), 2015 WL 5317005.

204. Id. at 5–6.

205. Letter from Carolyn Shapiro, Solic. Gen. Ill., to Scott Harris, Clerk of the Ct., Sup. Ct. U.S., at 1–2 (Sept. 25, 2015), https://www.documentcloud.org/documents/2483671-madigan-1.html (on file with the *Columbia Law Review*) ("[T]he Attorney General is the chief legal officer of the state and its *only* legal representative in the courts . . . . " (quoting Scachitti v. UBS Fin. Servs., 831 N.E. 2d 544, 553 (Ill. 2005))).

the Attorney General replied again, arguing that the Governor's brief did not purport to speak in an individual capacity and, in any event, Illinois law would not have authorized that course of action.[206] Once more, the Court did not resolve the dispute, instead simply docketing the Governor's brief.[207]

There are many more examples of intrastate disputes about who "speaks" for the state.[208] And that is predictable: Many states have divided governments in which different elected officials will be drawn to opposing sides in federal litigation. Elections, moreover, can alter the legal strategies during the pendency of a lawsuit. State-level constitutional frameworks for determining who speaks for the state in different forms of litigation can also vary significantly.[209] In some, different departments of the state can each speak for themselves and the state allows itself, as a result, to speak in cacophony. In others, the state prioritizes unity and designates the attorney general or a different official (as Texas law prescribed for the prosecutor in *Moore*). What matters is that each state's own structural choice be respected, not disregarded.

In these cases, to that end, the Court had a range of options. It could have simply decided the state law question on the briefs and motions filed. It could have looked to its own case law, which has in recent years emphasized the importance of accepting, as intervenors, all those state institutions "lawfully authorized [as] state agents."[210] Or it could use an even simpler method, which would still take seriously the significance of state constitutions and state law in assigning state authority: It could

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206. See Letter from Jason Barclay, Gen. Couns. to Governor, and Dennis Murashko, Deputy Gen. Couns. to Governor, to Scott Harris, Clerk of the Ct., Sup. Ct. U.S., at 1 (Oct. 1, 2015), https://www.documentcloud.org/documents/2483672-rauner.html (on file with the *Columbia Law Review*) ("[T]he *amicus curiae* brief filed on Governor Rauner's behalf pursuant to Supreme Court Rule 37 makes very clear that it is filed only in his individual capacity . . . ."); Letter from Carolyn Shapiro, Solic. Gen. Ill., to Scott Harris, Clerk of the Ct., Sup. Ct. U.S., at 1 (Oct. 9, 2015), https://www.documentcloud.org/documents/2483673-madigan-2.html (on file with the *Columbia Law Review*) ("Mr. Barclay and Mr. Murashko claim that Governor Rauner submitted his amicus brief 'in his individual capacity.' But the brief makes no such claim . . . . Moreover, it would be unlawful for Mr. Barclay and Mr. Murashko, while acting as state employees . . . to represent Mr. Rauner in his individual capacity . . . .").

207. See Docket, Friedrichs v. Cal. Teachers Assoc. (docketing brief of Governor Bruce Rauner on Sept. 11, 2015).

208. See, e.g., Johnstone, supra note 30, at 1486 (cataloging instances in which both state attorneys general and governors sought to speak for the state in litigation connected to the Affordable Care Act); Letter from Susan Herman, Me. Deputy Att'y Gen., to Karen Mitchell, Clerk, U.S. Dist. Ct for the N. Dist. of Tex. (Nov. 15, 2018) (on file with the *Columbia Law Review*) (clarifying that Governor Paul LePage, who joined an ACA lawsuit as a plaintiff, did not have authority to do so because the Attorney General "represent[s]" Maine's interests in litigation).

209. Devins & Prakash, supra note 66, at 513–20.

210. See, e.g., Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2202 (2022) (interpreting Fed. R. Civ. P. 24(a)(2)).

require state agents to certify that they have the authority to represent the interests of the state in the filing.[211]

In confronting similar issues in the federal system, the Court would—at the very least—see as highly significant the question of who lawfully speaks for the government. In *United States v. Providence Journal Co.*, the Court considered whether a special prosecutor of a judicial contempt order could petition the Supreme Court for certiorari when the Solicitor General declined to give that prosecutor permission to do so.[212] The United States Solicitor General is, after all, the individual vested with authority to represent the interests of the United States before the Supreme Court.[213] But the Solicitor General claimed that this case—involving judicial power—was not one in which the United States had an "interest" and so it disclaimed a responsibility to represent.[214] In a protracted opinion, the Court parsed whether the judicial power of the United States was something different from the "United States" for purposes of representation in federal court.[215] Ultimately, the Court concluded that the judicial power was one of the interests of the United States that the Solicitor General is charged with representing, so the special prosecutor could not petition for certiorari without the Solicitor General's authority.[216] Although the Court's conclusion is telling, it is the Court's rigor in examining this federal representation issue that is most important here. When faced with analogous state-level questions, the Court does not apply an approach of parity.

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This Part has shown that in many more cases than previously recognized, federal courts have read the Constitution to regulate state institutional design. These rules of state structure are the outgrowth of an eclectic set of indirect and often inconspicuous constitutional references: of spare mentions of "the states"; of unelaborated invocations of state "legislatures," "executives," and "judges"; of provisions governing generic topics like Article III standing that seem little connected to federalism or state structure; and of common law constitutional rules with accreted assumptions about how states govern. Taking this body of law seriously

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211. This is a technique sometimes used by Congress in accepting "consent" to cooperative programs from state agents. See Fahey, Consent Procedures, supra note 30, at 1621. A variation on this theme is to require the certification to cite relevant legal authority, a technique also used in the cooperative context. Id. at 1566.

212. 485 U.S. 693, 694–95 (1988). For more on the Solicitor General's role in defining the United States' interests in federal court, see generally Z. Payvand Ahdout, "Neutral" Gray Briefs, 43 Fordham Int'l L.J. 1285 (2020).

213. 28 U.S.C. § 518(a) (2018).

214. *Providence J.*, 485 U.S. at 700.

215. Id. at 700–03.

216. Id. at 701.

suggests that state structure is a significant federal constitutional concern, one that courses through constitutional provisions governing a range of subjects and areas. And it requires the conclusion that the Constitution has not one but many different understandings of what a state is and what structures it must act through for different purposes.

Those conclusions are in tension with the conventional assumption that the states have broad structural self-determination.[217] They are in tension, as the next Part shows, with traditional federalism values. They are also, perhaps more surprisingly, in tension with updated and more persuasive accounts of federalism and its objectives, which are friendly in many other ways to blurring the lines between the federal government and the states.[218] And they are in tension with the Court's commitments and institutional sensitivities in analogous areas. To name just one, they suggest that although Congress must speak clearly when it disrupts the federal–state balance of power,[219] the Constitution itself pursues a course of state structural regulation in cryptic and convoluted ways. The next Part explores those tensions and suggests ways to minimize them.

III. MAKING SENSE OF FEDERAL CONSTITUTIONAL REGULATION OF STATE STRUCTURE

This Part begins to make sense of the cases discussed above. It first suggests a vocabulary—the terms *layered constitutionalism* and *structural interdependency*—to clarify just what is happening in these cases, and what the Court is saying about the federal Constitution when it introduces new constraints on state structural discretion. Next, it considers how structural interdependencies fit with both classic and modern federalism values and how they relate to the Court's institutional role.

A. *Layered Constitutionalism and Structural Interdependency*

This section begins by suggesting a conceptual vocabulary for understanding what aspects of our federalist system are implicated in these cases—one that clarifies why the federal regulation of state structure raises questions that are central, not just peripheral or incidental, to our system of federalism.

Federalism is a varied form of government that can be fine-tuned across a range of design dimensions. Three design choices—related to boundaries, policy jurisdiction, and rules of engagement—get the lion's

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217. See sources cited supra note 3.

218. This tension is discussed at greater length below. See infra section III.B.

219. See Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (alteration in original) (internal quotation marks omitted) (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989))).

share of attention in American federalism. Federalist systems must, of course, decide where to draw territorial boundaries between units of government, disputes which once crowded the Supreme Court's federalism docket, and continue (if in less imposing number) today.[220] Federalist systems must also decide how to allocate policy jurisdiction among those units of government, the meaning of the Tenth Amendment, and the scope of preemption under the Supremacy Clause.[221] A federalist system must also author rules that govern how power and jurisdiction can be renegotiated, combined, and exchanged: the "rules of engagement" for domestic governments.[222]

Given the Supreme Court's overriding focus on those three features of our federalism, it is not surprising that it has failed to see the cases collected here as reflecting significant federalism stakes. These cases concern a different federalism design feature—namely, how to legally organize state governments within a federalist system. It would be difficult to understand this case law—or, for that matter, how our federalism works, what its benefits are, and how those benefits can be secured—without appreciating the choices that our constitutional system has made about how state governments should be structured.

On this design dimension, federalist systems have a range of options. States (or "subsidiary governments," as they are often called in

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220. Felix Frankfurter & James M. Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L.J. 685, 692, 705 n.87 (1925) (cataloguing the "enormous drain on the [Supreme] Court's time and energy involved in . . . intricate interstate boundary disputes" during the nineteenth and early twentieth centuries). Boundary disputes continue to be highly salient for Native nations, see, e.g., McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (holding much of Oklahoma is Native land), and although state boundaries today may seem to be etched in stone, boundary problems still arise. See Joseph Blocher, Selling State Borders, 162 U. Pa. L. Rev. 241, 243 nn.2–4 (2014) (documenting ongoing state boundary disputes).

221. See, e.g., Arizona v. United States, 567 U.S. 387, 398–400 (2012) (finding certain sections of an Arizona immigration statute were preempted by federal law); Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 584 (2011) ("The Arizona licensing law is not impliedly preempted by federal law."); United States v. Morrison, 529 U.S. 598, 617–18 (2000) (finding the Violence Against Women Act interfered with the "regulation and punishment of intrastate violence"); United States v. Lopez, 514 U.S. 549, 559–62 (1995) (striking down a federal criminal statute because it "has nothing to do with 'commerce'").

222. See Fahey, Federalism by Contract, supra note 20, at 2408 n.351 (arguing that the Court has created "rules of engagement" in its commandeering, coercion, and clear-statement cases, even if it has not understood them in those terms); see also NFIB v. Sebelius, 567 U.S. 519, 588 (2012) (establishing the rule that the federal government many not coerce state participation in joint programs); Printz v. United States, 521 U.S. 898, 935 (1997) (establishing the rule that the federal government must negotiate for state participation in joint programs rather than commandeer it); New York v. United States, 505 U.S. 144, 166 (1992) (same); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (establishing the rule that the federal government may not use ambiguity to induce the states into agreeing to joint programs). For an early scholarly treatment of this doctrine, see Robert A. Schapiro, Toward a Theory of Interactive Federalism, 91 Iowa L. Rev. 243, 285 (2005) (first suggesting the phrasing "rules of engagement").

comparative literatures)[223] can be structured as administrative organs of the federal government, with institutions chartered and amendable by the national legislature through statute.[224] They can be structured through text in the federal Constitution itself, as are the Canadian provinces.[225] They can be organized using corporate charters extended by the central government.[226] They can opt for a blend of differently ordered internal governments.[227] And most familiar to the United States, a federalist system's internal governments can be ordered through written constitutions—each subsidiary government memorializing a distinct governmental structure and portfolio of rights in a written document.

That is, of course, the form our constitutional system took at its founding—and has repeatedly renewed since. In 1776, the Continental Congress recommended that its constituent governments adopt written constitutions suitable to independent governance. By the time the federal Constitution was ratified in 1789, each had either written a new constitution, or in the cases of Rhode Island and Connecticut, determined that their existing charters, shorn of monarchical authority, would adequately perform that role.[228] The text of the federal Constitution

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223. See, e.g., Daniel Halberstam & Roderick M. Hills, Jr., State Autonomy in Germany and the United States, 574 Annals Am. Acad. Pol. & Soc. Sci. 173, 174 (2001); Mogens Herman Hansen, The Mixed Constitution Versus the Separation of Powers: Monarchical and Aristocratic Aspects of Modern Democracy, 31 Hist. Pol. Thought 509, 515 (2010); see also Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting) (using the term with reference to the governments of the European Union, Germany, and Switzerland).

224. The District of Columbia is structured this way, see District of Columbia Home Rule Act of 1973, Pub. L. No. 93-198, 87 Stat. 774 (codified at D.C. Code § 1-201.01 (2024)) (articulating the governmental structure of the District of Columbia). As is the Australian Capital Territory, see Australian Capital Territory (Self-Government) Act 1988 (Cth) (Austl.) (federal statute structuring government of the Australian Capital Territory).

225. See, e.g., Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.) Part V (national constitutional provisions enumerating the structure of the provincial governments).

226. Many of the smaller scale federalist systems that exist within each of the American states—connecting a state government to its towns, cities, and other municipalities—use this approach. See 2A McQuillin Mun. Corp. § 9:1 (3d ed. 2023) (describing municipal corporations and their charters).

227. Australia has a combination of differently structured subsidiary governments with six states that each has its own constitution and two territories that are administrative organs of the federal government. See, e.g., Australian Constitution s 106 (constitutions of the states); id. at s 122 (establishing central control of government of the territories). Reaching further back, Imperial Germany was composed of a particularly eclectic mix of monarchies, city-states, and territories. See Alon Confino, Federalism and the Heimat Idea in Imperial Germany, *in* German Federalism: Past, Present, Future 70, 72–73 (Maiken Umbach ed., 2002).

228. 4 Journals of the Continental Congress (1774–1789), at 342 (Worthington Chauncey Ford ed., 1906). As Gordon Wood has explained, Connecticut and Rhode Island had "corporate colonies" that "even before the Revolution were republics in fact," so they "simply confined themselves to the elimination of all mention of royal authority in their existing charters." Gordon S. Wood, The Creation of the American Republic 1776–1787, at 133 (1998).

reflects this constitutional ordering in the states by contemplating the *a priori* existence of state constitutions in the Supremacy Clause, which provides that federal law shall be supreme, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[229] The long process of state admission over the next century and a half repeatedly reenacted our commitment to layered constitutionalism. The standard template for Congress's enabling acts, which set forth admissions criteria for new states, made a written constitution a precondition of statehood.[230] The Reconstruction Act of 1867 likewise conditioned readmission on the formation of a new "constitution of government in conformity with the Constitution of the United States."[231]

State constitutions, like the federal Constitution, articulate rights. But constitutions also organize the exercise of governmental power: They charter institutions and offices, invest them with authorities, burden them with boundaries, specify agency relationships, and establish the processes and mechanisms of governance. State structures vary from one another and from the federal government. Some states bundle their executive branch with the governor at the helm, generally mirroring the federal government's unitary executive; others unbundle the executive branch, electing posts ranging from attorney general to state treasurer and vesting them with the autonomy that follows.[232] Some states appoint, and others elect, the judges on their high court.[233] Many but not all states depart from the federal government in permitting a form of legislative veto,[234] the states vary their governors' involvement in the lawmaking process,[235] they

229. U.S. Const. art. VI, cl. 2.

230. A representative example is the Enabling Act of 1802, which set forth the conditions of Ohio's entry into the Union and formed a template for future admissions. See Enabling Act of 1802, ch. 40, § 5, 2. Stat. 173, 174 (conditioning Ohio's entry on a constitutional convention accepting Congress's invitation to "form a constitution and state government"); see also, e.g., Act of 1889, ch. 180, § 4, 25 Stat. 676, 676 (same for North Dakota, South Dakota, Montana, and Washington); Nevada Admission Act, ch. 36, § 4, 13 Stat. 30, 31 (1864) (same).

231. The Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429.

232. Council of State Gov'ts, supra note 40, at 160, 169, 174, 184 (describing states that variously appoint and elect functions ranging from the attorney general and secretary of state to state auditor and state comptroller).

233. Id. at 203–05. States like Alabama, Georgia, Oregon, Pennsylvania, Texas, and many others elect their supreme courts. Others appoint justices in a variety of ways: by the governor with legislative consent, by the governor with advice from a nominating commission, and by the governor alone. Id.

234. Compare id. at 99–101 (comparing fifty state systems of "legislative review of administrative rules"), with Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) (barring legislative veto in the federal system).

235. Council of State Gov'ts, supra note 40, at 114 (comparing gubernatorial powers across fifty states).

distribute powers between their state and local governments differently, and much more.[236]

The states also take note of intellectual developments in institutional design, and they structurally experiment. Indeed, they were America's original structural innovators: Although the federal government is often credited with the structural innovations in its Constitution, the historian Gordon Wood notes that the "office of our governors, the bicameral legislatures, [and] tripartite separation of powers . . . were all born during the state constitution-making period between 1775 and the early 1780s."[237] Unlike the federal Constitution, state constitutions are frequently amended and they have continued to structurally evolve. Following theories of popular democracy in the early part of the twentieth century, a wave of states constitutionalized popular referenda and initiatives.[238] And in the early part of this century, joining nations around the world, another wave of state constitutional amendments chartered nonpartisan redistricting commissions—part of an experimental category of "guarantor institutions" or the "fourth branch."[239]

American federalism, in short, is a system of layered constitutionalism—one in which not only the central government but also the subsidiary governments operate according to constitutional frameworks.

For decades, scholars and judges have plumbed the implications of our layered constitutionalism for individual rights. Supreme Court Justice William Brennan spawned a generation of interest in the interplay between federal and state constitutional rights when he proclaimed one of the great "strengths of our federal system" is its "double source of protection for the rights of our citizens."[240] More recently, interest in how

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236. For a small sampling of the growing body of comparative work on state structure, see, e.g., Jeffrey S. Sutton, Who Decides? States as Laboratories of Constitutional Experimentation (2021); Robert F. Williams, The Law of American State Constitutions (2009); see also sources cited infra 240–243.

237. Gordon S. Wood, Foreword: State Constitution-Making in the American Revolution, 24 Rutgers L.J. 911, 911 (1993); see also id. ("Not only did the formation of the new state constitutions in 1776 establish the basic structures of our political institution, their creation also brought forth the primary conceptions of America's political and constitutional culture that have persisted to the present.").

238. Bulman-Pozen & Seifter, supra note 86, at 888.

239. See Tarunabh Khaitan, Guarantor Institutions, 16 Asian J. Compar. L. S40, S41 (2021); Mark Tushnet, Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries, 70 U. Toronto L.J. 95, 96 (2020) (calling them "institutions protecting constitutional democracy"). Many states now have redistricting commissions, see, e.g., Ariz. Const. art. IV, pt. 2, § I; Cal. Const. art. V, §§ 1–3; Colo. Const. art. V, § 44; Idaho Const. art. III, § 2; Mich. Const. art. IV, § 6; Mont. Const. art. V, § 14; Wash. Const. art. II, § 43.

240. See Brennan, State Constitutions, supra note 16, at 503; see also William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535 (1986). For a sampling of the large body of more recent literature, see, e.g., Jeffrey S. Sutton, 51 Imperfect Solutions: States and

state constitutions layer additional rights on top of the federal floor has surged again in the aftermath of *Dobbs v. Jackson Women's Health Organization*.[241] But constitutions do not just enumerate rights. They also elaborate structures.[242] Making sense of the cases collected in this Article requires an understanding of the less-scrutinized structural facets of layered constitutionalism.[243]

One way of layering constitutional governments is to sharply separate them, to carefully distribute power between layers, then let each decide how to internally manage its allocated power. This is the idea in the much-cited passage from Federalist 51 describing how power is distributed in our "compound republic." James Madison explains: "[T]he power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among

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the Making of American Constitutional Law (2018); Emily Zackin, Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights (2013); Robert F. Williams, State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?, 46 Wm. & Mary L. Rev. 1499, 1502 (2005).

241. 142 S. Ct. 2228 (2022); Becky Sullivan, With *Roe* Overturned, State Constitutions Are Now at the Center of the Abortion Fight, NPR (June 29, 2022), https://www.npr.org/2022/06/29/1108251712/roe-v-wade-abortion-ruling-state-constitutions [https://perma.cc/YMU9-EK2S] (cataloging judicial strategies focused on state constitutional rights).

242. One of us has recently extended similar insights about federal constitutional rights into federal structural constitutional law. See Ahdout, Separation-of-Powers Avoidance, supra note 187, at 2413–18.

243. Two existing scholarly conversations about state constitutionalism bear on structural questions related to layered constitutionalism. First, some state courts have used federal analogies (and federal doctrine) to interpret state structural provisions—a migration of so-called "locksteppping" into questions of structure. Scholars have generally been critical of that practice because of the many nuanced differences between state and federal institutions of government. See, e.g., John Devlin, Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions, 66 Temp. L. Rev. 1205, 1224 (1993) ("[D]ivergences between federal and state governments and constitutions . . . [make the] relevance of federal models to issues of state constitutional law . . . questionable . . . ."); Robert A. Schapiro, Contingency and Universalism in State Separation of Powers Discourse, 4 Roger Williams U. L. Rev. 79, 81 (1998) ("[F]ollowing federal separation of powers doctrine leads to distorted and unsatisfying efforts at state constitutional interpretation."). Second, in a growing comparative literature on "subnational constitutionalism" or "subconstitutionalism," comparative scholars have theorized that the structure of the central government may, by performing certain functions for substate governments, alter the structural design incentives for substates. See, e.g., Tom Ginsburg & Eric A. Posner, Subconstitutionalism, 62 Stan. L. Rev. 1583, 1602 (2010) (noting that subsconstitutionalism in the United States led to "greater majoritarianism, weaker rights, and more frequent amendment" of state constitutions); see also Constitutional Dynamics in Federal Systems: Sub-national Perspectives 20–32 (Michael Burgess & G. Alan Tarr eds., 2012) (noting "the variety of constitutional sub-national experience"); Federalism, Subnational Constitutions, and Minority Rights (G. Alan Tarr, Robert F. Williams & Josef Marko eds., 2004) (collecting essays on this topic); Jonathan L. Marshfield, Models of Subnational Constitutionalism, 115 Penn. St. L. Rev. 1151, 1160–61, 1166–67 (2011) (observing that subnational units have varying forms and degrees of discretion when compared across systems).

distinct and separate departments."[244] This produces, he elaborates, a "double security," in which the "different governments will control each other, at the same time that each will be controlled by itself."[245]

After power is divided between the states and federal government, each state's constitution, the idea goes, will further divide its own power internally and so enable the self-control typical of systems of separated powers. Layered constitutionalism, in that frame, is composed of institutionally distinct and self-controlled constitutional republics. Some scholars of state constitutionalism have described states in this way.[246]

But that account is incomplete. The federal Constitution clearly contemplates, and doctrine has long settled, some federal constitutional regulation of state structure. Our system of layered constitutionalism has (and needs) structural interdependencies. For example, as noted at the beginning of Part I, the federal Constitution requires state courts to enforce federal law, thus impressing state courts into federal service; it requires state governments to yield to federal constitutional rights, thus imposing on them structural obligations to carry out those substantive guarantees commensurate with their place in our federal system; and it states—expressly—that those governments must be "republican" in form.[247]

With that vocabulary in mind, consider again the cases discussed in Part II. When the Supreme Court holds that state initiative proponents cannot represent the State in federal court,[248] or when it gives preference to the state legislature's positive-law enactments when determining whether the Eighth Amendment prohibits capital punishment,[249] the Court does not just issue a decision about substantive federal law (that is, about the law of Article III standing or the Eighth Amendment). It also makes a claim about how the federal Constitution views state structure—indeed, it is a claim *that* the federal Constitution has something to say about state structure at all. The cases identified in this Article, in short, expand the Constitution's structural interdependencies beyond those that are textually explicit or structurally obvious by articulating additional federal constitutional regulations that speak to state structure. The commonly expressed intuition that the states generally have broad structural discretion, therefore, needs to be qualified not only by the

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244. The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

245. Id.

246. See, e.g., James A. Gardner, Subnational Constitutionalism in the United States: Powerful States in a Powerful Federation, *in* Routledge Handbook of Subnational Constitutions and Constitutionalism 294, 294 (Patricia Popelier, Giacomo Delledonne & Nicholas Aroney eds., 2022) ("[States have] virtually complete constituent powers of self-organization . . . .").

247. See infra section III.B.4.

248. See supra notes 70–74 and accompanying text.

249. See supra notes 117–126 and accompanying text.

handful of settled exceptions (the Supremacy Clause, rights, and the Guarantee Clause), but by the larger portfolio of implicit structural interdependencies gathered here. What follows begins to make sense of these cases by thinking about what is at stake when courts etch new structural interdependencies into a federalist system committed to layered constitutionalism.

B. *Structural Interdependency and Federalism Values*

The cases identified in Part II implicate a common conceptual question: When should a federal Constitution in a layered system work structural interdependencies? But the answers offered by the Court are plural and balkanized, developed without cross-pollination or comparison. Drawing them together lets us ask whether, as a basic matter, the Court has managed to confront the common problems raised by these cases, whether it has been consistent, and whether any inconsistencies can be justified. We find no coherent set of principles in these cases to orient where and why the federal Constitution regulates state structure—or what theory of federalism, federal–state interaction, or federal and state functions those regulations advance.

This section begins to ask what federalism values (values that get at how much authority should be diffused or centralized) have to say about layered constitutionalism and structural interdependencies. To be clear, these values do not alone resolve any concrete cases. This is a varied body of law, and in each case, there is much more than federalism at stake. Our goal is instead to refute the idea that the omission of serious federalism discussion in these cases is based in principle. Indeed, in our view, there are real federalism costs to recognizing new structural interdependencies that the Court should more directly frame and weigh in state structural cases.

1. *Dual Sovereignty.* — It is the Court's constant refrain that the Constitution embodies a theory of federalism as "dual sovereignty"—one that imagines the states and federal government operating as distinct and insular governments, each exerting a straightforward kind of "tax-raising, law-making, peace-keeping sovereignty" within an exclusive sphere of jurisdiction, that must be actively managed by judicial rules.[250] The federalism values the Court uses to justify that system are not our federalism values (we doubt that separation is as universally valuable as the Court believes and that it is achievable on the ground). But the structural interdependencies identified in this Article are so discordant with the Court's stated commitment to federal–state independence that it is worth discussing.

The Court's conventional portfolio of federalism values develop reasons to value separation, such as preserving state sovereignty (a shape-

250. Fahey, Consent Procedures, supra note 30, at 1570.

shifting value that can be made to justify virtually any deference to the states),[251] localizing governance,[252] promoting experimentation and competition,[253] and preventing the concentration of power in the federal government as a "checking function" against tyranny.[254] Those objectives generally do not delineate between the value of protecting state jurisdiction and the value of protecting state structure; indeed, they only very rarely peer into the states and see them as anything other than unified entities. But it is difficult to see how these values can be achieved without taking seriously a state's structural self-determination.

That idea is elaborated, if briefly, in *Gregory v. Ashcroft*, which concerned the application of the federal Age Discrimination in Employment Act (which prohibits most mandatory retirement rules) to Missouri's constitutional requirement that judges retire at age seventy.[255] Finding a significant federalism value in the state's interest in controlling its own employees, the Court applied a federalism interpretive canon requiring Congress to make regulations applicable to state operations in express terms, and found that the Act did not meet that bar.[256] Explaining the state interest, the Court placed structural autonomy at the heart of "sovereignty": "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."[257] What good is the power to govern if the mechanisms of government are controlled by someone else? As the Court appreciates, at least in heuristic terms, the value of dual jurisdictional sovereignty is difficult to vindicate without dual structural autonomy to complement it.[258]

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251. See, e.g., Alden v. Maine, 527 U.S. 706, 714 (1999) ("[The] Constitution preserves the sovereign status of the States . . . .").

252. NFIB v. Sebelius, 567 U.S. 519, 536 (2012) ("[Federalism ensures] powers which . . . ['concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy." (quoting Federalist No. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961))).

253. Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416, 416–24 (1956) (describing the idea that a "mobile" citizenry will seek out membership in the best governed local polities); see also New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (hypothesizing that the states, if left sufficiently to their own devices, will serve as the "laboratories" of democracy).

254. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

255. See id.

256. Id. at 461, 470.

257. See id. at 460.

258. Cf. Printz v. United States, 521 U.S. 898 (1997) (establishing that the federal government may not commandeer state executive apparatuses); New York v. United States, 505 U.S. 144, 166 (1992) (prohibiting the federal government from commandeering state legislative processes).

2. *Federal Supremacy.* — A second value worth considering as a justification for some structural interdependencies is the value of federal supremacy. The basic structure of that claim is straightforward: The federal Constitution confers a right or duty on the federal government; that federal function cannot be performed without assistance from the states; state assistance must therefore take a particular structural form. Indeed, this is the justification for one of the Constitution's overt structural interdependencies: the Supremacy Clause's requirement that state courts enforce federal law.

The Supremacy Clause makes federal law "the supreme Law of the Land."[259] But it also expresses an enforcement mechanism: The "*Judges* in every State shall be bound thereby."[260] State judges cannot deny federal supremacy simply by declining to enforce federal law. At the same time, the Court has recognized that the states must have "great latitude to establish the structure and jurisdiction of their own courts."[261] The reason is easy to appreciate in layered constitutionalism terms: As the great debates internal to the federal system show so clearly, how a constitution confers and restricts judicial jurisdiction can profoundly shape the government's capabilities, accountability, and the rule of law.

But layered constitutionalism must also yield when a state's constitutional structure presents an obstacle to the supremacy of federal law. States cannot, for instance, permit their courts to deny federal rights in proceedings "properly before them,"[262] or strip their courts of jurisdiction because of policy disagreements with federal law,[263] or deny causes of action to effectively immunize a class of defendants from federal law.[264]

But that justification is not aired in the cases collected here. Consider the Elections Clause. State "legislatures" undoubtedly perform federal functions when they regulate and administer federal elections. That state legislatures perform those regulatory functions for federal elections is of potential significance to the federal government's ability to function. If a state disclaimed the interior authority to regulate elections, that structural choice might well undermine the cause of federal supremacy.[265] But how a state legislature regulates elections—with or without gubernatorial veto,

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259. See U.S. Const. art. VI, cl. 2.

260. See id. (emphasis added).

261. Howlett v. Rose, 496 U.S. 356, 372 (1990).

262. Douglas v. N.Y., New Haven & Hartford R.R., 279 U.S. 377, 387–88 (1929).

263. Mondou v. N.Y., New Haven & Hartford R.R., 223 U.S. 1, 57 (1912).

264. Haywood v. Drown, 556 U.S. 729, 742 (2009) (calling an invalidated state jurisdictional statute "effectively an immunity statute cloaked in jurisdictional garb").

265. Or it might not: The Elections Clause authorizes Congress to "make or alter" state elections codes. U.S. Const. art. I, § 4, cl. 1. So it would also be plausible for a court to hold that if a state disclaims its Elections Clause powers, the federal government can simply regulate in its stead.

with or without an independent redistricting commission, or with or without involvement from popular referenda—is of far less relevance to the cause of federal supremacy. So too in the Eighth Amendment context: The federal government may have an interest in measuring popular preferences as expressed through institutional mechanisms (rather than as expressed in opinion polls). But that interest is no less vindicated when the Court uses the institutions as the state has itself structured them, rather than as the Court would see (or simplify) them.

3. *Uniformity.* — It is an uncontroversial observation that federal law should, for the most part, be uniform. It should not mean something different in each of the fifty states. In the adjacent area of diversity suits, for instance, *Erie* requires federal courts sitting in diversity to apply state common law rather than their own interpretation of "general law."[266] But the *Erie* principle must yield in cases that implicate a significant interest of the federal government—the law that applies to its contracts, for instance—and where state law would "subject the rights and duties of the United States to exceptional uncertainty."[267]

Perhaps, then, structural interdependencies can be justified not by the need to guide the states toward a *particular* governmental structure, but by the need to guide the states toward a *uniform* governmental structure. The justification could be formal: like the view that the word "legislature" must mean the same thing in each state or else be so indeterminant as to mean nothing. Or it could be functional: the view that understanding and accommodating state differences imposes an intolerable burden or uncertainty on the federal government.

But our system of layered constitutionalism helps answer the formal case for uniformity. For embedded in the Constitution is state structural disuniformity. The states could have been assigned standard frameworks for government in the text of the federal Constitution, but they were not. Theirs, instead, was diffuse, organic, and self-structuring. When the Constitution references the states and their institutions, it references the constitutionally organized republics that preexisted the Constitution and that were admitted by Congress into its league of states only after adopting a constitution. Context suggests, in short, that those references are means of incorporating the states in that form, not means of furtively redefining and standardizing them.

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266. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938). *Erie* does not, to be clear, apply to the state structural questions gathered in this Article—for it expressly exempts "matters governed by the Federal Constitution" and these cases clearly arise from that document. See id. at 78 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

267. Clearfield Tr. Co. v. United States, 318 U.S. 363, 367 (1943). See also Boyle v. United Techs. Corp., 487 U.S. 500, 517 (1988) (Brennan, J., dissenting) ("Thus, *Erie* was deeply rooted in notions of federalism, and is most seriously implicated when, as here, federal judges displace the state law that would ordinarily govern with their own rules of federal common law.").

The functional motivation for uniformity is likewise easy to overcome. That claim is perhaps strongest in a context like Article III standing, in which rules of standing apply to a wide range of individuals and institutions. Specialized rules for different entities are not costless. But in *Hollingsworth*, the Court did not need to guess who the state authorized to represent itself in Court. The Ninth Circuit certified that question to the California Supreme Court and the Court returned an answer in its own voice.[268] Because of *Erie*, moreover, federal courts are well practiced at ascertaining state law on particular questions. So it seems unlikely that uniformity could be justified on the ground that it imposes too great a burden on federal courts.

4. *Republicanism.* — From the perspective of institutional design, there is a straightforward reason to authorize a central constitutional court to intervene in state structuring choices: The states, like the federal government, sometimes make poor structural choices. It could make sense to empower the central government to review and, subject to guidelines, override those choices. Perhaps, then, structural interdependencies may serve a republicanism- or democracy-reinforcing character. Maybe the assignment of duties to state legislatures is an invitation for the Court to imagine the features of an ideal American legislature and constrain states—at least when performing the federal constitutional roles assigned to those bodies—to act in that institutionally preferred form.

That is a plausible understanding of the purpose of the Guarantee Clause, which instructs the federal government to "guarantee to every State in this Union a Republican Form of Government."[269] If the Union is to be republican, the idea goes, there must be a way of ensuring the republican character of each of its constituent parts. But it is notable that when confronted with a constitutional provision that speaks expressly and directly to the character and structure of state government—text much more inviting than the bare mention of "states" or state "legislatures," "executives," or "judges,"—the Court has stepped gingerly, and resisted arrogating to itself the power to sift through state structural choices and assess their republican character.

There are many good reasons for that restraint. One is embedded in the value of republicanism itself: A people's structural self-determination is a basic feature of its republican character.[270] Each state is republican in form at least in part because it constitutionally charters its own institutions

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268. See supra notes 68–74 and accompanying text.

269. U.S. Const. art. IV, § 4.

270. See Duncan v. McCall, 139 U.S. 449, 461 (1891) ("By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration . . . ."); see also Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 23 (1988) (elaborating that argument).

of government. Even as it positions the federal government as "guarant[or]" of the states' character, the Clause also encumbers the federal government not to disregard their legitimate republican choices, lest it become the instrument of their republican dissolution, rather than protector of their republican character.[271] So too each state is republican in form at least in part because it uses systems of institutional accountability—like the separation of powers among coordinate branches, processes like bicameralism and gubernatorial presentment that stitch separate institutional actions together, and calibrated forms of intergovernmental interaction like judicial review or the legislative veto. Republicanism, as amply indicated by the federal system, cannot be guaranteed through simple voter control over a single institution. Institutions exist—and represent—within rich contexts. Reaching into a state and restructuring one of its branches (or federalizing one of its branches and removing it from those forms of systemic control) will inevitably alter that institution's representative character. The task of understanding how a federal decision might reinforce or detract from a state's system of representative government is a perilously difficult one. And there is little evidence that the Supreme Court recognizes and thinks critically about how to productively manage those effects in Part II's structural interdependency cases.

Another cause for restraint, of course, is the Court's institutional competency to decide what constitutes "republican" government. Indeed, questions of institutional competency have prompted the Court to reject the Guarantee Clause's invitation to elaborate constitutional rules of state republicanism and instead to find issues related to the Clause are nonjusticiable political questions.[272]

To the extent that the Court thinks of itself as nudging states toward better, more democratic, governing structures—as the generic republic analogy perhaps gestures at—it is perhaps no accident that the Court has expressed skepticism of state institutional innovations that depart from a conception of republicanism in vogue in 1789. In *Hawke v. Smith*, for instance, the Court resisted the broad trend in the states to subject highly salient action by popular assemblies—like the ratification of a constitutional amendment—to popular referenda.[273] In *Hollingsworth*, likewise, the agency relationship that triggered the Court's scrutiny—which deputized the civilian proponents of California's citizen initiative to defend the law on the state's behalf—was a design feature that fortified the (to some, controversial) institutional innovation of popular

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271. U.S. Const. art. IV, § 4.

272. See Baker v. Carr, 369 U.S. 186, 218 (1962) ("Guaranty Clause claims . . . are nonjusticiable [political questions]."); Luther v. Borden, 48 U.S. 1, 42 (1849) (reasoning that the Guaranty Clause is binding on all departments of the government and not questionable in a judicial tribunal).

273. 253 U.S. 221, 231 (1920); see also supra note 90 and corresponding text.

referenda.[274] For referenda are valuable precisely when elected representatives lack incentive to enact a popularly preferred policy—just the circumstance when those same representatives could be expected to pretermit the referenda's success by declining to defend it in court. And in *Arizona Independent Redistricting Commission*,[275] the Court contorted its conception of a legislature still further to avoid putting its firm imprimatur on state structural experiment. There, it directly contradicted the claim in *Hawke* that referenda are not legislative, and upheld the state's redistricting commission as a "legislative" body. The Court did not issue this ruling because the voters had amended their constitution to include the commission within its legislative branch (as the voters had, in fact, done) but because they had done so through a referenda that exercised legislative power.

5. *Federal Rights.* — A significant federal justification for structural interdependency is the vindication of federal rights. Indeed, as noted above, states must structure their governments to comply with nearly every right enumerated in the federal Constitution.[276] The cases collected here, however, generally exist outside the rights context—illustrating how many state structural questions remain even when (as we do) we take a capacious view of federal rights protections and their capacity to limit state structural discretion.

One exception is the Eighth Amendment context, which connects federal rights and state structure in an unusual way. In the standard case, states must organize their governments to respect federal rights. In the Eighth Amendment context, the structural interdependency does not facilitate state compliance with the Constitution's ban on cruel and unusual punishment. It facilitates the Court's measurement of the voter preferences that render a punishment cruel or unusual in the first place. There is, simply put, no rights interest in the structural assumptions embedded in the Court's measurement process, so the Court's preference for legislatures—the structural interdependency embedded in the Eighth Amendment—cannot be justified by reference to securing federal rights.

6. *Integration.* — A final group of federalism values have not gained expression in judicial opinions but have been energetically pressed by scholars. Those scholars (ourselves among them) begin with a more realistic view of how federalism operates on the ground. Contrary to the Court's assumption that the states and federal government function separately, virtually every policy area—from education and land use to national security and immigration—has become the terrain of all levels of

274. See supra notes 66–77 and accompanying text.

275. 576 U.S. 787 (2015).

276. For an exception, see Roger A. Fairfax, Jr., Interrogating the Nonincorporation of the Grand Jury Clause, 43 Cardozo L. Rev. 855, 881 (2022).

government.[277] The states and federal government exchange and pool governmental powers, create legal spaces for joint governance, and devise increasingly creative forms of joint lawmaking, joint rulemaking, and joint enforcement.[278] American federalism is on a relentless drive toward intergovernmental integration, not separation.

As the states and federal government increasingly work together, some of the potential value of separation is lost: The states cease to look like the "sovereigns" that so many federalism doctrines are concerned with protecting; power moves between governments and is pooled in joint programs, casting doubt on some of the "anti-tyranny" functions of diffusing power in the first place; and policy areas once reserved for the local governments, who could operate closer to the people, become intertwined with federal, top-down policymaking.

But in this increasing federal–state integration, there are new opportunities for the kind of intergovernmental friction, negotiation, and accommodation that yields institutional vitality. The federal government and states can devise new modes of governance by drawing together and reorganizing their respective institutional capacities.[279] States can serve as "dissenter, rival, and challenger" within coordinated programs combatting the stasis common in bureaucracy.[280] Within those integrated spaces can arise the "discursive benefits of structure" by enlarging the opportunity for the kinds of interactions through which federal and state officials "tee up national debates, accommodate political competition, and work through normative conflict."[281] When federal and state governmental structure is so often static, their flexibility in structuring cooperative programs is a source of adaptation and resilience.

Structural-interdependence cases pose a kind of puzzle for these scholars. Most are, on the one hand, broadly skeptical of judicially crafted federalism rules that try to overlay abstract formalism onto messy and adaptive institutions. But they are, on the other hand, broadly in favor of

277. While also acknowledging, of course, the historical practice of coordination between the federal government and the states. See generally Daniel J. Elazar, The American Partnership (1962) (documenting the nineteenth-century history of intergovernmental coordination).

278. See Bridget A. Fahey, Data Federalism, 135 Harv. L. Rev. 1007, 1045–54 (2002) [hereinafter Fahey, Data Federalism] (describing institutional innovation in the cross-governmental bureaucracies that oversee federal–state data pools); see also Bridget A. Fahey, Coordinated Rulemaking and Cooperative Federalism's Administrative Law, 132 Yale L.J. 1320, 1324 (2023) (describing the unorthodox cross-governmental rulemaking used to implement cooperative programs).

279. See Abbe R. Gluck, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale L.J. 534, 584–88 (2011) (canvasing a range of federalism models embedded in the Affordable Care Act).

280. Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 Yale L.J. 1256, 1258 (2009).

281. Heather K. Gerken, Federalism as the New Nationalism: An Overview, 123 Yale L.J. 1889, 1894 (2014).

intergovernmental integration, and these cases draw the Court—for once—into the project of facilitating it.

In our view, even those federalism scholars who have celebrated organic and voluntary federal–state integration on the ground should be skeptical of the judicially mandated federal–state interdependence in these cases. Integration that elides each government's democratic self-control threatens the rest of the integrative project. When the federal government and the states set up programs, processes, and administrative structures to pursue a joint project, those apparatuses gain legitimacy, and are subjected to democratic control, only independently: Each participating government must exert independent control over the officials and resources it contributes to the shared effort.[282] State constitutions provide the legitimating framework for the state agents that inhabit what one of us has called federalism's "interstitial spaces."[283] They supply the distinctions between those who act for the federal government and those who act for the state within the joint ecosystems that contemporary federalism scholarship celebrates. Perhaps most fundamentally, state constitutions—if structured by the state itself—permit a kind of genealogy of these democratically precarious coordinated programs: They let us trace the use of state resources—whether state personnel, state authority, or state assets—to a decision by someone who can claim authorization through a state-crafted decisionmaking process proscribed in a state-crafted constitutional framework.

C. *Structural Interdependency and Judicial Competency*

The last section argued that federalism values generally counsel in favor of constitutional separation. This section approaches the federal law of state structure from a different perspective. It considers the institutional sensitivities the Court confronts when it crafts federal constitutional rules of state structure. This section highlights three areas of institutional sensitivity that further counsel in favor of (federal) judicial restraint in this area: courts' institutional competency to make the kind of structural judgments these rules require, the incentives created by the social sensitivity present in these cases, and the distortions of the dispute-resolution posture in which these rules have arisen.

First, the Supreme Court should confront its institutional competency to make judgments about state structure. Does it have an informed intuition about the political valence of its judgments? Does it understand the effects of its rulings on state institutions? Even if it does, can it effectively devise rules to meet its objectives?

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282. Our governments, moreover, use treaty-like instruments to set up their joint projects precisely so that they can retain their independence even in partnership. Fahey, Federalism by Contract, supra note 20, at 2411–16.

283. Fahey, Data Federalism, supra note 278, at 1077.

Structural interdependencies sit at the intersection of two institutionally sensitive areas: federalism and the separation of powers. In both areas, the Court has expressed reasonable concerns about inserting itself into the political fray and doubts about its capacity to understand the institutional effects of its decisions. In the most analogous federalism context, one of the few contexts in which the Court was likewise in a position to make structural judgments about the states, the Court famously and almost jarringly conceded defeat. In *National League of Cities v. Usery*, the Court sustained a constitutional challenge to the application of the federal Fair Labor Standards Act to some state employees, reasoning that the Constitution restricted Congress from interfering with the states' "traditional governmental functions."[284] But in less than a decade, it reversed course, finding no judicially "manageable" standard with which to delineate traditional from nontraditional state governmental functions.[285] When it confronts questions of state structure head-on, in short, the Court has yet to realize an institutional competency to craft nuanced rules for state structural arrangements.

The cases identified here present a task still more complicated than crafting rules for fifty separate state systems. That is because these cases are also separation-of-powers cases. Not in the sense that they position the court to adjudicate disputes between the President and Congress, but because they so often arise as intramural state disputes between state governors and legislatures, attorneys general and initiative proponents, commissioners and administrators. These cases, in short, also raise familiar separation-of-powers sensitivities by positioning the Court to hand a win to one or another state political actor. They have many of the same rule-of-law sensitivities that inform the Court's thinking about its insertion into federal intramural disputes, but on an intersystemic axis that only magnifies those concerns.

The Court, therefore, needs not only to be assured of its competency to evaluate state-level institutional arrangements, it also needs to be aware of something like the intersystemic rule-of-law consequences of a national court making structural judgments for state systems. We might hypothesize, for instance, that state-level institutional actors—governors, legislatures, commissions, and the like—resort to federal courts not *ex ante* to establish clear rules of structural design before elections, appointments, and other power changeovers, but *ex post*, when the selection process has run its course and the litigious official has failed to prevail. In examples ranging from *Hollingsworth v. Perry*[286] to *Moore v. Texas*,[287] state officials try to disrupt the institutional design choices of their states through litigation.

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284. 426 U.S. 833, 852 (1976).

285. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 543 (1985).

286. 570 U.S. 693 (2013).

287. See Moore v. Texas (*Moore II*), 139 S. Ct. 666 (2019) (per curiam); Moore v. Texas (*Moore I*), 137 S. Ct. 1039 (2017).

When intervening in structural disputes, the Supreme Court thinks of its own role, often using language to lower the political temperature of its decision.[288] Indeed, federal separation-of-powers suits can set the president of one party against the legislature of another, which risks creating the appearance that the Court is choosing political winners and losers.[289] When the Court intervenes in state-level structural questions that have consequences for many or all of the states—as do most Elections Clause cases—those risks are multiplied across the many states. Now the Court is in a position not to choose one political winner, but as many as there are states affected by the rule. The political aftermath of federal judicial intervention in state political battles warrants greater research. The goal here is just to suggest that the institutional sensitives in this area are heightened and potentially novel.

Second, many structural interdependency cases have arisen incidentally in disputes over significant social or political issues—like presidential elections, marriage equality, and reproductive freedom.[290] Social salience influences the arguments that lawyers make concerning the merits and justiciability, and also about state structure.[291] Structural constitutional law, including intersystemic structural constitutional law, is not free from partisanship. Although views on executive power may correlate with and be influenced by social politics, one might think that the ground rules for layered constitutionalism ought to be settled free from—or at least further from—divisive social issues. A dispute about reproductive freedom, religious liberty, or gun rights, put differently, may not be the place to hash out whether states have autonomy over their own system of governance in a structural sense. Litigants (and judges) are understandably fixated on the socially salient issue before them. But because litigants are the engines of litigation and, indeed, courts are generally bound by the arguments parties make,[292] the merits influence the arguments about the non-merits. Yet some of the structural interdependencies this Article uncovers have arisen precisely in these socially charged contexts.[293]

But there is a deeper way that social salience may shape judicial decisionmaking. In the federal system, there is a well-known dynamic in

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288. See Ahdout, Enforcement Lawmaking and Judicial Review, supra note 189, at 982.

289. Ahdout, Separation-of-Powers Avoidance, supra note 187, at 2366 ("When federal judges opine on the separation of powers, they are not neutral arbiters of the separation of powers.").

290. See supra Part II.

291. See, e.g., Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95 (1974) (exploring the role and advantages of repeat players in litigation).

292. See June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2118 (2020) (declining to consider arguments that the State did not brief until its certiorari stage reply).

293. See supra notes 59–60 and accompanying text (discussing *Hollingsworth v. Perry*); notes 116–128 (discussing capital punishment); notes 104–112 (discussing *Bush v. Gore*).

which courts circumvent the socially significant issue by deciding cases on jurisdictional or quasi-jurisdictional grounds. Scholars and observers sometimes celebrate this behavior as an appealing judicial minimalism or a vindication of the "passive virtues."[294] The Court seems to use structural interdependencies as an escape hatch—to avoid other substantive questions—in the same way it uses jurisdictional doctrines like standing as tools of evasion. *Hollingsworth*,[295] for example, was framed as a case with high, politically salient stakes for marriage equality. The Court avoided the political fray by dismissing the case on standing grounds that were inflected with judgments about state structure. But the Court did not foreground—or even meaningfully discuss—those federalism concerns, even as its primary effect was to bound direct democracy in the states. State structure, that is to say, has come to serve as a hydraulic for the "passive virtues": Courts can avoid socially salient questions by ruling on justiciability or, as in some of cases discussed in Part II, on state structure. The worry, of course, is that evading a hard federal question by imposing structural constraints (and concomitant burdens) on the states is hardly passive or virtuous. The consequences of doing so are just less visible to federal judges concerned primarily with the federal system.

Third, when federal courts articulate legal rules, they do so through a system of dispute resolution: case-by-case and conflict-by-conflict. There are long-debated benefits and drawbacks of legal ordering through dispute resolution.[296] Scholars have long dissected and critiqued the federal courts' institutional role in adjudicating federal constitutional rights in a dispute resolution posture and, more recently, federal constitutional structure as well.[297] Those same concerns apply to

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294. See Alexander M. Bickel, The Supreme Court—1960 Term, Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 47–58 (1961).

295. Hollingsworth v. Perry, 570 U.S. 693 (2013).

296. These debates take many forms. One wave is about dispute resolution and institutional advantage. E.g., Richard H. Fallon, Jr., The Core of an Uneasy Case for Judicial Review, 121 Harv. L. Rev. 1693 (2008); Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978); Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L.J. 1346 (2006). A second wave centered on public law litigation's initial form. E.g., Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Owen M. Fiss, The Social and Political Foundations of Adjudication, 6 Law & Hum. Behav. 121 (1982); Susan P. Sturm, A Normative Theory of Public Law Remedies, 79 Geo. L.J. 1355 (1991). A more recent form extends into the new wave of public law litigation. E.g., Ahdout, Enforcement Lawmaking and Judicial Review, supra note 189; Davis, supra note 45; Tara Leigh Grove, Government Standing and the Fallacy of Institutional Injury, 167 U. Pa. L. Rev. 611 (2019).

297. E.g., Ahdout, Separation-of-Powers Avoidance, supra note 187 (arguing that federal adjudication of disputes between coordinate branches yields systemic distortions to federal separation-of-powers doctrine); Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731 (1991); Kermit Roosevelt III, Constitutional Calcification: How the Law Becomes What the Court Does, 91 Va. L. Rev. 1649 (2005); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978).

intersystemic structural disputes. Indeed, dispute resolution and conflict can be overexposed to opportunistic framing by litigants and a source of legal uncertainty as judges strain not to predetermine the answer to the next dispute.[298] Why has federal regulation of state structure developed in such a haphazard manner? At least in part because of a dispute resolution posture. Unlike other areas of federalism or separation-of-powers doctrine, there is no push-and-pull between judicial rules and legislative rules of the type that can have a salutary effect on dispute resolution by introducing courts to the broader-scale, prospective reasoning that is characteristic of legislative acts. The more pressing question is whether unaltered dispute resolution offers the best way forward or whether the Court should use techniques of restraint that it has used in other contexts to minimize its role relative to other federal and state actors. This Article cannot offer a satisfying answer to that richly important question here, but can instead flag it as a future area ripe for further development and debate.

CONCLUSION

American federalism is characterized by its layered constitutionalism. The structures of our governments are defined by fifty-one interconnected constitutions, each purporting to define its jurisdiction's separation of powers. But there is more to the story than this. In a system of layered constitutionalism, there are bound to be structural interdependencies to navigate the friction between constitutional governments. And indeed, the federal Constitution contemplates some of these in its text: The Guarantee Clause, the Supremacy Clause, the Bill of Rights, and the Reconstruction Amendments all bound state structure textually, and for good reason.

But this Article has shown that the common belief that states are free to structure themselves so long as they comport with these constitutional provisions must be updated. In a broader set of circumstances than previously believed, the Supreme Court has determined that the federal Constitution does circumscribe the structural autonomy that states possess. From Article III to the Eleventh Amendment and beyond, there is a rich landscape of intersystemic structural constitutional law that has been developed under our noses.

Once the legal architecture of structural interdependency is brought into view, it unlocks deep questions for both federalism and federal separation of powers. How and who should create structural interdependencies? What justifies limiting state structural autonomy? What does it mean to have structural interdependencies that are created in dispute resolution? How do these structural interdependencies affect

298. Frederick Schauer, Do Cases Make Bad Law?, 73 U. Chi. L. Rev. 883, 883 (2006) ("It is the merit of the common law . . . that it decides the case first and determines the principle afterwards." (internal quotation marks omitted) (quoting Oliver Wendell Holmes, Codes, and the Arrangement of the Law, 5 Am. L. Rev. 1, 1 (1870))).

state institutional design, and therefore substantive outcomes? This Article has sought to both begin this conversation and develop a vocabulary to move it forward.

PSYCHIATRIC HOLDS AND THE FOURTH AMENDMENT

*Jamelia N. Morgan**

Fourth Amendment jurisprudence governing emergency searches and seizures for mental health evaluation, crisis stabilization, and treatment is in disarray. The Supreme Court has yet to opine on what Fourth Amendment standards apply to these "psychiatric holds," and lower courts have not, on the whole, distinguished legal standards governing emergency holds from those governing routine criminal procedure.

This Article argues against the uncritical doctrinal overlay of criminal investigative rules and standards onto cases implicating noncriminal behavioral health concerns. Using a critical disability lens, it reconsiders key Fourth Amendment doctrines and standards applicable to people experiencing, or labeled as experiencing, mental crises. It situates emergency hold cases against a backdrop of disability policing and state institutionalization, connecting them to the broader privacy and security interests of disabled people and offering doctrinal interventions.

This Article unites two areas of law—Fourth Amendment law and mental health law pertaining to emergency civil commitments—to present a comprehensive view of mental health crisis response systems in the United States and the legal regimes governing these systems. Ultimately, it explores how to interpret Fourth Amendment doctrine in light of existing civil commitment regimes and disabled people's group-based history of subordination so as to protect their unique interests.

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INTRODUCTION

One night, Edward Caniglia and his wife, Kim, had a heated argument.[1] During the disagreement, Edward retrieved a handgun, placed it on the dining table, and told Kim to "shoot [him] now and get it over with."[2] Kim ignored the comment and decided instead to leave their home and spend the night in a hotel.[3] The next morning, Kim tried to reach Edward by phone but could not get a hold of him.[4] She called the police

1. Caniglia v. Strom, 141 S. Ct. 1596, 1598 (2021).
2. Id. (alteration in original) (internal quotation marks omitted).
3. Id.
4. Id.

to request that they go to the couple's home to perform a welfare check.[5] When the police arrived, they found Edward on the porch.[6] Edward spoke with the officers and denied that he was suicidal.[7] Nevertheless, police officers assessed that he posed a risk to himself and others.[8] The officers called an ambulance based on this assessment.[9] Edward agreed to go to the hospital for a psychiatric evaluation on the condition that the officers not confiscate his firearms.[10] Despite agreeing to his request, after he left, the officers found and seized his firearms.[11]

Edward filed suit arguing that the warrantless entry into his home and seizure of his firearms violated his Fourth Amendment rights. The district court granted summary judgment to the police,[12] and the First Circuit affirmed on the ground that the community caretaking exception to the warrant requirement provided a constitutional basis for removing Edward and his firearms from his home.[13] In its opinion, the First Circuit stated that police functions can be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[14]

The Supreme Court held that community caretaking did not "create[] a standalone doctrine that justifies warrantless searches and seizures in the home."[15] In the majority opinion by Justice Clarence Thomas, the Court reasoned that "[n]either the holding nor logic" of a prior case called *Cady*[16] introduced that broad exception to the warrant requirement.[17] Though *Cady* "also involved a warrantless search for a firearm[,] . . . the location of that search was an impounded vehicle—not a home—[which made] 'a constitutional difference.'"[18] Recognizing that the Fourth Amendment only prohibits unwelcome intrusions on private property that are "unreasonable," the Court ruled that the search at issue

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5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. See Caniglia v. Strom, 396 F. Supp. 3d 227, 236 (D.R.I. 2019), aff'd, 953 F.3d 112 (1st Cir. 2020), vacated and remanded, 141 S. Ct. 1596 (2021).
13. *Caniglia*, 953 F.3d at 124, vacated, 141 S. Ct. 1596.
14. Id. at 123 (internal quotation marks omitted) (quoting Cady v. Dombrowski, 413 U.S. 433, 441 (1973)).
15. *Caniglia*, 141 S. Ct. at 1598.
16. Cady v. Dombrowski, 413 U.S. 433 (1973).
17. Id. at 1599.
18. Id. (quoting *Cady*, 413 U.S. at 439).

extended beyond a reasonable exception to the warrant requirement under existing precedent.[19]

Despite the narrow holding, three concurring opinions expressly declined to rule out possible caretaking functions performed by police officers that might constitute exigent circumstances (and, therefore, constitutionally reasonable intrusions) justifying warrantless entries into homes. Specifically, concurrences written by Chief Justice John Roberts, Justice Samuel Alito, and Justice Brett Kavanaugh, each emphasized a set of exigent circumstances where police may enter the premises without a warrant.[20]

Chief Justice Roberts wrote a short concurrence to note that *Brigham City v. Stuart*[21] and *Michigan v. Fisher*[22] allow police to enter a home without a warrant "when there is a 'need to assist persons who are seriously injured or threatened with such injury,'"[23] and where "there was an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger."[24]

Justice Alito elaborated on his interpretation of the "broad category of cases involving 'community caretaking.'"[25] Acknowledging the breadth of these categories of police functions, Justice Alito emphasized that the Fourth Amendment's reasonableness command does not presumptively apply to all police functions that might conceivably be covered under the community caretaking exception.[26] He also questioned whether the Fourth Amendment rules in criminal cases necessarily applied to "non-law-enforcement purposes."[27] Finally, he acknowledged that existing precedent did not address what the Fourth Amendment commands in emergency situations requiring police involvement. While noting that, under existing precedent, police may enter a home without a warrant when exigent circumstances are present, Justice Alito stressed that such circumstances could be classified as exigent "only when there is not

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19. Id. Reasonableness is the touchstone of Fourth Amendment analysis. See Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("We have long held that the 'touchstone of the Fourth Amendment is reasonableness.' Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." (citation omitted) (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991)))). As the *Caniglia* Court emphasized, "[t]he 'very core' of this guarantee is 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'"—a thread that this Article discusses further in section III.A. *Caniglia*, 141 S. Ct. at 1599 (quoting Florida v. Jardines, 569 U.S. 1, 6 (2013)).

20. *Caniglia*, 141 S. Ct. at 1600–05.

21. 547 U.S. 398 (2006).

22. 558 U.S. 45 (2009).

23. *Caniglia*, 141 S. Ct. at 1600 (Roberts, C.J., concurring) (quoting *Brigham City*, 547 U.S. at 403).

24. Id. (internal quotation marks omitted) (quoting *Fisher*, 558 U.S. at 49).

25. Id. at 1600 (Alito, J., concurring).

26. Id.

27. Id.

enough time to get a warrant . . . and warrants are not typically granted for the purpose of checking on a person's medical condition."[28]

Describing how Fourth Amendment doctrine would apply to "some heartland emergency-aid situations,"[29] Justice Kavanaugh's concurring opinion referred to a litany of cases in which police were permitted to enter homes without a warrant when they had "an objectively reasonable basis to believe that there [was] a current, ongoing crisis for which it [was] reasonable to act now."[30] These cases included, among other things, calls about missing persons, sick neighbors, premises left open at night, wellness checks for elderly persons, unattended young children, and, most relevant here, individuals who were experiencing (or labeled as experiencing) mental crises.[31] Drawing on the well-known proposition that the "ultimate touchstone of the Fourth Amendment is reasonableness,"[32] Justice Kavanaugh referred back to several cases when the Court found a warrant was not required after a reasonableness analysis and noted that under the exigent circumstances exception, exigencies included the "need to assist persons who are seriously injured or threatened with such injury."[33]

Taken together, the four concurring Justices made profound statements about law enforcement's role in crisis situations—statements that have huge implications for the rights of people experiencing mental crises. Despite extensively discussing emergency care *functions* that police officers might lawfully perform, the concurring Justices in *Caniglia* did not elaborate on what specific *standards* should govern emergency searches and seizures for the purposes of mental health evaluation, which was the purpose of the specific seizure at issue in *Caniglia*.[34] With little to no empirical evidence as to whether police are efficacious crisis responders, the four Justices lumped together various categories of emergencies and framed their hypotheticals to suggest the reasonableness of certain searches and seizures under the exigent circumstances exception.[35]

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28. Id. at 1602 (citing Missouri v. McNeely, 569 U.S. 141, 149 (2013); Michigan v. Tyler, 436 U.S. 499, 509 (1978)).

29. Id. at 1604 (Kavanaugh, J., concurring).

30. Id.

31. See id. at 1604–05 (collecting examples).

32. See Riley v. California, 573 U.S. 373, 381 (2014) (internal quotation marks omitted) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

33. See *Caniglia*, 141 S. Ct. at 1603–04 (internal quotation marks omitted) (quoting *Brigham City*, 547 U.S. at 403).

34. See Graham v. Barnette, 5 F.4th 872, 883–84 (8th Cir. 2021) ("That said, the Court in *Caniglia* 'refrain[ed]' from addressing generally the standards governing 'emergency seizures for psychiatric treatment, observation, or stabilization.'" (quoting *Caniglia*, 141 S. Ct. at 1601 (Alito, J., concurring))).

35. See *Caniglia*, 141 S. Ct. at 1605 (Kavanaugh, J., concurring) (suggesting officers have an "objectively reasonable basis" for entering a home without a warrant in case where an elderly man is believed to have fallen and hurt himself).

Despite the breadth of the Justices' speculation, and the potential legal and physical injuries that their arguments might lead to in the real world, *Caniglia* slipped by without much legal commentary. Indeed, leading scholars and commentators maintained that *Caniglia* was far from a significant decision as far as Fourth Amendment doctrine was concerned.[36] This oversight was likely due to the narrow legal issue addressed by the Court. Yet, within a larger context, *Caniglia*'s discussions pose deeper questions than may appear at first glance. Missing from the commentary was scrutiny of the basis for the welfare-check-turned-warrantless-search-and-seizure that led to the legal issue in the first place. Yet the narrow legal issues should not distract from important questions raised by the case (and others like it) relating to the constitutional scope of police authority to perform a warrantless entry when there is an allegation of mental distress or suicidality.

This Article casts *Caniglia* in a different light.[37] It reframes and situates *Caniglia* in a broader historical and social context, as a case that reveals important constitutional questions implicating the rights to privacy and security of people experiencing, or labeled as experiencing, crises—including people with mental disabilities. Emergency holds, or brief involuntary detention of an individual to determine whether the criteria for individual civil commitment are met,[38] implicate the privacy and security interests of a group long ignored within Fourth Amendment jurisprudence: disabled people.[39] Using a critical disability lens, it reconsiders key doctrines (exigent circumstances, emergency aid, and

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36. See, e.g., Orin Kerr (@OrinKerr), Twitter (Mar. 22, 2021), https://twitter.com/OrinKerr/status/1374085650589253633 [https://perma.cc/44FG-GGJV] (describing the decision as "small"). Orin Kerr is a professor specializing in criminal procedure and the Fourth Amendment at Berkeley Law.

37. For some, *Caniglia*'s facts make it a hard case from which to launch a critique. The Supreme Court's opinion does not suggest that Kim had any other options but to call the police, and there is no indication that the jurisdiction had either a co-responder or community responder program. Yet it is for these reasons that *Caniglia* is the most appropriate launch point for this Article and its critique of Fourth Amendment doctrine. As discussed in Part II, *Caniglia* is typical of many cases referenced in this Article in which police are dispatched to respond to individuals in crisis, or labeled in crisis, when mental crisis response (not criminal law enforcement) is the primary reason for the dispatch. While on the surface this is a case that the Court "gets right" by doing away with the community caretaking exception to the warrant requirement, the concurring Justices seem to substitute exigent circumstances for what the community caretaking exception can no longer achieve.

38. Leslie C. Hedman, John Petrila, William H. Fisher, Jeffrey W. Swanson, Deirdre A. Dingman & Scott Burris, State Laws on Emergency Holds for Mental Health Stabilization, 67 Psychiatric Servs. 529, 529–30 (2016).

39. This Article's discussion of individuals with disabilities uses identity-first language to refer to disabled people as a group or class. See Disability Language Style Guide, Nat'l Ctr. on Disability & Journalism, https://ncdj.org/style-guide/ [https://perma.cc/CJ9Y-XUBA] (last updated Aug. 2021) ("In the past, we have encouraged journalists and others to use person-first language . . . . Even with the caveat that this does not apply to all, we have heard from many people with disabilities who take issue with that advice. . . . [S]o we are no longer offering advice regarding a default.").

special needs) and legal standards (probable cause and reasonableness) most relevant to people experiencing, or labeled as experiencing, mental crises. With these doctrinal interventions, this Article proposes that courts scrutinize the reasonableness of the government's conduct by assessing both whether it was reasonable to dispatch law enforcement to the scene *in the first place* and whether the manner of performing the search or seizure was reasonable according to professional guidelines and practices relating to prevailing behavioral health standards. This Article argues that Fourth Amendment doctrine should align with disabled people's unique history of group-based subordination—specifically, the histories of criminalization, segregation, and exclusion that characterized the height of eugenics and institutionalization.

This Article make three doctrinal interventions. First, it argues that police are not reasonable first responders as a constitutional matter and that, when possible, mental health providers should contribute to assessments of exigency.[40] In destabilizing existing doctrinal rules and standards that defer to nonexpert police as though they were mental health experts, this Article proposes that when evaluating emergency searches and seizures for the purpose of mental health evaluation, courts should not apply the same legal rules and standards derived from cases involving criminal law enforcement—including exigent circumstances, emergency aid, and probable cause, among others. To advance this argument, section II.C explains how mental health exigencies are different from other exigencies in the criminal law enforcement context. Unlike other emergencies, mental health emergencies are harder to diagnose as actual emergencies and are often misinterpreted as emergency situations.[41] Importantly, these exigencies do not always implicate "traditional" criminal law enforcement functions and, moreover, do not always necessitate a police response. Dispatching law enforcement to the scene increases the likelihood of injury or even death.[42] Indeed, for a significant portion of mental health exigencies, the presence of police might actually hasten (or lead to, rather than prevent) harm to the individual.[43] Even with their oft-lauded crisis intervention training, police are often not equipped to provide necessary emergency aid—namely, therapeutic support necessary for de-escalation—without

40. To put the point differently, dispatching police officers to perform mental health searches and seizures does not comport with the Fourth Amendment requirement that all searches be reasonable. See supra notes 19, 25–28 and accompanying text. Including mental health providers in assessments as to exigency should not be taken to mean that the expertise of mental health providers (MHPs) is superior to that of individuals with experience living with psychiatric disabilities. It also should not be taken to mean that involving MHPs would remove all the risk of coercive or abusive conduct. It does suggest that, at the very least, by including MHPs, the risk of violence would decrease because MHPs are unarmed.

41. See infra section II.C.2.b.

42. See infra section I.B.2.

43. See infra section II.D.

causing physical injuries (including death) or resorting to unnecessary criminal arrests.[44] With more careful analysis and fine-tuned legal rules, it becomes easier to notice whether individual intrusions to one's privacy—intrusions posed by law enforcement's crisis response—likely outweigh the stated government interest justifying the police intervention in the first place.

Second, this Article argues against importing probable cause standards from the criminal seizures context into the mental health seizures context. Psychiatric holds are authorized under state civil commitment laws. To be detained for emergency evaluation, these laws require law enforcement to have probable cause that individuals (1) pose a danger to themselves or others, (2) have a disability that prevents them from meeting their basic needs, or (3) are refusing treatment.[45] Section II.E traces the origin of probable cause definitions in these situations to cases involving criminal investigations. Definitions of probable cause vary widely across court opinions, and there is little guidance as to exactly what counts as probable cause in the context of mental health seizures. In opposing this practice, this Article argues that, rather than defer to law enforcement's "know-it-when-I-see-it" approach, probable cause should be more structured in incidents involving mental health seizures. This Article proposes guidelines to cabin police discretion with respect to probable cause. First, probable cause for alleged criminal conduct should be distinguishable from probable cause assessments for emergency holds; and second, when available, the reasonable officer's belief as to the sufficiency of probable cause must be based in part on information obtained from the individual in crisis and a credible medical professional.

Searches lacking in probable cause should not be classified as special needs searches. Under existing doctrine, warrantless searches conducted without probable cause are permissible when classified as special needs searches that extend "beyond the normal need for law enforcement" and "make the warrant and probable-cause requirement impracticable."[46] These special needs searches conducted without a warrant have been upheld as reasonable when they further important regulatory or administrative purposes.[47] In cases where there is no evidence of exigent

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44. See infra section III.B.

45. See, e.g., Alaska Stat. § 47.30.708(b) (2024) (referencing "serious harm to self or others"); Cal. Welfare & Inst. Code § 5150(a) (2024) (addressing when a person "is a danger to others, or to themselves"); Ind. Code Ann. § 12-26-5-0.5 (2024) (emphasizing dangerousness or grave disability combined with an "immediate need of hospitalization and treatment"); Miss. Code Ann. § 41-21-65(5) (2024) (qualifying any person "alleged to be in need of treatment" by a relative or "interested person").

46. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (internal quotation marks omitted) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

47. See id. ("[I]n certain circumstances government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable-cause requirements as long as their searches meet 'reasonable legislative or administrative standards.'" (quoting Camara v. Mun. Ct., 387 U.S. 523, 538 (1967))); McCabe v. Life-Line

circumstances, courts have found that local policies governing emergency holds fall within the category of searches known as special needs searches.[48] Section II.F argues against classifying emergency searches and seizures for the purpose of mental health evaluation as special needs searches. This Article notes the drawbacks of assessing the reasonableness of a particular mental health crisis response under the special needs exception to the warrant requirement. Specifically, because the Supreme Court has weakened Fourth Amendment protections governing administrative searches,[49] classifying policies governing psychiatric holds as special needs searches would seriously undermine the privacy and security interests of people in crisis—a group that includes disabled people.

Finally, this Article calls for more rights-protective legal standards governing emergency searches and seizures for the purpose of mental health evaluations. Specifically, given the documented risks of police involvement in mental health crisis response, the Fourth Amendment balancing of interests (as between the individual and the state) leans in favor of individual rights and away from the government's interest in conducting these searches and seizures without a warrant in certain cases.

This Article looks to develop guidelines to constrain police discretion in mental health crisis response and to offer a set of arguments that question the appropriateness of police involvement in crisis response as an initial matter. Though the risk of suicide is a real concern, courts should also avoid developing constitutional rules and standards that expose classes of people—here, people in crisis and disabled people—to diminished Fourth Amendment protections.[50] Exigencies may seem patently reasonable for constitutional purposes only to the extent that competing values and considerations are excluded from the analysis. That

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Ambulance Serv., Inc., 77 F.3d 540, 545 (1st Cir. 1996) (describing a warrantless procedure as potentially reasonable if the search was performed "in furtherance of an important administrative or regulatory purpose").

48. See, e.g., *McCabe*, 77 F.3d at 545.

49. See Eve Brensike Primus, Disentangling Administrative Searches, 111 Colum. L. Rev. 254, 277 (2011) (explaining that the Supreme Court weakened and eliminated doctrinal safeguards that were previously required for administrative searches, facilitating "warrantless searches unsupported by probable cause").

50. Research indicates that people diagnosed with psychiatric disorders are thirteen times more likely to die from suicide than people who do not have those conditions. Shanti Silver, Research Weekly: Early Treatment Engagement and Self-Harm, Treatment Advoc. Ctr. (Apr. 5, 2023), https://www.treatmentadvocacycenter.org/research-weekly-early-treatment-engagement-and-self-harm/ [https://perma.cc/8YTX-AKX5]; see also Lay San Too, Matthew J. Spittal, Lyndal Bugeja, Lennart Reifels, Peter Butterworth & Jane Pirkis, The Association Between Mental Disorders and Suicide: A Systematic Review and Meta-Analysis of Record Linkage Studies, 259 J. Affective Disorders 302, 311 (2019) (finding, compared with the general population, an increased risk of suicide associated with borderline personality disorder (45-fold greater risk), "anorexia nervosa in women (31-fold greater risk), depression (20-fold greater risk), bipolar disorder (17-fold greater risk), opioid use (14-fold greater risk), and schizophrenia (13-fold greater risk)").

is to say, it might seem reasonable to have police enter the residences of people in crisis without warrants, seize them, and take them to hospitals for evaluation or stabilization if this reasonableness assessment does not factor in the risks of harm police pose when they participate in mental health crisis response. Police should rarely be involved in mental health crisis response, and Fourth Amendment doctrine should not make legally reasonable what is practically unreasonable. The analysis that follows incorporates into the range of doctrinal tests these risks and concerns to prevent this aspect of Fourth Amendment doctrine from continuing to serve as a vehicle for undermining protections for people in crisis and disabled people.

In Part I, this Article provides an overview of mental health crisis response and the police role in mental health crisis response. Part II examines Fourth Amendment doctrine as it relates to psychiatric holds and outlines the shortcomings of existing legal rules and standards governing emergency seizures for the purposes of mental health evaluation and treatment. Part III sets forth new standards and rules for assessing the constitutionality for emergency seizures for mental health evaluations. This Article concludes on that note.

I. MENTAL HEALTH CRISIS RESPONSE: AN OVERVIEW

To understand how police come to be involved in mental health crisis response, a brief overview of behavioral health infrastructure is in order. Mental health crisis response services are a fundamental component of any well-functioning, effective, and safe behavioral health system. There are a number of elements that make up an effective crisis care system—elements sometimes referred to as a "continuum of care."[51] In its toolkit for behavioral health crisis care, the Substance Abuse and Mental Health Services Administration (SAMHSA) defines mental health crisis response as "for anyone, anywhere and anytime."[52] A robust crisis response system includes: (1) "crisis lines accepting all calls and dispatching support based on the assessed need of the caller"; (2) "mobile crisis teams dispatched to wherever the need is in the community (not hospital emergency departments)"; and (3) "crisis receiving and stabilization facilities that

51. Comm. on Psychiatry & the Cmty. for the Grp. for the Advancement of Psychiatry, Roadmap to the Ideal Crisis System: Essential Elements, Measurable Standards and Best Practices for Behavioral Health Crisis Response 85 (2021), https://www.thenationalcouncil.org/wp-content/uploads/2021/03/031121_GAP_Crisis-Report_Final.pdf?daf=375ateTbd56 [https://perma.cc/B6QF-F6C6].

52. Substance Abuse and Mental Health Servs. Admin., National Guidelines for Behavioral Health Crisis Care—A Best Practice Toolkit 8 (2020), https://www.samhsa.gov/sites/default/files/national-guidelines-for-behavioral-health-crisis-care-02242020.pdf [https://perma.cc/B2NG-6NXP] [hereinafter SAMHSA, Best Practice Toolkit].

serve everyone that comes through their doors from all referral sources."[53] Other mental health advocacy organizations support this view.[54]

The demand for mental health crisis response services is high. More than a million emergency holds take place every year, though state and national aggregate data is hard to come by.[55] The lack of data frustrates any effort to examine—and critique—emergency holds systematically. Yet a partial picture emerges from publicly available data sources: A recent report found that "[i]n 2016, among 22 states, the median and mean emergency detention rates were 196 and 309 per 100,000 people, respectively."[56] Between 2011 and 2018, across 25 states, emergency detention rates per 100,000 people ranged from 29 in Connecticut to 966 in Florida.[57] Data from 2017 indicates that there were 37,209 psychiatric beds in state and county psychiatric facilities.[58] If 24-hour residential treatment centers, VA hospitals, private hospitals, and hospitals with separate psychiatric units are included, the number of beds in patient facilities rises to 170,200.[59] As the next section discusses, law enforcement

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53. Id.; see also Nat'l Ass'n of State Mental Health Program Dirs., A Comprehensive Crisis System: Ending Unnecessary Emergency Room Admissions and Jail Bookings Associated With Mental Illness 4 (2018), https://www.nasmhpd.org/sites/default/files/TACPaper5_ComprehensiveCrisisSystem_508C.pdf [https://perma.cc/4NB8-CB4B] (defining essential crisis services as "(1) regional or statewide crisis call centers coordinating in real time, (2) centrally deployed, 24/7 mobile crisis response teams and (3) short-term, 'sub-acute' residential crisis stabilization programs").

54. See, e.g., Getting Treatment During a Crisis, Nat'l All. on Mental Illness, https://nami.org/About-Mental-Illness/Treatment/Getting-Treatment-During-a-Crisis [https://perma.cc/Z6X7-VYGT] (last visited Mar. 8, 2024) (stating that effective response systems include 24-hour crisis lines, walk-in crisis services, and mobile crisis teams); Continuum of Care, Treatment Advoc. Ctr., https://www.treatmentadvocacycenter.org/resources/continuum-of-care/ [https://perma.cc/ENJ4-WDVB] (last visited Feb. 14, 2024) (endorsing a local crisis phone number, peer respite, and residential services as evidence-based crisis services).

55. See Nathaniel P. Morris, Detention Without Data: Public Tracking of Civil Commitment, 71 Psychiatric Servs. 741, 741 (2020) ("[B]asic statistics about civil commitment remain unavailable in many parts of the United States. At a 2019 conference, researchers highlighted that 'the number of people detained nationally has never been reliably estimated' and identified yearly psychiatric detention data in just eight states." (citing Gi Lee & David Cohen, Poster Presentation at the 23rd Annual Conference of the Society for Social Work and Research, How Many People are Subjected to Involuntary Psychiatric Detention in the US? First Verifiable Population Estimates of Civil Commitment (Jan 18, 2019), https://sswr.confex.com/sswr/2019/webprogram/Paper34840.html [https://perma.cc/BES8-FQJR])).

56. Gi Lee & David Cohen, Incidences of Involuntary Psychiatric Detentions in 25 U.S. States, 72 Psychiatric Servs. 61, 64 (2021).

57. Id.

58. Substance Abuse and Mental Health Servs. Admin., Civil Commitment and the Mental Health Care Continuum: Historic Trends and Principles for Law and Practice 7 (2019), https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care.pdf [https://perma.cc/FJB5-E6Y4].

59. Id.

officers serve as the default responders and primary conduits for crisis response services for individuals in need.[60]

A. *Law Enforcement's Role in Mental Health Crisis Response*

Law enforcement is a primary component of the provision of crisis services in jurisdictions across the United States.[61] In Arizona, law enforcement drop-offs to crisis facilities or emergency departments are the vast majority of all admissions to those facilities.[62] In Mississippi, police are the only conduit to services: An individual cannot access inpatient crisis services without being accompanied by law enforcement.[63] In other jurisdictions, police officers are part of mental health crisis responses where they make determinations for whether an individual is eligible for involuntary commitment, specifically for psychiatric holds.[64] And, in still

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60. Jackson Beck, Melissa Reuland & Leah Pope, Behavioral Health Crisis Alternatives: Shifting From Police to Community Responses, Vera Inst. Just. (Nov. 2020), https://www.vera.org/behavioral-health-crisis-alternatives [https://perma.cc/4AQR-9DLW] (describing police as "default first responders" for a large number of social problems, including behavioral health crises).

61. Police officers are not the only pathways into a crisis system. The individual in crisis, family, friends, primary care and social services providers, and crisis call centers are other conduits into the crisis care system. Nat'l Action All. for Suicide Prevention, How Does Your Crisis System Flow?, https://crisisnow.com/wp-content/uploads/2020/02/CrisisNow-HowDoesThatFlow.pdf [https://perma.cc/7RT7-RLJT] (last visited Feb. 14, 2024) (noting that, according to the National Action Alliance for Suicide Prevention, "[m]ost all community crisis referrals flow through the hospital [emergency department]").

62. See, e.g., SAMHSA, Best Practice Toolkit, supra note 52, at 58–59, 59 fig.4 (finding that eighty-one percent of all admissions to an Arizona Crisis Recovery Center were law enforcement drop-offs in 2019).

63. See N. Miss. State Hosp., Commitment, http://www.nmsh.state.ms.us/commitment.html [https://perma.cc/SJ6R-324J] (last visited Feb. 14, 2024) ("Admission to North Mississippi State Hospital is primarily initiated through an involuntary committal process. . . . If inpatient treatment is ordered, the person is brought to [the hospital] by the appropriate law enforcement officials . . . .").

64. See, e.g., Va. Code Ann. § 15.2-1704 (2024) ("A police officer has no authority in civil matters, except (i) to execute and serve temporary detention and emergency custody orders and any other powers granted to law-enforcement officers . . . ."); see also Cal. Welfare & Inst. Code § 5150(a) (2024) ("When a person, as a result of a mental health disorder, is a danger to others, or to themselves, or gravely disabled, a peace officer . . . may, upon probable cause, take, or cause to be taken, the person into custody . . . ."); D.C. Code § 21-521 (2024) ("An accredited officer or agent of the Department of Mental Health . . . or an officer authorized to make arrests . . . or a physician or qualified psychologist of the person in question, who has reason to believe that a person is mentally ill . . . [may] take the person into custody . . . ."); N.H. Rev. Stat. Ann. § 135-C:28(III) (2024) ("When a peace officer . . . [has] reasonable suspicion to believe that the person may be suffering from a mental illness and probable cause to believe that . . . the person poses an immediate danger of bodily injury to himself or others, the police officer may place the person in protective custody."); N.Y. Mental Hyg. Law § 9.41 (McKinney 2024) ("Any peace officer . . . or police officer . . . may take into custody any person who appears to be mentally ill and is conducting himself in a manner which is likely to result in serious harm . . . . Such officer may direct the removal of such person or remove him to any hospital . . . ."). For an overview of each state's standards for emergency evaluation, see generally Treatment Advoc. Ctr., State Standards

other jurisdictions, law enforcement officers provide security in emergency rooms and psychiatric hospitals responsible for providing care to individuals in crisis.[65]

Mental health crisis response services constitute anywhere from one out of ten to one out of three calls for police services.[66] When police get involved in crisis care implementation, the risk of violence is real. Individuals in mental crisis are more than sixteen times more likely to die in encounters with law enforcement.[67] To take one example, in Los Angeles, nearly a third of the more-than-thirty people shot by LAPD officers in 2021 were identified as having a psychiatric disability.[68] Furthermore, recent reporting by the *LA Times* indicates that for many individuals living with psychiatric disabilities, the interaction when officers deploy force typically isn't the first time they've encountered police or criminal legal system actors more broadly.[69]

Though crisis response takes up police time, it is not generally regarded as a "traditional" law enforcement function.[70] Predecessors to modern police forces were not involved in transporting people in crisis to hospitals; people in crisis were cared for by their families or their local communities that had resources to provide care. Historian Kim Nielsen notes that in the seventeenth century, care for individuals with psychiatric disabilities and individuals with cognitive disabilities was a local and

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for Emergency Evaluation (2020), https://www.treatmentadvocacycenter.org/storage/documents/state-standards/state-standards-for-emergency-evaluation.pdf [https://perma.cc/2RSD-PVKH].

65. See Ji Seon Song, Policing the Emergency Room, 134 Harv. L. Rev. 2646, 2654 (2021).

66. See Etienne Blais & David Brisebois, Improving Police Responses to Suicide-Related Emergencies: New Evidence on the Effectiveness of Co-Response Police-Mental Health Programs, 51 Suicide & Life-Threatening Behav. 1095, 1095 (2021) ("According to various estimates, between 7% and 31% of all police calls in North America involve an individual with mental health problems or in psychosocial crisis."); Treatment Advoc. Ctr., Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters 1 (2015), https://www.treatmentadvocacycenter.org/reports_publications/overlooked-in-the-undercounted-the-role-of-mental-illness-in-fatal-law-enforcement-encounters/ [https://perma.cc/5DYR-V27Q] [hereinafter Treatment Advoc. Ctr., Overlooked].

67. Treatment Advoc. Ctr., Overlooked, supra note 66, at 1.

68. Kevin Rector, String of LAPD Shootings Exposes L.A.'s Broken Mental Health System, Officials Say, L.A. Times (Nov. 18, 2021), https://www.latimes.com/california/story/2021-11-18/string-of-lapd-shootings-exposes-l-a-s-broken-mental-health-system-officials-say (on file with the *Columbia Law Review*).

69. Id.; see also Kevin Rector, Shootings by LAPD Officers Rising Again After Years of Decline, L.A. Times (Oct. 15, 2021), https://www.latimes.com/california/story/2021-10-15/string-of-recent-lapd-shootings-pushes-2021-count-beyond-2020-2019-totals (on file with the *Columbia Law Review*).

70. See Benjamin Andoh, The Evolution of the Role of the Police With Special Reference to Social Support and the Mental Health Statutes, 38 Med. Sci. & L. 347, 348 (1998) (discussing "non-traditional" social support roles performed by police).

communal concern within the American colonies.[71] Though wealthy individuals with disabilities could rely on their families for support, the community at large was responsible for caring for individuals labeled as "dangerous" and "insane." For instance, according to Nielsen, "A 1694 Massachusetts statute guaranteed that each community had the responsibility 'to take effectual care and make necessary provision for the relief, support and safety of such impotent or distracted person.' If the insane person was destitute, they became the town's fiscal responsibility."[72] Similar statutes were passed later in Connecticut, New York, Rhode Island, Vermont, and Virginia.[73]

Beginning in the second half of the nineteenth century, U.S. cultural and social norms shifted the care of disabled people from the purview of local families and local jurisdictions to state-run asylums "established and administered by the states."[74] During this period, smaller rural and agrarian communities gave way to larger urban and industrial centers while the numbers of individuals labeled as "mentally ill" increased.[75] Historian Gerald Grob explains this shift from familial and community care to the large asylum as partly due to the increased visibility of people with psychiatric disabilities in public spaces and growing "public concern about security."[76]

At the same time, law enforcement entities that preceded organized police forces—constables and justices of the peace—did play a role in managing individuals in crisis in public spaces, particularly when individuals in crisis were labeled as dangerous. Eighteenth century English statues specifically provided constables with a basis for seizing individuals labeled as "mentally disordered" who were found wandering in public spaces.[77] England's Vagrancy Act of 1714 permitted constables to arrest individuals labeled as "lunatics" and take them to a Justice who could issue an order to return the individual to that person's home district. This law

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71. See Kim E. Nielsen, A Disability History of the United States 25 (2012); see also Donna R. Kemp, Mental Health in America 2 (2007) (explaining that care for individuals with psychiatric disabilities was the responsibility of family members and the local community or parish).

72. Nielsen, supra note 71, at 25.

73. Id.

74. See Gerald N. Grob, The Mad Among Us: A History of the Care of America's Mentally Ill 40 (1994) [hereinafter Grob, The Mad Among Us]; Jefferson D.E. Smith & Steve P. Calandrillo, Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After *Olmstead v. L.C.*, 24 Harv. J.L. & Pub. Pol'y 695, 706 (2001) ("Before the proliferation of institutions in the mid-1800s, the care of mentally disabled individuals was left to families, jails, poorhouses, and ad hoc community arrangements.").

75. See Grob, The Mad Among Us, supra note 74, at 23–24 (explaining that "[t]he dramatic growth in population was accompanied by a proportionate increase in the number of insane persons," with "the mental hospital . . . designed to serve more densely populated areas and to assume functions that previously had been the responsibility of families").

76. Id. at 24.

77. Andoh, supra note 70, at 350.

and the Vagrancy Act of 1744 were primarily concerned with removing from public places "dangerous lunatic[s]," defined as "persons who, by their lunacy or otherwise, are furiously mad, or are so far disordered in their senses that they may be dangerous to be permitted to go abroad."[78] The laws permitted detention of such persons in a "secure place within the parish."[79]

More modern accounts of the police role rarely point to this history; more often they take police involvement in crisis response as given.[80] Longstanding views that police are necessary, if not appropriate, responders to mental health crises are reflected in policing literature.[81] Sociologist Egon Bittner's classic study referred to the police role in mental crisis response as "psychiatric first aid."[82] More recently, researchers on the role of police in crisis services have recognized that "[t]he police have a great deal of discretion in the exercise of their duties, including determining what to do when dealing with a person with acute mental illness in the community."[83] They often use "informal tactics, such as trying to 'calm' the person or taking the person home."[84] These accounts suggest some of the field's foundational literature takes the police role in mental health crisis response as given.

Justifications for police involvement in mental crisis response are buttressed by existing interpretations of parens patriae authority and the state's police power. The state's relationship to individuals in crisis, in particular, is structured by the state's police power to regulate the general welfare and has been used to justify police involvement in caring for people with psychiatric disabilities in general.[85] Parens patriae is a legal

78. Id. (internal quotation marks omitted).

79. Id.

80. See, e.g., Linda A. Teplin, Managing Disorder: Police Handling of the Mentally Ill, *in* Mental Health and Criminal Justice 157, 157 (Linda A. Teplin, ed., 1984) ("Police have long been recognized as a primary mental health resource within the community.").

81. See, e.g., Egon Bittner, Police Discretion in Emergency Apprehension of Mentally Ill Persons, 14 Soc. Probs. 278, 278 (1967) ("The official mandate of the police includes provisions for dealing with mentally ill persons."); Robin Shepard Engel & Eric Silver, Policing Mentally Disordered Suspects: A Reexamination of the Criminalization Hypothesis, 39 Criminology 225, 225 (2001) ("Contact with mentally disordered citizens has long been a part of police work.").

82. Bittner, supra note 81, at 288.

83. H. Richard Lamb, Linda E. Weinberger & Walter J. DeCuir, Jr., The Police and Mental Health, 53 Psychiatric Servs. 1266, 1267 (2002).

84. Id.

85. See, e.g., McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 547 (1st Cir. 1996) ("The legitimacy of the State's parens patriae and 'police power' interests in ensuring that 'dangerous' mentally ill persons not harm themselves or others is beyond dispute." (emphasis omitted)); John Kip Cornwell, Understanding the Role of the Police and Parens Patriae Powers in Involuntary Civil Commitment Before and After *Hendricks*, 4 Psych. Pub. Pol'y, & L. 377, 377–78 (1998) ("The state's authority to commit individuals involuntary for psychiatric care is derived from two sources: its *parens patriae* power . . . and its police power . . . .").

concept that descended from English law.[86] The doctrine refers to the powers and duties "exercised by the King in his capacity as 'father of the country.'"[87] Parens patriae traditionally referred to the power of the king to act as guardian for those persons who were unable to act on their own behalf. Historically, those deemed incapable of caring for themselves were individuals labeled as having physical, mental, and cognitive disabilities. Blackstone referred to the king's role under parens patriae as "the general guardian of all infants, idiots, and lunatics," and as superintendent of "all charitable uses in the kingdom."[88] As the Supreme Court has said, a state has "a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."[89] Today, parens patriae and the police power provide powerful (and rarely questioned) justifications for the protection of citizens who are unable to care for themselves or who pose a risk of harm to others, including individuals who are in mental crisis.[90]

Though these doctrines are longstanding, the state's responsibilities with respect to individuals in crisis shifted markedly after deinstitutionalization.[91] The delivery of mental health services shifted from large, congregate facilities to a constellation of smaller public and private entities.[92] After deinstitutionalization, policymakers failed to fund programs required to meet the level of need within local communities,[93] including crisis response and chronic care services in communities that

86. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972).

87. Id. (citing Michael Malina & Michael D. Blechman, Parens Patriae Suits for Treble Damages Under the Antitrust Laws, 65 Nw. U. L. Rev. 193, 197 (1970)); Michael L. Rustad & Thomas H. Koenig, State Protection of Its Economy and Environment: Parens Patriae Suits for Damages, 6 Colum. J.L. & Soc. Probs. 411, 412 (1970)).

88. 3 William Blackstone, Commentaries *47.

89. Addington v. Texas, 441 U.S. 418, 426 (1979). On the limits of a state's power to detain, see O'Connor v. Donaldson, 422 U.S. 563, 565–67, 576 (1975) (holding that a finding of mental illness alone is insufficient to justify confinement of a "nondangerous individual").

90. See Stephen J. Morse, A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered, 70 Calif. L. Rev. 54, 58 (1982) (noting that "[i]nvoluntary commitment is an extraordinary exercise of the police power and paternalism of the state").

91. See Chris Koyanagi, Learning from History: Deinstitutionalization of People With Mental Illness as Precursor to Long-Term Care Reform, Kaiser Comm'n on Medicaid and the Uninsured 6–8 (2007), https://www.kff.org/wp-content/uploads/2013/01/7684.pdf [https://perma.cc/LQJ2-V94V] (discussing the history of deinstitutionalization from 1955–1980).

92. See Bernard E. Harcourt, Reducing Mass Incarceration: Lessons From the Deinstitutionalization of Mental Hospitals in the 1960s, 9 Ohio St. J. Crim. L. 53, 59 n.18 (2011) (defining deinstitutionalization as "the decline in patient populations and the use of large-scale, state-run psychiatric facilities for treatment of the mentally ill").

93. See Koyanagi, supra note 91, at 2.

fall within these community-based services. Rather than receive chronic care services in their communities, some individuals were tracked into the criminal legal system, a pattern that continues to this day.[94] As one advocacy organization put it, "Deinstitutionalization, . . . discriminatory federal Medicaid funding practices, and the prolonged failure by states to fund their mental health systems drive those in need of care into the criminal justice and corrections systems, rather than into the public health system where they belong."[95]

By most accounts, after deinstitutionalization, police began to play a more prominent role "in the management of persons . . . experiencing psychiatric crises."[96] Changes to laws governing civil commitment and affirming patient rights and liberties also led to increased interactions between law enforcement and people experiencing mental crises.[97] Again, a brief overview of the history of societal responses to "mental illness" is instructive here. In the colonial era, individuals who needed mental treatment but lacked support from their families were housed in jails and almshouses, with no therapeutic treatment.[98] The first involuntary civil commitment occurred in Philadelphia in 1752, with private and public facilities developing across the states by the early nineteenth century.[99] During the Progressive Era, states started developing inpatient psychiatric hospitals for acute treatment and emergency psychiatric holds.[100] It is during this era that police (but also physicians) became involved in implementing emergency, involuntary psychiatric holds without prior judicial approval.[101] Yet by the late 1940s, advocates began to complain about police involvement, jail detention, and procedures that mirrored criminal procedures.[102]

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94. See Harcourt, supra note 92, at 87 (discussing the "transinstitutionalization" of mental health patients into jails, prisons, and nursing homes). But see Liat Ben-Moshe, Decarcerating Disability: Deinstitutionalization and Prison Abolition 147 (2020) [hereinafter Ben-Moshe, Decarcerating Disability] (contending that the transinstitutionalization thesis oversimplifies the relationship between deinstitutionalization and larger jail and prison populations).

95. Criminalization, Treatment Advoc. Ctr., https://www.treatmentadvocacycenter.org/key-issues/criminalization [https://perma.cc/S7Z5-YR3F] (last visited Feb. 14, 2024).

96. Lamb et al., supra note 83, at 1266; see also Linda A. Teplin, Keeping the Peace: Police Discretion and Mentally Ill Persons, 244 Nat'l Inst. Just. J. 8, 9 (2000) [hereinafter Teplin, Keeping the Peace] (explaining why "responding to mentally ill people has become a large part of the police peacekeeping function").

97. See Teplin, Keeping the Peace, supra note 96, at 9 (listing several factors that increased the likelihood of police encounters with individuals with psychiatric disabilities).

98. Stuart A. Anfang & Paul S. Appelbaum, Civil Commitment—The American Experience, 43 Isr. J. Psychiatry & Related Scis. 209, 209 (2006).

99. Id. at 210.

100. See id.

101. Id.

102. Id. at 210–11.

In the 1960s and 1970s, states modified their civil commitment laws in response to litigation and advocacy. State civil commitment laws shifted from the easily satisfied requirement that the patient "needs treatment" to a heightened legal standard that the patient pose a "danger to self" or have a "grave disability" as the basis for commitment.[103] These changes to the legal standards were in response to concerns that the state's power to detain people was too broad and eclipsed the autonomy and individual rights of patients.[104] As one commentator put it, "danger-or-grave-disability statutes were . . . responding to inaccurate medical doctrines [and] . . . the horrors of judicial opinions that, for instance, sanctioned the sterilization of the mentally ill in the early twentieth century."[105]

Today, civil commitment laws in forty-seven states and the District of Columbia permit three forms of involuntary commitment: (1) emergency hospitalization for evaluation or "psychiatric holds," (2) inpatient civil commitment, and (3) outpatient civil commitment, or assisted outpatient treatment, a community-based intervention.[106] Emergency hospitalization for evaluation refers to crisis response programs in which a patient is admitted to a treatment facility for psychiatric evaluation for up to a few days. Inpatient civil commitment, or involuntary hospitalization, refers to the process by which a judge orders hospital treatment for someone who continues to satisfy the state's civil commitment criteria following an emergency hold.[107] The criteria for whether an individual is eligible for involuntary commitment vary from state to state.[108] Finally, outpatient civil commitment, or assisted outpatient treatment, is a coercive treatment option in which a judge orders a qualifying person with symptoms of mental illness to adhere to a mental health treatment plan while living in the community.[109]

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103. See David D. Doak, Note, Theorizing Disability Discrimination in Civil Commitment, 93 Tex. L. Rev. 1589, 1598–1601 (2015).

104. Rachel A. Scherer, Note, Toward a Twenty-First Century Civil Commitment Statute: A Legal, Medical, and Policy Analysis of Preventive Outpatient Treatment, 4 Ind. Health L. Rev. 361, 363–67 (2007).

105. Id. at 364 n.11 (citing Buck v. Bell, 274 U.S. 200, 207 (1927)). Courts also incorporated criminal procedures into the civil commitment process citing the Supreme Court's opinion in In re Gault, 387 U.S. 1, 70 (1967). See, e.g., Lessard v. Schmidt, 349 F. Supp. 1078, 1086 (E.D. Wis. 1972).

106. See Lisa Dailey, Michael Gray, Betsy Johnson, Sabah Muhammad, Elizabeth Sinclair & Brian Stettin, Treatment Advoc. Ctr, Grading the States: An Analysis of Involuntary Psychiatric Treatment Laws 6, 9–11 (2020), https://www.treatmentadvocacycenter.org/wp-content/uploads/2023/10/grading-the-states-6.pdf [https://perma.cc/3BAD-9ELG] (showing that Connecticut, Maryland, and Massachusetts have not yet adopted court-ordered outpatient treatment).

107. Id.

108. See Dailey et al., supra note 106, at 18–21 (discussing varying standards and definitions utilized by states for inpatient civil commitment laws).

109. Id. at 22–23, 25.

State statutes confer discretion on police to determine whether a person meets the criteria for emergency hospitalization. In some states, statutes explicitly identify police as qualified to evaluate whether the criteria for involuntary commitment are met.[110] In other states, police are eligible to make such determinations, or at least not expressly excluded from making them.[111] That said, police do not assess potential "harm to self," harm to others, or "grave disability" in isolation. Social workers, behavioral health specialists, and case workers connected to child protective services, among others, may also play a role in these determinations.[112]

Frequently, the police are called into crisis situations by a relative, neighbor, or friend and asked to perform so-called welfare checks.[113] The reporting here is not always the typical call to law enforcement to report an alleged crime, though in some cases family members, friends, and neighbors have reported allegations of violence.[114] Lacking alternatives to

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110. See, e.g., Ariz. Rev. Stat. Ann. § 36-524 (2024) (authorizing "peace officer[s]" to apply for "emergency admission" based on their determination that a person "is a danger to self or others or has a persistent or acute disability or a grave disability, and is unable or unwilling to undergo voluntary evaluation"); Iowa Code Ann. § 229.22(2)(a)(1) (2024) ("[A]ny peace officer who has reasonable grounds to believe that a person is mentally ill, and because of that illness is likely to physically injure the person's self or others if not immediately detained, may without a warrant take . . . that person . . . to the nearest available facility or hospital . . . ."); Ky. Rev. Stat. Ann. § 202A.041(1) (West 2024) (authorizing "peace officer[s]" to act upon their determination that "an individual is mentally ill and presents a danger or threat of danger to self, family, or others if not restrained" by transporting them to the appropriate facility).

111. See, e.g., Cal. Welfare & Inst. Code § 5150(a) (2024) (authorizing "peace officer[s]" to "take . . . the person into custody for a period of up to 72 hours for assessment, evaluation, and crisis intervention"); D.C. Code § 21-521 (2024) (permitting an "officer authorized to make arrests" to take someone into custody who he "has reason to believe . . . is mentally ill and . . . likely to injure himself or others"); Ga. Code. Ann. § 37-3-42(a) (2024) (allowing a "peace officer" with probable cause, after consulting with a physician and gaining transport authorization, to "take any person to an emergency receiving facility").

112. See, e.g., Myers v. Patterson, 819 F.3d 625, 633–34 (2d Cir. 2016) (discussing personal observations of police officer and case worker from Nassau County Child Protective Services).

113. Policing Project, Reimagining Public Safety Issue Brief Series: Welfare Checks 1 (2024), https://assets-global.website-files.com/622ba34c0b752e795eb9334b/65c6820cc07ca237f1e377de_Welfare%20Checks%2002.08.24.pdf [https://perma.cc/66QL-QXZ4].

114. See, e.g., Hannah Fry, Fatal Shooting of Autistic Teen Raises Concerns About Police Response to People With Mental Health Issues, L.A. Times (Mar. 12, 2024), https://www.latimes.com/california/story/2024-03-12/fatal-police-shooting-of-autistic-teen-raises-concerns-about-police-response-to-mental-health-issues (on file with the *Columbia Law Review*) ("Some people with autism experience heightened emotions, and on that day Ryan responded [to a disagreement with his parents] by breaking glass on the front door . . . ." (quoting attorney DeWitt Lacy)); Adrienne Hurst, Black, Autistic, and Killed by Police, Chi. Reader (Dec. 17, 2015), https://www.chicagoreader.com/chicago/stephon-watts-police-shooting-autism-death/Content?oid=20512018 [https://perma.cc/8DE8-T2J9] ("Like many families with autistic children, the Watts family relied on emergency

police, family members also call 911 to request assistance with relatives who may be off their medications and to resolve nonviolent disputes.[115] In some cases, reports include witness statements that these individuals are armed, or appear to be armed.[116] And in yet another subset of cases, in which individuals are armed with a deadly weapon, whether they actually pose a threat of imminent harm is often—or could be—contested.[117] In any event, the point is that there are a variety of reasons why relatives call the police to report family members experiencing mental health crises—violence (against themselves or others) is one reason, but it's not the only one. Callers may report that an individual is showing signs of mental distress or behaving "abnormally," or they may call to report a missing person or an escape from a mental facility or group home.[118] Given the variety of cases, it is unsurprising that many encounters that lead to deadly force by law enforcement stem from officers arriving to the scene wholly unprepared to respond to a mental health crisis or arriving prepared to respond using one tool: force.[119]

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services for help when Stephon became agitated or wandered off. . . . [After a] violent outburst, [his mother] called 911 in order to get him back on his medication and into emergency psychiatric treatment.").

115. See Jennifer D. Wood, Amy C. Watson & Anjali J. Fulambarker, The "Gray Zone" of Police Work During Mental Health Encounters: Findings From an Observational Study in Chicago, 20 Police Q. 81, 94–95 (2017) ("A common category of mental health-related calls originates from families who lack the resources to support members with mental illness over the long term.").

116. See, e.g., Nieto v. City of San Francisco, No. 14-cv-03823 NC, 2015 WL 7180609, at *1 (N.D. Cal. Nov. 16, 2015) (adjudicating the police killing of a man reported as being armed, despite subsequent eyewitness testimony that the only weapon present was a holstered Taser); Benjamin Mueller & Nate Schweber, Police Fatally Shoot a Brooklyn Man, Saying They Thought He Had a Gun, N.Y. Times (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/nyregion/police-shooting-brooklyn-crown-heights.html (on file with the *Columbia Law Review*) (describing the police killing of well-known local man carrying a metal pipe after a "frantic[]" woman's 911 call that "a man was pointing a gun at people").

117. See Hurst, supra note 114.

118. See, e.g., Gray v. Cummings, 917 F.3d 1, 16 (1st Cir. 2019) ("[A woman involuntarily committed for mental illness] absconded from the hospital on foot. Hospital staff called the Athol Police Department, asking that [she] . . . be 'picked up and brought back.'"); Jury Deadlocks on North Miami Cop Who Shot Unarmed Caretaker, CBS News (Mar. 15, 2019), https://www.cbsnews.com/news/charles-kinsey-shooting-clears-officer-jonathan-aledda-on-1-count-deadlocks-on-others-today-2019-03-15/ [https://perma.cc/QF5D-ZW5B] ("Prosecutors say [a mentally ill man] had left his nearby group home and sat down in the road to play with his toy. A motorist called 911, saying the man was holding what may be a gun and appeared suicidal.").

119. See, e.g., C.R. Div., DOJ, Investigation of the Baltimore City Police Department 75 (2016), https://www.justice.gov/d9/bpd_findings_8-10-16.pdf [https://perma.cc/7UG9-7GZV] (finding "reasonable cause to believe that BPD officers use unreasonable force in violation of the Fourth Amendment, and fail to make reasonable modifications necessary to avoid discrimination in violation of Title II of the Americans with Disabilities Act" (footnote omitted)).

B. *Pathways to Police Violence: Structural Deficiencies in Crisis Response*

Structural deficiencies in behavioral health systems coupled with high demand create what Professor Devon Carbado referred to as "[p]athways to [p]olice [v]iolence" and, as this Part argues, lead to increased encounters with law enforcement—whether in hospitals or on the streets.[120] Failures to adequately invest in a robust, community-based behavioral health system and fund effective crisis response systems track individuals in crisis into confrontations with law enforcement, often leading to arrests and incarceration in local jails.[121] Ultimately, the structural deficiencies in crisis care lead to institutionalization in prisons and jails and overreliance on emergency rooms. Police provide the conduit to these forms of crisis care within criminal legal systems and often within emergency rooms, which increases exposure to violence.

1. *Structural Deficiencies in Crisis Response.* — Each year, millions of Americans with behavioral healthcare needs—whether for mental disabilities, substance use dependencies, or both—are denied access to appropriate services. According to the SAMHSA, approximately fifty million adults in the United States report living with a mental health disability and about one-quarter report not receiving necessary mental health services.[122] Government officials, crisis care advocates, and administrators agree that jurisdictions across the United States are failing to meet these minimum standards of mental healthcare. In a recent guidance document, the SAMHSA recognized that "[t]he current approach to crisis care is patchwork and delivers minimal treatment for some people while others, often those who have not been engaged in care, fall through the cracks; resulting in multiple hospital readmissions, life in

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120. See Devon W. Carbado, From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence, 105 Calif. L. Rev. 125, 125, 131 (2017) (describing how Fourth Amendment doctrine "exposes African Americans not only to the violence of frequent police contact but also to the violence of police killings and physical abuse").

121. See Nat'l Ass'n of State Mental Health Program Dirs., supra note 53 ("[L]aw enforcement agencies report waiting an average of three hours to connect someone in crisis with a medical facility . . . compare[d] with 30 minutes to book them into jail . . . . [T]he average distance is five times longer to reach an access point for care than it is to reach the closest jail."). According to one study, individuals with psychiatric disabilities are more likely to be arrested for theft and trespassing offenses than people who do not have psychiatric disabilities. See Michael T. Compton, Adria Zern, Leah G. Pope, Nili Gesser, Aaron Stagoff-Belfort, Jason Tan de Bibiana, Amy C. Watson, Jennifer Wood & Thomas E. Smith, Misdemeanor Charges Among Individuals With Serious Mental Illnesses: A Statewide Analysis of More Than Two Million Arrests, 74 Psychiatric Servs. 31, 34 (2023).

122. Substance Abuse & Mental Health Servs. Admin., Key Substance Use and Mental Health Indicators in the United States: Results from the 2019 National Survey on Drug Use and Health 5 (2020), https://www.samhsa.gov/data/sites/default/files/reports/rpt29393/2019NSDUHFFRPDFWHTML/2019NSDUHFFR1PDFW090120.pdf [https://perma.cc/Y8SC-GEX2].

the criminal justice system, homelessness, early death and suicide."[123] Deficiencies exist among private healthcare providers as well. A 2019 analysis of preferred provider organization claims data found that only one percent of healthcare spending went to treatment for substance use dependencies, and only a little more than four percent went to mental health treatment.[124]

The immense demands on crisis response systems place significant strain on state and local mental health services, often spilling over into the criminal legal system. Troublingly, about a third of individuals have their first experience with mental health treatment through law enforcement contact.[125] Beyond this, disjointed,[126] underfunded systems put a strain on healthcare systems and emergency departments, increasing the cost of healthcare.[127] As one advocacy organization put it, "With non-existent or inadequate crisis care, costs escalate due to an overdependence on restrictive, longer-term hospital stays, hospital readmissions, overuse of law enforcement and human tragedies that result from a lack of access to care."[128]

The DOJ under President Barack Obama identified similar shortcomings. The Obama DOJ launched numerous investigations into states and state-run entities based on allegations that they were providing inadequate crisis care and mental health services. Generally, these investigations included site visits, research, data collection, review of standing policies and procedures, and interviews with relevant staff, officials, community members, advocates, and individuals who received care services from the state or state-run entities.[129] At the conclusion of the

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123. SAMHSA, Best Practice Toolkit, supra note 52, at 3, 8 ("[W]e based this information in this toolkit on the experience of veteran crisis system leaders and administrators.").

124. See Steve Melek, Stoddard Davenport & T.J. Gray, Milliman, Addiction and Mental Health vs. Physical Health: Widening Disparities in Network Use and Provider Reimbursement 17 (2019), https://www.milliman.com/en/insight/addiction-and-mental-health-vs-physical-health-widening-disparities-in-network-use-and-p [https://perma.cc/ZB92-HF9J].

125. Treatment Advoc. Ctr., Road Runners: The Role and Impact of Law Enforcement in Transporting Individuals With Severe Mental Illness 1 (2019), https://www.treatmentadvocacycenter.org/wp-content/uploads/2024/01/Road-Runners.pdf [https://perma.cc/T8P9-3SMS].

126. See Nat'l Ass'n of State Mental Health Program Dirs., supra note 53, at 5 ("Far too often, crisis services do not represent a systemic approach to addressing community needs but rather a collection of disconnected, overlapping and non-coordinated services . . . often missing essential pieces needed to align the service delivered with the needs of the individual.").

127. See id. at 10 ("[A] lack of [mental health crisis] resources translates into paying for inefficiencies such as unnecessary [emergency department] bills that are estimated to typically cost between $1,200 and $2,264 . . . .").

128. SAMHSA, Best Practice Toolkit, supra note 52, at 8.

129. See, e.g., C.R. Div., DOJ, Investigation of Alameda County, John George Psychiatric Hospital, and Santa Rita Jail 3–4 (Apr. 22, 2021), https://www.justice.gov/crt/case-

investigations, the DOJ published letters detailing its findings—threatening to file suit against the state or state-run entities and outlining suggested and minimum remedial measures that the entities should begin implementing to avoid further violations.[130] Taken together, these suggested remedial measures often outlined different aspects of the same goal: developing effective and adequate mental health crisis response systems.[131]

DOJ investigations found an overreliance on police and unnecessary institutionalization, which resulted in violations of the Constitution and federal disability laws.[132] At the root of these allegations was the lack of adequate crisis care services, which could prevent reliance on police, institutionalization, and unlawful conduct.[133]

Investigations into Alameda County and the Portland Police Bureau are illustrative and highlight the general systemic issues and rights violations that occur when there is an overreliance on police and institutionalization. In April 2021, the DOJ completed an investigation into Alameda County, California, the Alameda County Sheriff's Office, and the Santa Rita Jail.[134] The investigation found that the county's

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document/file/1388891/download [https://perma.cc/83BZ-XLWD]; Letter from Vanita Gupta, Principal Deputy Assistant Att'y Gen., DOJ, on United States' Investigation, Pursuant to the Americans with Disabilities Act, of Louisiana's Use of Nursing Facilities to Serve People With Mental Health Disabilities to John Bel Edwards, Governor, La. 3 (Dec. 21, 2016), https://www.justice.gov/opa/file/920141/download [https://perma.cc/2LE7-TRRA]; Letter from Thomas E. Perez, Assistant Att'y Gen., DOJ, on United States' Investigation of the State of Mississippi's Service System for Persons With Mental Illness and Developmental Disabilities to Haley R. Barbour, Governor of Miss. 5–6 (Dec. 22, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2012/01/26/miss_findletter_12-22-11.pdf [https://perma.cc/C4UX-REQ9] [hereinafter Perez, Mississippi]; Letter from Thomas E. Perez & Amanda Marshall, Assistant Att'y Gen. & Att'y, DOJ, on Investigation of the Portland Police Bureau to Sam Adams, Mayor, City of Portland 4–5 (Sept. 12, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/09/17/ppb_findings_9-12-12.pdf [https://perma.cc/C8BM-HLBR] [hereinafter Perez & Marshall, Portland].

130. See, e.g., C.R. Div., DOJ, supra note 129, at 36–39; Gupta, supra note 129, at 28–29; Perez, Mississippi, supra note 129, at 32–33; Perez & Marshall, Portland, supra note 129, at 40–41.

131. See C.R. Div., DOJ, supra note 129, at 36–37; Gupta, supra note 129, at 28–29; Perez, Mississippi, supra note 129, at 32–33; Perez & Marshall, Portland, supra note 129, at 40–41.

132. See C.R. Div., DOJ, supra note 129, at 1–2; Gupta, supra note 129, at 1–2; Perez, Mississippi, supra note 129, at 2–4; Perez & Marshall, Portland, supra note 129, at 2–4.

133. See C.R. Div., DOJ, supra note 129, at 11–13 ("It is the County's failure to provide evidence-based, community-based treatment, including crisis services and processes to divert people from psychiatric institutionalization, that results in and perpetuates the cycle of needless institutionalization described above."); Perez & Marshall, Portland, supra note 129, at 6–8 (identifying the lack of "an adequate support system to help people avoid a mental health crisis" and of "an adequate crisis response system to provide services to and help stabilize people in crisis" as "the most significant issues" in the state's mental health system that cause more police encounters).

134. Letter from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., DOJ, to Keith Carson, President, Alameda Cnty. Bd. of Supervisors; Gregory J. Ahern, Alameda Cnty.

inadequate crisis care system was causing a risk of unnecessary institutionalization and that inadequate crisis care and mental health services in Santa Rita Jail were resulting in serious Americans with Disabilities Act (ADA) violations against incarcerated people.[135] In 2012, another DOJ investigation found that the Portland Police Bureau exhibited a pattern or practice of using unnecessary or unreasonable force against people who had or were perceived as having a "mental illness" as a result of "deficiencies in policy, training, and supervision."[136] The report revealed that a lack of adequate crisis care services had caused an overreliance on police, which in turn exacerbated the impact of the police's lack of training and pattern of excessive force against individuals experiencing mental health crises.[137]

Other investigations have revealed ADA violations in state-run nursing facilities that were failing to provide community-based services and placing individuals in institutions unnecessarily.[138] These investigations all point to the lack of crisis care services as a cause of unnecessary institutionalization and suggest developing such services as a remedial measure to prevent individuals from ending up in these facilities in the first place.[139]

In most jurisdictions without a comprehensive crisis service system, involving law enforcement contributes to increases in wait times and access to care. Oftentimes, police will encounter someone in crisis and lack knowledge about where exactly to take them to access care. When police do have knowledge of local crisis response providers, space at the facility may not be available. In both scenarios, police might take people in crisis to emergency departments or even jail.[140] As one crisis services provider found, this process is deeply inefficient: "It can take hours or even days in an emergency department" for a person to access mental health crisis services.[141] The outcomes of such systemic failures are beyond inefficient; they are deadly. Such local deficiencies are even more troubling when considering the surging demand for mental health services alongside increased suicide rates. According to the CDC, suicides rose in 2021, after

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Sheriff/Coroner; & Mark Fratzke, Alameda Health Sys. Interim Chief Operating Officer 1 (Apr. 22, 2021).

135. Id. at 1–2.

136. Perez & Marshall, Portland, supra note 129, at 1–3.

137. See id. at 7.

138. See, e.g., Gupta, supra note 129, at 1–2; Perez, Mississippi, supra note 129, at 2–5; see also Letter from Grace Chung Becker, Acting Assistant Att'y Gen., to Theodore R. Kulongoski, Governor of Or. 5 (Jan. 9, 2008), https://www.justice.gov/sites/default/files/crt/legacy/2011/04/14/oregon_state_hospital_findlet_01-09-08.pdf [https://perma.cc/2P9B-6WR8] ("Many of these deficiencies stem from a system that does not have clear, specific standards of care or an adequate number of trained professional and direct care staff.").

139. See C.R. Div., DOJ, supra note 129, at 13–14; Perez & Marshall, Portland, supra note 129, at 19–23.

140. Nat'l Ass'n of State Mental Health Program Dirs., supra note 53, at 5–6, 8.

141. SAMHSA, Best Practice Toolkit, supra note 52, at 54.

two years of decline, from 45,979 in 2020 to 47,646 in 2021.[142] Suicide claimed the lives of more than 48,000 Americans in 2018.[143]

2. *Street-Level Violent Encounters Between Police and Individuals in Mental Crisis.* — When police serve as a gateway for accessing mental health services, there is a high risk that individual encounters will turn violent. A *Washington Post* database indicates that in almost sixty percent of the reported cases of an individual being killed by police, individuals (disabled *and* nondisabled) reportedly had a gun.[144] Reporting from the *Boston Globe* found that "[a]bout 90 percent of [disabled and non-disabled] people shot by police [in Massachusetts] had weapons and did not respond when told to drop them."[145] That said, although most individuals killed by the police are armed with *something*, including but not limited to guns, many are not. For example, data collected since 2015 show that 155 people killed by police were found to be holding toy guns.[146] According to the *Globe*, "Most often—in 65 percent of shootings involving apparent mental illness—that weapon was a knife or other sharp object, such as a hatchet, machete, or screwdriver. However, 13 percent of the time, police shot people holding firearms."[147] Police use of force against unarmed people also reveals disparities along racial lines. Black people, though they comprise a disproportionate share of police killings, make up one-third of unarmed victims.[148] Whether similar disparities exist for disabled people—

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142. Sally C. Curtin, Matthew F. Garnett & Farida B. Ahmad, CDC, Provisional Numbers and Rates of Suicide by Month and Demographic Characteristics: United States, 2021, at 1 (2022), https://www.cdc.gov/nchs/data/vsrr/vsrr024.pdf [https://perma.cc/M4K3-R38Q].

143. Id. at 3; 988 Suicide and Crisis Lifeline, FCC, https://www.fcc.gov/suicide-prevention-hotline [https://perma.cc/JN7B-CUDG] (last updated Nov. 30, 2022) ("In 2020 alone, the U.S. had one death by suicide about every 11 minutes—and for people aged 10-34 years, suicide is a leading cause of death."). The concurring Justices surfaced these concerns at oral argument as they articulated a set of exigencies that might justify warrantless searches and seizures for the purposes of mental health evaluation and treatment. See Transcript of Oral Argument at 39–41, 53, 79, Caniglia v. Strom, 141 S. Ct. 1596 (2021) (20-157), 2021 WL 1123794 ("[E]very single day on average, there are 65 suicides by gunshot in the United States . . . .").

144. Joe Fox, Adrian Blanco, Jennifer Jenkins, Julie Tate & Wesley Lowery, What We've Learned About Police Shootings 5 Years After Ferguson, Wash. Post (Aug. 9, 2019), https://www.washingtonpost.com/nation/2019/08/09/what-weve-learned-about-police-shootings-years-after-ferguson/ [https://perma.cc/GK5V-A8CW].

145. Jenna Russell, Michael Rezendes, Maria Cramer, Scott Helman & Todd Wallack, Families Failed by a Broken Mental Health Care System Often Have No One to Call but Police, Bos. Globe (July 6, 2016), https://apps.bostonglobe.com/spotlight/the-desperate-and-the-dead/series/police-confrontations/ [https://perma.cc/2LS7-J38W].

146. Fox et al., supra note 144.

147. Russell et al., supra note 145.

148. See Deidre McPhillips, Deaths From Police Harm Disproportionately Affect People of Color, U.S. News (June 3, 2020), https://www.usnews.com/news/articles/2020-06-03/data-show-deaths-from-police-violence-disproportionately-affect-people-of-color (on file with the *Columbia Law Review*) ("More than 1,000 unarmed people died as a result of police harm between 2013 and 2019 . . . . About a third of them were black."); see also Campaign

and not just those showing "signs of mental illness"—is unknown as there is no national database containing this information. What is known is that disabled people of color make up a disproportionate number of police killings.[149]

The frequency of deadly encounters between individuals in crisis and law enforcement has led to a series of protests, hashtags, and calls for systemic and structural change.[150] When Walter Wallace Jr., a twenty-seven year old Black man with bipolar disorder and in mental crisis, was killed by police in Philadelphia, local communities rallied.[151] Police reported Wallace was brandishing a knife and waiving it "erratically."[152] The Wallace family honed in on the inappropriate and violent police response to Walter's mental health crisis in the media, and an attorney for the family put it this way: "You don't deal with crisis with a firearm."[153]

Beyond this, stereotypes about people with psychiatric disabilities can facilitate violent encounters at the individual level. Constructions of dangerousness reflect deep-seated and pervasive stereotypes, myths, and tropes about mental illness and its connections to dangerousness and criminality in U.S. society. These biases show up in clinical assessments of dangerousness for the purpose of civil commitment and have garnered

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Zero, Mapping Police Violence, https://mappingpoliceviolence.org/ [https://perma.cc/PR87-Y5AR] (last updated Mar. 17, 2024) (aggregating comprehensive data on police killings in the United States from 2013 to the present).

149. See Fatal Force, Wash. Post, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (on file with the *Columbia Law Review*) (last updated Apr. 7, 2024); Vilissa Thompson, Understanding the Policing of Black, Disabled Bodies, Ctr. for Am. Progress, https://www.americanprogress.org/article/understanding-policing-black-disabled-bodies/ [https://perma.cc/C9CZ-XRKX] (Feb. 10, 2021) ("In the United States, 50 percent of people killed by law enforcement are disabled, and more than half of disabled African Americans have been arrested by the time they turn 28—double the risk in comparison to their white disabled counterparts.").

150. Nicole Hong, Rochester Officers Suspended After Pepper-Spraying of 9-Year-Old Girl, N.Y. Times (Jan. 31, 2021), https://www.nytimes.com/2021/01/31/nyregion/rochester-police-pepper-spray-child.html (on file with the *Columbia Law Review*); Bill Hutchinson, Police Handcuffed Lifeless Andre Hill Instead of Helping Him, Family's Lawyer Says, ABC News (Dec. 31, 2020), https://abcnews.go.com/US/police-handcuffed-lifeless-andre-hill-helping-lawyer/story?id=74988393 [https://perma.cc/8MB8-L252]; Claudia Lauer, Walter Wallace Jr.'s Family Called for Ambulance, Not Police, His Parents Say, NBC Phila. (Oct. 29, 2020), https://www.nbcphiladelphia.com/news/local/family-of-walter-wallace-called-for-ambulance-not-police-lawyer-says/2575903/ [https://perma.cc/459X-HMNY]; Christina Morales, Andre Hill's Family Reaches $10 Million Settlement With City of Columbus, N.Y. Times (May 14, 2021), https://www.nytimes.com/2021/05/14/us/andre-hill-columbus-settlement.html (on file with the *Columbia Law Review*).

151. Nicole Chavez, Walter Wallace Jr Struggled With Mental Health Issues, Family Says, CNN (Oct. 28, 2020), https://www.cnn.com/2020/10/28/us/walter-wallace-jr-family-reaction/index.html [https://perma.cc/9UXJ-URTJ].

152. Id.

153. Id. (internal quotation marks omitted).

significant criticism in the scholarly literature.[154] Similarly, tasking police with responding to individuals experiencing mental crises both reflects and reinforces societal stereotypes that link people with psychiatric disabilities to characteristics of dangerousness and criminality.[155] Historically, disabled people were segregated into large-scale institutions as part of eugenics policies aimed at violently suppressing their reproductive capacities and preventing them from passing on supposedly defective traits.[156] Beyond the institution, disabled people were policed heavily in public spaces and arrested for violating quality-of-life offenses and so-called "ugly laws." Professor Susan Schweik explains that during the late nineteenth and early twentieth centuries, some municipalities enacted laws that expressly prohibited the public appearance of certain "unsightly" disabled people.[157] In some localities, disabled people were subjected to removal and criminal sanction for simply appearing in public with physical disabilities such as blindness, deformities, and other "unsightly" features.[158] Beyond this, local jurisdictions passed a bevy of laws aimed at preserving order in public and private spaces, from public squares and streets to "bawdy" and "disorderly" houses, ridding these places of persons labeled disorderly—including so-called vagrants, beggars, and panhandlers.[159]

These historical practices likely have informed (and continue to inform) how the public thinks about people with psychiatric disabilities, particularly with respect to notions of dangerousness. According to one study, "[M]embers of the public undoubtedly exaggerate both the strength of the relationship between major mental disorders and violence, as well as their own personal risk from the severely mentally ill."[160] Indeed, researchers have concluded that "[p]ublic perceptions of the link between mental illness and violence are central to stigma and discrimination as people are more likely to condone forced legal action and coerced treatment when violence is at issue."[161] Such public perceptions are concerning in light of extensive research as to the ineffectiveness of

154. See, e.g., Michel Foucault, About the Concept of the "Dangerous Individual" in 19th Century Legal Psychiatry, 1 Int'l J.L. & Psychiatry 1, 2, 6–7 (1978).

155. Jamelia N. Morgan, Policing Under Disability Law, 73 Stan. L. Rev. 1401, 1423–24 (2021) [hereinafter Morgan, Policing Under Disability Law].

156. Id. at 1413–14.

157. Susan M. Schweik, The Ugly Laws: Disability in Public 1–2, 33 (2009).

158. Id. at 31–33, 35–36.

159. See William J. Novak, The People's Welfare: Law & Regulation in Nineteenth-Century America 167–71 (1996) (describing local laws).

160. Heather Stuart, Violence and Mental Illness: An Overview, 2 World Psychiatry 121, 123 (2003).

161. Id. (citing Bernice A. Pescosolido, John Monahan, Bruce G. Link, Ann Stueve & Aeko Kikuzawa, The Public's View of the Competence, Dangerousness, and Need for Legal Coercion of Persons With Mental Health Problems, 89 Am. J. Pub. Health 1339, 1339–45 (1999)).

involuntary treatment, as well as the harms of such coercive treatment to mental health consumers.[162]

Misconceptions about psychiatric disabilities and violence show up in the attitudes of law enforcement towards people with psychiatric disabilities. For example, according to one study, researchers found that police officers perceived people with psychiatric disabilities to be more dangerous than the general population, despite research indicating that these individuals are accused of serious crimes at a rate proportional to their population numbers.[163] Another study found that younger, white officers with less training on people with psychiatric disabilities "perceived persons with mental illness as being more dangerous than . . . their older, nonwhite, and better-trained colleagues."[164] At the same time, another study found that while police officers viewed people with schizophrenia as "less responsible, more deserving of pity, and more worthy of help than a

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162. See Joshua T. Jordan & Dale E. McNiel, Perceived Coercion During Admission Into Psychiatric Hospitalization Increases Risk of Suicide Attempts After Discharge, 50 Suicide & Life-Threatening Behav. 180, 186 (2019) ("[P]atients who perceived their hospitalization as coercive were significantly more likely to make a postdischarge suicide attempt . . . ."); Damian Smith, Eric Roche, Kieran O'Loughlin, Daria Brennan, Kevin Madigan, John Lyne, Larkin Feeney & Brian O'Donoghue, Satisfaction With Services Following Voluntary and Involuntary Admission, 23 J. Mental Health 38, 43 (2014) (finding associations between lower levels of satisfaction following psychiatric admission and the following factors: "involuntary admission, co-morbid substance use disorder, less procedural justice, greater perceived coercion, experiencing the use of seclusion and medication without consent"); Sophie Staniszewska, Carole Mockford, Greg Chadburn, Sarah-Jane Fenton, Kamaldeep Bhui, Michael Larkin, Elizabeth Newton, David Crepaz-Keay, Frances Griffiths & Scott Weich, Experiences of In-Patient Mental Health Services: Systematic Review, 214 Brit. J. Psychiatry 329, 329 (2019) (showing that "averting negative experiences of coercion" was one of the "four dimensions [that] were consistently related to significantly influencing in-patients' experiences of crisis and recovery-focused care"). As one civil rights group put it, "Forced treatment is not treatment at all." Letter from Civil Rights Advocates to New York State Legislators to Reject Expansion of Forced Psychiatric Commitment Laws 1 (Mar. 25, 2022), https://secureservercdn.net/198.71.233.111/d25.2ac.myftpupload.com/wp-content/uploads/2022/03/Kendras-Law-Letter-to-State-Legislators.pdf [https://perma.cc/MLU4-2E2U]. Stigma also contributes to negative treatment outcomes. See Nathalie Oexle, Mario Müeller, Wolfram Kawohl, Ziyan Xu, Sandra Viering, Christine Wyss, Stefan Vetter & Nicolas Rüsch, Self-Stigma as a Barrier to Recovery: A Longitudinal Study, 268 Eur. Archives Psychiatry & Clinical Neurosci. 209, 209–12 (2018) (showing a positive correlation between recovery and interventions supporting persons with mental illness to cope with self-stigma); Stigma, Prejudice and Discrimination Against People With Mental Illness, Am. Psychiatric Ass'n, https://www.psychiatry.org/patients-families/stigma-and-discrimination (last visited Feb. 14, 2024) [https://perma.cc/7AAS-JSRX] (noting the association between self-stigma and less effective recovery from mental illness over two years, including because of reluctance to seek treatment, social isolation, and other factors).

163. See Linda A. Teplin, The Criminality of the Mentally Ill: A Dangerous Misconception, 142 Am. J. Psychiatry 593, 593 (1985).

164. Amy C. Watson, Patrick W. Corrigan & Victor Ottati, Police Officers' Attitudes Toward and Decisions About Persons With Mental Illness, 55 Psychiatric Servs. 49, 49 (2004) (citing Michael J. Bolton, The Influence of Individual Characteristics of Police Officers and Police Organizations on Perceptions of Persons With Mental Illness (Nov. 2000) (Ph.D. Dissertation, Virginia Commonwealth University) (on file with the *Columbia Law Review*)).

person without a mental illness label," the officers also perceived individuals with the schizophrenia as more dangerous and more violent, even controlling for other variables.[165] Researchers in the study noted that "exaggerated perceptions of dangerousness could lead to behaviors that escalate the situation."[166]

Widespread perceptions that people with psychiatric disabilities are more dangerous should be considered alongside racial disparities. Black patients are 1.6 times more likely to experience an involuntary psychiatric hospitalization than white patients.[167] Racial disparities also exist with respect to accessing outpatient mental health treatment in general. According to one recent study, Black and Latinx people are less likely than white people to receive outpatient mental health care, even when controlling for differences in mental health need, income, education, age, gender, insurance coverage, and employment status.[168]

For some, the connection between systemic failures to invest in healthcare systems more broadly and police violence is more of a nexus: Actors and entities tasked with providing care instead coerce, control, sterilize, and otherwise inflict harm.[169] Some public health researchers have framed policing itself as a public health issue, calling on public health educators to use evidence to "reorient[] perspectives on public safety and advocat[e] to shift funding priorities toward evidence-based programs focused on the social determinants of health."[170] Similarly, abolitionists rooted in disability justice have campaigned to defund and decouple police from crisis care services.[171] Advocates for disability rights and

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165. Id. at 52; see also M. Mengual-Pujante, I. Morán Sánchez, A. Luna-Ruiz Cabello & M.D. Pérez-Cárceles, Attitudes of the Police Towards Individuals With a Known Psychiatric Diagnosis, BMC Psychiatry, Dec. 2022, at 8 (noting police officer perceptions of dangerousness linked to mental illness diagnosis).

166. Watson et al., supra note 164, at 53.

167. See Timothy Shea, Samuel Dotson, Griffin Tyree, Lucy Ogbu-Nwobodo, Stuart Beck & Derri Shtasel, Racial and Ethnic Inequities in Inpatient Psychiatric Civil Commitment, 73 Psychiatric Servs. 1322, 1326 (2022).

168. Mark Olfson, Samuel H. Zuvekas, Chandler McClellan, Melanie M. Wall, Sidney H. Hankerson & Carlos Blanco, Racial-Ethnic Disparities in Outpatient Mental Health Care in the United States, 74 Psychiatric Servs. 674, 676 (2023).

169. Medical Industrial Complex Visual, Leaving Evidence (Feb. 6, 2015), https://leavingevidence.wordpress.com/2015/02/06/medical-industrial-complex-visual/ [https://perma.cc/F64K-VY8X].

170. Paul J. Fleming, William D. Lopez, Maren Spolum, Riana Elyse Anderson, Angela G. Reyes & Amy J. Schulz, Policing Is a Public Health Issue: The Important Role of Health Educators, 48 Health Educ. & Behav. 553, 555 (2021).

171. See Mission and Vision, Fireweed Collective, https://fireweedcollective.org/mission-vision-values/ [https://perma.cc/HC7E-8X2W] (last visited Feb. 14, 2024) ("Our work seeks to disrupt the harm of systems of abuse and oppression, often reproduced by the mental health system."); Welcome to CAT-911.ORG, CAT-911.ORG, https://cat-911.org/ [https://perma.cc/57C4-FQMZ] (last visited Feb. 14, 2024) (describing and, in the case of Southern California, providing Community Action Teams as 911 alternatives "based on a framework of Transformative Justice, which aims to

disability justice seek community-based options for care and treatment instead of hospitalization in psychiatric hospitals or emergency departments.[172] So, though most jurisdictions have a shortage of inpatient psychiatric beds, these advocates seek community-based care and support, along with peer-based support—not more hospital beds.[173]

In the midst of these structural and systemic failures is the law. As this Article will show, there is a considerable lack of clarity regarding how precisely the Fourth Amendment regulates mental health crisis response. The next Part describes current Fourth Amendment doctrine governing psychiatric holds. A close examination of the jurisprudence demonstrates how uncritically importing legal rules from the criminal law context undermines legal protections for people experiencing mental crises in their homes. The next Part centers on the histories of disabled people in the United States before turning to a critique of key doctrinal rules—exigent circumstances, emergency aid, probable cause, and special needs—within this area of law.

II. PSYCHIATRIC HOLDS AND THE LIMITS OF FOURTH AMENDMENT DOCTRINE

A. *Disabled People, the Home, and Independent Living*

The sanctity of the home is a cherished principle in Fourth Amendment jurisprudence—and the subject of important criticisms.[174] While the Fourth Amendment provides for the "right of the people to be secure in their persons, houses, papers, and effects," the Supreme Court has framed the home as "first among equals."[175] The privileged place of the home in Fourth Amendment jurisprudence has prevented warrantless

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create a world governed on principles of mutual respect, interrelatedness and reciprocity rather than violence, domination and disposability"); see also Navigating Crisis, The Icarus Project, https://fireweedcollective.org/wp-content/uploads/2020/03/IcarusNavigatingCrisisHandoutLarge05-09.pdf%20 [https://perma.cc/DF8T-JWKJ] (last visited July 8, 2024) ("Calling the police or hospital shouldn't be the automatic response.").

172. See, e.g., Jennifer Mathis, Medicaid's Institutions for Mental Diseases (IMD) Exclusion Rule: A Policy Debate—Argument to Retain the IMD Rule, 70 Psychiatry Servs. 4, 5 (2019) ("What I needed was a stronger community-based system to divert patients from inpatient hospitalizations and the community resources to discharge my patients who were ready for community placement . . . ." (internal quotation marks omitted) (quoting Dr. Jess Jamieson)).

173. Id. at 6.

174. See Groh v. Ramirez, 540 U.S. 551, 559 (2004) ("'[T]he right of a man to retreat into his own home and there be free from unreasonable government intrusion' stands 'at the very core of the Fourth Amendment.'" (quoting Kyllo v. United States, 533 U.S. 27, 31 (2001)); see also Ric Simmons, *Lange*, *Caniglia*, and the Myth of Home Exceptionalism, 54 Ariz. St. L.J. 145, 147–49 (2022) ("The sanctity of the home has deep roots in Anglo-American law, dating to Blackstone, who said that the law has a 'particular and tender regard to the immunity of a man's house.'").

175. U.S. Const. amend. IV; Florida v. Jardines, 569 U.S. 1, 6 (2013).

searches and seizures or limited their scope.[176] "[T]he overriding respect for the sanctity of the home," as Justice Lewis Powell put it in his *Payton v. New York* concurrence, "has been embedded in our traditions since the origins of the Republic."[177] While this Article takes no position as to the propriety of centering the home in Fourth Amendment analysis and whether the sanctity of the home is more rhetoric than reality,[178] it does offer a discussion of the importance of the home from the standpoint of disability rights movements.

For decades, disability rights movements and organizations have centered independent living as an essential aspect of equal rights and societal inclusion for disabled people.[179] The focus on independent living as a central goal of disability rights makes sense given the historical treatment of disabled people in society. The birth of the asylum in the mid-nineteenth century coincided with the move to institutionalize people with psychiatric disabilities and intellectual disabilities, which removed disabled people from their homes and denied them access to community living.[180] Locked away in large-scale institutions, disabled people were forced into total dependence on the institution to meet their daily needs.[181]

By some accounts, conditions within asylums were characterized as neglectful, abusive, and violent, targeting even reproductive capacities.[182] The rise of the eugenics period intensified the focus on controlling the reproductive capacities of disabled people.[183] Once institutionalized,

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176. See, e.g., Payton v. New York, 445 U.S. 573 (1980) (holding that the Fourth Amendment prohibits law enforcement from conducting warrantless entry into a suspect's home to make an arrest for a felony).

177. Id. at 601 (Powell, J., concurring).

178. See Kate Weisburd, The Carceral Home, 103 B.U. L. Rev. 1879, 1884 (2023) (discussing the contradiction of the carceral home in criminal procedure); see also Simmons, supra note 174, at 149–58 (discussing the myth of home exceptionalism).

179. See About Independent Living: What is Independent Living?, Nat'l Council on Indep. Living, https://ncil.org/about/aboutil/ [https://perma.cc/C9TZ-RUYK] (last visited Mar. 14, 2024); What Is Independent Living?, Centers for Independent Living, Admin. for Cmty. Living, https://acl.gov/programs/aging-and-disability-networks/centers-independent-living [https://perma.cc/573L-L8EY] (last visited Feb. 14, 2024) (describing function of centers for independent living).

180. See David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic 130–31 (Routledge rev. ed. 2017) (2002) (describing the origins of the asylum and the move to institutionalize people with disabilities).

181. See generally Erving Goffman, Asylums: Essays on the Social Situation of Mental Patients and Other Inmates (Routledge 2017) (1961) (describing asylums as total institutions characterized by bureaucratic control of every aspect of individuals' basic needs).

182. See Madeline M. Atwell, The Madness They Endured: A Biocultural Examination of Women's Experiences of Structural Violence Within 20th-Century Missouri State Mental Hospitals, 39 Int'l J. Paleopathology 75, 76–78 (2022) (describing public asylums as "known for egregious neglect and abuse").

183. See Alexandra Minna Stern, Eugenic Nation: Faults and Frontiers of Better Breeding in Modern America 52–53 (2d ed. 2016) (describing the common Progressive view

disabled people were forcibly sterilized to prevent them from passing on so-called "defective" traits to offspring.[184] Infamously, in 1927, the Supreme Court sanctioned this practice and gave it the imprimatur of constitutionality in *Buck v. Bell*.[185] As discussed above, these abuses spurred the deinstitutionalization movement in the early 1960s, which focused on closing down these large congregate asylums and institutions.

Deinstitutionalization was a triumph for disability rights but remains an unfulfilled mandate. In 1963, President John F. Kennedy signed the Community Mental Health Act, declaring that the "cold mercy of custodial isolation [would] be supplanted by the open warmth of community concern and capability."[186] Despite its ambitions, community mental health centers were never adequately funded.[187] According to one commentator, "Instead of 'care,' in the 1980s and 1990s, presidents from Ronald Reagan through Bill Clinton pushed policies that punished the poor, curtailed access to health care and welfare, and promoted incarceration."[188]

The unmet promises of deinstitutionalization did not go unrecognized. In enacting the Americans with Disabilities Act in 1990, Congress recognized institutionalization and segregation as forms of discrimination.[189] Similarly, the Supreme Court in *Olmstead v. L.C.* interpreted Title II of the ADA to prohibit unjustified institutionalization and recognized it as a form of unlawful discrimination under the Act.[190] Today, centers for independent living help individuals transition from institutions to their homes and other community-based living

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of the early twentieth century that "depriving [disabled persons] of their reproductive capacity benefited both the individual and society").

184. Id. at 83.

185. 274 U.S. 200, 205–07 (1927).

186. President John F. Kennedy, Special Message to the Congress on Mental Illness and [Intellectual Disability], Am. Presidency Project, https://www.presidency.ucsb.edu/documents/special-message-the-congress-mental-illness-and-mental-retardation [https://perma.cc/BV9E-SYEE] (last visited Mar. 28, 2024).

187. See, e.g., Blake Erickson, Deinstitutionalization Through Optimism: The Community Mental Health Act of 1963, 16 Am. J. Psychiatry Residents' J. 6, 7 (2021) ("Because of construction and long-term funding impediments, states built approximately half of the 1,500 centers outlined in the CMHA." (citing Gerald N. Grob, From Asylum to Community: Mental Health Policy in Modern America (1991))).

188. Elliott Young, Locking Up the Mentally Ill Has a Long History, Wash. Post (Jan. 3, 2023), https://www.washingtonpost.com/made-by-history/2023/01/03/history-mental-illness-incarceration/ (on file with the *Columbia Law Review*).

189. See 42 U.S.C. § 12101 (2018) (acknowledging that "society has tended to isolate and segregate individuals with disabilities" and that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization"); see also Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 588 (1999) (recognizing the same).

190. 527 U.S. at 587, 600.

arrangements,[191] while disability rights groups, like protection and advocacy organizations,[192] assist disabled people with obtaining and retaining access to social security and Medicaid benefits that facilitate the personal care assistance and support necessary to remain in their homes and communities.[193] In light of this history, the home remains an important symbol of disability rights and a cornerstone of independent living.

At the same time, decades-long failures to invest in affordable and accessible housing threaten this longstanding movement goal. Housing shortages have contributed to homelessness and a surge of tent communities across major American cities, including New York, Los Angeles, and Seattle, and disabled people are among their ranks.[194] Cities have responded punitively and violently to unsheltered communities residing in public spaces, conducting "sweeps" and citing and arresting individuals for any number of quality-of-life offense violations.[195] Indeed,

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191. Centers for Independent Living, Admin. for Cmty. Living, https://acl.gov/programs/aging-and-disability-networks/centers-independent-living [https://perma.cc/VL4D-5QD3] (last updated Mar. 25, 2024).

192. Protection and advocacy agencies provide an array of services to people with disabilities including investigating allegations of abuse or neglect, monitoring facilities, and pursuing litigation, among other duties. See Protection & Advocacy Systems, Admin. for Cmty. Living, https://acl.gov/programs/pa-programs [https://perma.cc/C2NF-QCAK] (last updated July 7, 2023).

193. See, e.g., Government Benefits and Disability Advocacy Project, Legal Aid Soc'y, https://legalaidnyc.org/programs-projects-units/government-benefits-and-disability-advocacy-project/ [https://perma.cc/V8ZY-Z7B4] (last visited Mar. 9, 2024).

194. See Mike Baker, Homeless Residents Got One-Way Tickets Out of Town. Many Returned to the Streets., N.Y. Times (Sept. 14, 2019), https://www.nytimes.com/2019/09/14/us/homeless-busing-seattle-san-francisco.html (on file with the *Columbia Law Review*) (last updated Sept. 15, 2019) (describing programs busing unhoused populations to other locations, which have been used by major cities to address rises in homelessness); Rick Paulas, Instead of Helping Homeless People, Cities are Bussing Them Out of Town, Vice (Feb. 13, 2020), https://www.vice.com/en_us/article/bvg7ba/instead-of-helping-homeless-people-cities-are-bussing-them-out-of-town [https://perma.cc/5CED-YZNG] (same); Heidi Schultheis, Lack of Housing and Mental Health Disabilities Exacerbate One Another, Ctr. for Am. Progress (Nov. 20, 2018), https://www.americanprogress.org/article/lack-housing-mental-health-disabilities-exacerbate-one-another/ [https://perma.cc/V8VZ-LJDB] ("Coupled with deinstitutionalization, the nation's growing affordable housing crisis has exacerbated conditions for people with mental health disabilities who experience homelessness.").

195. See Nat'l Health Care for the Homeless Council, Impact of Encampment Sweeps on People Experiencing Homelessness 4 (2022), https://nhchc.org/wp-content/uploads/2022/12/NHCHC-encampment-sweeps-issue-brief-12-22.pdf [https://perma.cc/XQL8-GFE8] (explaining that sweeps of homeless encampments increase arrest rates and generate collateral consequences for residents); Claire Rush, Janie Har & Michael Casey, Cities Crack Down on Homeless Encampments. Advocates Say That's Not the Answer, Associated Press (Nov. 28, 2023), https://apnews.com/article/homelessness-encampment-sweeps-cities-08ff74489ba00cfa927fe1cf54c0d401 [https://perma.cc/QWM5-MJ7C] (using data requests and interviews from cities across the United States to show that "attempts to clear encampments [have] increased" in recent years).

what legal scholar Chris Slobogin called the "poverty exception to the Fourth Amendment" might have a particularly harmful effect on disabled people who occupy spaces less likely to have reasonable expectations of privacy.[196]

Beyond this, current behavioral health systems and mental health crisis response programs threaten the ability of disabled people to live at home and in their communities in several ways. First, lack of community mental health treatment options leads to unnecessary inpatient hospitalizations and emergency room admissions.[197] Such reliance on involuntary hospitalization and emergency rooms is costly and does not produce optimal treatment outcomes.[198] Second, lack of access to chronic mental health care *facilitates* reliance on hospitalization and emergency rooms, as failures to treat chronic mental health conditions can often lead to crisis situations. Finally, police involvement in crisis response can lead to institutionalization of a different kind—jail or prison. A host of quality-of-life offenses can provide a basis for citation and arrest and a pathway into incarceration. For example, individuals experiencing crises have been arrested for disorderly conduct for exhibiting symptoms related to their underlying psychiatric disabilities.[199] Even more troubling, when police do not have sufficient grounds for detaining someone under state civil commitment laws, quality-of-life offenses provide ample grounds for arrest

196. See Christopher Slobogin, The Poverty Exception to the Fourth Amendment, 55 Fla. L. Rev. 391, 401 (2003) [hereinafter Slobogin, Poverty Exception] (arguing that "Fourth Amendment protection varies depending on the extent to which one can afford accoutrements of wealth such as a freestanding home, fences, lawns, heavy curtains, and vision- and sound-proof doors and walls"); see also id. at 401 n.65 (collecting cases where individuals living in makeshift shelters in public spaces have no reasonable expectation of privacy that would classify police intrusion as a search triggering Fourth Amendment protections). The *Katz* test, which articulated the "reasonable expectation of privacy" as a heuristic, is under immense scrutiny—and there are arguments for its replacement. See Matthew Tokson, The *Carpenter* Test as a Transformation of Fourth Amendment Law, 2023 U. Ill. L. Rev. 507, 509 (arguing that the *Katz* test provides a "vague, unpredictable, circular, underinclusive . . . , and unprotective" standard for determining what constitutes a search receiving Fourth Amendment protections (footnotes omitted)); see also Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

197. See Disability Rts. Or., The 'Unwanteds': Looking for Help, Landing in Jail 6, 34–36 (2019), https://s3.documentcloud.org/documents/6158693/Report-the-Unwanteds-Looking-for-Help-Landing-in.pdf [https://perma.cc/P934-P2AL] (citing rising housing costs and unmet behavioral health needs as major drivers of emergency department admissions and showing "fewer emergency room visits and hospitalizations," among other benefits, in a pilot program providing community-based housing, medical, and mental health supports).

198. See infra notes 415–416 and accompanying text.

199. See Jamelia N. Morgan, Rethinking Disorderly Conduct, 109 Calif. L. Rev. 1637, 1651 (2021) (arguing that disorderly conduct laws are used to proscribe "behaviors linked to disability . . . perceived as deviant or threatening").

through what are referred to as "mercy bookings"—a grim term used to refer to the practice of arresting people in crisis in order to book them in jail, where they can access what little treatment is available there.[200]

Taken together, the history of disability rights and ongoing deficiencies with behavioral health systems nationwide provide a basis for vigorous enforcement of the protections that the Fourth Amendment affords. In the next section, this Article argues against the uncritical importation of criminal law enforcement standards and rules to psychiatric holds—jurisprudence that diminishes Fourth Amendment protections for disabled people. Further, this Article argues that importing existing doctrines as they have been applied by courts does little to constrain police discretion and fails to adequately protect the privacy and security interests of people experiencing (or labeled as experiencing) mental health crises.

B. *Disability and Dangerousness*

A substantial number of state civil commitment laws require probable cause that an individual poses a danger to themselves or others, among other criteria, for involuntarily commitment.[201] The prevalence of dangerousness as a key criterion in most state civil commitment regimes is not without controversy. Legal scholars and researchers, including psychiatrists, debate whether it is even possible to clinically assess dangerousness.[202] At the same time, dangerousness itself is viewed by critics of existing state civil commitment regimes as creating too high a bar for commitment.[203] In other words, dangerousness makes it too difficult to involuntarily commit people who do not pose an imminent threat to themselves or others. These critics have advocated instead for detaining individuals who are "mentally ill" or are unable to take care of

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200. E. Fuller Torrey, Criminalization of Individuals With Severe Psychiatric Disorders, Mental Illness Pol'y Org., https://mentalillnesspolicy.org/consequences/criminalization.html [https://perma.cc/FAC5-WM7H] (last visited Feb. 14, 2024).

201. See supra note 45 and accompanying text; see also Dan Moon, The Dangerousness of the Status Quo: A Case for Modernizing Civil Commitment Law, 20 Widener L. Rev. 209, 218–19 (2014) (providing examples of dangerousness standards found in state civil commitment laws).

202. See, e.g., Hadar Aviram, Yesterday's Monsters: The Manson Family Cases and the Illusion of Parole 182–83 (2020) ("[T]he psychiatric documentation in the inmate's file is a panacea in which one can find evidence of dangerousness as well as lack thereof.").

203. See, e.g., M.M. Large, C.J. Ryan, O.B. Nielssen & R.A. Hayes, The Danger of Dangerousness: Why We Must Remove the Dangerousness Criterion From Our Mental Health Acts, 34 J. Med. Ethics 877, 880 (2008) ("[J]urisdictions with [a dangerousness standard] may be subjecting . . . other citizens to an increased risk of harm from those in their first episode of psychosis."); Moon, supra note 201, at 210 ("The [dangerousness] standard is difficult to meet, varies by state, and withholds involuntary treatment until it is too late to protect the public or help the mentally ill individual.").

themselves.[204] California governor Gavin Newsom's CARE Court and New York City Mayor Eric Adams's involuntary hospitalization policy exemplify the trend of moving beyond existing standards of dangerousness under civil commitment laws and towards the use of preventative detention as a way of removing individuals who "appear[] to be mentally ill" or are unable to care for themselves.[205] Key to these policies is the notion that individuals with untreated psychiatric disabilities are at risk to themselves or others—albeit a lesser degree of risk than what is required for involuntary commitment. Critics of these policies recognize them as punitive efforts to remove unsheltered communities from public spaces.[206]

Yet there is an even longer history of using the fear of dangerousness to eliminate or scale back the rights of people with psychiatric disabilities, dating back to the rise of the asylum in the mid-nineteenth century and extending through to the eugenics period in the early twentieth century. The "dangerousness" label provided a justification for placement into asylums, though assessments as to the label (and justification for placement) were far from scientific.[207] Dominant society perceived people with psychiatric (and cognitive) disabilities as a threat to the well-functioning social order, and segregation became a pathway to their

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204. See, e.g., Moon, supra note 201, at 235–36 (discussing "the adoption of broader standards for involuntary commitment" that "would allow earlier state intervention, which would prevent individuals from deteriorating").

205. See Jaclyn Cosgrove & Thomas Curwen, L.A. County Is Launching CARE Court. Here's What to Expect, L.A. Times (Nov. 30, 2023), https://www.latimes.com/california/story/2023-11-30/l-a-county-launches-gov-newsom-care-couirt (on file with the *Columbia Law Review*) (noting that "[c]ivil rights advocates have long expressed concerns that CARE Court will lead to more people being forced into involuntary treatment" and that the program's focus will be medication compliance instead of social support); Press Release, Office of the Mayor of N.Y.C., Mental Health Involuntary Removals (Nov. 28, 2022), https://www.nyc.gov/assets/home/downloads/pdf/press-releases/2022/Mental-Health-Involuntary-Removals.pdf [https://perma.cc/7HU9-H9XM] (authorizing "the removal of a person who appears to be mentally ill and displays an inability to meet basic living needs, even when no recent dangerous act has been observed").

206. See, e.g., Sam Levin, California Proposal Would Force Unhoused People Into Treatment, The Guardian (Mar. 3, 2022) https://www.theguardian.com/us-news/2022/mar/03/california-proposal-forced-unhoused-treatment [https://perma.cc/47N9-4A75] ("Subjecting unhoused people to forced treatment is extremely draconian, and it would take us back to the bad old days of confinement, coercive treatment and other deprivations of rights targeting people with disabilities." (internal quotation marks omitted) (quoting Eve Garrow, Policy Analyst, ACLU of Southern California)).

207. See Rothman, supra note 180, at 261–62 (describing the use of asylums and reformatories to effectively incarcerate those society considered to be of the "dangerous classes," particularly children "from the bottom layers of the social structure"); id. at 126 ("The discussions of insanity, like those of crime, conveyed a heightened, almost hysterical sense of peril, with the very safety of the republic and its citizens at stake."); see also Charles Loring Brace, The Dangerous Classes of New York and Twenty Years' Work Among Them 26–28 (1880) (describing the "dangerous classes" as children of immigrants, the descendants of "peasantry," and generally "ignorant, untrained, passionate, [and] irreligious boys and young men").

incapacitation, social exclusion, and in many cases, forcible sterilization.[208] Per the eugenicists of the day, the danger they posed stemmed from the risk that their "deviant" traits would pass to their offspring and increase crime, disorder, and dependency in society.[209]

But dangerousness plays a more pernicious function according to critical disability scholars. Critical disability theory scholars provide methods for analyzing disability as a category of subordination, along with race, gender, sexual orientation, class, and other categories of difference.[210] These scholars define disability as a social construct and reject medical and biological models of disability.[211] But beyond this, as Dr. Sami Schalk argues, a critical disability theory analysis "involves scrutinizing not bodily or mental impairments but the social norms that define particular attributes as impairments, as well as the social conditions that concentrate stigmatized attributes in particular populations."[212] Along these lines, as I've argued elsewhere, "disability as constructed in Fourth Amendment doctrine reinforces associations between disability and criminality."[213] This socially constructed meaning of disability links certain disabilities with attributes of criminality, particularly psychiatric disabilities and intellectual disabilities. The perceived risks of particular disabilities to society "will vary based on the nature of the disability and how it is expressed."[214]

"[T]he presence of disability renders . . . individuals with multiple marginalized statuses and identities vulnerable to policing . . . [and

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208. See Rothman, supra note 180, at 125–26.

209. Stern, supra note 183, at 16–18.

210. See, e.g., Subini Ancy Annamma, David Connor & Beth Ferri, Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability, 16 Race Ethnicity & Educ. 1, 4 (2013) (discussing intersectional approaches to disability, race, gender, and class).

211. See, e.g., Christopher Newell, The Social Nature of Disability, Disease and Genetics: A Response to Gillam, Persson, Holtug, Draper and Chadwick, 25 J. Med. Ethics 172, 172, 174 (1999) (criticizing the then-dominant "biomedically informed view of disability" and arguing for an increased acceptance of the "social nature of disability . . . especially in terms of oppression").

212. Sami Schalk, Critical Disability Studies as Methodology, Lateral, Spring 2017, http://csalateral.org/issue/6-1/forum-alt-humanities-critical-disability-studies-methodology-schalk/ [https://perma.cc/TLK9-8KH6] (internal quotation marks omitted) (quoting Julie Avril Minich, Enabling Whom? Critical Disability Studies Now, Lateral, Spring 2016, https://csalateral.org/issue/5-1/forum-alt-humanities-critical-disability-studies-now-minich/ [https://perma.cc/T37L-N89Z]); see also Rabia Belt & Doron Dorfman, Response, Reweighing Medical Civil Rights, 72 Stan L. Rev. Online 176, 186–87 (2020), https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/10/72-Stan.-L.-Rev.-Online-Belt-Dorfman.pdf%20 [https://perma.cc/8QFK-ZG72] ("Disability is therefore formulated through a complex interaction between the impairment and the social environment.").

213. Jamelia Morgan, Disability's Fourth Amendment, 122 Colum. L. Rev. 489, 510 (2022) [hereinafter Morgan, Disability's Fourth Amendment].

214. Id.

produces] vulnerabilities to police violence."[215] When multiply-marginalized individuals encounter police during a perceived or actual mental crisis, stereotypes that associate disability with criminality are reinforced, specifically those that label disabled people as "suspicious, deviant, risky, dangerous, or threatening."[216]

Particular manifestations of actual or perceived mental disability—mumbling, screaming, public expressions of anger, frustration, or dismay—read as inherently risky, uncontrollable, unpredictable, and therefore, dangerous. These stereotypes make it seem as though if individuals with particular disability labels are not closely monitored and managed, even using force, they will lash out and harm themselves or the public at-large. Critical disability studies scholar Liat Ben-Moshe has argued that the label of disability itself functions as a kind of risk management: "[D]isability [is a kind of] risk coding, . . . an aspect of population management."[217] In other words, by "labeling certain differences as disabilities, society communicates what it considers a social risk, which in turn serves to control through policing, surveillance, and the use of force [against] those behaviors labeled as risky."[218]

"Mental illness" itself has been pathologized in ways that construct all individuals who have a mental illness diagnosis or who are perceived to be "mentally ill" as dangerous. Indeed, the construction of mental illness as a deviance in itself can be traced to its being medicalized in the first place.[219] Through medicalization, "mental illness" became a pathology to be treated, cured, or rehabilitated.[220] If a cure was not possible, the

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215. Id.

216. See id. (citing Elliot Oberholtzer, Police, Courts, Jails, and Prisons All Fail Disabled People, Prison Pol'y Initiative (Aug. 23, 2017), https://www.prisonpolicy.org/blog/2017/08/23/disability/ [https://perma.cc/WLC9-TQZF]) (discussing how, as with race, enforcement practices can reinforce associations between disability and criminality).

217. Liat Ben-Moshe, The State of (Intersectional Critique of) State Violence, Women's Stud. Q., Fall/Winter 2018, at 308 (book review).

218. Morgan, Disability's Fourth Amendment, supra note 213, at 512; see also Christopher Slobogin, Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Persons With Disabilities on the Insanity Defense, Civil Commitment, and Competency Law, 40 Law & Psych. Rev. 297, 303–04 (2016) (noting that "[m]ental disability is usually seen as . . . a risk factor in a preventive regime").

219. See Peter Conrad & Joseph W. Schneider, Deviance and Medicalization: From Baldness to Sickness 17 (1992) ("[O]ur approach focuses on how certain categories of deviant behavior become defined as medical rather than moral problems and how medicine, rather than, for example, the family, church, or state, has become the dominant agent of social control for those so identified.").

220. Morgan, Policing Under Disability Law, supra note 155, at 1425 ("[D]isabilities were not only medicalized but also pathologized. Medicalization provides pathways to criminalization in part because it positions disability as a problem to be cured—through medication, treatment, therapy, and containment." (footnote omitted)); see also Ben-Moshe, Decarcerating Disability, supra note 94, at 28 ("[A race-ability framework] is also an understanding that antiblack racism is composed of pathologization and dangerousness,

individual would be segregated away from society to prevent their "illness" from spreading to others and that person from procreating.[221] Such pathologization was a feature of historical narratives surrounding disability, but its legacy continues to this day.[222] Pathologizing disability is a social activity; individuals lacking medical education or training routinely hurl mental diagnoses at public figures, characterizing them as possessing an array of "disorders" under the Diagnostic and Statistical Manual of Mental Disorders.[223]

Any legal criterion—or exercise of state power for that matter—that relies on danger in the context of disability will incorporate not just the individual biases against people with psychiatric disabilities but also the structural harms and social processes that produce group-based subordination on that basis. Whether state power is exercised to prevent "danger," or to provide "care" or "treatment," the subordinating function of the disability label—"mentally ill," "disordered," "deranged," "insane," etc.—is a product of the nature of disability, its manifestation in the individual, and that individual's positionality within society. To accept that account is to see a legal criterion like danger as socially constructed, historically contingent, and variable. And, if that is so, then danger as a basis for a vast intrusion of state power into the lives of individuals deemed eligible for civil commitment, or other kinds of preventative detention whether "CARE Courts" or involuntary hospitalization, should be scrutinized particularly when constitutional rights are at stake.

That brings us back to civil commitment, psychiatric holds, and other forms of so-called preventative detention. If dangerousness is a social meaning that attaches to psychiatric disabilities (i.e., mental illness), then protecting the privacy and security interests under the Fourth Amendment of disabled people requires scrutinizing the factual basis for the assessment

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which lead to processes of criminalization and disablement, for instance, constructing people as Other or as deranged, crazy, illogical, unfathomable, or scary.").

221. See Morgan, Policing Under Disability Law, supra note 155, at 1414 ("Social policies that segregated disabled people reinforced ideologies that persons with disabilities *should be* segregated in institutions to correct and contain their supposed physical, psychological, and moral deficiencies and abnormalities. Disability itself was conceived of as a social contagion or pathology to be contained through policing and carceral control." (footnotes omitted)).

222. See, e.g., David I. Hernández-Saca, Laurie Gutmann Kahn & Mercedes A. Cannon, Intersectionality Dis/ability Research: How Dis/ability Research in Education Engages Intersectionality to Uncover the Multidimensional Construction of Dis/abled Experiences, 42 Rev. Rsch. Educ. 286, 303 (2018) (highlighting how pathologizing disability is particularly detrimental to students from underrepresented backgrounds).

223. See, e.g., Nick Davis, The Goldwater Rule: Why Commenting on Mental Health From a Distance Is Unhelpful, The Guardian (July 28, 2017), https://www.theguardian.com/science/head-quarters/2017/jul/28/the-goldwater-rule-why-commenting-on-mental-health-from-a-distance-is-unhelpful [https://perma.cc/SPK9-8RXV] ("Donald Trump . . . Princess Diana and Winston Churchill, Carrie Fisher and Robin Williams, Britney Spears and Genghis Khan have all been the subject of public speculation about their mental health . . . .").

of dangerousness. Disabled people's right to be "secure in their persons, houses, papers, and effects"[224] requires scrutinizing legal exceptions to the warrant requirement and the facts that support the requirement of probable cause that threaten to undermine the Fourth Amendment rights of that group.

C. *Mental Health Exigencies Are Not Like Other Exigencies*

Warrantless entries into the homes of persons who are alleged to be experiencing mental health crises are constitutional when reasonable.[225] Though nonconsensual searches are presumptively unreasonable,[226] warrantless entries may still be reasonable when one of several exceptions is satisfied.[227] As is relevant to mental health seizures, there are two exigencies that count as exceptions to the warrant requirement. One of those exceptions is the exigent circumstances exception and includes cases where there is an imminent threat to the safety of police officers, relatives, members of the public, or the person who is alleged to need mental health treatment. The other is the emergency aid exception, which will be discussed in section II.C.

1. *Mental Health Exigencies at Common Law.* — Under the Supreme Court's common law approach to Fourth Amendment questions, history informs questions of constitutional reasonableness as an initial matter. In *Virginia v. Moore*, Justice Scalia reiterated the Court's common law approach to assessing constitutional reasonableness: "In determining whether a search or seizure is unreasonable, we begin with history. We look

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224. U.S. Const. amend. IV.

225. See Cady v. Dombrowski, 413 U.S. 433, 439–40 (1973) ("The ultimate standard set forth in the Fourth Amendment is reasonableness."); cf. Wyman v. James, 400 U.S. 309, 318 (1971) (finding a social services case worker's home visit permissible under the Fourth Amendment "because it does not descend to the level of unreasonableness"); Camara v. Mun. Ct., 387 U.S. 523, 537–38 (1967) (indicating a lower reasonableness bar to pass constitutional muster for searches "[w]here considerations of health and safety are involved," distinguished from those "where a criminal investigation has been undertaken" (internal quotation marks omitted) (quoting Frank v. Maryland, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting))).

226. See Kirk v. Louisiana, 536 U.S. 635, 637–38 (2002) ("[P]olice need both probable cause to either arrest or search and exigent circumstances to justify a nonconsensual warrantless intrusion into private premises . . . ." (internal quotation marks omitted) (quoting App. to Petition for Writ of Certiorari, at 1–2, *Kirk*, 536 U.S. 635 (No 01-8419))); Welsh v. Wisconsin, 466 U.S. 740, 748–49 (1984) (discussing the Court's long-recognized principle that "searches and seizures inside a home without a warrant are presumptively unreasonable" (quoting Payton v. New York, 445 U.S. 573, 586 (1980))).

227. See Brigham City v. Stuart, 547 U.S. 398, 403 (2006) ("[B]ecause the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." (citing Flippo v. West Virginia, 528 U.S. 11, 13 (1999) (per curiam); Katz v. United States, 389 U.S. 347, 357 (1967))); Morse v. Cloutier, 869 F.3d 16, 23–24 (1st Cir. 2017) (discussing "well-delineated exception[s]" to the warrant requirement (internal quotation marks omitted) (quoting United States v. Romain, 393 F.3d 63, 68 (1st Cir. 2004))).

to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve."[228]

At common law, justices of the peace in eighteenth-century America were authorized "to confine individuals with dangerous mental impairments."[229] "[M]ere suspicion of serious mental illness was [not] sufficient at common law to deprive someone of his rights."[230] But anyone could arrest so-called "dangerous lunatics"[231] that posed a risk of imminent harm to themselves or the public.[232] And although "the common law prohibited the warrantless arrest of those thought to have lost their reason, . . . it allowed for the deprivation of the fundamental right to liberty or the fundamental right to control one's property *only* upon a valid judgment from a civil tribunal."[233] Imminent dangerousness in public was an essential component of warrantless seizures at common law, making that finding (or lack thereof) essential to determining Fourth Amendment rights violations.

This history instructs that without a finding of imminent dangerousness, emergency aid for the purpose of mental health evaluation does not clearly fit within the kinds of exigencies that permitted peace officers to arrest people experiencing crises in public places at common law.[234] An originalist view would suggest that the finding of actual dangerousness is the key criterion authorizing public and private exercises of the coercive power to arrest.[235] Less clear, however, is whether such

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228. 553 U.S. 164, 168 (2008). For criticisms of the Supreme Court's common law approach, see generally David A. Sklansky, The Fourth Amendment and Common Law, 100 Colum. L. Rev. 1739, 1743 (2000) ("[T]he Fourth Amendment on its face says nothing about common law, but bans all unreasonable searches and seizures, whether or not they were legal before the Amendment was adopted.").

229. Carlton F.W. Larson, Four Exceptions in Search of a Theory: *District of Columbia v. Heller* and Judicial Ipse Dixit, 60 Hastings L.J. 1371, 1378 (2009); see also id. at 1377 (citing Henry Care & William Nelson, English Liberties, or the Free-Born Subject's Inheritance 329 (6th ed. 1774)).

230. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 706 (6th Cir. 2016) (Batchelder, J., concurring) (citing Henry F. Buswell, The Law of Insanity in Its Application to the Civil Rights and Capacities and Criminal Responsibility of the Citizen 26–28, 33–34 (1885)).

231. Despite many variances, early nineteenth century legal theorists mainly defined "lunatics" as individuals who lost their reason. See *Tyler*, 837 F.3d at 705 (Batchelder, J., concurring) (listing sources utilizing this definition). For one such variance, see, for example, A. Highmore, A Treatise on the Law of Idiocy and Lunacy 1 (1822) ("Lunatic is one whose imagination is influenced by the moon: a madman.").

232. *Tyler*, 837 F.3d at 706 (Batchelder, J., concurring).

233. Id. (emphasis added).

234. See Henry F. Buswell, The Law of Insanity in Its Application to the Civil Rights and Capacities and Criminal Responsibility of the Citizen 33 (1885) ("[I]f any person is so insane that his remaining at liberty would be dangerous to himself or the community, any other person may, without warrant, or other authority than the inherent necessity of the case, confine such dangerous insane person . . . .").

235. One counterpoint might be that if anyone had the power to arrest individuals labeled as "dangerous lunatics," that power also authorized constables to arrest. For further

authority permitted peace officers to *enter homes* without a warrant in order to arrest individuals labeled in crisis and deemed dangerous. At least one leading treatise on the topic suggested this power was limited to "dangerous lunatics" found in public spaces[236]—a limitation that makes sense given references to individuals as dangerous when they risked engaging in breaches of the peace, which are public order offenses.[237] It is also not clear whether imminent danger had to be linked to a possible crime, like criminal mischief or breach of peace.[238] Distinguishing mental health emergencies from other emergencies helps make it clear that common law analysis fails to offer a clear answer to resolve the Fourth Amendment inquiry, and so reasonableness analysis should control.[239]

2. *(Un)Reasonable Exigencies.* — Warrantless entries pursuant to exigent circumstances are reasonable. Under the exigent circumstances exception to the warrant requirement, "'exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment."[240] With real exigencies, police are called to intervene because postponing or failing to act would lead to serious consequences.[241] In *Brigham City v. Stuart*, the Supreme Court held that police may enter a home without a warrant if they have an "objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury."[242] The government bears the burden of establishing that exigent circumstances justified the warrantless entry.[243]

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discussion of the common law power of constables, see also supra notes 77–79 and accompanying text.

236. See Highmore, supra note 231, at 136 ("[The statute] which empowers magistrates to take care of lunatics, upon complaint of outrages committed, [r]elates to vagrant lunatics only, who are strolling about, and does not extend to persons of rank and condition, whose relations can take care of them properly.").

237. See Buswell, supra note 234, at 33–34 (specifying that magistrates may "order into custody an insane person who is in the act of committing a breach of the peace").

238. See id. at 34 ("[A]n officer . . . is justified in arresting and detaining one whom there is probable cause to believe insane and about to commit a mischief which would be criminal in a sane person; and such detention may lawfully be continued till . . . the person detained has forgotten or abandoned his mischievous purpose.").

239. See Virginia v. Moore, 553 U.S. 164, 170–71 (2008) (noting that there was "not a case in which the claimant [could] point to 'a clear answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since'" (second alteration in original) (internal quotation marks omitted) (quoting Atwater v. City of Lago Vista, 532 U.S. 318, 345 (2001))).

240. Kentucky v. King, 563 U.S. 452, 460 (2011) (alteration in original) (quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978)); see also Payton v. New York, 445 U.S. 573, 590 (1980) (requiring exigent circumstances to enter a home without a warrant).

241. See, e.g., Thacker v. City of Columbus, 328 F.3d 244, 253 (6th Cir. 2003) ("Exigent circumstances are situations where 'real immediate and serious consequences' will 'certainly occur' if the police officer postpones action to obtain a warrant." (quoting Ewolski v. City of Brunswick, 287 F.3d 492, 501 (6th Cir. 2002))).

242. 547 U.S. 398, 400 (2006); see also *King*, 563 U.S. at 460.

243. See State v. Samuolis, 278 A.3d 1027, 1035 (Conn. 2022).

Courts are applying the exigent circumstances doctrine in unsound ways in cases involving mental health seizures. To begin with, courts tend to treat mental health exigencies just like any other kind of emergency.[244] Yet mental health emergencies are distinguishable from other kinds of emergencies in several ways.

a. Mental Health Is Different. — Exigent circumstances can justify warrantless intrusions into the home.[245] In the traditional law enforcement context, four circumstances count as exigent and therefore give rise to reasonable searches under the Fourth Amendment: (1) hot pursuit of a fleeing felon,[246] (2) imminent destruction of evidence,[247] (3) the need to prevent a suspected person's escape,[248] and (4) a risk of danger to the police or others.[249] But mental health exigencies are not like other exigencies developed in traditional criminal procedure cases. To begin with, substantial risk of flight and "hot pursuit" are not implicated when individuals labeled in crisis are in their homes. Similarly, imminent destruction of evidence is not relevant in most cases either because there is no suspected criminal activity at issue or because there's no tangible evidence that can be destroyed. Mental health exigencies are personal

244. See Sutterfield v. City of Milwaukee, 751 F.3d 542, 558 (7th Cir. 2014) (arguing that *Brigham City* "effectively made [emergency aid] a subset of the latter [exigent circumstances]"); Ziegler v. Aukerman, 512 F.3d 777, 786 (6th Cir. 2008) (recognizing suicide as a different kind of "danger" to police but nonetheless characterizing that kind of danger as similar to traditional dangers that pose a risk to law enforcement); McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 546 (1st Cir. 1996) (declining to "enter the skirmish over the distinctions between 'emergencies' and 'exigent circumstances'"); Elifritz v. Fender, 460 F. Supp. 3d 1088, 1111–12 (D. Or. 2020) ("When police use deadly force against a person who has committed serious crimes and presents an immediate threat of serious injury or death to others, the presence of emotional disturbance does not reduce the governmental interest in using deadly force."). But see United States v. Christy, 810 F. Supp. 2d 1219, 1269 (D.N.M. 2011) ("It is important to recognize that there is not a suicide exception to the warrant requirement; there is an exigent circumstances exception. The self harm must still be exigent."), aff'd, 739 F.3d 534 (10th Cir. 2014).

245. *Brigham City*, 547 U.S. at 403.

246. See, e.g., Warden v. Hayden, 387 U.S. 294, 298–300 (1967) (finding that the warrantless entry of premises and search for "persons and weapons" was justified to ensure that a robbery suspect was the only person on the premises and to prevent weapons from being used against police or to carry out an escape).

247. See, e.g., Schmerber v. California, 384 U.S. 757, 770–71 (1966) (explaining that, because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops" and given delays in investigation and transportation, "there was no time to seek out a magistrate and secure a warrant," so "the attempt to secure evidence" incident to arrest was appropriate).

248. See, e.g., United States v. Cortez-Moran, 17 F. App'x 539, 542 (9th Cir. 2001) ("We conclude that the Government has failed to carry its 'heavy burden' of showing 'particularized evidence' that the agents reasonably believed that the defendants presented a substantial risk of flight at the time of the arrest." (quoting United States v. Reid, 226 F.3d 1020, 1028 (9th Cir. 2000))).

249. See, e.g., Minnesota v. Olson, 495 U.S. 91, 100 (1990) (describing "risk of danger to the police or to other persons inside or outside the dwelling" (internal quotation marks omitted) (quoting State v. Olson, 436 N.W.2d 92, 97 (Minn. 1989))).

health matters that become emergencies when the person in crisis does not receive appropriate care in a timely manner. Under existing doctrine, the exigency arises when there are facts sufficient to support a finding that "the exigencies of the situation" make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.[250] At the same time, there is no way to know with certainty whether the individual will engage in acts of self-harm or harm to others. Even researchers and psychologists studying risk factors for suicide acknowledge as much.[251] The state's power to intervene to (ostensibly) prevent the harm includes the power to enter the home without a warrant.[252] Outside of the criminal arrest context, no other exigencies justify such a broad scope of state power. The unique personal interests implicated in mental health seizures make it so that courts should distinguish these kinds of emergencies from others.

b. Non-Emergencies. — Second, mental health exigencies, unlike other exigencies, might not even be actual emergencies. Indeed, any case in which an individual is seized and later released is *not* an emergency in fact, even though some courts may count it as an exigency for Fourth Amendment purposes.[253] In general, the uncritical framing of police work and police responses to mental health crises as prototypical emergencies prevents more measured assessments by courts as to whether exigencies exist in the first place. Police work in this context is often framed as involving emergencies per se—that is, split-second decisionmaking on the part of police officers.[254] This is not always an apt characterization of incidents involving people in mental crisis. Often, at the time of dispatch,

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250. Mincey v. Arizona, 437 U.S. 385, 393–94 (1978) (internal quotation marks omitted) (quoting McDonald v. United States, 335 U.S. 451, 456 (1948)).

251. See Nat'l Action All. for Suicide Prevention, Recommended Standard Care for People With Suicide Risk: Making Health Care Suicide Safe, 3, https://theactionalliance.org/sites/default/files/action_alliance_recommended_standard_care_final.pdf [https://perma.cc/6N6N-7UWU] (last visited Feb. 14, 2024); see also Aubrey M. Moe, Elyse Llamocca, Heather M. Wastler, Danielle L. Steelesmith, Guy Brock, Jeffrey A. Bridge & Cynthia A. Fontanella, Risk Factors for Deliberate Self-Harm and Suicide Among Adolescents and Young Adults With First-Episode Psychosis, 48 Schizophrenia Bull. 414, 414–15 (2022); Too et al., supra note 50, at 302; Position Statement on Assessing the Risk for Violence, Am. Psychiatric Assoc. (Dec. 2017), https://www.psychiatry.org/getattachment/d8f3377d-7d67-4517-a409-8e10ce6fd7c3/Position-2012-Violence-Risk-Assessment.pdf [https://perma.cc/G3UY-MB8F] ("While psychiatrists can often identify circumstances associated with an increased likelihood of violent behavior, they cannot predict dangerousness with definitive accuracy.").

252. See Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

253. See, e.g., May v. City of Nahunta, 846 F.3d 1320, 1326–28 (11th Cir. 2017) (finding seizure justified at its inception even though plaintiff was at the hospital for only two hours before she was dismissed and informed that there was "nothing wrong with her").

254. Commonwealth v. Coughlin, 199 A.3d 401, 407 (Pa. Super. Ct. 2018) (finding that to invoke the emergency aid exception, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving").

law enforcement officers have knowledge that the person is experiencing a mental health crisis and, arguably, time to assess the situation and develop an appropriate response that can avoid warrantless searches and seizures and, importantly, uses of force.[255]

Exigency doctrine is supposed to limit the volume of warrantless searches and seizures in the mental health context.[256] Yet if circumstances giving rise to exigencies are not scrutinized, then reasonable exigencies offer no limit at all. More to the core of exigent circumstances doctrine, when courts accept as given that mental health crises are invariably going to involve split-second decisionmaking, these courts will be less likely to scrutinize whether the real exigencies do indeed exist and justify warrantless intrusions.[257] Effectively, presuming exigency is not consistent with what is required to assess reasonableness under the Fourth Amendment's totality of the circumstances analysis.[258]

Police should not be mental health first responders, but when police are dispatched, one of the cornerstones of effective, data-informed crisis response is building in *more time* to engage the person who is experiencing a mental health crisis—a point with which the International Association of Chiefs of Police (IACP) agrees.[259] In its paper, IACP argues that more time allows for greater opportunity for successful implementation of de-

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255. See, e.g., Est. of Chamberlain v. City of White Plains, 960 F.3d 100, 101–02 (2d Cir. 2020); Rockwell v. Brown, 664 F.3d 985, 988–89 (5th Cir. 2011). Of course, if hours pass during the course of officer dispatch, exigent circumstances are a nonstarter, though qualified immunity may be available to defeat a claim. See, e.g., United States v. Witzlib, 796 F.3d 799, 802 (7th Cir. 2015) (rejecting exigent circumstances following a four-hour delay in commencing search); O'Brien v. City of Grand Rapids, 23 F.3d 990, 999–1000 (6th Cir. 1994) (granting qualified immunity).

256. Roberts v. Spielman, 643 F.3d 899, 905 (11th Cir. 2011) (noting that warrantless searches and seizures "must be strictly circumscribed by the exigencies which justify [their] initiation" (internal quotation marks omitted) (quoting Mincey v. Arizona, 437 U.S. 385, 393 (1978))).

257. Professors Seth Stoughton and Brandon Garrett have made a similar argument as relates to jurisprudence on excessive force. As Garrett and Stoughton maintain, a more tactical approach to the objective reasonableness inquiry in excessive force cases would require courts to consider whether officers should have used other methods (e.g., de-escalation, nonviolent conflict resolution) in responding to the individual labeled as a suspect, in order to reduce the need to use force in the first place. Brandon Garrett & Seth Stoughton, A Tactical Fourth Amendment, 103 Va. L. Rev. 211, 228–37, 295–96 (2017).

258. Cf. Missouri v. McNeely, 569 U.S. 141, 145 (2013) (rejecting a per se exigency approach as inconsistent with "general Fourth Amendment principles, that exigency . . . must be determined case by case based on the totality of the circumstances").

259. See Int'l Ass'n of Chiefs of Police, National Consensus Policy and Discussion Paper on Use of Force 2–3 (2020), https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf [https://perma.cc/KVA5-P7NZ] (recommending de-escalation as a technique "to stabilize [potential force encounters] and *reduce the immediacy of the threat* so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction in the force necessary" (emphasis added)).

escalation tactics and communication strategies.[260] Importantly, building in more time will likely obviate the need for force.[261]

That does not mean that there will not be situations in which first responders are required to act quickly.[262] At the same time, it would be imprudent for courts to presume that the police response to a person in crisis always involves quick, split-second decisionmaking.[263]

c. Lack of Limits on Police Discretion. — Third, courts have applied exigent circumstances doctrine in ways that do not provide adequate limits on police discretion in cases involving mental health seizures. Scholars have rightly noted that the *Caniglia* Court's rejection of a broad community caretaking exception to the warrant requirement could work to limit police discretion in mental health crisis-related searches and seizures. In recent work, Christopher Slobogin argues that "[a]n expansive interpretation of *Caniglia v. Strom*'s rejection of a free-standing caretaker exception would help curb both police misuse of force and police use of pretexts to pursue illegitimate agendas, because it would limit police-initiated searches and seizures purporting to be for benign purposes," which "might also provide doctrinal support for the fledgling movement to de-police."[264] Furthermore, Slobogin argues, "given the potential for police misuse of force and for pretextual actions by the police, warrantless

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260. Id. at 9.

261. See id. ("[T]he goal of de-escalation is to slow down the situation so that the subject can be guided toward a course of action that will not necessitate the use of force, reduce the level of force necessary, allow time for additional personnel or resources to arrive, or all three."). Consistent with this literature, in cases that rely on exigent circumstances to justify warrantless searches and seizures, reviewing courts should assess whether—at critical decision points—police officers had the opportunity to slow down the pace of the encounter or obtain assistance from first responders and other professionals with the skills to do so. As a doctrinal matter, that would mean that law enforcement tactics that contributed to the exigent circumstance (that then is used as a basis to justify the warrantless search and seizure) weigh against a finding of exigency.

262. Respondents to one survey indicated that approximately twenty-four percent of people reporting suicide attempts indicated that they attempted suicide less than five minutes after the decision to make the attempt. Thomas R. Simon, Alan C. Swann, Kenneth E. Powell, Lloyd B. Potter, Marcie-Jo Kresnow & Patrick W. O'Carroll, Characteristics of Impulsive Suicide Attempts and Attempters, 32 Suicide & Life-Threatening Behav. 49, 52 (2001).

263. Not all situations involving people in crisis involve split-second decisionmaking. Recognizing this, amici in *Caniglia* argued that the police officers knew they lacked a basis to sustain the warrant on the grounds of exigency, which is why they argued for the caretaking exception. Brief for Amicus Curiae American Association of Suicidology Submitted in Support of Petitioner at 22–24, Caniglia v. Strom, 141 S. Ct. 1596 (2021) (No. 20-157), 2021 WL 307470.) [hereinafter Am. Ass'n of Suicidology]. Cf. City of San Francisco v. Sheehan, 575 U.S. 600, 612 (2015) ("The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay 'would gravely endanger their lives or the lives of others.'" (quoting Warden v. Hayden, 387 U.S. 294, 298–99 (1967))).

264. Christopher Slobogin, Police as Community Caretakers: *Caniglia v. Strom*, 2020–2021 Cato Sup. Ct. Rev. 191, 216 (2021).

home entries in the absence of real exigency should never be part of policing's mission, even when a 'caretaking' goal can be articulated."[265]

Slobogin is correct: By rejecting the community caretaking exception, the *Caniglia* Court helped to reign in police officer abuses of discretion. But at the same time, given the state of the doctrine governing emergency mental health seizures, limiting warrantless exceptions to real exigencies in incidents involving people experiencing crises (or labeled as such) might not provide any real limit at all. Real exigencies involve the risk of imminent and concrete harm, but the Supreme Court has not provided much guidance as to what counts as imminent harm. Moreover, the risk of harm varies across all potential exigencies, but what level of risk is reasonable for constitutional purposes? So far, the courts have not provided a clear answer.

Courts have said that law enforcement does not have to wait until harm has materialized before they act,[266] but in the cases above, there is considerable variation with respect to how to assess exigencies in cases involving individuals in crisis. There are a few common risk factors that courts have found weigh in favor of finding exigencies, including allegations of suicidality,[267] the presence of weapons in the home,[268] bad hygiene,[269] verbal threats of self-harm,[270] and noncompliance with medication or treatment plans.[271] Yet there is little guidance as to how much weight to give these common (but not always relevant)[272] factors—and importantly, how police officers (or even clinicians) would evaluate these risk factors in their assessments of dangerousness, or what level of certainty regarding risk is sufficient to justify an exigency.[273]

Fourth, by grouping mental health emergencies with all other emergencies, courts can overlook significant reasons why police are particularly unsuited for mental health crisis response. In his *Caniglia* concurrence, Justice Kavanaugh referenced then-Professor Debra Livingston's 1998 article approvingly and echoed Chief Judge Livingston's

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265. Id. at 194.

266. See *Caniglia*, 141 S. Ct. at 1604 (Kavanaugh, J., concurring) (stating "officers do not need to show that the harm has already occurred or is mere moments away" because such a model would not work for cases like "a person who is currently suicidal or an elderly person who has been out of contact and may have fallen"); Brigham City v. Stuart, 547 U.S. 398, 406 (2006) ("Nothing in the Fourth Amendment required them to wait until another blow rendered someone 'unconscious' or 'semi-conscious' or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties . . . .").

267. See, e.g., Ziegler v. Aukerman, 512 F.3d 777, 784 (6th Cir. 2008).

268. See, e.g., Est. of Bennett v. Wainwright, 548 F.3d 155, 174 (1st Cir. 2008).

269. See, e.g., May v. City of Nahunta, 846 F.3d 1320, 1329 (11th Cir. 2017).

270. See, e.g., Mora v. City of Gaithersburg, 519 F.3d 216, 220 (4th Cir. 2008).

271. See, e.g., *Est. of Bennett*, 548 F.3d at 169 (noting noncompliance with medications).

272. See infra text accompanying notes 395–402.

273. For suggestions on how common risk factors might be weighed, see discussion in section III.A.

specific point that "'the responsibility of police officers to search for missing persons, to mediate disputes, and to aid the ill or injured has never been the subject of serious debate; nor has' the 'responsibility of police to provide services in an emergency.'"[274] "Consistent with that reality," Justice Kavanaugh reasoned, "the Court's exigency precedents . . . permit warrantless entries when police officers have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reasonable to act now."[275] Justice Kavanaugh emphasized that the imminence of the harm was required to justify the reasonableness of the warrantless entry:

> "[O]fficers do not need to show that the harm has already occurred or is mere moments away, because knowing that will often be difficult if not impossible in cases involving, for example, a person who is currently suicidal or an elderly person who has been out of contact and may have fallen. If someone is at risk of serious harm and it is reasonable for officers to intervene now, that is enough for the officers to enter."[276]

Since now-Chief Judge Livingston's 1998 article, the police role, particularly in the realm of crisis response, has been subject to debate and has been challenged. Critics—and even law enforcement officials—maintain that police should not be involved in responding to every manner of emergency, or alleged emergency, including mental health response.[277]

Moreover, in practice, popular and professional opinions as to reasonableness have, since 1998, evolved to include an assessment as to whether law enforcement is the best, or most effective, first responder in mental health crisis situations. Nationwide police reforms reflect a shift away from police in mental health crisis responses and toward co-responder (if not alternative responder) programs in which police and behavioral health specialists or social workers are deployed to respond to individuals in crisis.[278] According to one study, co-responder programs

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274. Caniglia v. Strom, 141 S. Ct. 1596, 1604 (2021) (Kavanaugh, J., concurring) (quoting Debra Livingston, Police, Community Caretaking, and the Fourth Amendment, 1998 U. Chi. Legal F. 261, 263).

275. Id. (citing City of San Francisco v. Sheehan, 575 U.S. 600, 612 (2015); Michigan v. Fisher, 558 U.S. 45, 48–49 (2009); Brigham City v. Stuart, 547 U.S. 398, 406–07 (2006)).

276. Id.

277. See, e.g., Molly Kaplan, Why Are Police the Wrong Response to Mental Health Crises?, ACLU: At Liberty (Oct. 8 2020), https://www.aclu.org/podcast/why-are-police-wrong-response-mental-health-crises-ep-122-0 [https://perma.cc/JBY4-7LUB]; Nicholas Turner, We Need to Think Beyond Police in Mental Health Crises, Vera Inst. Just. (Apr. 6, 2022), https://www.vera.org/news/we-need-to-think-beyond-police-in-mental-health-crises [https://perma.cc/2UTN-CC2W].

278. See, e.g., Charlotte Resing, Scarlet Neath, Hilary Rau & Andrew Eslich, Ctr. for Policing Equity, Redesigning Public Safety: Mental Health Emergency Response 4, 7–8 (2023), https://policingequity.org/mental-health/69-cpe-whitepaper-mentalhealth/file

reduce use of force incidents against people in crisis.[279] Among more radical calls for change, abolitionists are advocating for a complete decoupling of police from public safety.[280]

d. Interrogating the Police Role. — Finally, mental health seizures must be distinguished from other emergencies on another ground. Mental health crises are exigencies in which, depending on the tactics deployed, police can cause the very harm that is to be avoided—physical harm to the individual or harm to others. In other words, law enforcement tactics and mere presence may escalate the situation and contribute to the conditions justifying use of deadly force. Curiously, Justice Kavanaugh's concurrence references *City and County of San Francisco v. Sheehan* as an example of an exigent circumstance and objectively reasonable basis for entering a home without a warrant—a case that went horribly wrong in violent ways. He writes: "The exigent circumstances doctrine applies. . . . After all, a suicidal individual in such a scenario could kill herself at any moment. The Fourth Amendment does not require officers to stand idly outside as the suicide takes place."[281]

It is not clear why Justice Kavanaugh cited the *Sheehan* case as an example of an incident involving an actively suicidal person, as there was no evidence that Sheehan was actively suicidal. In *Sheehan*, police officers were called to the group home where Teresa Sheehan resided to effectuate a temporary detention order after a social worker had determined that Sheehan required psychiatric evaluation and treatment.[282] According to the social worker, Sheehan had stopped taking her medication, which concerned him, so he called the police.[283] When the officers arrived at Sheehan's room, they knocked and informed Sheehan that they were there to help her.[284] When Sheehan did not respond, the officers obtained a key from the social worker and entered the room, which startled Sheehan.[285] Sheehan picked up a "kitchen knife with an approximately 5-inch blade and began approaching the officers, yelling something along the lines of 'I am going to kill you. I don't need help.'"[286] The officers retreated and left Sheehan in her room alone.[287] Fearing that Sheehan

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[https://perma.cc/W5T9-H6GR] (arguing that police should not be default responders and discussing co-responder and alternate responder programs).

279. Blais & Brisebois, supra note 66, at 1102.

280. See, e.g., Mariame Kaba, We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice 15–17 (2021).

281. *Caniglia*, 141 S. Ct. at 1604 (Kavanaugh, J., concurring); cf. City of San Francisco v. Sheehan, 575 U.S. 600, 612 (2015) ("The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay 'would gravely endanger their lives or the lives of others.'" (quoting Warden v. Hayden, 387 U.S. 294, 298–99 (1967))).

282. *Sheehan*, 575 U.S. at 603.

283. Id.

284. Id. at 604.

285. Id.

286. Id.

287. Id.

would escape or harm herself or others, the officers reentered the room instead of waiting for backup.[288] Armed with pepper spray and their pistols, the officers sprayed Sheehan in the face. They testified that when Sheehan did not drop the knife after being pepper sprayed, they shot her multiple times.[289] Sheehan survived and later sued, alleging that the officers had used excessive force in violation of the Fourth Amendment, among other claims.[290]

Throughout his concurrence, Justice Kavanaugh at worst conflates emergencies; at best, he provides multiple examples of exigencies without distinguishing when police involvement is problematic and when it is not. In one passage, he compares an emergency involving a suicidal person with one involving a "wellness check" on an "elderly man" who is "uncharacteristically absent from Sunday church services and repeatedly fails to answer his phone throughout the day and night."[291] Such conflation is misguided and unsound. A person who is labeled suicidal will be regarded as a danger or threat[292] and likely will be responded to with violence; an elderly person missing from church will likely not be. Furthermore, to have an "objectively reasonable basis" for believing that an occupant is "seriously injured or threatened with such injury,"[293] one must be trained to assess the nature of the injury and not just the threat of injury. Locating an elderly man in his home is different from assessing the needs of a person experiencing a mental health crisis, which is a more appropriate task for medical and behavioral health professionals.

Similarly, appellate courts have, in general, failed to distinguish mental health emergencies in their assessments as to whether police officers had a reasonable basis for the warrantless search or seizure, lumping these emergencies alongside other exigencies.[294] Once in the same category as all other emergencies, courts tend to ask whether given the facts on the scene as the officer found them, there was an immediate risk of serious harm. Missing from the analysis is how to gauge imminence, which is in part a medical and mental health assessment of how likely it is that an individual threatening self-harm, or harm to others, will actually harm. Troublingly, they have assessed reasonableness in some cases without assessing whether and to what extent law enforcement relied on medical professionals' statements, observations, or opinions.[295]

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288. Id. at 604–05.

289. Id. at 605–06.

290. Id. at 606.

291. Caniglia v. Strom, 141 S. Ct. 1596, 1605 (2021) (Kavanaugh, J., concurring).

292. See supra section II.B.

293. Brigham City v. Stuart, 547 U.S. 398, 400, 403 (2006).

294. See, e.g., Johnson v. City of Memphis, 617 F.3d 864, 868 (6th Cir. 2010) (discussing emergency aid without specific reference to unique circumstances of mental health crises).

295. Compare Ewolski v. City of Brunswick, 287 F.3d 492, 515 (6th Cir. 2002) (assessing appellant's substantive due process claims that the police chief failed to properly account for medical professional statements), with Ewolski v. City of Brunswick, 287 F.3d 492, 520

Treating mental health exigencies like other emergencies weakens Fourth Amendment protections for people experiencing (or labeled as experiencing) mental health crises, precisely in the location where Fourth Amendment protections should be at their peak. The Supreme Court has recognized as much in cases involving the due process rights of individuals who are civilly committed.[296] Such a "massive curtailment of liberty"[297] does not just occur at the point of hospital admission. Forcible detentions by law enforcement—often because they look just like arrests—can be stigmatizing events, functioning as a kind of degradation ceremony.[298]

e. What is Reasonable?. — Combining different exigencies into the same broad category has produced doctrinal disarray beyond what is typically found (and criticized) in cases implicating traditional criminal law enforcement roles. In conflating exigencies, the Supreme Court has neither recognized nor specified what level of proof is necessary to find that a warrantless search or seizure is reasonable under the exigent circumstances doctrine. Professor Kit Kinports argues that the quantum of suspicion needed to justify exigent searches varies across Supreme Court opinions from probable cause to reason to believe to reasonable belief.[299] So, too, within the case law on emergency seizures for mental health evaluation, stabilization, and treatment. Among lower courts, there are numerous variations; courts have determined that anything from probable cause to reasonable belief may justify a finding of exigent circumstances.[300]

(6th Cir. 2002) (Hull, J., dissenting) (assessing the police chief's statements under the reasonableness prong of the Fourth Amendment). Such analysis can be made expressly part of the reasonableness inquiry as this Article discusses in Part III.

296. Vitek v. Jones, 445 U.S. 480, 491–92 (1980); accord Addington v. Texas, 441 U.S. 418, 425–26 (1979); see also Myers v. Patterson, 819 F.3d 625, 632 (2d Cir. 2016) ("[T]here is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom." (internal quotation marks omitted) (quoting Rodriguez v. City of New York, 72 F.3d 1051, 1061 (2d Cir. 1995))).

297. *Vitek*, 445 U.S. at 491–92 (internal quotation marks omitted) (quoting Humphrey v. Cady, 405 U.S. 504, 509 (1972)).

298. Professor Kaaryn Gustafson has described degradation ceremonies as communicative work "whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types." Kaaryn Gustafson, Degradation Ceremonies and the Criminalization of Low-Income Women, 3 U.C. Irvine L. Rev. 297, 301 (2013).

299. Kit Kinports, The Quantum of Suspicion Needed for an Exigent Circumstances Search, 52 U. Mich. J.L. Reform 615, 617–18 (2019).

300. See, e.g., Fitzgerald v. Santoro, 707 F.3d 725, 732 (7th Cir. 2013) ("Probable cause exists 'only if there are reasonable grounds for believing that the person seized is subject to seizure under the governing legal standard . . . .'" (quoting Villanova v. Abrams, 972 F.2d 792, 795 (7th Cir. 1992))); United States v. Porter, 594 F.3d 1251, 1258 (10th Cir. 2010) (requiring a reasonable belief in the need for medical assistance); Cloaninger ex rel. Est. of Cloaninger v. McDevitt, 555 F.3d 324, 334 (4th Cir. 2009) ("[O]fficers have probable cause to seize a person for a psychological evaluation when 'the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man' to believe that the person poses a danger to himself or others." (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964))); Est. of Bennett v. Wainwright, 548 F.3d

Of course, warrantless entries into homes for mental health seizures based on exigencies must be reasonable, and reasonableness is closely connected with the nature of the emergency. The more imminent the risk of harm, the more likely courts will find that law enforcement acted reasonably. The problem is that the Supreme Court has not sought to distinguish exigent circumstances from one another and has instead collapsed exigencies into the same broad category.

The reasonableness of law enforcement response depends not just on the imminence of the concrete harm (that purportedly requires an immediate response) but whether the particular emergency was responded to in a reasonable way. A reasonable response includes both the manner of the search and seizure and the scope. Though courts have acknowledged that the manner of the search or seizure matters in reasonableness analyses, comparatively few scrutinize police tactics to assess whether they align with leading guidance on mental health crisis response. Police are regarded as appropriate responders to mental health emergencies with little inquiry into the amount or quality of their training.[301] Though a reasonableness analysis could incorporate questions as to the police role, existing doctrine does not include much analysis as to the appropriateness of police serving in this role at all.[302] By collapsing exigencies into one large category, courts are prevented from meaningfully assessing the reasonableness of searches and seizures for emergency holds.

D. *Are Police Reasonable Mental Health First Responders?*

Under the "emergency aid" exception, "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[303] Such exigencies justify a warrantless search because of the "need to assist persons who are seriously injured or threatened with such injury,"[304] and the "'need to protect or preserve life or avoid serious injury is justification for what

155, 169 (1st Cir. 2008) ("Such circumstances exist, for example, where law enforcement officers enter a home without a warrant under a reasonable belief that doing so is necessary to render emergency assistance to a person inside."); Monday v. Oullette, 118 F.3d 1099, 1103 (6th Cir. 1997) (finding both probable cause and a reasonable belief that the plaintiff needed psychiatric treatment sufficiently satisfied Fourth Amendment and state statutory requirements).

301. See Hutcheson v. Dallas County, 994 F.3d 477, 483 (5th Cir. 2021) (concluding that mere existence of training protocol was sufficient to show that police officers were equipped to deal with individuals with psychiatric disabilities).

302. Cf. Barry Friedman, Disaggregating the Police Function, 169 U. Pa. L. Rev. 925, 939–48 (2021) (discussing the police role in responding to chronic social problems and finding that officers are trained "primarily on how to use force" and little "in the categories of mediation and social work").

303. Kentucky v. King, 563 U.S. 452, 460 (2011) (internal quotation marks omitted) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

304. *Brigham City*, 547 U.S. at 403.

would be otherwise illegal absent an exigency or emergency.'"[305] Officers do not need to actually believe that there was an emergency, but the test is instead whether a reasonable officer would have believed there was an actual emergency.[306] Police officers must have an objectively reasonable basis to believe that there is a real threat of harm (to the individual and to others) and that the intrusion is reasonably necessary to alleviate the threat.

The government has the burden to establish that the defendant required emergency aid and that the warrantless entry into the defendant's home pursuant to the emergency circumstances exception to the warrant requirement was justified.[307] Though the government has the burden, courts might not scrutinize the government's proffered justifications for warrantless searches under the emergency aid exception.[308] Furthermore, and more to one of the central claims in this Article, courts do not distinguish emergency aid related to mental health from other traditional emergencies.[309] Again, this is not surprising because the doctrinal test itself does not distinguish traditional emergencies from other emergencies.

The emergency aid exception to the warrant requirement frames police as reasonable and capable mental health first responders. But absent from the balance are the serious harms that interventions by the police can and do cause. When it comes to mental health crisis response, police are very often not qualified to provide the necessary emergency aid—namely, therapeutic interventions necessary for de-escalation.[310] Indeed, as numerous cases demonstrate, the presence of police might

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305. Id. (quoting Mincey v. Arizona, 437 U.S. 385, 392 (1978)).

306. See Michigan v. Fisher, 558 U.S. 45, 47 (2009) (stating that a law enforcement officer only needs an objectively reasonable basis for believing that a person needs immediate aid to search a home without a warrant).

307. State v. Samuolis, 278 A.3d 1027, 1035 (Conn. 2022).

308. See, e.g., Johnson v. City of Memphis, 617 F.3d 864, 868 (6th Cir. 2010) (stating that "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury . . . [n]or do officers need to wait for a potentially dangerous situation to escalate into public violence" in order to invoke the emergency aid exception (quoting Michigan v. Fisher, 558 U.S. 45, 49 (2009)). Here, scrutiny could take the form of scrutinizing facts that provide the basis for the government's claim of the need for emergency aid. See, e.g., French v. City of Cortez, 361 F. Supp. 3d 1011, 1024 n.9 (D. Colo. 2019) (enumerating the contested government facts justifying emergency aid that the judge "rejected for the purposes of summary judgment").

309. See supra section II.C.

310. See José M. Viruet, How Can I Use De-Escalation Techniques to Manage a Person in a Mental Health Crisis?, SMI Adviser (Jan. 11, 2022), https://smiadviser.org/knowledge_post/how-can-i-use-de-escalation-techniques-to-manage-a-person-in-a-mental-health-crisis [https://perma.cc/7JYG-AKES] (discussing several therapeutic interventions and de-escalation techniques).

actually increase (rather than prevent) the risk of physical harm to the individual.[311]

Are police officers reasonable first responders as a constitutional matter? The heart of the inquiry is often whether officers had an objectively reasonable basis for believing that there was a need to render emergency aid to an injured party or to protect a person from imminent injury.[312] But that inquiry is unduly narrow, and it neglects the reasonableness of the decision to dispatch the officer in the first place. The assessment does not evaluate whether the need to render emergency aid necessitated *police* response. Of course, a nonpolice response will not be available in jurisdictions that lack alternative response or community responder programs. But if 911 dispatch answers the call within jurisdictions where there are programs requiring nonpolice response, the current legal test does not require that courts take these diversion programs into account. Of course, the Fourth Amendment as a constitutional floor cannot compel jurisdictions to create alternatives to police first responders. But, as to the constitutional assessment of reasonableness, that question should at least include inquiry into whether reasonable alternatives (where they exist) were available. After all, it would not be reasonable to dispatch only police in a jurisdiction that has an available alternative response.

Police are often presumed to be appropriate first responders without much consideration as to whether police have the qualifications and training to perform crisis response functions effectively.[313] Some might contend that providing police with training will improve outcomes—for example, reduce uses of force or reduce arrests—in mental health crisis response. Crisis intervention trainings provide law enforcement with training on communicating with individuals in crisis and de-escalation tactics.[314] The "Memphis model" is the most well-known Crisis

311. See, e.g., Ayobami Laniyonu & Phillip Atiba Goff, Measuring Disparities in Police Use of Force and Injury Among Persons With Serious Mental Illness, 21 BMC Psychiatry 1, 7 (2021) ("The present study provides evidence that [persons with serious mental illness] are significantly overrepresented in police use of force and suspect injury events."); see also Hyun-Jin Jun, Jordan E. DeVylder & Lisa Fedina, Police Violence Among Adults Diagnosed With Mental Disorders, 45 Health Soc. Work 81, 81–89 (2020) (finding higher rates of police victimization for adults with psychiatric disabilities, even when controlling for higher criminal involvement).

312. See Sutterfield v. City of Milwaukee, 751 F.3d 542, 558 (7th Cir. 2014) (describing the test for the emergency aid exception to the warrant requirement).

313. See supra section II.A. Critically, though, this Article does not suggest that police would be appropriate first responders even with training, due to their role misalignment.

314. See Crisis Intervention Team (CIT) Programs, Nat'l All. on Mental Illness, https://www.nami.org/Advocacy/Crisis-Intervention/Crisis-Intervention-Team-(CIT)-Programs [https://perma.cc/J9Y5-55VS] (last visited Mar. 9, 2024) (discussing the benefits of Crisis Intervention Team Programs in improving officer knowledge about mental illness and reducing injuries during officer encounters, including by eighty percent in one city).

Intervention Training (CIT) training model.[315] Despite its popularity in police reform circles, there is no conclusive evidence that crisis intervention programs are effective in reducing arrests or reducing police uses of force.[316] Though there is some evidence that these trainings improve police attitudes, it should be relevant to our analysis that the metrics that matter most—at least if the goal truly is to reduce harm to people in crisis—are not being met.[317]

Reporting from the Marshall Project indicates that police receive limited first aid training, typically in their first year: "Of the 50 departments we contacted, 37 said they provide first aid training to recruits, but only 20 among them said they offer refresher courses, and only 14 departments require officers to attend them."[318] The report documented cases where officers were sued for failing to administer lifesaving care to gunshot victims and for refusing to administer CPR to a child.[319] Police officers in these cases defended their actions by stating either that they lacked the training or that calling 911 constituted adequate medical assistance and they were not required to do anything more.[320] This failure to render aid has led states to pass "duty to aid" laws requiring law enforcement to render medical assistance consistent with their training or to call for medical assistance.[321]

Up until now, this Article has surfaced two main problems with collapsing mental health exigencies into all other exigencies: (1) that mental health exigencies are often not exigencies in fact, and though exigent circumstances and emergency aid doctrines do not require that police accurately predict exigencies in any event, courts do not even attempt to establish some threshold for what risk factors support a finding of imminent harm justifying such exigencies, and (2) that police are not qualified in providing emergency aid and therefore should not be presumed to be reasonable first responders for constitutional purposes. But there is also a third problem that arises from this conflating of emergencies: When courts, under current Fourth Amendment doctrine, collapse exigencies, police who lack expertise for handling mental health

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315. See Michael S. Rogers, Dale E. McNiel & Renée L. Binder, Effectiveness of Police Crisis Intervention Training Programs, 47 J. Am. Acad. Psychiatry L. 414, 415–16 (describing the Memphis CIT model).

316. Sema A. Taheri, Do Crisis Intervention Teams Reduce Arrests and Improve Officer Safety? A Systematic Review and Meta-Analysis, 27 Crim. Just. Pol'y Rev. 76, 90 (2016) ("At this time, however, there appears to be some evidence that CIT have no effect on outcomes of arrest, nor on officer use of force, with the overall findings being mixed.").

317. See Rogers et al., supra note 315, at 417.

318. Taylor Elizabeth Eldridge, Cops Could Use First Aid to Save Lives. Many Never Try., Marshall Project (Dec. 15, 2020), https://www.themarshallproject.org/2020/12/15/cops-could-use-first-aid-to-save-lives-many-never-try [https://perma.cc/L679-LGUR].

319. Id.

320. Id.

321. See, e.g., 720 Ill. Comp. Stat. Ann. 5/7-15 (West 2024).

exigencies are treated as de facto experts. The breadth of discretion afforded to police under the permissive objective reasonableness standard, exigent circumstances, emergency aid, special needs doctrines, and the fluid, unbounded, and fact-driven nature of probable cause make it so that the question of whether a search or seizure is reasonable is rarely a rigorous inquiry. This is, in large part, the problem with treating all emergencies alike: It obscures the line between police expertise, behavioral health expertise, and individual expertise—and privileges police expertise above all other forms.

In short, even while recognizing that police are not mental health experts, current Fourth Amendment doctrine still privileges police expertise. This paradoxical relationship might be because courts defer to the police in promoting public safety when responding to people in mental crisis (or labeled as such), though as this Article has described, this account of public safety is exclusionary because it fails to consider the harms police pose to individuals in crisis. The paradoxical relationship could also be because police are serving a role the behavioral health system is not yet equipped to fill. Yet while this view is consistent with the practical reality, constitutional rules and standards that do little to cabin police discretion but nonetheless promote deference to the police foreclose pathways for contesting police dispatch in mental health seizures, even if and when jurisdictions adequately fund behavioral resources.

Even while accepting that police are not medical experts, courts find it reasonable that police perform medical functions, which is true with respect to providing emergency aid after physical injury and also with respect to mental health first aid. Yet police providing medical functions should also raise constitutional concern.[322] Take de-escalation tactics: While de-escalation tactics are often referred to as policing tactics, they are also therapeutic techniques informed by medical practices.[323] Framed in this way, they are like medical techniques—drawing blood or checking temperatures—requiring not medical instruments and devices measuring bodily fluids or physical states but rather medical techniques that measure

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322. Of course, as discussed supra section I.A, in many jurisdictions relatives, neighbors, and friends are given no options but to call the police when someone is experiencing mental crises. That police are the sole responders available in mental health crises in many jurisdictions does not dispositively resolve whether it is reasonable for police to perform mental health searches and seizures as a constitutional matter. Acting as though the Fourth Amendment should be applied to mental health searches and seizures in the same way it applies in criminal law enforcement contexts simply because the police perform the role given ongoing failures to invest in a robust behavioral health system imports the constraints of political economy on the realm of constitutional law—an approach better aligned with legal realism than originalist or textualist approaches. See Thomas Y. Davies, The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine, 100 J. Crim. L. & Criminology 933, 1036 (2010) (tracking a throughline of legal realism in Fourth Amendment search and seizure doctrine).

323. See Viruet, supra note 310 (describing how to use de-escalation techniques in a therapeutic setting).

physical, affective, emotional, and mental responses to calibrate therapeutic interventions accordingly. And though the medical technique is not used to search for evidence of an alleged criminal act within the body, the stated purpose of the medical technique is to avoid or prevent a whole range of undesirable responses—whether violence or physical, mental, and emotional stressors—and ensure the removal of the person from the home and into (albeit, forced) treatment if the requirement of imminent harm to self or others is satisfied.

Yet framing de-escalation tactics in this way presents a conundrum and a constitutional problem: At least in *Schmerber v. California*, the Supreme Court recognized that police lack medical expertise sufficient to perform certain medical techniques. Indeed, the Court said that "if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment," then such a search might raise serious constitutional questions.[324] Given that, is it constitutionally reasonable for police to perform wellness checks and engage in de-escalation tactics, which can be thought of as medical techniques? Taking seriously what Justice Brennan wrote in *Schmerber* would suggest the answer is no.[325]

E. *State Civil Commitment Laws and the Problems With Probable Cause for Psychiatric Seizures*

State laws govern whether officers have the authority to detain an individual for emergency evaluation, observation, and treatment. When state civil commitment laws are the basis for the emergency search or mental health seizure, probable cause is required for police to justify the intrusion based on state law criteria for emergency civil commitment. The majority of circuit courts have held that a seizure for emergency mental health evaluation is reasonable when supported by probable cause that the person is experiencing mental distress and is dangerous.[326] If an officer

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324. Schmerber v. California, 384 U.S. 757, 771–72 (1966).

325. See id. (implying that it would not be reasonable for police to perform medical techniques).

326. See, e.g., Graham v. Barnette, 5 F.4th 872, 884–86 (8th Cir. 2021) (concluding that officers can make a "mental-health arrest" based on "probable cause of dangerousness"); Myers v. Patterson, 819 F.3d 625, 632 (2d Cir. 2016) ("To handcuff and detain, even briefly, a person for mental-health reasons, an officer must have 'probable cause to believe that the person presented a risk of harm to [her]self of others." (alteration in original) (quoting Kerman v. City of New York, 261 F.3d 229, 237 (2d Cir. 2001))); Cantrell v. City of Murphy, 666 F.3d 911, 923 (5th Cir. 2012) ("[P]robable cause exists where the facts and circumstances within the officer's knowledge at the time of the seizure are sufficient for a reasonable person to conclude that an individual is mentally ill and poses a substantial risk of serious harm."); Roberts v. Spielman, 643 F.3d 899, 905 (11th Cir. 2011) ("When an officer stops an individual to ascertain that person's mental state . . . , the Fourth Amendment requires the officer to have probable cause to believe the person is dangerous either to himself or to others."); Cloaninger ex rel. Est. of Cloaninger v. McDevitt, 555 F.3d 324, 334 (4th Cir. 2009) (holding that officers can only detain a person for mental health

exceeds their authority under state law and lacks a legal basis for detaining a person for emergency evaluation, aggrieved plaintiffs may allege a Fourth Amendment claim.[327] Reviewing courts then assess whether officers had probable cause that the criteria under the state statute had been satisfied.[328]

There are no clear guidelines for assessing probable cause for emergency seizures.[329] Requirements for probable cause vary widely across circuits.[330] Courts draw from criminal law in setting standards for what constitutes probable cause.[331] While in the criminal law context probable cause requires that an officer conclude that there is "substantial chance of criminal activity,"[332] in the mental health context, probable cause exists when an officer "believe[s] the individual is a danger to herself or others" and when "there is a substantial risk of serious physical harm to herself or

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evaluation when they have probable cause to believe that the person is dangerous); Meyer v. Bd. of Cnty. Comm'rs, 482 F.3d 1232, 1239 (10th Cir. 2007) (finding that detention required "probable cause to believe—that is a reasonable perception of a probability or substantial chance—that [the detainee] posed a danger to herself or others"); Monday v. Oullette, 118 F.3d 1099, 1102 (6th Cir. 1997) (requiring probable cause that a person has a "dangerous mental condition"); Ahern v. O'Donnell, 109 F.3d 809, 817 (1st Cir. 1997) ("Fourth Amendment standards require a showing of probable cause; that is, circumstances warranting a reasonable belief that the person to be seized does (as outlined in the statute) have a mental health condition threatening serious harm to himself or others."); Maag v. Wessler, 960 F.2d 773, 775–76 (9th Cir. 1991) (per curiam) (finding that officers were justified in detaining a person who they thought to "be a danger to himself or others" under a state law allowing the detention of "seriously mentally ill" persons (internal quotation marks omitted) (quoting Mont. Code Ann. § 53-21-129 (West 1991) (amended 2013))); see also Cole v. Town of Morristown, 627 F. App'x 102, 106–07 (3d Cir. 2015) ("[I]t is not unreasonable to temporarily detain an individual who is dangerous to herself or others."); In re Barnard, 455 F.2d 1370, 1373–74 (D.C. Cir. 1971) (describing the standard for a court to order involuntary commitment as "probable cause to believe the patient is mentally ill and, as a result thereof, is likely to injure himself or others").

327. See, e.g., *Cantrell*, 666 F.3d at 922.

328. See id. at 923.

329. Gooden v. Howard County, 954 F.2d 960, 968 (4th Cir. 1992) (reversing the district court's order denying qualified immunity because "[t]he lack of clarity in the law governing seizures for psychological evaluations is striking when compared to the standards detailed in other Fourth Amendment contexts, where probable cause to suspect criminal misconduct has been painstakingly defined").

330. See, e.g., Guan v. City of New York, 37 F.4th 797, 805 (2d Cir. 2022) ("[F]or a mental health arrest, police officers must have 'reasonable grounds for believing that the person seized is dangerous to herself or others.'" (quoting Anthony v. City of New York, 339 F.3d 129, 137 (2d Cir. 2003))); *Graham*, 5 F.4th at 886 ("Officers have probable cause to arrest a person for a mental-health evaluation when 'the facts and circumstances within . . . the officers' knowledge . . . are sufficient . . . to warrant a man of reasonable caution' to believe that the person poses an emergent danger to himself or others." (alterations in original) (quoting Baribeau v. City of Minneapolis, 596 F.3d 465, 474 (8th Cir. 2010))).

331. See, e.g., S.P. v. City of Takoma Park, 134 F.3d 260, 272 (4th Cir. 1998).

332. Washington v. Howard, 25 F.4th 891, 898–99 (11th Cir. 2022) (quoting Wesby v. District of Columbia, 138 S. Ct. 577, 588 (2018)).

others."[333] Probable cause includes facts about the person's physical appearance, including dress and hygiene, along with past conduct, like how the person is behaving leading up to and during the point when police officers arrive at the scene and whether they are complying with medication regimens.[334] Taken together, these factors go to whether police had probable cause of dangerousness (harm to self or others) or disability sufficient to justify emergency holds under state civil commitment laws.

Uncritical applications of criminal law standards to emergency mental health searches and seizures have undermined legal protections for people experiencing (or labeled as experiencing) mental health crises. Courts have conflated probable cause of alleged criminal conduct with probable cause justifying emergency seizures for the purposes of mental health evaluation and have largely relied on definitions, albeit imprecise ones, of criminal law probable cause.[335] Courts have deferred to police recountings of facts related to probable cause determinations without interrogating how such deference may further insulate police bias against disabled people from judicial scrutiny.[336] Fundamentally, courts by and large do not appreciate that the nature of the probable cause inquiry in criminal law cases is markedly different from that in mental health searches and seizures. The paragraphs that follow discuss each of these points.

Courts have treated probable cause standards for criminal conduct and mental health seizures as one and the same.[337] For example, in one

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333. *Guan*, 37 F.4th at 807; see also *Graham*, 5 F.4th at 886 (articulating a similar standard based on the officer's reasonable belief that a person is dangerous); Fitzgerald v. Santoro, 707 F.3d 725, 732 (7th Cir. 2013) (explaining that under Illinois statute, "[p]robable cause exists 'only if there are reasonable grounds for believing that the person seized is subject to seizure under the governing legal standard'" (quoting Villanova v. Abrams, 972 F.2d 792, 795 (7th Cir. 1992))).

334. See, e.g., People v. Triplett, 192 Cal. Rptr. 537, 537 (Ct. App. 1983) (finding probable cause where person was tearful, intoxicated, and displayed "obvious physical signs of a recent suicide attempt"); DelCastillo v. City of San Francisco, No. CV 08-3020, WL 1838939, at *7 (N.D. Cal. 2010) (considering plaintiff's appearance, statements, response to officers orders, and general behavior relevant to the probable cause analysis).

335. Pino v. Higgs, 75 F.3d 1461, 1467–68 (10th Cir. 1996) ("Because similar underlying interests arise in the context of a detention for an emergency health evaluation, several courts have applied an analogous 'probable cause' doctrine in determining the validity of the government's seizure of a person for mental health reasons." (citations omitted)).

336. In fact, inquiry into the officer's subjective bias is not appropriate under Fourth Amendment analysis under *Whren*. See Whren v. United States, 517 U.S. 806, 810–13 (1996) ("Subjective intentions [of individual officers] play no role in ordinary, probable-cause Fourth Amendment analysis.").

337. See, e.g., Guan v. City of New York, 18 Civ. 2417, 2020 WL 6365201, at *4 (S.D.N.Y. Oct. 29, 2020), aff'd on other grounds, 37 F.4th 797 (2d Cir. 2022) ("The probable cause analysis for a mental health seizure may differ from trespassing or disorderly conduct, but so long as probable cause existed for the Officer Defendants to seize and detain Plaintiff for any reason, that is sufficient to defeat Plaintiff's claim of false arrest.").

case, the Second Circuit "conclude[d] that the district court erred in holding that probable cause for a trespass arrest obviated the need for probable cause for a mental health arrest."[338] Kaibin Guan's autistic son was removed from her home when she was not there and taken to a hospital for a psychiatric evaluation. Guan was distraught and feared for her son's safety.[339] She went to the hospital and, according to hospital staff and police, behaved disruptively and was asked to leave.[340] Guan left but returned and was arrested for criminal trespass.[341] She sued alleging false arrest.[342] In holding that the district court erred in its analysis, the Second Circuit stated that "[t]he constitutional protections against an unreasonable arrest 'adhere[] whether the seizure is for purposes of law enforcement or due to an individual's mental illness.' But a different probable cause analysis applies to each type of arrest."[343] The Second Circuit nonetheless determined that officers were entitled to qualified immunity because, at the time that officers arrested Guan, it was not clearly established that they were required to have probable cause for the emergency psychiatric evaluation, even if they had probable cause to arrest her for trespass.[344]

Aside from conflating probable cause for criminal arrest with probable cause for mental health seizures, courts are not defining probable cause with sufficient clarity. Tolerance of fluid, capacious standards for probable cause in the criminal law enforcement context (which facilitates deference to law enforcement) does not make much sense in the context of psychiatric crises. For example, consider what the Supreme Court said in *Ornelas v. United States* of reasonable suspicion and probable cause: "They are commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.' . . . *They are . . . fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.*"[345] Yet the concerns in *Ornelas* do not apply to mental health seizures and such fluid conceptions of probable cause do not fit this context. Accurate assessments as to mental health are clinical determinations rather than common sense determinations and police should not be entrusted to make these

338. *Guan*, 37 F.4th at 807.

339. Id. at 801.

340. Id. at 801–02.

341. Id. at 802–03.

342. Id. at 803.

343. Id. at 805 (second alteration in original) (quoting Myers v. Patterson, 819 F.3d 625, 632 (2d Cir. 2016)); see also id. at 807–09 ("Probable cause to arrest for a criminal violation such as trespass is not a sufficient basis to arrest an individual for an emergency mental health evaluation."). In effect, the Second Circuit's holding can be taken to mean that pretextual arrests are not permissible in cases involving mental health seizures.

344. Id. at 809.

345. Ornelas v. United States, 517 U.S. 690, 695 (1996) (emphasis added) (citations omitted) (quoting Illinois v. Gates, 462 U.S. 213, 231 (1983)).

assessments. Indeed, consistent with the Fourth Amendment's balancing test, to justify such an intrusion (warrantless search and then seizure), the government interest must be strong. Here, the strength of the government's interest is only as strong as the accuracy of its assessment of probable cause of imminent harm or dangerousness. Fluid and capacious definitions of probable cause are inappropriate in cases involving mental health seizures because whether such searches are reasonable should be linked to whether the warrantless seizure was both appropriate and accurate. If anything, the *Ornelas* Court's own statement invites new formulations for probable cause attuned to the "particular context" of mental health seizures.

Probable cause is a notoriously capacious standard.[346] Once it's asserted, courts are reluctant to second-guess determinations by law enforcement. For example, in *May v. City of Nahunta*, the Eleventh Circuit found that an officer had arguable probable cause to seize May, the plaintiff, for a psychiatric hold when two EMTs reported to the officer that May was "'a little combative to herself' and was upset . . . [and] clasping her fists and 'vigorously . . . scruffing and hitting herself in the head,'" and that the officer's "own observations corroborated these statements, as he testified that May's hair was 'all over her head in disarray.'"[347] The Eleventh Circuit found that this evidence established that the officer could "reasonably have believed that May posed a danger to herself."[348] May was eventually released from the hospital about two hours later and reported that a nurse informed her that there was "nothing wrong with her."[349] In affirming the district court's grant of summary judgment, the Eleventh Circuit stressed that "in view of the chilling effect that a contrary ruling may have in this context, we are reluctant to second guess an officer's decision on these facts to transport a person to the hospital to evaluate possible mental-health concerns."[350] Yet, as this Article argues, in cases involving mental health seizures, such second-guessing by courts is appropriate.

Judicial deference to probable cause determinations by law enforcement is inappropriate in cases involving mental health searches and seizures. As in criminal law enforcement cases, capacious legal standards like probable cause, coupled with the constitutional irrelevance of an officer's subjective motivations under *Whren*,[351] serve to mask the role of bias in assessments of dangerousness or grave disability in legal determinations for psychiatric holds. For example, in *Myers v. Patterson*, a

346. See Andrew Manuel Crespo, Probable Cause Pluralism, 129 Yale L.J. 1276, 1280–82 (2020) (describing problems with "an infinitely malleable approach to probable cause").

347. May v. City of Nahunta, 846 F.3d 1320, 1329 (11th Cir. 2017) (second alteration in original).

348. Id.

349. Id. at 1326.

350. Id. at 1329.

351. Whren v. United States, 517 U.S. 806, 810–13 (1996); see also supra note 336.

police officer detained a mother after a Child Protective Services caseworker perceived her to be "'annoyed,' 'very uncooperative,' and 'irrational,'" and perceived her child to be "'fearful' of talking to the caseworker."[352] Officers ultimately detained the mother, Julia Johnson, for emergency involuntary psychiatric observation.[353] While she was under observation, mental health professionals diagnosed Johnson with delusional disorder and paranoid schizophrenia, and she disclosed a prior suicide attempt.[354] Mental health professionals determined that she posed a risk of danger to herself and others "based on her suicide attempt and her paranoia, guardedness, and suspiciousness."[355]

For some, the outcome of the incident (i.e., the plaintiff's detention) suggests the presence of probable cause and that the officers got it right. Yet the Second Circuit's statement regarding this outcome is instructive: "[H]owever prescient the officer's instincts may have been, we cannot grant immunity for decisions merely because *ex post* they seem to have been good ones, any more than we could hold officers liable for decisions that seemed reasonable when made but subsequently turned out to be wrong."[356]

As *Myers* illustrates, in cases involving unspecified mental distress practically any behavior that appears to be abnormal can form the basis for probable cause required to satisfy extant standards under existing state civil commitment laws governing emergency holds. The cases in this area of law reflect a wide array of behaviors, appearances, statements, speech patterns, and other subjective factors observed by officers that were determined to be reasonable under the Fourth Amendment because the officer had probable cause, or reasonable basis, that the individual posed a danger.[357]

No state regime requires officers to identify a set of behaviors that automatically amount to probable cause of imminent danger or grave disability, and so, in this context, probable cause assessments tend to function as a more flexible approach.[358] For instance, as the Sixth Circuit put it, probable cause in cases involving mental health seizures "requires

352. Myers v. Patterson, 819 F.3d 625, 630 (2d Cir. 2016).

353. Id. at 635.

354. Id.

355. Id.

356. Id. at 636.

357. See, e.g., Sutterfield v. City of Milwaukee, 751 F.3d 542, 545–47 (7th Cir. 2014) (finding officers acted reasonably when an individual stated, "I guess I'll go home and blow my brains out," and nine hours had passed between notification of threat and warrantless entry); Johnson v. City of Memphis, 617 F.3d 864, 869–70 (6th Cir. 2010) (holding warrantless entry was justified when officers responded to an emergency hang-up phone call, the emergency dispatcher's return call was unanswered, the front door to the residence was open, and officers announced their presence and received no response).

358. Cf. Florida v. Harris, 568 U.S. 237, 244 (2013) ("We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach.").

only a 'probability or substantial chance' of dangerous behavior, not an actual showing of such behavior," which could mean probable cause may be satisfied when officers have a reasonable belief that the person is dangerous.[359] Yet this formulation does not recognize how notions of reasonableness in the mental health seizures context differ from the criminal law context: Dangerousness is a clinical assessment under civil commitment laws. Whether an officer's belief is reasonable depends on whether the individual poses a danger to themselves and others—an assessment that properly includes clinical determinations as recognized by most civil commitment laws. Danger in the mental health seizure context is connected to the individual's mental state and incorporates an awareness of how that state relates to risk factors for harm to others or self-harm. The hybrid nature of this assessment is not at all captured by existing probable cause definitions. The capacious (if not vague) standards allow for bias and arbitrariness to seep into probable cause and undermine its supposed function in narrowing police discretion.[360] Deference to police undermines the ability of courts to scrutinize probable cause assessments to ensure that myths, misconceptions, biases, and stereotypes about people experiencing mental crises did not cloud officers' judgements as to necessity of involuntary commitment. In light of the biases that individuals (including law enforcement) have towards people with psychiatric disabilities (e.g., that they are prone to dangerousness) courts must scrutinize facts underlying probable cause of dangerousness.[361]

Finally, mental health probable cause is not the same kind of *inquiry* as probable cause in the criminal law enforcement context, even though

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359. Monday v. Oullette, 118 F.3d 1099, 1102 (6th Cir. 1997) (quoting Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983)); see also Roberts v. Spielman, 643 F.3d 899, 905 (11th Cir. 2011). Probability language shows up in the statutory text of civil commitment laws. See, e.g., Wis. Stat. Ann. § 51.15 (1) (ar) (2024) (authorizing detention where there is "[a] substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm").

360. For the ways bias seeps into probable cause determinations, see, e.g., Paul Butler, The White Fourth Amendment, 43 Tex. Tech L. Rev. 245, 250 (2010) ("[T]he Fourth Amendment allows police officers to stop and arrest every black man on the street or in their vehicle and refuse to stop any whites, provided that the officer has probable cause of some violation, no matter how minor."); Robert J. Smith, Justin D. Levinson & Zoë Robinson, Implicit White Favoritism in the Criminal Justice System, 66 Ala. L. Rev. 871, 910 (2015) ("Though the *Garner* Court narrowed the scope of the permissible use of deadly force considerably, the 'probable cause to believe that the suspect poses a significant threat of death or serious physical injury' standard leaves a lot of room for officer discretion. Implicit racial bias thrives under such circumstances." (footnote omitted) (quoting Tennessee v. Garner, 471 U.S. 1, 3 (1985))); Simon Stern, Constructive Knowledge, Probable Cause, and Administrative Decisionmaking, 82 Notre Dame L. Rev. 1085, 1121 (2007) (explaining the risks of confirmation bias in law enforcement searches).

361. See supra notes 160–166 and accompanying text.

courts treat it as such.[362] Mental health probable cause includes the individual's likelihood of engaging in any potential activity that poses a risk of imminent harm to the person or another. It can include an assessment as to whether an individual is currently (or at some point in the immediate future will be) unable to meet their basic needs. Law enforcement and medical professionals may be called on to assess whether the criteria for involuntary commitment have been satisfied in order to effectuate the mental health seizure, which brings in two different sets of professional norms for evaluating risk of harm, danger, or mental disability. By contrast, probable cause in the criminal law enforcement context is pegged to the specific alleged offense (or group of possible offenses), an enterprise (given existing social arrangements) currently delegated to law enforcement authorities. These nuances are hardly captured in existing probable cause standards governing mental health seizures.

F. *Special Needs Searches*

Special needs searches are suspicionless searches aimed at furthering some government interest "other than crime detection."[363] Drug testing programs[364] and sobriety check points[365] are examples of special needs searches. Involuntary civil commitment procedures should not be characterized as special needs searches justifying warrantless intrusions into the home for the reasons that follow.

In *McCabe v. Life-Line Ambulance Services*, the First Circuit considered whether the City of Lynn's policy that permitted forcible, warrantless entries of private residences to enforce psychiatric holds under the state's civil commitment law violated the Fourth Amendment.[366] Ruchla Zinger

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362. See, e.g., Gooden v. Howard County, 954 F.2d 960, 968–69 (4th Cir. 1992) ("Certainly the concept of 'dangerousness' which calls on lay police to make a psychological judgment is far more elusive than the question of whether there is probable cause to believe someone has in fact committed a crime."); Initial Brief of Petitioner-Appellant at 27, United States v. Hollingsworth, No. 22-11250 (11th Cir. 2023), 2022 WL 3225134 ("In the mental health context, '[v]ague notions about what a person might do—for example, a belief about some likelihood that without treatment a person might cause some type of harm at some point—does not meet this standard." (alteration in original) (quoting Khoury v. Miami-Dade Cnty. Sch. Bd., 4 F.4th 1118, 1126 (11th Cir. 2021))).

363. Chandler v. Miller, 520 U.S. 305, 314 (1997); see also Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 449–50 (1990) ("[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." (alteration in original) (internal quotation marks omitted) (quoting Treasury Emps. v. Von Raab, 489 U.S. 656, 665–66 (1989))).

364. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 633–34 (1989) (holding that mandatory drug and alcohol testing were reasonable under the Fourth Amendment).

365. *Sitz*, 496 U.S. at 447 (holding that sobriety checkpoint did not violate the Fourth Amendment).

366. 77 F.3d 540, 542–43 (1st Cir. 1996).

died of cardiorespiratory arrest while resisting officers who had forcibly entered her home without a warrant in order to transport her to the local hospital for emergency psychiatric evaluation and treatment.[367] The First Circuit concluded that the City's policy governing emergency holds fell squarely within the special needs search category.[368] After applying the balancing test articulated by the Supreme Court in *T.L.O.*, as between the important government interest on the one hand and the intrusion to the individual's Fourth Amendment rights on the other hand, the *McCabe* court determined that Lynn's policy of permitting warrantless searches was constitutional.[369]

According to the *McCabe* court, the relevant procedures under state civil commitment laws might be found to comply with the Fourth Amendment when these procedures are part of furthering an important regulatory or administrative purpose.[370] The court noted that "[t]he City policy, as evidenced by the actual conduct of its police officers, falls squarely within a recognized class of *systemic* 'special need' searches which are conducted without warrants in furtherance of important administrative purposes."[371] After "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion," the Court found the warrantless entry to be reasonable under the Fourth Amendment.[372]

There are serious drawbacks to assessing the reasonableness of a particular mental health-related search under the special needs exception to the warrant requirement.[373] To begin with, Fourth Amendment doctrine governing administrative searches remains woefully in disarray and fails to adequately constrain executive discretion and arbitrary exercises of state power.[374] Professor Eve Primus has argued that courts have improperly conflated legal standards for "dragnet searches" with subpopulation searches.[375] As Primus maintains, after the Supreme Court

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367. Id. at 542. The Amended Complaint alleged the lack of any exigent circumstances to justify the warrantless entry at the time the police forced their way into Zinger's home, so the exigent circumstances exception to the warrant requirement did not come into play. Id. at 543.

368. Id. at 546.

369. Id. at 545–47.

370. Id. at 545; see also Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) ("[W]e have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment))).

371. McCabe v. Life-Line Ambulance Serv., 77 F.3d 540, 546 (1996) (footnote omitted).

372. Id. at 546–47 (alteration in original) (internal quotation marks omitted) (quoting O'Connor v. Ortega, 480 U.S. 709, 719 (1987)).

373. The First Circuit is not alone in classifying psychiatric holds as special needs searches. See Doby v. DeCrescenzo, 171 F.3d 858, 871 (3d Cir. 1999).

374. Primus, supra note 49, at 257–59.

375. Id. at 276.

added "special subpopulations searches" to the category of administrative searches, the Court declined to examine whether statutory or regulatory regimes limited executive discretion—a focus of the Court's examination of the constitutionality of dragnet searches in earlier cases.[376] Because searches of special subpopulation members required executive discretion (determining who to search and when), it conflicted with the dragnet category of searches in which the broad exercise of executive discretion for suspicionless searches was discouraged and actively curtailed.[377] The result, according to Primus, is that Fourth Amendment protections governing administrative searches were severely weakened, undermining the central goal of the Fourth Amendment—constraining arbitrary exercises of executive power.[378]

Searches incident to mental health seizures might, at first glance, appear to be administrative searches of special subpopulations.[379] But the entanglement that Primus describes should caution against uncritically lumping these searches into the administrative search category where the permissive special needs test now controls.

Searches incident to emergency seizures for mental health evaluation should not be classified doctrinally as administrative searches for three main reasons. First, these searches are not of "subpopulations" that have a reduced expectation of privacy.[380] Special subpopulations—schoolchildren, government employees, parolees, probationers[381]—occupy spaces, perform functions, or possess a legal status that the Supreme Court has determined justifies a reduced expectation of privacy. But individuals in crisis (or labeled in crisis) are usually within a private dwelling or group home, not at roving checkpoints, schools, or automobiles—sites that the Supreme Court has held give rise to a lesser expectation of privacy.[382] Emergency seizures often involve warrantless

376. Id. at 278–79.

377. Id.

378. Id. at 277.

379. See, e.g., McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 546–47 (1st Cir. 1996) ("'Special need' searches are . . . conducted without warrants in furtherance of important administrative purposes.").

380. Primus, supra note 49, at 271–72.

381. Id. at 270–71. For examples of Supreme Court decisions finding a reduced expectation of privacy, see Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 371 (2009) (schoolchildren); Samson v. California, 547 U.S. 709, 725 (2006) (parolees); Griffin v. Wisconsin, 483 U.S. 868, 879 (1987) (probationers); O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (government employees); New Jersey v. T.L.O., 325 U.S. 325, 340 (1985) (schools).

382. See e.g., *T.L.O.*, 469 U.S. at 338–40; United States v. Brignoni-Ponce, 422 U.S. 873, 880–83 (1975) (reasonable suspicion required for police stop not probable cause); Cardwell v. Lewis, 417 U.S. 583, 590 (1974).

entry into homes (including group homes), sites that the Supreme Court has held warrant particularly heightened constitutional protections.[383]

Second, given the conflation of mental disabilities with notions of criminality and dangerousness within society, courts should not regard searches incident to emergency seizures as divorced from "the normal need of law enforcement."[384] Though the government may establish a special need other than crime detection, the risk of criminalization remains ever present in mental health crisis response. It is, in other words, not always clear that the search is taking place "beyond the normal need for law enforcement."[385] The criminalization of disability makes the point: If officers arrive and the individual in crisis refuses treatment, is armed with (or believed to be armed with) a weapon, or threatens use of a weapon, not only are officers permitted under the Constitution to use force (or even deadly force) but they are also permitted to charge the individual with any number of crimes—like simple assault or assault with a deadly weapon—even if they engage in behaviors caused by their mental disabilities. In an overcriminalized society, an individual posing an immediate danger to themselves or others is likely breaking any number of criminal laws; the decision whether to arrest in that context is up to the officer. In fact, it's more likely that the officer will have probable cause of criminal conduct than probable cause that one of the criteria in the civil commitment statutes is satisfied.[386] Given that, the entanglement between criminal law enforcement functions and non-law enforcement functions suggests the inappropriateness of classifying warrantless entries into homes for psychiatric holds as special needs searches. Doing so would authorize a vast expansion of state power into the homes of people experiencing mental crises.

Finally, the special needs balancing test in practice weighs heavily in favor of the government's interest in performing wellness checks or effectuating psychiatric holds pursuant to court orders. Commentators have determined that this standard amounts to something like rational

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383. Minnesota v. Carter, 525 U.S. 83, 100 (1998) (Kennedy, J., concurring); see also Wilson v. Layne, 526 U.S. 603, 609–10 (1999); Payton v. New York, 445 U.S. 573, 596 (1980).

384. See *Griffin*, 483 U.S. at 873 (internal quotation marks omitted) (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment)); see also supra section II.B.

385. *Griffin*, 483 U.S. at 873 (quoting *T.L.O.*, 469 U.S. at 351). Previous sections argued that many mental health searches and seizures do not take place pursuant to traditional criminal law enforcement purposes. See supra sections II.C–.D. This should not be taken to contradict that claim. That these searches and seizures are outside traditional law enforcement functions does not mean that mental health-related behaviors cannot be identified as violative of criminal laws. That is the risk of criminalization of disability.

386. See, e.g., Risdon N. Slate, Deinstitutionalization, Criminalization of Mental Illness, and the Principle of Therapeutic Jurisprudence, 26 S. Cal. Interdisc. L.J. 341, 348–49 (2017) ("Police may also find it more expedient to use the criminal justice process over that of civil commitment.").

basis review.[387] That standard is particularly inappropriate when dealing with individuals with psychiatric disabilities, a long-subordinated and stigmatized group within American society.[388] Given the long history of discrimination against people with psychiatric disabilities, such a low level of scrutiny will fail to adequately smoke out impermissible privacy intrusions and violations against this group. To take the rational basis review analogue one step further, it would be as though the particular privacy intrusions and invasions inflicted upon disabled people—part of the collective security interests and rights of the "people" that the Fourth Amendment aims to protect—would not count as privacy intrusions so long as the state framed the intrusion as part of a broader program of effectuating psychiatric holds. In this way, adopting the special needs test diminishes the significance of clear privacy interests; by framing the particular intrusion as programmatic, the analysis diminishes the import of that individual's interest even while purporting to recognize it. This special needs analysis fails to scrutinize how even framing crisis response as a *program* (a collective set of government interests in response to what is frequently framed as a threat to public safety) to respond to individuals in crisis, or labeled in crisis, may by its very nature ignore, erase, or devalue the individual rights at stake.[389]

Notably, other justifications—namely parens patriae and the state's police power itself—offer ready mechanisms for both elevating the public safety rationale and devaluing the individual rights at stake. Justifying these searches under the special needs exception to the warrant requirement might reinforce inaccurate assumptions and stereotypes about people dealing with mental crises. At one point, the *McCabe* court references the legitimacy of the parens patriae and police power to buttress the state's legitimacy in averting the potential consequences of a "mentally ill subject" causing death or serious bodily injury.[390] Perhaps unsurprisingly then the Court determined that the standard of imminent danger was

387. See, e.g., Primus, supra note 49, at 256–57 ("This reasonableness balancing—which scholars often describe as a form of rational basis review—is very deferential to the government, and the resulting searches are almost always deemed reasonable." (footnotes omitted)); see also Tracey Maclin, The Central Meaning of the Fourth Amendment, 35 Wm. & Mary L. Rev. 197, 199–200 (1993); Carol S. Steiker, Second Thoughts About First Principles, 107 Harv. L. Rev. 820, 855 (1994); cf. Christopher Slobogin, The World Without a Fourth Amendment, 39 UCLA L. Rev. 1, 68, 106–07 (1991) [hereinafter Slobogin, World Without a Fourth Amendment] (arguing in favor of a "reconceptualization" of search and seizure law toward a "proportionality principle").

388. See Samuel R. Bagenstos, Subordination, Stigma, and "Disability", 86 Va. L. Rev. 397, 419–20 (2000) (citing 42 U.S.C. § 12101 (1994)).

389. This is likely due to the fact that the framing of crisis response as a public safety program will largely justify the role for police in the first place. McCabe v. Life-Line Ambulance Serv., 77 F.3d 540, 552–53 (1st Cir. 1996).

390. Id. at 547.

"sufficiently clear and reasonably reliable" particularly given the difficulties predicting human behavior.[391]

Pegging the vast scope of state power that parens patriae and the police power confers to states to the "potential consequences" of an individual experiencing (or believed to be experiencing) mental crisis seems misplaced in Fourth Amendment analysis in which the concern is *constraining* executive power. Indeed, the breadth of state power that undergirds parens patriae and police power calls for a more robust and probing Fourth Amendment analysis, particularly given the potential for abuse and mistreatment against disabled people—a long-oppressed and targeted minority group.

III. NEW STANDARDS FOR ASSESSING THE CONSTITUTIONALITY OF PSYCHIATRIC HOLDS

Proper accounting of the rights at stake for people experiencing crises (or labeled as experiencing crises) shifts the balancing under the Fourth Amendment's reasonableness test. Removing individuals from their homes for emergency evaluation and treatment is an invasive, intimate intrusion that risks violating the personal security and bodily autonomy of people experiencing crises.[392] By strengthening legal protections, the goal is not to make it more difficult for individuals in crisis to access treatment. But access to mental treatment should not come at the expense of (or diminution of) constitutional rights.

Of course, ex ante and ex post review are necessary to regulate searches and seizures.[393] Existing civil commitment laws governing emergency holds could be modified to regulate police conduct by requiring court orders before performing all holds. But, at least as current Fourth Amendment doctrine goes, the very existence of mental health exigencies would obviate any justification for seeking a court order in the first place. Given that, this Part addresses what substantive rules should

391. Id. at 548.

392. While this Article surfaces doctrinal rules and standards that undermine Fourth Amendment protections for people experiencing crises in the home, many of the concerns discussed in the Article apply to unsheltered communities residing in public spaces across the country. Future research might aim to examine Fourth Amendment doctrine as applied to individuals in crisis and residing in public spaces. Moreover, strengthening legal protections for people experiencing mental crises in their homes should also not be taken to mean that individuals who are unsheltered receive less protection. Indeed, several have argued that the values and principles undergirding the Fourth Amendment make it so it can be interpreted to cover temporary shelters. See, e.g., Gregory Townsend, Cardboard Castles: The Fourth Amendment's Protection of the Homeless's Makeshift Shelters in Public Areas, 35 Cal. W. L. Rev. 223, 224 (1999); Lindsay J. Gus, Comment, The Forgotten Residents: Defining the Fourth Amendment "House" to the Detriment of the Homeless, 2016 U. Chi. Legal F. 769, 771; see also Slobogin, Poverty Exception, supra note 196, at 399–406 (discussing implicit exceptions to warrant requirement for low-income people).

393. Slobogin, World Without a Fourth Amendment, supra note 387, at 8.

guide courts assessing whether mental health searches and seizures are reasonable under the Fourth Amendment.

A. *Reasonable Exigencies*

For mental health seizures, what exigencies satisfy the legal standard of reasonableness under the Fourth Amendment? Of course, facts will vary. But frameworks can structure the analysis, provide for flexibility under the reasonableness standard, and also cabin police discretion in constitutionally appropriate ways. This section proposes a few steps courts could take to clarify doctrinal rules and standards.

At common law, warrantless seizures in public were justified by immediate dangerousness,[394] but there is less evidence as to what was required to search and seize an individual in the home. Under the totality of the circumstances analysis, courts should establish what risk factors would suffice such that officers' reasonable beliefs of their presence indicated an immediate danger are constitutionally reasonable.[395] Currently, common risk factors that tend to weigh in favor of finding exigent circumstances—whether recent statements as to suicidality, weapons possession, access weapons in the home, bad hygiene, verbal threats, and noncompliance with medication or treatment plans—are all taken as relevant to the exigency inquiry.[396] Under current case law, the presence of one or more of these factors satisfies the legal showing requiring that officers have a reasonable belief that an individual needed emergency aid.[397] Yet, though these risk factors are relevant to assessing whether exigent circumstances justify the warrantless search or seizure, not all the factors point to the necessity for emergency aid or exigent circumstances more broadly. Stated differently, not all the factors (e.g., bad hygiene, verbal threats, noncompliance with medication) should weigh equally because it is not reasonable to infer exigency or an immediate need for emergency aid (given, again, immediate danger) from each of these factors.

Whether a search or seizure is reasonable should turn on the presence of specific risk factors for physical harm to self or others, and the nexus between the specific risk factor and its risk of imminent danger should determine its weight in the totality of the circumstances analysis. With respect to harm to self, risk factors like weapons possession (whether, for example, within reach or within possession), accompanied by clear statements evincing a clear intention to inflict immediate harm, a plan to engage in harm, and access to the means to harm, should weigh in favor of finding exigent circumstances—all factors that indicate risk of

394. See supra note 234 and accompanying text.

395. Samson v. California, 547 U.S. 843, 848 (2006).

396. See notes 267–271 and accompanying text.

397. See, e.g., Ziegler v. Aukerman, 512 F. 3d 777, 786 (6th Cir. 2008) (upholding a warrantless search based only on a finding of suicide risk).

suicidality in social science literature.[398] When possible, these risk factors should be assessed alongside and corroborated by credible statements or documentation by medical professionals[399] and any statements of the individual, including any prior statements made in a psychiatric advance directive regarding specific interventions during mental crises.[400] Bad hygiene, verbal threats, and noncompliance with medication on their own should not weigh in favor of finding exigency.

Beyond this, the *absence* of relevant exigencies should also be assessed. For instance, in *French v. City of Cortez*, the district court found that "under the facts presented by the [plaintiffs], the officers did not have an objectively reasonable basis to believe there was an immediate need to protect the lives and safety of those inside the home and [that] the scope of their search was unreasonable."[401] In reaching its conclusion, the court did not just take as given what defendants argued were the facts that, taken together, amounted to exigent circumstances. Rather, the court looked to what "circumstances the officers did not encounter": (1) reports of an ongoing or completed crime; (2) noises suggesting that there was an altercation within the house or that someone was being injured; (3) signs that [the individual] had injured his parents or that he was armed.[402] The district court then balanced the absent circumstances against the circumstances that the Supreme Court approved of in *Brigham City*.[403] Similarly, courts can ensure that the immediacy requirement underlying the exigent circumstances doctrine is met for mental health searches and seizures not only by examining facts that point to the presence of emergencies but also by identifying facts that are not present but that should be present if there were indeed an emergency.

Of course, the harm need not materialize before assistance may be provided, but immediate action does not require immediate *police* action. In the mental health context, courts must scrutinize whether immediate

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398. See, e.g., Matthew Miller, Steven J. Lippmann, Deborah Azrael & David Hemenway, Household Firearm Ownership and Rates of Suicide Across The 50 United States, 62 J. Trauma: Injury, Infection & Critical Care 1029, 1031 (2007); see also Risk Factors, Protective Factors, and Warning Signs, Am. Found. for Suicide Prevention, https://afsp.org/risk-factors-protective-factors-and-warning-signs/ [https://perma.cc/AT4Z-CSA3] (last visited Mar. 28, 2024).

399. Chathas v. Smith, 884 F.2d 980, 987 (7th Cir. 1989) (holding that an officer's decision to detain an individual was reasonable when based upon information provided by doctor rather than the officer's own observations).

400. Resources for (Un)learning, Project Lets, https://projectlets.org/resources [https://perma.cc/48RV-APQN] (last visited Feb. 15, 2024). By including the views of medical professionals, this Article does not seek to privilege those views over the lived experiences and expertise of individuals with psychiatric disabilities experiencing mental crisis. Cf. Ben-Moshe, Decarcerating Disability, supra note 94, at 73–86 (discussing factors that led to the "breaking down of the monopoly of medical expertise" in movements led by, alongside, and on behalf of people with intellectual and developmental disabilities).

401. French v. City of Cortez, 361 F. Supp. 3d 1011, 1031 (D. Colo. 2019).

402. Id. at 1029.

403. See id. at 1029–30; see also Brigham City v. Stuart, 547 U.S. 398, 406 (2006).

law enforcement action is necessary in that particular jurisdiction, taking into account existing resources (whether alternative, co-response, or community response models). Only then should the police response be assessed as constitutionally reasonable or not.

Finally, when police have information about the individual's mental health and potential need for purportedly immediate access to mental health treatment, a more appropriate test attuned to the constitutional rights at stake would be a standard that aligns reasonableness with professional standards of care. Thus, to satisfy the state's burden, the government should provide specific and articulable facts that include information from medical or mental health professionals, when available, to demonstrate that law enforcement relied on this information and performed the search and seizure in a manner that was consistent with, or did not at least conflict with, information from these mental health professionals.

B. *Police Are Not Reasonable First Responders*

When is it constitutionally reasonable for police to render emergency aid to persons under a less permissive, more rigorous reasonableness test? This Article proposes the following test: It is presumptively unreasonable for police, as non-mental health experts, to be involved in mental health crisis response. Consistent with its burden, the government must rebut this presumption of unreasonableness by establishing that (1) it was necessary (and therefore reasonable) to dispatch police in response to a person suspected of experiencing a mental health crisis, and (2) the police, or mental health professionals,[404] performed the dispatch in a reasonable manner.[405] In assessing the reasonableness of the officers' actions, courts should first consider whether the decision to dispatch law enforcement (as opposed to mental health professionals) was reasonable in the first place *before* assessing whether the officer had an objectively reasonable basis for the warrantless entry of the home. Stated differently, as a threshold matter the government has the burden to establish that law enforcement dispatch was necessary before establishing a justification—whether exigency or emergency aid—for a warrantless mental health search or seizure. Building necessity into the reasonableness test furthers the objectives of constitutional reasonableness[406] by considering the existing resources and alternative responder programs within the jurisdiction with respect to mental health crisis response.

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404. See Shawn E. Fields, The Fourth Amendment Without Police, 90 U. Chi. L. Rev. 1023, 1056–61 (2023).

405. Cf. Schmerber v. California, 384 U.S. 757, 771 (1966) (discussing reasonableness in events surrounding an arrest).

406. See Slobogin, World Without a Fourth Amendment, supra note 387, at 6 (explaining that the state's interest in "avoiding unnecessary searches and seizures" overlaps with citizens' interests in related constitutional liberties, including privacy and autonomy).

In the vast majority of jurisdictions, the fact is that police remain involved in transporting individuals for emergency evaluation, stabilization, and treatment. Courts, in assessing whether officers acted reasonably, must both recognize this reality while meaningfully applying the "objectively reasonable officer" standard. Police officers are not mental health professionals and, because of this, some might argue that they cannot be held to that higher standard.[407] After all, the reasonable officer standard as it now stands in Fourth Amendment jurisprudence is focused on what a reasonable police officer would do, not what a reasonable mental health professional would do. While the reasonable police officer standard might not be the same standard as the mental health professional, the standard (if it is to operate as a constraint on law enforcement discretion at all) should incorporate professional norms and current standards that govern mental health crisis response. At the very least, that would build in a set of measurable, concrete standards from which to assess an officer's conduct.

The reality—one not often recognized in Fourth Amendment doctrine—is that police are not reasonable first responders in cases involving harm to self or inability to care, or even cases in which the person appears to pose a danger to others. Nonetheless, as this Article has shown, courts have for too long presumed that police are reasonable first responders, even when research acknowledges that police lack expertise in responding to mental health emergencies. There is little empirical evidence to demonstrate that CIT training would turn police into reasonable first responders. Law enforcement departments across the country have enacted policies requiring de-escalation and training, and some report a reduction in uses of force, detention, and arrests as a result of such reforms.[408] Yet, as I have argued elsewhere, "these reforms do not go far enough in disrupting the pathways to police violence . . . because of the risks that armed officers will respond with potentially lethal force during the encounter."[409] This risk remains even in cases where law

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407. See Caniglia v. Strom, 953 F.3d 112, 129 n.8 (1st Cir. 2020) ("That an expert psychologist might have reached a different conclusion about the plaintiff's condition than a police officer without such training does not render the officers' determination objectively unreasonable.").

408. See, e.g., Seattle Police Dep't, Seattle Police Department Manual § 8.100 (2021), https://public.powerdms.com/Sea4550/tree/documents/2042943 [https://perma.cc/NBY8-Z9EN] (offering broad guidelines for de-escalating situations); Robin S. Engel, Nicholas Corsaro, Gabrielle T. Isaza & Hannah D. McManus, Assessing the Impact of De-Escalation Training on Police Behavior: Reducing Police Use of Force in the Louisville, KY Metro Police Department, 21 Criminology & Pub. Pol'y 199, 216–17 (2022); Paras V. Shah, Note, A Use of Deadly Force: People With Mental Health Conditions and Encounters With Law Enforcement, 32 Harv. Hum. Rts. J. 207, 218 (2019); Claire Trageser, Experts, Activists Say San Diego's New Police De-Escalation Policy May Not Change Much, KPBS (June 26, 2020), https://www.kpbs.org/news/public-safety/2020/06/26/san-diegos-new-police-de-escalation-policy [https://perma.cc/BF42-MFL3].

409. Morgan, Policing Under Disability Law, supra note 155, at 1467–68.

enforcement is dispatched to perform what might be classified "care" related functions, like performing welfare checks. The extent of violence against individuals in crisis and the tragic loss of life should disrupt any notions that police are suited to these mental health-related caretaking functions.

Nationwide, the existence of alternative or community responder programs explicitly contests the role of police as necessary first responders for mental health crisis response.[410] A number of jurisdictions are pursuing plans to decouple police from crisis response through the implementation of the 988 crisis lifeline.[411] Community groups have developed diversionary programs that do not involve law enforcement in responding to mental crisis calls[412] but instead involve private responses led by local and, in some cases, peer groups.[413] Mobile crisis units that do not rely on police as first responders have proven successful. One crisis intervention specialist with the CAHOOTS program in Eugene, Oregon explained that out of approximately 24,000 calls for crisis assistance, police were called in only about 150 cases. CAHOOTS's approach has been celebrated as a leading model for crisis response.[414]

When courts critically engage with the question of whether police are reasonable first responders, they can better assess and align Fourth Amendment values with practical realities on the ground. Fourth Amendment values that promote privacy and security by narrowing the discretion of law enforcement can be furthered by approaches that

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410. For a list of alternative response programs, see 988 Crisis Response State Legislation Map, Nat'l All. on Mental Illness, https://reimaginecrisis.org/map/ [https://perma.cc/J9S7-24NK] (last visited Feb. 28, 2024).

411. Substance Abuse and Mental Health Servs. Admin., 988 Frequently Asked Questions, https://www.samhsa.gov/find-help/988/faqs [https://perma.cc/ZK3Y-BH75] (last visited Feb. 28, 2024).

412. See Mayor Bill de Blasio, Transcript: Mayor de Blasio Appears Live on Inside City Hall, NYC.gov (Oct. 21, 2019), https://www.nyc.gov/office-of-the-mayor/news/499-19/transcript-mayor-de-blasio-appears-live-inside-city-hall [https://perma.cc/AQG3-GKP2].

413. See Jackson Beck, Melissa Reuland & Leah Pope, Behavioral Health Crisis Alternatives: Shifting From Police to Community Responses, Vera Inst. of Just. (Nov. 2020), https://www.vera.org/behavioral-health-crisis-alternatives [https://perma.cc/4AQR-9DLW]; Us Protecting Us, https://www.facebook.com/usprotectingus/ [https://perma.cc/R835-YP66] (last visited Feb. 28, 2024) ("Us Protecting Us is a group of people with and without disabilities dedicated to building a world without the threat of policing. Together, we are educating and training ourselves to handle crises without police and building power amongst ourselves."); Ellen Meny, CAHOOTS an Alternative to Traditional Police, Ambulance Response, KVAL (Feb. 5, 2016), https://kval.com/news/local/theres-a-growing-awareness-that-alternatives-to-law-enforcement-are-needed [https://perma.cc/N29S-WCJY].

414. See, e.g., Ben Adam Climer & Brenton Gicker, CAHOOTS: A Model for Prehospital Mental Health Crisis Intervention, Psychiatric Times (Jan. 29, 2021), https://www.psychiatrictimes.com/view/cahoots-model-prehospital-mental-health-crisis-intervention [https://perma.cc/S9PL-LV2L] (noting that the CAHOOTS program has quadrupled in size over the past decade and expanded its geographic reach).

recognize that reasonableness in the context of mental health exigencies should be informed by professional standards of care governing mental health crisis response. Stated differently, professional standards of care governing mental health crisis response align with Fourth Amendment values—they need only be incorporated into doctrinal analysis. Professional standards of care governing mental health crisis response emphasize the importance of, and aim to promote, privacy and personal autonomy. That these standards reflect these values can be seen through empirical research and guidelines that aim to reduce reliance on forcible care as a pathway to mental health treatment and services.[415] Studies have shown that voluntary care, which does not rely on coercive pathways to mental health care, produces better mental health outcomes (e.g., continued involvement in treatment) over time.[416] By inquiring into whether police are reasonable first responders, advocates can present, and courts can review, arguments that surface whether coercive police responses that undermine patient privacy and security are constitutionally

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415. See, e.g., Penelope Weller, Therapeutic Jurisprudence and Procedural Justice in Mental Health Practice: Responding to 'Vulnerability' Without Coercion, *in* Critical Perspectives on Coercive Interventions 212, 212–24 (Claire Spivakovsky, Kate Seear & Adrian Carter, eds., 2018) (describing lack of empirical evidence supporting forced treatment); Jennifer Zervakis, Karen M. Stechuchak, Maren K. Olsen, Jeffrey W. Swanson, Eugene Z. Oddone, Morris Weinberger, Elena R. Bryce, Marian I. Butterfield, Marvin S. Swartz & Jennifer L. Strauss, Previous Involuntary Commitment Is Associated With Current Perceptions of Coercion in Voluntarily Hospitalized Patients, 6 Int'l J. Forensic Mental Health 105, 110–11 (2007) (finding that patients experience trauma by forcible treatment, which adversely affects future engagement with voluntary mental healthcare); Forced Treatment, Bazelon Ctr. for Mental Health L., https://www.bazelon.org/our-work/mental-health-systems/forced-treatment [https://perma.cc/86FL-J2HB] (last visited Feb. 28, 2024) ("Forced treatment—including forced hospitalization, forced medication, restraint and seclusion, and stripping—is only appropriate in the rare circumstance when there is a serious and immediate safety threat."); Involuntary Mental Health Treatment, Mental Health Am., https://mhanational.org/issues/involuntary-mental-health-treatment [https://perma.cc/LA2A-SYX8] (last visited Feb. 28, 2024) (describing involuntary treatment as a "last resort").

416. See, e.g., Joshua T. Jordan & Dale E. McNiel, Perceived Coercion During Admission Into Psychiatric Hospitalization Increases Risk of Suicide Attempts After Discharge, 50 Suicide & Life-Threatening Behav. 180, 181 (2019) (explaining that people who are involuntarily committed are more likely to attempt suicide during hospitalization than those receiving treatment voluntarily); Damian Smith, Eric Roche, Kieran O'Loughlin, Daria Brennan, Kevin Madigan, John Lyne, Larkin Feeney & Brian O'Donoghue, Satisfaction With Services Following Voluntary and Involuntary Admission, 23 J. Mental Health 38, 38 (2014) ("Inpatient treatment negatively impacts upon ratings of satisfaction, especially if on an involuntary basis . . . . These service users are also more likely to experience greater levels of perceived and physical coercion during the process of their admission . . . ." (citation omitted)); Sarah Woodward, Katherine Berry & Sandra Bucci, A Systematic Review of Factors Associated With Service User Satisfaction With Psychiatric Inpatient Services, 92 J. Psychiatric Rsch. 81, 91 (2017) ("Coercion was shown to be negatively associated with satisfaction, while voluntary admission was positively associated with satisfaction. Satisfaction was reported to be higher on open than closed wards, possibly due to the restrictions placed on freedom on closed wards.").

unreasonable. Such an inquiry adds another layer to the reasonableness analysis, and in a manner that aligns with core Fourth Amendment values.

C. *Right-Sizing Probable Cause*

Probable cause requires "that it be reasonable for any particular officer to conclude that there is a substantial chance of criminal activity" based on the totality of the circumstances.[417] This standard does not fit neatly into the mental health seizures context. Still, courts have imported probable cause definitions into this context, contributing to doctrinal disarray. This section aims to clarify how to think about probable cause in the context of mental health seizures.

Probable cause assessments in criminal law cases should be distinguished from probable cause assessments for mental health seizures.[418] Importantly, there must be a basis for determining whether police have enough evidence to satisfy state-law-based criteria in involuntary commitment laws. Probable cause for mental health seizures should mean more than a "probability or substantial chance" that a person will harm themselves;[419] it should be a meaningful standard from which to assess the reasonableness of warrantless searches and seizures under Fourth Amendment. For the purposes of mental health seizures, probable cause of dangerousness should be considered as more of an explanatory standard than a probabilistic one.[420]

This section proposes three guidelines to cabin police discretion and to clarify probable cause standards governing emergency holds: (1) probable cause for alleged criminal acts should be distinguishable from probable cause assessments for emergency holds; (2) the reasonable officer's belief as to the sufficiency of probable cause must be based on information obtained from a credible medical professional, solicited

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417. Washington v. Howard, 25 F.4th 891, 899 (11th Cir. 2022).

418. Past and present social stereotypes about "mental illness" do tend to conflate mental crisis and mental disability more broadly with notions of criminality. See, e.g., Morgan, Disability's Fourth Amendment, supra note 213, at 528; Morgan, Policing Under Disability Law, supra note 155, at 1413; see also Camille A. Nelson, Racializing Disability, Disabling Race: Policing Race and Mental Status, 15 Berkeley J. Crim. L. 1, 18–20 (2010) (noting "the conflation of madness with criminality" and frequent police "stereotyping of the mentally ill as violent").

419. Monday v. Oullette, 118 F.3d 1099, 1102 (6th Cir. 1997) (internal quotation marks omitted) (quoting Illinois v. Gates, 462 U.S. 213, 245 n.13 (1983)).

420. For example, Professor Kiel Brennan-Marquez has argued that "[f]or probable cause to be satisfied, an inference of wrongdoing must be *plausible*—the police must be able to explain why observed facts give rise to the inference. And judges must have an opportunity to scrutinize that explanation." Kiel Brennan-Marquez, "Plausible Cause": Explanatory Standards in the Age of Powerful Machines, 70 Vand. L. Rev. 1249, 1253 (2017) (footnote omitted); see also id. at 1265–73 (describing Supreme Court cases endorsing the plausible cause and explanatory view of the Fourth Amendment); Maclin, supra note 387, at 202 ("At a minimum, the Fourth Amendment commands compelling reasons, or at least a substantial justification, before a warrantless search or seizure is declared reasonable.").

through witness reports, or secondhand information; and (3) when reviewing probable cause, courts must incorporate and take seriously the views of the individual as to the need for emergency treatment.

As to the first guideline, facts supporting probable cause of a crime should not form the basis for probable cause of dangerousness or any of the criteria for emergency civil commitment. These two standards are legally separate determinations and should not be conflated. When feasible, credible information from medical professionals must factor into probable cause assessments. In particular, courts should look to professional standards of care for guidance as to what factors indicate an immediate risk of self-harm when individuals are alleged to pose an imminent danger to themselves. Furthermore, police are not mental health experts and their interpretations of the facts in mental health crisis situations should not receive deference, even if they receive deference in criminal law enforcement functions as scholars have noted and criticized.[421] Under existing case law, courts defer to police given their purported expertise, training, and know-how with respect to criminal law enforcement.[422] But this deference is not warranted in an area in which officers, even with training, lack expertise. Finally, probable cause of dangerousness or grave disability should, where possible, include the views of the individual, including any statements that might weigh against emergency civil commitment and statements regarding how to implement a psychiatric advance directive if the person does experience mental crisis.

As with my proposal under exigent circumstances, innocent and innocuous variables (general appearance and affective behaviors) should matter less in the totality of the circumstances analysis—in other words, courts should give them less weight. Such an inquiry recognizes that, as a Fourth Amendment matter, warrantless seizures were justified at common law only when the individual was deemed to pose an imminent danger. Because biases against disabled people can seep into police judgments like probable cause, reviewing courts should scrutinize probable cause assessments so to prevent probable cause from becoming a vehicle for laundering and legitimizing police work that incorporates potential (explicit and implicit) biases against disabled people.

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421. Anna Lvovsky, Rethinking Police Expertise, 131 Yale L.J. 475, 488 (2021) (explaining that lower and state courts "extended [a] deferential posture to a range of other investigative judgments, from the assessment of exigent circumstances (which must yield to the perspective of 'experienced officer[s]') to the risk of danger justifying a frisk" (second alteration in original) (footnote omitted) (quoting Chamberlain v. City of White Plains, 986 F. Supp. 2d 363, 381 (S.D.N.Y. 2013))); see also Benjamin Levin, Criminal Justice Expertise, 90 Fordham L. Rev. 2777, 2782–83 (2022) (discussing "three different conceptions of expertise that are reflected in contemporary debate").

422. Anna Lvovsky, The Judicial Presumption of Police Expertise, 130 Harv. L. Rev. 1995, 1997–99 (2017) (describing deference to police expertise involving probable cause and criminal investigations).

Finally, courts should scrutinize any and all facts supporting probable cause.[423] Probable cause should be based on current information, not just past information, to ensure that individuals are evaluated based on current conduct, not prior risks alone, which would obviate the need for the emergency seizure in the first place.[424] For instance, the Second Circuit, in an opinion by Judge Calabresi, remanded a finding of probable cause and reevaluation of qualified immunity when the record contained only "terse notes of the CPS caseworkers" that "lack[ed] indicia of, or specific observations substantiating, Johnson's 'dangerousness,'" and which did not "show that [the officer] reasonably relied on communications from [the case worker] or others in making the seizure," and in which "there [was] no statement by Patterson in the record."[425] The district court in that case found that "defendant did not provide evidence that either [officer] Patterson or [case worker] Weitzman witnessed [plaintiff] Johnson 'threaten her own life'" or that Johnson "'manifested homicidal or other violent behavior placing' [the child] at risk of serious physical harm," a reference to New York state law governing the involuntary commitment of a parent.[426] Like *Myers*, these proposals build in greater scrutiny in cases where an officer initiates an emergency hold while helping to reduce the risk of criminalizing individuals in mental crisis, particularly when law enforcement is dispatched and later tasked with assessing dangerousness. Ultimately, these proposals make it so law enforcement is required to produce more information—and high-quality information—before performing warrantless seizures for emergency treatment and evaluation.

CONCLUSION

Existing Fourth Amendment jurisprudence treats emergency searches and seizures for the purpose of mental health evaluation like criminal law enforcement seizures. This Article argues against such approaches. Psychiatric holds are different from other exigent circumstances that involve emergency aid, and legal standards and doctrines that govern in criminal procedure cases—whether probable cause or special needs—do not fit neatly into the mental health context. Applying criminal law enforcement standards to the mental health context also works to diminish Fourth Amendment legal protections for people in crisis and disabled people. A critical disability analysis of Fourth Amendment doctrine in this area provides a framework to question, as a

423. See, e.g., Myers v. Patterson, 819 F.3d 625, 628 (2d Cir. 2016) (vacating the district court's grant of qualified immunity and remanding to the district court for an elaboration as to the basis for probable cause).

424. See Am. Ass'n of Suicidology, supra note 263, at 17–18 (noting that officers "relied solely upon what happened the day before when demanding a psychiatric evaluation and confiscating Edward's guns").

425. *Myers*, 819 F.3d at 628.

426. Id. at 631.

constitutional matter, the reasonableness of police response in the first place.

Removing law enforcement from mental crisis response will not eliminate punitive responses to individuals in crisis. Hospitals and behavioral health providers as a whole are themselves punitive, as scholars have shown in recent work.[427] Policing and surveillance systems are integrated into hospitals, altering the scope of rights in this sphere, particularly for individuals suspected and convicted of criminal activity.[428] Ensuring that individuals' Fourth Amendment rights are protected will require tackling the punitive reach of behavioral health systems from the homes of people experiencing crisis and into hospitals and clinics where they access treatment. Beyond this, substantial investments in behavioral health systems—both chronic care and crisis care services—are necessary to address the structural deficiencies that make police the primary mental health responders in the vast majority of jurisdictions today.

427. See Interrupting Criminalization, The Beyond Do No Harm Principles 15 https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/6361cb40ed7e991b1f1092e7/1667353416900/IC+BDNH+PDF_Final.pdf [https://perma.cc/666J-R88P] (last visited Feb. 28, 2024).

428. See Sunita Patel, Embedded Healthcare Policing, 69 UCLA L. Rev. 808, 811–13 (2022) ("[Hospitals] are quintessential care institutions, but even they have become policed spaces."); Ji Seon Song, Patient or Prisoner, 92 Geo. Wash. L. Rev. 1, 48–49 (2024) (describing a case in which a prison warden removed a patient from life support against the wishes of the patient's mother).

NOTES

STRUCTURAL SCIENTER: OPTIMIZING FRAUD DETERRENCE BY LOCATING CORPORATE SCIENTER IN CORPORATE DESIGN

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In the context of section 10(b) securities fraud class actions, conceptualizing corporate intent is both an unnatural and a necessary exercise. Circuit courts apply a variety of different approaches to analyze the question of corporate scienter, but they typically start with agency law and impute the intentions of corporate employees to the corporation itself.

Recognizing the fraud-deterrence purpose of these class actions suggests that when corporate liability is on the table, courts should focus more on the ideal of optimal deterrence, which requires consideration of the corporation's capacity to deter fraud. This Note applies optimal deterrence reasoning and argues that courts should consider higher-order decisionmaking related to corporate structure and compliance efforts when evaluating a corporation's intent to defraud investors. Importing consideration of structural design into the corporate scienter analysis will help courts better calibrate the corporation's incentives to deter fraud and avoid the problems that come with too much or too little corporate liability for securities fraud under section 10(b).

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INTRODUCTION

Securities fraud class actions are big business. More than fifty percent of federal class actions filed are securities class actions,[1] and over $114 billion has changed hands through securities class action settlements since 1996.[2] While the total number of filings has decreased significantly since 2017,[3] the magnitude of potential losses to be claimed continues to increase.[4] And there is little reason to believe this trend will slow down:

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1. James C. Spindler, Optimal Deterrence When Shareholders Desire Fraud 4 (Univ. of Tex. Sch. of L., Law & Econ. Rsch. Paper No. 595, 2021) [hereinafter Spindler, Optimal Deterrence].

2. Stanford L. Sch. & Cornerstone Rsch., Box Scores or Key Statistics From 1996 to YTD, Sec. Class Action Clearinghouse, https://securities.stanford.edu/stats.html [https://perma.cc/28XY-DMZ7] (last visited Feb. 14, 2024).

3. See Stanford L. Sch. & Cornerstone Rsch., Filings by Year, Sec. Class Action Clearinghouse, https://securities.stanford.edu/charts.html [https://perma.cc/SQX6-2T36] (last visited Feb. 14, 2024).

4. Two measures of market capitalization losses, "disclosure dollar loss" (DDL) and "maximum dollar loss" (MDL), reached "historically high levels" in the first six months of 2022. Cornerstone Rsch., Securities Class Action Filings: 2022 Midyear Assessment 1 (2022), https://securities.stanford.edu/research-reports/1996-2022/Securities-Class-Action-Filings-2022-Midyear-Assessment.pdf [https://perma.cc/LXK7-2F3H]. In 2023, DDL decreased to pre-pandemic levels while MDL again increased. Cornerstone Rsch., Securities Class Action Filings: 2023 Year in Review 1 (2024), https://www.cornerstone.com/wp-content/uploads/2024/01/Securities-Class-Action-Filings-2023-Year-in-Review.pdf [https://perma.cc/6VXN-UYCB].

Many have predicted that a recession is on the horizon,[5] and recessions are often correlated with fraud in financial markets.[6] By the numbers, legal standards in securities fraud litigation have a significant impact on corporations and the millions of Americans whose wealth is invested in the stock market.[7] And they may become even more salient in the coming years.

One of the most-argued elements in section 10(b) securities fraud class actions is the defendant's scienter. Scienter refers to fraudulent intent; it is what separates fraud from negligent or accidental misstatements.[8] The concept of scienter is straightforward as applied to natural persons: What it means for an individual to intend or know something is clear, notwithstanding that intent and knowledge can be difficult to prove.[9] For corporate defendants, however, an additional layer of conceptual difficulty emerges. A corporation is a fictional person, by definition distinct from the natural persons who are its owners and take actions on its behalf.[10] This feature of the corporate form means that to determine whether a corporation has scienter, courts must first develop a theory of the corporate mind that accommodates this separation.

Even though corporations are regularly defendants in securities fraud class actions, and plaintiffs must plead scienter to establish claims against

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5. See, e.g., Aruni Soni, No Soft Landing: The US Economy Is Going to Fall Into Recession in the Middle of 2024, Citi's Chief Economist Says, Bus. Insider (Feb. 15, 2024), https://www.businessinsider.com/recession-outlook-us-economy-job-market-unemployment-soft-landing-citi-2024-2 (on file with the *Columbia Law Review*) (quoting Andrew Hollenhorst, chief U.S. economist for Citi, and other economists predicting a possible recession in 2024 despite rosy economic indicators).

6. See Jean Eaglesham, SEC Accountant Warns of Heightened Fraud Risk Amid Recession Fears, Market Selloff, Wall St. J. (Nov. 3, 2022), https://www.wsj.com/articles/sec-accountant-warns-of-heightened-fraud-risk-amid-recession-fears-market-selloff-11667427464 (on file with the *Columbia Law Review*).

7. See Katie Kolchin, SIFMA, SIFMA Insights: Q: Who Owns Stock in America? A: Individual Investors 14–15 (2019), https://www.sifma.org/wp-content/uploads/2019/10/SIFMA-Insights-Who-Owns-Stocks-in-America.pdf [https://perma.cc/3WEK-73XD] (noting that fifty-two percent of U.S. households own stocks and that households own a plurality of all equities in the United States).

8. See Scienter, Black's Law Dictionary (11th ed. 2019).

9. See PAMCAH-UA Loc. 675 Pension Fund v. BT Grp. PLC, No. 20-2106, 2021 WL 3415060, at *1 (3d Cir. Aug. 5, 2021) (explaining that securities fraud, including scienter, "is not easy to allege"); see also Steven Shavell, Liability and the Incentive to Obtain Information About Risk, 21 J. Legal Stud. 259, 269 (1992) ("[E]xactly what a defendant knew about risk may be hard to establish even when what he should have known and his level of care can be fairly well determined.").

10. See 15 U.S.C. § 7 (2018) (defining "person" to include corporations); Adolf A. Berle, Jr. & Gardiner C. Means, The Modern Corporation and Private Property 3–9 (1933) (discussing the implications of separation of ownership from control in the modern corporation); Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305, 310–11 & n.12 (1976) (explaining the concept of legal fiction as applied to organizations and defining "corporation").

them,[11] organizational scienter remains "one of the greatly under-theorized subjects in all of securities litigation."[12] This theoretical gap could be explained by the fact that imputation of intent through respondeat superior is deeply ingrained as a method for ascribing intent to corporations in the tort context.[13] But securities fraud is unlike other torts in its singular focus on deterrence[14]—specifically, this Note argues, optimal deterrence.[15] Respondeat superior liability is not suited to this goal.[16] Most circuits recognize the shortcomings of respondeat superior and deviate from it, sometimes without acknowledging the deviation.[17] Circuit court approaches to corporate scienter[18] can be sorted into three major groups: adherence to respondeat superior and variations,[19] collective scienter,[20] and the high managerial agent approach.[21] But analyzed under the framework of optimal deterrence, these alternative approaches each fall short.[22]

This Note argues that courts should consider corporate institutional features in the definition of corporate scienter to better meet the ideal of

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11. See Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 175–78, 191 (1994) (holding there is no aiding and abetting liability under section 10(b)); infra note 35.

12. Donald C. Langevoort, Lies Without Liars? *Janus Capital* and Conservative Securities Jurisprudence, 90 Wash. U. L. Rev. 933, 959 (2013).

13. See infra notes 64–67 and accompanying text.

14. See Stuart M. Speiser, Charles F. Krause & Alfred W. Gans, 1 American Law of Torts § 1.3 & n.1, Westlaw (Monique C.M. Leahy, ed., database updated Feb. 2024) ("The fundamental policy purposes of the tort compensation system are compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct."); infra notes 42–46 and accompanying text.

15. See Amanda M. Rose, Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5, 108 Colum. L. Rev. 1301, 1322 (2008) [hereinafter Rose, Reforming Securities Litigation Reform] (defining optimal deterrence as being achieved when defendants internalize the social costs of their behavior); infra section I.B.

16. See infra section II.C.1.

17. Professor Ann Lipton has argued that courts already deviate from respondeat superior in section 10(b) cases even while they claim to apply it. See Ann M. Lipton, Slouching Towards *Monell*: The Disappearance of Vicarious Liability Under Section 10(b), 92 Wash. U. L. Rev. 1261, 1276–80 (2015). She argues courts surreptitiously apply principles of organizational fault in section 10(b) cases. See id.

18. Some courts have used "corporate scienter" to refer only to scienter that cannot be established by imputation. See, e.g., Rahman v. Kid Brands, Inc., 736 F.3d 237, 246 (3d Cir. 2013) (indicating that "corporate scienter" and "collective scienter" are synonymous). This Note uses the phrase "corporate scienter" to refer generally to scienter attributed to corporations, whether by imputation or otherwise.

19. The Fourth, Fifth, Seventh, and Eleventh Circuits fall into this group. See infra section II.B.1.

20. The Second and Ninth Circuits have each indicated openness to collective scienter, although neither has relied on it in denying a motion to dismiss. See infra section II.B.2.

21. The Sixth Circuit is associated with this approach, although its popularity in other circuits is growing. See infra section II.B.3.

22. See infra sections II.C.2–.3.

optimal fraud deterrence. The concept of optimal deterrence is well adapted to the securities fraud context, where maintaining market efficiency is a primary goal.[23] Moreover, since optimal deterrence reflects a balancing of the arguments for and against private section 10(b) litigation against corporations, it is the key goal that should orient corporate scienter analysis. The optimal deterrence framework suggests that courts are right to move away from the pure application of respondeat superior, but they should consider adding a category of corporate scienter that looks to corporate structure and compliance efforts as proxies for organizational "intent" to defraud. The U.S. Sentencing Commission incorporates similar considerations in its Organizational Sentencing Guidelines,[24] and these guidelines provide helpful examples of corporate actions that could be factored in to the scienter analysis. Injecting these principles into the corporate scienter analysis in securities fraud cases will better calibrate corporations' deterrence-related incentives. Corporate structure may determine who becomes aware of what information and when, and structures that prevent or inhibit the flow of information both prevent scienter from attaching to any corporate speaker and encourage fraud.[25] Consequently, structure and compliance measures reflect both the corporation's intention and ability to prevent fraud, or not.

Part I summarizes the law of federal securities fraud class actions and explores the building blocks of corporate scienter. It also introduces the optimal deterrence goal that guides the remainder of the argument. Part II explains the ongoing circuit split and argues that each of the currently prevailing approaches is systematically either over- or underdeterrent. Part III proposes a new category of corporate scienter oriented to the idea of organizational fault. Inspired in part by the Organizational Sentencing Guidelines, this new category would allow courts to consider corporate structure and compliance alongside the traditional imputation analysis. Part III concludes by reviewing two hypothetical case studies that show how the proposed scienter concept is better equipped than predecessors to handle certain sets of facts that can arise in securities class actions.

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23. See Frank H. Easterbrook & Daniel R. Fischel, Optimal Damages in Securities Cases, 52 U. Chi. L. Rev. 611, 613 (1985); see also H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.) (indicating one of the purposes of securities law is to "maintain confidence in the securities markets").

24. See U.S. Sent'g Guidelines Manual § 8A1.1–.2 (U.S. Sent'g Comm'n 2023) (considering an organization's "compliance and ethics program" to calculate a "culpability score"); Paula Desio, Deputy General Counsel, U.S. Sent'g Comm'n, An Overview of the Organizational Guidelines, https://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf [https://perma.cc/CLQ4-WGHA] (last visited Feb. 10, 2024).

25. See Shavell, supra note 9, at 261, 268–69.

I. CORPORATE SCIENTER AND SECURITIES FRAUD DETERRENCE

To understand the corporate scienter mess,[26] it is necessary to contextualize the concept of corporate scienter within the history and purposes of private section 10(b) litigation, scienter standards, and the corporate liability. Section I.A focuses on the textual basis and doctrine of each and their purposes in modern securities fraud class actions. Section I.B introduces the goal of optimal deterrence and explains how it is uniquely suited to the corporate scienter problem.

A. *Building Blocks of Corporate Scienter*

1. *Section 10(b) and Private Class Action Enforcement.* — Congress passed the Securities Exchange Act of 1934 (1934 Act)[27] in the aftermath of the Great Depression to encourage transparency and disclosure in financial markets.[28] Section 10(b) of the 1934 Act gave the newly created SEC[29] near-plenary authority to design a securities fraud regulation scheme.[30] Rule 10b-5 was promulgated under this power and has since evolved into the primary regulatory authority for private securities fraud litigation.[31]

The judiciary inferred a right to private civil remedies under section 10(b) and shaped the private cause of action. Neither the text of section

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26. This "mess" characterization is borrowed from Samuel W. Buell, What Is Securities Fraud?, 61 Duke L.J. 511, 548 (2011) (entitling the discussion of scienter doctrine "The Scienter Mess").

27. Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–qq (2018)).

28. See Knurr v. Orbital ATK Inc., 294 F. Supp. 3d 498, 513 (E.D. Va. 2018) ("[T]he Exchange Act seeks to 'substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.'" (quoting Sec. Exch. Comm'n v. Cap. Gains Rsch. Bureau, Inc., 375 U.S. 180, 186 (1963))).

29. 15 U.S.C. § 78d(a).

30. See id. § 78j(b) (prohibiting the use of "any manipulative or deceptive device" in connection with securities transactions); Rose, Reforming Securities Litigation Reform, supra note 15, at 1308–09 ("Congress granted the Commission broad authority to enact regulations banning manipulation or deception in connection with the purchase or sale of securities.").

31. See 17 C.F.R. § 240.10b-5 (2024). This rule makes it unlawful for "any person" to do any of the following in interstate commerce "in connection with the purchase or sale of any security":

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . . .

Id. The Supreme Court has stated that "[t]he scope of Rule 10b-5 is coextensive with the coverage of § 10(b); therefore, [the Court] use[s] § 10(b) to refer to both the statutory provision and the Rule." Sec. Exch. Comm'n v. Zandford, 535 U.S. 813, 816 n.1 (2002) (citations omitted) (citing United States v. O'Hagan, 521 U.S. 642, 651 (1997); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1976)). This Note follows that referential tradition.

10(b) nor Rule 10b-5 explicitly provides for private remedies. The court in *Kardon v. National Gypsum Co.*, the first private action under section 10(b), reasoned from the common law maxim of *ubi jus ibi remedium* and concluded "in view of the general purpose of the act, the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies."[32] The Supreme Court ratified this inference without ceremony in 1971.[33] The elements of common law fraud were thus transposed to the private section 10(b) cause of action:[34] To prevail, plaintiffs must prove "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."[35]

While these elements remain the standard for proving section 10(b) violations, the fraud-on-the-market doctrine simplifies the inquiry in practice. The fraud-on-the-market theory recognizes that many investors do not carefully follow or rely on corporate disclosures when deciding whether to buy or sell stock but may still be harmed by fraud that affects market prices and overall market efficiency.[36] Fraud on the market thus

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32. 69 F. Supp. 512, 513–14 (E.D. Pa. 1946). The court perceived a "broad purpose" of the 1934 Act to "regulate securities transactions of all kinds and . . . provide[] for the elimination of all manipulative or deceptive methods in such transactions." Id.

33. See Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 (1971) (reversing the dismissal of a private plaintiff's section 10(b) complaint and remanding the case for trial). The private right of action has remained settled law ever since, but commentators have continued to question its wisdom. See John C. Coffee, Jr., Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534, 1536–37 (2006) [hereinafter Coffee, Reforming the Securities Class Action] (arguing that securities fraud class actions inequitably burden the victims of fraud); Joseph A. Grundfest, Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority, 107 Harv. L. Rev. 961, 1023 (1994) (arguing that the SEC should take action to address concerns about private fraud litigation that had "gotten out of hand" (citation omitted)).

34. See James Cameron Spindler, We Have a Consensus on Fraud on the Market—And It's Wrong, 7 Harv. Bus. L. Rev. 67, 73–74 (2017) [hereinafter Spindler, Consensus on Fraud on the Market] (listing the elements of a common law fraud claim and drawing an analogy to the elements of section 10(b) claims). Despite these parallel elements, section 10(b) is not understood as a codification of common law fraud. See Lipton, supra note 17, at 1280 (explaining one way section 10(b) deviates from common law fraud).

35. Stoneridge Inv. Partners, LLC v. Sci.–Atlanta, 552 U.S. 148, 157 (2008) (citing Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005)). Corporations can be held liable under section 10(b) only if they are found to have satisfied each element: Since 1994, there is no liability for aiding and abetting section 10(b) violations. See Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 175–78, 191 (1994). Even absent direct liability, however, corporations may nevertheless pay for individual section 10(b) violations through indemnification or director-and-officer (D&O) insurance. See infra note 74 and accompanying text.

36. See Spindler, Consensus on Fraud on the Market, supra note 34, at 74–75. For a summary of the theoretical backing of the fraud-on-the-market theory and discussion of its evolution in the lower courts, see generally Daniel R. Fischel, Use of Modern Finance

comports with the "overriding purpose" of the U.S. securities law regime "to protect investors and to maintain confidence in the securities markets."[37] It operates as a rebuttable presumption of reliance that also provides a means of proving materiality, causation, and damages.[38] When plaintiffs invoke fraud on the market, they must only prove a public misrepresentation, establish scienter, and connect a decrease in the stock price to the revelation of fraud.[39] This simplifying presumption enables section 10(b) class actions by collapsing individual questions of reliance and causation, which would otherwise predominate over common questions, into a single inquiry about changes in the stock price.[40] Fraud on the market also adds complexity to the question of corporate scienter by raising the possibility that fraud allegations will be based on the collective action of corporate agents.[41]

One significant attribute of fraud-on-the-market class actions is that they are much more readily justified on deterrence grounds than compensation grounds. Most scholars agree that compensation is not a credible rationale for these class actions because typical investors are diversified and effectively pay themselves damages.[42] Further, the median

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Theory in Securities Fraud Cases Involving Actively Traded Securities, 38 Bus. Law. 1 (1982) ("The cases adopting the fraud on the market theory are noteworthy because of their explicit recognition of the market model of the investment decision and the concept of efficient capital markets on which the model is based.").

37. H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.).

38. See James C. Spindler, Why Shareholders Want Their CEOs to Lie More After *Dura Pharmaceuticals*, 95 Geo. L.J. 653, 661 & n.35 (2007) [hereinafter Spindler, Why Shareholders Want Their CEOs to Lie]. The Supreme Court confirmed the theory's validity in *Basic, Inc. v. Levinson*. 485 U.S. 224, 250 (1988); see also Spindler, Consensus on Fraud on the Market, supra note 34, at 74.

39. See Spindler, Consensus on Fraud on the Market, supra note 34, at 74–75.

40. The Federal Rules of Civil Procedure require issues common to the class to "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23; see also *Basic*, 485 U.S. at 242 (discussing the predominance requirement). Because causation and reliance on the misrepresentation are generally fact-intensive inquiries unique to each claimant, they would likely predominate if assessed individually, meaning section 10(b) class actions would be impossible without the fraud-on-the-market presumption. See *Basic*, 485 U.S. at 242.

41. Lipton, supra note 17, at 1264 (explaining fraud on the market raises the possibility that scienter could exist in a different agent than the one who makes the misstatement).

42. This phenomenon is known as circularity or pocket-shifting. See, e.g., Coffee, Reforming the Securities Class Action, supra note 33, at 1558 (arguing that compensation is impossible for diversified investors because they will come out even at best as a result of securities class actions); see also Lipton, supra note 17, 1265 & n.10 (arguing that compensation is not "a realistic or achievable goal" of fraud-on-the-market class actions and collecting sources that support this point). For a slightly weaker version of the circularity argument that does not depend on diversification, see James D. Cox, Making Securities Fraud Class Actions Virtuous, 39 Ariz. L. Rev. 497, 509–10 (1997) (arguing the typical securities fraud settlement is functionally a wealth transfer from one innocent group (shareholders outside the class) to another (class members)). For an argument that compensation remains possible despite circularity, see Spindler, Consensus on Fraud on the Market, supra note 34, at 101.

ratio of investor losses to settlement dollars is consistently less than three percent, indicating that compensation is rare in practice, even setting aside circularity concerns.[43]

On the other hand, the prospect of massive class action damages means this private litigation has the potential to function as a powerful fraud deterrent and serve the public good.[44] While the compensatory potential of section 10(b) class actions is controversial,[45] this deterrent potential is not.[46] But some argue the class action is a too-powerful deterrent. This argument relies on the idea that plaintiff counsel can extract settlements from corporations for almost any decrease in their

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43. Edward Flores & Svetlana Starykh, NERA Econ. Consulting, Recent Trends in Securities Class Action Litigation: 2023 Full-Year Review 26 fig.22 (2024), https://www.nera.com/content/dam/nera/publications/2024/PUB_2023_Full-Year_Sec_Trends_0123.pdf [https://perma.cc/QGU6-4SKA] (showing the maximum median ratio of settlement to investor losses since 2014 was 2.5%). Professor John Coffee originally made this point in his 2006 article using the then-most-recent NERA data, see Coffee, Reforming the Securities Class Action, supra note 33, at 1545, and it has remained true for almost twenty years. Professors James Cox and Randall Thomas have also used empirical data to question the compensation rationale, showing that institutional investors' beneficiaries are almost never directly compensated for securities fraud losses because of the way those investors handle settlement funds. See James D. Cox & Randall S. Thomas, Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements, 58 Stan. L. Rev. 411, 449–53 (2005) (explaining that institutional investors often do not claim settlement funds to which they are entitled, and, when they do, they do not distribute those funds to beneficial owners). Given the significant costs involved in securities litigation, see Coffee, Reforming the Securities Class Action, supra note 33, at 1558, these data suggest that compensation alone cannot justify fraud-on-the-market class actions.

44. See, e.g., Coffee, Reforming the Securities Class Action, supra note 33, at 1547–48 (arguing that the damages threatened in securities class actions outweigh the potential benefits to fraudsters and that "class actions . . . constitute a deterrent threat for most public corporations"); Lipton, supra note 17, at 1265–66 ("Shareholder lawsuits . . . act as a quasi-public mechanism for enforcement of societal norms.").

45. See supra notes 42–43 and accompanying text.

46. See Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) ("[W]e repeatedly have emphasized that implied private actions provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action.'" (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964))); Jennifer H. Arlen & William J. Carney, Vicarious Liability for Fraud on Securities Markets: Theory and Evidence, 1992 U. Ill. L. Rev. 691, 704–05, 704 n.69 (1992) ("The central aim of the securities laws is to deter fraud."); Easterbrook & Fischel, supra note 23, at 614–15 (arguing the role of contract damages is to deter inefficient breaches and that it is not obvious that breaches are ever efficient in the securities context); Lipton, supra note 17, at 1265 ("[Section 10(b) actions] are now justified as a deterrent mechanism to protect the integrity of corporate communications."); Rose, Reforming Securities Class Action Reform, supra note 15, at 1314 ("[T]he purpose served by securities class actions today is more akin to the purpose served by qui tam actions than traditional private civil litigation." (footnote omitted)); Spindler, Optimal Deterrence, supra note 1, at 4 ("The main deterrence mechanism for corporate fraud in the United States is private securities litigation under Rule 10b-5 . . . .").

stock price, regardless of whether there was any indication of fraud.[47] These frivolous "strike suits" are thought to be socially detrimental to the extent they chill desirable corporate disclosures, burden courts with meritless litigation, and impose financial costs on corporations that have not committed fraud.[48]

Congress undertook legislative reform in the 1990s to calibrate the deterrent benefits of the section 10(b) class action in response to these overdeterrence concerns.[49] The resulting law, the Private Securities Litigation Reform Act (PSLRA), increased burdens on would-be private section 10(b) plaintiffs and imposed higher standards for pleading certain elements of section 10(b) claims, including scienter.[50] By leaving the private right of action and the fraud-on-the-market presumption intact, these reforms preserved the deterrent benefits of the class action while discouraging strike suits and other questionable litigation.[51] Since the PSLRA came into effect, the vast majority of securities class actions end

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47. See, e.g., Grundfest, supra note 33, at 969–70 (arguing that private plaintiffs have an incentive to pursue questionable claims to extract settlements); Spindler, Why Shareholders Want Their CEOs to Lie, supra note 38, at 659 n.25 (explaining that firms are "very often sued after disappointing results" even when there is no indication of fraud). For an argument that these concerns are overblown and that strike suits are likely uncommon in practice, see Coffee, Reforming the Securities Class Action, supra note 33, at 1536 n.5 ("The true 'strike suit' nuisance action, filed only because it was too expensive to defend, is, in this author's judgment, a beast like the unicorn, more discussed than directly observed.").

48. See Arlen & Carney, supra note 46, at 705 n.72 (noting the disclosure chilling argument); Spindler, Why Shareholders Want Their CEOs to Lie, supra note 38, at 659 & n.26 (discussing the negative impacts of too much fraud liability).

49. Amanda M. Rose, The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis, 158 U. Pa. L. Rev. 2173, 2174 (2010) [hereinafter Rose, The Multienforcer Approach].

50. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.); see also infra note 58 and accompanying text. Soon after, Congress enacted the Securities Litigation Uniform Standards Act of 1998 (SLUSA) to prevent class action lawyers from avoiding PSLRA restrictions by filing securities class actions under state law. Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.); see § 2, 112 Stat. at 3227 (stating congressional findings regarding abusive litigation practices).

51. See Novak v. Kasaks, 216 F.3d 300, 306 (2d Cir. 2000) (citing H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.)) (discussing the legislative history of the PSLRA and the motivation to combat strike suits). Congress could have abrogated the private right of action or the fraud-on-the-market presumption entirely but chose to retain the deterrent benefits they enable. See H.R. Rep. No. 104-369, at 31 (Conf. Rep.) ("Private securities litigation is an indispensable tool . . . . [P]rivate lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing . . . ."). Some have argued that the PSLRA went too far, making it overly difficult for plaintiffs to bring meritorious fraud claims or otherwise encouraging bad behavior. See, e.g., Charles W. Murdock, Sarbanes-Oxley, Corporate Corruption, and Complicity of Courts and Legislatures 46–50 (Sept. 7, 2006) (unpublished manuscript), https://ssrn.com/abstract=1012970 [https://perma.cc/B62E-TXYA]; see also John C. Coffee, Jr., Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms, 84 B.U. L. Rev. 301, 318–20 (2004) (arguing the PSLRA encouraged increased auditor acquiescence in aggressive accounting practices).

with either a successful motion to dismiss or settlement following an unsuccessful one.[52] As a result, standards at the pleading stage are of primary practical importance. Plaintiffs must plead scienter sufficiently to survive a motion to dismiss without the benefit of discovery;[53] if they are successful, they are likely to win a settlement without the risks and costs involved in trial.

2. *Scienter.* — Scienter is defined in general as "[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission."[54] Because a "congressional intent to proscribe a type of conduct quite different from negligence" was "unmistakable" from the text of the 1934 Act, the Supreme Court held that a section 10(b) claim could not stand without an allegation of scienter.[55] The Court defined scienter in this context as a "mental state embracing intent to deceive, manipulate, or defraud."[56] While state of mind may be pled generally for most claims,[57] the PSLRA imposed a higher standard: Securities fraud plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," that is, scienter.[58] In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, the Supreme Court held that a "strong" inference under the PSLRA must be "more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."[59]

In economic terms, state of mind requirements like scienter distinguish certain civil and criminal offenses, including fraud, from those involving mere negligence. Judge Richard Posner's influential article discussing the economics of criminal law addressed the legal need to distinguish intentional from unintentional conduct.[60] Judge Posner

52. See Stanford L. Sch. & Cornerstone Rsch., Heat Maps & Related Filings: Litigation Status, Sec. Class Action Clearinghouse, https://securities.stanford.edu/litigation.html [https://perma.cc/MRP3-AL5F] (last visited Feb. 11, 2024) (cataloguing 6,550 securities class actions filed since 1996; while 5,980 have either settled or been dismissed, just nine have been tried to verdict).

53. Under the PSLRA, discovery is always stayed pending a motion to dismiss. 15 U.S.C. § 78u-4(b)(3)(B)(iv) (2018).

54. Scienter, Black's Law Dictionary (11th ed. 2019).

55. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976).

56. Id. at 193 n.12. This is the general definition of scienter in section 10(b) actions, although different standards apply to forward-looking statements and claims involving "soft" information. See 15 U.S.C. § 78u-5(c) (imposing an actual knowledge requirement for scienter with respect to forward-looking statements); Ansfield v. Omnicare, Inc. (In re Omnicare, Inc. Sec. Litig.), 769 F.3d 455, 470 (6th Cir. 2014) (holding that statements of "soft information" are actionable only if they were made with "knowledge of [their] falsity"); Kushner v. Beverly Enters., Inc., 317 F.3d 820, 831 (8th Cir. 2003) (same).

57. Fed. R. Civ. P. 9(b).

58. 15 U.S.C. § 78u-4(b)(2)(A).

59. 551 U.S. 308, 314 (2007).

60. Richard A. Posner, An Economic Theory of the Criminal Law, 85 Colum. L. Rev. 1193, 1221–25 (1985).

argued that intent requirements help prevent excessive punishment for accidental conduct, which involves social costs in the form of overdeterrence of lawful activity (among other evils).[61] In the context of securities fraud, punishing any ultimately incorrect statement would likely have a chilling effect on corporate disclosures that would be detrimental to stockholders and others.[62] The scienter requirement mitigates this effect by preventing liability for corporate misstatements that are the product of negligent failure to discover information rather than intentional deception.[63]

3. *Corporate Liability.* — Corporate liability for fraud comes from agency law. The idea that principals may be liable for their agent's torts has ancient roots.[64] By the late seventeenth century, the principle of imputation had been extended to impersonal principal–agent relationships much like those that exist in the modern business corporation: those between shipowners and crewmen.[65] While the notion that a corporation could be held directly liable for crimes of intent is much more recent, it rests on the same basic agency law principles.[66] For this type

61. See id. at 1221; see also Arlen & Carney, supra note 46, at 705 n.72 (arguing that the solution to overdeterrence concerns is to strengthen scienter requirements). Relatedly, Professor V.S. Khanna argues that mens rea requirements facilitate optimal targeting of higher-than-optimal sanctions. See V.S. Khanna, Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea, 79 B.U. L. Rev. 355, 391–95 (1999) [hereinafter Khanna, Notion of Corporate Fault] (arguing that when the optimal level of an activity is zero, there tend to be upwardly biased penalties, and mens rea requirements serve an important optimizing function).

62. See Lipton, supra note 17, at 1288–89 (discussing the social importance of corporate disclosure).

63. See Arlen & Carney, supra note 46, at 705 n.72 (arguing that strengthened scienter requirements are the solution to the perceived chilling problem). Recklessness, on the other hand, is typically sufficient to prove scienter in a section 10(b) case. See *Tellabs*, 551 U.S. at 319 n.3 (noting that while the Supreme Court has never spoken to the recklessness question, "[e]very Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly" (citing Ottmann v. Hanger Orthopedic Grp., Inc., 353 F.3d 338, 343 (4th Cir. 2003))).

64. See John H. Wigmore, Responsibility for Tortious Acts: Its History, 7 Harv. L. Rev. 315, 317–18 (1894) (noting a master's liability for the actions of his servants under primitive Germanic law).

65. Rory Van Loo, The Revival of Respondeat Superior and Evolution of Gatekeeper Liability, 109 Geo. L.J. 141, 148 (2020) (citing Boson v. Sandford (1689) 91 Eng. Rep. 382 (KB)). "Imputation" here means "ascrib[ing] or attribut[ing]" from an individual. Impute, Black's Law Dictionary (11th ed. 2019).

66. The Supreme Court first clearly held a corporation liable for a crime of intent in New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481 (1909). V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, 109 Harv. L. Rev. 1477, 1482 (1996) [hereinafter Khanna, Corporate Criminal Liability].

of wrongdoing, the agent's intent—in addition to their actions—is typically imputed to the corporation-principal.[67]

In general, corporate liability is justified to the extent that "individual liability alone . . . cannot adequately deter corporate wrongdoing."[68] This is the case whenever individual agents are judgment proof or available individual sanctions involve too much social cost.[69] Further, the deterrent effect of individual sanctions depends on the extent to which the individuals are able to rationally weigh the potential costs of their conduct. The corporate form itself can inspire systematic deviation from perfectly rational behavior.[70] And given that potential fraudsters are not perfectly rational, enhanced internal monitoring spurred by the prospect of corporate liability may be a more effective deterrent than the prospect of individual liability alone, even if the actual expected penalty is the same.[71] The central justification for corporate liability, then, especially in the context of financially driven, marketized litigation like securities fraud, is efficient deterrence of the culpable conduct.[72]

The idea that corporations should be held liable for securities fraud remains controversial. Some have argued that corporations and their shareholders are the true victims of securities fraud, making corporate liability a perverse, inefficient device that works a double injury.[73] Another

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67. Lipton, supra note 17, at 1268; see also id. at 1268 n.20 (collecting cases in which courts imputed mens rea).

68. Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L. Rev. 687, 695 (1997).

69. See id. at 695–96 & n.21.

70. See Donald C. Langevoort, Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms), 146 U. Pa. L. Rev. 101, 131–34 (1997) [hereinafter Langevoort, Organized Illusions] (arguing that corporate culture can encourage managers to adopt certain biases).

71. See Arlen & Kraakman, supra note 68, at 696 & n.23 ("[H]olding the expected sanction constant, individuals are deterred more by a high probability of paying a relatively low fine than the relatively low probability of paying a high fine."). This is especially notable in the securities fraud context since there is reason to believe the individual's expected sanction is zero in any case. See id. at 695 n.20 (noting that company managers are typically indemnified by the firm); Coffee, Reforming the Securities Class Action, supra note 33, at 1553 (discussing the impact of D&O insurance on corporate agents' incentives).

72. To be sure, there are other arguments in favor of corporate liability in general. A significant strand argues that "moral condemnation" and retribution are properly aimed at corporate defendants in certain cases. See, e.g., Lawrence Friedman, In Defense of Corporate Criminal Liability, 23 Harv. J.L. & Pub. Pol'y 833, 834 (2000); Gregory M. Gilchrist, Individual Accountability for Corporate Crime, 34 Ga. St. U. L. Rev. 335, 342, 348–49 (2018) (arguing that corporate criminal liability is important to avoid "the dangerous message that corporations may price criminal conduct"). But in the context of fraud-on-the-market class actions, the moral valence of each case is usually not clear-cut. See supra notes 42–48 and accompanying text. Given that the goal is market efficiency, optimizing deterrence is the best justification for corporate liability in this context. See infra section I.B.

73. See Coffee, Reforming the Securities Class Action, supra note 33, at 1537 ("To punish the corporation and its shareholders in such a [typical stock drop] case is much like

line of criticism is more pragmatic: Given the ubiquity of indemnity provisions and director-and-officer (D&O) insurance, the corporation and its insurers pay settlements in connection to directors' and officers' bad conduct, making any direct finding of corporate liability redundant.[74] But there could be cases in which there is no culpable individual, or that individual's identity is not obvious.[75] From a deterrence perspective, it may still be beneficial to impose liability on the corporation in these circumstances.[76] Moreover, when corporations create incentives for their agents to violate the law (e.g., through their structure or lenient compliance practices), those violations are best deterred by addressing the undesirable incentive structure directly.[77] Accomplishing these goals in the securities class action context requires a theory of corporate scienter that deviates from traditional principles of respondeat superior.[78]

B. *Optimal Deterrence Should Be the Goal*

As used in the law and economics tradition, efficiency and optimization refer to the balancing of social benefits against social costs, usually in the service of maximizing some net good.[79] While there are

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seeking to deter burglary by imposing penalties on the victim for having suffered a burglary."); see also Gilchrist, supra note 72, at 344 ("The line between ownership and control of the corporation is the fundamental challenge . . . . Control violated the law, and ownership pays for that violation."). But see Spindler, Optimal Deterrence, supra note 1, at 7–12 (arguing owners do desire fraud and providing a supporting model); id. at 15–19 (arguing that there is fraud at the equilibrium of ownership and control incentives).

74. See Coffee, Reforming the Securities Class Action, supra note 33, at 1550–52 ("The strangest aspect of this pattern involves corporate insiders . . . . Although they are regularly sued, . . . the corporate defendant and its insurer typically advance the entire settlement amount."); see also Arlen & Kraakman, supra note 68, at 695 n.20.

75. See, e.g., Makor Issues & Rts., Ltd. v. Tellabs Inc., 513 F.3d 702, 710 (7th Cir. 2008) (arguing a hypothetical case where GM commits blatant fraud but there is no identifiable individual wrongdoer); City of Monroe Emps. Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 684–90 (6th Cir. 2005) (finding the corporation's public statements evinced fraud even though they could not be connected to any particular individual with scienter).

76. See Arlen & Kraakman, supra note 68, at 695 n.20 (arguing in favor of corporate liability for collective torts).

77. See Deborah A. DeMott, Organizational Incentives to Care About the Law, 60 Law & Contemp. Probs. 39, 44–52 (1997) (arguing that vicarious liability makes sense when agents "act as a consequence of pressures created by the organization's incentive and control systems"); Langevoort, Organized Illusions, supra note 70, at 158 (arguing the law should "create incentives . . . to force the 'debiasing' of corporate inference"); see also Donald C. Langevoort, Capping Damages for Open-Market Securities Fraud, 38 Ariz. L. Rev. 639, 653 (1996) (arguing that corporate fraudsters' "thought processes will be affected by the organizational setting in which their actions are embedded").

78. See infra note 122 and accompanying text (explaining that the pure respondeat superior approach requires plaintiffs to identify a single misfeasant agent whose intent can be imputed to the corporation).

79. Guido Calabresi, Transaction Costs, Resource Allocation and Liability Rules—A Comment, 11 J.L. & Econ. 67, 69–70 (1968) (conceptualizing efficiency and optimization in structural design using law and economics analysis).

obvious social costs associated with fraud,[80] it is arguably impossible (or at least prohibitively costly) to completely eliminate.[81] Consequently, there is an "optimal" level of fraud enforcement at which the net social benefits of fraud deterrence are maximized;[82] fraud should be reduced until the marginal benefit of preventing additional fraud equals the marginal cost of preventing additional fraud. If corporations can prevent certain frauds through relatively low-cost monitoring and control measures or other specific structuring decisions, the securities fraud litigation regime should encourage these measures by holding them liable for preventable frauds specifically.[83]

Section I.A emphasized that calibrating deterrence is the key goal of corporate liability under section 10(b), and the scienter requirement is a key aspect of that goal. Economic analysis is well suited to the question of corporate scienter because this area of law is built on "fundamentally economic concepts."[84] Securities fraud is a notably market-driven area of the law—as one commentator has observed, in securities litigation, "all we care about is money"[85] and, one might add, market efficiency.[86] As a result, principles of efficiency and optimization fit more comfortably here than they do elsewhere in the law, where the popularity of law and economics has been rightfully questioned.[87]

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80. For example, Professor Amanda Rose has argued the social costs of securities fraud include overinvestment in information gathering, disguising governance issues, and inefficient allocation of resources. Rose, The Multienforcer Approach, supra note 49, at 2179–80.

81. The social costs of fraud enforcement include both the direct costs of detection and prosecution and the indirect costs associated with overdeterrence. Id. at 2184. "Perfect" enforcement (leading to the complete elimination of all fraud) would seem to involve infinite detection costs.

82. According to standard economic assumptions, this should occur at the level at which the marginal social benefit is equal to marginal social cost. See Arlen & Kraakman, supra note 68, at 704 n.39 (defining wrongdoing as any activity where the marginal social cost exceeds the marginal social benefit).

83. See infra section II.C.

84. Easterbrook & Fischel, supra note 23, at 613.

85. Spindler, Why Shareholders Want Their CEOs to Lie, supra note 38, at 656.

86. See Rose, The Multienforcer Approach, supra note 49, at 2179–80 (identifying the negative impacts on market efficiency as the primary costs of securities fraud); supra note 79 and accompanying text; see also Easterbrook & Fischel, supra note 23, at 613 (arguing that economic analysis of securities law is appropriate because markets are well-functioning and participants on both sides tend to be sophisticated).

87. See, e.g., Elliott Ash, Daniel L. Chen & Suresh Naidu, Ideas Have Consequences: The Impact of Law and Economics on American Justice 50–52 (Nat'l Bureau of Econ. Rsch., Working Paper 29788, 2022), https://www.nber.org/system/files/working_papers/w29788/w29788.pdf [https://perma.cc/BX2L-CTGM] (cataloguing the impact of the law and economics movement on judicial decisionmaking). One persuasive critique of the law and economics school is that it undervalues distributive justice goals. See Lee Anne Fennell & Richard H. McAdams, The Distributive Deficit in Law and Economics, 100 Minn. L. Rev. 1051, 1053–54 (2016) ("Systematic neglect of these distributive shortfalls has led to a scholarly deficit in the economic analysis of law."); Daniel Hemel, Regulation

The application of economic principles to securities fraud is not innovative, but the concept of optimal deterrence is notably absent as a principle guiding discussions of corporate scienter.[88] Most commentators who write about securities fraud incorporate economic analysis into their work but do not apply it directly to scienter.[89] Even when the Second Circuit recognized an inherent "difficulty" in applying PSLRA scienter pleading standards stemming from the "'inevitable tension' between the interests in deterring securities fraud and deterring strike suits," it moved on without engaging with the optimization problem.[90] Thus, optimal deterrence analysis is not only uniquely suited to section 10(b) and the corporate scienter problem, but it is a relatively untapped resource. Optimal deterrence is the ideal that should guide corporate scienter standards.

II. DISAGREEMENT PERSISTS AS TO HOW TO CAPTURE CORPORATE FAULT IN CORPORATE SCIENTER

The building blocks of corporate scienter all point to the need to balance the fraud deterrence goals of section 10(b) with the risks of overdeterrence, and the definition of corporate scienter is the ideal nexus for this balancing. Scienter is typically a major issue in the section 10(b) class actions this Note is focused on.[91] Further, the lack of clear statutory limitations and Supreme Court precedents gives lower courts flexibility to reason out the best standard of corporate scienter that comports with the goals of the modern fraud-on-the-market class action. But without the explicit ideal of optimal deterrence to guide the analysis, circuit courts

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and Redistribution With Lives in the Balance, 89 U. Chi. L. Rev. 649, 651–53 (2022) (arguing for the injection of distributive considerations into the favorite tool of law and economics scholars: cost-benefit analysis). But there is reason to question whether distributive justice is achievable in the modern section 10(b) class action given the general failure of compensation. See supra notes 42–43 and accompanying text. If the true goal of securities litigation is market efficiency, the distributive justice critique is less salient. See supra note 23 and accompanying text.

88. See, e.g., Patricia S. Abril & Ann Morales Olazábal, The Locus of Corporate Scienter, 2006 Colum. Bus. L. Rev. 81, 101 (using deterrence to justify comparison to criminal law but otherwise not engaging with the concept); Arlen & Carney, supra note 46, at 705 n.72 (arguing that strengthened scienter requirements are the solution to overdeterrence in the form of chilling, but relegating this argument to a lone footnote); Kevin M. O'Riordan, Note, Clear Support of Cause for Suspicion? A Critique of Collective Scienter in Securities Litigation, 91 Minn. L. Rev. 1596, 1623 (2007) (noting that making it easier to plead scienter might deter wrongdoing but pursuing the argument no further).

89. See, e.g., Rose, The Multienforcer Approach, supra note 49, at 2178 (framing an argument regarding securities fraud enforcement using optimal deterrence concepts); Spindler, Optimal Deterrence, supra note 1, at 4 (same).

90. Novak v. Kasaks, 216 F.3d 300, 307 (2d Cir. 2000) (quoting In re Time Warner Inc. Sec. Litig., 9 F.3d 259, 263 (2d Cir. 1993)).

91. See supra notes 36–41 and accompanying text.

have balanced the relevant concepts inconsistently, leading to a variety of suboptimal approaches.

Circuit courts follow one of three approaches to corporate scienter: respondeat superior, collective scienter, or the high managerial agent approach. Under the pure version of respondeat superior, a corporation commits fraud if and only if one of its agents makes a material misstatement with an intent to defraud investors *and* an intent to benefit the corporation.[92] Respondeat superior is the orthodox approach to corporate scienter, but courts regularly deviate from its pure application, applying variations or entirely different approaches.[93] At the other end of the spectrum is the expansive collective scienter approach, which allows for a finding of corporate scienter based on the aggregate knowledge of multiple agents or the knowledge of one agent combined with the actions of another.[94] A third approach allows for imputing scienter either from the speaker or from certain "high managerial agents," borrowing this concept from the organizational mens rea teachings of the Model Penal Code.[95] This high managerial agent approach has been characterized as a "middle ground" in conceptualizing corporate scienter.[96]

This Part argues that the collective concern about respondeat superior in the circuit courts has yet to be resolved because courts have not applied optimal deterrence reasoning to home in directly on the shortcomings of the current approaches and the policy implications of the relevant legal authorities. Section II.A reviews the Supreme Court doctrine that touches on corporate scienter. Section II.B discusses the varying approaches taken by the circuit courts. Section II.C analyzes the shortcomings of each of these approaches from the optimal deterrence perspective.

A. *The Supreme Court Accepts Imputation but Has Not Addressed Corporate Scienter*

The Supreme Court has never spoken directly to the issue of corporate scienter, although the facts of two of its cases raised the issue

92. See infra section II.C.1.

93. See Ansfield v. Omnicare, Inc. (In re Omnicare, Inc. Sec. Litig.), 769 F.3d 455, 477 (6th Cir 2014); In re Cognizant Tech. Sols. Corp. Sec. Litig., No. CV-16-6509 (ES) (CLW), 2020 WL 3026564, at *24 (D.N.J. June 5, 2020) (explaining another judge rejected the respondeat superior approach due to concerns that it would be underinclusive); Abril & Olazábal, supra note 88, at 120 ("[S]ome scholars and courts have proposed that the proper way to apply the collective knowledge doctrine is in conjunction with other considerations that may more accurately point to culpability, most notably the presence of willful blindness."); Lipton, supra note 17, at 1276–80; see also infra section II.B.1.

94. See Khanna, Notion of Corporate Fault, supra note 61, at 372.

95. See *Omnicare*, 769 F.3d at 476 (citing Abril & Olazábal, supra note 88, at 135).

96. Id.

obliquely.[97] In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, the Court considered what is required for allegations to raise a "strong inference" of scienter under the PSLRA.[98] While there was a corporate defendant in that case, the question presented was about pleading standards under the PSLRA, not the requirements of corporate scienter.[99] After announcing the new prevailing pleading standard,[100] the Court remanded to the Seventh Circuit for further proceedings without analyzing the corporate defendant's scienter.[101] A few years later, in *Matrixx Initiatives, Inc. v. Siracusano*, the Court took up the question of what bearing statistical significance has on materiality and scienter.[102] It did not analyze the corporate defendant's scienter separately from the individual defendants'.[103] Apart from these cases, the Court has also cautioned in general that "the § 10(b) private right should not be expanded beyond its present boundaries."[104]

Matrixx Initiatives was somewhat more on point for the issue of corporate scienter than *Tellabs*, especially as analyzed by the Ninth Circuit. The plaintiffs alleged that several people within Matrixx's corporate ranks were aware that the company's key product, Zicam, had been connected to anosmia (loss of smell) in certain patients.[105] Timothy Clarot, Matrixx's Vice President and Director of Research and Development, had corresponded with research scientists treating anosmia patients who had taken Zicam.[106] Anosmia-related lawsuits were also filed against Matrixx.[107] Nevertheless, Matrixx stated publicly that Zicam was "poised for growth"

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97. Professor Lipton argued that Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135 (2011), and Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc., 552 U.S. 148 (2008), undermine imputation of scienter from low-ranking individuals because they limit the concepts of reliance and attribution. See Lipton, supra note 17, at 1281–86. But neither case engaged directly with corporate scienter. See *Janus*, 564 U.S. at 142–44 (refusing to hold a parent company liable for its subsidiary's misstatements because liability should not be expanded "beyond the person *or entity* that ultimately has authority over a false statement" (emphasis added)); *Stoneridge*, 552 U.S. at 164–66 (refusing to expand the concept of reliance in part because the private right of action is not explicitly authorized by statutory text).

98. 551 U.S. 308, 314 (2007) (quoting 15 U.S.C. § 78u-4(b)(2) (2006)).

99. Id.

100. Following *Tellabs*, an inference of scienter is sufficiently "strong" if it is "cogent and at least as compelling as any opposing inference of nonfraudulent intent." Id.

101. Id. at 329. The Court did note, however, that the corporate defendant's scienter would need to be proven "by imputation" at trial. Id. at 328.

102. 563 U.S. 27, 30 (2011).

103. Id. at 48–49.

104. Stoneridge Inv. Partners, LLC v. Sci.–Atlanta, Inc., 552 U.S. 148, 165 (2008); see also Lipton, supra note 17, at 1281–86 (summarizing the Court's scienter jurisprudence).

105. *Matrixx Initiatives*, 563 U.S. at 31–32; see also Siracusano v. Matrixx Initiatives, Inc., 585 F.3d 1167, 1181–83 (9th Cir. 2009), aff'd, 563 U.S. 27 (2011).

106. *Siracusano*, 585 F.3d at 1170.

107. Id. at 1172, 1174.

and that the company's financial prospects were good.[108] SEC filings failed to disclose the pending lawsuits and minimized relevant risks.[109] The Supreme Court was not attentive to the intricacies of corporate scienter in its analysis, treating all the defendants as one unit for purposes of the question presented.[110] But the Ninth Circuit implied that Clarot was sufficiently high-ranking for his intent to be imputed to the corporation in connection with public statements attributed to the corporation.[111] With respect to the omission of the lawsuits from the SEC filings, it reasoned that "the inference that high-level executives such as [the CEO, the CFO], and Clarot would know that the company was being sued in a product liability action is sufficiently strong to survive a motion to dismiss."[112] In short, the Ninth Circuit determined Clarot's intent could be imputed based on the presumption that corporate speech can be attributed in general to corporate officers,[113] and the Supreme Court affirmed. But the Supreme Court's decision did not specifically endorse this corporate scienter analysis.

To the extent these two cases can be interpreted to reflect the Court's implicit corporate scienter positions, they authorize a variety of approaches. In *Tellabs*, the Court indicated the corporate defendant's scienter must be shown "by imputation" from a specific individual;[114] this language suggests the respondeat superior approach, which relies on imputing intent from individuals. But in *Matrixx Initiatives*, the Court did not systematically engage with what each individual knew when they made each statement, as is probably required under the pure respondeat superior approach.[115] To be sure, the Court was not specifically attuned to corporate scienter in either case, since the questions presented were about

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108. Id. at 1170–76.

109. Id. at 1172, 1774.

110. See *Matrixx Initiatives*, 563 U.S. at 30 (defining "Matrixx" to include the corporation and individual defendants and referring to the defendants collectively throughout the opinion). The question presented in this case was whether it is possible to state a claim under § 10(b) "based on a pharmaceutical company's failure to disclose reports of adverse events associated with a product if the reports do not disclose a statistically significant number of adverse events." Id.

111. See *Siracusano*, 585 F.3d at 1181 (referencing Clarot's awareness of the anosmia problem and grouping him with the CEO and CFO as "high-level executives"). Under the pure respondeat superior approach, this imputation would only be allowed if Clarot made or approved the relevant misstatements. Attributing statements in SEC filings and general press releases to management at large is a hallmark of the high managerial agent approach, see infra section II.B.3, but it also makes sense in the context of collective scienter, see infra section II.B.2.

112. *Siracusano*, 585 F.3d at 1181.

113. See infra note 111.

114. Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 328 (2007).

115. See *Matrixx Initiatives*, 563 U.S. at 30; infra section II.B.1. The Ninth Circuit's approach, which the Supreme Court affirmed, relied on a more expansive view that excuses plaintiffs from having to connect to corporate speech to specific speakers. See supra note 111 and accompanying text.

other, related issues.[116] But these cases allow for any concept of corporate scienter that does not entirely eschew the possibility of imputing intent from individuals.

B. *The Circuit Split*

Given the lack of concrete Supreme Court guidance and the complexity of balancing the issues and values involved, it is not surprising that there is a long-existing circuit split regarding the proper approach to corporate scienter. The circuits that have ascribed scienter to corporations appear to be moving toward consensus in practice, but their doctrines remain inconsistent. Other circuits, notably the Third,[117] have declined to wade into the split at all.[118] This section reviews each of the three major approaches that circuit courts take to corporate scienter: respondeat superior, collective scienter, and the high managerial agent approach.

1. *Respondeat Superior.* — Respondeat superior is the traditional approach to imputing intent to corporations and is the default adopted by courts in section 10(b) cases.[119] It is also the strictest way to define corporate scienter. In theory, any agent's state of mind may be imputed to their corporate principal; if that state of mind involves fraudulent intent,

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116. See *Tellabs*, 551 U.S. at 314 (addressing the PSLRA's "strong inference" requirement); *Matrixx Initiatives*, 563 U.S. at 30 (considering whether a risk can be material if the risk is not statistically significant).

117. The Third Circuit is "notable" because it has been repeatedly explicit in its refusal to decide the corporate scienter issue. See In re Hertz Glob. Holdings Inc., 905 F.3d 106, 121 n.6 (3d Cir. 2018) ("We have neither accepted nor rejected that doctrine [of collective scienter] and decline to do so here . . . ."); see also PAMCAH-UA Loc. 675 Pension Fund v. BT Grp. PLC, No. 20-2106, 2021 WL 3415060, at *2 (3d Cir. Aug. 5, 2021) (declining to address whether the collective scienter theory is viable because it could not support the allegations at hand); Rahman v. Kid Brands, Inc., 736 F.3d 237, 246 (3d Cir. 2013) (same). Other circuits have signaled acceptance of the doctrine regardless of its application in particular cases. See, e.g., Cohen v. NVIDIA Corp. (In re NVIDIA Corp. Sec. Litig.), 768 F.3d 1046, 1063 (9th Cir. 2014) (citing Glazer Cap. Mgmt., LP v. Magistri, 549 F.3d 736, 743–44 (9th Cir. 2008)); Teamsters Loc. 445 Freight Div. Pension Fund v. Dynex Cap. Inc., 531 F.3d 190, 195–96 (2d Cir. 2008) ("[W]e do not believe [Congress has] imposed the rule . . . that in no case can corporate scienter be pleaded in the absence of successfully pleading scienter as to an expressly named officer.").

118. See Smallen v. W. Union Co., 950 F.3d 1297, 1314–15 (10th Cir. 2020) ("We have neither accepted nor rejected [the collective scienter] theory of corporate scienter, and we need not do so now."); Metzler Asset Mgmt. GmbH v. Kingsley, 928 F.3d 151, 162–63 (1st Cir. 2019) (declining to determine whether collective scienter is viable because plaintiffs' scienter allegations could not be sustained even if it were); *In re Hertz*, 905 F.3d, at 121 n.6; Horizon Asset Mgmt. Inc. v. H&R Block, Inc., 580 F.3d 755, 767 (8th Cir. 2009) (noting the appropriate standard for pleading corporate scienter under the PSLRA is an "open question" in the circuit).

119. See supra notes 64–67 and accompanying text. To the extent courts deviate from pure respondeat superior, they tend to expand, not contract, the scope of liability. See infra sections II.B.2–.3.

that intent may be imputed as well.[120] Because the required state of mind is the "intent to deceive, manipulate, or defraud" via a misstatement, omission, or other scheme,[121] courts applying pure respondeat superior require plaintiffs to identify a single corporate agent who made the misstatement and acted with this intent.[122] Often, this identified agent will also be named as an individual defendant.[123]

The Fifth and Eleventh Circuits have each largely declined to extend corporate scienter beyond the traditional principles of respondeat superior, although neither adheres to the pure version. In *Southland Securities Corp. v. INSpire Insurance Solutions,* the Fifth Circuit relied on a Restatement to hold "the required state of mind must actually exist in the individual making (or being a cause of the making of) the misrepresentation, and may not simply be imputed to that individual on general principles of agency."[124] While this language could be read as a strong statement in favor of pure respondeat superior, it also indicates that the "required state of mind" could be imputed from someone who was only "a cause of the making of" the misstatement.[125] Other language in the opinion clarifies that there are cases in which scienter might be imputed from corporate agents who did not make any public misstatements:

> For purposes of determining whether a statement made by the corporation was made by it with the requisite Rule 10(b) scienter[,] we believe it appropriate to look to the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve it or its making or issuance, or who furnish information or language for inclusion therein, or the like) . . . .[126]

This language supports the idea that fraudulent intent could be imputed from any corporate "official" who could be connected to the

120. See Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1247–48 (1979) ("[U]nder respondeat superior, the intent of the offending agent is imputed directly to the corporation."); see also supra note 67 and accompanying text.

121. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

122. See Southland Sec. Corp. v. INSpire Ins. Sols., Inc., 365 F.3d 353, 366 (5th Cir. 2004) (citing Restatement (Second) of Agency §§ 268 cmt. d, 275 cmt. b (Am. L. Inst. 1958)). For a general description of the respondeat superior approach to imputing states of mind, see Khanna, Notion of Corporate Fault, supra note 61, at 369–71.

123. See, e.g., *Southland*, 365 F.3d at 385 (imputing scienter from the defendant CEO); see also Matrix Cap. Mgmt. Fund, LP v. BearingPoint, Inc., 576 F.3d 172, 189 (4th Cir. 2009) ("Most often, the complaint and documents incorporated into the complaint by reference will identify a corporate agent who acted with scienter.").

124. 365 F.3d at 366 (citing Restatement (Second) of Agency §§ 268 cmt. d, 275 cmt. b).

125. Id.

126. Id.

misstatement.[127] The Eleventh Circuit adopted a similar approach in *Mizzaro v. Home Depot*, citing *Southland* with approval.[128]

In a 2016 case, the Fifth Circuit decided that it would even consider the state of mind of officials whom plaintiffs could not directly connect to the misstatement at the pleading stage, but only in case of "special circumstances" that urge deviation from respondeat superior.[129] When "some combination of" these circumstances obtain, the Fifth Circuit may find a strong inference of scienter from an officer who has a sufficiently high position in the company.[130] This approach expands the universe of agents eligible to have their knowledge imputed to the corporation as compared to *Southland*, edging closer to the high managerial agent approach.[131] But the requirement that scienter be imputed directly from an individual who can be connected to the misstatement remains in most cases.

One common variation on pure respondeat superior is the "anonymous fraudster" version. Under this approach, the rules of respondeat superior apply, but courts do not require plaintiffs to identify the specific individual with scienter at the pleading stage.[132] The Fourth

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127. For a discussion of the different possible readings of *Southland*, see Ashley S. Kircher, Note, Corporate Criminal Liability Versus Corporate Securities Fraud Liability: Analyzing the Divergence in Standards of Culpability, 46 Am. Crim. L. Rev. 157, 162 (2009).

128. 544 F.3d 1230, 1254 (11th Cir. 2008) (citing *Southland*, 365 F.3d at 366). The *Mizzaro* court indicated openness to the anonymous fraudster version of respondeat superior pleading as well: "Even though it failed to plead scienter adequately for any of the individual defendants, the amended complaint could, in theory, still create a strong inference that the corporate defendant . . . acted with the requisite state of mind." Id.; see also infra notes 132–133 and accompanying text. The court declined to pursue this argument since the plaintiff did not raise it. *Mizzaro*, 544 F.3d at 1254. Since *Mizzaro*, the Eleventh Circuit has limited itself to the pure respondeat superior approach despite reaffirming its openness to go further in the right circumstances. See Thompson v. RelationServe Media, Inc., 610 F.3d 628, 635 (11th Cir. 2010).

129. Loc. 731 I.B. of T. Excavators & Pavers Pension Tr. Fund v. Diodes, Inc., 810 F.3d 951, 958–59 (5th Cir. 2016). The considerations identified as "special circumstances" included the size of the company (because an executive is more likely to be familiar with day-to-day operations in a smaller company), the importance of the transaction to the company's continued vitality, whether the misrepresented information would have been readily apparent to the speaker, and whether the defendant's statements were internally inconsistent. Id. at 959.

130. Id.

131. See infra section II.B.3.

132. See Matrix Cap. Mgmt. Fund, LP v. BearingPoint, Inc., 576 F.3d 172, 189–90 (4th Cir. 2009) ("A complaint that alleges facts giving rise to a strong inference that at least one corporate agent acted with the required state of mind satisfies the PSLRA even if the complaint does not name the corporate agent as an individual defendant or otherwise identify the agent."). Most courts adopting this approach couch their decisions in the language of the PSLRA's strong inference standard. See id. But since cases that survive a motion to dismiss typically settle, pleading standards are of special significance. See supra note 52 and accompanying text.

and Seventh Circuits have explicitly adopted this more-permissive variation,[133] and it can also apply in the collective scienter circuits.[134]

The Seventh Circuit addressed a version of the anonymous fraudster theory in *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*[135] In an oft-cited hypothetical, the court explained:

> Suppose General Motors announced that it had sold one million SUVs in 2006, and the actual number was zero. There would be a strong inference of corporate scienter, since so dramatic an announcement would have been approved by corporate officials sufficiently knowledgeable about the company to know that the announcement was false.[136]

Makor quoted and adopted the "order or approve" language from *Southland*,[137] and, in *Pugh v. Tribune Co.*, the Seventh Circuit confirmed *Makor* was intended as an endorsement of the anonymous fraudster pleading theory.[138] Nevertheless, both the Second and Ninth Circuits have quoted this hypothetical to justify collective scienter.[139] Confusion between anonymous fraudster and collective scienter makes sense because the two may be functionally equivalent,[140] and it can be difficult to distinguish them based on some of the verbal formulations courts employ. In fact, the formulation the Second Circuit adopted in *Dynex Capital*[141] has been framed as an endorsement of collective scienter, though it is arguably an

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133. See *Matrix Cap.*, 576 F.3d at 189–90 (explaining plaintiffs do not need to identify the agent with scienter in the complaint to survive a motion to dismiss); Pugh v. Trib. Co., 521 F.3d 686, 697 & n.5 (7th Cir. 2008) (stating the Seventh Circuit rejects the collective scienter doctrine but indicating openness to the anonymous fraudster approach (quoting Makor Issues & Rts., Ltd. v. Tellabs, Inc., 513 F.3d 702, 708 (7th Cir. 2008))).

134. See infra notes 139–143 and accompanying text.

135. 513 F.3d 702.

136. Id. at 710.

137. Id. at 708; see supra note 126 and accompanying text.

138. See *Pugh*, 521 F.3d at 697 (quoting *Makor*, 513 F.3d at 708, for the proposition that the Seventh Circuit rejects the collective scienter doctrine); see also id. at 697 n.5 (declining to assess the anonymous fraudster argument because plaintiffs did not pursue it).

139. See Glazer Cap. Mgmt., LP v. Magistri, 549 F.3d 736, 744 (9th Cir. 2008) ("[T]here could be circumstances in which a company's public statements were so important and so dramatically false that they would create a strong inference that at least some corporate officials knew of the falsity upon publication."); Teamsters Loc. 445 Freight Div. Pension Fund v. Dynex Cap. Inc., 531 F.3d 190, 195–96 (2d Cir. 2008) (quoting and adopting the GM hypothetical).

140. If plaintiffs need not identify a specific individual with the requisite scienter, nothing would prevent them from inventing an anonymous fraudster who was tipped off by each of the individuals whose combined knowledge or intent would make up the collective scienter. See supra note 94 and accompanying text. If this hypothetical fraudster enabled them to get past the pleading stage, it is unlikely the plaintiffs would be forced to identify the fraudster before the case settled. See supra note 52 and accompanying text.

141. *Dynex Cap.*, 531 F.3d at 196.

anonymous fraudster rule.[142] In theory, true collective scienter probably remains more permissive, at least when the relevant knowledge is dispersed and seems insignificant.[143]

2. *Collective Scienter.* — Collective scienter is the most expansive approach to corporate scienter. Under collective scienter, unlike under respondeat superior, a corporation may have scienter even if there is no single culpable individual.[144] A collective scienter allegation typically comes in one of two forms: (1) those in which one agent's state of mind is combined with another agent's conduct to establish corporate scienter;[145] or (2) those in which multiple agents' states of mind are aggregated and ascribed in full to the corporation.[146] The Second and Ninth Circuits are associated with this approach, although neither typically applies it in practice.[147]

The Second Circuit may accept collective scienter in limited circumstances. In *Dynex Capital*, the Second Circuit endorsed a version of collective scienter as a pleading theory while simultaneously indicating the plaintiff would need to identify a specific agent from whom intent could be imputed to prevail on scienter at trial.[148] In *Jackson v. Abernathy*, the court clarified *Dynex Capital* by discussing a number of ways to show corporate scienter: by showing that a "dramatic" misstatement was "the product of collective fraudulent conduct" and "not a case of mere

142. See Ansfield v. Omnicare, Inc. (In re Omnicare, Inc. Sec. Litig.), 769 F.3d 455, 474–75 (6th Cir. 2014) (citing *Dynex Capital* as an endorsement of collective scienter); infra notes 148–151 and accompanying text.

143. See United States v. Bank of New Eng., N.A., 821 F.2d 844, 855–56 (1st Cir. 1987) (finding a bank willfully failed to report a reportable withdrawal under a collective scienter standard when the transaction was only reportable based on the cumulative total of multiple withdrawals involving different tellers). In such a case, it would be difficult to argue each teller tipped off the same anonymous individual, but liability would attach via collective scienter.

144. See Khanna, Notion of Corporate Fault, supra note 61, at 372.

145. See, e.g., Metzler Asset Mgmt. GmbH v. Kingsley, 928 F.3d 151, 162 (1st Cir. 2019) (securities fraud example); *Bank of New Eng.*, 821 F.2d at 854–57 (1st Cir. 1987) (non-securities fraud example).

146. See, e.g., United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 732–33, 738 (W.D. Va. 1974) ("[T]he corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly."), vacated sub nom Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

147. See, e.g., Jackson v. Abernathy, 960 F.3d 94, 99 (2d Cir. 2020) (indicating "collective corporate scienter may be inferred" in "exceedingly rare instances" but finding the "proposed amended complaint sets forth no such allegations"); Cohen v. NVIDIA Corp. (In re NVIDIA Corp. Sec. Litig.), 768 F.3d 1046, 1063 (9th Cir. 2014) (noting the court has "opined that the doctrine [of collective scienter] might be appropriate in some cases" but that it has never used that theory to justify its holding).

148. *Dynex Cap.*, 531 F.3d 190, 196 (2d Cir. 2008); see also Ansfield v. Omnicare, Inc. (In re Omnicare, Inc. Sec. Litig.), 769 F.3d 455, 474–75 (6th Cir. 2014) (citing *Dynex Capital* as an endorsement of collective scienter).

mismanagement;"[149] by "imput[ing] [scienter] from an individual defendant who made the challenged misstatement;"[150] or by imputing scienter from "other officers and directors who were involved in the dissemination of the fraud."[151] Under the *Jackson* standard, then, a plaintiff can establish collective scienter in certain unique circumstances, but otherwise the Second Circuit's approach is similar to the *Southland* version of respondeat superior.[152]

The Ninth Circuit is more permissive than the Second Circuit but similarly hesitant to make a finding of collective corporate scienter. In *Glazer Capital Management v. Magistri*, the Ninth Circuit indicated openness to the collective scienter theory based on a dramatic false statement but held the theory was not appropriate for the facts of that case.[153] The court has subsequently reaffirmed its openness to collective scienter pleading;[154] it has yet to apply the theory.[155] In a recent case, the court acknowledged that collective scienter had only been endorsed in dicta in the Ninth Circuit and questioned whether it is a "viable theory."[156] But, to the extent this dicta is persuasive to the court in future cases where collective scienter would be viable, it remains undisturbed. If the Ninth Circuit rejects collective scienter, *Siracusano* suggests it would follow the high managerial agent approach.[157]

3. *High Managerial Agents*. — The high managerial agent approach endorses imputing scienter either from any of the agents responsible for the statement or from certain corporate officials termed "high managerial agents," even if they cannot be connected to the misstatement.[158] The Sixth Circuit adopted this approach in *Omnicare*, presenting it as a new, "middle ground" approach inspired by an article written by Professors Patricia Abril and Ann Morales Olazábal.[159] Despite being an imputation theory much like respondeat superior, this approach does not require the

149. 960 F.3d at 96; see also id. at 99 ("In exceedingly rare instances, a statement may be so 'dramatic' that collective corporate scienter may be inferred." (quoting *Dynex Cap.*, 531 F.3d at 195–96)).

150. Id. at 98.

151. Id.

152. See supra notes 129–131 and accompanying text.

153. 549 F.3d 736, 744 (9th Cir. 2008).

154. See, e.g., Cohen v. NVIDIA Corp. (In re NVIDIA Corp. Sec. Litig.), 768 F.3d 1046, 1063 (9th Cir. 2014).

155. Id. (finding the false statement was not sufficiently dramatic); see also supra note 153 and accompanying text.

156. Loc. 353, IBEW Pension Fund v. Zendesk, Inc., No. 21-15785, 2022 WL 614235, at *2 (9th Cir. Mar. 2, 2022).

157. Siracusano v. Matrixx Initiatives, Inc., 585 F.3d 1167, 1181 (9th Cir. 2009) (finding an inference of scienter viable based on the knowledge of "high-level executives"), aff'd, 563 U.S. 27 (2011); see also infra section II.B.3.

158. See Ansfield v. Omnicare, Inc. (In re Omnicare, Inc. Sec. Litig.), 769 F.3d 455, 476 (6th Cir. 2014) (quoting Abril & Olazábal, supra note 88, at 135).

159. Id.

managers' imputed scienter to be connected directly to the misstatement.[160] It also introduces new complexity in the need to decide who qualifies as a "high managerial agent." The Sixth Circuit did not engage with this issue in *Omnicare*, determining only that a vice president who conducted audits was "potentially" a high managerial agent.[161]

The high managerial agent approach envisioned by the Sixth Circuit is similar to the anonymous fraudster approach in its improvements on pure respondeat superior. The *Omnicare* court set out to reinterpret and revise its then-operative precedent, which had the potential to be read "too broadly" and to enable corporate liability "for a statement made regarding a product so long as a low-level employee, perhaps in another country, knew something to the contrary."[162] This new approach precluded that possibility while allowing a corporation to be found liable for securities fraud even when no identifiable speaker possessed the requisite scienter. And it goes further than the anonymous fraudster approach, allowing a finding of corporate liability even when it can be *proven* that no one involved in the statement had scienter, as long as some manager did.

The Sixth Circuit is the only circuit court to explicitly adopt this high managerial agent approach, but through modifications to other leading approaches, many circuits are moving in the same direction. No matter

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160. Specifically, the *Omnicare* court declared:

> The state(s) of mind of any of the following are probative for purposes of determining whether a misrepresentation made by a corporation was made by it with the requisite scienter under Section 10(b): . . .
>
> a. The individual agent who uttered or issued the misrepresentation;
>
> b. Any individual agent who authorized, requested, commanded, furnished information for, prepared (including suggesting or contributing language for inclusion therein or omission therefrom), reviewed, or approved the statement in which the misrepresentation was made before its utterance or issuance;
>
> c. Any high managerial agent or member of the board of directors who ratified, recklessly disregarded, or tolerated the misrepresentation after its utterance or issuance . . . .

Id. (quoting Abril & Olazábal, supra note 88, at 135). This approach differs from the Fifth Circuit's in that scienter can be imputed from these officials without regard to "special circumstances." See Loc. 731 I.B. of T. Excavators and Pavers Pension Tr. Fund v. Diodes, Inc., 810 F.3d 951, 957–59 (5th Cir. 2016).

161. *Omnicare*, 769 F.3d at 483.

162. Id. at 475–76 (citing City of Monroe Emps. Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 688 (6th Cir. 2005)). *Bridgestone* had held "knowledge of a corporate officer *or agent* acting within the scope of [his] authority is attributable to the corporation," *Bridgestone*, 399 F.3d at 688 (alteration in original) (emphasis added) (internal quotation marks omitted) (quoting 2 Thomas Lee Hazen, Treatise on the Law of Securities Regulation 444 (4th ed. 2002)), which was read as an endorsement of collective scienter, see *Omnicare*, 769 F.3d at 475–76; Abril & Olazábal, supra note 88, at 91–95 (noting *Bridgestone* did not invoke collective scienter explicitly but "presuppose[d] that corporations may have the requisite mental state to be held liable as primary violators of Section 10(b) without imputing scienter from a particular individual corporate agent").

where they stood in the immediate aftermath of the PSLRA, today each circuit to address corporate scienter has moved toward the high managerial agent approach.[163]

C. *Current Approaches Do Not Encourage Optimal Deterrence*

None of these standards is particularly attuned to the goal of optimal deterrence. An optimal corporate securities fraud liability regime would cause corporations to efficiently internalize the social costs of fraud.[164] Efficient internalization would mean that corporations are held responsible for frauds they were competent to prevent.[165] When corporations are held responsible for frauds they could not have

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163. The Second Circuit backed away from an earlier endorsement of collective scienter and toward a more manager-centric approach in a 2020 opinion. Compare Jackson v. Abernathy, 960 F.3d 94, 98 (2d Cir. 2020) (indicating corporate scienter may be imputed from "officers or directors who were involved in the dissemination of the fraud . . . even if they themselves were not the actual speaker" or inferred collectively), with Teamsters Loc. 445 Freight Div. Pension Fund v. Dynex Cap. Inc., 531 F.3d 190, 196 (2d Cir. 2008) (indicating openness to collective scienter). The Fifth Circuit softened its initial commitment to respondeat superior. Compare *Diodes*, 810 F.3d at 958–59 (allowing imputation from management in case of "special circumstances"), with Southland Sec. Corp. v. INSpire Ins. Sols., Inc., 365 F.3d 353, 366 (5th Cir. 2004) (limiting corporate scienter to respondeat superior principles). A district court in the Seventh Circuit recently indicated that the potential knowledge of management, rather than any anonymous fraudster, was key in the imputation analysis. Compare In re Boeing Co. Aircraft Sec. Litig., No. 19-cv-02394, 2022 WL 3595058, at *11 (N.D. Ill., Aug. 23, 2022) (considering the argument that "widespread knowledge" within the company could support a collective scienter allegation but finding that the problem at issue would not necessarily have been known by senior management), with Pugh v. Trib. Co., 521 F.3d 686, 697 (7th Cir. 2008) (adopting the anonymous fraudster approach). The Ninth Circuit, which initially limited itself to imputation of scienter from individual defendants, began considering the knowledge of executive managers more broadly. Compare Siracusano v. Matrixx Initiatives, Inc., 585 F.3d 1167, 1181 (9th Cir. 2009) (allowing scienter to be imputed from "high-level executives"), aff'd, 563 U.S. 27 (2011), with Nordstrom, Inc. v. Chubb & Son, Inc., 54 F.3d 1424, 1436 (9th Cir. 1995) (requiring scienter to be imputed from individual defendants). And the Eleventh Circuit adopted a more permissive version of respondeat superior. Compare Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1254 (11th Cir. 2008) (indicating plaintiffs could prove scienter without identifying a specific individual who acted with scienter), with Phillips v. Sci.–Atlanta, Inc., 374 F.3d 1015, 1018 (11th Cir. 2004) (requiring imputation from specific, identified defendants).

164. See Rose, Reforming Securities Litigation Reform, supra note 15, at 1322 ("[O]ptimal deterrence is achieved when the defendant is made to internalize the net social costs of the contemplated misbehavior . . . ."); Shavell, supra note 9, at 260 (noting that parties make socially optimal decisions when they internalize the social costs of their actions).

165. Holding corporations responsible for frauds they could not prevent could hardly be argued to have deterrent benefits. Because this Note contemplates corporate liability in addition to, not instead of, individual liability, corporate liability is justified as long as it would provide additional deterrent benefits at the same or lower cost than individual liability.

prevented, the deterrence justification evaporates;[166] it follows that the liability scheme should hold corporations accountable only for preventable frauds to encourage efficient fraud deterrence.[167] Whether the corporation can prevent or discourage fraud at acceptable cost depends on the specific nature of the fraud and its relationship to reasonable corporate structure and compliance mechanisms.[168]

This section analyzes each of the circuit court approaches from the perspective of optimal deterrence. Each captures some unpreventable frauds (i.e., is overinclusive) with some—like collective scienter—capturing conduct that strains the very concept of fraud. Some are also underinclusive, precluding corporate liability for frauds that corporations can efficiently deter. Ultimately, none is optimal because none involves consideration of corporate structuring decisions that may enable willful ignorance or otherwise intentionally obscure misleading disclosures.

1. *Respondeat Superior.* — The pure respondeat superior approach is both over- and underinclusive; while variations help remedy some of the issues, more progress is possible with respect to optimizing deterrence. Pure respondeat superior is a blunt instrument, imposing liability on corporations even when they act reasonably.[169] And there may be good reason to hold a corporation liable even though there is no specific individual who can be alleged to have the requisite imputable intent.[170] Respondeat superior does catch the clearest cases of fraud: those driven by an individual bad actor who acts on the corporation's behalf to trick the investing public. But there is an argument that corporate liability is less important in these circumstances because individual liability is likely to

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166. Many of the criticisms of corporate liability for securities fraud sound in the concept of agency costs, arguing that the corporation (meaning, ultimately, its shareholders) is unjustly held responsible for the ultra vires actions of its agents. See Spindler, Optimal Deterrence, supra note 1, at 6–7 (collecting arguments relying on the agency costs critique). Professor James Spindler argues that shareholders do benefit from (and thus desire) fraud in some cases. See id. at 7–12. But the idea that shareholders may encourage fraud in certain circumstances does not imply that the corporation can *always* prevent fraud at reasonable cost even if properly incentivized.

167. Corporations can often efficiently deter fraud because they are better positioned to identify potential fraud internally than external investigators are, thus increasing the probability that fraud will be prevented or discovered and remedied quickly. See Arlen & Kraakman, supra note 68, at 699.

168. A corporation is very likely to be able to prevent fraud committed by a rogue, high-level manager because it can require important decisions and disclosures to be made by multiple managers who are unlikely to have influence over each other. See id. at 702. By contrast, a corporation is very unlikely to be able to prevent so-called fraud premised on pieces of seemingly insignificant knowledge possessed by different employees. See infra section II.C.2.

169. See Khanna, Notion of Corporate Fault, supra note 61, at 370–71; see also United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989) (finding Fox liable for its employee's violation of a consent decree and refusing to consider evidence of Fox's "reasonable diligence" in ensuring compliance).

170. See supra notes 75–78 and accompanying text.

have a sufficient deterrent effect[171] without the additional costs involved in corporate liability.[172] Perhaps recognizing these issues, no circuit court adheres strictly to pure respondeat superior.[173] While respondeat superior remains the baseline, most courts have loosened the traditional rules to allow imputation from agents, especially managers, who did not directly make the misstatement.

Basic practical flaws in the pure version of respondeat superior make it underinclusive from the optimal deterrence perspective. If the person actually making the statement was strictly required to have scienter to support any fraud liability, corporations could always avoid liability by making public statements through walled-off representatives. These representatives would never have the intent (or the capacity) to defraud because they would never have any inside information about the corporation or its business. Further, at the pre-discovery pleading stage, plaintiffs are unlikely to have specific evidence regarding who knew what and when.[174] So the *Southland* variation allowing imputation of scienter from agents who "order or approve" or "furnish information or language for" the misstatement[175] is a wise expansion, but it does not go far enough. Any form of respondeat superior encourages inefficient management and works against optimal deterrence to the extent it encourages corporations to keep information as dispersed as possible. The Seventh Circuit's GM hypothetical illustrates a scenario that leaves the reader with a strong conviction that the corporation should be held liable for fraud but without a clear path to impute scienter.[176] While the Seventh Circuit was focused on the limitations of proof at the pleading stage,[177] holding GM liable for the fraud in this context even if an anonymous fraudster could never be identified would have deterrent benefits. If there were no specific culpable individual causing this gross misreporting, such misreporting could only be a result of intentionality or recklessness on the part of the corporation as a whole reflected in its deficient structure and compliance apparatus.[178] Because no individual would face liability in this circumstance, corporate liability is essential for deterrence.[179]

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171. See Coffee, Reforming the Securities Class Action, supra note 33, at 1563 (arguing that individual liability is typically a stronger deterrent than corporate liability). But see Arlen & Kraakman, supra note 68, at 695–96 (arguing that corporate liability is an important supplement to individual liability when agents are judgment proof or not perfectly rational).

172. See supra note 81.

173. See supra section II.B.1.

174. Recall that the key action in securities litigation typically occurs at the pleading stage. See supra notes 52–53 and accompanying text.

175. Southland Sec. Corp. v. INSpire Ins. Sols., Inc., 365 F.3d 353, 366 (5th Cir. 2004).

176. Makor Issues & Rts., Ltd. v. Tellabs Inc., 513 F.3d 702, 710 (7th Cir. 2008).

177. See id. (indicating "it is possible to draw a *strong inference* of corporate scienter" without identifying an individual fraudster (emphasis added)).

178. See infra section III.B.2.

179. See Arlen & Kraakman, supra note 68, at 695–96.

Respondeat superior is also overinclusive to the extent it leads to corporate liability for unpreventable frauds. When a rogue employee circumvents legitimate and generally effective fraud deterrence mechanisms and falsifies records for their own personal gain, the agency costs argument against corporate liability for securities fraud is most salient.[180] In these cases, the corporation could still be liable under respondeat superior if a purpose to benefit the corporation even partially animated the rogue fraudster,[181] but corporate liability would have no deterrent benefit.

2. *Collective Scienter.* — The collective scienter approach corrects some of the underdeterrence problems of respondeat superior, but it casts a very wide net, creating the potential for corporate liability that does not track the corporation's capacity to deter fraud. It discourages willful blindness but causes other problems associated with broad overdeterrence, including chilling disclosures.[182] As such, its advocates typically endorse it as a pleading theory rather than a true definition of corporate scienter.[183] But an overinclusive pleading theory is arguably as bad as an overinclusive trial standard in the section 10(b) context, where the vast majority of cases are dismissed or settled.[184] If too many cases survive a motion to dismiss based on a questionable pleading theory, there may be an overdeterrence problem even if these cases probably could not be proven at trial.

The strong form of collective scienter has yet to gain widespread acceptance in the circuit courts, and the optimal deterrence analysis confirms that hesitations are well placed. In *Omnicare*, the Sixth Circuit explained that it was not comfortable with the possible collective scienter implications of its previous leading case, *Bridgestone*, which was interpreted as the high-water mark of collective scienter at the time.[185] Collective scienter flouts the spirit of the PSLRA and the broader goal of optimal deterrence by holding corporations liable for so-called fraud that is not clearly recognizable as any kind of intentional wrongdoing.[186] No one could know whether some widespread group of employees had bits of

180. See supra note 73 and accompanying text.

181. Lipton, supra note 17, at 1296. Professor Lipton argued that discomfort with the implications of corporate liability for this type of fraud has pushed courts to modify traditional respondeat superior doctrine in the section 10(b) context. See id. at 1266.

182. See supra note 48 and accompanying text.

183. See, e.g., Heather F. Crow, Comment, Riding the Fence on Collective Scienter: Allowing Plaintiffs to Clear the PSLRA Pleading Hurdle, 71 La. L. Rev. 313, 341–43 (2010); see also Cohen v. NVIDIA Corp. (In re NVIDIA Corp. Sec. Litig.), 768 F.3d 1046, 1063 (9th Cir. 2014) (discussing the possibility that a collective scienter theory could raise an *inference* of corporate scienter); Teamsters Loc. 445 Freight Div. Pension Fund v. Dynex Cap. Inc., 531 F.3d 190, 195–96 (2d Cir. 2008) (same).

184. See supra note 52 and accompanying text.

185. See Ansfield v. Omnicare, Inc. (In re Omnicare, Inc. Sec. Litig.), 769 F.3d 455, 475–76 (6th Cir. 2014); Abril & Olazábal, supra note 88, at 91–95 (referencing *Bridgestone* as the key example of collective scienter principles in securities litigation).

186. See supra note 143.

knowledge that could be aggregated to prove the misleading nature of some corporate statement, and thus corporations have little to no power to control these circumstances.[187] Therefore, allowing a complaint premised on such allegations to survive a motion to dismiss undercuts the optimal deterrence goal of the securities fraud enforcement scheme.[188]

3. *High Managerial Agents*. — The high managerial agent approach is the product of careful reasoning, but its original advocates in the securities fraud context were not focused specifically on optimizing deterrence.[189] It improves on the underdeterrence problems of pure respondeat superior by allowing plaintiffs to impute scienter from certain management employees to the corporation even if those managers could not be connected to the fraudulent misrepresentation. Allowing imputation of scienter from management employees regardless of connection to the misstatement makes sense from a deterrence perspective. The executives who are most likely to be defined as "high managerial agents" tend to have incentives more aligned with the corporation's and are more likely to be subject to the supervision of the board of directors.[190] Further, they are likely to be in a position to prevent or correct misstatements, even if they are not involved enough in the original statement to be eligible for imputation under the *Southland* approach.[191]

One shortcoming of the high managerial agent approach is the difficulty in defining "high managerial agent," which the Sixth Circuit did not engage with in *Omnicare*.[192] Following the Model Penal Code, Professors Abril and Olazábal defined the category to include "an officer . . . a partner, or any other agent of a corporation or association 'having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.'"[193] This definition begs the question of *whose* conduct may fairly be assumed to represent the policy of the corporation. In practice, courts in section 10(b) cases may or may not impute scienter from a variety of high-ranking managers.[194] And there is no principled reason to exclude, for example,

187. Cf. Stavros Gadinis & Amelia Miazad, The Hidden Power of Compliance, 103 Minn. L. Rev. 2135, 2139, 2179–80 (2019) (arguing that compliance officers' power lies in their ability to make key players aware of key information that could, in the securities fraud context, contradict public statements and thus create scienter).

188. See supra notes 49–51 and accompanying text.

189. See Abril & Olazábal, supra note 88, at 101–02 (using the similar deterrence goals to justify a comparison to criminal law but otherwise not engaging with the concept).

190. Cf. Rose, The Multienforcer Approach, supra note 49, at 2222 (arguing that private enforcement encourages directors to better control for the risk of "managerial fraud").

191. See supra notes 124–127 and accompanying text.

192. See supra notes 158–161 and accompanying text.

193. Abril & Olazábal, supra note 88, at 146 n.210 (quoting Model Penal Code § 2.07(4)(c) (Am. L. Inst. 1985)).

194. See, e.g., Ansfield v. Omnicare, Inc. (In re Omnicare, Inc. Sec. Litig.), 769 F.3d 455, 483 (6th Cir. 2014) (indicating that a Vice President who conducted audits is "potentially" a high managerial agent); Siracusano v. Matrixx Initiatives, Inc., 585 F.3d 1167,

regional managers.[195] Unconstrained, this category could expand to encompass anyone with management responsibilities; at the limit, it becomes virtually indistinguishable from the collective scienter approach.[196] Conversely, if "high managerial agent" were defined with a bright-line rule, courts would lose the valuable flexibility to consider the unique circumstances of each corporate structure.

More fundamentally, this approach does not connect to the corporation's capacity to deter fraud nor to calibrate managerial incentives effectively. It may be argued that each "high managerial agent" *should* know the content of every public corporate statement and be positioned to verify the underlying facts, but, given the volume of corporate speech, this level of monitoring may not always be possible. By imputing these managers' knowledge to the corporation with reference to a particular misstatement regardless of their actual knowledge of the statement, the high managerial agent approach is potentially overdeterrent. One manager's knowledge may be contradicted by one public statement even if that manager (and management as a whole) has done everything in their power to deter fraud; this approach does not explicitly leave room for courts to weigh whether corporate scienter has been established in these circumstances.[197] And while it might be argued that the prospect of corporate liability should encourage these managers to do more to deter fraud, their incentives with respect to each potential misstatement may not be aligned with the corporation's.[198] On any given day, a manager may be distracted by other corporate projects or captured by personal goals;[199] they are much more likely to consider the corporation's liability exposure when making big-picture decisions impacting overall corporate structure than they are when making individual, moment-to-moment monitoring decisions.[200] But the high managerial agent approach implicitly focuses on the micro-universe of each potentially fraudulent misstatement rather than the bigger picture of

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1181 (9th Cir. 2009) (grouping a Vice President with the CEO and CFO as "high-level executives"), aff'd, 563 U.S. 27 (2011).

195. See State v. Cmty. Alts. Mo., Inc., 267 S.W.3d 735, 737, 744 (Mo. Ct. App. 2008) (finding that a "lead staff person" who "supervised subordinate employees in a managerial capacity" is a high managerial agent under the Model Penal Code).

196. As a result, the criticisms of collective scienter could apply to the high managerial agent approach as well. See supra section II.C.2.

197. While Professor Lipton has argued courts already do this surreptitiously, see Lipton, supra note 17, at 1276–80, this reasoning is better made explicit.

198. See supra note 71 and accompanying text.

199. See Reza Dibadj, Reconceiving the Firm, 26 Cardozo L. Rev. 1459, 1493 (2005) (explaining managers' personal goals that might conflict with business objectives include "personal financial rewards, security, power and prestige within the organization, desire to be liked, human sympathy, the urge to create and perhaps occasionally the desire for an easy life" (internal quotation marks omitted) (quoting William L. Baldwin, The Motives of Managers, Environmental Restraints, and the Theory of Managerial Enterprise, 78 Q.J. Econ. 238, 248 (1964))).

200. See supra note 77 and accompanying text.

corporate structure and compliance policies. These structure and compliance decisions represent the corporation's true power to deter fraud, and a definition of corporate scienter can best optimize deterrence by capturing intentions at that level.

III. ORGANIZATIONAL FAULT AND STRUCTURAL CORPORATE SCIENTER

Similar policy concerns animate the varying scienter pleading standards in the circuit courts. These courts regularly discuss the legislative purpose behind the PSLRA, the need to avoid runaway liability for corporations in securities fraud class actions, and whether the corporation can reasonably be said to be at "fault" for the fraud.[201] While the circuit courts have not explicitly applied optimal deterrence analysis, their reasoning sounds in calibrating incentives. But each circuit court approach is imperfect in that it fails to connect corporate liability to the corporation's capacity to deter fraud.[202]

As a result, most circuits have moved or are moving towards the high managerial agent approach,[203] which fares better than other approaches when evaluated under an optimal deterrence lens even though it still fails to capture the corporation's direct role in fraud deterrence.[204] The high managerial agent approach is appealing in that it locates the corporation's mind in the individuals most identifiable with the corporation itself: its high-ranking managers.[205] But these managers may be more or less identifiable with the corporation depending on what type of work they are engaged in on its behalf. Even high-ranking managers may be more "human" with respect to their day-to-day monitoring role and more "corporate" when they are intentionally considering big-picture corporate structure, at least with respect to incentives.[206] Regardless, the high managerial agent approach does not account for the possibilities that a corporation's design intentionally prevents management from becoming aware of relevant information or that its compliance efforts are unreasonably insufficient.[207]

This Part argues that intentions behind corporate structuring and compliance decisions should be factored into the analysis of corporate scienter. Ultimately, a corporation's mind is reflected in its self-determined structure. The Organizational Sentencing Guidelines promulgated by the U.S. Sentencing Commission (Guidelines) provide a

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201. See Lipton, supra note 17, at 1266, 1276–80.

202. See supra section II.C.

203. See supra note 163.

204. See supra section II.C.3.

205. Although, as discussed above, the current definitions of "high managerial agent" do not limit how deep in the organizational chart courts may look to find high-ranking managers. See supra notes 192–196 and accompanying text.

206. See supra notes 77, 199 and accompanying text; see also supra section II.C.3.

207. See infra notes 221–223 and accompanying text.

model for considering structure and compliance efforts in the corporate crime context that could be applied within the analysis of corporate scienter.[208] Adding consideration of organizational features like structure and compliance to the current approaches would better optimize deterrence by allowing courts to hold corporations directly accountable for deficient structures, reduce or exclude corporate liability in cases of unpreventable frauds, and encourage adoption of effective fraud deterrence structures without deviating from black-letter law. Section III.A explains the teachings of the Guidelines as applied to the corporate scienter problem. Section III.B reviews two hypothetical case studies that illustrate the potential practical benefits of considering structure in section 10(b) class actions.

A. *Corporate Scienter Based on Structuring Decisions*

To calibrate corporations' incentives to deter fraud, courts should be attuned to corporations' actual deterrence capacities and thus should consider the features of the corporation itself more directly in analyzing the corporate scienter. Incorporating principles of organizational liability from criminal law into the definition of corporate scienter can help achieve this goal by facilitating consideration of corporate intent at the level of ex ante structuring decisions, which otherwise would not be reached by scienter doctrine. This section first reviews some principles of organizational liability and incentive creation that are relevant to the corporate scienter inquiry. It then proposes that courts consider these principles as a factor in whichever approach to corporate scienter they currently employ.

1. *Organizational Structure and Liability.* — From the optimal deterrence perspective, corporations should be held liable only for frauds they were competent to prevent.[209] When a corporation knows of a pending fraudulent misstatement through one of its agents, the corporation is competent to prevent the fraud: That knowledgeable agent can take action to prevent the misstatement themselves if they are appropriately positioned within the organization, or otherwise they can notify someone who is.[210] But the reverse does not necessarily follow. Even

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208. Prior work has advocated incorporating these guidelines in the section 10(b) regime, although not specifically as advocated here. See Abril & Olazábal, supra note 88, at 160–64 (arguing culture as used in the Guidelines is evidence of corporate scienter); David Ian Wishengrad, Comment, Securities, Scienter & Schizophrenia: Should the Efficacy of Compliance Initiatives Within Multi-Service Investment Firms Be Used to Determine Scienter for 10b-5 Violations Under Federal Securities Law?, 25 Pace L. Rev. 383, 402–04 (2005) (pointing to the Guidelines as evidence that efficacy of compliance initiatives is a "valid assessment of 'organizational scienter'").

209. See supra notes 164–165 and accompanying text.

210. This is possible assuming that the corporation established channels that facilitate the flow of relevant information to those agents who are positioned to take appropriate action and that those agents (presumably managers or lawyers) are properly motivated to

when no single agent is aware of the misstatement—and thus, no agent has scienter—the corporation may still have been competent to deter the fraud because its self-determined structure influences its agents' conduct with respect to reporting potentially relevant information to management.[211] Said differently, corporate structure determines who becomes aware of which information and when, and structures that inhibit fraud detection both prevent scienter from attaching to any individual agent and encourage fraud.[212] Considering corporate structure as an element of corporate scienter would mitigate these potentially inefficient incentives.

The current corporate criminal sentencing regime incorporates general principles of "corporate good citizenship" and corporate culture that reflect the organization's structural efforts to reduce misconduct within its ranks.[213] Corporate liability in both the criminal and civil contexts is typically based on agency principles, so a corporation can be held liable for its agent's crimes or torts even if the agent's actions directly conflicted with specific corporate directions[214] or the agent did not act with an obvious motive to benefit the corporation.[215] These categories of liability may be disconnected from the corporation's ability to deter wrongdoing, and the Guidelines recognize this by allowing corporations to mitigate the punishment imposed on them through "[c]ompliance standards and procedures reasonably capable of reducing the prospect of criminal activity."[216] These "effective compliance programs" might involve appropriate oversight and monitoring systems, effective channels of communication, and consistent enforcement of compliance policies and related sanctions.[217] Overall, efforts like these both contribute to an honest corporate culture and enable the corporation to prevent, detect, and

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respond to the information. See DeMott, supra note 77, at 45, 55–56. Even if they do not respond by preventing the fraud, they are likely to have imputable scienter. See Gadinis & Miazad, supra note 187, at 2180.

211. See DeMott, supra note 77, at 45–46.

212. In fact, a liability system that depends on the information the party (or its agent) actually possesses creates a perverse incentive to intentionally avoid obtaining information that might expand the scope of liability. See Shavell, supra note 9, at 261. Professor Shavell's model shows that this kind of liability arrangement is suboptimal. Id. at 268–69.

213. See Symposium, Corporate Crime in America: Strengthening the "Good Citizen" Corporation, U.S. Sent'g Comm'n 119, 261 (1995), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/19950907-symposium/WCSYMPO_opt.pdf [https://perma.cc/ECC9-BVW2].

214. Desio, supra note 24; see also supra note 169 and accompanying text.

215. See Ira S. Bushey & Sons v. United States, 398 F.2d 167, 170–72 (2d Cir. 1968) (finding the government vicariously liable when its sailor returned drunk to his ship at night and caused damage by "turn[ing] some valves" because "it was foreseeable that crew members crossing the drydock might do damage").

216. Desio, supra note 24.

217. Id.

respond to potential fraud.[218] To encourage corporations to make such efforts, the Guidelines allow for a "mitigation credit" for firms that have adopted effective compliance measures but are nevertheless convicted of corporate criminal conduct. This credit can reduce corporate criminal fines by up to ninety-five percent and gives courts leeway to tailor punishment based on the corporation's efforts to prevent wrongdoing from happening in the first place.[219]

While connecting corporate fraud liability to the corporation's structure and compliance efforts is likely to help optimize deterrence,[220] it is less clear that the concept of corporate structure can be reconciled with a state of mind requirement like scienter. But to say that a corporation's structure itself rises to the level of state of mind is simply to recognize that corporate structure is the product of intentional choices by corporate actors.[221] Corporations have the capacity to be intentional about the level of direct monitoring required and the way such requirements are enforced, about the lines of communication available for everyday reporting and reporting suspected wrongdoing, and about the prescribed response to possible wrongdoing. These structural features reflect the corporation's intentionality about reducing fraud because they reflect decisions by high-level actors that directly determine corporate action with respect to fraud reduction. Some structures or practices are so clearly deficient that they could raise an inference of recklessness or willfulness with respect to certain misstatements.[222] At least at the pleading stage, plaintiffs could argue that corporate structure is a product of the intent of *some* high-ranking corporate agent, since only directors and high-level managers can influence the corporation's structure. The collective shift toward the high managerial agent approach in the circuit courts supports the idea that scienter could attach from decisions that impact the corporation's structure and thus facilitate—but do not directly connect

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218. See Barry D. Baysinger, Organization Theory and the Criminal Liability of Organizations, 71 B.U. L. Rev. 341, 341–42 (1991) (arguing these control systems "force low-level managers and other employees to internalize the organizational costs of their opportunistic actions" and the result is "a relatively effective system of deterrence"); see also Arlen & Kraakman, supra note 68, at 712 (arguing that the possibility of duty-based corporate liability makes the threat of internal sanctions more credible, which has its own deterrence benefits). Professor Donald Langevoort identifies these reputational deterrent mechanisms as elements of corporate culture. See Langevoort, Organized Illusions, supra note 70, at 132.

219. Desio, supra note 24.

220. See Baysinger, supra note 218, at 342; supra notes 164–212 and accompanying text.

221. See DeMott, supra note 77, at 40 (explaining that corporate principals design agents' incentives).

222. For examples, see infra section III.B; see also Abril & Olazábal, supra note 88, at 160–61 (presenting a fraudulent culture hypothetical based on the facts of In re Alpharma, Inc., Sec. Litig., 372 F.3d 137 (3d Cir. 2004)). Under the PSLRA, scienter must be alleged with respect to each alleged misstatement, see 15 U.S.C. § 78u-4(b)(2)(A) (2018), but this approach does not preclude that.

to—the alleged fraud.[223] And this way of considering management decisions is better, from an optimal deterrence perspective, than the Sixth Circuit's high managerial agent approach because it connects more clearly to the corporation's capacity to deter fraud.[224]

2. *Combining Respondeat Superior With Organizational Fault Theory.* — Infusing principles of organizational fault drawn from the Guidelines into the corporate scienter inquiry can help optimize the fraud deterrence potential of section 10(b). But this is not to say that corporate structure should be the only way to ascribe intent to corporations; the principles of organizational fault outlined in section III.A.1 can and should be applied within an existing imputation framework.[225] As originally proposed, the Abril and Olazábal high managerial agent approach included the possibility of locating scienter in "the corporation itself,"[226] and corporate criminal enforcement and organizational theory provide tools to analyze the corporation's scienter independently of direct imputation from an agent.[227] This section envisions organizational fault as an added factor in the respondeat superior analysis, finding that this addition fully addresses the optimal deterrence problems with respondeat superior and that other variations are thus unnecessary. But the idea of structural scienter need not be tied to any particular approach; courts should consider injecting organizational fault as one factor in analyzing corporate scienter within any baseline approach.

Considering organizational fault would require courts to analyze corporate scienter more holistically by weighing allegations and evidence related to corporate structure and compliance measures to either establish or mitigate an inference of corporate scienter. In the section 10(b) context, the most important features of the corporate structure are reporting requirements, effective options for reporting suspected wrongdoing or problems sufficiently likely to affect the corporation as a whole, and oversight by officials with appropriate incentives.[228] The response to fraud is also relevant to a corporation's organizational fault.[229] When these structural factors are so deficient that they did not meet a

223. See supra section II.B.3; see also Lipton, supra note 17, at 1316–17.

224. See supra section II.C.3.

225. In any case, given the current state of the doctrine in the Supreme Court, some imputation theory would remain the baseline for ascribing intent to corporations. See supra section II.A (concluding that Supreme Court doctrine would not permit completely abandoning imputation).

226. See Ansfield v. Omnicare, Inc. (In re Omnicare, Inc. Sec. Litig.), 769 F.3d 455, 476 n.2 (6th Cir. 2014) (explaining this factor and rejecting it as "highly theoretical"); Abril & Olazábal, supra note 88, at 151–64 (indicating scienter in the corporation itself can be established through the corporation's history, common knowledge, or culture).

227. See supra section III.A.1.

228. These might include lawyers, see DeMott, supra note 77, at 55–56, or multiple managers working in tandem as concurrent checks on each other, see Arlen & Kraakman, supra note 68, at 702.

229. See Desio, supra note 24.

minimum threshold of fraud deterrence, or that there is a culture of deception within the firm, this may raise a strong inference that the corporation itself had the intent to defraud.[230] On the other hand, when the corporation is appropriately structured and an agent intentionally circumvents fraud controls, these circumstances would weigh against imputing that agent's scienter to the corporation.[231] And courts might consider allowing corporations to defend allegedly deficient designs by pointing to legitimate business justifications that rebut the inference of "willfully" deficient structure.[232]

Grounding corporate scienter in a corporation's deficient structure would be a deviation from the usual reliance on agency law, but the texts of the relevant laws and regulations do not preclude this framework. The textual underpinnings of section 10(b) class action litigation are sparse.[233] Congress has said plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind" in their complaint and must allege scienter "with respect to each act or omission."[234] Beyond these directives, no legislative text defines what can or cannot be factored in to the already abstract analysis of corporate scienter, and nothing limits courts to a strict imputation analysis. In fact, most courts look beyond strict agency principles to help calibrate their corporate scienter analysis in these cases.[235] And there is a distinct intentionality about corporate structuring.[236] Even though decisions regarding corporate structure typically cannot be connected directly to fraudulent misstatements, they determine the flow of information that comes to define what is or isn't fraud. Thus, considering structure as intention allows courts to close a loophole that has driven the appeal of otherwise questionable doctrines such as collective scienter: Courts want to hold corporations accountable for designing themselves to allow abdication of responsibility. Considering institutional structure as an

230. See supra notes 220–223 and accompanying text.

231. Such a mitigation analysis need not be applied as a bright-line rule. If a corporation had a robust fraud-deterring structure, but half of its officers were complicit in the fraud, the facts could still be found to support a strong inference of corporate scienter. See Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 326 (2007) (directing lower courts to consider plaintiffs' allegations holistically to determine whether they raise a strong inference of scienter).

232. Courts could consider such evidence to combat a rebuttable presumption of corporate scienter created by a plaintiff's deficient-structure evidence or otherwise as an affirmative defense.

233. See supra section I.A.1.

234. 15 U.S.C. § 78u-4(b)(2)(A) (2018).

235. See, e.g., Loc. 731 I.B. of T. Excavators and Pavers Pension Tr. Fund v. Diodes, Inc., 810 F.3d 951, 958–59 (5th Cir. 2016) (conducting a fact-intensive analysis before allowing imputation); see also Abril & Olazábal, supra note 88, at 120 ("[S]ome scholars and courts have proposed that the proper way to apply the collective knowledge doctrine is in conjunction with other considerations that may more accurately point to culpability, most notably the presence of willful blindness.").

236. See supra notes 220–223 and accompanying text.

element of corporate scienter allows intent (and, ultimately, culpability) determinations to implicate these deficient designs directly.

Moreover, considering organizational fault principles helps optimize deterrence and comports with the purpose of the overall statutory enforcement scheme. Optimally calibrating fraud deterrence is the key goal of corporate liability in section 10(b) class actions, and scienter standards facilitate that goal. Considering organizational fault helps courts encourage optimal deterrence by mitigating the over- and underdeterrence problems associated with existing approaches. It would shape corporate scienter to reflect statutory purpose and policy goals by limiting corporate liability for frauds in which the corporation is truly a victim and expanding liability to capture wrongdoing that is within the intended scope of section 10(b) but unaddressed due to current scienter formulations. The uneven evolution of corporate scienter standards in the circuit courts can be explained as an effort to incorporate certain policy goals into the doctrine; structural scienter captures these goals in a cohesive framework motivated by optimal deterrence. Injecting this framework into existing imputation approaches would be far preferable to ad hoc revisions reflected in the trend in the circuit courts toward high managerial agent-style approaches[237] and flirtations with collective scienter.[238]

B. *Hypothetical Case Studies*

The previous section focused on the theoretical benefits of considering structure and compliance principles reflected in the Guidelines as one factor in analyzing corporate scienter. This section reviews two hypothetical case studies to address the practical benefits of adding a structural scienter category.

1. Makor *GM Hypothetical*. — Recall the Seventh Circuit's GM hypothetical from *Makor*.[239] The Seventh Circuit intended to illustrate the need to allow plaintiffs to allege corporate scienter even if they cannot identify a responsible individual[240] and concluded that the anonymous fraudster approach would be sufficient to handle these facts.[241] Other courts have quoted this hypothetical as justification for collective

237. See supra note 163 and accompanying text.

238. See supra section II.B.2.

239. The hypothetical is as follows:

> Suppose General Motors announced that it had sold one million SUVs in 2006, and the actual number was zero. There would be a strong inference of corporate scienter, since so dramatic an announcement would have been approved by corporate officials sufficiently knowledgeable about the company to know that the announcement was false.

Makor Issues & Rts., Ltd. v. Tellabs Inc., 513 F.3d 702, 710 (7th Cir. 2008).

240. Id.

241. See Pugh v. Trib. Co., 521 F.3d 686, 697 & n.5 (7th Cir. 2008).

scienter.[242] But the organizational fault framework is actually best suited to handle at least one version of this hypothetical.

These facts could arise in a few circumstances. In one version, the speaking official or someone else at the management level who advises them knew that the company sold no cars and nevertheless made or supplied the rosy announcement. That person would have scienter that could be imputed to the corporation under the *Southland* version of respondeat superior,[243] and most courts would find scienter had been sufficiently alleged even if the plaintiffs could not identify the fraudster at the pleading stage.[244] But, in another version, the low-level salespeople all come together and agree to do just enough work to keep up appearances but no more. They make no sales. Through some lie or even an error, management receives a report of a million cars sold and immediately passes this news to the public. Here, no one has scienter that can be imputed to the corporation with respect to the false public statement. GM would not be liable under respondeat superior,[245] even though this extreme communication failure could seemingly only occur if the corporation were intentionally designed to prevent relevant information from reaching high-level management. Collective scienter would probably support liability, but commitment to collective scienter is likely ill-advised.[246]

This situation would easily fall into the organizational fault category of scienter. That an entire class of employees could functionally cease working without this being reported to upper management, and that some further error could lead to a grossly inflated sales report, would provide prima facie evidence of a failure to maintain effective communication and oversight. One might argue that this structure could only result from a corporate framer's intention to prevent information from flowing to the top, or else from extreme recklessness. But in any case, the obvious failures in communication and oversight presented here seem to implicate the type of reckless or intentionally deficient structure that should establish corporate scienter under the proposed framework. This version of corporate scienter allows for liability based on the corporation's own

242. See Teamsters Loc. 445 Freight Div. Pension Fund v. Dynex Cap. Inc., 531 F.3d 190, 195–96 (2d Cir. 2008) (quoting and adopting the GM hypothetical); Glazer Cap. Mgmt., LP v. Magistri, 549 F.3d 736, 744 (9th Cir. 2008) ("[T]here could be circumstances in which a company's public statements were so important and so dramatically false that they would create a strong inference that at least *some* corporate officials knew of the falsity upon publication." (citing *Makor*, 513 F.3d at 710)).

243. See supra notes 124–127 and accompanying text.

244. The Second, Fifth, Seventh, Ninth, and Eleventh Circuits have all endorsed the anonymous fraudster pleading theory. See supra sections II.B.1–.2.

245. Plaintiffs could probably still sustain a complaint through a motion to dismiss on these facts by imagining an anonymous fraudster within the managerial ranks. See supra note 140. But presumably, once it was established that no one in management knew about the discrepancy, GM could not be held liable due to a lack of imputable scienter.

246. See supra section II.C.2.

relevant shortcomings without introducing the problems associated with commitment to collective scienter or engage with what managers "must have known."

2. Matrixx Initiatives *Counterfactual*. — While the facts of *Matrixx Initiatives v. Siracusano* supported a finding of scienter by imputation in the Ninth Circuit,[247] one might imagine an alternative version in which a finding of corporate liability would still be warranted even though there is no imputation avenue. Consider a scenario where Clarot is not a Vice President but instead is sufficiently low ranking that he is not presumed to be involved in the formulation of press releases and SEC filings. He has the same information about the anosmia reports but has not reported it to anyone further up the chain of management. Further assume that there is conclusive evidence that the managers were not aware of lawsuits filed against the company—perhaps Clarot is engaged in a massive cover-up, or perhaps communication from the legal department to management is simply failing. If all the other facts were the same as *Matrixx Initiatives*, there might still be a case for corporate liability. The fraud may have been outside the corporation's reasonable ability to control if Clarot actively ignored reporting protocols and prevented the legal department from communicating with management due to some personal vendetta. But if Clarot were just not required (or worse, were unable) to report this information up the chain, and if the legal department were similarly disconnected from upper management, individual liability would make much less sense and corporate liability would become more appealing.

The organizational fault framework has double benefits in this scenario: It would give the corporation the opportunity to mitigate its exposure in the rogue Clarot version and would hold Matrixx responsible if its internal systems were deficient. Assuming Matrixx could show it had reasonably sufficient oversight and communication mechanisms in place, and that it punished Clarot appropriately upon discovering the cover-up, its liability could be greatly reduced or eliminated. By contrast, if the corporation were set up to prevent or discourage reporting such that public communications continued without input from lawyers or research scientists, plaintiffs could allege scienter on that basis even if its deficient systems prevented scienter from attaching to anyone actually responsible for its statements.

CONCLUSION

Given that most section 10(b) cases settle if they make it past a motion to dismiss and that scienter is a frequent battleground issue in fraud-on-the-market class actions, the definition of scienter at the pleading stage is often outcome determinative. It should be supported by sound legal reasoning and informed by the policy objectives captured in optimal

247. See supra notes 105–113 and accompanying text.

deterrence. The optimal deterrence goal suggests that corporate scienter should be conceptually connected to the corporation's capacity to deter fraud, which exists primarily in structure and compliance decisions. The Organizational Sentencing Guidelines provide a starting point to help courts consider these decisions as one factor in the analysis of corporate scienter, and each circuit should inject their teachings into its doctrine.

Incorporating corporate structure into the analysis of corporate states of mind is conceptually and legally justified and practically helpful. The category of structural scienter directly captures the policy decisions underlying the securities litigation regime that have driven both the scienter circuit split and the appeal of the high managerial agent approach. Further, the organizational fault framework advocated herein can be injected into any existing corporate scienter approach to give courts better tools to calibrate corporate incentives with respect to securities fraud no matter how they have historically handled corporate scienter. Corporations may not have literal minds, but they are intentionally designed. Structural decisions can and should be considered to reflect corporate intentions separate from those of any individual agent at any particular time to supplement the analysis of corporate scienter in section 10(b) litigation.

COMING UP SHORT: USING SHORT-SELLER REPORTS TO PLEAD LOSS CAUSATION IN SECURITIES CLASS ACTIONS

*Matthew B. Schneider**

Plaintiffs in securities class actions have increasingly relied on reports published by anonymous short sellers when alleging the element of loss causation. Indeed, short-seller reports are useful for plaintiffs, as they purport to reveal negative information about a targeted company and generally cause a decline in the targeted company's stock price. Unlike other types of corrective disclosures, however, short-seller reports are unique in that they are written by self-interested parties who benefit financially from driving down stock prices. For that reason, short-seller reports are potential tools for stock-price manipulation. This Note, addressing a recent circuit split on this issue, argues that courts should require more from plaintiffs who rely on short-seller reports for their complaints' loss causation allegations. In particular, this Note advocates for the judicial assessment of certain facts available at pleading—namely, price reversals, short-seller reputation, and corroborative corrective disclosures—when courts consider a motion to dismiss in cases that rely on revelations contained in short-seller reports. In doing so, courts can reduce burdensome litigation based on manipulative reports while enabling the compensation of genuinely defrauded plaintiffs.

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INTRODUCTION

In the summer of 2020, Nikola Corp. was in high gear. The company, a purported developer of electric and hydrogen-powered trucks, had attained a market capitalization of $30 billion just days after its initial public offering.[1] This made the startup more valuable than older automakers like Ford and Fiat Chrysler, despite it never having sold a single vehicle.[2] Such shareholder optimism was not entirely unwarranted. For instance, the company's founder, Trevor Milton, claimed that the

1. Ben Foldy, Electric-Truck Startup Nikola Bolts Past Ford in Market Value, Wall St. J., https://www.wsj.com/articles/electric-truck-startup-nikola-bolts-past-ford-in-market-value-11591730357 (on file with the *Columbia Law Review*) (last updated June 9, 2020). A firm's market capitalization is a measure of value of a firm that represents the total value of a company's stock, calculated as the price of a single share multiplied by the number of shares outstanding. Market Cap Explained, FINRA (Sept. 30, 2022), https://www.finra.org/investors/insights/market-cap [https://perma.cc/JA7C-LMS4].

2. Foldy, supra note 1.

company had a working prototype of one of its hydrogen-powered vehicles;[3] meanwhile, General Motors took a $2 billion stake in Nikola.[4]

Nikola's fortunes changed, however, on September 10, 2020. On that day, a short seller[5] published a report declaring that the company was an "intricate fraud," having mischaracterized the state of the technology it was developing and the value of the reservations it had booked.[6] In response to this report, Nikola's stock price declined by over 11% and fell by another 14.5% the following day.[7] Milton resigned from the company shortly thereafter and was eventually charged with—and convicted of—securities fraud.[8] The company's stock price hovered at just over $3 as of October 2022, down from over $40 just before the short seller published its report.[9] Unsurprisingly, Nikola shareholders sued the company in a private securities class action, seeking compensation for their losses associated with the publication of the short-seller report and other subsequent developments.[10]

Contrast the plight of Nikola with recent events at Farmland Partners, a real-estate investment trust.[11] On July 11, 2018, an anonymous short

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3. Corinne Ramey & Ben Foldy, Nikola Founder Faces Securities-Fraud Trial Over Promises About Electric Trucks, Wall St. J., https://www.wsj.com/articles/nikola-founder-faces-securities-fraud-trial-over-promises-about-electric-trucks-11662894001 (on file with the *Columbia Law Review*) (last updated Sept. 11, 2022).

4. Mike Colias, GM Stock Jumps on News of Stake in Electric-Vehicle Company Nikola, Wall St. J., https://www.wsj.com/articles/general-motors-takes-stake-in-electric-vehicle-company-nikola-11599568421 (on file with the *Columbia Law Review*) (last updated Sept. 8, 2020).

5. Short sellers are investors who sell securities they have borrowed, hoping that the price of the security will decline, allowing them to replace the borrowed security for a lower price than which they sold the security. GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 196 (3d Cir. 2001).

6. Nikola: How to Parlay an Ocean of Lies Into a Partnership With the Largest Auto OEM in America, Hindenburg Rsch. (Sept. 10, 2020), https://hindenburgresearch.com/nikola/ [https://perma.cc/R52V-UEAP].

7. Consolidated Amended Class Action Complaint at 135, Borteanu v. Nikola Corp., No. CV-20-01797-PHX-SPL (D. Ariz. filed Jan. 24, 2022), 2022 WL 1081539.

8. Corinne Ramey & Ben Foldy, Nikola Founder Trevor Milton Convicted of Securities Fraud, Wall St. J., https://www.wsj.com/articles/nikola-founder-trevor-milton-convicted-of-securities-fraud-11665779578 (on file with the *Columbia Law Review*) (last updated Oct. 14, 2022).

9. Id.

10. See Consolidated Amended Class Action Complaint at 10–12, *Borteanu*, 2022 WL 1081539 (alleging damages following a 76% decrease in the price of Nikola shares between September 2020 and July 2021).

11. Justin Baer, Short Sellers Upended a Small Farm Real-Estate Company. This Is What It Looked Like., Wall St. J. (Sept. 25, 2022), https://www.wsj.com/articles/short-sellers-upended-a-small-farm-real-estate-company-this-is-what-it-looked-like-11664076506 (on file with the *Columbia Law Review*). Real estate investment trusts own and operate real estate. Real Estate Investment Trusts (REITs), SEC, https://www.investor.gov/introduction-

seller published a report on the website *Seeking Alpha*, claiming that the company's lending practices to related parties put it at risk of insolvency.[12] That day alone, Farmland's stock price declined 39%.[13] As with Nikola, investors in Farmland Partners sued; in their complaint, Farmland's shareholders alleged that the company defrauded them and sought to recover damages resulting from the decline in the share price following the report's release.[14]

The issue, however, was that the allegations contained in the short-seller report were not true. Instead, the author of the article, who was working on stock research for a hedge fund that held a short position in Farmland Partners, later admitted that his report was incorrect.[15] Indeed, Farmland's auditors confirmed that the company was not lending to related parties.[16] Nonetheless, Farmland's stock price took over two years to return to its price before the short-seller report had been published.[17] Moreover, Farmland spent years fighting the class action suit brought by its shareholders, which was only dismissed in May 2022, nearly four years after the short seller published its report.[18]

These episodes highlight a growing dilemma for courts overseeing private securities fraud cases: whether short sellers, who by definition have a strong incentive to drive down a stock's price, can be relied on to show that securities fraud took place. As the Nikola saga suggests, short-seller reports can expose corporate fraud. Accordingly, investors misled by statements made by corporate executives or contained in corporate filings deserve recompense when short sellers expose those misrepresentations. On the other hand, the events at Farmland Partners show how easy it is for a short seller to manipulate the market and create investor losses. While such malicious activities might harm investors, companies should not face yearslong litigation and the threat of large settlement payments to their shareholders when they have done nothing wrong.

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investing/investing-basics/investment-products/real-estate-investment-trusts-reits [https://perma.cc/M3PS-P7JN] (last visited Feb. 25, 2024).

12. Sinéad Carew, Farmland Partners Shares Skid on Short Seller Report; CEO Disputes Findings, Reuters (July 11, 2018), https://www.reuters.com/article/us-farmland-prtnrs-stock/farmland-partners-shares-skid-on-short-seller-report-ceo-disputes-findings-idUSKBN1K12LA [https://perma.cc/M793-4DG8].

13. Baer, supra note 11.

14. Amended Class Action Complaint for Violations of the Federal Securities Laws at 57–58, Turner Ins. Agency, Inc. v. Farmland Partners Inc., No. 18-cv-02104-DME-NYW (D. Colo. filed Mar. 11, 2019), 2019 WL 1613308.

15. Baer, supra note 11.

16. Id.

17. Id.

18. Press Release, Farmland Partners Inc., Farmland Partners: 'Short and Distort' Class Action Lawsuit Officially Concluded (May 9, 2022), https://www.businesswire.com/news/home/20220509005246/en/ [https://perma.cc/FQC7-X9HJ].

Short-seller reports have played an increasingly prominent role in securities class actions, and plaintiffs' attorneys often rely on such reports in their complaints to serve as corrective disclosures.[19] In recent cases, the circuit courts have taken differing approaches to this issue. The Ninth Circuit has taken a restrictive approach and has concluded that certain anonymous short-seller reports cannot serve as corrective disclosures.[20] Meanwhile, the Second Circuit—along with several district courts—has taken a permissive approach, refusing to assess the credibility of short-seller reports at the pleadings stage.[21]

This Note will argue that both approaches raise issues. The former approach—rejecting short-seller reports as corrective disclosures as a matter of law—is too restrictive, as it prevents courts from considering whether the reports actually did disclose new information to the market. The latter approach—simply not assessing the credibility of short-seller reports at the pleadings stage—is too permissive, as most securities litigation cases never proceed to a fact-finder (or even to summary judgment) and instead settle, potentially leaving corrective disclosures

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19. See Cornerstone Rsch., Securities Class Action Filings: 2023 Year in Review 29 (2024), https://www.cornerstone.com/wp-content/uploads/2024/01/Securities-Class-Action-Filings-2023-Year-in-Review.pdf [https://perma.cc/QTA2-5TFW] [hereinafter Cornerstone Rsch., 2023 Year in Review] ("In 2023, 19 core federal first identified complaints, or about 9%, alleged stock price drops related to reports published by short sellers . . . ."); Peter Molk & Frank Partnoy, The Long-Term Effects of Short Selling and Negative Activism, 2022 U. Ill. L. Rev. 1, 14, 32 (finding eighty-four securities class actions that relied on short-seller reports from 2009 to 2016); Nessim Mezrahi, Stephen Sigrist & Carolina Doherty, More Securities Class Actions May Rely on Short-Seller Data, Law360 (Jan. 10, 2022), https://www.law360.com/securities/articles/1453499/ (on file with the *Columbia Law Review*) (stating that, in 2021, "[a]round 21%, or 27 of 131, of fraud-on-the-market securities class actions rel[ied] on short-seller research that affected the price of common stock of the defendant company"); see also Andrew R. Gray, Ryan A. Walsh, Spencer L. Chatellier, Nguyet Nguyen & Torben Voetmann, Counterfactuals in Securities Class Actions—An Illustration Using Third-Party Corrective Disclosures, 23 Hous. Bus. & Tax L.J. 105, 106 (2022) (noting that short-seller reports have been "used by plaintiffs to substantiate fraud-on-the-market claims in several securities class actions in recent years"); Gideon Mark, Cannabis Securities Litigation, 46 Seton Hall Legis. J. 557, 574 (2022) ("A significant share of cannabis [event-driven securities litigation] has followed the publication of negative reports by short seller investors."); Joshua Mitts, Short Sellers and Plaintiffs' Firms: A Symbiotic Ecosystem, CLS Blue Sky Blog (Oct. 14, 2020), https://clsbluesky.law.columbia.edu/2020/10/14/short-sellers-and-plaintiffs-firms-a-symbiotic-ecosystem/ [https://perma.cc/5LGR-2JXE] [hereinafter Mitts, Symbiotic Ecosystem] (observing that "short seller reports are often followed by plaintiffs' firms rushing to file a complaint which quotes the short report at great length as revealing of the truth"); Emily Strauss, Can Shareholder Lawsuits Police Companies' Climate Disclosures?, CLS Blue Sky Blog (Nov. 18, 2022), https://clsbluesky.law.columbia.edu/2022/11/18/can-shareholder-lawsuits-police-companies-climate-disclosures/ [https://perma.cc/4J2G-SSAJ] ("[V]irtually all consequential climate-related shareholder litigation consists of follow-on lawsuits, based either on investigative findings by a government regulator or a short-seller report.").

20. See In re Nektar Therapeutics Sec. Litig., 34 F.4th 828, 839–40 (9th Cir. 2022); In re BofI Holding, Inc. Sec. Litig., 977 F.3d 781, 797 (9th Cir. 2020).

21. See Lea v. TAL Educ. Grp., 837 F. App'x 20, 27–28 (2d Cir. 2020).

based on short-seller market manipulation in the suit (and thereby making eventual settlement amounts excessive).[22]

Most importantly, these conflicting approaches could undermine the primary justifications of securities class actions—appropriate compensation of investors victimized by fraud and the deterrence of securities law violations by securities issuers[23]—as well as undercut the operations of the financial markets themselves. Indeed, while issues associated with pleading in securities class actions might seem theoretical and abstract, markets burdened by fraud or manipulation obscure investment incentives and lead to the misallocation of resources in the economy, reducing the economy's long-term productive capacity.[24] More directly, securities fraud falls disproportionately on mom-and-pop investors who rely on their personal investments to store their wealth and save for retirement.[25] Finally, companies under the cloud of a misleading short attack and subsequent securities litigation may struggle to obtain capital, impairing their ability to invest and create jobs.[26] These effects impact ordinary people, and a well-functioning securities litigation regime can help to mitigate them.

This Note stakes a middle ground between the conflicting approaches provided by the circuit courts. In Part I, this Note will summarize the state of the law of securities class actions, the role securities class actions play in compensating investors and deterring fraud, and the function of short sellers in modern financial markets. In Part II, this Note will discuss the recent rise in the use of short-seller reports in securities litigation and how short sellers can use their reports to manipulate stock prices. That Part will also discuss the recent circuit split over whether anonymous short-seller reports can serve as corrective disclosures. Finally, in Part III, this Note will discuss two possible approaches to addressing this issue. First, it will suggest reading extant case law to allow courts to delve into the merits of claims based on short-seller reports at the class certification stage, earlier in the lawsuit than is traditionally permitted. Second, this Note will suggest

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22. See Laarni T. Bulan & Laura E. Simmons, Cornerstone Rsch., Securities Class Action Settlements: 2022 Review and Analysis 14 fig.13 (2023), https://www.cornerstone.com/wp-content/uploads/2023/03/Securities-Class-Action-Settlements-2022-Review-and-Analysis.pdf [https://perma.cc/K8U7-Q6BD] (showing that the vast majority of securities class actions settle before the filing of a motion for summary judgment).

23. Jill E. Fisch, Cause for Concern: Causation and Federal Securities Fraud, 94 Iowa L. Rev. 811, 864 (2009) [hereinafter Fisch, Causation and Federal Securities Fraud].

24. Merritt B. Fox & Joshua Mitts, Event-Driven Suits and the Rethinking of Securities Litigation, 78 Bus. Law. 1, 13–14 (2022).

25. Alicia Davis Evans, The Investor Compensation Fund, 33 J. Corp. L. 223, 233–34 (2007).

26. See Jules H. van Binsbergen, Xiao Han & Alejandro Lopez-Lira, Textual Analysis of Short-Seller Research Reports 5 (2023) (unpublished working paper), https://ssrn.com/abstract=3965873 [https://perma.cc/AH93-2QSW] ("[S]hort-sell research reports are associated with significant reductions in future real investment and stock issuances . . . .").

that judges seek information probative of short-seller reliability at the pleadings stage of the securities class action. These approaches, this Note argues, can facilitate investor compensation without deferring to self-interested short sellers. Ultimately, this would better enable securities litigation to fulfill its twin goals of compensation and deterrence.

I. LOSS CAUSATION IN SECURITIES LITIGATION

This Part summarizes the current state of the law around private securities class actions and discusses the basics of short selling. Section I.A discusses the general features of the securities class action, motion practice in these types of cases, and the purposes of securities litigation. Section I.B then presents the mechanics of short selling and the important role this type of activity plays in contemporary financial markets.

A. *The Basics of Securities Litigation*

This section discusses the securities fraud cause of action, what plaintiffs are required to plead in securities class actions, motion practice in this area of litigation, and the goals securities class actions are meant to serve.

1. *Securities Class Actions Generally.* — Section 10(b) of the Securities Exchange Act of 1934 prohibits the "use or employ[ment], in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe."[27] Pursuant to this section, the SEC issued Rule 10b-5, which makes it unlawful, among other things, "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading."[28] Courts have interpreted this rule to give investors an implied federal cause of action against companies alleged to have made misstatements or omissions affecting the price of their securities.[29]

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27. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10(b), 48 Stat. 881, 891 (codified at 15 U.S.C. § 78(j) (2018)).

28. Rule 10b-5, 17 C.F.R § 240.10b-5 (2024).

29. See Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 573 U.S. 258, 267 (2014) ("Although section 10(b) does not create an express private cause of action, we have long recognized an implied private cause of action to enforce the provision and its implementing regulation."); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) ("Despite the contrast between the provisions of Rule 10b-5 and the numerous carefully drawn express civil remedies provided in the Acts of both 1933 and 1934 . . . we confirmed . . . the overwhelming consensus of the District Courts and Courts of Appeals that such a cause of action did exist."). Federal courts have exclusive jurisdiction over actions brought under the Securities Exchange Act of 1934. Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 138 S. Ct. 1061, 1066 (2018).

Securities class actions under Rule 10b-5 proliferated following *Basic Inc. v. Levinson*, in which the Supreme Court set forth the so-called "fraud-on-the-market" presumption.[30] According to this presumption, in an efficient market,[31] all purchasers of a security are assumed to have relied on the price of the security when purchasing that security.[32] In other words, courts presume that misrepresentations can induce investors to purchase securities even if they did not directly rely on those misrepresentations or misstatements.[33] The practical effect of this holding was to facilitate class actions under Rule 10b-5.[34] Before *Basic*, courts might have been required to make individualized reliance inquiries to ensure that the alleged misstatements actually affected investors' purchasing decisions.[35] Under the fraud-on-the-market presumption, however, courts can assume that all investors in a security—and thereby all class members—relied on the misstatements in their purchasing decisions.[36]

Accordingly, securities suits under Rule 10b-5 generally proceed as class actions.[37] Therefore, in a typical securities class action, the first order of business for plaintiffs is selecting a lead plaintiff and consolidating multiple complaints filed by various investors into one action.[38] Generally, lead plaintiffs are those that experienced large losses as a result of alleged fraud.[39] This collective-action mechanism facilitates the compensation of

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30. 485 U.S. 224, 240–42 (1988).

31. An efficient market is one in which "security prices at any time 'fully reflect' all available information." Eugene F. Fama, Efficient Capital Markets: A Review of Theory and Empirical Work, 25 J. Fin. 383, 383 (1970).

32. *Basic*, 485 U.S. at 240–42.

33. Id.

34. Fisch, Causation and Federal Securities Fraud, supra note 23, at 818.

35. See Frederick C. Dunbar & Dana Heller, Fraud on the Market Meets Behavioral Finance, 31 Del. J. Corp. L. 455, 457 (2006) ("Without the efficient market hypothesis, . . . defendants could make a reasonable claim that individual issues of reliance would require separate trials for each plaintiff.").

36. To invoke the *Basic* presumption, plaintiffs must show "(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed." Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 573 U.S. 258, 268 (2014).

37. Christine Hurt & Paul Stancil, Short Sellers, Short Squeezes, and Securities Fraud, 47 J. Corp. L. 105, 111 (2021).

38. Elizabeth L. Yingling, Baker McKenzie, U.S. Securities Class Actions–An Overview 1–2, https://www.bakermckenzie.com/-/media/files/locations/india/overview_of_a_securities_class_action_suit.pdf [https://perma.cc/9D8Y-A8S7] (last visited Jan. 1, 2023).

39. See Stephen Choi & Jill E. Fisch, Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act, 83 Wash. U. L.Q. 869, 871 (2005) (describing the Private Securities Litigation Reform Act's rebuttable presumption that "the plaintiff with the largest financial interest in the relief sought by the class will be selected as the lead plaintiff.").

ordinary investors, who might have experienced small losses and thereby had little incentive to sue.[40]

2. *Loss Causation and the Other Pleading Requirements Under Rule 10b-5.* — Courts have set forth six requirements for plaintiffs to successfully plead a claim under Rule 10b-5. In particular, plaintiffs must allege "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."[41]

The final pleading requirement of loss causation is codified in the Private Securities Litigation Reform Act of 1995 (PSLRA).[42] The PSLRA, which amended the Securities Exchange Act of 1934,[43] was aimed at discouraging so-called "strike suits," meritless litigation driven by plaintiffs' attorneys that aimed to extract settlements from targeted firms.[44] The PSLRA sought to remedy this issue by, among other things, adding a safe-harbor provision for forward-looking statements, establishing heightened pleading requirements, requiring discovery to be stayed when a motion to dismiss is pending, and adding a provision on the appointment of lead plaintiffs for class actions.[45] As to loss causation, the PSLRA simply states that "the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages."[46]

The Supreme Court elaborated further on the loss causation requirement in *Dura Pharmaceuticals, Inc. v. Broudo*.[47] In that case, the

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40. Hurt & Stancil, supra note 37, at 112; Hillary A. Sale & Robert B. Thompson, Market Intermediation, Publicness, and Securities Class Actions, 93 Wash. U. L. Rev. 487, 499–500 (2015).

41. Erica P. John Fund, Inc. v. Halliburton Co. (*Halliburton I*), 563 U.S. 804, 810 (2011) (internal quotation marks omitted) (quoting Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 37–38 (2011)).

42. 15 U.S.C. § 78u-4(b)(4) (2018). The first two requirements, material misrepresentation or omission and scienter, are also codified in the PSLRA. Id. §§ 78u-4(b)(1)–(2).

43. Kendra Schramm, Note, Reform After the Reform Act, 19 J.L. & Pol'y 435, 437 (2010).

44. See Edward A. Fallone, Section 10(b) and the Vagaries of Federal Common Law: The Merits of Codifying the Private Cause of Action Under a Structuralist Approach, 1997 U. Ill. L. Rev. 71, 72 (discussing pre-PSLRA critiques arguing that companies were "the target of frivolous class actions alleging securities fraud, brought by a specialized segment of the plaintiffs' bar, and generating nuisance settlements of the class's claims conjoined with large awards of attorneys' fees"); James A. Kassis, The Private Securities Litigation Reform Act of 1995: A Review of Its Key Provisions and an Assessment of Its Effects at the Close of 2001, 26 Seton Hall Legis. J. 119, 120 (2001) ("The focus of the debate [around the PSLRA] had been on the explosion of meritless class action lawsuits, commonly called 'strike suits,' which are filed entirely for their settlement value." (footnote omitted)).

45. Kassis, supra note 44, at 121.

46. 15 U.S.C. § 78u-4(b)(4).

47. 544 U.S. 336 (2005).

Court explained that loss causation is derived from the common law tort element of proximate causation.[48] Accordingly, the loss causation element requires plaintiffs to "provide a defendant with some indication of the[ir] loss and the causal connection" between that loss and the defendant's misrepresentation.[49] Typically, plaintiffs make this showing circumstantially by "(1) identifying a 'corrective disclosure' (a release of information that reveals to the market the pertinent truth that was previously concealed or obscured by the company's fraud); (2) showing that the stock price dropped soon after the corrective disclosure;" and in some circuits "(3) eliminating other possible explanations for this price drop."[50] Corrective disclosures can take many forms[51] and indicate when any artificial share price "inflation," or the portion of the stock price that does not reflect the security's true value and is attributable to misrepresentations, dissipates from the price of the security.[52]

Finally, securities class action plaintiffs must also meet the heightened pleading requirements from the PSLRA, as well as Federal Rule of Civil Procedure 9(b). Rule 9(b) raises the pleading standard for suits alleging fraud and requires parties to "state with particularity the circumstances constituting fraud or mistake."[53] Meanwhile, the PSLRA requires that plaintiffs allege "with particularity" why each of the defendant's misrepresentations or omissions was misleading and why there is a strong inference that the defendant acted with scienter.[54] The circuit courts generally understand the PSLRA's heightened pleading standard to only apply to the misrepresentation and scienter requirements, not to loss

48. Id. at 344.

49. Id. at 347.

50. FindWhat Inv. Grp. v. FindWhat.com, 658 F.3d 1282, 1311–12 (11th Cir. 2011) (footnote omitted). But see Fox & Mitts, supra note 24, at 68 & n.143 (explaining that there is "broad judicial acceptance of the idea that, beyond alleging a meaningful price drop, the plaintiff does not need to allege facts that rule out alternative explanations for the drop").

51. See, e.g., In re Tesla, Inc. Sec. Litig., 477 F. Supp. 3d 903, 931 (N.D. Cal. 2020) (discussing alleged corrective disclosures that included a company press release, the announcement of a government investigation, and a news article).

52. David Tabak & Chudozie Okongwu, Inflation Methodologies in Securities Fraud Cases: Theory and Practice 1–2 (2002) (unpublished working paper), https://www.nera.com/content/dam/nera/publications/archive1/5343.pdf [https://perma.cc/G356-8FKW].

53. Fed. R. Civ. P. 9(b).

54. 15 U.S.C. § 78u-4(b)(1)–(2).

causation.[55] The circuits are split, however, on whether Rule 9(b)'s heightened "particularity" requirement applies to loss causation.[56]

3. *Motion Practice in Securities Class Actions.* — The pleading requirements of securities class actions are critical to the success of the litigation—not just because they provide an obstacle to proceeding with a case but because satisfying them is often the entire game. Indeed, a Rule 12(b)(6) motion to dismiss for failure to state a claim is often the closest a defendant will get to challenging the merits of a plaintiff's claim.[57] Accordingly, securities class actions often proceed as follows: selection of a lead plaintiff, adjudication of the defendant's motion to dismiss the complaint, adjudication of the plaintiff's motion for class certification, then settlement.[58]

Statistical analyses of securities class actions bear out how rare it is for cases to proceed to trial or to summary judgment. For instance, one analysis found that from 1996 to 2019, just fourteen securities class actions out of over 1,800 were tried to a verdict.[59] Another analysis found that, from 2014 to the end of 2023, a motion to dismiss was filed in 96% of securities class actions (with 60% of those motions granted), but a motion for class certification was filed in just 18% of cases.[60] A third analysis found that just over 3% of 10b-5 settlements from 2018 to 2022 took place after a ruling on summary judgment, with another 7% of settlements taking place between the filing of a motion for summary judgment and a ruling on that motion.[61]

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55. See, e.g., Hampton v. root9B Techs., Inc., 897 F.3d 1291, 1298 (10th Cir. 2018) ("[U]nder the PSLRA, a plaintiff must meet a heightened pleading standard with regards . . . to whether the statements at issue were false or misleading, and whether the defendant acted with the requisite scienter." (citing 15 U.S.C. §§ 78u-4(b)(1)–(2))); Spitzberg v. Hous. Am. Energy Corp., 758 F.3d 676, 683 (5th Cir. 2014) (explaining that "the PSLRA did not create heightened pleading standards for all six elements of a claim of securities fraud" and did not "heighten[] the standard of pleading applicable to loss causation" (citing Lormand v. U.S. Unwired, Inc., 565 F.3d 228, 267 (5th Cir. 2009))).

56. See Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc., 774 F.3d 598, 604–05 (9th Cir. 2014) (explaining that the Fourth and Seventh Circuits apply the heightened Rule 9(b) pleading standard to loss causation, the Second Circuit applies its own heightened standard, and the Fifth Circuit applies the lower Rule 8(a) standard). The Ninth Circuit applies the Rule 9(b) pleadings standard to loss causation. Id.

57. See Bulan & Simmons, supra note 22, at 14 fig.13 (showing that the vast majority of cases settle before the filing of a motion for summary judgment).

58. See Sale & Thompson, supra note 40, at 506–07 (describing the progression of securities class actions); Yingling, supra note 38, at 1–3 (same).

59. Hurt & Stancil, supra note 37, at 113.

60. Edward Flores & Svetlana Starykh, NERA, Recent Trends in Securities Class Action Litigation: 2023 Full-Year Review 15–16 (2024), https://www.nera.com/content/dam/nera/publications/2024/PUB_2023_Full-Year_Sec_Trends_0123.pdf [https://perma.cc/HW7Q-TNHD].

61. See Bulan & Simmons, supra note 22, at 14 fig.13 (showing that 370 settlements took place from 2018 to 2022, with fourteen occurring after a ruling on a motion for

Why are these cases so prone to settle? The nature of securities litigation gives companies very strong incentives to do so. Claimed damages in securities class actions are very high—often reaching billions of dollars.[62] The potential for a "death penalty damages verdict" against a company that could bankrupt it (or severely impair its ability to operate) encourages defendants to settle for a manageable amount that is often covered by their insurance.[63] Moreover, litigation costs themselves, like the costs of discovery, are often high and fall disproportionately on the defendant company.[64] Plaintiffs' attorneys, meanwhile, also face substantial incentives to settle early given the standard contingent fee arrangement; if plaintiffs lose at trial, plaintiffs' attorneys receive nothing and are saddled with the costs of the litigation.[65] Accordingly, both sides of a securities class action see the early stages of the litigation as the real fight.

4. *The Dual Purposes of Securities Class Actions: Compensation and Deterrence.* — Private securities litigation serves two important and interrelated purposes. First, and most obviously, securities class actions serve to compensate investors wrongly defrauded by the companies whose securities they own.[66] Indeed, securities fraud is highly costly for investors. For instance, one analysis found total market capitalization losses of $335 billion following final corrective disclosures for firms sued in 2023 for securities fraud.[67] Accordingly, like any other claim for damages, securities class actions serve to make defrauded investors whole.[68] While this rationale has been subject to controversy, there is substantial evidence

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summary judgment and twenty-six taking place after a filing of a motion for summary judgment but before a ruling on summary judgment).

62. See id. at 5 fig.4 (showing a median damages estimate of $1.5 billion for cases in 2022 and $706 million for cases in 2021); Flores & Starykh, supra note 60, at 26 fig.22 (showing median investor losses of $923 million for securities class actions that settled in 2023).

63. See Hurt & Stancil, supra note 37, at 114 ("The key existential problem in securities fraud, that a successful jury verdict could theoretically result in a death penalty damages verdict, one not covered by insurance, still exists." (footnotes omitted)); see also Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497, 532 (1991) (finding that "[t]he stakes in many securities class actions are high enough to threaten the continued existence of the company"); James D. Cox, Making Securities Fraud Class Actions Virtuous, 39 Ariz. L. Rev. 497, 512 (1997) ("[A]pproximately 96% of securities class action settlements are within the typical insurance coverage, with the insurance proceeds often being the sole source of settlement funds.").

64. See Alexander, supra note 63, at 548–49 (observing that "discovery in securities class actions is almost completely one-sided").

65. Id. at 536–37.

66. Elizabeth Chamblee Burch, Optimal Lead Plaintiffs, 64 Vand. L. Rev. 1109, 1117 (2011); Hurt & Stancil, supra note 37, at 111.

67. Cornerstone Rsch., 2023 Year in Review, supra note 19, at 11 fig.10.

68. See Fisch, Causation and Federal Securities Fraud, supra note 23, at 864 (stating that an objective of securities class actions is "victim compensation" modeled on tort law).

supporting the compensatory role of securities class actions.[69] For instance, one scholar has argued that losses due to securities fraud might fall disproportionately on retail investors—"mom-and-pop" investors holding shares in their personal accounts[70]—who trade less frequently and hold less-diversified portfolios than larger institutional investors.[71] Another scholar has argued that securities litigation damages payments can compensate the non-diversified, "informed" traders who promote pricing efficiency by trading based on firm-specific information (and who thereby disproportionately rely on fraudulent information).[72]

Second, and more indirectly, securities class actions deter further securities fraud—both by companies targeted by the litigation and by other publicly traded companies more generally.[73] In particular, securities class actions can deter fraud by allowing investors to supplement the limited enforcement powers of the federal government, increasing the likelihood that the securities laws will be enforced and companies will incur costs for fraud.[74] Moreover, some scholars have argued that securities

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69. Some scholars have suggested that securities class actions often fail to fulfill their compensatory purpose. First, scholars have criticized securities litigation as circular, as diversified investors (those who own securities from many different companies) will sometimes win and sometimes lose due to securities fraud and on balance will experience no long-run gains or losses from fraud. See, e.g., Frank H. Easterbrook & Daniel R. Fischel, Optimal Damages in Securities Cases, 52 U. Chi. L. Rev. 611, 641 (1985). Additionally, scholars argue that payments made by companies to investors in settlements merely amount to transfers from one group of innocent shareholders (those holding at the time of the settlement) to former shareholders (those who are members of the class). E.g., John C. Coffee, Jr., Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534, 1556 (2006) [hereinafter Coffee, Reforming the Securities Class Action]. Moreover, settlement amounts generally constitute a very small percentage of investor losses, with one study finding that the median ratio of settlement amounts to investor losses in 2023 was just 1.8%. Flores & Starykh, supra note 60, at 26 fig.22.

70. Adam Hayes, Retail Investor: Definition, What They Do, and Market Impact, Investopedia, https://www.investopedia.com/terms/r/retailinvestor.asp [https://perma.cc/C3KN-2HCC] (last updated Jan. 12, 2024).

71. Evans, supra note 25, at 233–34. Evans notes that losses by retail investors associated with securities fraud would not be offset on average by corresponding gains caused by securities fraud, as retail investors rarely sell shares. Id.

72. Jill E. Fisch, Confronting the Circularity Problem in Private Securities Litigation, 2009 Wis. L. Rev. 333, 345–48.

73. See, e.g., Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 345 (2005) ("The securities statutes seek to maintain public confidence in the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud actions." (citation omitted)); Fox & Mitts, supra note 24, at 12–13 ("Imposing liability on an issuer for making a share price–inflating misstatement deters other issuers from making such misstatements in the future.").

74. See Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 313 (2007) ("This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange

class actions have had this effect by improving the efficacy of disclosure requirements or by encouraging shareholder monitoring of corporate management.[75]

B. *Short Selling*

As will be discussed, the relatively straightforward role of securities class actions in compensating investors and deterring securities fraud has been complicated by the use of short-seller reports as corrective disclosures. This section discusses the practice of short selling generally and the ever-important role of short sellers in contemporary financial markets.

Short selling is a bet that the price of a security will decrease.[76] In other words, short selling is the inverse of holding a "long" position—that is, owning a security with the expectation that the price of that security will increase over time.[77] To enter a short position, an investor borrows a security and sells that security at the prevailing market price.[78] If the price of the security then decreases, a short seller can close their short position by purchasing that same security at the prevailing (lower) market price and using that security to replace the security they borrowed.[79] The difference between the price at which the investor sold the borrowed security and the price at which the investor repurchased that security is the investor's profit.[80]

Commission . . . ."); Burch, supra note 66, at 1117 ("[S]ecurities class actions supplement public enforcement efforts through . . . deterring fraud by making it less profitable . . . .").

75. See Merritt B. Fox, Why Civil Liability for Disclosure Violations When Issuers Do Not Trade?, 2009 Wis. L. Rev. 297, 329 (arguing that securities class actions can create substantial incentives for "issuer managers to disclose at the socially optimal level"); Lawrence E. Mitchell, The "Innocent Shareholder": An Essay on Compensation and Deterrence in Securities Class-Action Lawsuits, 2009 Wis. L. Rev. 243, 290–92 ("Shareholders can be seen as part of the mechanism by which managerial frauds are deterred . . . . [S]hareholders, through their governance potential, become part of the very enforcement regime designed to maintain market integrity."). As with the compensatory justification of the securities class action, there is scholarly disagreement over whether securities class actions actually deter securities fraud by corporate managers. For instance, some argue that since insurance generally covers settlement costs and since executives rarely are required to contribute to settlements in their personal capacity, the deterrent effect of securities litigation is minimal. See Coffee, Reforming the Securities Class Action, supra note 69, at 1567–71.

76. GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 196 (3d Cir. 2001); Laura Rodini, What Is Short Selling? Definition, Explanation & Examples, TheStreet (Apr. 5, 2022), https://www.thestreet.com/dictionary/s/short-selling-shorting [https://perma.cc/H4L9-9UY8] (last updated Feb. 13, 2023).

77. Rodini, supra note 76.

78. Id. Short selling can also be implemented through the use of options. Id.

79. Id.

80. For instance, assume that Investor expects the price of Company A's stock, currently trading at $10, to decline in the future. To profit from such an expectation,

Short selling is nothing new. The practice has existed for as long as stock markets themselves have operated.[81] Nonetheless, some recent changes in how short selling is practiced are notable. In particular, there has been a recent trend towards "negative activism," whereby short sellers actively seek to drive down a targeted firm's share price rather than simply waiting for a stock's price to decrease over time.[82] Indeed, several firms specialize in activist short selling.[83] These firms—which include Muddy Waters Research, Citron Research, and Hindenburg Research—profit by identifying companies engaging in fraud, taking short positions in those companies, releasing their findings to the public in written reports, and then closing their short positions after those companies' stock prices decline in response to their reports.[84] These firms have successfully targeted a number of companies, exposing frauds at Nikola,[85] Luckin Coffee,[86] and Valeant Pharmaceuticals,[87] among others.[88]

Investor borrows a share of Company A stock and then sells that stock for $10, the prevailing market price. The following week, Company A shares bad news about its financial performance, and its stock price declines to $7. Investor then repurchases Company A stock at $7 and uses that share to replace the share Investor borrowed. The difference between the price at which Investor sold the stock ($10) and the price at which Investor repurchased the stock ($7) is Investor's profit ($3), minus any interest that Investor paid on the borrowed shares. Id. If instead Company A's stock price increased to $13, Investor would have to buy a share at that price to replace the share it borrowed and would instead incur a loss of $3 (plus interest).

81. See Short-Sellers Are Good for Markets, The Economist (Oct. 11, 2018), https://www.economist.com/finance-and-economics/2018/10/11/short-sellers-are-good-for-markets (on file with the *Columbia Law Review*) (discussing regulations on short selling in seventeenth-century Amsterdam and Napoleonic France).

82. Barbara A. Bliss, Peter Molk & Frank Partnoy, Negative Activism, 97 Wash. U. L. Rev. 1333, 1339 (2020); see also Janja Brendel & James Ryans, Responding to Activist Short Sellers: Allegations, Firm Responses, and Outcomes, 59 J. Acct. Rsch 487, 503 tbl.1 (2021) (showing an increase in activist short reports after 2009); Molk & Partnoy, supra note 19, at 65 fig.A1 (showing an increase in negative activist reports from fifteen in 2009 to 179 in 2016).

83. Bernhard Warner, Little Big Shorts: Sheriffs in a Wild West Market, Fortune, Dec. 2020–Jan. 2021, at 56, 59.

84. Matthew Goldstein & Kate Kelly, A Skeptical Stock Analyst Wins Big by Seeking Out Frauds, N.Y. Times (Aug. 16, 2021), https://www.nytimes.com/2021/08/16/business/short-seller-wall-street-scams-hindenburg.html (on file with the *Columbia Law Review*); see also Alexander Ljungqvist & Wenlan Qian, How Constraining Are Limits to Arbitrage?, 29 Rev. Fin. Stud. 1975, 1976 (2016) (describing activist short selling).

85. See supra notes 1–10 and accompanying text.

86. See Warner, supra note 83, at 59–60 (discussing Muddy Waters Research's short campaign against Luckin).

87. See Matt Wirz, The 'Short' Who Sank Valeant Stock, Wall St. J. (Oct. 22, 2015), https://www.wsj.com/articles/the-short-who-sank-valeant-stock-1445557157 (on file with the *Columbia Law Review*) (describing Citron Research's report on Valeant).

88. See Bliss et al., supra note 82, at 1352 tbl.2 (finding that reports published by Muddy Waters Research and Citron Research induced average market capitalization declines of over $299 million and $258 million, respectively, at targeted companies).

Another even more controversial trend in the activist short selling space has been the rise of *Seeking Alpha*, an online forum that publishes stock research articles by anonymous contributors.[89] Rather than waiting for traditional sources of market information—like the news media or government regulators—to expose corporate wrongdoing, authors on *Seeking Alpha* can themselves act as "brash public activists."[90] The website has a large following[91] and has been described as having gained "mainstream respectability."[92] Articles from *Seeking Alpha* have also had substantial effects on targeted stocks, including those of Farmland, Banc of California, and Akoustis Technologies.[93] Indeed, one academic analysis of some prominent pseudonymous short sellers on *Seeking Alpha* showed that their reports were associated with substantial stock price declines.[94]

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89. Richard Levick, Does Seeking Alpha Enable Anonymous Authors to Spread Fake News?, Forbes (Aug. 20, 2018), https://www.forbes.com/sites/richardlevick/2018/08/20/does-seeking-alpha-enable-anonymous-authors-to-spread-fake-news/ (on file with the *Columbia Law Review*); see also In re Galena Biopharma, Inc. Sec. Litig., 117 F. Supp. 3d 1145, 1158 n.6 (D. Or. 2015) ("As alleged by Plaintiffs, *Seeking Alpha* is the leading website used by analysts and professional and institutional investors to publish independent analyses related to investment."); Wuyang Zhao, Activist Short-Selling and Corporate Opacity 2 (2020) (unpublished manuscript), https://ssrn.com/abstract=2852041 [https://perma.cc/5X4L-7DR5] (finding that a sample of *Seeking Alpha* posts showed "a rapidly increasing trend of activist short-selling in the past decade").

90. Lawrence Delevingne, Short & Distort? The Ugly War Between CEOs and Activist Critics, Reuters (Mar. 21, 2019), https://www.reuters.com/article/us-usa-stocks-shorts-insight/short-distort-the-ugly-war-between-ceos-and-activist-critics-idUSKCN1R20AW [https://perma.cc/YH68-UXTJ].

91. See About Us, Seeking Alpha, https://about.seekingalpha.com/ [https://perma.cc/7XVB-48J4] (last visited Feb. 9, 2024) ("Each month our unique crowdsourced investment analysis draws an audience of 20 million visitors . . . .").

92. Levick, supra note 89.

93. See Jeff Katz & Annie Hancock, Short Activism: The Rise in Anonymous Online Short Attacks, Harv. L. Sch. Forum on Corp. Governance (Nov. 27, 2017), https://corpgov.law.harvard.edu/2017/11/27/short-activism-the-rise-in-anonymous-online-short-attacks/ [https://perma.cc/8LVD-SJKF] (discussing the short attacks on Banc of California and Akoustis, which led to stock price declines of twenty-nine percent and five percent, respectively, after the publication of short reports on *Seeking Alpha*); supra notes 11–18 and accompanying text (discussing the short attack on Farmland Partners).

94. Bliss, Molk, and Partnoy found that the reports of two popular *Seeking Alpha* bloggers, known by the pseudonyms SkyTides and Pump Stopper, on average produced cumulative abnormal returns of -9.45% and -13.05%, respectively, in targeted stocks in the period ranging from the three days before the report was published to the three days after the report was published. Bliss et al., supra note 82, at 1353 tbl.2; see also Joshua Mitts, Short and Distort, 49 J. Legal Stud. 287, 292 (2020) [hereinafter Mitts, Short and Distort] (describing SkyTides as a "pseudonymous blogger on Seeking Alpha"); Katz & Hancock, supra note 93 (describing Pump Stopper as an "anonymous blogger" with "approximately 1,700 followers on Seeking Alpha"). Another study of short-seller reports published on *Seeking Alpha* found smaller price declines. Zhao, supra note 89, at 2, 14 (finding based on a sample of over 5,000 *Seeking Alpha* articles that such articles, on average, produced a 1.6% stock price decline for the targeted company).

While short selling has long been controversial,[95] it is legal and substantially regulated.[96] The SEC regulates short selling under its Regulation SHO and has implemented a set of rules on broker-dealers designed to discourage abusive short selling practices, like "naked" short selling (short selling without having borrowed a security).[97] Moreover, short sellers are subject to securities fraud liability under Rule 10b-5's prohibition on stock price manipulation.[98] Meanwhile, in October 2023, the SEC promulgated a new Rule 13f-2 requiring institutional investment managers to disclose large short positions in public filings,[99] a requirement that had historically only applied to holders of long positions.[100]

Beyond generating profits for those who practice it, short selling has tangible benefits for financial markets as a whole. Indeed, financial economists are generally of the view that short selling is highly beneficial.[101] For instance, studies in the finance literature have shown that bans on short selling are associated with higher bid-ask spreads,[102] increased stock price volatility,[103] and slower price discovery,[104] all factors associated with impaired market efficiency.[105] Moreover, short selling

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95. See Short-Sellers Are Good for Markets, supra note 81 (discussing some of the historical controversy over short selling).

96. See GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 211 (3d Cir. 2001) ("[S]hort selling is lawful, and courts have held that short selling, even in massive volume, is neither deceptive nor manipulative when carried out in accordance with SEC rules and regulations.").

97. Division of Market Regulation: Responses to Frequently Asked Questions Concerning Regulation SHO, SEC, https://www.sec.gov/divisions/marketreg/mrfaqregsho1204.htm [https://perma.cc/EWA7-QW54] (last updated Oct. 15, 2015); see also 17 C.F.R. § 242.200 (2024) (requiring broker-dealers to mark all sales of securities as "long" or "short"); id. § 242.201 (limiting short selling when a security has declined by 10% in price in one trading day); id. § 242.203 (prohibiting broker-dealers from accepting short sale orders unless they have borrowed or agreed to borrow a security); id. § 242.204 (establishing close-out requirements).

98. Brendel & Ryans, supra note 82, at 491.

99. Press Release, SEC, SEC Adopts Rule to Increase Transparency Into Short Selling and Amendment to CAT NMS Plan for Purposes of Short Sale Data Collection (Oct. 13, 2023), https://www.sec.gov/news/press-release/2023-221 [https://perma.cc/MS9B-TLZK].

100. See Katz & Hancock, supra note 93, at n.3 (discussing the SEC's earlier refusals to require disclosure of large short positions).

101. See Ekkehart Boehmer, Charles M. Jones & Xiaoyan Zhang, Shackling Short Sellers: The 2008 Shorting Ban, 26 Rev. Fin. Stud. 1363, 1363 (2013) ("[F]inancial economists consider short sellers to be the 'good guys,' unearthing overvalued companies and contributing to efficient stock prices.").

102. Id. at 1379. Bid-ask spreads are a measure of liquidity. Short-Sellers Are Good for Markets, supra note 81.

103. Boehmer et al., supra note 101, at 1384.

104. Alessandro Beber & Marco Pagano, Short-Selling Bans Around the World: Evidence from the 2007–09 Crisis, 68 J. Fin. 343, 345 (2013).

105. See Krogman v. Sterritt, 202 F.R.D. 467, 478 (N.D. Tex. 2001) ("A large bid-ask spread is indicative of an inefficient market, because it suggests that the stock is too

prevents stock price "bubbles" and other overvaluations in securities prices.[106] Securities litigation jurisprudence itself has recognized that short-seller activity is indicative of market efficiency; in particular, courts rely on short-seller activity to assess whether a stock trades in an efficient market when assessing motions for class certification.[107]

Finally, short sellers take on additional risks compared to those who simply hold securities. Most obviously, short sellers can experience much larger losses than investors with long positions. In particular, those with long positions can "only" lose the full value of their investment (i.e., if the price of the security goes to $0). Short sellers, on the other hand, can have losses far in excess of the security's price at the time they borrowed the security, as there is no limit to how high a security's price can go.[108] Moreover, short sellers borrow shares from the equity lending market, which requires them to post collateral and pay loan fees; accordingly, potential loan recalls and changes in loan terms expose short sellers to additional risks than those with long positions.[109] Finally, short sellers might be subject to short squeezes, whereby the actions of short sellers in closing their short positions—and buying back shares they had shorted—cause the price of a security to increase; this can induce other short sellers to likewise close their short positions, potentially leading to sharp jumps in the shorted security's price.[110] This risk was vividly illustrated by the

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expensive to trade."); Boehmer et al., supra note 101, at 1386 (hypothesizing that "[i]ncreased volatility during [a] shorting ban could be due to . . . worsening market quality"); Eugene F. Fama, Lawrence Fisher, Michael C. Jensen & Richard Roll, The Adjustment of Stock Prices to New Information, 10 Int'l Econ. Rev. 1, 1 (1969) (describing an efficient market as one "that adjusts rapidly to new information").

106. Bliss et al., supra note 82, at 1380; see also ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 101 (2d Cir. 2007) ("[S]hort selling enhances pricing efficiency by helping to move the prices of overvalued securities toward their intrinsic values."). Short selling also reduces the time during which companies' financial misrepresentations remain undetected. Jonathan M. Karpoff & Xiaoxia Lou, Short Sellers and Financial Misconduct, 65 J. Fin. 1879, 1911 (2010).

107. See, e.g., In re Teva Sec. Litig., No. 3:17-CV-558 (SRU), 2021 WL 872156, at *1, *14 (D. Conn. Mar. 9, 2021) (noting in a ruling on class certification that "[t]he number of arbitrageurs holding short positions . . . varied substantially month-to-month" which "supports the conclusion that investors were able to, and did, take and change positions . . . to reflect their views, the core mechanism by which financial markets are driven to efficiency" (quoting from the record)).

108. See Zlotnick v. TIE Commc'ns, 836 F.2d 818, 820 (3d Cir. 1988) ("[T]here is no limit to the short seller's potential loss: if the price of the stock rises, so too does the short seller's loss, and since there is no cap to a stock's price, there is no limitation on the short seller's risk.").

109. Joseph E. Engelberg, Adam V. Reed & Matthew C. Ringgenberg, Short-Selling Risk, 73 J. Fin. 755, 755–56 (2018).

110. Simon Constable, What Is a Short Squeeze?, Wall St. J., https://www.wsj.com/articles/what-is-a-short-squeeze-1449460381 (on file with the *Columbia Law Review*) (last updated Dec. 6, 2015); see also In re Jan. 2021 Short Squeeze Trading Litig., 620 F. Supp. 3d 1231, 1240–41 (S.D. Fla. 2022) ("(1) [A] stock's price rises; (2) short sellers purchase the stock to cover their losses; (3) short sellers' capitulation causes the stock price to rise

short squeeze in GameStop shares in early 2021, during which hedge funds shorting GameStop stock experienced massive losses.[111]

II. SHORT-SELLER REPORTS IN SECURITIES LITIGATION

This Part discusses the unique issues raised by the use of short-seller reports as corrective disclosures in securities class actions. In particular, section II.A distinguishes short-seller-prompted securities class actions from other such cases based on short sellers' ability and incentives to manipulate stock prices, and section II.B discusses the recent split among the circuits about whether anonymous short-seller reports can serve as corrective disclosures.

A. *Short Reports Are a Unique Form of Corrective Disclosure*

This section will discuss how the use of short reports in securities class actions has followed the broader trend embodied by event-driven securities litigation. This section will then explain why suits that utilize short-seller reports are distinct from this broader category of event-driven securities cases; in particular, this section will argue that the potential manipulation of share prices sets short-seller reports apart from other types of corrective disclosures.

1. *Short-Seller Reports in the Context of Event-Driven Securities Litigation.* — A common refrain in the world of securities litigation is that, indeed, "everything is securities fraud."[112] This platitude is a reference to a recent trend in securities litigation, whereby securities class actions are less frequently centered around financial disclosures ("traditional securities litigation") and more focused on bad events that affect the company.[113] This latter category of securities cases is often referred to as "event-driven" securities litigation.[114] Such cases do not involve issues with a firm's financial statements but rather are associated with issues like regulatory

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further; (4) and other short sellers are forced to purchase the stock; (5) sending the stock price rising even further, and so on.").

111. Joshua Mitts, Robert Battalio, Jonathan Brogaard, Matthew Cain, Lawrence Glosten & Brent Kochuba, A Report by the Ad Hoc Academic Committee on Equity and Options Market Structure Conditions in Early 2021, at 31 (July 2, 2022), https://ssrn.com/abstract=4030179 [https://perma.cc/8V8R-RT7G].

112. Matt Levine, Opinion, Everything Everywhere Is Securities Fraud, Bloomberg (June 26, 2019), https://www.bloomberg.com/opinion/articles/2019-06-26/everything-everywhere-is-securities-fraud (on file with the *Columbia Law Review*).

113. See John C. Coffee, Jr., The Changing Character of Securities Litigation in 2019: Why It's Time to Draw Some Distinctions, CLS Blue Sky Blog (Jan. 22, 2019), https://clsbluesky.law.columbia.edu/2019/01/22/the-changing-character-of-securities-litigation-in-2019-why-its-time-to-draw-some-distinctions/ [https://perma.cc/G79A-CXAJ] [hereinafter Coffee, Changing Character] (describing the increasing prevalence of disaster-driven securities litigation).

114. Id.

noncompliance,[115] product failures,[116] natural disasters,[117] and other occurrences that cause a company's stock price to decline.[118] The common thread linking all of these corporate events together is the argument by shareholders that the company failed to disclose the extent of its vulnerability to the event that caused the stock price decline.[119] In other words, these cases involve the "materialization of an undisclosed or an underdisclosed risk."[120]

A couple features of event-driven securities litigation are worth mentioning here. First, event-driven securities cases often rely on third-party disclosures, particularly those from government agencies.[121] Second, plaintiffs in event-driven securities litigation often use the so-called price maintenance theory in alleging that the affected stock's price was inflated.[122] Under this theory, plaintiffs allege that a misrepresentation, rather than increase the amount of inflation in a stock's price, instead maintains that level of inflation, preventing a stock's price from declining when it otherwise would decline.[123] Accordingly, plaintiffs in these cases often point to the back-end stock price decline, rather than a front-end price increase associated with the purported misrepresentation, in alleging that shareholders were harmed.[124]

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115. John C. Coffee Jr., Event-Driven Securities Litigation: Its Rise and Partial Fall, N.Y. L.J. (Mar. 20, 2019), https://www.law.com/newyorklawjournal/2019/03/20/event-driven-securities-litigation-its-rise-and-partial-fall/ (on file with the *Columbia Law Review*).

116. Id.

117. Coffee, Changing Character, supra note 113; see also Fox & Mitts, supra note 24, at 58–59 (discussing a case in which wildfires prompted the securities class action).

118. Matt Levine provides other potential events that might prompt a securities fraud claim:

> [C]ontributing to global warming is securities fraud, and sexual harassment by executives is securities fraud, and customer data breaches are securities fraud, and mistreating killer whales is securities fraud, and whatever else you've got. . . . [A]nything bad that is done by or happens to a public company is also securities fraud . . . .

Levine, supra note 112.

119. Coffee, Changing Character, supra note 113.

120. Gideon Mark, Event-Driven Securities Litigation, 24 U. Pa. J. Bus. L. 522, 527 (2022) [hereinafter Mark, Event-Driven Securities Litigation].

121. See Emily Strauss, Is Everything Securities Fraud?, 12 U.C. Irvine L. Rev. 1331, 1338–39 (2022) (discussing the use of government investigations in event-driven suits, resulting from the PSLRA's heightened pleading requirements).

122. Mark, Event-Driven Securities Litigation, supra note 120, at 568.

123. See In re Vivendi, S.A. Sec. Litig., 838 F.3d 223, 256 (2d Cir. 2016) (stating that the price maintenance theory "posits that statements that merely maintain inflation already extant in a company's stock price, but do not add to that inflation, nonetheless affect a company's stock price").

124. Noah Weingarten, *Halliburton II* at Four: Has It Changed the Outcome of Class Certification Decisions?, 25 Fordham J. Corp. & Fin. L. 459, 462 (2020).

Qualitatively, suits based on short-seller reports fit within the event-driven litigation framework. For one, such cases rely on disclosures made by third parties (the short sellers). Second, these cases often rely on the back-end price drop caused by the short report to allege that prior disclosures by the company were misleading and did not fully disclose a risk discussed by the short seller.[125] Finally, event-driven suits and suits relying on short reports have made up sizable portions of recent securities class actions, suggesting they are part of the same phenomenon.[126]

2. *Short-Seller Reports as Market Manipulation and the Need for Caution.* — Securities class actions relying on short-seller reports, however, are distinct from standard event-driven suits; short sellers have unique incentives to purposely drive down the price of the targeted security, which might encourage market manipulation. Of particular concern are so-called "short and distort" schemes, whereby short sellers build up a short position in a company's securities, release a report containing false or misleading information about the company, then close their short position for a large profit when the price of the company's securities decline.[127]

The seminal study in this area is Professor Joshua Mitts's analysis of 2,900 pseudonymous *Seeking Alpha* blog posts.[128] That study found that these articles were often followed by price declines on the day the articles were published, which partially reversed in the days following the article's publication.[129] The analysis also found suspicious options trading activity on the day the *Seeking Alpha* articles were published and in the following days that seemed to anticipate these stock price movements.[130] The study

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125. See Mitts, Symbiotic Ecosystem, supra note 19 (noting event-driven cases "in which an event (like a blog post) serves as a putative corrective disclosure, inducing a rapid decline in the share price by allegedly revealing that a prior corporate statement was false or misleading"). In one study that analyzed securities class actions that relied on short-seller reports as corrective disclosures, the authors found that such short reports produced an average stock decline of 16.8%, with 68% of such declines being statistically significant. Nessim Mezrahi & Stephen Sigrist, Guest Post: Conflicts Abound When Activist Short-Sellers Publish Reports, D&O Diary (Jan. 16, 2024), https://www.dandodiary.com/2024/01/articles/securities-litigation/guest-post-conflicts-abound-when-activist-short-sellers-publish-reports/ [https://perma.cc/SS8V-YGAG].

126. Compare Mark, Event-Driven Securities Litigation, supra note 120, at 528 ("[B]y 2018 such [event-driven] suits accounted for more than one-quarter of all securities class actions filings . . . ."), with Mezrahi et al., supra note 19 ("Around 21%, or 27 of 131, of fraud-on-the-market securities class actions rely on short-seller research that affected the price of common stock of the defendant company . . . ."), and Cornerstone Rsch., 2023 Year in Review, supra note 19, at 29 ("In 2023, 19 core federal first identified complaints, or about 9%, alleged stock price drops related to reports published by short sellers . . . .").

127. Delevingne, supra note 90.

128. Mitts, Short and Distort, supra note 94, at 288.

129. Id. at 306 & fig.3.

130. Id at 288. In particular, the analysis showed that put options trading activity increased on the day the article was published, while call options trading activity increased in the following days. Id. Put options allow investors to sell securities at a fixed price in the future and are generally used when betting that the underlying security's price will fall. Call

concluded that the most likely explanation for these findings was that some pseudonymous authors on *Seeking Alpha* publish baseless negative articles while also using options positions to profit from such stock price manipulation.[131] Additionally, this research also provides insight into how market participants view short sellers. In particular, Mitts finds that markets were more likely to trust—and thereby react to—articles written by authors with a prior history of publishing articles followed by price declines that did not reverse, as well as articles written by authors with no prior history of publishing articles on *Seeking Alpha*.[132]

These findings have several implications for securities cases relying on the disclosures provided by short sellers. For instance, this study suggests that market prices might react negatively to false information—either through the spread of misinformation by a short seller or through selling pressure caused by the short seller's trading activities. This could make such reports seem like corrective disclosures, despite the reports not revealing any truthful information to the market. Accordingly, courts might interpret such mechanical or incorrect price reactions as demonstrative of loss causation. The quick, but not immediate, price reversals that followed the release of short reports further complicate this analysis, as losses might be temporary or substantially smaller than the one-day price reaction following an article's publication might suggest.

B. *The Circuit Split Over Short-Seller Reports as Corrective Disclosures*

Unsurprisingly, courts have had to grapple with the issue posed by short reports in securities litigation and have come out different ways in whether to give credence to such reports.[133] In particular, the Ninth Circuit

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options allow investors to purchase securities at a fixed price in the future and are generally used when betting that the underlying security's price will rise.

131. Id.

132. Id. at 311–13.

133. When this Note discusses short reports as corrective disclosures, it refers to short reports that reveal purportedly new information to the public. The circuit courts universally reject as corrective disclosures short reports (and other types of disclosures) that merely repeat already-public information but have split on whether reports that conduct some complex analysis of public information can serve as corrective disclosures. See Grigsby v. BofI Holding, Inc., 979 F.3d 1198, 1203 (9th Cir. 2020) ("[T]his particular *Seeking Alpha* article did not constitute a corrective disclosure, in part because it was written by an anonymous short-seller with no expertise beyond that of a typical market participant who based the article solely on information found in public sources."); Pub. Emps. Ret. Sys. of Miss. v. Amedisys, Inc., 769 F.3d 313, 323 (5th Cir. 2014) (holding that a news article's analysis "based on publicly available . . . records" (internal quotation marks omitted) (quoting from the record) could serve as a corrective disclosure because "it is plausible that . . . the efficient market was not aware of the hidden meaning of the . . . data that required expert analysis"); Meyer v. Greene, 710 F.3d 1189, 1199 (11th Cir. 2013) ("[T]he mere repackaging of already-public information by an analyst or short-seller is simply insufficient to constitute a corrective disclosure."); see also Gray et al., supra note 19, at 108 (noting that some circuit courts require corrective disclosures to contain "entirely new information not already known to the public" while others allow corrective disclosures that

and Second Circuit—the two circuits with the highest caseloads of securities class actions filed in recent years[134]—have divided on the issue, with the former taking a restrictive approach and the latter taking a more permissive approach. This section will discuss the nature of this circuit split and why both approaches are unsatisfactory given the twin aims of securities litigation—compensation and deterrence.

1. *The Ninth Circuit: "A Healthy Grain of Salt."* — In two recent decisions on appeal from orders granting motions to dismiss, the Ninth Circuit held that anonymous short-seller reports could not be used to establish loss causation. Both cases involved *Seeking Alpha* posts written by anonymous short sellers. In both cases, the court relied on the credibility (or lack thereof) of the short seller, rather than assessing the traditional requirements for pleading loss causation—a revelation of fraud and an associated price decline.[135]

The first case was *In re BofI Holding, Inc. Securities Litigation*.[136] In that case, plaintiffs cited eight anonymous *Seeking Alpha* blog posts as corrective disclosures.[137] In the posts, the anonymous author questioned BofI's internal controls and loan origination practices and disclosed that he was shorting the company's stock.[138] In upholding the district court's determination that plaintiffs had not plausibly alleged loss causation, the Ninth Circuit stated that it was "not plausible that the market reasonably

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"do real work to unpack complex public material"). This split is outside the scope of this Note, which instead focuses on short reports that would otherwise be considered proper corrective disclosures under the relevant circuit's conception of loss causation, but-for their publication by short sellers whose interest is to drive down the targeted security's price.

134. See Flores & Starykh, supra note 60, at 5 (finding that out of 228 new securities cases filed in 2023, 54 were filed in the Second Circuit and 66 were filed in the Ninth Circuit); Cornerstone Rsch., Securities Class Action Filings: 2022 Year in Review 31 (2023), https://www.cornerstone.com/wp-content/uploads/2023/05/Securities-Class-Action-Filings-2022-Year-in-Review.pdf [https://perma.cc/QY88-XNV4] ("The Second and Ninth Circuits made up 69% of all core federal [securities litigation] filings in 2022 . . . ."); see also John C. Coffee, Jr., Hillary A. Sale & Charles K. Whitehead, Securities Regulation: Cases and Materials 992 (14th ed. 2021) (noting that "almost all of the securities fraud action is" in the Second and Ninth Circuits). This distribution might be explained by the Second and Ninth Circuits containing, respectively, the country's main securities markets and the headquarters of the country's technology companies, whose stocks can be volatile. See Cornerstone Rsch., Securities Class Action Filings: 2022 Midyear Assessment 22 (2022), https://www.cornerstone.com/wp-content/uploads/2022/08/Securities-Class-Action-Filings-2022-Midyear-Assessment.pdf [https://perma.cc/57N3-N7ZB] (explaining that the largest filed securities class actions in the Ninth Circuit in 2022 involved internet companies); Karen Patton Seymour, Securities and Financial Regulation in the Second Circuit, 85 Fordham L. Rev. 225, 226 (2016) ("The Second Circuit has a distinct geographic advantage: its jurisdiction includes New York City, home to the largest securities market in the world.").

135. See supra note 50 and accompanying text.

136. 977 F.3d 781 (9th Cir. 2020).

137. Id. at 788.

138. Id.

perceived these posts as revealing the falsity of BofI's prior misstatements."[139] The court reasoned that the "posts were authored by anonymous short-sellers who had a financial incentive to convince others to sell" and "included disclaimers from the authors stating that they made 'no representation as to the accuracy or completeness of the information'" contained in the articles.[140] Accordingly, the court concluded, the market would have considered these reports with "a healthy grain of salt."[141]

The second case was *In re Nektar Therapeutics Securities Litigation*.[142] In that case, plaintiffs alleged a corrective disclosure based on an anonymous short-seller report that claimed that Nektar Therapeutics, a biopharmaceutical company, overstated the effectiveness of a drug it was developing.[143] The court, in upholding the district court's dismissal of this corrective disclosure, held that the plaintiffs did not plausibly allege loss causation with regard to the short-seller report.[144] Relying heavily on the reasoning in *BofI*, the court again emphasized the characteristics of the short-seller report as being dispositive, rather than the fact that it might have introduced new information to the market.[145] According to the court, "the central holding in [*BofI*] was that the character of the report—anonymous and self-interested short-sellers who disavowed any accuracy—rendered it inadequate."[146]

Accordingly, the Ninth Circuit has set out three characteristics that render short-seller reports de facto inadequate to show loss causation: (1) the anonymity of the reports, (2) the self-interested nature of the authors, and (3) the use of language to disclaim the accuracy of the information provided in the reports. While it is unclear whether reports that share these three characteristics are categorically excluded as a matter of law, the language of the opinions suggests that this is the case.[147] Indeed, there is disagreement among the district courts in the Ninth Circuit about whether

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139. Id. at 797.

140. Id.

141. Id.

142. 34 F.4th 828 (9th Cir. 2022).

143. Id. at 833–34.

144. Id. at 840.

145. Id. at 839–40.

146. Id. at 840.

147. See Ann Lipton, A Terrible Injustice Has Been Corrected, Bus. L. Prof Blog (Oct. 10, 2020), https://lawprofessors.typepad.com/business_law/2020/10/a-terrible-injustice-has-been-corrected.html [https://perma.cc/LU6E-4GVL] (arguing that the *BofI* holding was "a helluva thing to conclude on the pleadings" and noting that the short reports were associated with price declines, which "suggest[ed] that traders *did* take them seriously, regardless of the Ninth Circuit's post hoc assessments of what a reasonable investor *would* do"); Mitts, Symbiotic Ecosystem, supra note 19 ("The *BofI* court concluded, as a matter of law, that traders cannot rely on pseudonymous blog posts.").

BofI and *Nektar* created such a per se rule.[148] Nonetheless, these decisions almost certainly do set a higher pleading standard for loss causation specifically for cases relying on short-seller reports.[149]

2. *The Second Circuit: Anything Goes.* — By contrast, in another recent case, *Lea v. TAL Education Group*, the Second Circuit took a different approach from the Ninth Circuit.[150] In that case, plaintiffs alleged a corrective disclosure based on a short-seller report produced by Muddy Waters Research, which was followed by a 10% price decline in TAL Education's stock.[151] The court, in a summary opinion reversing the district court's order granting defendant's motion to dismiss, rejected defendant's arguments concerning loss causation.[152] In its analysis, the court did not address the issue of the credibility of the short report at all.[153] Instead, the court summarized its reasoning on loss causation as follows: "In short, the stock value loss following the disclosure of such information in the Muddy Waters report is sufficient at this stage to plead loss causation as to each of the claims."[154] This argument seems to align with the traditional assessment of loss causation by courts.[155] Following this decision, legal commentators noted that there appeared to be a split among the circuits on the issue of short-seller reports serving as corrective disclosures.[156]

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148. Compare In re eHealth, Inc. Sec. Litig., No. 20-CV-02395-JST, 2023 WL 6390593, at *8 (N.D. Cal. Sept. 28, 2023) (following *BofI* to reject the use of a Muddy Waters report as a corrective disclosure because "Muddy Waters is a short-seller" and the report disclaims any warranty of accuracy and "has no identified author"), and In re LexinFintech Holdings Ltd. Sec. Litig., No. 3:20-CV-1562-SI, 2021 WL 5530949, at *15–16 (D. Or. Nov. 24, 2021) (following *BofI* without further analysis because the corrective disclosure "was issued by anonymous, self-interested short sellers and the report contained a broad disclaimer on every page," despite the possibility that the short seller's "report revealed new information that the market had not previously taken into account" (footnote omitted)), with In re QuantumScape Sec. Class Action Litig., 580 F. Supp. 3d 714, 731 (N.D. Cal. 2022) (describing the *Nektar* discussion of short sellers—as well as other Ninth Circuit case law—as "part of a broader contextual analysis, not as a bright-line rule of exclusion" and explaining that *Nektar* was "concerned with the nature of the revelation more than it coming from a short-seller").

149. See *Nektar*, 34 F.4th at 839 ("*BofI* underscored the high bar that plaintiffs must meet in relying on self-interested and anonymous short-sellers.").

150. 837 F. App'x 20 (2d Cir. 2020).

151. Id. at 27–28.

152. Id. at 21, 27–28.

153. Id. at 27–28.

154. Id. at 28.

155. See supra note 50 and accompanying text (noting that courts generally require plaintiffs to identify a corrective disclosure that reveals information that was concealed by the alleged fraud and an associated price decline to adequately plead loss causation).

156. See, e.g., Max W. Berger, Salvatore J. Graziano, Avi Josefson, Adam D. Hollander, Jai K. Chandrasekhar & Caitlin Bozman, Plaintiff's Perspective, *in* Litigating Securities Class Actions § 1.01 (Jonathan N. Eisenberg ed., 2021) ("The Circuits are currently divided on whether public information disseminated by short-sellers based on publicly available

Other district courts in the Second Circuit and in other circuits that have addressed this question largely seem to follow the approach in *TAL Education* when analyzing loss causation, rejecting assessments of short-seller credibility at the pleadings stage.[157] For instance, in one

information can constitute a disclosure."); Roman E. Darmer & Geoffrey J. Ritts, Jones Day, 2020 Securities Litigation Year in Review 9 (2021), https://www.jonesday.com/en/insights/2021/02/2020-securities-litigation-year-in-review [https://perma.cc/6AKC-4Y6M] ("In contrast with the Ninth Circuit's ruling . . . that a short-seller's blog post on the Seeking Alpha website was not a corrective disclosure, the Second Circuit reached a contrary conclusion in an unpublished summary order in *Lea v. TAL Education Group*."); Nessim Mezrahi, Guest Post: Second Circuit Ruling Exposes D&Os to Exchange Act Claims Based on Biased Short-Seller Research, D&O Diary (Dec. 3, 2020), https://www.dandodiary.com/2020/12/articles/securities-litigation/guest-post-second-circuit-ruling-exposes-dos-to-exchange-act-claims-based-on-biased-short-seller-research/ [https://perma.cc/5NSP-4TQH] ("The Second Circuit's ruling [in *TAL Education*] contrasts the Ninth Circuit decision *In Re BofI Holding* . . . .").

157. See, e.g., Bush v. Blink Charging Co., No. 20-23527-CV, 2023 WL 8263037, at *10 (S.D. Fla. Nov. 27, 2023) (holding that plaintiffs sufficiently alleged loss causation because plaintiffs alleged that a short-seller report "disclose[d] new information" and the defendant's "stock price subsequently dropped"); Noto v. 22nd Century Grp., Inc., 650 F. Supp. 3d 33, 50 (W.D.N.Y. 2023) (holding that plaintiffs' allegations that a pseudonymous short seller's *Seeking Alpha* article caused a stock price drop was sufficient to plead loss causation); Theodore v. Purecycle Techs., Inc., No. 6:21-CV-809-PGB-GJK, 2022 WL 20157415, at *17–18 (M.D. Fla. Aug. 4, 2022) (holding that plaintiffs' allegations that a Hindenburg report caused a price decline and revealed new information to the market were sufficient to plead loss causation); Boluka Garment Co. v. Canaan Inc., 547 F. Supp. 3d 439, 445 n.2 (S.D.N.Y. 2021) ("Defendants suggest that Plaintiffs cannot plead loss causation based on a report written by an anonymous short seller with a financial incentive to mislead investors. But there is no requirement that a corrective disclosure come from a particular source, 'take a particular form[,] or be of a particular quality.'" (alteration in original) (citation omitted) (quoting In re Winstar Commc'ns, No. 01-CV-3014, 2006 WL 473885, at *14 (S.D.N.Y. Feb. 27, 2006))); City of Sunrise Gen. Emps.' Ret. Plan v. Fleetcor Techs., Inc., No. 1:17-CV-2207-LMM, 2018 WL 4293143, at *4 n.4, *14 (N.D. Ga. May 15, 2018) (holding that two Citron reports could be used as corrective disclosures, and that with regard to "a motion to dismiss, the Court will only consider the . . . Complaint's allegations—not outside evidence—and will not resolve any factual or credibility disputes in this procedural posture"); In re Longwei Petroleum Inv. Holding Ltd. Sec. Litig., No. 13 CV 214(HB), 2014 WL 285103, at *6 (S.D.N.Y. Jan. 27, 2014) (stating that a short seller's credibility "cannot be evaluated on a motion to dismiss"); Lewy v. SkyPeople Fruit Juice, Inc., No. 11 CIV. 2700(PKC), 2012 WL 3957916, at *13, *17 (S.D.N.Y. Sept. 10, 2012) (holding that plaintiffs adequately alleged loss causation based on a short-seller report because the price declined on the day of the report's publication, despite the fact that the report "contain[ed] disclaimers and . . . [the report's] authors intended to short SPU stock"); *Winstar Commc'ns*, 2006 WL 473885, at *14–15 (holding that allegations of a price drop following a short seller's report that revealed new information to the market were sufficient to plead loss causation). But see Leacock v. IonQ, Inc., No. DLB-22-1306, 2023 WL 6308045, at *23 (D. Md. Sept. 28, 2023) (following *Nektar* and holding plaintiffs' loss causation allegations were inadequate because "the nature of the report—in particular, its disclaimers as to the accuracy of the information it purports to 'reveal'— makes it implausible that investors perceived the report as revealing information that [the defendant] . . . concealed from the market"); Bond v. Clover Health Invs., Corp., 587 F. Supp. 3d 641, 668 (M.D. Tenn. 2022) ("Other courts, however, have found that so-called 'short seller reports' like the Hindenburg Report, if pleaded with sufficient context attesting to their credibility, can appropriately be relied

representative opinion, a court in the Eastern District of New York recently held, in response to defendant's argument that the short seller's report should be discounted because of the author's interest in driving prices down, that "[w]hether the Hindenburg Report, in fact, contained false information is a factual dispute that cannot be resolved at the motion to dismiss stage."[158]

3. *Resolving the Split: A Compromise Approach.* — This Note argues that neither approach—the Ninth Circuit's "high bar"[159] and the Second Circuit's more traditional loss causation analysis—is satisfactory. Given that short sellers can provide information to the market that can expose fraud and can also manipulate the market to induce price declines for financial gain—an issue that can only be assessed with investigation—these approaches are too restrictive and permissive, respectively. Instead, this Note argues that courts should take an approach that both recognizes the potential for manipulation—as the Ninth Circuit did in *BofI* and *Nektar*—and the potential for short-seller reports to reveal important information to markets—as the Second Circuit did in *TAL Education*.

Consider first the Ninth Circuit's approach from *BofI* and *Nektar*. The heightened standard used in these cases conflicts with existing doctrine on 10b-5 pleading standards and loss causation. As mentioned above, the PSLRA's heightened pleading standards only apply to misrepresentations and scienter, not to loss causation.[160] Meanwhile, although the Ninth Circuit has applied the heightened pleading standard under Rule 9(b) to loss causation, that standard is still not especially onerous.[161] In *BofI* itself, the Ninth Circuit stated that "[w]hen applied to allegations of loss causation, however, Rule 9(b)'s particularity requirement usually adds little to the plaintiff's burden."[162] Instead, the plaintiff needs to "plausibly

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upon in a complaint." (citing McIntire v. China MediaExpress Holdings, Inc., 927 F. Supp. 2d 105, 123–24 (S.D.N.Y. 2013); Snellink v. Gulf Res., Inc., 870 F. Supp. 2d 930, 939 (C.D. Cal. 2012))). Notably, judges in the Southern District of New York have split on scrutinizing short-seller reports' credibility when assessing alleged misstatements or omissions, a pleading requirement subject to the PSLRA's heightened standard. See supra note 55 and accompanying text. Compare Long Miao v. Fanhua, Inc., 442 F. Supp. 3d 774, 801 (S.D.N.Y. 2020) (explaining that courts sustain factual allegations from short-seller reports "where independent factual allegations corroborated the factual allegation in the complaint drawn from short-sellers' reports"), with *McIntire*, 927 F. Supp. 2d at 124 (holding that at the pleadings stage, "the Court must accept the factual allegations contained in the Citron Report and the Muddy Waters Report as sufficiently reliable as a factual source for Plaintiffs' allegations").

158. Behrendsen v. Yangtze River Port & Logistics Ltd., No. 19-cv-00024 (DLI)(LB), 2021 WL 2646353, at *15 (E.D.N.Y. June 28, 2021) (citing *McIntire*, 927 F. Supp. 2d at 124).

159. In re Nektar Therapeutics Sec. Litig., 34 F.4th 828, 839 (9th Cir. 2022).

160. See supra note 55 and accompanying text.

161. See supra note 56.

162. In re BofI Holding, Inc. Sec. Litig., 977 F.3d 781, 794 (9th Cir. 2020); see also Grigsby v. BofI Holding, Inc., 979 F.3d 1198, 1206 (9th Cir. 2020) (explaining that the heightened pleading standard "does not require that the causation inference be *more* than

allege a causal connection between the defendant's misstatements and the plaintiff's economic loss, and to succeed in doing so the plaintiff will always need to provide enough factual content to give the defendant 'some indication of the loss and the causal connection that the plaintiff has in mind.'"[163] It is not clear where the market's assessment of the trustworthiness of the source of the corrective disclosure comes into play in this analysis.[164] This is especially the case when, as in *BofI*, the market did appear to take the short seller's allegations seriously, given the stock price drop.[165]

Moreover, the *BofI* standard also conflicts with the purposes of securities fraud: compensation and deterrence. For one, there will be instances when anonymous short sellers reveal information to the market about genuinely fraudulent activities, whereby the stock of the targeted company will decline. Refusing to recognize such a report as a corrective disclosure would prevent shareholders from being compensated for that stock drop. Similar reasoning applies for deterrence: Without requiring companies to compensate their shareholders for fraudulent activity revealed by a short seller, companies will not be discouraged from committing such frauds in the future. Finally, *BofI* ignores the role of short sellers in promoting market efficiency and price discovery, another professed goal of the securities laws.[166]

These final points are illustrated well by the events at Nikola. In that case, the *BofI* standard, if followed strictly, could have diminished the potential compensation of Nikola shareholders, who almost certainly were the victims of fraud.[167] Indeed, the *Nikola* court might have found that the three factors that the *BofI* court considered important applied to the short-

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'plausible'" and that "Plaintiffs' burden is to describe how the falsity of the defendant's misstatement was revealed to the market"); Robert N. Rapp, Plausible Cause: Exploring the Limits of Loss Causation in Pleading and Proving Market Fraud Claims Under Securities Exchange Act § 10(b) and SEC Rule 10b-5, 41 Ohio N.U. L. Rev. 389, 411 (2015) ("When dealing with the sufficiency of loss causation allegations in practice post-*Dura*, the distinction between a pleading standard governed by Federal Rule 8(a) and a 'heightened' version that is the amalgamation of Federal Rule 9(b) and the PSLRA is one without a difference.").

163. *BofI*, 977 F.3d at 794 (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

164. Lyle Roberts, The Ninth Circuit's Recent Decisions on the Pleading of Loss Causation in Securities Fraud Cases, Rev. Sec. & Commodities Regul., May 19, 2021, at 1, 4 (arguing that "[i]t is not clear why the [*BofI*] court's assessment of the 'credibility' of the short sellers should matter").

165. See Lipton, supra note 147 ("[T]he [*BofI*] plaintiffs alleged that the stock price *dropped* in reaction to the blog posts, which – for pleading purposes – suggests that traders *did* take them seriously . . . .").

166. See Marcel Kahan, Securities Laws and the Social Costs of "Inaccurate" Stock Prices, 41 Duke L.J. 977, 979 (1992) (noting that one primary goal of the securities laws is "to create stock markets in which the market price of a stock corresponds to its fundamental value").

167. See supra note 8 and accompanying text.

seller report in the *Nikola* case. For one, the report, while affiliated with Hindenburg Research, is unsigned.[168] Moreover, the report contains a lengthy legal disclaimer, which states that readers "should assume that as of the publication date of any short-biased report or letter, Hindenburg Research . . . has a short position in all stocks (and/or options of the stock) covered herein" and that "Hindenburg Research makes no representation, express or implied, as to the accuracy, timeliness, or completeness of any such information" contained in the report.[169] Plaintiffs alleged that this was a corrective disclosure in their amended complaint and attributed an 11.33% price decline in the stock to the Hindenburg report.[170] Removing this corrective disclosure from the complaint would have eliminated a substantial amount of plaintiffs' potential damages (and accordingly, would have lowered their expected settlement amount), despite their claims appearing to be valid.[171] While the court ultimately never addressed such a *BofI*-type challenge to the use of a Hindenburg report to establish loss causation in its order denying Nikola's motion to dismiss,[172] at least one district court in the Ninth Circuit has followed the rule from *BofI* and *Nektar* to exclude a Muddy Waters report as insufficient to allege loss causation.[173] This suggests that the threat of the removal of such important corrective disclosures is not theoretical.

On the other hand, the Second Circuit's approach also raises concerns. For instance, reserving consideration of the credibility of a short-seller report until the merits stage of the lawsuit ignores the reality that the vast majority of securities cases settle well before any consideration of the merits—that is, before summary judgment or trial.[174] Instead, illegitimate corrective disclosures might be allowed to remain in the suit, both extending the time of the suit and virtually guaranteeing some settlement payments to plaintiffs. This deeply undermines one of the main purposes of the PSLRA, which was to prevent so-called "strike suits" that allowed plaintiffs' attorneys to extract settlements from companies

168. Hindenburg Rsch., supra note 6.

169. Id.

170. Consolidated Amended Class Action Complaint at 134–36, Borteanu v. Nikola Corp., No. CV-20-01797-PHX-SPL (D. Ariz. filed Jan. 24, 2022), 2022 WL 1081539.

171. See id. at 135 (alleging that the Hindenburg report caused a two-day price decline in Nikola stock of $10.24 per share).

172. Borteanu v. Nikola Corp., No. CV-20-01797-PHX-SPL, slip op. at 27–29 (D. Ariz. Dec. 8, 2023).

173. See In re eHealth, Inc. Sec. Litig., No. 20-CV-02395-JST, 2023 WL 6390593, at *8 (N.D. Cal. Sept. 28, 2023) (holding that a "Muddy Waters report is not a corrective disclosure under *BofI* and related cases" because Muddy Waters Research is a short seller, and the report disclaims its accuracy and had no identified author).

174. Molk and Partnoy found that from 2009 to 2016, eighty-four securities class action complaints depended directly on information from short-seller reports. Of those, none made it to a jury verdict. Molk & Partnoy, supra note 19, at 14, 32; see also supra section I.A.3.

unwilling to incur the costs of defending lawsuits.[175] By simply deferring to short sellers, courts fail to recognize the "symbiotic ecosystem" between plaintiffs' attorneys and short sellers, facilitating predatory litigation.[176]

Moreover, the traditional doctrine utilized by the Second Circuit fails to accommodate recent research on the manipulation of stock markets by anonymous short sellers. As discussed above, short-seller articles are sometimes followed by "false" price declines. These declines might be caused by options trading by a market manipulator, misinformation, or temporary market reactions.[177] By not recognizing these possibilities, this approach to loss causation likewise undermines the twin aims of securities litigation, leading to overcompensation of shareholders and over-deterrence of issuers.[178] Indeed, securities litigation might be acting like an insurance program for investment losses where companies did nothing wrong but were targeted by malicious short sellers.[179] Meanwhile, overdeterrence results in companies reducing the amount of useful information they provide to the market to avoid incurring liability, which impedes market efficiency.[180]

Turning back to the events at Farmland Partners, a low bar for pleading loss causation like that used in the Second Circuit clearly would—and did—allow the shareholders' litigation against the company to continue for far too long. As previously mentioned, the securities class action brought by Farmland Partners shareholders hung over the company for almost four years.[181] The company's motion to dismiss was denied in June 2019, and the court did not discuss the credibility of the

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175. See James D. Cox & Randall S. Thomas, Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 100 Colum. L. Rev. 101, 114 n.46 (2006) (referencing congressional testimony focused on strike suits).

176. Mitts, Symbiotic Ecosystem, supra note 19.

177. See supra section II.A.2.

178. See Fisch, Causation and Federal Securities Fraud, supra note 23, at 866 ("Securities fraud litigation also presents a risk of overdeterrence, a risk that increases to the extent that settlement pressure and other factors reduce the accuracy with which sanctions are imposed.").

179. See Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 345 (2005) (noting that securities class actions are available "not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause"); Robbins v. Koger Properties, Inc., 116 F.3d 1441, 1447 (11th Cir. 1997) (stating that the loss causation requirement should "prevent[] 10b-5 from becoming a system of investor insurance that reimburses investors for any decline in the value of their investments").

180. Fisch, Causation and Federal Securities Fraud, supra note 23, at 866; Paul G. Mahoney, Precaution Costs and the Law of Fraud in Impersonal Markets, 78 Va. L. Rev. 623, 650–55 (1992).

181. See supra note 18 and accompanying text (noting that the shareholder litigation against Farmland concluded in May 2022). The first complaint against Farmland by its shareholders was filed in August 2018. See Brokop v. Farmland Partners Inc., No. 18-CV-02104-DME-NYW, 2022 WL 1619939, at *3 (D. Colo. Apr. 5, 2022) ("On August 17, 2018, the original plaintiffs in this case filed a class action complaint against Defendants . . . .").

short-seller article or its pseudonymous author, who went by the moniker Rota Fortunae, in its analysis of loss causation in its order on that motion.[182] The case was only dismissed in April 2022 following Farmland's motion for summary judgment, after discovery into the nature of Farmland's lending practices was completed and the shareholder class was certified.[183] Meanwhile, there was publicly available information that indicated that market manipulation had taken place. In particular, options trading data suggested that traders had accumulated large put-option positions in Farmland's stock prior to the release of the Rota Fortunae article.[184] Moreover, Farmland later argued in its suit against Rota Fortunae that these put options were priced in a way such that, when unwound, would cause a sharp decline in Farmland's stock price.[185] Had the district court been able to consider such information—which was publicly available by the time the motion to dismiss was filed[186]—then perhaps it could have dismissed this case much earlier, allowing Farmland to avoid wasting time and money on defending itself against a meritless suit.[187]

Accordingly, instead of using either of these approaches, a compromise approach—one that recognizes both the benefits and risks of giving credence to short sellers—is required. In particular, allowing courts to delve in a limited way into the merits of securities cases relying on short-seller reports might better serve the purposes of securities litigation.

III. MOVING UP THE ASSESSMENT OF LOSS CAUSATION

This Part suggests a compromise approach to addressing the issue of short-seller reports in securities class actions. In particular, this Part discusses how existing case law can be read to require a more exacting

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182. Turner Ins. Agency, Inc. v. Farmland Partners Inc., No. 18-CV-02104-DME-NYW, 2019 WL 2521834, at *6–7 (D. Colo. June 18, 2019).

183. See *Brokop*, 2022 WL 1619939, at *4–8 (observing that "[w]hat was uncovered in discovery was evidence that the allegations were false" (emphasis omitted)). The court dismissed the claims based on plaintiffs' failure to meet their burden with respect to materiality, loss causation, and scienter. Id. at *5, *9.

184. Declaration From Joshua Mitts in Support of Plaintiff's Motion to Remand at 4–5, Farmland Partners Inc. v. Rota Fortunae, No. 1:18-cv-02351-KLM (D. Colo. filed Oct. 5, 2018).

185. Id. at 5.

186. The data source used by Farmland's expert, Professor Joshua Mitts, in his analysis of trading in Farmland put options was CBOE LiveVol, which provides options trading activity data. Id. at 1–2. According to the product's website, users can view trading data "live as they hit the Trade tape." CBOE LiveVol, https://www.livevol.com/ [https://perma.cc/9E77-BG5E] (last visited Jan. 1, 2023).

187. While the order granting summary judgment to Farmland Partners did not discuss the evidence of manipulative trading by short sellers, such manipulation was discussed by the parties' economic experts at the summary judgment stage. *Brokop*, 2022 WL 1619939, at *4–9; Rebuttal Expert Report of Tiago Duarte-Silva, Ph.D. at 36, *Brokop* (on file with the *Columbia Law Review*).

analysis by district court judges before the merits stage of a securities class action lawsuit. This would enable district court judges to weed out abusive cases that are the product of market manipulation by short sellers, while allowing meritorious suits based on reliable short-seller reports to proceed. In particular, section III.A will discuss how recent Supreme Court jurisprudence can be interpreted to allow judges to assess loss causation—or something close to it—when ruling on motions for class certification. Section III.B will propose various factors, as discussed in case law and academic research, that judges might consider at the motion to dismiss stage when determining whether loss causation was sufficiently pleaded by plaintiffs. Allowing judicial assessment of the market's perception of a short-seller report at the earliest possible stage of a securities class action is the best way to ensure shareholders receive compensation for claims that are based on credible short-seller reports, while also preventing manipulative short reports from being used to establish loss causation.

A. *Read the Supreme Court's* Goldman *Decision to Allow for a Partial Adjudication of Loss Causation at the Class Certification Stage*

The contours of securities litigation are based on judge-made doctrine.[188] Accordingly, what judges must consider—and must not consider—at certain stages of the securities class action are defined by judicial interpretation of the federal securities laws and Rule 10b-5. Given this, if judges believe that certain issues, especially those that involve assessing a claim's merits, should be adjudicated earlier in the litigation process, they have the authority to do so.

Recent Supreme Court cases suggest that such a shift might already be underway. In particular, in the last decade, the Supreme Court has sought to align the circuits on how they approach the class certification stage of litigation.[189] For instance, in *Halliburton I*, the Court held that loss causation cannot be assessed at the class certification stage.[190] The Court held in *Halliburton II*, however, that courts may consider an issue referred to as "price impact" at that stage.[191] According to that case, when a judge is deciding whether to certify a class in a securities class action,[192] the main

188. See supra section I.A.1.

189. See, e.g., Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 141 S. Ct. 1951, 1961 (2021) (holding that courts must consider any evidence relevant to price impact at the class certification stage, even if that evidence overlaps with merits issues); Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 459 (2013) (holding that plaintiffs do not need to prove materiality to obtain class certification); Erica P. John Fund, Inc. v. Halliburton Co. (*Halliburton I*), 563 U.S. 804, 807 (2011) (holding that plaintiffs do not need prove loss causation to obtain class certification).

190. *Halliburton I*, 563 U.S. at 807.

191. Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 573 U.S. 258, 282–84 (2014).

192. Class certification takes place pursuant to Federal Rule of Civil Procedure 23, which requires, among other things, "that the questions of law or fact common to class members

issue is often reliance.[193] As discussed above, class-wide reliance can be presumed under the *Basic* fraud-on-the-market presumption.[194] Defendants, however, may rebut this presumption by providing "evidence that an alleged misrepresentation did not actually affect the market price of the stock" (i.e., there was a lack of price impact).[195] The Court was clear in *Halliburton I*, however, that price impact and loss causation are distinct issues.[196] Accordingly, loss causation assessments must wait until an assessment of the merits.[197]

Nonetheless, the Supreme Court's most recent major securities case addressing class certification, *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, might have opened the door to some consideration of merits-related issues, like loss causation, at the class certification stage.[198] In that case, the Court held that courts must consider the generic nature of a misrepresentation when assessing price impact.[199] In so concluding, the Court noted that courts "must take into account *all* record evidence relevant to price impact, regardless whether that evidence overlaps with materiality or any other merits issue."[200] The Court also noted that "courts may consider expert testimony and use their common sense" in such determinations.[201]

Such broad language indicates that courts can—and indeed must—consider evidence of price impact that overlaps with evidence related to loss causation at the class certification stage. This might include evidence that shows that a report published by a short seller was manipulative or unreliable. Indeed, commentators and academics have read *Goldman* to expand the gatekeeping role of district court judges in securities class actions. For instance, one academic argued that *Goldman* further expanded the scope of economic evidence that courts must consider at the class certification stage, effectively enabling open-ended assessments

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predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

193. See *Halliburton I*, 563 U.S. at 810 ("Whether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance.").

194. See supra notes 30–36.

195. *Halliburton II*, 573 U.S. at 284.

196. *Halliburton I*, 563 U.S. at 814 ("[L]oss causation is a familiar and distinct concept in securities law; it is not price impact.").

197. See Michael J. Kaufman & John M. Wunderlick, Regressing: The Troubling Dispositive Role of Event Studies in Securities Fraud Litigation, 15 Stan. J.L. Bus. & Fin. 183, 187, 209 (2009) (discussing how courts assess loss causation through event studies in the context of motions for summary judgment).

198. 141 S. Ct. 1951 (2021).

199. Id. at 1958.

200. Id. at 1961.

201. Id. at 1960.

of price impact based on a totality of the circumstances.[202] Others have suggested that the language of the opinion could easily be extended beyond materiality to loss causation, bringing that assessment into the class certification analysis.[203] This reading of *Goldman* is especially convincing given the apparent academic consensus that the price impact (particularly back-end price impact) and loss causation concepts, if not identical, overlap substantially.[204] Reading *Goldman* to have softened *Halliburton I*'s bar on considering evidence related to loss causation at the class certification stage could allow an earlier assessment of the merits of claims based on short-seller reports.[205]

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202. Matthew C. Turk, The Securities Fraud Class Action After Goldman Sachs, 59 Am. Bus. L.J. 281, 334, 337 (2022).

203. See Stephen P. Blake & Bo Bryan Jin, Loss Causation and Damages, *in* Securities Litigation: A Practitioner's Guide § 7:4.2, at 7-27 to -28 (Lyle Roberts & Jonathan K. Youngwood eds., 2d ed. 2023) (positing that "[t]he Court's recent decision in *Goldman* . . . supports an inquiry into the impact of loss causation on a classwide damages model at the class certification stage" and that "there may yet be room to challenge the adequacy or fitness of loss causation theories at the class certification stage"); Gray et al., supra note 19, at 113–15 (arguing that courts, following *Goldman*, should assess loss causation, and specifically confounding information in third-party corrective disclosures, at the class certification stage); Mark, Event-Driven Securities Litigation, supra note 120, at 571 ("[T]he [*Goldman*] decision expressly allowed defendants to rebut *Basic* reliance by using merits evidence at the class certification stage. Such evidence is not limited to event studies or other economic analyses—it also includes the contents of the alleged misrepresentations and subsequent corrective disclosures."); Richard A. Booth, Reliance and Loss Causation—Know the Difference: The Supreme Court Takes on Securities Fraud Class Actions, Vill. L. Rev.: Blog (July 26, 2021), https://www.villanovalawreview.com/post/1098 [https://perma.cc/9AV9-EYRP] ("[C]lear[ly], . . . Justice Barrett was thinking about loss causation. But she was able to couch the Court's opinion in the familiar language of materiality rather than to introduce a new source of confusion, while simultaneously opening the . . . door to consideration of how to measure direct investor loss.").

204. See, e.g., Mark A. Perry & Kellam M. Conover, The Interrelationship Between Price Impact and Loss Causation After *Halliburton I & II*, 71 N.Y.U. Ann. Surv. Am. L. 189, 201–02 (2015) (arguing that while "price impact is a necessary—though not sufficient—component of loss causation . . . price impact is the obverse of loss causation"); Turk, supra note 202, at 295 (observing that price impact "is essentially the mirror image of loss causation"). Some courts have also noted the substantial overlap between price impact and loss causation. See, e.g., In re Apple Inc. Sec. Litig., No. 4:19-CV-2033-YGR, 2022 WL 354785, at *8 (N.D. Cal. Feb. 4, 2022) (holding that an analysis of back-end price impact by defendants was permissible, despite overlap with loss causation); Pearlstein v. BlackBerry Ltd., No. 13 CIV. 7060 (CM), 2021 WL 253453, at *18 (S.D.N.Y. Jan. 26, 2021) (noting that while courts should not assess loss causation during class certification, "the Court must nevertheless consider Defendants' evidence that an alleged misrepresentation did not, for whatever reason, actually affect the market price of defendant's stock" (internal quotation marks omitted) (quoting Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc., 879 F.3d 474, 483 (2d Cir. 2018))); In re Chi. Bridge & Iron Co. N.V. Sec. Litig., No. 17 CIV. 1580 (LGS), 2020 WL 1329354, at *6 (S.D.N.Y. Mar. 23, 2020) ("[A]n inquiry into correctiveness . . . is appropriate at the class certification stage.").

205. Professors Merritt Fox and Joshua Mitts have made a similar suggestion to accelerate the consideration of econometric evidence on inflation provided by experts at the class certification stage. Fox & Mitts, supra note 24, at 75–76.

This solution, however, is still not completely availing. Indeed, reading *Goldman* to allow a more thorough analysis of a corrective disclosure prompted by short sellers would bring the adjudication of short-seller credibility up to the class certification phase, not the earlier motion to dismiss phase. As discussed above, the motion to dismiss phase is when much of the action in securities litigation takes place, given the high propensity for settlement.[206]

B. *Factors Courts Should Consider in Assessing Short-Seller Reports at the Motion to Dismiss Stage*

Alternatively, courts should look for—and litigants should provide—facts available at the time of pleading that speak to whether the relevant short-seller report actually did induce a genuine price decline. Indeed, the Ninth Circuit's approach in *Bofl* and later cases—analyzing specific aspects of the short-seller report being used as a corrective disclosure—is not a misguided approach on the whole. Courts *should* be somewhat skeptical of loss causation allegations based on short-seller reports. Like the factors considered by the Ninth Circuit, the factors outlined in this section should be apparent and easily assessable by the time a complaint is prepared and a motion to dismiss is filed. Importantly, however, the factors used by the Ninth Circuit do not effectively get at the issue of loss causation.[207] Instead, the factors discussed below will enable plaintiffs to establish that their otherwise-suspect loss causation allegations create a "reasonable inference" that their losses were caused by the information revealed in a short-seller report and thereby should survive a motion to dismiss.[208]

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206. See supra section I.A.3. A recent analysis of securities class actions found that nearly half of suits settled after a ruling on a motion to dismiss and before a ruling on class certification. See Bulan & Simmons, supra note 22, at 14 fig.13 (showing that 177 of 370 settlements from 2018 to 2022 took place after a ruling on a motion to dismiss and before a ruling on class certification). This indicates that the costs of waiting until the class certification stage to assess evidence related to loss causation might be large, as the PSLRA's stay on discovery is lifted after a failed motion to dismiss. 15 U.S.C. § 78u-4(b)(3)(B) (2018); see also Fox & Mitts, supra note 24, at 41 (describing the motion to dismiss as "a point that precedes most of what makes securities litigation expensive").

207. Again, the short-seller report used against Nikola shows that investors can and do rely on unsigned short-seller reports that disclaim accuracy. Indeed, the court in the Nikola case held that plaintiffs successfully alleged loss causation because the short-seller report in the case "directly implicated previous misstatements" and was associated "with a loss in stock value." Borteanu v. Nikola Corp., No. CV-20-01797-PHX-SPL, slip op. at 27–29 (D. Ariz. Dec. 8, 2023). Given these two features of the report, holding otherwise would have contradicted courts' general approach to loss causation. See supra note 50 and accompanying text (noting that courts generally require plaintiffs to identify a corrective disclosure and associated price decline in order to plead loss causation).

208. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))).

1. *Price Reversals.* — First, courts should consider whether the price of the security at issue in the case bounced back shortly after the short report was released. As discussed above, there is evidence that some short-seller reports are followed by sizable price declines, then slower partial price reversals.[209] If judges or litigants notice such a price reversal following the alleged corrective disclosure in their cases, this might raise red flags that the plaintiffs' alleged "loss" was actually caused by misinformation or market manipulation. While smaller price reversals might be meaningless, large reversals could suggest that a "short and distort" scheme has occurred. Indeed, "[a] stronger price reversal indicates a higher degree of mispricing—while mispricing does not necessarily prove that manipulation was occurring, it is a necessary condition for manipulation to have occurred."[210]

Recognizing that stock prices can bounce back as the market digests misleading information might seem to conflict with the concept of market efficiency—the idea that stock prices reflect all available information—that underpins the securities class action.[211] Notably, however, financial economists have long argued that markets can make mistakes.[212] In the context of reactions to short-seller reports, such mispricing might reflect algorithmic traders quickly reacting to the headlines from sites like *Seeking Alpha*.[213] Moreover, short sellers could more directly be manipulating prices through their own options trading.[214] Finally, the reaction might reflect the market fearing the worst following an "incomplete disclosure," after which the market does not have all of the information required to make an accurate valuation of the targeted company.[215] Such incomplete

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209. See Mitts, Short and Distort, supra note 94, at 306–10 (finding on average that in the period from two to five days after a pseudonymous short-seller report was released, approximately thirty-one percent of the price decline that followed the release of the report was reversed).

210. Id. at 307.

211. See supra note 31 and accompanying text.

212. See, e.g., Eugene F. Fama, Market Efficiency, Long-Term Returns, and Behavioral Finance, 49 J. Fin. Econ. 283, 284 (1998) ("[A]n efficient market generates categories of events that individually suggest that prices over-react to information. But in an efficient market, apparent underreaction will be about as frequent as overreaction.").

213. See Mitts, Short and Distort, supra note 94, at 307 ("Seeking Alpha publications generally served as an important source of news for algorithmic trading over these years . . . ."); Yesha Yadav, How Algorithmic Trading Undermines Efficiency in Capital Markets, 68 Vand. L. Rev. 1607, 1619, 1648 (2015) (noting that algorithms used by high-frequency traders, which account for seventy percent of trading of stocks in the United States, "may over-value some data, under-emphasize it in other cases, make mistakes, and fail to check its truthfulness").

214. Joshua Mitts & John C. Coffee, Jr., Petition for Rulemaking on Short and Distort 2 (2020), https://www.sec.gov/rules/petitions/2020/petn4-758.pdf [https://perma.cc/4QLF-MBZM].

215. Robert A. Fumerton, Market Overreaction and Loss Causation, 62 Bus. Law. 89, 91 (2006).

disclosures might lead to "herding" behavior, whereby investors react to the actions taken by other investors rather than the information available to them.[216]

Indeed, the law underpinning securities litigation already recognizes that rapid stock price declines can be followed by slower stock price recoveries. In particular, the PSLRA contains a so-called bounce-back provision, which caps a plaintiff's damages by the difference between the plaintiff's purchase price of the security and the mean trading price of the security in the 90-day period following the corrective disclosure.[217] The provision is rarely formally invoked, given that securities class actions seldom proceed to trial,[218] but is nearly always used in settlement negotiations to limit plaintiffs' damages.[219] The idea behind the provision was to reduce damages if the stock price overreacted to the corrective disclosure that was the basis for the lawsuit.[220] Incorporating this premise into a consideration of the pleadings could serve a similar purpose.

This approach is also consistent with existing case law. Some courts—including the Ninth Circuit—have held that quick price reversals following corrective disclosures can undermine a plaintiff's loss causation allegations.[221] As these courts have explained, a price rebound may render

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216. Dunbar & Heller, supra note 35, at 494–95.

217. 15 U.S.C. § 78u-4(e)(1) (2018); see also In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 461 (9th Cir. 2000) ("[I]f the mean trading price of a security during the 90-day period following the correction is *greater* than the price at which the plaintiff purchased his stock then that plaintiff would recover nothing under the PSLRA's limitation on damages.").

218. John Schreiber & John Tschirghi, Market Rebound May Curb Securities Class Actions, Damages, Law360 (July 31, 2020), https://www.law360.com/articles/1295065 (on file with the *Columbia Law Review*).

219. See Catherine J. Galley, Daniel J. Tyukody, Erin E. McGlogan & Jason L. Krajcer, Cornerstone Rsch., Limiting Rule 10b-5 Damages Claims 7–8 (2014), https://www.cornerstone.com/wp-content/uploads/2014/04/Limiting-Rule-10b-5-Damages-Claims.pdf [https://perma.cc/K2GJ-A95S] (analyzing settlement allocation plans and finding that "[i]n almost all of the settlements reviewed, the formula that was used limited plaintiffs' damages" in a way that was "consistent with the PSLRA 90-day 'bounce-back' rule").

220. See Jonathan C. Dickey & Marcia Kramer Mayer, Effect on Rule 10b-5 Damages of the 1995 Private Securities Litigation Reform Act: A Forward-Looking Assessment, 51 Bus. Law. 1203, 1211 (1996) ("[A]n alternative justification for the ninety-day rule may be that prices typically overreact to adverse news and that the 'settle out' period runs this long.").

221. See Wochos v. Tesla, Inc., 985 F.3d 1180, 1197–98 (9th Cir. 2021) (noting that the "quick and sustained price recovery" following a corrective disclosure can render an allegation of loss causation insufficient); Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1059, 1065 (9th Cir. 2008) (holding that plaintiffs failed to plead loss causation when the defendant's stock price "rebounded within three trading days"); Bajjuri v. Raytheon Techs. Corp., 641 F. Supp. 3d 735, 770–71 (D. Ariz. 2022) (holding that plaintiffs failed to plead loss causation because the defendant's stock price "recovered entirely within four trading days"); In re Manulife Fin. Corp. Sec. Litig., 276 F.R.D. 87, 104 (S.D.N.Y. 2011) (rejecting plaintiffs' loss causation allegations because the closing price of defendant's stock three days after the corrective disclosure was "just three cents lower than the closing price preceding the [corrective disclosure]"). Notably, in the *Dura* case itself, the Court noted

loss causation allegations "implausible"[222] and undermine the critical inference that plaintiffs ask courts to draw: that a particular disclosure revealed fraud to the market.[223] This reasoning seems particularly applicable to cases involving short-seller reports, in which judges should be especially skeptical on the issue of loss causation given the possibility of manipulation. Indeed, a handful of district courts, all in dicta, have justified their holdings that short-seller reports could not be used to establish loss causation because the report only induced a temporary price reaction in the targeted stock.[224] Conversely, an allegation in the complaint that the stock price did not rebound after the short-seller report's publication and instead remained depressed would support plaintiffs' loss causation theory.

Importantly, historic stock price data is readily available at the pleadings stage and is subject to judicial notice.[225] Accordingly, even defendants could rely on changes in stock prices at the pleadings stage without converting their motion to dismiss into a motion for summary judgment.[226] By arguing that a stock price reversal was both large and durable in their motion to dismiss, defendants could rebut the standard judicial presumption that the allegations in the plaintiffs' complaint are to

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that following the corrective disclosure at issue in that case, the defendant's stock price "temporarily fell but almost fully recovered within one week." Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 339 (2005). That fact ultimately did not play a role in the Court's analysis of the plaintiff's loss causation allegation, which instead focused on plaintiff's failure to allege that the share price fell significantly. Id. at 346–47.

222. See *Manulife*, 276 F.R.D. at 104 ("While such a 'rebound' in a stock price after an alleged corrective disclosure does not make the allegation implausible per se, the [plaintiffs'] failure to address or explain this rebound renders their loss causation allegation implausible in this case.").

223. See *Metzler*, 540 F.3d at 1065 ("The [complaint's] allegation that the market understood the . . . disclosures as a revelation of [fraud] is not a 'fact.' It is an inference that [the plaintiff] believes is warranted from the facts that are alleged. But . . . this is not the case. . . . [The defendant] points out that its stock quickly recovered . . . .").

224. See Jedrzejczyk v. Skillz Inc., No. 21-CV-03450-RS, 2023 WL 2333891, at *4 (N.D. Cal. Mar. 1, 2023) ("Plaintiff's loss causation theory is undercut by the fact that, as the [complaint] states and then attempts to explain away, Skillz's stock price dipped but then rebounded in the days following the Report's release."); In re Ideanomics, Inc., Sec. Litig., No. 20 CIV. 4944 (GBD), 2022 WL 784812, at *11 (S.D.N.Y. Mar. 15, 2022) ("[T]he stock price rose above $2 and stayed over $2 until July 1, 2020 closing at $1.725. Plaintiff provides no explanation for this upward fluctuation just four days after the J Capital and Hindenberg publications."); Harris v. AmTrust Fin. Servs., Inc., 135 F. Supp. 3d 155, 173 n.30 (S.D.N.Y. 2015) ("Rather than injecting new information into the market that was absorbed into a corrected stock price, the [short report] caused a temporary price drop (which presumably resulted in a pecuniary gain for its author).").

225. *Metzler*, 540 F.3d at 1064 n.7 (noting that judicial notice for a defendant's stock price history was "proper"); Ganino v. Citizens Utils. Co., 228 F.3d 154, 166 n.8 (2d Cir. 2000) ("[T]he district court may take judicial notice of well-publicized stock prices without converting the motion to dismiss into a motion for summary judgment.").

226. *Ganino*, 228 F.3d at 166 n.8.

be taken as true.[227] Instead, defendants could use such stock price data to render plaintiffs' loss causation allegations unable to meet Rule 8's plausibility standard.[228]

Plaintiffs should be able to preserve their loss causation allegations based on short-seller reports in spite of a price recovery by pleading that there was some other news following the corrective disclosure that caused the company's share price to bounce back.[229] In particular, courts should require such an allegation of other positive news when the price recovery occurs within a period of a few days after the short report's publication, which would be a red flag for potential manipulation. Indeed, Professor Mitts's analysis of pseudonymous *Seeking Alpha* articles found that these reports typically lead to substantial and rapid price declines immediately after publication; meanwhile, slower post-report price reversals often occur within two to five days after the report is published.[230] Accordingly, courts should be less concerned with unexplained price reversals over longer periods of time.[231]

Disentangling the effects of various disclosures on stock price movements is notoriously difficult, and plaintiffs may want to obtain assistance from an economic expert when preparing their complaints.[232] Plaintiffs' attorneys may accordingly ask an expert to prepare an event study. Event studies are statistical analyses that use a company's historical stock price data to determine the magnitude of that stock price's response

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227. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . .").

228. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." (quoting *Twombly*, 550 U.S. at 556)).

229. See, e.g., In re Take-Two Interactive Sec. Litig., 551 F. Supp. 2d 247, 289–90 (S.D.N.Y. 2008) ("[B]ecause the rapid recovery of Take–Two's share price from declines that it suffered may have resulted from factors unrelated to the [alleged fraud], it is premature to preclude a showing of loss causation on that ground.").

230. Mitts, Short and Distort, supra note 94, at 303–10 & fig.3.

231. See Allen Ferrell & Atanu Saha, The Loss Causation Requirement for Rule 10b-5 Causes of Action: The Implications of *Dura Pharmaceuticals, Inc. v. Broudo*, 63 Bus. Law. 163, 167–68 (2007) ("[I]n some circumstances, there appears to be market 'overreaction' to certain disclosures and . . . it might take the market some time to 'digest' fully and accurately the implications of a corrective disclosure . . . . The market may correct for the 'overreaction' over the course of several days . . . ." (cleaned up)); see also Hable v. Godenzi, No. 2:22-cv-02012-GMN-BNW, 2023 WL 8653185, at *8 (D. Nev. Dec. 12, 2023) (declining to follow *Metzler* and *Wochos* and holding that plaintiff properly pled loss causation when the recovery in the price of the at-issue securities took place over a one-month period).

232. See Madge S. Thorsen, Richard A. Kaplan & Scott Hakala, Rediscovering the Economics of Loss Causation, 6 J. Bus. & Sec. L. 93, 124–25 (2006) ("Expert help at the outset of a case is . . . bound to be helpful, if not mandatory, [in securities litigation]. Thus, the assistance of accountants, finance professionals, valuation experts, or economists, can confirm the presence of, if not the exact amount or precise changes in, inflationary loss for pleading purposes.").

to a news event, controlling for market and industry factors that might have affected the price of the stock.[233] Indeed, expert witnesses and their event studies already play an instrumental role in securities class actions, especially at the class certification stage, when they use these analyses to opine on market efficiency, damages, and price impact.[234] While such complex economic analysis is generally not required at the pleading stage, plaintiffs might rely on expert analyses of price movements when preparing their complaints to ensure that their allegations of loss causation do not simply repeat false allegations contained in a baseless and manipulative short-seller report that the market eventually saw as unreliable.[235] This approach may also help plaintiffs' lawyers avoid running afoul of Rule 11's requirement that a complaint's "factual contentions have evidentiary support."[236]

It should be noted, however, that a more rigorous judicial analysis of stock price movements would not be a cure-all to the issue here. Even economic experts using event studies cannot definitively determine what caused a stock price movement at a given time.[237] Accordingly, the

233. Kevin L. Gold, Eric Korman & Ahmer Nabi, Federal Securities Acts and Areas of Expert Analysis, *in* Litigation Services Handbook: The Role of the Financial Expert 1, 8–9 (Roman L. Weil, Daniel G. Lentz & Elizabeth A. Evans eds., 6th ed. 2017).

234. Kristin Feitzinger, Amir Rozen & Shaama Pandya, Cornerstone Rsch., Economic Analysis at the Class Certification Stage of Exchange Act Securities Class Actions 1–3 (2022), https://www.cornerstone.com/wp-content/uploads/2022/01/Economic-Analysis-at-the-Class-Certification-Stage.pdf [https://perma.cc/7ETB-9BZB]. Judges also often treat event studies as essential for a plaintiff to survive a motion for summary judgment. Kaufman & Wunderlich, supra note 197, at 208–10 ("[A] proper event study is now a necessary element in a securities fraud claim. . . . The absence of an event study for damages, in particular, will often result in summary judgment in favor of the defendant."); see also Fox & Mitts, supra note 24, at 15 ("[T]he court in a fraud-on-the-market suit will typically grant the defendant's motion for summary judgment unless the plaintiff can introduce a[n] . . . event study rejecting with 95 percent confidence the null hypothesis that the price change accompanying the misstatement or its corrective disclosure was not due entirely to other causes."); Rapp, supra note 162, at 393–94 ("'Event studies,' designed and executed by dueling experts have become ubiquitous in fraud-on-the-market litigation, as parties seek to establish a link, or absence thereof, between the alleged dissemination of materially false or misleading information . . . and the 'truth' that is later revealed, deflating the price.").

235. See Jill E. Fisch, Jonah B. Gelbach & Jonathan Klick, The Logic and Limits of Event Studies in Securities Fraud Litigation, 96 Tex. L. Rev. 553, 569 (2018) ("In the post-*Dura* state of affairs, plaintiffs . . . would also be well-advised to allege that an expert-run event study establishes . . . loss causation . . . ."); Thorsen et al., supra note 232, at 124–25 (arguing that expert help might be required at the pleading stage post-*Dura* in the form of a "rough and ready . . . valuation analysis" or an event study of "modest scope" in the pleadings or parties' briefs).

236. Fed. R. Civ. P. 11(b)(3).

237. See William O. Fisher, Does the Efficient Market Theory Help Us Do Justice in a Time of Madness?, 54 Emory L.J 843, 874 (2005) ("[S]uch a study does not test why the market moved in response to the announcement. . . . [A]n event study does not test whether the price change was driven by market professionals and . . . whether those professionals were rationally relating the announcement to some fundamental analysis such as expected future cash returns.").

proposed approach here might be overly simplistic. Further, plaintiffs (and their experts) would not have access to materials from discovery, limiting their ability to explain such price reversals.[238] Moreover, expert analysis is expensive,[239] and plaintiffs might not want to invest resources before a motion to dismiss is decided; but plaintiffs might recoup these costs if more detailed allegations explaining price movements make it less likely that judges will dismiss corrective disclosures based on short-seller reports. This would end up increasing the settlement value of such cases. Nonetheless, a durable price drop or sustained price recovery not explainable by other news can serve as just one convincing piece of information at the pleading stage for courts determining whether a short-seller report plausibly changed the market's perceptions of a company.

2. *Short-Seller Reputation.* — While price reversals might be useful in determining whether a short-seller report's effect on the market persisted, courts should consider other available information that suggests that such a report genuinely affected the market's perception of the company. Another such factor could include an assessment of the reputation of the short seller who produced the report. For instance, Professor Mitts's research on pseudonymous short sellers posits that markets are most likely to react to these reports when their authors have a record of publishing articles that did not lead to price reversals.[240] Accordingly, plaintiffs could provide—and courts could consider—information about the author of the at-issue short-seller report during the pleading stage. This information is likely to be easily available early on in the litigation. For instance, the major short-seller firms, like Citron Research, generally make all of their prior short-seller reports available online.[241] Moreover, even visitors to *Seeking Alpha* can look at the post history of a particular pseudonymous author.[242]

This raises a second point. Not all short sellers should be seen as equals. While one dividing line between short sellers is their history of

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238. See 15 U.S.C. § 78u-4(b)(3)(B) (2018) ("In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss . . . .").

239. For instance, in the *Goldman* case, plaintiffs' and defendants' economic experts were compensated at rates of $990 and $900 per hour, respectively. Declaration of John D. Finnerty, Ph.D. in Support of Lead Plaintiff's Motion for Class Certification at 3, In re Goldman Sachs Grp., Inc. Sec. Litig., No. 1:10-cv-03461-PAC (S.D.N.Y. Sept. 24, 2015), 2015 WL 12866858; Declaration of Stephen Choi, Ph.D. at 6, *Goldman*, 2015 WL 11661898.

240. Mitts, Short and Distort, supra note 94, at 310; see also Ljungqvist & Qian, supra note 84, at 2012–14 (arguing that short sellers that published prior reports that produced profits for that short seller are seen as more credible by the market).

241. Ljungqvist & Qian, supra note 84, at 2012.

242. For instance, the pseudonymous author who wrote the *Seeking Alpha* article that targeted Farmland Partners, Rota Fortunae, has a page on the website listing other reports he published prior to being blocked on the site. Rota Fortunae, Seeking Alpha, https://seekingalpha.com/author/rota-fortunae [https://perma.cc/Z386-74BM] (last visited Feb. 23, 2024). Rota Fortunae's article about Farmland Partners is no longer available on *Seeking Alpha*'s website. Id.

producing accurate reports, another is the level of anonymity associated with the short seller. In particular, the large short-seller firms are intimately associated with at least one well-known individual investor. Firms like Muddy Waters Research, Citron Research, and Hindenburg Research are led by investors Carson Block, Andrew Left, and Nathan Anderson, respectively.[243] Accordingly, while these firms' reports are generally unsigned, the reports might not be considered truly anonymous; indeed, at least one district court in the Ninth Circuit reached this same conclusion in a pre-*BofI* case.[244]

In contrast, pseudonymous authors on *Seeking Alpha* have no such association with any named individual. While both groups have incentives to drive down share prices and disclaim the accuracy of their reports, being tied to named investors could increase the likelihood that the market would ignore later reports published by these firms if their reports were unreliable. This would severely damage their business model. Accordingly, these firms might have more at stake than a pseudonymous author who can just start writing reports under a new fictitious name if their reports are seen as unreliable by the market.[245] This is not to say that short reports backed by institutions are always right,[246] but it can be another tool in the toolbox for judges assessing pleadings or plaintiffs trying to bolster their complaints.

3. *Corroborative Corrective Disclosures.* — Finally, another category of information that courts and litigants should consider is whether the short report's allegations were confirmed by later events. In particular, those involved in the litigation should consider whether there were later corrective disclosures released by parties other than short sellers (like from

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243. See Goldstein & Kelly, supra note 84 (describing Hindenburg Research as "Mr. Anderson's five-person firm"); Warner, supra note 83, at 59 (describing Carson Block as "founder and chief investment officer of Muddy Waters"); Wirz, supra note 87 (noting that Andrew Left runs Citron Research).

244. See In re China Educ. All., Inc. Sec. Litig., No. CV 10-9239 CAS JCX, 2011 WL 4978483, at *4 (C.D. Cal. Oct. 11, 2011) (agreeing with plaintiffs that an unsigned report issued by a short selling firm "does not implicate the same skepticism as a 'traditional' anonymous source"). But see In re eHealth, Inc. Sec. Litig., No. 20-CV-02395-JST, 2023 WL 6390593, at *8 (N.D. Cal. Sept. 28, 2023) (following *BofI* to reject the use of a Muddy Waters report as a corrective disclosure because "Muddy Waters is a short-seller" and the report states that it "makes no representation, express or implied, as to the accuracy, timeliness, or completeness of any such information" and "has no identified author" (internal quotation marks omitted) (quoting the record)); In re LexinFintech Holdings Ltd. Sec. Litig., No. 3:20-CV-1562-SI, 2021 WL 5530949, at *15–16 (D. Or. Nov. 24, 2021) (following *BofI* without further analysis because the corrective disclosure "was issued by anonymous, self-interested short sellers and the report contained a broad disclaimer on every page" (footnote omitted)).

245. See Mitts, Short and Distort, supra note 94, at 315–16 (discussing evidence consistent with pseudonymous authors no longer publishing under their fictitious names after losing credibility).

246. See, e.g., Wirz, supra note 87 (discussing Citron Research's failed short call against Tesla Motors).

journalists, government investigators, or the company itself) that confirm the basic set of allegations revealed in the short-seller report.[247] Such additional confirmation could eliminate any concern over unreliability or the inherent conflict of interest presented by short-seller reports, especially when combined with price movements indicating that the market believed the short seller's report. Moreover, subsequent events that confirm short sellers' allegations are quite common. One analysis found that nearly half of firms targeted by activist short sellers subsequently experienced at least one adverse outcome like an SEC enforcement action, delisting, or financial restatement, among others.[248]

Notably, the Ninth Circuit and other courts have taken a similar approach to the announcement of government investigations. In particular, courts have held that such disclosures raise concerns about the reliability of the market's reaction to that event, given that mere investigations do not reveal whether any fraud actually took place.[249] Nonetheless, the Ninth Circuit has held that such announcements can serve as corrective disclosures "if the complaint also alleges a subsequent corrective disclosure by the defendant."[250] In doing so, that court recognized that "loss causation is a 'context-dependent' inquiry" and that later disclosures can "confirm[] that investors understood the [government's] announcement as at least a partial disclosure of the inaccuracy of" alleged misstatements.[251] Indeed, the Fifth Circuit has held that while the announcement of a government investigation and a speculative report from Citron Research could not alone serve as corrective disclosures, those disclosures, along with the resignations of two corporate executives and a news article, could "collectively" serve as a corrective disclosure to adequately plead loss causation.[252]

It should be noted, however, that short reports often contain more specific factual allegations than the mere announcement of a government

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247. Corroborative corrective disclosures could take many forms, including company press releases confirming the short seller's claims, the announcement of the results of an internal investigation, SEC enforcement actions, and financial statement restatements. See Brendel & Ryans, supra note 82, at 488–89 (discussing company responses and other adverse outcomes for targeted firms following the release of short reports).

248. See id. at 506 tbl.2 (showing that fifty-one percent of targeted firms did not experience a severe outcome following a short report).

249. See Loos v. Immersion Corp., 762 F.3d 880, 890 (9th Cir. 2014) ("[A]ny decline in a corporation's share price following the announcement of an investigation can only be attributed to market speculation about whether fraud has occurred. This type of speculation cannot form the basis of a viable loss causation theory.").

250. Lloyd v. CVB Fin. Corp., 811 F.3d 1200, 1210 (9th Cir. 2016) (citing *Loos*, 762 F.3d at 890 n.3).

251. Id. (quoting Miller v. Thane Int'l, Inc., 615 F.3d 1095, 1102 (9th Cir. 2010)).

252. Pub. Emps. Ret. Sys. of Miss. v. Amedisys, Inc., 769 F.3d 313, 324 (5th Cir. 2014).

investigation.[253] Accordingly, a hard rule against short reports being used as corrective disclosures by themselves, as is the case for the announcement of government investigations,[254] is less useful in this context. Indeed, the Ninth Circuit has made such a distinction between announcements of government investigations and allegations contained in a complaint in separate litigation, finding that the latter can serve as a corrective disclosure because of its more specific factual content.[255] Accordingly, a totality of the circumstances approach, considering all available information, is more appropriate for considering whether short reports can be used to plead loss causation.[256]

Again, such disclosures corroborating a short-seller report would likely be available at the time a court is considering a motion to dismiss. Motions to dismiss in securities class actions often occur many months later than the disclosures at issue.[257] This should give sufficient time for another party, or the company itself, to uncover or reveal additional information about the fraud presented by the short-seller report (and sufficient time for a plaintiff to amend its complaint to include this later disclosure), if such misdoings actually had taken place.

4. *The Role of Judges.* — How could such a change to the approach judges take to the pleading of loss causation be implemented? The most obvious solution could be an amendment to the PSLRA or the Securities Exchange Act of 1934. A statutory amendment codifying consideration of additional information by judges at the pleadings stage could efficiently address the problem posed by short-seller reports in securities class actions. Moreover, this approach would have the added benefit of

253. See *Loos*, 762 F.3d at 890 (describing the factual content of an announcement of a government investigation as "speculation"); Ljungqvist & Qian, supra note 84, at 1976 (noting that activist short reports often "contain a wealth of new facts").

254. See *Loos*, 762 F.3d at 890 (holding that "the announcement of an investigation, without more, is insufficient to establish loss causation"); see also Meyer v. Greene, 710 F.3d 1189, 1202 (11th Cir. 2013) (same).

255. See In re BofI Holding, Inc. Sec. Litig., 977 F.3d 781, 793 (9th Cir. 2020) (noting that the complaint serving as a corrective disclosure "disclosed facts that, if true, rendered false BofI's prior statements about its underwriting standards, internal controls, and compliance infrastructure" and that "[n]o speculation on that score was required").

256. See id. at 792 ("We . . . reject[] any . . . categorical rule. . . . [A]llegations in a lawsuit do not provide definitive confirmation that fraud occurred. But short of an admission by the defendant or a formal finding of fraud—neither of which is required—any corrective disclosure will necessarily take the form of contestable allegations of wrongdoing." (citations omitted)).

257. For instance, in the *Nikola* case, the first motion to dismiss was filed in April 2022, seventeen months after the corrective disclosure from Hindenburg Research in September 2020. Nikola Defendants' Motion to Dismiss Pursuant to Rules 9(b) and 12(b)(6), Borteanu v. Nikola Corp., No. 2:20-cv-01797-PHX-SPL (D. Ariz. filed Apr. 8, 2022), 2022 WL 1081541. Meanwhile, in the *Farmland Partners* case, the motion to dismiss was filed in April 2019, nine months after the publication of the Rota Fortunae report in July 2018. Motion to Dismiss Plaintiffs' Amended Class Action Complaint, Turner Ins. Agency, Inc. v. Farmland Partners Inc., No. 18-cv-02104-DME-NYW (D. Colo. filed Apr. 15, 2019), 2019 WL 1613301.

uniformity among the circuits. As discussed above, the circuit courts are split on many issues related to securities class actions, and expecting a cohesive approach to emerge naturally through judge-made common law might be unduly optimistic.[258] Of course, such an approach yields its own problems, in particular the heavy burden of passing such an amendment through Congress. Indeed, some scholars have been advocating for changes to securities class actions through amendment of the PSLRA since the statute was passed over two decades ago.[259] Moreover, a formal codification of a heightened pleading standard could be too blunt a tool.[260]

Instead, a more straightforward approach is to leave such questions to judges. Courts, as required by the PSLRA, already consider loss causation at the pleadings stage.[261] Further, in *Dura*, the Supreme Court recognized that "an initially inflated purchase price might mean a later loss. But that . . . lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which . . . [may] account for some or all of that lower price."[262] "Firm-specific facts" or "other events" might include the fact that the firm was targeted by a (potentially) malicious short seller. Finally, judges already require more from plaintiffs when certain types of corrective disclosures—like government investigations—are used to plead loss causation, in spite of the standard judicial assumption that a complaint's factual allegations are true.[263] Given all of this, judges are already well-equipped to handle the approach proposed here.

Accordingly, there is little reason to expect that this approach will harm judicial efficiency. Instead, the opposite is the case: Judges will be able to make informed decisions on corrective disclosures involving short reports, allowing meritorious suits to proceed while preventing suits

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258. See supra note 56 and accompanying text (noting the split on the application of Rule 9(b)'s heightened pleading requirement to loss causation); supra section II.B (analyzing the split on whether anonymous short reports can serve as corrective disclosures); supra note 133 (noting the split on allowing corrective disclosures that analyze already-public information).

259. See, e.g., Fallone, supra note 44, at 140 (arguing in 1997 for codification by Congress of the private right of action under 10b-5).

260. See Mark, Event-Driven Securities Litigation, supra note 120, at 634–36 (critiquing proposals to add a heightened pleading standard in the PSLRA to address event-driven securities litigation).

261. 15 U.S.C. § 78u-4(b)(4) (2018); see also Fox & Mitts, supra note 24, at 66 (noting that the judicial inquiry into loss causation at the motion to dismiss stage "relates to the content of the corrective disclosure specified in the complaint" and "price movements").

262. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 342–43 (2005) (emphasis omitted).

263. See supra notes 249–252 and accompanying text; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (instructing judges to assume that "all the [factual] allegations in the complaint are true").

following manipulative short reports from continuing and taking up valuable judicial time. This aligns with the core purpose of the PSLRA.[264] Indeed, judges, when equipped with the right information, can determine whether investors were truly harmed by the defendant company and allow for appropriate compensation.

CONCLUSION

Loss causation allegations that rely on short-seller reports will likely become an increasingly common component of the securities class action. The current split between the Second Circuit and the Ninth Circuit on this issue suggests that courts are just beginning to grapple with the implications of using these reports as corrective disclosures. By recognizing both the harm done by manipulative short attacks and the benefits provided by investor compensation through securities litigation, this Note seeks to reconcile the two approaches provided by the Ninth Circuit and the Second Circuit in dealing with short-seller reports. The compromise approach suggested here, in which courts should assess information related to loss causation as early as possible in the lawsuit, can recognize the unique conflicts of interest present in short-seller reports while not foreclosing compensation for harmed investors.

264. See Sale & Thompson, supra note 40, at 505 (stating that the PSLRA's pleading requirements and discovery stay "push plaintiffs to develop facts prior to filing their complaints in order to survive the motion to dismiss and pursue their claims").

ESSAY

REDISTRIBUTING JUSTICE

Benjamin Levin & Kate Levine***

This Essay surfaces an obstacle to decarceration hiding in plain sight: progressives' continued support for the carceral system. Despite progressives' increasingly prevalent critiques of criminal law, there is hardly a consensus on the left in opposition to the carceral state. Many left-leaning academics and activists who may critique the criminal system writ large remain enthusiastic about criminal law in certain areas—often areas in which defendants are imagined as powerful and victims as particularly vulnerable.

In this Essay, we offer a novel theory for what animates the seemingly conflicted attitude among progressives toward criminal punishment—the hope that the criminal system can be used to redistribute power and privilege. We examine this redistributive theory of punishment via a series of case studies: police violence, economic crimes, hate crimes, and crimes of gender subordination. It is tempting to view these cases as one-off exceptions to a general opposition to criminal punishment. Instead, we argue that they reflect a vision of criminal law as a tool of redistribution—a vehicle for redistributing power from privileged defendants to marginalized victims.

Ultimately, we critique this redistributive model of criminal law. We argue that the criminal system can't redistribute in the egalitarian ways that some commentators imagine. Even if criminal law somehow could advance some of the redistributive ends that proponents suggest, our criminal system would remain objectionable. The oppressive and inhumane aspects of the carceral state still would be oppressive and inhumane, even if the identity of the defendants or the politics associated with the institutions shifted.

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INTRODUCTION

We are living in a moment of reckoning for U.S. criminal policy. In recent years, as police brutality has gone viral and the drug war has been exposed as ineffective and racist, many progressive politicians,[1]

1. See, e.g., Nathalie Baptiste, Democrats Say They Want to End Mass Incarceration. There's No Way They'll Do What's Needed to Get There., Mother Jones (Sept. 20, 2019), https://www.motherjones.com/crime-justice/2019/09/democrats-say-they-want-to-end-mass-incarceration-why-dont-they-address-the-real-solution [https://perma.cc/SF3L-CABP] (observing that "[s]hrinking the enormous US prison population has become a standard promise from Democrats running for president" but noting that "[i]f Democratic candidates actually want to end mass incarceration, they'll have to talk about reforms that are for *everyone* behind bars, not just the low-level drug offenders").

academics,[2] organizations,[3] organizers,[4] and voters[5] have aligned themselves with moves toward decarceration or police and prison

2. See, e.g., Aya Gruber, The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration 6–9 (2020) [hereinafter Gruber, The Feminist War on Crime] (critiquing carceral feminism from an abolitionist perspective); Amna A. Akbar, Toward a Radical Imagination of Law, 93 N.Y.U. L. Rev. 405, 408 (2018) ("[T]he most imaginative voices within contemporary racial justice movements . . . [are] focused on shifting power into Black and other marginalized communities; shrinking the space of governance now reserved for policing, surveillance, and mass incarceration; and fundamentally transforming the relationship among state, market, and society." (footnote omitted)); Benjamin Levin, The Consensus Myth in Criminal Justice Reform, 117 Mich. L. Rev. 259, 293 (2018) [hereinafter Levin, The Consensus Myth] (describing widespread critiques of the criminal system); Kate Levine, Police Prosecutions and Punitive Instincts, 98 Wash. U. L. Rev. 997, 1003 (2021) [hereinafter Levine, Police Prosecutions] (critiquing carceral solutions to policing problems); Allegra M. McLeod, Prison Abolition and Grounded Justice, 62 UCLA L. Rev. 1156, 1161–63 (2015) (envisioning a "prison abolitionist framework" that would "substitut[e] a constellation of other regulatory and social projects for criminal law enforcement" and imagining abolition both as "decarceration and substitutive social—not penal—regulation"); Dorothy E. Roberts, The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism, 133 Harv. L. Rev. 1, 8–11 (2019) [hereinafter Roberts, Abolition Constitutionalism] (arguing that "the only way to transform our society from a slavery-based one to a free one is to abolish the prison industrial complex" and arguing for a new abolition constitutionalism based on engaging the abolitionist history of the Constitution and the modern-day prison abolition movement); Jocelyn Simonson, Police Reform Through a Power Lens, 130 Yale L.J. 778, 787–91 (2021) [hereinafter Simonson, Power Lens] (using a power lens to describe movement groups' push to change police governance and arguing that "power shifting is important and necessary to the larger abolitionist project"); India Thusi, Policing Is Not a Good, 110 Geo. L.J. Online 226, 233–34, 249–50 (2022), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2022/07/Thusi-Policing-Is-Not-a-Good.pdf [https://perma.cc/D4K6-PNGC] (calling for "a macro-level evaluation of policing that centers the history of policing and its continued role in racial subordination" and arguing that such an assessment would weigh in favor of defunding and abolishing the police); Jamelia Morgan, Responding to Abolition Anxieties: A Roadmap for Legal Analysis, 120 Mich. L. Rev. 1199, 1202 (2022) (book review) (exploring how abolitionist theories and methodologies might enrich and transform traditional legal analysis). The recent literature on abolition has begun to draw criticism from prominent legal scholars. See, e.g., Rachel E. Barkow, Promise or Peril?: The Political Path of Prison Abolition in America, 58 Wake Forest L. Rev. 245, 252–55 (2023) (cautioning that calls for prison abolition may alienate politicians and the public and impede reforms to the criminal system); Daniel Richman, The (Immediate) Future of Prosecution, 50 Fordham Urb. L.J. 1139, 1143–44 (2023) ("I think talk of 'abolition' and 'defunding' horribly misplaced—since constitutional policing can be extremely expensive, and adjudicative fairness and reliability only enhanced by better funding of defense lawyers and prosecutors.").

3. Marty Johnson, ACLU Pressing Biden to Stick to Promise of Decarceration With New Ad Buy, The Hill (Jan. 28, 2021), https://thehill.com/homenews/news/536238-aclu-pressing-biden-to-stick-to-promise-of-decarceration-with-new-ad-buy [https://perma.cc/H7UN-DR4G] (describing the ACLU's campaign urging President Joseph Biden to grant mass clemency to people who fit certain criteria).

4. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, Movement Law, 73 Stan. L. Rev. 821, 824 (2021) ("The Ferguson and Baltimore rebellions, combined with organizing by the Movement for Black Lives (M4BL) and a growing constellation of abolitionist organizations, have made anti-Blackness, white supremacy, and police violence core issues on the liberal-to-left spectrum and redefined the terms of policy debate.");

abolition. Increasingly, many progressive commentators criticize mass incarceration and treat criminal legal institutions as objectionable responses to social problems.[6] Nevertheless, these anticarceral commitments often have their limits. Despite the prevalence of increasingly radical rhetoric on the left, many progressives continue to make exceptions and favor criminal solutions when presented with particularly sympathetic victims or particularly unsympathetic defendants.[7]

In this Essay, we aim to describe and explain why many on the political left (broadly conceived) who generally favor decarceration selectively turn to the carceral state to solve social problems.[8] This kind of selective reliance on the carceral system is widespread in today's progressive movements,[9] and it has not been addressed adequately by the current scholarly literature. We believe that confronting this reliance on criminal law is essential to any movement that aims to take widespread decarceration or abolition of the carceral state seriously. Critics must grapple with what social movements and commentators on the left continue to find promising about criminal law.

Our claim is that critical accounts tend to miss the possible explanatory power of distribution (or redistribution) as a way of understanding why otherwise-decarceral progressive activists might favor criminalization in certain situations.[10] Viewed in this light, criminal legal

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Mariame Kaba, Opinion, Yes, We Mean Literally Abolish the Police, N.Y. Times (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html (on file with the *Columbia Law Review*) (calling for police forces and their budgets to be immediately halved to reduce the number of police interactions and for abolition of the police and redirection of police resources towards other social programs).

5. See, e.g., Sarah Figgatt, Progressive Criminal Justice Ballot Initiatives Won Big in the 2020 Election, Ctr. for Am. Progress (Nov. 19, 2020), https://www.americanprogress.org/article/progressive-criminal-justice-ballot-initiatives-won-big-2020-election [https://perma.cc/WL2T-WST8] (noting numerous decarceral ballot initiatives that passed in 2020).

6. See, e.g., Aya Gruber, The Critique of Carceral Feminism, 34 Yale J.L. & Feminism 55, 59 (2023) [hereinafter Gruber, The Critique of Carceral Feminism] ("For all their differences, the radical institutional and moderate mass-incarceration critiques both frequently feature a cast of conservative villains who progressives would abhor even if mass incarceration never existed: corporate exploiters, unscrupulous prosecutors, and moral majoritarians.").

7. See infra notes 23–27 and accompanying text.

8. Of course, it's tricky to define "the left," just as it is to define "progressives," "liberals," or any other ideological camp or label. We acknowledge some imprecision and slippage in our usage throughout—these definitional questions are very important, but they also require more space than this Essay affords. Throughout, our use of labeling relies on our sense of how commentators and organizations are *perceived* or how they *perceive themselves*.

9. See, e.g., Gruber, The Feminist War on Crime, supra note 2, at 169 (arguing that young feminists will "carry a mattress [symbolizing a desire for a male sexual assaulter to be incarcerated] one day and raise a fist at a Black Lives Matter protest the next").

10. In this respect, we hope to contribute to a larger conversation about the role of distributive arguments in legal thought and practice. See Paulo Barrozo, Critical Legal Thought: The Case for a Jurisprudence of Distribution, 92 U. Colo. L. Rev. 1043, 1052

institutions might be justified as vehicles for redistributing power and resources to marginalized victims and away from defendants based on wealth, race, gender, sexuality, or other privileged societal positions.

A redistributive justification for criminalization or punishment suggests that criminal law is desirable because it will create—or strengthen—the right social arrangement.[11] For progressives, that means criminal law would be a social good when it benefits marginalized defendants and harms powerful defendants or defendants advancing regressive ends.[12] Criminal law and punishment might be worth supporting if they *distribute* the right way.[13]

To be clear, we aren't arguing that this is a good justification or that we would support criminal punishment because of its redistributive potential. We wouldn't, and we don't.[14] Rather, our suggestion is that understanding pro-criminalization arguments as reflecting a redistributionist logic should help us make sense of apparent contradictions in academic and public discourse.

We are not the first to suggest that progressives have a role in the making and maintenance of the carceral state. Indeed, several authors in the past decade have addressed this as a historical phenomenon.[15] Nor is this the first piece of scholarship to highlight critically the individual carceral issues—police violence, economic crimes, hate crimes, and gender-subordinating crimes—we describe in this Essay.[16] What we hope

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(2021) (noting that "a commitment to equality commits critical legal theory to a comprehensive and systematic jurisprudence of distribution").

11. See Deborah Tuerkheimer, Criminal Justice and the Mattering of Lives, 116 Mich. L. Rev. 1145, 1161 (2018) (book review) (articulating an "*antisubordination* theory of criminal justice"); cf. Hadar Aviram, Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends, 68 Buff. L. Rev. 199, 225 (2020) (comparing contemporary "progressive punitivism" to Maoist approaches to criminal law, which considers "the locus of the perpetrator in the class structure" in deciding whether punishment is warranted).

12. See infra Part I.

13. See infra Part I.

14. See generally infra Part III.

15. See generally James Forman, Jr., Locking Up Our Own: Crime and Punishment in Black America (2017) (noting the contribution of the Black community to the War on Crime); Gruber, The Feminist War on Crime, supra note 2 (describing carceral feminism throughout U.S. history); Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America (2016) (observing that President Lyndon B. Johnson's war on poverty provided language and ideology for the war on crime); Naomi Murakawa, The First Civil Right: How Liberals Built Prison America (2014) (describing liberals' contribution to the explosion of the penal system in the late twentieth century).

16. On police brutality, see, e.g., Derecka Purnell, Becoming Abolitionists: Police, Protests, and the Pursuit of Freedom 269 (2021) (discussing some progressives' desire to see brutal police incarcerated); Aviram, supra note 11, at 208–09 (identifying trends of "progressive punitivism" in discussions surrounding police violence); Kate Levine, How We Prosecute the Police, 104 Geo. L.J. 745, 748–50 (2016) [hereinafter Levine, How We Prosecute the Police] (arguing that the preferential precharge procedures that prosecutors employ when dealing with police suspects, such as precharge investigations and full

to contribute is a theory for *why* so many progressives still turn to criminal law despite all of the evidence that we as a society have overrelied on police and prisons for far too long. Redistribution certainly isn't the only explanation. Indeed, many scholars and activists appear to justify their selective preference for criminal law in terms of retribution, expressivism, or deterrence.[17] But redistribution appears to have particular purchase in progressive circles as a vocabulary for justifying punitive politics. For scholars and activists committed to dismantling the carceral state, then, it is essential to grapple with these difficult areas and to recognize what does (or doesn't) make them difficult.

We do not seek to suggest how progressives might solve social problems like systemic racism, gender subordination, or income inequality through noncarceral means. It remains to be seen whether the rich and increasing literature describing alternatives to the carceral state can

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evidentiary presentations before a grand jury, should be applied to all suspects); Levine, Police Prosecutions, supra note 2, at 1003 (warning that "a project to increase the harshness of the criminal legal system against police officers will, far from its proponents' goals, legitimize and increase the footprint of our current criminal legal system"); Kate Levine, Police Suspects, 116 Colum. L. Rev. 1197, 1201–05 (2016) [hereinafter Levine, Police Suspects] (arguing that the preferential criminal procedure rights that police suspects have should be extended to all people arrested for crimes).

On economic crime, see, e.g., Pedro Gerson, Less is More?: Accountability for White-Collar Offenses Through an Abolitionist Framework, 2 Stetson Bus. L. Rev. 144, 147 (2023) (arguing that abolitionist responses to white collar crimes "may be better able to guarantee accountability than continuing to use the carceral model"); Benjamin Levin, Mens Rea Reform and Its Discontents, 109 J. Crim. L. & Criminology 491, 551–52 (2019) [hereinafter Levin, Mens Rea Reform] (identifying white-collar crime as an area of "carceral exceptionalism" in mens rea reform); Benjamin Levin, Wage Theft Criminalization, 54 U.C. Davis L. Rev. 1429, 1435–36 (2021) [Levin, Wage Theft] (noting the tension inherent in calls to criminalize wage theft to protect marginalized workers despite the fact that "in calling for criminalization and criminal prosecution, many commentators have embraced the same actors and institutions that have decimated poor communities and used criminal law to construct a hyper-policed, hyper-incarcerated population").

On hate crimes, see, e.g., Aviram, supra note 11, at 209–11 (discussing reactions of "progressive punitivism" in response to hate crimes); Kate Levine, The Progressive Love Affair with the Carceral State, 120 Mich. L. Rev. 1225, 1238–40 (2022) (book review) [hereinafter Levine, Progressive Love Affair] (critiquing the movement to criminalize hate crimes and warning about the likely "actual distributional effect of more criminalization"); Shirin Sinnar, Hate Crimes, Terrorism, and the Framing of White Supremacist Violence, 110 Calif. L. Rev. 489, 509–15 (2022) [hereinafter Sinnar, Hate Crimes] (exploring the limits of the hate crimes frame).

On gender-subordinating crime, see, e.g., Aviram, supra note 11, at 205–07 (noting "progressive punitivism" in the areas of sexual harassment and assault); Aya Gruber, Sex Exceptionalism in Criminal Law, 75 Stan. L. Rev. 755, 824–25 (2023) (critiquing carceral feminism); I. India Thusi, Feminist Scripts for Punishment, 134 Harv. L. Rev. 2449, 2451 (2021) (same).

17. See, e.g., Tuerkheimer, supra note 11, at 1160 ("An unpunished hate crime expresses a devaluation of the victim—not only by the perpetrator, but also by the state. If the successful prosecution of a hate crime is viewed as validating the victim's life and identity, a perceived criminal justice failure accomplishes the exact opposite." (footnotes omitted)); infra note 29 and accompanying text.

ameliorate the pain and fury generated by crimes against marginalized people.[18] Instead, our project here is to surface and theorize the continued progressive commitment to criminal law, and to suggest that it should be recognized as a significant barrier to decarceral projects.[19] If progressives and decarcerationists are to be allies, they must see the fault lines in their alliance.

Further, we argue that the criminal system can't do the redistributive work that some commentators imagine. Not only do we doubt that incarcerating brutal police officers will stop police brutality, but we also doubt that it will empower communities harmed by the police. Similarly, we doubt that incarcerating employers who steal their workers' wages will redistribute wealth or remedy economic inequality.[20] Indeed, these carceral responses often serve to legitimate structural inequality by *appearing* to redistribute justice without doing anything about the larger systemic inequities that remain.[21] Perhaps even more troubling, these redistributive attempts actually may lead to more policing, prosecution, and punishment of the same marginalized communities that progressives hope to help.[22]

Our argument unfolds in three Parts. In Part I, we trace the limits of anticarceral arguments and highlight the ways in which opposition to mass incarceration and overcriminalization often is heavily circumscribed—exceptions and carveouts abound. We describe a unifying theme in many of these progressive criminalization projects—a focus on redistribution. We examine competing conceptions of what redistribution means in this context (for example, shifting power, reallocating resources, and signaling social inclusion and valuation). In Part II, we offer a series of case studies to illustrate how progressive and left academics, activists, and lawmakers have justified punitive policies on redistributive grounds. Specifically, we examine the cases of police violence, economic crimes, hate crimes, and

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18. See, e.g., Danielle Sered, Until We Reckon: Violence, Mass Incarceration, and a Road To Repair 12–14 (2019) (describing the author's work at Common Justice, "an organization that seeks to address violence without relying on incarceration," and explaining that alternatives to incarceration must be "survivor-centered, accountability-based, safety-driven, and racially equitable" and will require "a fundamental realignment in our values and practice"); Monica C. Bell, Katherine Beckett & Forrest Stuart, Investing in Alternatives: Three Logics of Criminal System Replacement, 11 U.C. Irvine L. Rev. 1291, 1301–02, 1309–10, 1318–23 (2021) (examining how defunding the police and reinvesting in social welfare, safety production, and racial reparations can provide an alternative to the carceral state that considers its harmful effects on racially marginalized communities); Allegra M. McLeod, Envisioning Abolition Democracy, 132 Harv. L. Rev. 1613, 1622 (2019) [hereinafter McLeod, Envisioning Abolition Democracy] (noting how abolitionist projects "call for justice in the aftermath of police shootings in connection with a movement to divest from the criminal arm of the state and invest in other social projects, including reparations and democratic institutions").

19. See infra Part I.

20. See infra Part III.

21. See infra section III.B.3.

22. See infra section III.A.

crimes of gender subordination. Finally in Part III, we step back and offer a critical take on redistributive arguments for criminal law. We argue that many redistributive arguments for criminal law rest on speculative empirical claims that lack real-world support. Further, we contend that the criminal system can't redistribute in the egalitarian ways that some commentators imagine—criminal legal institutions are fundamentally regressive and tied to subordination. And, even if they somehow could advance some of the redistributive ends that their proponents suggest, our carceral system would remain objectionable. That is, the oppressive and inhumane aspects of the carceral state still would be oppressive and inhumane, even if the identity of the defendants or the politics associated with the institutions shifted.

I. REDISTRIBUTIVE CRIMINAL LAW

Despite increasingly prevalent critiques of criminal law on the left, there is hardly a consensus in opposition to criminalization and punishment. Indeed, even many of the most vocal critics of the criminal system remain enthusiastic about criminalization, prosecution, and punishment in certain areas. As Professor Doug Husak argues,

> Even those members of the public who tend to agree that the criminal justice system punishes too many persons with too much severity can be heard to complain when leniency is afforded to certain kinds of offenders. The best candidates to illustrate this phenomenon depend on one's political ideology. Among liberals, justice is said to be denied when police are not punished for using excessive force against unarmed minorities, when prosecutors are reluctant to indict white collar criminals, or when sexual offenders escape their just deserts. . . . In these cases and others, the public demands *justice*—by which I gather they mean some form of *punishment*.[23]

Particularly in left and progressive circles, then, we often see "carve-outs"[24] or "exceptional"[25] treatments of certain defendants or classes of crime. Mass incarceration represents injustice on a grand scale, commentators argue. But that doesn't stop continued, often discrete, advocacy for criminal legal responses to the actions of powerful defendants or harms associated with subordination across lines of gender, race, sexuality, ability, and class.

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23. Douglas Husak, The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law, 23 New Crim. L. Rev. 27, 51–52 (2020) [hereinafter Husak, Price of Criminal Law Skepticism].

24. See, e.g., Gruber, The Feminist War on Crime, supra note 2, at 6 (describing progressive support for criminal law solutions to gender crimes as a carve-out); Aya Gruber, #MeToo and Mass Incarceration, 17 Ohio St. J. Crim. L. 275, 279 (2020) (same).

25. See Levin, Mens Rea Reform, supra note 16, at 548–57 (identifying this phenomenon as "carceral exceptionalism").

It's tempting to view these carveouts as one-off exceptions to a general opposition to criminal punishment—a random assortment of areas in which anticarceral commitments give way, or in which principle falls in the face of inconsistency (or even hypocrisy). But such a view misses much.[26] It takes for granted that these "exceptional" cases actually are exceptions to a general rule. And it allows us to leave important questions unanswered: How deep do anticarceral commitments go? How should academics and activists navigate potential tensions between abolition and progressivism or other left political projects?

Failing to take seriously the theme or throughline that unites these areas of "carceral progressivism" allows for a limited vision of our anticarceral moment. And, importantly, it obscures the fraught and contingent relationship between left-wing or progressive politics and anticarceral commitments. That is, these carveouts may reflect hypocrisy much less than a specific vision of the criminal system—one that exists to advance certain left-wing and progressive ends.[27]

In this Part, therefore, we identify a specific style of argument and unifying theme among many of these carveouts or progressive exceptions: an attempt to redistribute from relatively powerful defendants to weaker or marginalized victims.[28]

Certainly, there are carveouts and progressive criminalization projects that don't reflect this approach or might be justified better in other terms.[29] Indeed, progressive scholars and activists marshal a range of arguments in support of criminalization, often turning to the language of

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26. See Ely Aharonson, "Pro-Minority" Criminalization and the Transformation of Visions of Citizenship in Contemporary Liberal Democracies: A Critique, 13 New Crim. L. Rev. 286, 288 (2010) ("Relatively little systematic work has been undertaken to probe the underlying ideas and common institutional features shared among these criminalization regimes.").

27. To be clear, hypocrisy or inconsistency certainly also might be at work in some cases.

28. What exactly it is that criminal law distributes (Power? Resources? Social status?) isn't always clear or consistent across different movements. See infra Part II.

29. For example, some progressive carveouts might reflect a simple faith in criminal law's deterrent effect. Proponents of harsh "white-collar" enforcement sometimes argue that those defendants are uniquely inclined to engage in cost-benefit analysis that responds to criminal enforcement. See, e.g., Sally S. Simpson, Corporate Crime, Law, and Social Control 161 (Alfred Blumstein & David Farrington eds., 2002) (describing the possible deterrent effect of criminal enforcement); Melissa Sanchez & Matt Kiefer, Wage Theft Victims Have Little Chance of Recouping Pay in Illinois, Chi. Rep. (Aug. 9, 2017), https://www.chicagoreporter.com/wage-theft-victims-have-little-chance-of-recouping-pay-in-illinois/ [https://perma.cc/E7UH-4FY4] ("One of the most celebrated aspects of the reforms elevated repeat offenses to felonies, a change that advocates hoped would be a deterrent."); Terri Gerstein & David Seligman, A Response to "Rethinking Wage Theft Criminalization", On Labor (Apr. 20, 2018), https://onlabor.org/a-response-to-rethinking-wage-theft-criminalization/ [https://perma.cc/F6UH-LUA5] ("[I]ncreased penalties do deter certain types of crimes, . . . [such as] tax evasion, which is similar to wage theft in that it often involves persistent and calculated misconduct committed by those who may think that their crimes are unlikely to be discovered.").

deterrence, expressivism, and retributivism.[30] But we see this redistributive frame as an approach with a lot of purchase, particularly in many contemporary left-leaning circles.

A. *A Theory of Redistribution*

Conventional accounts of criminal law assert that punishment is justified by a handful of "traditional" theories—deterrence, incapacitation, rehabilitation, and retributivism.[31] For decades, as prison populations expanded and racial disparities in enforcement grew harder to ignore, many "legal and academic commentators . . . continued their long engagement in jurisprudential debates about the purposes of punishment."[32] Such traditional accounts "speak the language of morality, of rational actors, or of impersonal, ostensibly apolitical institutional design" and are "a poor fit for structural accounts of criminal law as a political creature, an engine of social control, or a tool of redistribution and oppression."[33] Critical accounts, therefore, increasingly contend that these justifications hardly explain the U.S. carceral state. Instead, critics argue that criminalization and criminal punishment reflect much more nefarious logics—social control, cruelty, and the desire to protect the powerful and subordinate socially marginalized groups.[34]

But pointing to social control and subordination as the core logics of criminal law leaves an important question unanswered: Why do left and

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30. See supra note 17 and accompanying text.

31. See Robert Weisberg, Reality-Challenged Philosophies of Punishment, 95 Marq. L. Rev. 1203, 1204 (2012) (noting academics' "long engagement in jurisprudential debates about the purposes of punishment (retribution, general and specific deterrence, incapacitation, and rehabilitation)").

32. Id.

33. Levin, Wage Theft, supra note 16, at 1476.

34. See, e.g., Liat Ben-Moshe, Decarcerating Disability: Deinstitutionalization and Prison Abolition 123 (2020) ("It is imperative to ask, in the context of the prison–industrial complex as well as in the disability context, what rehabilitation means when it is decontextualized from discussions of inequality, inequity, and social justice, or from deconstructing the discourse and materiality of racial criminal pathologization . . . ."); David Garland, Punishment and Modern Society: A Study in Social Theory 3–22 (1990) (focusing on criminal law's role in social control); Georg Rusche & Otto Kirchheimer, Punishment and Social Structure 111 (Routledge 2017) (1939) (arguing that prison labor, and by extension criminal law, advances the interests of capital); Jessica M. Eaglin, To "Defund" the Police, 73 Stan. L. Rev. Online 120, 125 (2021), https://review.law.stanford.edu/wp-content/uploads/sites/3/2021/06/73-Stan.-L.-Rev.-Online-120-Eaglin.pdf [https://perma.cc/G38K-Y5GJ] (highlighting the raced and classed dimensions of criminal enforcement); Roberts, Abolition Constitutionalism, supra note 2, at 33–34 (tracing mass incarceration to slavery, Jim Crow, and white supremacy); Ahmed A. White, Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society, 37 Ariz. St. L.J. 759, 786 (2005) ("Behind the façade of justifications, the criminal justice system is an institution of social control oriented to the management of dysfunctions inherent in capitalist society—unemployment, poverty, and the like—that, if left unchecked, tend to produce untenable levels of social disorder and deviance.").

progressive activists and advocates committed to egalitarian social projects still favor criminal law in some cases? How do people who often see criminal law as unjustified come to justify criminal solutions to social problems? A totalizing critique of criminal law might make sense if one were to reject criminal law and punishment in all instances. But how can we make sense of the continued, selective preference for criminal law among academics and activists who deploy such critiques?[35] Our claim is that the continued allure of criminal law demonstrates that critical accounts need to grapple with what social movements and commentators on the left find promising about criminal law.

Understanding criminal law and criminal legal institutions as in some way distributive isn't unprecedented.[36] For example, Professor Aya Gruber has argued that U.S. criminal legal institutions can be understood not in traditional retributive or consequentialist terms, but as reflecting distribution on a sort of pain–pleasure axis:

> The distributive theory of criminal law holds that an offender ought to be punished, not because he is culpable (as he may not have intended harm) and not because such punishment increases net security in the world (as it empirically may not), but because punishment appropriately distributes pleasure and pain between the offender and victim. . . . [C]riminal rules often distribute punishment to defendants in order to secure a good such as compensation, satisfaction, or "closure" for victims.[37]

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35. There's something to be said here, as well, about the mismatch between radical rhetoric and radical commitments. Or, put differently, it's worth recognizing that as radical critiques and language become more popular, the likelihood that they will be coopted or deployed by people unthinkingly increases. As opposing mass incarceration has entered the pantheon of socially acceptable progressive views or beliefs, it becomes quite probable that people using anticarceral language aren't doing so as a result of some well-considered political project but just because it's understood as the right thing to do. See, e.g., Ruth Wilson Gilmore & Craig Gilmore, Restating the Obvious, *in* Indefensible Space: The Architecture of the National Insecurity State 141, 150 (Michael Sorkin ed., 2008) (arguing that radical language can be "hollow[ed] out"); Benjamin Levin, After the Criminal Justice System, 98 Wash. L. Rev. 899, 944–45 (2023) (similarly noting the "danger in overemphasizing the work that language and labels can do," as they may be "a way of signaling politics without actually taking concrete action or advancing those politics").

36. See, e.g., Paul H. Robinson, Distributive Principles of Criminal Law: Who Should Be Punished How Much? 2–7 (2008) (arguing for "distributive principles" as important to the design of criminal legal institutions); Aya Gruber, A Distributive Theory of Criminal Law, 52 Wm. & Mary L. Rev. 1, 5 (2010) [hereinafter Gruber, A Distributive Theory] (arguing that criminal law operates to distribute pleasure and pain).

37. Gruber, A Distributive Theory, supra note 36, at 5. As Gruber goes on to note, even though this distributive approach pervades the criminal system, it's not at all clear "whether current victim-based laws actually meet their purported distributive goals." Id. at 73. Gruber points out that "[a]lthough touting victim-centered reforms serves prosecutors' and policymakers' interests, it is another question altogether whether such reforms actually improve victims' lives." Id.

Viewed through this lens, distribution operates as a foundational logic of criminal law and punishment.[38] And other scholars have suggested that criminal law should serve to make victims whole or shift *something* from defendants to victims.[39] Indeed, some version of this claim underpins expressive theories of punishment that focus on how punishment signals society's valuation of victims and defendants.[40]

Unlike Gruber, our focus isn't necessarily on pleasure and pain.[41] But we see her articulation of a "distributive theory of criminal law" as helpful to understanding contemporary progressive claims about criminal law as redistributive. The emphasis on how criminal law distributes reflects a broader realist and critical orientation that recognizes that law *is* its effects—what matters is how the law operates on the ground (as opposed to what the law is on the books or in theory).[42] Assessing legal rules and

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38. This move differs from a focus on distribution that treats criminal law as justified on nondistributive terms and implicates distributive questions only in resolving how much to punish individual defendants. Cf. Robinson, supra note 36, at 2 ("This book assumes that one can justify the *institution* of punishment and examines how one might justify one or another *distribution* of punishment.").

39. See, e.g., Stephanos Bibas & Richard A. Bierschbach, Integrating Remorse and Apology into Criminal Procedure, 114 Yale L.J. 85, 111–12, 148 (2004) (calling for the inclusion of a more restorative process focused on victims and summarizing other scholars' arguments on the issue); Amy J. Cohen, Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States, 104 Minn. L. Rev. 889, 896–97 (2019) (discussing approaches to criminal justice reform grounded in restorative justice).

40. This vision finds perhaps its clearest articulation in the work of legal philosopher Jean Hampton. E.g., Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659, 1661–85 (1992) [hereinafter Hampton, Correcting Harms]; Jean Hampton, Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law, 11 Canadian J.L. & Juris. 23, 36–41 (1998) [hereinafter Hampton, Punishment, Feminism, and Political Identity]; cf. Stephen P. Garvey, Punishment as Atonement, 46 UCLA L. Rev. 1801, 1837 (1999) ("This theory, which I follow Jean Hampton in calling the 'annulment' theory, sees punishment as the institutional means by which the organized community condemns wrongdoing and vindicates the value of those members whom other members have wronged." (footnote omitted)); Erik Luna, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, 2003 Utah L. Rev. 205, 218 n.56 (describing Hampton as the "leading proponent of [this] expressive theory of punishment"). Hampton argues that punishment "is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity." Hampton, Correcting Harms, supra, at 1686. "It is because these [criminal] actions 'say' something that diminishes the victims' value that we wish to inflict punishment that says something in return in order to insist on the victim's true (equal) value, and deny the wrongdoer's claim to elevation." Hampton, Punishment, Feminism, and Political Identity, supra, at 39; cf. Donna Coker, Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review, 4 Buff. Crim. L. Rev. 801, 849–52 (2001) [hereinafter Coker, Crime Control and Feminist Law Reform] (describing and critiquing these arguments in the context of intimate partner violence).

41. See supra note 36 and accompanying text.

42. See, e.g., Laura Kalman, Legal Realism at Yale: 1927–1960, at 3 (1986) (describing this concept of legal realism); John Henry Schlegel, American Legal Realism

institutions is not simply a matter of formal logic or precise readings; it is a question of determining who benefits or who suffers as a result of each arrangement, decision, or interpretation. Therefore, in examining redistributive arguments for criminal law, we borrow from a broader set of critical literatures that deploy "distributional analysis" as a framework for assessing the desirability of legal rules or policies.[43]

At its most basic level, distributional analysis asks "who wins and who loses."[44] Doing a distributional analysis of a proposed law reform "involves meticulous and deliberate contemplation of the many interests affected by the existing criminal law regime and evidence-informed predictions about how law reform might redistribute harms and benefits, not just imminently but over time."[45] Instead of pointing to grand theories of how criminal punishment should (or shouldn't) work, distributional analysis invites us to "treat[] law as simply another way of doing politics and cuts through metaphysical, culturalist, economicist, and other mystifications of the law and legal discourse."[46]

A redistributive frame for criminal law resonates with calls for criminal law to serve antisubordination goals. For example, Professor Deborah Tuerkheimer has argued that "the state should incarcerate only when and to the extent necessary to vindicate identifiable antisubordination norms."[47] On this view, "an antisubordination approach to criminal justice requires special commitment to the redress of violence suffered by subordinated populations . . . because violence against socially disempowered victims furthers their subordination."[48] By refocusing its

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and Empirical Social Science 1–4 (1995) (discussing the development of and debates over legal realism in America).

43. See Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir, Governance Feminism: Notes from the Field, at xvii (2019) (applying distributional analysis in discussing the consequences of feminism applied in legal systems); Jorge L. Esquirol, Legal Latin Americanism, 16 Yale Hum. Rts. & Dev. L.J. 145, 161–62 (2013) (noting that distributional analysis is "another direction for Latin Americanist legal scholarship"); Aya Gruber, When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing, 83 Fordham L. Rev. 3211, 3213 (2015) [hereinafter Gruber, When Theory Met Practice] (applying distributional analysis in criminal law to "ease the apparent tension between progressives' laudable desire to address crimes against minorities and their deep concern with the U.S. penal state"); Levin, Wage Theft, supra note 16, at 1477 (applying distributional analysis as a lens for evaluating wage theft criminalization).

44. Esquirol, supra note 43, at 162.

45. Gruber, When Theory Met Practice, supra note 43, at 3213; cf. Donna Coker, Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color, 33 U.C. Davis L. Rev. 1009, 1009 (2000) [hereinafter Coker, Shifting Power for Battered Women] ("I argue that every domestic violence intervention strategy should be subjected to a material resources test. This means that in every area of anti-domestic violence law and policy . . . priority should be given to those laws and policies which improve women's access to material resources." (emphasis omitted)).

46. Esquirol, supra note 43, at 161–62.

47. Tuerkheimer, supra note 11, at 1162.

48. Id. at 1163.

prosecutorial attentions, the state "can mitigate the subordinating effects of the crime" and "demonstrate its commitment to equality."[49]

A redistributive theory of criminal law similarly resonates with Professor Jocelyn Simonson's recent work on "power shifting" as a framework for assessing criminal policy.[50] Drawing from social "movement[s'] focus on power shifting in the governance of the police," Simonson has advocated the use of a "power lens" in assessing criminal policy.[51] The power lens does similar work to a distributive analysis—it asks whether a given policy empowers a marginalized or subordinated group.[52] If a policy distributes power to a marginalized community, it might be desirable or defensible. If a policy entrenches the status quo or preserves existing hierarchies, we should be skeptical. Viewed through this lens, the redistribution or reallocation of power via criminal legal institutions could be understood "as reparations, as a method of antisubordination, or as facilitating contestation necessary for democracy."[53]

Notably, although Simonson is a committed abolitionist herself,[54] she argues that left critics should be focused less on substantive outcomes (for example, whether a policy leads to more police or fewer; more convictions or fewer) than on how those outcomes build or diminish political power.[55] While a focus on power shifting has been a hallmark of grassroots abolitionist organizing and activists associated with the Movement for Black Lives,[56] that doesn't mean that this approach necessarily would

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49. Id.; see also Alessandro Corda, The Transformational Function of the Criminal Law: In Search of Operational Boundaries, 23 New Crim. L. Rev. 584, 634–35 (2020) (noting that criminalization, though usually an "instrument[] of preservation of widely shared beliefs and societal norms," may also "exercise, from a normative standpoint, a function of innovation—either by promoting the establishment of brand new norms or by nurturing norms, attitudes, values, and beliefs"); Hampton, Punishment, Feminism, and Political Identity, supra note 40, at 39 (arguing that "[i]t is because [crimes] 'say' something that diminishes the victims' value that we wish to inflict punishment that says something in order to insist on the victim's true (equal) value, and deny the wrongdoer's claim to elevation").

50. Simonson, Power Lens, supra note 2.

51. Id. at 787.

52. See id.

53. Id. at 788.

54. See Jocelyn Simonson, Radical Acts of Justice: How Ordinary People Are Dismantling Mass Incarceration 179–84 (2023) (describing Simonson's personal journey to becoming a carceral state abolitionist).

55. See Simonson, Power Lens, supra note 2, at 789.

56. See The BREATHE Act, Movement for Black Lives 12 (2020), https://breatheact.org/wp-content/uploads/2020/07/The-BREATHE-Act-PDF_FINAL3-1.pdf [https://perma.cc/M7NP-K22N] (describing a proposed bill that would, among other things, "hold officials accountable and enhance self-determination of Black communities" (cleaned up)).

advance decarceral ends.[57] Indeed, Simonson is careful to note that "there is no guarantee that a power-shifting arrangement in policing would on its own lead to any particular outcomes."[58] (And some anticarceral critics have expressed skepticism about power shifting precisely because of its capacity to expand, rather than shrink, the carceral state.)[59]

Our claim in this Essay, then, builds on Simonson's observation about the indeterminacy of power shifting. We argue that left and progressive commentators who are otherwise critical of the carceral state have come to embrace criminal law when it is imagined as a vehicle for shifting power. In left discourse, the objectionable corners of the criminal system are framed as regressive—spaces of subordination and marginalization. That's one way of understanding the growing attention paid to "managerial justice" and the mass processing of misdemeanor defendants—it's an area in which criminal law appears to operate as an explicit vehicle for controlling marginalized populations.[60] There, criminal law's distributive project runs counter to left and progressive goals, as it dehumanizes and disempowers the already disempowered.

But the corners of the criminal system that retain some (or even great) allure for left and progressive commentators are understood in different terms. Here, pro-criminalization and pro-prosecutorial policies and their advocates speak the language of power shifting. Criminalization, prosecution, and punishment are framed as a vehicle for redistribution and a means of achieving equality in an unequal society.[61]

Put differently, our suggestion is that many left and progressive commentators don't actually see criminal legal institutions as fundamentally objectionable. Rather, they understand those institutions as

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57. See Simonson, Power Lens, supra note 2, at 789 (noting that "[t]he power lens is rarely going to be, on its own, a complete way of approaching reform of the criminal legal system").

58. Id. As Simonson notes, "Community control of the police, for instance, might very well lead a particular police district to more police patrols, more arrests, more stops-and-frisks, and an increase in other tactics that are seen as 'tough on crime.'" Id. at 790; cf. John Rappaport, Some Doubts About "Democratizing" Criminal Justice, 87 U. Chi. L. Rev. 711, 759 (2020) (collecting studies that show popular support for punitive policies).

59. See, e.g., Trevor George Gardner, By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law, 130 Yale L.J. Forum 798, 805 (2021), https://www.yalelawjournal.org/pdf/GardnerEssay_rsqx8yoi.pdf [https://perma.cc/TF9G-5AV5] ("It would be a categorical mistake to equate the pursuit of an equitable process of crime policymaking—even as it relates to race-class subordinated communities—with the pursuit of equitable crime policy."); Benjamin Levin, Criminal Justice Expertise, 90 Fordham L. Rev. 2777, 2827 (2022) (raising questions about this approach).

60. See, e.g., Issa Kohler-Hausmann, Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing 60–98 (2018) (arguing that low-level criminal courts operate as a vehicle for mass processing of racially and economically marginalized people); Alexandra Natapoff, Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal 3–18 (2018) (describing the harms caused by the misdemeanor system).

61. See infra Part II.

objectionable when they are deployed in service of particular regressive ends.[62] By recalibrating those institutions or resituating them in an alternate political economy, redistributive advocates contend that criminal law could be a necessary—or even desirable—component of good governance and a just society.

B. *The Structure of Redistributive Arguments*

To the extent that left and progressive arguments for criminal legal solutions speak in redistributive terms, they require us to do a distributional analysis.[63] Or, using Simonson's language, they require us to ask whether and to whom criminal legal institutions shift power. Does criminal law actually distribute the way that its proponents believe that it will? Would a new criminal statute or a decision to prosecute redound to the benefit of and shift power to marginalized communities?[64] Or would criminal solutions to social problems serve to entrench the injustices of the criminal system, empowering police prosecutors and other "criminal justice" actors?[65]

There are many ways that criminal law does or could distribute. But contemporary progressive, pro-prosecutorial redistributive claims often sound in one of two registers: (1) that criminal law will have desirable distributive consequences (that is, that marginalized communities or victims will receive some benefit from a prosecution or new criminal statute), or (2) that the only way to address current social inequities is to expose more powerful defendants to the same institutional violence that marginalized or subordinated defendants face. In this Essay, we primarily focus on the first set of arguments, but we think it's worth taking a moment to unpack both moves.

The first style of redistributive argument rests on a straightforward claim about distributive consequences: Criminalizing certain conduct or prosecuting a particular defendant (or class of defendants) will benefit a marginalized victim or set of victims. How this benefit will accrue or how

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62. Cf. Tuerkheimer, supra note 11, at 1162–63 ("Just as it demands movement toward less incarceration, an antisubordination approach to criminal justice requires special commitment to the redress of violence suffered by subordinated populations.").

63. Cf. Coker, Shifting Power for Battered Women, supra note 45, at 1009 (arguing that proponents of criminal responses to intimate partner violence should perform a "material resources test" to determine if these approaches actually shift material resources to victims—particularly poor women of color); Corda, supra note 49, at 612 ("Unlike a purely symbolic use of the criminal law—not supported by any concrete form of state action aimed at achieving the goal stated on paper—a legitimate and permissible transformational employment of this branch of the law must be inherently outcome-oriented and directed at achieving tangible effects.").

64. See infra Part II (tracking these arguments).

65. See infra section III.A.

individuals and communities will benefit is not always entirely clear.[66] And what is to be redistributed varies—sometimes, advocates appear to imagine a redistribution of power or social standing, while at other times, advocates actually appear to imagine that criminal law might directly shift material conditions by redistributing wealth or access to resources.[67] But regardless, the rhetoric of redistribution, power shifting, and antisubordination is common.[68] The redistributive cases for criminal punishment tend to rely on an imagined dynamic in which the defendant is (relatively) powerful and the victim is (relatively) powerless or subordinated. Criminal law, then, serves as an equalizer.

To be clear, that distributive case for criminal law is highly speculative and contingent. How do we know that defendants charged with a given crime actually will be powerful?[69] And why should we think that criminal law will effectively distribute whatever it is that it's supposed to distribute?[70] But this mode of argument is still less speculative than the second set of redistributive arguments for criminal punishment.

The second model suggests that exposing more powerful defendants to the violence and cruelty of the carceral state will redound to the benefit of marginalized defendants (particularly racially or economically subordinated defendants) via a sort of trickle-down logic. If the rich and powerful are subjected to intrusive policing and harsh sentences, the argument goes, they may come to appreciate the injustice of the criminal system. And, once they appreciate the injustice (and walk a mile in the shoes of the poor, the marginalized, and the subordinated), they will be more likely to favor criminal reform.[71] While wealthy, white voters might be likely to support harsh criminal policies when the imagined defendants

66. Cf. Monica C. Bell, Police Reform and the Dismantling of Legal Estrangement, 126 Yale L.J. 2054, 2087 (2017) [hereinafter Bell, Police Reform] ("[I]ncreasing the power of the state bears at most a spurious relationship to the outcome of concern, which is social inclusion across groups."); Levin, Wage Theft, supra note 16, at 1494–95 ("[D]espite claims about empowering workers that tend to underpin wage theft activism, this embrace of criminal law does not redistribute power or resources from bosses to workers; it distributes more power to the institutions of the carceral state." (footnote omitted)).

67. See infra Part III.

68. See infra Part II.

69. See infra section III.A.

70. See infra section III.A.

71. See, e.g., Daniel Epps, The Consequences of Error in Criminal Justice, 128 Harv. L. Rev. 1065, 1103–04 (2015) (arguing that the Blackstone principle "concentrates criminal punishment on a more discrete group," which makes that group less popular because "a higher percentage of them will be guilty (or at least *seen as* guilty)," which in turn will lead to more tolerance for harsh punishments for those individuals); William J. Stuntz, The Political Constitution of Criminal Justice, 119 Harv. L. Rev. 781, 782–84 (2006) (arguing that "local police and prosecutors . . . focus too much attention on the crimes of the poor and too little on the crimes of the middle class").

are poor and Black, those voters might change their tune when they see themselves as potential defendants.[72]

The classic version of this claim involves drug policing and prosecution. Affluent white college students use illegal drugs just like poor Black teenagers, the argument goes, but the latter group is heavily policed and punished for their actions, while the former breaks the law with impunity. On this telling, the War on Drugs persisted for decades in large part because of the *underenforcement* of crimes committed by affluent white people. If police had treated college campuses and affluent suburbs the same way they treated "inner cities" and poor communities of color, public outcry would have put an end to punitive politics.[73]

In slightly cruder terms, this argument operates as the inverse of the much-quoted aphorism about crime policy that "a conservative is a liberal who has been mugged."[74] Instead, some progressives seem to argue that a progressive might be a conservative who has been arrested, prosecuted, or incarcerated—treated like the race–class marginalized people who fill jails

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72. As one of us has previously explained:

> Borrowing from social cognition theory, legal scholars have argued that many policy decisions are shaped by the "fundamental attribution error"—a tendency to view our own bad conduct as "mistakes" caused by situational factors, while we view others' bad conduct as blameworthy and the result of some dispositional flaw. . . . [T]here is good evidence to suggest that people might still have a difficult time identifying with other defendants. And, similarly, other issues of identity (race, class, gender, sexuality, etc.) might continue to make certain defendants less sympathetic and might allow for an identification of certain defendants as more deserving of punishment, less remorseful, etc.

Levin, Mens Rea Reform, supra note 16, at 543–44 n.251 (citations omitted).

73. See, e.g., Steven W. Bender, The Colors of Cannabis: Race and Marijuana, 50 U.C. Davis L. Rev. 689, 695 (2016) (noting how the response to the "epidemic of opiate use among whites" is comparable to the "whitening and lightening of marijuana penalties" because both focused on public health responses instead of criminal penalties); David Cole, As Freedom Advances: The Paradox of Severity in American Criminal Justice, 3 U. Pa. J. Const. L. 455, 467 (2001) (recounting how previously harsh marijuana possession penalties that had primarily targeted nonwhite defendants were reduced or eliminated after "many white high school and college students experimented with marijuana, and an increasing number found themselves in trouble with the law" in the 1960s); andré douglas pond cummings, Reforming Policing, 10 Drexel L. Rev. 573, 624–25 (2018) ("It is almost unthinkable to imagine the War on Drugs being prosecuted on Wall Street, in fraternity and sorority houses, or along the many wealthy beach cities . . . [unlike] in urban communities and upon blacks, minorities, and poor Americans . . . ."); Keturah James & Ayana Jordan, The Opioid Crisis in Black Communities, 46 J.L. Med. & Ethics 404, 412 (2018) ("[T]he marijuana decriminalization movement of the 1970s explicitly revolved around the view that white middle-class Americans should not have their futures ruined by policies designed to protect them from international trafficking and urban drug markets.").

74. See, e.g., Kate Stith-Cabranes, Fear of Discretion, 1 Green Bag 209, 211 (1998) (describing "one of Mayor Ed Koch's favorite sayings . . . that a conservative is a liberal who has been mugged").

and courtrooms every day.[75] Because of their race, class, or relative social standing, many people might not have been exposed to the harsh realities of the criminal system. And, because of their identity and experiences, they might be comfortable viewing criminal legal institutions as just and the targets of state violence as deserving.[76] Exposure to the injustice of the system, the argument goes, would yield a reconceptualization of the system and a drive to reform it. The traditional conservative move suggests that—if victimized—we all would turn to punishment. The contemporary progressive move suggests the opposite: If arrested or prosecuted, we all would become sympathetic to other criminal defendants.

In this Essay, we are less concerned with this latter set of arguments about identification with defendants than the first class of arguments—that criminal law will directly redistribute power and resources in ways that will benefit progressive ends. The identification-style arguments are important in our contemporary political moment.[77] But we see less need to unpack them here because they tell us less about specific classes of crime than they do about generic approaches to law enforcement. That is, the defendant-identification or empathy-based approach might operate as a blanket call for aggressive enforcement of all criminal laws, whereas redistribution-via-prosecution arguments focus on specific classes of crimes and defendants as justified (while other ones are not).

As we will argue in Part III, we remain skeptical at best of these redistributive arguments. Instead of imagining criminal legal institutions as possible sites of achieving egalitarian ends, we see the criminal system as fundamentally objectionable—inextricable from troubling punitive impulses and logics of subordination. But before unpacking those arguments, we turn to a series of case studies to illustrate how academics, advocates, and activists frame pro-punitive policies in redistributive terms.

II. CASE STUDIES IN REDISTRIBUTIVE PUNISHMENT

Despite a long-running narrative that conservatives are tough on crime and liberals are more concerned about mass incarceration, there are numerous areas in which progressives remain committed to the

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75. See, e.g., Tom Wolfe, The Bonfire of the Vanities 522 (1987) ("A liberal is a conservative who has been arrested." (internal quotation marks omitted)); Craig S. Lerner, Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants, 2004 U. Ill. L. Rev. 599, 603–04 ("[I]f a conservative is a liberal who's been mugged, then a liberal would seem to be a conservative who's been indicted." (footnote omitted)); Jeremiah W. Nixon, Remarks on Racial Profiling in Missouri, 22 St. Louis U. Pub. L. Rev. 53, 56 (2003) ("It has been said that a liberal is a conservative who has just been arrested, and a conservative is a liberal who has just been mugged.").

76. See supra note 72.

77. See Levin, Mens Rea Reform, supra note 16, at 543–44 n.251 (discussing the prevalence of such claims about identification with criminal defendants).

carceral state.[78] In this Part, we highlight a handful of contexts in which the progressive turn to criminal law and punitive politics is explicitly framed in redistributive terms: police violence, economic crimes, hate crimes, and offenses of gender subordination. These are areas in which progressives have identified serious structural problems and have turned to criminal law to redress harm to marginalized communities. In some contexts, academics and activists call for more enforcement of existing laws; in others, they call for new criminalization projects. Put differently, "the problem [according to activists and scholars] often runs deeper than merely lax enforcement—many of these crimes are simply not socially understood as crimes or legally coded as such."[79] Our claim isn't that this enthusiasm for criminal solutions is new. Instead, we highlight recent case studies in each area to emphasize that punitive sentiments coexist with contemporary progressive critiques of the criminal system. Similarly, we don't mean to understate the work of scholars and activists who prefer *noncarceral* approaches to these problems (e.g., abolitionists opposed to prosecuting police, Black socialist feminists who fought punitive approaches to intimate partner violence, etc.).[80] Rather, our goal in this Part is to outline a series of common areas in which many progressives continue to favor criminal solutions to social problems.

A. *Police Crimes*

When police commit acts of violence, the progressive commitment to decarceration often takes a hiatus.[81] It is not hard to understand the pain

78. See, e.g., Forman, supra note 15, at 47–77 (discussing support among progressive Black activists for harsh criminal gun laws); Gruber, The Feminist War on Crime, supra note 2, at 5–6 (discussing support among feminist activists for criminal prosecution of sex crimes); Justin Marceau, Beyond Cages: Animal Law and Criminal Punishment 20 (2019) (discussing support among progressives for criminal prosecution of animal abuse); Aharonson, supra note 26, at 287 ("Over the last decades, social movements around the globe have increasingly resorted to criminalization campaigns as primary instruments for promoting greater social equality . . . yield[ing] a variety of new offenses specifically aimed at protecting women and minority groups (including hate crime, hate speech, stalking, and sexual harassment).").

79. Aviram, supra note 11, at 224.

80. Indeed, this work is foundational to our ultimate critiques of carceral progressivism. See infra Part III.

81. See Levine, Police Prosecutions, supra note 2, at 1005–06 (showing the many ways in which progressives have pushed for increased criminalization of police brutality); Melanie D. Wilson, The Common Prosecutor, 53 Loy. U. Chi. L.J. 325, 362 (2022) ("[A]necdotal evidence is building that all prosecutors are beginning to take police brutality more seriously and that the progressives are leading the way."). Indeed, even leading abolitionist scholars appear to support the prosecution and incarceration of police officers who commit brutal acts against certain citizens. Compare Berkeley Talks: Paul Butler on How Prison Abolition Would Make Us All Safer, Berkeley News, at 15:20 (Jan. 17, 2020), https://news.berkeley.edu/2020/01/17/berkeley-talks-paul-butler [https://perma.cc/B4DY-Q9QN] (stating that the solution to mass incarceration is abolition, not reform; that alternatives to incarceration "can provide any of the crime control benefits we think prison does now"; and that abolition must be "more than just tearing down the prison walls," but also must "build something up,

and outrage that high-salience police killings occasion—particularly when those killings reflect historical patterns of violent racial subordination. As Professor Devon Carbado argues:

> Surviving, or living through, police interactions is part of Black people's social reality. That experience produces what I will call "police encounter afterlives," remembrances of the potentiality of death those encounters portend, remembrances of our survival through submission, resistance, or escape. Patricia Williams might think of this survival as an instance of "spirit murder," a form of killing whose violence presupposes an afterlife of further racial injury.[82]

This "spirit murder" is reproduced for those who have had their own terrifying encounters with police each time a new video of police brutality is distributed, each time a new narrative of violence is told.[83] Thus, perhaps it is no wonder that people want to see these powerful state agents punished brutally for their actions.

This desire for charges and punishment is voiced in numerous contexts—not only in protests but also scholarly texts, political messages, and progressive organizational messaging. Not only do progressives and progressive organizations frequently clamor for prosecution and incarceration of individual police officers,[84] but some decry *dozens of years*

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too"), with Paul Butler, Opinion, The Most Important Trial of Police Officers for Killing a Black Man Has Not Happened Yet, Wash. Post (Apr. 29, 2021), https://www.washingtonpost.com/opinions/2021/04/29/next-trial-killing-george-floyd-will-be-real-test (on file with the *Columbia Law Review*) [hereinafter Butler, The Most Important Trial] (writing approvingly of the accomplice charges against the three officers who stood by while Derek Chauvin killed George Floyd and stating that "this is a case where any conviction and punishment—even a short prison sentence—would be better than none").

82. Devon W. Carbado, Strict Scrutiny & the Black Body, 69 UCLA L. Rev. 2, 67–68 (2022) (footnote omitted) (quoting Patricia J. Williams, The Alchemy of Race and Rights 163 (1991)).

83. And, Carbado notes, there is the further trauma of knowing that these videos are part of an almost fetishistic interest in violence against Black people that has shaped U.S. culture. See id. at 12 ("[C]onsider the mass circulation of videos depicting the killing or brutalization of Black people. . . . Those images and videos operate not just as iconography; they are, in a very peculiar way, iconic. 'Black bodies in pain for public consumption have been an American national spectacle for centuries.'" (quoting Elizabeth Alexander, "Can You Be BLACK and Look at This?": Reading the Rodney King Video(s), 7 Pub. Culture 77, 78 (1994))).

84. See, e.g., Press Release, ACLU of Kentucky, ACLU Statement on DOJ Charges of Police in the Killing of Breonna Taylor (Aug. 4, 2022), https://www.aclu.org/press-releases/aclu-statement-doj-charges-police-killing-breonna-taylor [https://perma.cc/J4QL-24XQ] ("The Department of Justice's announcement of charges against four law enforcement officers involved in Breonna Taylor's death is a critical step in holding police accountable when they kill those they are sworn to protect, violate our constitutional rights, and inflict lasting trauma upon our communities." (internal quotation marks omitted) (quoting Brandon Buskey, Director, ACLU Criminal Law Reform Project)).

of incarceration as too light and not justice.[85] Some commentators also are not satisfied with the prosecution of the officers who committed the violence and desire similarly punitive outcomes for officers who were at the scene.[86] The murder of George Floyd in 2020 provides an excellent case study for these reactions.

Minneapolis Police confronted Floyd after a convenience store employee accused him of purchasing something with a counterfeit twenty-dollar bill.[87] Within seventeen minutes, Floyd was dead, pinned under the knee of Derek Chauvin, one of the responding officers.[88] A video showed the killing and captured Floyd calling out for his mother.[89] The killing occasioned significant public outcry, sparking nationwide protests.[90]

Chauvin was convicted of state murder and manslaughter charges[91] and federal civil rights violations.[92] While progressive organizations hailed these sentences as "justice" and victory, some felt that twenty-two-and-a-half years in prison was not enough for Chauvin's crime.[93] While Floyd's

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85. Levine, Police Prosecutions, supra note 2, at 1000–02 (describing the tension between progressive support for prison abolition and progressive calls for imprisonment and enhanced sentencing in police prosecutions).

86. LDF Issues Statement on the Federal Convictions of Three Former Police Officers Involved in the Murder of George Floyd, LDF (Feb. 24, 2022), https://www.naacpldf.org/press-release/ldf-issues-statement-on-the-federal-convictions-of-three-former-police-officers-involved-in-the-murder-of-george-floyd [https://perma.cc/M4HZ-N9VR] (celebrating "accountability" for the three officers, noting that Chauvin was "enabled, supported, and undeterred" by the officers).

87. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, How George Floyd Was Killed in Police Custody, N.Y. Times (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html (on file with the *Columbia Law Review*) (last updated Jan. 24, 2022).

88. Id.

89. Diana Spalding, When George Floyd Called Out for His Mama, Mothers Everywhere Answered, Motherly (June 4, 2020), https://www.mother.ly/black-lives-matter/george-floyd-called-for-mothers-everywhere [https://perma.cc/8MNC-39D5] (noting that footage captured Floyd calling out for his mother before he fell unconscious).

90. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, Black Lives Matter May Be the Largest Movement in U.S. History, N.Y. Times (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/BZ5W-MPQU] (noting that protests following the killing may have been the largest in U.S. history).

91. Bill Chappell, Derek Chauvin Is Sentenced to 22 1/2 Years for George Floyd's Murder, NPR (June 25, 2021), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/06/25/1009524284/derek-chauvin-sentencing-george-floyd-murder [https://perma.cc/BV72-M8AE].

92. Press Release, DOJ, Former Minneapolis Police Officer Derek Chauvin Sentenced to More Than 20 Years in Prison for Depriving George Floyd and a Minor Victim of Their Constitutional Rights (July 7, 2022), https://www.justice.gov/opa/pr/former-minneapolis-police-officer-derek-chauvin-sentenced-more-20-years-prison-depriving [https://perma.cc/Z8WW-8CY2] (announcing that Chauvin was sentenced to 252 months in prison).

93. See Paul Butler, This Is What Derek Chauvin's Sentence Should Be, Wash. Post (June 24, 2021), https://www.washingtonpost.com/opinions/2021/06/24/this-is-what-derek-chauvins-sentence-should-be/ (on file with the *Columbia Law Review*) (arguing for eighteen years in prison but noting that "[s]ome Black Lives Matter activists, and probably

killing was a particularly high-salience act of brutality, the reactions from progressives were hardly unprecedented; other police killings have spawned similar punitive outcries over the past several years—from lamenting prosecutorial decisions not to charge[94] to decrying sentences as too light.[95]

For some activists and academics, it often is not enough to achieve long sentences for those officers who commit acts of violence against civilians. Progressive scholars have called for criminal punishment for officers who were at the scene of the crime and did not intervene.[96] This reaction once again is exemplified by the killing of George Floyd. Not only was Chauvin prosecuted; so too were the three rookie officers who were on the scene at the time and failed to stop Chauvin.[97] These officers were convicted of federal civil rights violations[98] and were convicted as accomplices to Chauvin's manslaughter charge.[99] Although vicarious liability in other contexts is often critiqued as leading to long sentences for less blameworthy conduct,[100] these convictions were met with approval by criminal justice progressives.[101]

Floyd's family, hope Chauvin receives the 40-year maximum that Minnesota law establishes for Murder 2"); cf. Guyora Binder & Ekow N. Yankah, Police Killings as Felony Murder, 17 Harv. L. & Pol'y Rev. 157, 228 (2022) (lamenting the felony murder charge in this case because it does not express firmly enough the intent Chauvin exhibited).

94. Levine, Police Prosecutions, supra note 2, at 1010 (discussing criticisms of prosecutors who haven't charged police officers after they shoot civilians).

95. See Levine, Progressive Love Affair, supra note 16, at 1235–36 ("Yet, at every turn and with only minor exceptions, progressives look to ratchet up the punishment of police rather than ratchet down the treatment of other people caught in the criminal legal machine.").

96. See Butler, The Most Important Trial, supra note 81 (arguing that the officers who did not intervene when Derek Chauvin killed George Floyd should be convicted of crimes).

97. Id. (noting that the three officers were prosecuted for aiding and abetting Chauvin).

98. Press Release, DOJ, Three Former Minneapolis Police Officers Convicted of Federal Civil Rights Violations for Death of George Floyd (Feb. 24, 2022), https://www.justice.gov/opa/pr/three-former-minneapolis-police-officers-convicted-federal-civil-rights-violations-death [https://perma.cc/J6F6-LHHD].

99. Holly Bailey, Last of Ex-Officers Implicated in Floyd's Killing Found Guilty on State Charge, Wash. Post (May 2, 2023), https://www.washingtonpost.com/nation/2023/05/02/tou-thao-george-floyd (on file with the *Columbia Law Review*) ("Kueng and Lane[,] [two of the three officers,] . . . pleaded guilty to aiding and abetting manslaughter charges in state court, avoiding a trial."); Amanda Holpuch, Ex-Officer Guilty of Abetting Manslaughter in George Floyd's Killing, N.Y. Times (May 2, 2023), https://www.nytimes.com/2023/05/02/us/tou-thao-verdict-george-floyd-death.html (on file with the *Columbia Law Review*).

100. See Erik Luna, The Overcriminalization Phenomenon, 54 Am. U. L. Rev. 703, 716 (2005) (listing vicarious liability as an example of a "legal device[] that can expand criminal liability to individuals who hardly seem blameworthy" and produce "grossly disproportionate penalties that bear no relation to the wrongfulness of the underlying crime").

101. See, e.g., Press Release, ACLU Minn., ACLU/ACLU-MN Statement on Federal Guilty Verdict in George Floyd Killing, (Feb. 24, 2022), https://www.aclu-mn.org/en/press-releases/mpd3-guiltyverdict [https://perma.cc/QA2D-JU4T] ("Any of these officers could

Much like progressive organizations and politicians, many law professors, who oppose criminalization in general, endorse prosecution and conviction for police in instances in which they do not for other people. Professor Paul Butler, a scholar who has widely advocated for prison abolition,[102] called the case against Chauvin and his colleagues "[t]he most important trial of police officers charged in the killing of a Black man" and hoped for "conviction and punishment."[103]

For other scholars, existing criminal statutes failed in their inability to criminalize officers who didn't intervene to stop their coworkers. For example, Professor Zachary Kaufman has suggested enlarging criminal codes to create a separate crime for non-intervening police officers.[104] Kaufman acknowledges that the Minnesota accomplice law was sufficient to convict the three bystander officers in Floyd's killing, but he argues that these convictions on the state and federal level do not "obviate the need for more—and more effective—avenues of passive-police [criminal] accountability."[105] In proposing new legislation, he argues that it would apply only to police and thus would not "exacerbat[e] the problem of 'mass incarceration.'"[106] This claim is central to many progressives' selective punitive projects—a justification that their target is the real villain and that their punitive proposal will not increase criminalization more broadly.[107]

Notably, Kaufman uses the power-shifting rationale explicitly, framing his policy proposal as directly responsive to police officers' grossly

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have saved George Floyd's life. They had a duty to intervene, and they failed. They all are accountable for his death." (internal quotation marks omitted) (quoting Ben Feist, Interim Executive Director, ACLU Minnesota)).

102. See, e.g., Author and Professor Paul Butler to Deliver McCormick Lecture, Letter of the L. (Univ. of Ariz. James E. Rogers Coll. of L., Tucson, Ariz.), Feb. 1, 2023, https://lotl.arizona.edu/feb012023.htm [https://perma.cc/DGG7-PKUN] (announcing that Butler would deliver a lecture "explor[ing] the movement to abolish prison, focusing on the consequences for racial justice and public safety"); see also Abolition, and a Mule, Rogers Williams Univ. Sch. of L., https://law.rwu.edu/events/abolition-and-mule [https://perma.cc/A7G5-VJC9] (last visited July 30, 2023) (noting Butler's lecture on abolition); Dorothy Wickenden, What Would a World Without Prisons Be Like?, New Yorker (Jan. 27, 2020), https://www.newyorker.com/podcast/political-scene/what-would-a-world-without-prisons-be-like (on file with the *Columbia Law Review*) (noting that the "idea of prison abolition is . . . gaining traction" and referencing a conversation about the movement with Butler).

103. Butler, The Most Important Trial, supra note 81.

104. Zachary D. Kaufman, Police Policing Police, 91 Geo. Wash. L. Rev. 353, 363–64 (2023) [hereinafter Kaufman, Policing Police].

105. Id. at 360. Bloated criminal codes have long been one of the acknowledged drivers of mass incarceration. Cf. Benjamin Levin, The Consensus Myth, supra note 2, at 292–94 (noting the frequency of this argument and arguing that we need a baseline comparison).

106. Kaufman, Policing Police, supra note 104, at 401.

107. See infra section III.A.2.

disproportionate use of lethal force against people of color.[108] The argument sounds in the register of redistribution, appealing to the sentiments of progressives who see a need to take power away from police via criminal punishment.

In many ways, police prosecutions are the most visible example of an imagined redistributive criminal system. Indeed, it is essentially impossible to run as a progressive district attorney without using the prosecution of police officers as a major part of one's platform.[109] Alvin Bragg, now famous for his prosecution of former President Donald Trump, touted his work prosecuting police with the New York State Attorney General's office in his successful bid for Manhattan District Attorney.[110] Others, such as Wesley Bell, the St. Louis County Prosecuting Attorney, ran a campaign that successfully unseated incumbent Robert McCulloch after seven terms by "mak[ing] the election a referendum on the events of Ferguson . . . when McCulloch gained national prominence—and infamy—for his handling of grand jury investigation into . . . the fatal police shooting of Ferguson teenager Michael Brown, which ended in [no charges] against the officer."[111]

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108. Kaufman centers his justification for increased criminal penalties for police officers by highlighting the statistical disparities, stating:

> Police have killed at least 2,219 Black Americans since 2015—more than three times the rate of White Americans, despite Black Americans representing less than a fifth of the White population in the United States. Similarly, Native Americans and Hispanic Americans are disproportionately slain by officers. Fatality rates among *unarmed* minorities are especially high as compared with their White counterparts. Commentators have characterized this slew of deaths as evidence of "systemic racism," a "public health emergency" for minorities, and even part of a broader "Crime[] against Humanity" against Black people in the United States.

Kaufman, Policing Police, supra note 104, at 356–57 (alteration in original) (footnotes omitted).

109. See Benjamin Levin, Imagining the Progressive Prosecutor, 105 Minn. L. Rev. 1415, 1438–40 (2021) (describing these policy positions as a staple of "prosecutorial progressivism").

110. See, e.g., Jonah E. Bromwich, Why Police Accountability Is Personal for This Manhattan D.A. Candidate, N.Y. Times (May 12, 2021), https://www.nytimes.com/2021/05/12/nyregion/alvin-bragg-manhattan-district-attorney.html (on file with the *Columbia Law Review*) ("[P]olice accountability . . . [is] at the center of his campaign to lead one of the most important district attorney's offices in the country.").

111. Danny Wicentowski, Wesley Bell's Win Surprised Everyone—Except His Campaign, Riverfront Times (Aug. 8, 2018), https://www.riverfronttimes.com/news/wesley-bells-win-surprised-everyone-except-his-campaign-22642547 [https://perma.cc/8Q37-7JZZ]. The grand jury's decision not to charge Wilson and similar nonindictments in other cases have also spurred academics to suggest changing the grand jury procedures for (only) police, or even abolishing the grand jury all altogether in cases of police violence. See Claire P. Donohue, Article 32 Hearings: A Road Map for Grand Jury Reform, 59 How. L.J. 469, 478–79 (2016) (arguing for open grand jury hearings in police misconduct cases); Roger A. Fairfax, Jr., Should the American Grand Jury Survive Ferguson?, 58 How. L.J. 825, 826 (2015) ("As a result of widespread outrage in the wake of . . . high-profile cases, politicians,

None of this is to say that left or progressive commentators consistently abandon anticarceral commitments when it comes to police. For example, the Movement for Black Lives has made divestment from the carceral state a hallmark of its proposed federal legislation, the BREATHE Act.[112] But this kind of programmatic divestment from the carceral system is often drowned out by louder calls from those with big platforms.

While police may appear to be an easy and isolated target for progressive punitivism, the several other case studies discussed in this Part will show that the arguments about, and criminal law solutions proposed to deal with, police brutality are repeated in several other contexts.

B. *Economic Crimes*

Intuitively, financial and economic crimes might be one of the more straightforward fits for a redistributive frame. "White-collar" crime has long been an area in which scholars and commentators have focused on inequality and the perceived impunity of the powerful.[113] We live in a country defined by growing economic inequality. Wages have stagnated, worker power has declined, and political and legal institutions that once kept capital *somewhat* in check have fallen by the wayside. Decades of neoliberal economic policy have led to an upward redistribution of wealth.[114] In turn, those policies have spawned a backlash from the left—from Occupy Wall Street to the rise of the Democratic Socialists of America and growing enthusiasm for politicians who explicitly speak in terms of economic inequality and the need for redistribution.[115] Against this

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pundits, scholars, and lawyers alike have renewed calls for an end to the grand jury in the United States."); Jasmine B. Gonzales Rose, Racial Character Evidence in Police Killing Cases, 2018 Wis. L. Rev. 369, 424 (advocating scrutiny of no true bills in police defendant cases). California has taken those suggestions to heart, abolishing the grand jury for police shootings. Allie Gross, California Becomes First State to Ban Grand Juries in Police Shooting Cases, Mother Jones (Aug. 13, 2015), https://www.motherjones.com/politics/2015/08/california-becomes-first-state-ban-grand-juries-police-shooting-cases [https://perma.cc/XRE6-6JS6].

112. The BREATHE Act, supra note 56, at 3–4.

113. See Aviram, supra note 11, at 219–20 (describing inquiries in white-collar crime scholarship, including a more "punitive" vein that "sees the impunity of white-collar criminals as a consequence of the overpowering neoliberal ethos").

114. Wendy Brown, Undoing the Demos: Neoliberalism's Stealth Revolution 213 (2015); David Harvey, A Brief History of Neoliberalism 16–19 (2005).

115. See, e.g., Ross Barkan, In New York City, Occupy Wall Street Got the Last Laugh, Jacobin (Sept. 21, 2021), https://jacobin.com/2021/09/occupy-wall-street-new-york-city-dsa-bloomberg-cuomo [https://perma.cc/6DGQ-VPWQ] (looking at politics in New York as a case study of the "broad revival of the Left in the United States"); Astra Taylor & Jonathan Smucker, Occupy Wall Street Changed Everything, N.Y. Mag. (Sept. 27, 2021), https://nymag.com/intelligencer/2021/09/occupy-wall-street-changed-everything.html [https://perma.cc/VQ3A-VE9W] (describing left organizing and politics after Occupy); Emily Stewart, We Are (Still) the 99 Percent, Vox (Apr. 30, 2019), https://www.vox.com/the-highlight/2019/4/23/18284303/occupy-wall-street-bernie-sanders-dsa-socialism

backdrop, many progressives and leftists have turned to criminal law as a means of disciplining capital, responding to the immorality (or, at least, amorality) of the marketplace, and curbing the perceived lawlessness of the wealthy.[116]

Criminal law—with its heightened penalties and moralistic language—operates as the apotheosis of state financial regulation.[117] The hope for liberal and left proponents of the criminal apparatus is that it might be repurposed to engage in a project of redistributing power and privilege not just through financial regulation but also through criminal punishment.[118] On this view, if the real economic crimes are being committed by the rich against the poor, the answer needn't be doing away with criminal law or punishment; rather, the goal should be altering the political economy such that the *real* crimes are prosecuted. Whether support for aggressive criminal enforcement of economic and white-collar crime comes from a progressive or more radical left perspective, it tends to reflect a view that criminal law is a necessary means of addressing inequality and that criminal law can do important work in recalibrating the balance of power in society. To see that move in action, it's worth considering three examples: liberal and left opposition to mens rea reform, support for wage theft criminalization, and calls for large-scale financial crime prosecutions.

Progressive lawmakers have opposed a number of criminal justice reform bills—particularly so-called "mens rea reform" statutes—because

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[https://perma.cc/6VUF-2SA3] (tracing the rise of the DSA and the popularity of Senator Bernie Sanders to the Occupy moment).

116. See Levin, Mens Rea Reform, supra note 16, at 528–40 (describing this approach).

117. On this view of criminal law as an extension of other regulatory approaches (rather than a distinct entity), see, e.g., Vincent Chiao, Criminal Law in the Age of the Administrative State, at vii (2019) ("[C]riminal law and its associated institutions are . . . subject to the same principles of institutional and political evaluation that apply to public law and public institutions generally."); Alice Ristroph, The Wages of Criminal Law Exceptionalism, 17 Crim. L. & Phil. 5, 15 (2023) ("To abandon exceptionalism is to abandon a perspective in which criminal law is taken for granted . . . . If instead, we focus our inquiries on human flourishing, seeking an honest assessment of criminal law's effects on human flourishing, that turn seems to me a great achievement in itself."); Benjamin Levin, Criminal Law Exceptionalism, 108 Va. L. Rev. 1381, 1389 (2022) ("I argue that the current moment should invite a de-exceptionalization of criminal law and a broader reckoning with the distributive consequences and punitive impulses that define the criminal system's functioning—and, in turn, define so many other features of U.S. political economy beyond criminal law and its administration."). On criminal law as a distinct entity, see generally R.A. Duff, The Realm of Criminal Law (2018) (aiming to create by reconstruction "a conception of criminal law as a distinctive kind of institution" and noting central features such as criminal law's "declarative definitions of . . . 'public' wrongs," criminal procedure, punishment, and the "processes of criminalization").

118. Cf. Aviram, supra note 11, at 225 (discussing Maoist approaches to criminal punishment grounded in remedying capitalist oppression); Michel Foucault, On Popular Justice: A Discussion with Maoists, *in* Knowledge/Power: Selected Interviews and Other Writings 1972–1977, at 1, 30 (Colin Gordon, Leo Marshall, John Mepham & Kater Soper eds., 1980) (same).

of the possibility that they might aid defendants charged with white-collar crimes.[119] Currently, many criminal statutes don't include clear mental state requirements; these reform bills would require the prosecution to prove that defendants acted purposely or knowingly (and in some cases that they were purposely or knowingly breaking the law).[120] Illinois Senator Dick Durbin has claimed that one such statute (which would benefit defendants of all classes charged with a host of different crimes)[121] "should be called the White Collar Criminal Immunity Act."[122] In the words of former President Barack Obama, criminal justice reform was a laudable goal, but legislation that might impede prosecution of financial crime could "undermine public safety and harm progressive goals."[123] And progressive calls for economic regulation in the wake of the 2008 Financial Crisis were often framed in terms of *criminal* impunity—why had no financial executive gone to prison when so many working class people suffered?[124] The problem wasn't capitalism; it was the failure to prosecute people who hadn't played by capitalism's rules. "White-collar" criminals have gotten rich at the expense of society, the argument goes, and the state should intervene to redistribute the wealth and power that they have unjustly earned.[125] This insistence that the state shouldn't need to meet its

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119. See, e.g., Mike Debonis, The Issue that Could Keep Congress From Passing Criminal Justice Reform, Wash. Post. (Jan. 20, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/01/20/the-issue-that-could-keep-congress-from-passing-criminal-justice-reform/ (on file with the *Columbia Law Review*); Carl Hulse, Why the Senate Couldn't Pass a Crime Bill Both Parties Backed, N.Y. Times (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html (on file with the *Columbia Law Review*); C.J. Ciaramella, The Senate Will Try Again on Sentencing Reform This Year, Reason (Oct. 4, 2017), http://reason.com/blog/2017/10/04/the-senate-will-try-again-on-sentencing [https://perma.cc/4RFJ-AG4B].

120. See, e.g., Mens Rea Reform Act of 2017, S. 1902, 115th Cong.; Stopping Over-Criminalization Act of 2015, H.R. 3401, 114th Cong.; Criminal Code Improvement Act of 2015, H.R. 4002, 114th Cong.; Mens Rea Reform Act of 2015, S. 2298, 114th Cong. For an extensive discussion of these bills, see Levin, Mens Rea Reform, supra note 16, at 509–17.

121. See Michael Serota, Strict Liability Abolition, 98 N.Y.U. L. Rev. 112, 163–69 (2023) (arguing that mens rea requirements would benefit many classes of defendants).

122. Matt Ford, Could a Controversial Bill Sink Criminal-Justice Reform in Congress?, The Atlantic (Oct. 26, 2017), https://www.theatlantic.com/politics/archive/2017/10/will-congress-reform-criminal-intent/544014 (on file with the *Columbia Law Review*) (internal quotations marks omitted).

123. Barack Obama, The President's Role in Advancing Criminal Justice Reform, 130 Harv. L. Rev. 811, 829 n.89 (2017).

124. See, e.g., Jesse Eisinger, The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives, at xvi (2017) (critiquing the failure to prosecute); Jennifer Taub, Big Dirty Money: The Shocking Injustice and Unseen Cost of White Collar Crime 131–34 (2020) (discussing how criminal punishments for white-collar crime do not provide much deterrence for the "morally flexible," who "clearly see that there would be few consequences for going down a criminal road, and that it pays to participate in a cover-up once caught red-handed").

125. In contrast, socialists, Marxists, and other more radical left-wing activists and commentators might understand the state in its most desirable form as a more explicit vehicle of redistribution. Philosopher Karl Marx's classic writing on "the theft of wood"

burden of proving a culpable mental state effectively scuttled multiple efforts at bipartisan "criminal justice reform" legislation.[126]

Similarly, over the last two decades, activists, academics, and policymakers have keyed on the problem of wage theft—bosses' failure to pay workers the wages they are owed.[127] While some of this activism has focused on civil enforcement or vehicles of worker empowerment (e.g., via unionization or worker centers), much of the work on wage theft has prioritized criminalization and prosecution as the desired vehicle for remedying the problem.[128] Advocates have called for new criminal statutes and increased criminal penalties—turning misdemeanors into felonies and seeking to increase possible jail or prison time have been frequent targets.[129] So-called "progressive prosecutors" and left-leaning DA

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argues not that there's something wrong with criminalization and punishment as such, but rather that criminalization and punishment in a capitalist society reflect (and construct) class oppression. See Karl Marx, Debates on the Law of Thefts of Wood, reprinted in 1 Karl Marx & Frederick Engels, Collected Works 224, 227–35. Criminal law in this account allowed property owners and members of the capitalist class to steal resources, while defining as "theft" the taking of property by the lower classes. See Peter Linebaugh, Stop, Thief!: The Commons, Enclosures, and Resistance 1–10 (2014) (critiquing these concepts of property, theft, and ownership); Pierre-Joseph Proudhon, What Is Property? 13 (Donald R. Kelley & Bonnie G. Smith eds. & trans., Cambridge Univ. Press 1994) (1840) (same); Peter Linebaugh, Karl Marx, the Theft of Wood, and Working-Class Composition, *in* Crime and Capitalism: Readings in Marxist Criminology 100, 103–05 (David F. Greenberg ed., 1993) (summarizing Marx's famous arguments about the theft of wood); Ahmed A. White, Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society, 37 Ariz. St. L.J. 759, 788–90 (2005) (noting the contemporary relevance of arguments that frame "criminal law as both reflecting and advancing the institutional and ideological interests of economic elites").

126. See Benjamin Levin, Decarceration and Default Mental States, 53 Ariz. St. L.J. 747, 754–56 (2021) (noting progressives' criticism that mens rea reform statutes "might shield rich, powerful defendants from prosecution, particularly in the realms of environmental and financial crime"); Levin, Mens Rea Reform, supra note 16, at 523–28 (similarly arguing that this criticism reflects a belief that "the wielders of capital and corporate executives" are the "*real criminals* that the system is designed to reach and on whom prosecutors should be focused").

127. See Kim Bobo, Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid and What We Can Do About It 7–15 (2011) (describing the problem of wage theft).

128. See Levin, Wage Theft, supra note 16, at 1446–76 (describing this preference for criminalization and prosecution in responding to wage theft).

129. The move to seek significant carceral penalties is particularly significant for two reasons. First, in a moment of skepticism about incarceration for even "violent" crimes, the turn to greater incarceration here is striking. See Ben Levin, Rethinking Wage Theft Criminalization, OnLabor (Apr. 13, 2018), https://onlabor.org/rethinking-wage-theft-criminalization/ [https://perma.cc/PSE5-LMLP] ("Ultimately, the push to criminalize wage theft provides an important opportunity for labor activists to reexamine their commitments. As I've written elsewhere, the impulse to use criminal law for 'progressive' ends is dangerous; it serves to bolster the carceral state and all of its deep structural flaws."). Second, the actual activism and advocacy for such carceral sentences stand in tension with claims from some on the left that the language of "theft" is more symbolic than literal—that activists want to see workers empowered, not employers incarcerated. See Eric Tucker, When

candidates—from Tiffany Cabán in Queens, to Larry Krasner in Philadelphia, to Chesa Boudin in San Francisco—have created special wage theft units or made prosecuting bad bosses a key component of their platforms.[130]

According to advocates, criminalizing wage theft and aggressively prosecuting bosses "should help send a strong message to employers about the importance of following workplace laws . . . [and] to hard working people that work is a thing of value and that intentionally stealing it is theft."[131] And criminalization proponents frame their advocacy explicitly as redistribution. According to workers' rights attorneys David Seligman and Terri Gerstein, "the threat of serious criminal sanction running . . . against the person who's abused [their] position of power[] helps to correct that power imbalance."[132] That is, employment relationships—particularly in low-wage sectors—are defined by inequality. Bosses hold all the cards and are essentially free to exploit workers. Prosecution and criminal punishment might help level the playing field and operate as a thumb on the scale in favor of otherwise powerless workers.

Prosecuting wage theft, according to criminalization supporters, is easily distinguishable from the objectionable corners of the criminal system. As Gerstein and Seligman argue, "[W]e don't think that bringing the criminal law to bear on predatory employers who take advantage of vulnerable workers exacerbates the injustices of our criminal justice system."[133] As one Chicago worker-center staffer explains his support for criminal law in this area, prison abolitionists "are right to protest the deeply unjust incarceration of poor people and people of color, particularly for nonviolent crimes" but should not "give a free pass to white-collar criminals, especially business owners who systematically

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Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Master's Tools Against the Master, 54 Osgoode Hall L.J. 933, 934 (2017) ("[W]hile the rhetoric of wage theft invokes the language of the criminal law, reformers typically stop short of calling for the imposition of criminal sanctions . . . .").

130. See, e.g., Juliana Feliciano Reyes, Philly DA's Office Launches a Unit to Prosecute Employers for Crimes Against Workers, Phila. Inquirer (Oct. 8, 2019), https://www.inquirer.com/news/district-attorney-larry-krasner-employer-crimes-prosecution-wage-theft-20191008.html (on file with the *Columbia Law Review*) ("[T]he Philadelphia District Attorney's Office has launched a unit to investigate and prosecute scofflaw employers. The new office is part of a nascent trend among progressive state and local prosecutors who are putting a priority on crimes committed against workers."); Oren Schweitzer, Tiffany Cabán, a Socialist in the District Attorney's Office, Jacobin (June 26, 2019), https://jacobinmag.com/2019/06/tiffany-caban-socialist-district-attorney-queens-election [https://perma.cc/WVH9-RWZL] (discussing Cabán's policy commitments, which include creating a wage theft unit to "take on hyper-exploitative bosses").

131. Terri Gerstein, Opinion, More States Should Follow New Colorado Policy on Wage Theft, The Hill (May 30, 2019), https://thehill.com/opinion/finance/446199-more-states-should-follow-new-colorado-policy-on-wage-theft [https://perma.cc/2LGM-62BR].

132. Gerstein & Seligman, supra note 29.

133. Id.

exploit workers."[134] And, as Cabán (a former public defender) describes the dynamic, "I represent people who are accused of stealing from their employers when in fact their employers are . . . stealing their wages."[135] According to Cabán, prosecutions of the real thieves (that is, the bosses) should be "prioritized."[136]

The structural issues with the criminal system (for example, unfettered prosecutorial discretion and harsh and dehumanizing punishment) don't seem to worry progressives here. While elsewhere critics rightly note that prosecutorial and law enforcement discretion tends to lead to the punishment of people from marginalized communities, those critiques are rarely heard here.[137] Instead, activists and advocates imagine those same flawed criminal legal institutions as antisubordination tools capable of empowering low-wage workers.[138] At the very least, carceral state critics suggest, if police and prosecutors really took harm seriously, they would focus on wage theft.[139]

The preference for criminal law as the tool of choice to address large-scale financial crime reflects a similar impulse. Much has been written about the United States' preference for white-collar criminal statutes over civil regulation.[140] There certainly might be different explanations for this

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134. César F. Rosado Marzán, Wage Theft as Crime: An Institutional View, 20 J.L. & Soc'y 300, 308–09 (2020) (quoting an email from a worker-center staffer).

135. Ella Mahony, Tiffany Cabán Knows Who the Bad Guys Are (Interview by Ella Mahony with Tiffany Cabán), Jacobin (May 23, 2019), https://jacobin.com/2019/05/tiffany-caban-queens-district-attorney-election [https://perma.cc/78LF-S9FJ].

136. Id.

137. But see Alan Bogg & Mark Freedland, A Framework for Discussion, *in* Criminality at Work 3, 12 (Alan Bogg, Jennifer Collins, Mark Freedland & Jonathan Herring eds., 2020) (noting the need to consider critical takes on criminalization in discussions of using criminal law to remedy workplace wrongs); Stephen Lee, Policing Wage Theft in the Day Labor Market, 4 U.C. Irvine L. Rev. 655, 664–68 (2014) (describing the ways that criminal enforcement might harm immigrant workers); Levin, Wage Theft, supra note 16, at 1481–1505 (arguing that critiques of criminalization should apply to efforts to criminalize wage theft).

138. Cf. César F. Rosado Marzán, Wage Theft as Crime: An Institutional View, 20 J.L. & Soc'y 300, 301 (2020) ("This essay argues for criminalizing wage theft, but urges a significant caveat: the right institutional framework must exist before worker advocates entrust the police and prosecutors to investigate and prosecute this workplace crime.").

139. See, e.g., Alec Karakatsanis, The Punishment Bureaucracy: How to Think About "Criminal Justice Reform", 128 Yale L.J. Forum 848, 886, 898 (2019), https://www.yalelawjournal.org/pdf/Karakatsanis_msbotakz.pdf [https://perma.cc/LK7V-VXKL] ("'Law enforcement' could infiltrate boarding-school campuses to bust underage drinking and tobacco use or set up sting operations to fight widespread wage theft by employers. The choices that the bureaucracy makes involve direct tradeoffs, for example, from black families to corporate executives or from drug sellers to sexual abusers.").

140. See, e.g., James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe 7–10, 47, 80–82 (2003) (discussing U.S. preferences for punishment); Miriam H. Baer, Choosing Punishment, 92 B.U. L. Rev. 577, 581 (2012) (same); Darryl K. Brown, Criminal Law's Unfortunate Triumph Over Administrative Law, 7 J.L. Econ. & Pol'y 657, 682–83 (2011) (same).

preference, but prosecuting some imagined class of bankers or executives remains very popular with many liberal, left, and progressive commentators. On the tenth anniversary of the 2008 financial crisis, Senator Elizabeth Warren introduced the "Ending Too Big to Jail Act" as a direct response to concerns that the finance industry's irresponsibility hadn't led to prison sentences.[141] "When Wall Street CEOs break the law, they should go to jail like anyone else. The fraud on Wall Street won't stop until executives know they will be hauled out in handcuffs for []cheating their customers and clients," announced Senator Warren in a press release.[142]

Similarly, Occupy the SEC (a group of former-financial-industry-workers-turned-activists) argued:

> The Great Recession of 2008 is a telling example of federal prosecutors' inability to punish corporate wrongdoing. Malfeasance on Wall Street produced a financial crisis that extinguished nearly 40% of family wealth from 2007 to 2010, pushing the household net worth back to 1992 levels. Despite these appalling statistics, not even ONE executive at a major Wall Street bank was criminally charged for playing a role in the 2008 global financial collapse. Everyday Americans were forced to pay the price for rampant speculation, mismanagement and fraud on Wall Street.[143]

Paying that price in much of the commentary and advocacy doesn't mean fines for bankers, greater oversight, or even the nationalization of the financial sector; it means prison.

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141. See Press Release, Sen. Elizabeth Warren, On Tenth Anniversary of Financial Crisis, Warren Unveils Comprehensive Legislation to Hold Wall Street Executives Criminally Accountable (Mar. 14, 2018), https://www.warren.senate.gov/newsroom/press-releases/on-tenth-anniversary-of-financial-crisis-warren-unveils-comprehensive-legislation-to-hold-wall-street-executives-criminally-accountable [https://perma.cc/7ULC-59F6].

142. Id. Senator Warren, one of the most vocal supporters of increased financial oversight, frequently has supported criminal law as the right response to the behavior of "Wall Street." See, e.g., Bridget Bowman, Elizabeth Warren Releases Report Showing How Corporate Criminals Get Off Easy, Roll Call (Jan. 29, 2016), https://rollcall.com/2016/01/29/elizabeth-warren-releases-report-showing-how-corporate-criminals-get-off-easy/ [https://perma.cc/92XD-8AMW]; Peter J. Henning, Elizabeth Warren Wants to Make It Easier to Prosecute Executives, N.Y. Times (Apr. 22, 2019), https://www.nytimes.com/2019/04/22/business/dealbook/elizabeth-warren-finance-executives.html (on file with the *Columbia Law Review*).

143. Join Occupy the SEC in Urging the Congress to Oppose H.R.A. 4002 ("Criminal Code Improvement Act of 2015"), Petition2Congress, https://www.petition2congress.com/ctas/join-occupy-sec-in-urging-congress-to-oppose-hr4002-criminal-code [https://perma.cc/5KUY-NWV2] (last visited Feb. 16, 2024).

C. *Hate Crimes*

The criminalization of violence targeted at marginalized communities has long enjoyed support in many progressive circles.[144] Supporters have argued that crimes based on hatred for a particular race, gender, sexuality, or other social identity are worse than crimes without such animus because of the longstanding harms of bigotry and exclusion.[145] Each crime victimizes an entire community and does harm that is amplified by a history of subordination.

As Professor Shirin Sinnar notes, hate crimes are defined differently by different jurisdictions but widely understood in one of two ways:

> One widely cited definition of hate crimes, used by the FBI to collect national hate crime statistics, defines a hate crime as a "criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity." While that definition focuses on the defendant's motive, other definitions focus on the intentional selection of victims on account of their identity. For instance, many state law definitions of hate crimes require the targeting of a person or group because of their membership in a legally protected group, while varying as to the range of status groups protected.[146]

It is the second definition—the idea that a person who targets a particular identity group should be liable for a sentence enhancement or specialized prosecution—that sparks progressive support for hate crime legislation and prosecution. Hate crime prosecution is seen as restoring or affirming value to a group that has been historically marginalized. Indeed, to some, not pursuing hate crime prosecution is a remarginalization. As Tuerkheimer writes: "[T]he underenforcement of hate crime laws compounds the subordinating effects of the violence. An unpunished hate crime expresses a devaluation of the victim—not only by the perpetrator, but also by the state."[147]

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144. See, e.g., Jeannine Bell, Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime 1 (2002) (describing the justification for hate crime statutes); Charles H. Jones, Jr., An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment, 21 Harv. C.R.-C.L. L. Rev. 689, 736 (1986) ("The failure of our society to provide adequate redress to the victims of racially motivated violence, and sufficiently punish the perpetrators, serves only to exacerbate the problem, and could lead ultimately to violent response from those victims."); Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2380 (1989) (advocating the criminalization of hate speech); Sinnar, Hate Crimes, supra note 16, at 509 ("Supported by civil rights groups but constrained by prevailing law-and-order politics, the hate crimes frame elevated attention to racist violence but construed it as a problem of biased private individuals and prioritized criminal law solutions.").

145. See supra note 144 (collecting sources).

146. Sinnar, Hate Crimes, supra note 16, at 504 (footnote omitted).

147. Tuerkheimer, supra note 11, at 1160; see also Janice Nadler, Ordinary People and the Rationalization of Wrongdoing, 118 Mich. L. Rev. 1205, 1230 (2020)

Some recent hate crime legislation has resulted from particularly brutal, high-salience crimes. Similarly, progressives writing or advocating in the LGBTQIA space also turn to criminal law to ensure that queer and trans people are not marginalized or harmed because of bigotry. In this section, we describe several such movements by progressives to make generalized hate crime laws more punitive to right perceived wrongs against marginalized groups or to apply the law more severely against those accused of racially motivated crimes. In particular, we look at the movement to enact hate crime legislation in Georgia following the racially motivated killing of Ahmaud Arbery and the multipronged criminalization effort aimed at hate crimes against Asian American and Pacific Islander (AAPI) people.

In February 2020, Ahmaud Arbery was jogging in a Georgia neighborhood called Satilla Shores when three white men chased him in a pickup truck before shooting and killing him.[148] Arbery was unarmed and not involved in any altercation with the men.[149] In other words, there was little evidence that the killing could be justified by anything other than racism against Arbery. All three men were convicted of and received life sentences for murder in Georgia.[150] They also were convicted of federal hate crimes.[151]

But many civil rights organizations[152] and progressive academics[153] alike believed that a state murder conviction was not enough or did not express the correct sense of outrage for the racially motivated killing. Thus, they pushed for a state hate crime bill to ensure that such killings were not treated as ordinary murders.[154] Before this killing, Georgia was one of only four states that did not have such a law.[155] The stated goal of

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("Underenforcement can signal to members of vulnerable groups that their lives do not matter, that if they are murdered, their killer will not be brought to justice."); cf. Hampton, Punishment, Feminism, and Political Identity, supra note 40, at 39 (making this broader claim about the expressive function of punishment).

148. Richard Fausset, What We Know About the Shooting Death of Ahmaud Arbery, N.Y. Times (Aug. 8, 2022), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html (on file with the *Columbia Law Review*).

149. Id.

150. Id.

151. Id.

152. The ACLU and NAACP of Georgia both supported the bill initially but withdrew support after "first responders" were added to the list of potential hate crime victims. Support Flips After Police Added to Georgia Hate Crime Bill, WABE (June 22, 2020), https://www.wabe.org/support-flips-after-police-added-to-georgia-hate-crimes-bill/ [https://perma.cc/4TW5-WX7J].

153. Ekow N. Yankah, Ahmaud Arbery, Reckless Racism and Hate Crimes: Recklessness as Hate Crime Enhancement, 53 Ariz. St. L.J. 681, 682–83 (2021) (approving the passage of the Georgia Hate Crime statute but lamenting that it only encompasses intentional rather than "reckless racism").

154. H.B. 426, 155th Gen. Assemb., Reg. Sess. (Ga. 2020).

155. Angela Barajas, Dianne Gallagher & Erica Henry, Georgia Governor Signs Hate Crime Bill Spurred by Outrage Over Ahmaud Arbery's Killing, CNN (June 26, 2020),

progressives linking this new law to the Arbery case was to ensure that historically dominant groups would be punished for crimes they committed out of hatred for marginalized groups. The ACLU and the NAACP actually withdrew their support for the eventual law because the legislature added "first responders" to the list of potential hate crime victims.[156] In other words, progressives balked at the idea that people already seen as powerful (i.e., police officers) might be treated as hate crime victims.

The Arbery case is hardly unique as an illustration of progressives' desire to respond to racist violence with more punishment. Recently, there has been a push to protect AAPI people through the use of the carceral state. Perhaps spurred by racist rhetoric from former President Donald Trump[157] and other right-wing politicians blaming the COVID-19 pandemic on China and Chinese people, reported crimes against AAPI people surged.[158] In response, the federal government passed the "COVID-19 Hate Crimes Act,"[159] which President Joe Biden signed into law on May 20, 2021.[160] The Act provides funding to streamline prosecutions of crimes against Asian Americans, particularly crimes related to COVID-19.[161] This legislation was supported by the ACLU, which said that the new bill would "bring[] us one step closer to addressing white

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https://www.cnn.com/2020/06/26/us/georgia-hate-crime-bill/index.html [https://perma.cc/PQJ8-2HPF].

156. Ben Nadler, Police In, Then Out, as Georgia Hate Crimes Bill Moves Ahead, Seattle Times (June 22, 2020), https://www.seattletimes.com/nation-world/nation/support-flips-after-police-added-to-georgia-hate-crimes-bill/ (on file with the *Columbia Law Review*).

157. See, e.g., Adam Gabbatt, Republicans Face Backlash Over Racist Labeling of Coronavirus, The Guardian (Mar. 10, 2020), https://www.theguardian.com/world/2020/mar/10/republicans-face-backlash-racist-labeling-coronavirus-china-wuhan [https://perma.cc/H6YM-97RM]; Colby Itkowitz, Trump Again Uses Racially Insensitive Term to Describe Coronavirus, Wash. Post (June 23, 2020), https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff_story.html (on file with the *Columbia Law Review*).

158. More Than 9,000 Anti-Asian Incidents Have Been Reported Since the Pandemic Began, NPR (Aug. 12, 2021), https://www.npr.org/2021/08/12/1027236499/anti-asian-hate-crimes-assaults-pandemic-incidents-aapi [https://perma.cc/V9H5-6CS7] (noting that more than 9,000 crimes against AAPI people were reported in the year after COVID-19 began); see also Shirin Sinnar, The Conundrums of Hate Crime Prevention, 112 J. Crim. L. & Criminology 801, 806 (2022) [hereinafter Sinnar, Conundrums of Hate Crime Prevention] ("[H]ate crimes and harassment targeting Asian Americans have soared during the pandemic. Hate crime statistics are notoriously unreliable . . . . Nonetheless, many sources of data suggest a rise that seems unlikely to result simply from increased attention or reporting." (footnote omitted)).

159. COVID-19 Hate Crimes Act, Pub. L. No. 117-13, 135 Stat. 265 (2021) (codified in scattered sections of 34 U.S.C.).

160. Barbara Sprunt, Here's What the New Hate Crimes Law Aims to Do as Attacks on Asian Americans Rise, NPR (May 20, 2021), https://www.npr.org/2021/05/20/998599775/biden-to-sign-the-covid-19-hate-crimes-bill-as-anti-asian-american-attacks-rise [https://perma.cc/46NQ-28CU].

161. Id.

supremacist violence."[162] The bill received support from progressive politicians and national progressive groups despite opposition by many local and grassroots AAPI organizations.[163]

At the state level, groups are also pushing to enhance hate crime legislation based on crimes against AAPI people. In New York, the Asian American Bar Association's (AABANY) stated mission sounds in progressive themes: "collaboration in the pursuit of social justice . . . ."[164] Recently, AABANY advocated hate crime legislation in a report called *Endless Tide*.[165] The report chronicles crimes against Asian Americans since the start of the pandemic and calls for legislation to amend New York's hate crime legislation to "remove two unduly restrictive requirements and to re-categorize the crime of Aggravated Harassment":

> The requirement that race be a motivating factor in the crime "in whole or in substantial part" should be revised to "in whole or in part" to permit more latitude where a defendant may have targeted a victim based on multiple or shifting motivations. In addition, the restriction of hate crime enhancements to an arbitrary list of offenses should be eliminated. Furthermore, the crime of Aggravated Harassment includes acts targeting persons because of their race, ethnicity, and other protected characteristics. These crimes should be re-categorized under the hate crimes statute.[166]

To ensure that crimes against AAPI people were sufficiently punished, AABANY also supported retrenching on more general criminal procedure laws. New York had passed legislation that ended money bail for many categories of arrestees before trial.[167] AABANY asked that the state reimpose stricter bail requirements and supported new proposed legislation to "permit[] bail determination for serious felonies to consider factors such as criminal history, mak[e] repeat offenses bail eligible,

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162. Press Release, ACLU, ACLU Comment on COVID-19 Hate Crimes Act Being Signed Into Law, ACLU (May 20, 2021), https://www.aclu.org/press-releases/aclu-comment-covid-19-hate-crimes-act-being-signed-law [https://perma.cc/2639-NBD3] (internal quotation marks omitted) (quoting Manar Waheed, Senior Legislative and Advocacy Counsel, ACLU).

163. Sinnar, Conundrums, supra note 158, at 809–10 ("[O]ver 100 local-level Asian and LGBTQ groups objected to the Covid-19 Hate Crimes Act for what they viewed as centering law enforcement solutions.").

164. About AABANY, Asian Am. Bar Ass'n N.Y., https://www.aabany.org/page/A1 (on file with the *Columbia Law Review*) (last visited July 10, 2024).

165. Asian Am. Bar Ass'n N.Y., Endless Tide: The Continuing Struggle to Overcome Anti-Asian Hate in New York 4–7 (2022), https://www.maglaw.com/media/publications/articles/2022-05-31-endless-tide-the-continuing-struggle-to-overcome-anti-asian-hate-in-new-york/_res/id=Attachments/index=0/Endless_Tide_Report_2022_FIN.pdf [https://perma.cc/79Y6-FBVG].

166. Id. at 6.

167. Beth Fertig, Major Bail Reform Is Coming to NY Next Month—Here's What to Expect, Gothamist (Dec. 11, 2019), https://gothamist.com/news/bail-reform-explained-nyc [https://perma.cc/7D8U-3K3C].

mak[e] hate crime offenses subject to arrest, and mak[e] gun-related offenses bail eligible."[168] The group urged even more restrictive bail conditions, advocating that "[b]ail determinations should consider public safety and whether a person charged poses a danger to the community."[169] That is, people too poor to pay bail became collateral damage in the effort to address anti-AAPI racism via criminal law.[170]

In Atlanta, the killing of several AAPI people in 2021 prompted "progressive" Fulton County District Attorney Fani Willis to reverse her campaign promise never to seek the death penalty.[171] Less than a year after her election, Willis sought the death penalty for a man charged with killing eight people, many of Asian descent, at spas in the Atlanta area.[172] Willis justified her decision in terms of empowering marginalized groups and signaling that the community valued members of the AAPI community. She stated that she would bring such charges to show victims that "it does not matter your ethnicity, it does not matter what side of the tracks you come from, it does not matter your wealth, you will be treated as an individual with value."[173]

D. *Crimes of Gender Subordination*

Much ink has been spilled over the use of criminal law to address gender subordination.[174] Under the banner of feminism, many progressive movements have encouraged the use of the carceral system to respond to nonconsensual sex and intimate partner violence.[175] The current carceral feminist movement appears particularly focused on incarceration as a form of power redistribution—to put men who abuse or harass women in

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168. Asian Am. Bar Ass'n N.Y., supra note 165, at 7.

169. Id.

170. See, e.g., Li Zhou, Hate Crime Laws Won't Actually Prevent Anti-Asian Hate Crimes, Vox (June 15, 2021), https://www.vox.com/2021/6/15/22480152/hate-crime-law-congress-prevent-anti-asian-hate-crimes [https://perma.cc/E24L-V8Y3] (arguing that the focus of anti-AAPI hate crime legislation on policing fails to get at the "root cause" of such racism).

171. Bill Rankin, Fulton DA, Two Challengers Commit to Not Seeking the Death Penalty, Atlanta J.-Const. (May 28, 2020), https://www.ajc.com/news/local/fulton-two-challengers-commit-not-seeking-the-death-penalty/7sfZRVL5ngc3eRf9Xo2MgJ/ [https://perma.cc/54HS-FEZN].

172. Nicholas Bogel-Burroughs, Atlanta Spa Shootings Were Hate Crimes, Prosecutor Says, N.Y. Times (May 11, 2021), https://www.nytimes.com/2021/05/11/us/atlanta-spa-shootings-hate-crimes.html (on file with the *Columbia Law Review*) (last updated May 24, 2021).

173. Id. (internal quotation marks omitted).

174. See, e.g., Gruber, The Critique of Carceral Feminism, supra note 6, at 63 (arguing that feminist carceral support is historical and current).

175. See, e.g., Gruber, The Feminist War on Crime, supra note 2, at 170 ("[P]lenty of feminists, veteran and ingenue, remain committed not just to upholding the existing feminist crime control regimes and closing 'loopholes' in them but also to creating new ones . . . .").

prison to empower women more generally.[176] Men who abuse or harass women are seen (perhaps accurately) as above the law, whether because their crimes are not reported or because the legal system is ill-equipped to deal with intimate violence.[177] Instead of seeing the terrible fit between criminalization and intimate partner violence,[178] however, many progressives continue to advocate the use of the carceral system to right these wrongs.[179]

A few examples from the past several years serve to make the point. The first is the case of Brock Turner, perhaps better known as the "Stanford Rapist," whose relatively light sentence after a conviction for sexual assault of an unconscious woman led not only to mass public condemnation but also to the recall of the judge who passed down this sentence.[180] The second is the successful movement to criminalize "revenge porn" or the dissemination of intimate images without the consent of the sender.[181] The final example is the movement to expand the definition of domestic violence to criminalize "coercive control."[182]

In 2015, Turner, a Stanford student athlete, was in the process of assaulting an unconscious woman when he was confronted by two other students.[183] He was convicted of sexually assaulting the woman, Chanel Miller.[184] As Gruber argues, Turner "represents millennial feminists' archetype of a bogeyman. . . . [H]is bad behavior was . . . a product of wealth, race, and male privilege."[185] Judge Aaron Persky sentenced Turner to six months in prison and a lifetime on the sex offender registry.[186] Given

176. This position is often traced to the structural "dominance" or "antisubordination" feminism of Catharine MacKinnon and other second-wave feminists. See id. at 123–42.

177. See, e.g., Margo Kaplan, Rape Beyond Crime, 66 Duke L.J. 1045, 1062–63 (2017) ("Although reforming the criminal law of rape is necessary, this single step is decidedly insufficient. The words of statutes themselves are unlikely to effect real change in the reporting, prosecution, or prevention of rape without significant change to the underlying culture in which those statutes are interpreted and applied.").

178. See, e.g., Beth E. Richie, Arrested Justice: Black Women, Violence, and America's Prison Nation 17 (2012) (arguing that "women of color from marginalized communities who experience violence are made more vulnerable by the operation of a prison nation").

179. In this respect, we agree with Professor Hadar Aviram that "carceral feminism shares important characteristics with other progressive movements deploying criminal justice for progressive ends—including those that advance the interests of people of color." Aviram, supra note 11, at 207–08.

180. See infra notes 183–194 and accompanying text.

181. See infra notes 195–205 and accompanying text.

182. See infra notes 206–212 and accompanying text.

183. Gruber, The Feminist War on Crime, supra note 2, at 178.

184. Id.; see also Concepción de León, You Know Emily Doe's Story. Now Learn Her Name., N.Y. Times (Sept. 4, 2019), https://www.nytimes.com/2019/09/04/books/chanel-miller-brock-turner-assault-stanford.html (on file with the *Columbia Law Review*) (last updated Sept. 24, 2019).

185. Gruber, The Feminist War on Crime, supra note 2, at 178.

186. Id. at 180.

the possibility of the statutory fourteen-year sentence, however, feminist groups were outraged at this perceived leniency.[187]

Stanford Law School Professor Michele Dauber, whose daughter was a friend of Miller's, called Miller's statement at Turner's sentencing "the manifesto of the Me Too movement."[188] Dauber led a successful and nationally publicized campaign to recall Persky.[189] Her movement won the support of "unions and prominent feminists, including Kirsten Gillibrand, Lena Dunham and Anita Hill."[190] "[A]t least ten prospective jurors . . . refused to serve" in an unrelated trial before then-Judge Persky because of his sentencing in Turner's case.[191]

Dauber argued that the recall campaign was not only about protecting women from the "lenient" judge.[192] As she explained, "The fact that Turner's victim was an Asian-American woman of color made [the recall] . . . even more important, given that research indicates survivors of color may be less likely to be believed."[193] In other words, some recall proponents imagined their campaign as reflecting not only a mission of gendered power redistribution but also a broader intersectional power-shifting project.[194]

While cases like Turner's deal with the meting out of incarceration based on well-established sexual assault laws, progressive scholars and lawmakers also advocate new criminal laws in various areas where gender subordination or intimate partner violence is suspected. One area is "revenge porn," in which a person (stereotypically a male) uses an intimate image sent to him by his (stereotypically female) partner to harm her after a perceived slight, such as a breakup.[195] He does this by

187. See Julia Ioffe, When the Punishment Feels Like a Crime, HuffPost (June 1, 2018), https://highline.huffingtonpost.com/articles/en/brock-turner-michele-dauber [https://perma.cc/RL2E-AP7J] (describing the coalition of feminist groups supporting an effort to recall Turner's sentencing judge).

188. Id. (internal quotation marks omitted).

189. Id.

190. Id.

191. Andrew Cohen, Should Jurors Refuse to Serve With the Judge in the Brock Turner Case?, Marshall Project (June 13, 2016), https://www.themarshallproject.org/2016/06/13/mutiny-in-the-jury-box [https://perma.cc/WYW5-AUUL]; Tracey Kaplan, Brock Turner Case Fallout: Prospective Jurors Refuse to Serve Under Judge, E. Bay Times (June 9, 2016), https:/www.eastbaytimes.com/2016/06/09/brock-turner-case-fallout-prospective-jurors-refuse-to-serve-under-judge (on file with the *Columbia Law Review*) (last updated Aug. 15, 2016) (noting that one juror stated, "I can't be here, I'm so upset," in reference to Turner's sentence (internal quotation marks omitted)).

192. Jeannie Suk Gersen, Revisiting the Brock Turner Case, New Yorker (Mar. 29, 2023), https://www.newyorker.com/news/our-columnists/revisiting-the-brock-turner-case (on file with the *Columbia Law Review*).

193. Id. (internal quotation marks omitted).

194. But see infra section III.A.2 (tracking the harms done to defendants of color as a result of the recall).

195. Danielle Keats Citron & Mary Anne Franks, Criminalizing Revenge Porn, 49 Wake Forest L. Rev. 345, 346 (2014) (defining revenge porn as "interchangeabl[e] with

disseminating the image publicly or sending it to a large group to shame the person in the image.

Criminalizing revenge porn is an area in which progressive scholars and activists have been immensely successful at instituting their agenda.[196] While only three states directly criminalized revenge porn before 2013, just ten years later, forty-eight states had statutes addressing the issue in some manner.[197] Proponents of new criminal laws for revenge porn see it as the best way to punish those who use their possession of intimate material to shame their victims, leaving these (mostly) women[198] powerless to control their own likeness: "Disclosing sexually explicit images without permission can have lasting and destructive consequences. Victims often internalize socially imposed shame and humiliation every time they see them and every time they think that others are viewing them."[199] Indeed, revenge porn is seen as tantamount to a sexual assault crime in that it is "degrading and humiliating for the victim's dignity."[200]

Prominent scholars Danielle Keats Citron and Mary Anne Franks argue that subordinated women are more likely to suffer "degradati[on]" from revenge porn than men: "[S]tereotypes help explain why—women would be seen as immoral sluts for engaging in sexual activity, whereas men's sexual activity is generally a point of pride."[201] They argue that ensuring that the revenge porn perpetrator is prosecuted rather than simply sued gives power back to the female victim by ensuring that men who misuse their images are also permanently "degrad[ed]" by a criminal conviction that "in most cases stay[s] on one's record forever."[202]

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nonconsensual porn," which is "the distribution of sexually graphic images of individuals without their consent," including "images originally obtained without consent . . . as well as images originally obtained with consent").

196. See id. at 349 ("In this Article we make the case for the direct criminalization of nonconsensual pornography."); Andrew Gilden, The Queer Limits of Revenge Porn Laws, 64 B.C. L. Rev. 801, 819 (2023) ("Professor Franks . . . advised numerous state legislatures that considered revenge porn statutes and, via the Cyber Civil Rights Initiative (CCRI), published a model criminal statute containing several express exemptions from liability.").

197. Gilden, supra note 196, at 818.

198. Citron & Franks, supra note 195, at 354 (noting that victims of revenge porn tend to be female and noting that "60% of cyber stalking victims are women" and that "[o]f the 3,787 individuals reporting cyber harassment to [Working to Halt Online Abuse] from 2000 to 2012, 72.5% were female, 22.5% were male, and 5% were unknown").

199. Id. at 364.

200. Id. at 362–64 (internal quotation marks omitted) (quoting Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 186 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998)) (noting that international criminal law punishes not just physical sexual violence but also sexual abuses that affect a person's "moral integrity" and "dignity," both of which are issues implicated by nonconsensual pornography).

201. Id. at 353 (citing Danielle Keats Citron, Hate Crimes in Cyberspace 21 (2014)).

202. Id. at 349, 353.

Criminal law, according to these authors, is necessary to do the work of gender justice.[203] In response to the anticipated critique that their newly proposed criminal laws would unnecessarily enlarge the criminal codes, Citron and Franks respond: "Only the shallowest of thinkers would suggest that the question whether nonconsensual pornography should be criminalized—indeed, whether any conduct should be criminalized—should turn on something as contingent and arbitrary as the number of existing laws."[204]

This is, in a way, a refreshing acknowledgement that the authors are not concerned with any increase in the number of those incarcerated, so long as prison is also the place for those who degrade subordinated victims through revenge porn.[205]

Finally, there is the recent movement to expand the definition of domestic violence to include the concept of "coercion."[206] Feminists have long argued that domestic violence is not only physical. That intuition is reflected in "battered person syndrome" cases in which no specific act of violence precipitates the killing, but rather a long pattern of abuse instills fear, leading an abused defendant to believe they are in imminent danger.[207]

Recent years have seen a strong push to make nonviolent abuse criminal in and of itself. In 2023, New Jersey expanded the definition of domestic violence in its penal code by adding the term "coercive control"

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203. Id. at 349 ("[A] criminal law solution is essential . . . ."); see also Bobby Chesney & Danielle Citron, Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security, 107 Calif. L. Rev. 1753, 1801 (2019) (proposing criminal liability as one way to punish the creation of "deepfakes"); Mary Anne Franks & Ari Ezra Waldman, Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions, 78 Md. L. Rev. 892, 897 (2019) ("[A]rguing that we should not enact [criminalization of] harmful speech because historical speech restrictions often targeted minority voices is like saying we should not criminalize rape because the criminal law has long been used to subjugate women.").

204. Citron & Franks, supra note 195, at 362.

205. Citron and Franks gesture to a concern about mass incarceration, but it is not a priority: "While we share general concerns about overcriminalization and overincarceration, rejecting the criminalization of serious harms is not the way to address those concerns." Id.

206. Patricia Fersch, A Call to Amend Domestic Violence Laws Nationwide to Include Coercion and Control, Forbes (Dec. 8, 2021), https://www.forbes.com/sites/patriciafersch/2021/12/08/coercion-and-control-update-year-end-2021/ (on file with the *Columbia Law Review*) (warning that the failure to expand the definition of domestic violence to include coercion and control may lead to psychologists, psychiatrists, and courts failing to recognize these issues and deter women from speaking up against abuse).

207. Abigail Finkelman, Note, Kill or Be Killed: Why New York's Justification Defense Is Not Enough for the Reasonable Battered Woman, and How to Fix It, 25 Cardozo J. Equal Rts. & Soc. Just. 267, 284 (2019) ("When BPS is raised . . . an expert testifies about the effects of sustained battering on a victim's psyche . . . . It is then argued that . . . battered women should not be held to the classic 'reasonable man' standard (the objective standard), and that there should be a 'reasonable battered woman' standard . . . .").

to the language of the statute, which had otherwise reserved criminal condemnation for an act of physical violence. Coercive control:

> [M]eans a pattern of behavior against a person protected under this act that in purpose or effect unreasonably interferes with a person's free will and personal liberty. "Coercive control" includes, but is not limited to, unreasonably engaging in any of the following:
>
> (a) Isolating the person from friends, relatives, or other sources of support;
> (b) Depriving the person of basic necessities;
> (c) Controlling, regulating or monitoring the person's movements, communications, daily behavior, finances, economic resources or access to services;
> (d) Compelling the person by force, threat or intimidation, including, but not limited to, threats based on actual or suspected immigration status, to (i) engage in conduct from which such person has a right to abstain, or (ii) abstain from conduct that such person has a right to pursue;
> (e) Name-calling, degradation, and demeaning the person frequently;
> (f) Threatening to harm or kill the individual or a child or relative of the individual;
> (g) Threatening to public information or make reports to the police or to the authorities;
> (h) Damaging property or household goods; or
> (i) Forcing the person to take part in criminal activity or child abuse.[208]

New Jersey isn't alone—at least three other states have seen similar unsuccessful legislative efforts in recent years.[209]

As the language of the New Jersey statute demonstrates, the addition of coercive control opens up a wide swath of behavior that can now be criminalized. This kind of broad discretion to prosecute intimate abuse is exactly what its progressive proponents want. As one expert in the field and the founder of one of the first battered women's shelters put it, coercive control is "oppressive behavior grounded in gender-based privilege."[210] Indeed, enlarging the criminal code for domestic violence to include mental as well as physical coercion has long been a project of

208. Gen. Assemb. A1475.3.a(20), 220th Gen. Assemb., Reg. Sess. (N.J. 2023).

209. See Courtney K. Cross, Coercive Control and the Limits of Criminal Law, 56 U.C. Davis L. Rev. 195, 224 (2022) ("New York, South Carolina, and Washington each introduced bills that would criminalize coercive control.").

210. Patricia Fersch, Domestic Violence: Coercion and Control Equates to a Loss of Liberty, Sense of Self and Dignity for Women, Forbes (Mar. 19, 2021), https://www.forbes.com/sites/patriciafersch/2021/03/19/domestic-violence-coercion-and-control-equates-to-a-loss-of-liberty-sense-of-self-and-dignity-for-women/ (on file with the *Columbia Law Review*).

carceral feminists.[211] Scholars have advocated protecting victims of domestic violence through criminalizing nonphysical coercion, from proposing a similar expansion to New Jersey's new law, to arguing that the United States should criminalize coercion as a form of fraud, to suggesting a crime of domestic battery that includes behavior that "the defendant 'knows or reasonably should know . . . is likely to result in substantial power or control.'"[212]

In this Part, we have outlined several contexts in which progressives seek to deploy criminal legal institutions as tools of redistribution. Much of this work is siloed—in other words, a carceral feminist may not believe that employee theft should be criminally punished.[213] She may also believe generally that the criminal legal system must be scaled back, even substantially. Yet in the aggregate, these redistributive projects (and the many others we do not detail here) might well strengthen the carceral state and exacerbate inequality. This is the issue we turn to in the next Part.

III. THE LIMITS OF PUNITIVE REDISTRIBUTION

As outlined in the previous Part, progressive lawmakers, activists, and academics have justified the turn to criminal legal institutions in distributive (or redistributive) terms. In this Part, we criticize that turn and the framing of criminal law as a potential engine of redistribution. First, we argue that criminal legal institutions simply can't achieve the redistributive ends that proponents suggest. We contend that a distributive case for criminalization requires empirical support for claims about positive distributive consequences—support that is sorely lacking. Further, we argue that the institutions of the punitive state are inherently regressive and antithetical to the egalitarian vision articulated by many of the commentators who have embraced redistributive carceral projects. Second, we claim that even if criminal law could do some of the redistributive work that proponents claim, the turn to criminal law still wouldn't be justified. Criminal law would do more harm than good, or, at the very least, scholars and activists committed to more radical visions of social change should be unwilling to accept the evils of state violence that any criminalization project entails, even in the name of redistribution.

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211. Gruber, The Feminist War on Crime, supra note 2, at 123–28 (discussing "dominance feminism" and consensual sex as coercion).

212. Cross, supra note 209, at 217–19 (collecting sources) (quoting Deborah Tuerkheimer, Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence, 94 J. Crim. L. & Criminology 959, 1019 (2004)).

213. Cf. Aharonson, supra note 26, at 288 (noting commonalities across different "'pro-minority' criminalization" projects); Aviram, supra note 11, at 207–08 (observing that "carceral feminism shares important characteristics with other progressive movements deploying criminal justice for progressive ends—including those that advance the interests of people of color").

A. *Distributive Objections*

If we take distributive arguments for criminalization on their own terms, there are two major follow-up questions: First, does the distributive reality match proponents' distributive arguments? And second, even if it does, are there distributive harms elsewhere? That is, can punitive or pro-prosecutorial policies in one area be confined to that area, or do they risk migrating and having negative consequences elsewhere?

1. *Law on the Ground vs. Law in the Cultural Imagination.* — To the extent that many progressives support criminal law for redistributive ends, progressives need to answer an empirical question: Does criminal law actually distribute in the way that they imagine?

Looking to the examples discussed in Part II, our tentative answer is "no." We lack extensive studies mapping, say, who is prosecuted for wage theft or which defendants receive harsher sentences for hate crimes. But the anecdotal evidence that we have (and the actual studies, in some cases) seem to indicate a troubling mismatch between progressive rhetoric and the realities of criminal enforcement. That mismatch hardly should be surprising: Race–class subordinated populations tend to face heavier policing than whiter and wealthier populations,[214] and studies have shown that minoritized defendants tend to face harsher charges and sentences.[215] It's likely that a new criminal statute or program of ramped-up enforcement would reflect similar dynamics.

Of course, the left and progressive advocates discussed in Part II don't see themselves as advocating further criminalization of marginalized communities—just the opposite.[216] Their imagined defendants represent the rich, the powerful, or the socially dominant. The imagined wage thief or rapist might be white, wealthy, and privileged. And pro-punitive advocacy frequently embraces or relies on that image.[217] But there is no

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214. See Monica C. Bell, Anti-Segregation Policing, 95 N.Y.U. L. Rev. 650, 705–09 (2020) [hereinafter Bell, Anti-Segregation Policing] ("[A] larger number of officers may be assigned to 'high-crime,' predominantly Black or Latinx parts of cities, affecting both the statistical likelihood of crime detection and structuring the mental frameworks of the officers assigned to those areas.").

215. See, e.g., Allen J. Beck & Alfred Blumstein, Racial Disproportionality in U.S. State Prisons: Accounting for the Effects of Racial and Ethnic Differences in Criminal Involvement, Arrests, Sentencing, and Time Served, 34 J. Quantitative Criminology 853, 877 (2018) (finding that for drug possession, drug trafficking, and weapons offenses, racial and ethnic disproportionality is "more responsive to police presence and patrol patterns and . . . the most sensitive to implicit or explicit racial profiling"); M. Marit Rehavi & Sonja B. Starr, Racial Disparity in Federal Criminal Sentences, 122 J. Pol. Econ. 1320, 1323 (2014) (describing sentence disparities between Black and white defendants).

216. See, e.g., Tuerkheimer, supra note 11, at 1162–64 (critiquing the War on Drugs and calling for criminal law to do "antisubordination" work instead); Gerstein & Seligman, supra note 29 (arguing that wage theft enforcement is distinct from other objectionable corners of the criminal system).

217. Cf. Thomas Ward Frampton, The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics, 135 Harv. L. Rev. 2013, 2037 (2022) ("Animating much of our

guarantee that the cultural framing of a given law will reflect how the law operates on the ground.[218] Why should we think that the people who are prosecuted or punished will actually be white, wealthy, or powerful?[219]

For example, a 2000 FBI report on white-collar crime enforcement stated that three times more economic crimes were committed at convenience stores (129,749) than at banks (38,364).[220] The mean amount stolen or counterfeited in white-collar incidents was $9,254.75, the median was $210, and the mode was $100.[221] That is, advocacy geared at white-collar crime enforcement appears just as likely to lead to more check fraud prosecutions as it is to mean a focus on executives at the nation's biggest banks.[222] And a rough survey of wage theft prosecutions appears to yield a focus on small, immigrant-run businesses or middle managers, rather than the executives of multinational corporations.[223]

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thinking about criminal law and policy in recent decades is 'the story of an imagined monstrous other—a monster who is not quite human like the rest of us . . . .'" (quoting Sered, supra note 18, at 11)).

218. This potential mismatch should be a cause for concern—or at least introspection and further study—in many ideologically loaded areas of criminal policy. See, e.g., Aya Gruber, Leniency as a Miscarriage of Race and Gender Justice, 76 Alb. L. Rev. 1571, 1572–74 (2013) (noting progressives' criticism of stand-your-ground laws after Trayvon Martin's death); Aya Gruber, A Provocative Defense, 103 Calif. L. Rev. 273, 332–33 (2015) (raising this concern in the context of the provocation defense); Aya Gruber, Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground, 68 U. Miami L. Rev. 961, 1021 (2014) (raising this concern in the context of stand-your-ground laws); Benjamin Levin, Guns and Drugs, 84 Fordham L. Rev. 2173, 2193 (2016) (raising this concern in the context of criminal gun regulation); David E. Patton, Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object, 69 Emory L.J. 1011, 1023 (2020) (same); Yankah, supra note 153, at 704 (raising this concern in the context of hate crimes); Benjamin Levin, Note, A Defensible Defense?: Reexamining Castle Doctrine Statutes, 47 Harv. J. on Legis. 523, 545 (2010) (raising this concern in the context of debates about duty to retreat).

219. In this respect, we suggest that there might well be a disconnect between a redistributive theory of criminal law and an actual redistributive application of criminal law. Cf. Chad Flanders, Reply, Can Retributivism Be Progressive?: A Reply to Professor Gray and Jonathan Huber, 70 Md. L. Rev. 166, 174 (2010) ("I wanted us, *qua* philosophers of punishment, to think twice about theorizing without considering the real world effects of our theories. Some theories are too abstract. Even worse, some theories are abstract and potentially harmful.").

220. Cynthia Barnett, FBI, The Measurement of White-Collar Crime Using Uniform Crime Reporting (UCR) Data 3 tbl.4 (2000), http://www.fbi.gov/about-us/cjis/ucr/nibrs/nibrs_wcc.pdf [https://perma.cc/9NJ4-3CZK].

221. Id. at 4 tbl.5; see also Levin, Wage Theft, supra note 16, at 1483–84 ("[T]he scale of the incidents and what they included (low-level property crimes, check fraud, etc.) fails to jibe with the dominant cultural (and legal) imagination of 'white-collar crime.'").

222. For a rare and incisive critique from the left of white-collar crime as a regulatory model, see generally Gerson, supra note 16.

223. See Levin, Wage Theft, supra note 16, at 1481–88 (examining the employers and industries targeted by wage theft prosecutions and noting that "these defendants may not look like the corporate monoliths or captains of industry who are often painted as driving the exploitative employment practices that result in worker exploitation").

Indeed, a recent study by legal economist Stephanie Holmes Didwania suggests that these anecdotal findings are representative of broader enforcement patterns.[224] Didwania's research—"the first comprehensive study of all federal white-collar prosecutions" from the early 1990s to the present—reveals that "the people convicted of financial crimes have fewer resources than the average U.S. adult" and that "[f]inancial crime defendants have attained less formal education than average and frequently rely on appointed counsel."[225] Further, "Black women are more likely to be convicted of a financial crime than any other type of federal crime."[226] As Didwania argues:

> [S]cholarly and public discourse around financial crime, which focuses on the absence of "white-collar" prosecutions (that is, prosecutions of members of the wealthy executive class), paints an inaccurate picture of how financial crime is prosecuted. The United States does, in fact, prosecute a huge number of people for financial crimes—thousands per year. But these defendants are for the most part not wealthy executives. Instead, financial crime prosecutions disproportionately involve people who are low-income and people who are Black.[227]

Put simply, despite its progressive framing, "financial crime is . . . unexceptional in an American criminal system that otherwise consistently reflects class- and race-based hierarchy."[228]

Similar dynamics may well be at play elsewhere. While many incidents of police violence lead to no criminal charges or convictions, a number of recent high-profile cases that have led to charges, convictions, and prison sentences have involved officers of color—Peter Liang in New York;[229]

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224. Stephanie Holmes Didwania, Regressive White-Collar Crime, 97 S. Calif. L. Rev. 105 (2024).

225. Id. at 105–06.

226. Id. at 106.

227. Id. at 105.

228. Id.

229. See Gabriel J. Chin, The Problematic Prosecution of an Asian American Police Officer: Notes From a Participant in *People v. Peter Liang*, 51 Ga. L. Rev. 1023, 1024, 1039 (2017) (providing background on the case, in which Liang, an Asian-American rookie NYPD officer, was "convicted of accidentally killing a twenty-eight-year-old African-American man, Akai Gurley in the stairwell of a Brooklyn housing project" (footnote omitted) and noting that "the case has been called an example of 'white police officer's executing unarmed black men'"(quoting Donald F. Tibbs, Towards an Abolition Democracy: The Death Penalty, Circa 2015, 25 Widener L.J. 83, 96 (2016))); Levine, Police Prosecutions, supra note 2, at 1036–40 (observing that "Liang's race was erased in the rush to criminally condemn a vision of white police brutality").

Mohammed Noor in Minnesota;[230] Nouman Raja in Florida;[231] Tou Thao in Minnesota;[232] and Demetrius Haley, Desmond Mills Jr., Emmitt Martin III, Justin Smith, and Tadarrius Bean in Tennessee.[233] That's not to minimize the harm caused by these officers or to suggest that each case was similar. But given the critiques of policing as a tool of white supremacy and the rarity of criminal charges against police officers, it is striking that police prosecutions appear to reflect—at least in part—the criminal system's broader racial disparities.[234]

Studies also demonstrate that ostensibly antiracist criminal statutes, like the hate crime enhancements proposed by progressives in Georgia or AABANY, often yield unexpected outcomes.[235] "[C]ases of violence between ethnic minority groups in gang-related conflict or low-level graffiti offenses are among the most vigorous uses of hate crime prosecutions."[236] In the early 2000s, sixty-three percent of the people charged under South Carolina's anti-lynching law—explicitly passed in response to the state's history of anti-Black violence—were Black.[237]

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230. See Levine, Police Prosecutions, supra note 2, at 1040–43 (noting that Noor, a Somali-American officer, was convicted of killing a white woman in a racially charged trial and that it was "the first time a Minnesota police officer was convicted of killing someone in the line of duty out of 179 police-involved shootings in Minnesota since 2000").

231. See id. at 1043–46 (stating that "Raja, a Pakistani-American officer, was the first police officer charged in twenty-six years and the first convicted in thirty years for an on-duty killing in Florida" and observing the lack of acknowledgment in statements by groups like the ACLU that Raja was also a person of color).

232. Steve Karnowski, Ex-Officer Thao Convicted of Aiding George Floyd's Killing, AP News (May 2, 2023), https://apnews.com/article/george-floyd-minneapolis-officer-tou-thao-841814b3f2d4258b79f3ae408ba11fac [https://perma.cc/8C7D-SBBK].

233. See Travis Caldwell & Ray Sanchez, 5 Former Memphis Police Officers Charged in Tyre Nichols' Death Plead Not Guilty, CNN (Feb. 17, 2023), https://www.cnn.com/2023/02/17/us/tyre-nichols-memphis-police-arraignment/index.html [https://perma.cc/6EY5-8GLK] (noting charges against Bean, Haley, Smith, Martin, and Mills for the killing of Tyre Nichols and noting Mills's attorney's call for the public not to judge too quickly, pointing out racially disparate incarceration rates and the fact that "[Mills] is a Black man in a courtroom in America" (internal quotation marks omitted) (quoting attorney Blake Ballin)).

234. See Levine, Police Prosecutions, supra note 2, at 1034–36 ("[F]ar from healing racial inequities present in the system, we see racism and racial tropes abound in the prosecutions of and discussions surrounding police who harm civilians.").

235. See supra section II.C.

236. Yankah, supra note 153, at 704 (citing Marc Fleisher, Down the Passage Which We Should Not Take: The Folly of Hate Crime Legislation, 2 J.L. & Pol'y 1, 23 (1994); James B. Jacobs & Kimberly A. Potter, Hate Crimes: A Critical Perspective, 22 Crime & Just. 1, 19 (1997)); see also Dean Spade, Keynote Address: Trans Law & Politics on a Neoliberal Landscape, 18 Temp. Pol. & C.R. L. Rev. 353, 357 (2009) ("Hate crimes laws strengthen and legitimize the criminal punishment system, a system that targets the very people that these laws are supposedly passed to protect. The criminal punishment system has the same biases (racism, sexism, homophobia, transphobia, ableism, xenophobia) that advocates of these laws want to eliminate.").

237. Joey L. Mogul, Andrea J. Ritchie & Kay Whitlock, Queer (In)Justice: The Criminalization of LGBT People in the United States 127 (2011).

A growing literature on the costs of "carceral feminism" similarly demonstrates that criminal laws enacted to protect women often harm women or are applied in ways that disproportionately harm other marginalized communities, such as racially and economically subordinated populations and queer people.[238] From "mandatory arrest" policies in the context of intimate partner violence, to the expansion of criminal liability for rape, to the rise of the sex-offender registry, the use of criminal law to respond to gender subordination has expanded the reach of the carceral state—with predictable distributive consequences.[239]

While the results of these studies might be shocking in light of the rhetoric discussed in Part II, they shouldn't be surprising to anyone familiar with the workings of the U.S. criminal system. Any turn to criminal legal institutions ultimately involves ceding power to those institutions—and the people who run them. So progressives who turn to criminal law to advance progressive ends are relying on the same prosecutors, judges, and police officers who are responsible for the day-to-day functioning of the criminal system.[240] To the extent that these institutions and actors are

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238. See Leigh Goodmark, Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence 29 (2018) ("Prisons reinforce and magnify the destructive ideologies that drive intimate partner violence."); Gruber, The Feminist War on Crime, supra note 2, at 87 (discussing carceral approaches to intimate partner violence).

239. As Kimberlé Crenshaw writes:

> [A]s many women of color predicted, mandatory arrest policies appear to have done little to protect women of color against domestic violence. Indeed, some studies seem to suggest that the policies have inadvertently increased the risks of serious injury or death for some victims of domestic violence, including a heightened risk of mortality for Black women in particular. Beyond the heightened risk of death, research suggests that women of color are more likely to be arrested themselves for behavior that may be consistent with self-defense but interpreted through the lens of stereotypes as overly aggressive.

Kimberlé W. Crenshaw, From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control, 59 UCLA L. Rev. 1418, 1454–55 (2012) (footnotes omitted); see also Goodmark, supra note 238, at 20 ("Mandatory policies deprive people of the ability to determine whether and how the state will intervene in their relationships, shifting power from the individual to the state."); Gruber, The Feminist War on Crime, supra note 2, at 87, 145 (noting that mandatory arrest policies "put minority women at disproportionate risk of future violence, homelessness, financial ruin, deportation, and their own incarceration" as well as the danger of affirmative consent laws that would likely "disproportionately affect black men"); Jeannie Suk, At Home in the Law: How the Domestic Violence Revolution Is Transforming Privacy 45 (2009) (observing that "[m]andatory arrest and no-drop policies have acclimated prosecutors to the norm of not allowing victims' wishes to control in making decisions in DV" and highlighting how prosecutors may extract protection orders to impose "de facto divorce").

240. One response to this concern might be to bring in different prosecutors to handle these types of cases. For example, Professor César F. Rosado Marzán has advocated for this approach in the wage theft context, arguing that traditional line-level Assistant District Attorneys shouldn't prosecute abusive bosses; instead, attorneys more attuned to the labor movement and worker advocacy should take charge. See Marzán, supra note 134, at 304–13. We are sympathetic to this impulse and Marzán's effort to think beyond traditional

responsible for entrenching inequality and for the injustices of the criminal system elsewhere, why wouldn't they be responsible for similarly troubling outcomes here?[241] That is, the politics and logics of criminal law's administration needn't (and likely do not) change with the politics of the activist or advocate who supports a punitive bill or individual prosecution. There's no reason to assume that police, prosecutors, and correctional officers will share the same values and priorities as progressive activists.

Further, using Simonson's "power-shifting" frame,[242] we are skeptical that carceral progressivism actually lives up to its promise of shifting power to marginalized groups. Pushing for more policing, prosecutions, and punishment directly empowers the state—and, specifically, the state's criminal apparatus.[243] Perhaps marginalized communities or relatively powerless defendants might benefit in some cases as well.[244] Take, for

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criminal legal institutions. That said, eliminating one problematic set of actors can't begin to address widespread institutional problems and pathologies—what about the sentencing judges, the wardens, and the prisons themselves? See Benjamin Levin, Victims' Rights Revisited, 13 Calif. L. Rev. Online 30, 33–34 (2022), https://www.californialawreview.org/s/Levin_Final.pdf [https://perma.cc/6HLM-D6A2] [hereinafter Levin, Victims' Rights Revisited] (explaining the limitations of private prosecutions by noting that prosecutions "would operate against the backdrop of brutal, state-run jails and prisons" and that even "[i]f a victim chose other forms of non-carceral state intervention . . . power would still rest in the hands of the state actors or state-sanctioned institutions" (footnote omitted)).

241. See Benjamin Levin, Response, Values and Assumptions in Criminal Adjudication, 129 Harv. L. Rev. Forum 379, 386 (2016), https://harvardlawreview.org/wp-content/uploads/2016/06/vol129_B-Levin.pdf [https://perma.cc/K3FA-3NJJ] (doubting that simply providing courts with systemic facts to contextualize cases will be sufficient to correct the injustices of the criminal law system, as courts see these systemic facts firsthand daily and yet have not significantly corrected for these inequities).

242. See supra notes 50–59 and accompanying text.

243. See Bell, Police Reform, supra note 66, at 2087 ("In an analysis based on legal estrangement theory, increasing the power of the state bears at most a spurious relationship to the outcome of concern, which is social inclusion across groups."); Nils Christie, Conflicts as Property, 17 Brit. J. Criminology 1, 3 (1977) ("[T]he victim[] is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing. . . . The victim has lost the case to the state."); Coker, Crime Control and Feminist Law Reform, supra note 40, at 860 ("[I]n developing anti-domestic violence strategies, we must attend to the coercive power of the state. . . .").

244. "Relatively powerless" is also a slippery concept. That is, a poor person who—while armed with a gun—robs a rich person might have more "power" in the moment because of the gun, even if the rich person enjoys more power as a structural matter. So should a power-focused approach to criminal law favor the rich victim (who wields less power in the moment) or the poor defendant (who wields less power in society)? Cf. Máximo Langer, Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then, 134 Harv. L. Rev. Forum 42, 54 (2020), https://harvardlawreview.org/wp-content/uploads/2020/10/134-Harv.-L.-Rev.-42.pdf [https://perma.cc/EA72-ELET] ("[Minimal criminal law] would always protect the weakest: the injured party during the offense, the defendant during the criminal process, and the prisoner during the execution of the prison sentence." (citing Luigi Ferrajoli, Il Diritto Penale Minimo, 3 Dei Delitti e Delle Pene 493, 512 (1985))). Or, to put the problem in broader terms: Many people—regardless of how

example, wage theft cases in which the state is able to collect fines from a boss and distribute that money to workers.[245] But that benefit is vicarious or at least contingent. It depends on the actions of police and prosecutors.[246] Any shift in power is mediated by criminal justice actors, who accrue power at defendants' expense.[247] These state actors might empower marginalized communities. Or they might not.[248] To the extent they do, though, any benefit to marginalized communities depends upon the carceral state growing and amassing further power.

Or perhaps our intuitions are wrong, and the anecdotal evidence that we have isn't actually representative. Perhaps criminal legal institutions *could* shift power in the way that progressive advocates imagine. Perhaps the defendants arrested, incarcerated, and punished harshly would be avatars of white supremacy, heteropatriarchy, and capitalist subordination. What we argue here, though, is that those outcomes would be unexpected and at odds with what we know about the way that U.S. criminal legal institutions generally function. Put differently, the redistributive case for progressive criminalization rests on empirical claims.[249] And those empirical claims strike us as very unlikely to be true.

Therefore, we argue that the burden of proof should fall on academics, activists, and policymakers who remain enthusiastic about using criminal law to advance progressive ends. It should be incumbent on those calling for more punishment to explain why criminal law *in this area* would work differently than criminal law *in other areas*.[250]

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powerful they are on a macro scale—might wield a relative power advantage in the context of interpersonal violence. So even if power shifting were an attractive theory for assessing criminal policy, power is a tricky enough concept that many criminal policy decisions could be justified in power-shifting terms. Cf. Bernard E. Harcourt, The Collapse of the Harm Principle, 90 J. Crim. L. & Criminology 109, 193 (1999) (making a similar argument about the use of the "harm principle" in decisions about what conduct to criminalize).

245. See, e.g., Molly Crane-Newman, Manhattan Workers Stiffed by Employers Given New Legal Route to Recoup Stolen Wages, N.Y. Daily News (Feb. 17, 2023), https://www.nydailynews.com/new-york/nyc-crime/ny-worker-protections-stolen-wages-20230217-c77cg7vlrvht7o6efmpd2exu5m-story.html (on file with the *Columbia Law Review*) (discussing efforts to use the Manhattan DA's office as a vehicle for refunding stolen wages).

246. Cf. I. Bennett Capers, Against Prosecutors, 105 Cornell L. Rev. 1561, 1583–1608 (2020) (examining the role of prosecutors in mediating victims' interests).

247. See Levin, Victims' Rights Revisited, supra note 240, at 32–34 (arguing that such a dynamic might well persist in a world of private prosecutions).

248. On this question, see Capers, supra note 246, at 1579–80 (noting possible explanations for the practice of private prosecution in the colonies and pointing out that while perhaps colonists saw them as "a net good," at the same time, "the colonies' turn to public prosecution may have been anything but disinterested").

249. Cf. Dan M. Kahan, The Secret Ambition of Deterrence, 113 Harv. L. Rev. 413, 415–17 (1999) (arguing that ostensibly utilitarian and data-driven arguments often provide cover for what are fundamentally moral or ideological claims).

250. Cf. Tommie Shelby, The Idea of Prison Abolition 148–49 (2022) ("[T]hose who defend the practice of imprisonment must justify it by showing that prisons prevent or reduce crime.").

2. *Trickle-Down Criminal Injustice*. — Even if the people charged with "crimes of power" were less likely to come from race–class subordinated communities, and even if marginalized victims might benefit in some of these cases, that still would leave a larger distributive question: Does amping up punitive policies in one area harm marginalized communities in other areas? That is, if we adopt a broader view for our distributional analysis, does empowering the carceral state in one area that progressives like (prosecuting police, hate crimes, white-collar crime, etc.) lead to a strengthened carceral state in other areas where progressives are less enthusiastic (drug crime, misdemeanor prosecutions, etc.)? Do punitive politics directed at powerful defendants "trickle down" to harm less powerful defendants?

Unlike the distributive questions raised in the previous section, this larger question is harder to answer empirically. It wouldn't be enough to track the race, class, and identity of defendants in hate crimes or police prosecutions.[251] We would need to determine if—say—support for a new hate crime statute had legitimated criminal legal solutions to other social problems,[252] or if advocating weak procedural protections in police prosecutions would harm non-police defendants.[253] Drawing such causal relationships would be difficult, as would designing a study to assess the ripple effects of each pro-punitive advocacy effort.[254]

Nevertheless, we are skeptical at best that punitive impulses and policies can be cabined. Arguments don't belong exclusively to the activists who use them. They can be deployed by people with very different politics and goals.[255] Claiming that prison is the right or the best solution to one social problem invites the question of why it wouldn't be just as desirable

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251. Those are the sorts of data that would be necessary to answer the questions in the previous section.

252. By legitimation, we refer to the Gramscian concept—that is, we are concerned with how people come to perceive unjust institutions as just. See generally Louis Althusser, Ideology and Ideological State Apparatuses (Notes Towards an Investigation), *in* Lenin and Philosophy and Other Essays 85, 124–26 (Ben Brewster trans., 2d ed. 2001); Selections From the Prison Notebooks of Antonio Gramsci (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971); Paul D. Butler, Poor People Lose: *Gideon* and the Critique of Rights, 122 Yale L.J. 2176, 2189 (2013); Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 429–32 (1995).

253. See, e.g., Levine, How We Prosecute the Police, supra note 16, at 750 (arguing that if all suspects experienced the "presumed preferential procedures" that police suspects do, "both innocent and guilty-but-harmless suspects might fare better, as would the legitimacy and accuracy of the system itself"); Levine, Police Suspects, supra note 16, at 1205 (arguing in favor of giving procedural protections police enjoy to all citizens).

254. Indeed, this observation has led some to critique the concept of legitimation altogether. See, e.g., Alan Hyde, The Concept of Legitimation in the Sociology of Law, 1983 Wis. L. Rev. 379, 426 (critiquing legal scholarship that relies on legitimation arguments).

255. Cf. Jeannie Suk, The Trajectory of Trauma: Bodies and Minds of Abortion Discourse, 110 Colum. L. Rev. 1193, 1252 (2010) (tracing anti-abortion judges' use of trauma rhetoric initially deployed by reproductive rights advocates).

in another area. Arguing that punishment and justice are synonymous in one context implies that they are in other contexts. And claiming that criminal institutions can empower victims in one class of cases suggests that victims can—and should—look to criminal law as a source of power in other cases.[256]

Our observation finds support in critical scholarship and activism that emphasizes the unintended consequences of strengthening the carceral state.[257] Turning to brutal and repressive institutions tends to redound to the detriment of nondominant social groups.[258] Our observation also finds support in certain liberal or rights-based approaches to law: In order to preserve all of our rights, the argument goes, we need to protect the rights of people we don't like. This, of course, has long been a refrain of civil libertarians who emphasize the importance of helping unpopular defendants or protecting unpopular speech.[259]

Either logic holds for the current societal punitive turn: Empowering or expanding the carceral state poses significant risks for the population at large—and particularly for marginalized communities. In a system marked by discretion, giving new tools and more power to police and prosecutors in one area means that police and prosecutors have more power—full stop. Accepting and advancing pro-punitive arguments here not only serves to legitimate criminal law, but also helps to provide a blueprint for future efforts at criminalization and punishment.[260] Put

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256. Cf. Jeffrie G. Murphy & Jean Hampton, Forgiveness and Mercy 124–28 (1988) ("I am proposing that retributive punishment is the defeat of the wrongdoer at the hands of the victim (either directly or indirectly through an agent of the victim's, e.g., the state) that symbolizes the correct relative value of wrongdoer and victim.").

257. See, e.g., supra note 43 (collecting sources).

258. See, e.g., Mogul et al., supra note 237, at 123–32 ("Even more disturbing is evidence suggesting hate crime laws can contribute to systemic violence against those they are intended to protect."); Spade, supra note 236, at 357–58 (arguing that concerns about "us[ing] criminal punishment-enhancing laws to purportedly address oppression" are "particularly relevant for trans people given our ongoing struggles with police profiling, harassment, and violence, and high rates of both youth and adult imprisonment").

259. The ACLU's representation of Nazis who marched in Skokie, Illinois, is perhaps the classic example. Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978). See generally Aryeh Neier, Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom (1979) (describing the ACLU's work on this case).

260. This concern has led some commentators to argue that the right way to address inequality in criminal administration is to treat everyone better (i.e., treat marginalized defendants more like powerful defendants) rather than treating powerful defendants worse. See, e.g., Aya Gruber, Equal Protection Under the Carceral State, 112 Nw. U. L. Rev. 1337, 1383 (2018) [hereinafter Gruber, Equal Protection Under the Carceral State] (warning that "[c]arceral reforms that ride in on a wave of bipartisan support for disparately treated minority victims may prove difficult or impossible to reverse" and "lead to level-up solutions that render minority defendants vulnerable to increased policing, prosecution, and incarceration"); Levin, Mens Rea Reform, supra note 16, at 540–48 ("[W]hen faced with the specter of inequality (wealthy corporate defendants receiving more protections than poor defendants), opponents of mens rea reform have made the move to level up punishment and prosecution."); Levine, How We Prosecute the Police, supra note 16, at 750

simply, punishment and punitive politics might well trickle down, harming the relatively powerless, not just the relatively powerful.

Again, whether and to what extent harsh policies trickle down are empirical questions. Given the enormous stakes and social costs of the turn to criminal law, we think it's important to try to answer those questions and to grapple with the very real (and—in our opinion—quite likely) possibility that progressive pro-criminalization advocates are wrong. While we lack comprehensive evidence that punitive policies aimed at one class of defendants harm all defendants, one recent study in the wake of the Brock Turner case provides some troubling support for this claim.[261]

In a 2022 study, political scientists Sanford Gordon and Sidak Yntiso tracked California county court sentencing patterns around the time of Judge Aaron Persky's recall election.[262] Gordon and Yntiso examined the claim that the highly publicized recall discouraged judicial leniency and encouraged judges to adopt a "tough on crime" posture.[263] Looking to sentencing data for six counties, Gordon and Yntiso observed "large, instantaneous increases in judicial punitiveness immediately following the announcement of the recall campaign."[264] Sentences increased roughly 30%, and Gordon and Yntiso found that the recall announcement could have been responsible for between 88 and 403 additional years in prison time doled out during the forty-five day window in question.[265] Those increases were "most readily apparent in sentencing for nonsexual violent crime."[266] Despite recall supporters' focus on Turner's race and attempts to distance the recall from discussions of racialized mass incarceration, the harsher sentences harmed defendants across racial lines.[267] The harsher sentences "neither mitigated nor exacerbated any long-term discriminatory treatment in sentencing."[268] And, as Gordon and Yntiso explained:

> [R]ecall campaign critics . . . anticipated a disproportionate racial burden even in the absence of any immediate change in discriminatory treatment by judges. Specifically, these critics emphasized how the overrepresentation of Black citizens in courts and prisons implies that even a race-neutral increase in

("Calls to cabin prosecutors' investigations and grand jury presentations when police are suspects miss an important opportunity to engage in meaningful conversation about why such process is not used for other criminal suspects.").

261. Sanford C. Gordon & Sidak Yntiso, Incentive Effects of Recall Elections: Evidence From Criminal Sentencing in California Courts, 84 J. Pol. 1947 (2022).

262. See id. at 1947–48.

263. See id. at 1960–61 ("The events of the Persky recall campaign and the salience of law and order in the 2016 presidential campaign suggest that elected officials still face strong incentives to appear tough on crime.").

264. Id. at 1960.

265. Id. at 1959.

266. Id. at 1960.

267. See id. at 1957–58.

268. Id. at 1958.

> overall severity will place a disproportionate burden on minority communities. Our findings are consistent with this interpretation.[269]

An advocacy campaign focused on the perceived privilege of an affluent, straight, cisgender, white male defendant actually had sweeping consequences.[270] Perhaps it raised awareness about sexual violence and advanced the goals of activists.[271] But it also had unintended consequences for people who looked nothing like Brock Turner.[272]

Of course, this is only one study focused on a single case. Nevertheless, the findings are sobering. And they should invite greater introspection from progressives who believe that unintended consequences are minor or that punitive impulses can be cabined easily.

B. *Decarceration Beyond Distribution*

As should be clear, we are skeptical at best that criminal law does—or could—achieve the redistributive ends that progressives favor. But even if criminal law distributed (or redistributed) in the ways that progressives imagine, would that mean that more criminal law, more criminal prosecutions, and more criminal punishment would be desirable? We think not.

The contemporary turn to "criminal law skepticism" in the United States generally reflects a focus on distributive consequences—on the criminal system as a driver of inequality. Critical accounts tend to emphasize the historical relationship between criminal legal institutions and chattel slavery, capital's oppression of labor, settler colonialism, and

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269. Id (footnote omitted).

270. See, e.g., The Recall Reframed (Racing Horse Prods. 2023); Alex N. Press, When a Fight Against Sexual Assault Bolstered Mass Incarceration, Jacobin (Mar. 26, 2023), https://jacobin.com/2023/03/the-recall-reframed-documentary-review-brock-turner-sexual-assault-carceral-feminism/ [https://perma.cc/8ATH-HPWE] (observing that once Persky's recall began, in six California counties, "judges immediately began extending the length of sentences by 30 percent" and noting that those "most likely to already be targeted by the criminal justice system—i.e., not the Brock Turners of the world—bear the brunt").

271. See, e.g., Julie Zigoris, This Judge's Recall Was a Win for #MeToo but a Setback for Prison Reform, New Documentary Argues, S.F. Standard (Mar. 4, 2023), https://sfstandard.com/arts-culture/this-judges-recall-was-a-win-for-metoo-but-a-setback-for-prison-reform-new-documentary-argues/ [https://perma.cc/VU3T-YPR3] (noting that Dauber saw the recall as "a strong statement against rape culture in the legal system" (internal quotation marks omitted) (quoting Dauber)).

272. See, e.g., Gordon & Yntiso, supra note 261, at 1960 (noting that the more punitive sentences were "most readily apparent in sentencing for nonsexual violent crime" and that "the petition announcement neither mitigated nor exacerbated observed longer-term racial disparities in sentencing"); Aya Gruber, Opinion, Was Recalling Brock Turner's Judge Justice?, MSNBC (Mar. 19, 2023), https://www.msnbc.com/opinion/msnbc-opinion/judge-sentenced-brock-turner-was-recalled-california-not-justice-rcna75515 [https://perma.cc/22A9-TYH9] ("A punitive response to injustice that calls for harsher sentences, even when aimed at the privileged, inevitably harms the people against whom the system is already stacked.").

other forms of subordination.[273] Activist and academic accounts rely on narratives of criminal law as an engine of inequality, reflecting prejudice and entrenching the power of socially dominant groups at the expense of marginalized communities.[274] Criminal law and its administration might be objectionable for a host of reasons, but contemporary U.S. movements (both inside and outside the academy) frequently ground their claims in the language of distributive justice—the system enacts institutionalized violence against society's most marginalized.[275]

To the extent that an abolitionist, minimalist, or anticarceral project focuses exclusively on distributive concerns, then the questions raised in the previous sections take on tremendous significance. The relevant inquiry when presented with a new piece of criminal legislation or an alteration to the criminal process is *how it will distribute*.[276] Of course, there

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273. See, e.g., Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build a Safer World 1–26 (2022) (describing the criminal system and family policing system as interlocking systems that oppress Black communities); Shelby, supra note 250, at 18–52 (tracing the origins of contemporary U.S. abolition to specific strands of the Black radical tradition); Amna A. Akbar, An Abolitionist Horizon for (Police) Reform, 108 Calif. L. Rev. 1781, 1818 (2020) [hereinafter Akbar, Abolitionist Horizon] (tracing policing to the work of slave patrols); McLeod, Envisioning Abolition Democracy, supra note 18, at 1622 (identifying abolition as a project of racial and economic transformation); Roberts, Abolition Constitutionalism, supra note 2, at 7 ("First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained. Second, the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime." (footnote omitted)); Dylan Rodríguez, Abolition As Praxis of Human Being: A Foreword, 132 Harv. L. Rev. 1575, 1580 (2019) (tracing the rise of the "carceral state" to institutions of chattel slavery).

274. See, e.g., Rachel Herzing, Commentary, "Tweaking Armageddon": The Potential and Limits of Conditions of Confinement Campaigns, 41 Soc. Just. 190, 193–94 (2015) ("Far from being broken . . . the prison-industrial complex is actually efficient at fulfilling its designed objectives—to control, cage, and disappear specific segments of the population."); Critical Resistance, What Is the PIC? What Is Abolition?, https://criticalresistance.org/mission-vision/not-so-common-language/ [https://perma.cc/B4S9-7HFG] (last visited Feb. 16, 2024) (arguing that the prison industrial complex reinforces racial, economic, and other social hierarchies, including by "mass media images that keep alive stereotypes of people of color, poor people, queer people, immigrants, youth, and other oppressed communities as criminal, delinquent, or deviant" (emphasis omitted)); End the War on Black People, Movement for Black Lives, https://m4bl.org/end-the-war-on-black-people/ [https://perma.cc/F4NF-29DZ] (last visited Mar. 18, 2024) (calling for "[a]n end to all jails, prisons, immigration detention, youth detention [a]nd civil commitment facilities as we know them").

275. See, e.g., Mariame Kaba, We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice 13 (Tamara K. Nopper ed., 2021) ("Decades of collective organizing have brought us to this moment: some are newly aware that prisons, policing, and the criminal punishment system in general are racist, oppressive, and ineffective."); Akbar, Abolitionist Horizon, supra note 273, at 1821–22 ("When abolitionist organizers say *the police were never meant to protect us*, they are drawing on the history of police in slave and border patrols, as well as their early history of crushing labor strikes in the North." (footnote omitted)).

276. See supra Part I.

may be a range of important follow-up questions—does criminal law work to advance the desired ends (reducing risk, remedying harm, advancing public safety, etc.)? Are criminal law and criminal punishments necessary to achieve the desired ends? And what are the appropriate or acceptable distributive consequences? But the litmus test for criminal policy depends on who will suffer and who will benefit.

Distributive justice is important in a society marked by widespread (and growing) inequality. That's why we see the sort of careful distributional analysis discussed above as such a valuable component of any project of dismantling the carceral state.

That said, it's not at all clear to us that distributive justice must be the sole focus of a project of abolition, penal minimalism, decarceration, or institutional transformation.[277] As Professor Máximo Langer observes, "[n]on-American penal abolitionists have presented a different range of social theories that have varied from author to author and that have included Marxism, humanist phenomenology, localism combined with a position against professionals and their expertise, and Christian thought and categories."[278] Indeed, some commentators have argued that "abolitionists need to turn not only to social, but also to moral theory to make explicit and improve the quality of their own moral judgements and to discuss whether a just society includes punishment."[279]

If certain forms of state violence, social control, and subordination are fundamentally objectionable in and of themselves, then their unequal application isn't exclusively what makes them bad.[280] If prisons should be abolished because it is wrong for the state to put members of the polity in cages, then the case for abolition doesn't depend on finding that the state disproportionately cages members of marginalized or disfavored groups. If penal institutions should be dramatically reduced rather than abolished (to employ a minimalist frame), we should be wary of embracing those institutions as a desired approach to *any* social problem.

In this section, we hardly hope to lay out a comprehensive theory of what makes criminalization and carceral punishment objectionable. But

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277. On different movements for and understandings of abolition, see Langer, supra note 244, at 46–57.

278. Id. at 50 (footnotes omitted); see also Thomas Mathiesen, The Politics of Abolition Revisited 31–36 (2015) (describing an "abolitionist stance"); Vincenzo Ruggiero, Penal Abolitionism 105–27 (2010) (describing a Christian abolitionist's perspective).

279. Langer, supra note 244, at 50.

280. See, e.g., Michael J. Zimmerman, The Immorality of Punishment, at vii (2011) ("I doubt that legal punishment—punishment by the state of its subjects—can be justified."); Elisabeth Epps, Amber Guyger Should Not Go to Prison, The Appeal (Oct. 7, 2019), https://theappeal.org/amber-guyger-botham-jean/ [https://perma.cc/G8RY-W8FL] [hereinafter Epps, Amber Guyger Should Not Go to Prison] ("The people for whom we have sympathy don't deserve freedom only because of their innocence—though of course that too—but also because of the improbably divisive contention: *People do not belong in cages*.").

we do hope to articulate several reasons why criminal solutions to social problems might be troubling—even absent clear evidence of criminal law's negative distributive consequences.[281]

1. *The Brutality of Criminal Punishment.* — The distributive concerns articulated above can be understood in consequentialist terms—criminal law actually can't accomplish what its proponents want it to. But not all concerns about criminal legal solutions to social problems are consequentialist.[282] Indeed, perhaps the most basic concern about progressives' turn to criminal punishment is that criminal punishment is awful. It is dehumanizing and imposes great harms on defendants, their families, and their communities.[283]

Arguing that conduct should be criminalized or that a person should be incarcerated isn't an academic exercise. And whatever one's idealized vision of criminal punishment might look like, we know that jails and prisons are sites of violence and degradation. A growing literature focuses on the brutal conditions of jails and prisons.[284] Activists, academics, and

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281. To be clear, these are issues that criminalization proponents of *all* political stripes must confront. Here, however, we direct our concerns to progressives and leftists both because they are the focus of our discussion overall and also because this Essay is meant to function as a piece of internal critique. We are deeply concerned about right-wing tough-on-crime politics, but we focus here on academics and activists whose politics generally fall closer to our own in an effort to excavate why we might part ways with them on certain questions of criminal policy.

282. Cf. Youngjae Lee, What Is Philosophy of Criminal Law?, 8 Crim. L. & Phil. 671, 683 (2014) (book review) ("In most debates concerning individual rights, deontological and consequentialist arguments assume familiar positions. Deontological arguments speak in favor of stringent to absolute protection of rights against consequentialist considerations, and consequentialist arguments, in favor of sacrificing such rights in order to produce the best outcome.").

283. On punishment as degrading or dehumanizing, see generally Chad Flanders, Shame and the Meanings of Punishment, 54 Clev. St. L. Rev. 609 (2006).

284. E.g., Keramet Reiter, 23/7: Pelican Bay Prison and the Rise of Long-Term Solitary Confinement 179–82 (2016) (pointing to the work on solitary confinement by psychologists, psychiatrists, and criminologists, who have "continued to document the extreme mental and physical consequences of even short-term sensory deprivation and isolation"); Jonathan Simon, Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America 109–33 (2014) (describing how "the largest, most expensive prison system in the country had actually decreased public safety by keeping [incarcerated persons] in 'extreme peril' under inhumane conditions"); Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. Rev. 881, 915 (2009) ("When the state puts offenders in prison, it forces them into close quarters with hundreds and sometimes thousands of other offenders . . . . To force prisoners to live in constant fear of violent assault . . . is to inflict a form of physical and psychological suffering akin to torture." (footnotes omitted)); Frampton, supra note 217, at 2046 (collecting sources on sexual abuse in prisons, most of which is inflicted by staff); Colleen Hackett & Ben Turk, Shifting Carceral Landscapes: Decarceration and the Reconfiguration of White Supremacy, *in* Abolishing Carceral Society 23, 43–48 (Abolition Collective ed., 2018) (describing how the prison "tier" system "exacerbates violent prison culture," including by "enforcing and promoting dehumanizing, degrading, and therefore violent conditions"); Raymond Luc Levasseur, Trouble Coming Every Day: ADX—The First Year 1996, *in* The

policymakers have stressed the broad-reaching challenges associated with having a criminal record.[285] In short, the administration of criminal law is defined by the imposition of significant harm on people accused or convicted of crimes. Those harms have become a source of significant criticism for progressive and left commentators. So why should those harms be acceptable if they are visited against the "right" defendants?

To use a crude analogy, if you oppose the death penalty because you think it is wrong for the state to kill a person (or to kill a person as punishment for a crime), then that rule should hold for all defendants—regardless of how egregious their conduct.[286] You shouldn't be content with a system of capital punishment, regardless of the defendants executed or the process that they receive.[287] On the other hand, if you oppose the death penalty because you believe that it is imposed in a way that reflects racial bias, then your problem isn't with the death penalty; it is with societal and structural racism. It is conceivable that you might accept—or even approve of—certain capital punishment schemes. Perhaps the death penalty would be acceptable if it were imposed in a race-neutral way. Or perhaps the death penalty, as an institution long associated in the United States with racial inequality, would be acceptable if it were used in an explicitly antiracist manner (e.g., as punishment for killing members of a racial or ethnic minority group).[288]

New Abolitionists: (Neo)Slave Narratives and Contemporary Prison Writings 45, 47–48 (Joy James ed., 2005) (recounting the harrowing conditions of the author's solitary confinement in Administrative Maximum (ADX) prison); I. India Thusi, Girls, Assaulted, 116 Nw. U. L. Rev. 911, 913 (2022) (noting the prevalence of sexual violence against poor women and girls in the criminal and juvenile legal systems, which have "managed to normalize pervasive sexual violence and exploitation"); Corey Devon Arthur, I've Been Strip-Frisked Over 1,000 Times in Prison. I Consider It Sexual Assault, Marshall Project (Feb. 4, 2021), https://www.themarshallproject.org/2021/02/04/i-ve-been-strip-frisked-over-1-000-times-in-prison-i-consider-it-sexual-assault [https://perma.cc/E9R4-W62X] (recounting the author's experience of being beaten and sexually assaulted by strip frisks in prison).

285. See, e.g., Devah Pager, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration 25–27 (2007) (describing the significance of a criminal record for job seekers); Bruce Western, Homeward: Life in the Year After Prison 26–45 (2018) (describing the challenges faced by previously incarcerated people as they transition to life outside of prison).

286. For a much more extensive discussion of the distinction between consequentialist and deontological objections to the death penalty, see generally Carol Steiker, The Death Penalty and Deontology, *in* The Oxford Handbook of Philosophy of Criminal Law 441 (John Deigh & David Dolinko eds., 2011).

287. See Gruber, Equal Protection Under the Carceral State, supra note 260, at 1356 ("To an abolitionist, the idea of applying barbaric and uncivilized capital punishment based on the racial makeup of a case is particularly repugnant, even if to remedy systemic disparities.").

288. See Randall L. Kennedy, *McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court, 101 Harv. L. Rev. 1388, 1438 (1988) (describing a potential "affirmative action" approach to the death penalty).

To be clear, the first position and the second are dramatically different—the first treats the death penalty as fundamentally troubling. The second treats the death penalty as troubling in its application, but sees the institution as redeemable (and perhaps even desirable).

For left and progressive critics of the carceral state, we think it is essential to grapple with this distinction—with what's actually so objectionable about criminal legal institutions. As explained above, we don't believe that criminal punishment could distribute in the way that some progressives imagine or could function as an egalitarian institution.[289] But to the extent that a project of abolition or decarceration isn't consequentialist and is instead grounded in a first-principle objection to incarceration or certain forms of criminal punishment, then progressives' redistributive vision of criminal law should be just as indefensible as regressive criminal law.[290]

2. *The Inevitability of Exclusion.* — Even if criminalization and pro-prosecutorial policies didn't have the troubling distributive consequences discussed above, there is reason to worry about how criminal law creates in-groups and out-groups. A long line of penal theory identifies social cohesion as one of the benefits of criminal punishment: By designating a given act as criminal and by punishing the person who has committed the act, a community reinforces its values and solidifies what it means to be a part of the polity.[291] Viewed critically, though, this "social cohesion" function of criminal law means that punishment always works to exclude, to marginalize, and to create an out-group.[292] The community bonds at the expense of the individual who is excluded and identified as deviant or transgressive.

So regardless of the governing ideology that shapes a system of criminal law (capitalist or socialist, racist or egalitarian, etc.), criminal law

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289. See supra section III.B.1.

290. Cf. Epps, Amber Guyger Should Not Go to Prison, supra note 280 ("If you champion abolition for certain people . . . but not others, then yours is not a call for abolition but for sentencing reform. If your strategy . . . is putting more white collar criminals in prison and freeing folks . . . on petty drug offenses, then . . . you just want different people in prison.").

291. See, e.g., Emile Durkheim, The Division of Labor in Society 105–06 (George Simpson trans., Free Press 1933) (1893) (describing this social function of criminal law); Bell, Police Reform, supra note 66, at 2083–84 ("Although the suitability of Durkheim's comprehensive view of law and punishment for modern contexts is questionable, the broadest reading . . . that the legal system is to create a cohesive and inclusive society . . . is at the root of legal estrangement theory."); Bernard E. Harcourt, Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style, 97 Mich. L. Rev. 291, 349 (1998) [hereinafter Harcourt, Reflecting on the Subject] (describing Durkheim's view of the role of criminal punishment as "social influence" that impacts "the honest person" and "the disorderly" differently).

292. And perhaps also policing. See Bell, Anti-Segregation Policing, supra note 214, at 687–729 (describing policing as doing the work of segregation—protecting in-groups and excluding out-groups).

would be engaged in a project of defining—and punishing—an outgroup.[293] Certainly, that project of exclusion, marginalization, and punishment is particularly troubling when it reinforces historical patterns of subordination. That's one reason that distributive critiques of the U.S. criminal system are so compelling. Even absent that unjust distributive dynamic, though, there's reason to worry about such an exclusionary institution and the way that it might invite subordination and the creation of a disempowered and disenfranchised minority.[294]

Framed slightly differently, we might conclude that criminal legal institutions will inevitably have distributive consequences that benefit majorities or socially dominant groups and harm marginalized or disfavored populations—some set of powerful actors will be engaged in disciplining an individual or community with less social capital. So looking to criminal law as a vehicle for advancing equality and creating a more egalitarian society would be a mistake.[295]

3. *Individualizing Structural Problems.* — One feature of the case studies discussed in Part II is that they reflect a concern about some larger structural or institutional failure: state violence against marginalized communities; capital's exploitation of labor; socially dominant groups using violence to subordinate minority populations; and sexually dominant groups using violence to subordinate queer people to enforce heteropatriarchy.[296] These are massive social problems. Indeed, liberal, progressive, and left-wing support for criminal legal interventions in these

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293. See David Garland, Punishment and Welfare: A History of Penal Strategies 255–56 (1985). Criminologist David Garland argues for "the necessity of conceiving penality in its relation to the 'external' social institutions that surround and support it," explaining that "penal institutions are functionally, historically and ideologically conditioned by numerous other social relations and agencies." Id. at viii. Therefore, "[t]hose who wish to see new forms of penal regulation that accord with the values of social equality, democracy and welfare cannot expect such forms to develop automatically or in the train of any general move towards socialism." Id. at 262; cf. Guyora Binder, Punishment Theory: Moral or Political?, 5 Buff. Crim. L. Rev. 321, 321–22 (2002) ("Because punishment is part of a system of institutional authority, it is not amenable to a simple moral analysis. The legitimacy of punishment is bound up with the legitimacy of the norm it enforces and of the institutions promulgating the norm, imposing the punishment, and inflicting it.").

294. Cf. Bernard E. Harcourt, Matrioshka Dolls, *in* Tracey L. Meares & Dan M. Kahan, Urgent Times: Policing and Rights in Inner-City Communities 81, 82–87 (Joshua Cohen & Joel Rogers eds., 1999) (arguing that the presence of sub-minority populations within minority populations makes for a slippery concept of "community" and that minority control of policing might still yield to subordination of those sub-minorities); Gardner, supra note 59, at 809–11 (noting that "just as subordinated racial groups are subject to social closure, these groups often show internal patterns of social closure that inform intraracial stratification").

295. Cf. Harcourt, Reflecting on the Subject, supra note 291, at 389 ("[C]ategories of the disorderly and law abiders, of order and disorder, limit our horizon. When we attempt to think about reducing violent crime—about, in effect, transforming society—we need to question these categories and, if we find them limiting, offer alternative understandings that lead to more innovative policies.").

296. See supra Part II.

areas reflects a belief that there are massive structural issues in need of drastic measures.[297]

But criminal law doesn't necessarily speak the language of structural change. Criminal legal institutions generally operate on the transactional or retail level, rather than systemic or wholesale level.[298] Individual defendants are prosecuted and punished for individual acts of (alleged) lawbreaking. And criminal legal institutions speak in an individualist language. That's one reason that criminal law is often critiqued from the left—it easily serves neoliberal ends by shifting the focus from structural problems and social programs to individual wrongdoing.[299] Therefore, there's good reason to worry about whether an individual prosecution could achieve the broader structural goals that progressive advocates have in mind when they call for addressing inequality along lines of gender,

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297. See supra Part II.

298. See, e.g., Andrew Manuel Crespo, Systemic Facts: Toward Institutional Awareness in Criminal Courts, 129 Harv. L. Rev. 2049, 2051 (2016) ("[C]ase-by-case adjudication naturally focuses judicial attention on the case-specific details of individual claims, presented by individual litigants, one case at a time."); Tracey L. Meares, Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident, 82 U. Chi. L. Rev. 159, 164 (2015) (critiquing the Supreme Court's "individual-level" approach in assessing Terry stops, which do not account for the "systematic[]" and "deliberate[]" nature of stop-and-frisk programs); Daphna Renan, The Fourth Amendment As Administrative Governance, 68 Stan. L. Rev. 1039, 1041–42 (2016) (critiquing the "transactional" model for Fourth Amendment analysis, which focuses on "one-off" encounters between law enforcement and citizens despite the fact that surveillance often occurs programmatically and systemically). But cf. Dorothy E. Roberts, The Social and Moral Cost of Mass Incarceration in African American Communities, 56 Stan. L. Rev. 1271, 1301 (2004) ("[T]he current sentencing regime that generated the enormous prison population is far from individualized. Indeed, the prison explosion is largely attributable to sentencing changes that made punishment *less* individualized.").

299. See, e.g., Bernard E. Harcourt, The Illusion of Free Markets: Punishment and the Myth of Natural Order 204–08 (2011) (making this historical claim); David Harvey, A Brief History of Neoliberalism 2, 47–48 (2005) (describing how in the 1980s and 1990s, following the devastation of racism, a crack cocaine epidemic, and the AIDS epidemic, "[r]edistribution through criminal violence became one of the few serious options for the poor, and the authorities responded by criminalizing whole communities of impoverished and marginalized populations"); Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America 1–3 (2016) ("Even if their legislative language never evoked race explicitly, policymakers interpreted black urban poverty as pathological—as the product of individual and cultural 'deficiencies.' This consensus distorted the aims of the War on Poverty and also shaped the rationale, legislation, and programs of the War on Crime."); Loïc Wacquant, Punishing the Poor: The Neoliberal Government of Social Insecurity 41–42 (2009) (describing the "gradual replacement of a (semi-) welfare state by a police and penal state" that criminalizes marginalized communities and noting that programs for marginalized groups view poverty as "a product of the individual failings of the poor"); Nicola Lacey, Differentiating Among Penal States, 61 Brit. J. Soc. 778, 779 (2010) ("The 'neoliberal' impetus to economic deregulation, welfare state retraction, and individualization of responsibility . . . has, paradoxically, gone hand in hand with the burgeoning of state powers, state pro-activity, and state spending in the costly and intrusive business of punishment.").

race, class, or ability.[300] And the institutional design of the criminal system means that an assignment of criminal liability all too easily does the exact opposite—scapegoating an individual and suggesting that problems involve bad apples rather than rotten barrels or blighted orchards.[301]

4. *Criminal Law as the One-Size-Fits-All Answer.* — Putting the prior concerns together, we worry that criminal law in all its brutality is an extreme response to social problems. One of the troubling aspects of the progressive criminalization projects discussed in Part II is that they reflect a willingness to default to the most restrictive or brutal means imaginable. Even if prosecutions and prisons worked to deter bad actors and to accomplish broader distributive goals,[302] they also impose tremendous costs on individuals and communities.

We don't mean that the answer to major theoretical and practical questions about criminalization is to turn to some sort of formalist or mechanical proportionality analysis. But one troubling feature of the progressive embrace of criminal law is that it often seems to dispense with considerations of proportionality or alternatives. There's a strand of argument that suggests that when there is a big problem, criminal punishment is the right response. Rather than arriving at criminalization after an exhaustive search for other solutions,[303] commentators appear to accept the logic of reflexive criminalization and criminal punishment: Wrong has been done or harm has been caused, so criminal law must be the right response.[304]

In each of the cases discussed in Part II, we agree that the problems are tremendous and the harms to individuals, communities, and society at large are massive. But that hardly means that the only way, or the *best way*, to respond to those problems is by looking to police, prosecutors, and prisons.[305] To return to the death penalty analogy, capital punishment

300. See, e.g., Corda, supra note 49, at 612 ("[P]enal legislation cannot successfully promote social change acting as a solitary trailblazer and should not be delegated tasks beyond its abilities."); Justin Marceau, Palliative Animal Law: The War on Animal Cruelty, 134 Harv. L. Rev. Forum 250, 251 (2021), https://harvardlawreview.org/wp-content/uploads/2021/03/134-Harv.-L.-Rev.-F.-250.pdf [https://perma.cc/9YAM-W49B] ("Rather than catalyze change in American values, however, these war-on-crime approaches create a distracting sideshow that diverts public scrutiny away from matters of the most urgent concern.").

301. See, e.g., Levine, Police Prosecutions, supra note 2, at 1035 (making this claim about police prosecutions); Akbar, Abolitionist Horizon, supra note 273, at 1821–22 (same).

302. To be clear, we do not believe that they do.

303. Cf. Mike C. Materni, The 100-Plus-Year-Old Case for a Minimalist Criminal Law (Sketch of a General Theory of Substantive Criminal Law), 18 New Crim. L. Rev. 331, 347 (2015) (describing the "classical" principle of "extrema ratio," which "establishes that the criminal law should be the option of the last resort—that the government is legitimized to use the criminal sanction only as a matter of necessity").

304. Cf. Levin, Mens Rea Reform, supra note 16, at 534–40 (critiquing the use of criminal law as a sort of regulatory default).

305. Cf. Douglas N. Husak, Overcriminalization: The Limits of the Criminal Law 186 (2008) [hereinafter Husak, Overcriminalization] ("A minimalist theory of

certainly would ensure that a defendant could no longer cause harm; yet that hardly means that the death penalty is the right or only option for preventing an individual from causing harm in the future.[306] Unless one were comfortable executing an awful lot of people, it would be important to consider alternatives.[307]

For over half a century, commentators with different ideological commitments have critiqued overcriminalization and the common impulse in the United States to treat criminal law as the regulatory tool of choice—the right way to respond to a pressing problem.[308] Using "criminalization and cages as catchall solutions to social problems" isn't inevitable,[309] but it has become the common institutional and advocacy vocabulary in the United States.[310] We share the concerns about this model of governance and think that—regardless of how criminal law distributes—it should be incumbent upon criminalization proponents to explain why the state must resort to its most restrictive and violent set of tools to respond to a given social problem.[311]

CONCLUSION

Recent years have seen a welcome rise in anticarceral sentiment among progressives and leftists. In this Essay, we have examined the limits of progressive opposition to criminal law—places in which academics and

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criminalization . . . precludes punitive sanctions when a less extensive alternative is available.").

306. Cf. Shelby, supra note 250, at 181 ("I doubt that there are legitimate means that would prevent all serious crime.").

307. Cf. Allegra M. McLeod, Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives, 8 Unbound: Harv. J. Legal Left 109, 132 (2013) (describing the importance of "unfinished alternatives" to criminal punishment). Of course, it's possible that one might find such alternatives unsatisfactory. Cf. Husak, Price of Criminal Law Skepticism, supra note 23, at 58 (arguing that criminal law skeptics have failed to explain what institutions could replace criminal law).

308. See, e.g., Husak, Overcriminalization, supra note 305, at 4–11 (describing and critiquing overcriminalization); Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear 17 (2007) (same); Sanford H. Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 909 (1962) (same); Ellen S. Podgor, Overcriminalization: The Politics of Crime, 54 Am. U. L. Rev. 541, 541 (2005) (same).

309. Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California 2 (2007).

310. See Miriam H. Baer, Sorting Out White-Collar Crime, 97 Tex. L. Rev. 225, 238 (2018) ("Many of these statutes represented cheap political reactions to singular events or scandals of the day."); supra note 140 and accompanying text.

311. A certain amount of work on "criminal law minimalism" reflects this position—that criminal punishment should only ever be acceptable as the response of last resort. See Langer, supra note 244, at 76 ("Under the conception of minimal criminal law . . . this conception of justice and way of looking at harmful situations should also be adopted as a last resort, only when other conceptions of justice and ways to look at these harmful situations would not suffice to adequately address them.").

activists support prosecution and punishment as vehicles for advancing progressive ends. While it is tempting to treat these exceptions or carveouts as evidence of hypocrisy, we have argued that they may reflect a particular vision of criminal law as a tool of redistribution. We remain concerned about that vision. There is little evidence that criminal legal institutions can achieve the redistributive ends that progressives desire. Instead, we fear that redistributive criminal law will backfire, harming marginalized communities and entrenching the carceral state.

Ultimately, then, we argue that progressive criminalization supporters should bear the burden of proving that criminal law *distributes* in the way that they imagine—that pro-prosecutorial politics actually redound to the benefit of marginalized communities. Even if criminal law can somehow accomplish this redistributive task, we remain skeptical of a turn to criminal legal institutions and argue that a purely redistributive vision misses some of the fundamental problems with a project of governing through crime. For those of us worried about the brutality of the carceral state, we argue that it's important to resist—or at least interrogate—our own punitive impulses when we encounter defendants we don't like or harms we see as inexcusable.

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