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Faculty Spotlight Journal 2016

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FORDHAM LAW SCHOOL

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FOREWORD

Legal scholarship is sometimes faulted for being arcane, abstruse, or out of touch with the real legal issues of the day.

One common charge leveled at scholarly work is that there is a disconnect between the academy and the profession. Some critics argue that, while legal scholarship may be of interest to academics, it isn't of much use to the judges and lawyers who employ the law.

The scholarship in this issue of Fordham Law's *Faculty Spotlight Journal* respectfully dissents. Scholarship by Fordham Law faculty is of great help to the legal profession. It directly engages with the most important, ongoing debates in law and in our society. It influences government policy. It inspires changes in our judiciary and legal system.

Our faculty produces scholarship that has an impact on the real world. This impact is an important part of the culture at Fordham Law and stems from our approach to legal education. We stress how lawyers can use their skills of critical analysis to question the status quo, challenge received wisdom, and make a difference in the world.

Deborah Denno conducts a comprehensive study of the use of neuroscientific evidence and shares some disturbing results. Sean Griffith fundamentally transforms deal litigation in corporate law cases. Chi Mgbako challenges dominant conceptions of sex workers in Africa, advocating for the recognition of their basic rights and human dignity. John Pfaff reveals the truth behind the country's distressingly large prison population. Jed Shugerman plumbs the past to illuminate the contemporary problems of our campaign finance system.

The scholarship in this journal represents just a small sample of our professors' fine work. I encourage you to visit our website to learn more about the work of all our professors as well as our renowned student-edited journals, which are among the most cited in the country.

I hope you enjoy reading about Fordham Law scholarship that is making an impact throughout the legal profession and beyond.

Matthew Diller
Dean
Paul Fuller Professor of Law
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Deborah W. Denno

Criminal law in the 21st century is fraught with contradiction.

Newer evidentiary techniques, while innovative, are often misused. Old-fashioned methods of punishment, while widely derided, should be considered viable. These are but two examples of the insights that Deborah Denno's wide-ranging and interdisciplinary approach to research brings to bear on our criminal justice system.

Her groundbreaking neuroscience study, for instance, confronts the mistaken belief that brain scans of a victim's injury in shaken baby syndrome (SBS) cases can be used to establish a defendant's criminal intent.

The research—an original analysis of 150 key factors relevant to the criminal justice system from 800 cases across two decades—reveals the following:

- SBS accounts for nearly half of cases involving victim neuroscience evidence.
- Prosecutors have been allowed to concoct intent from brain scans that were admitted for the sole purpose of presenting the victim's injury.
- The science behind SBS diagnosis is problematic and controversial.
- SBS cases are a transparent example of the failure of the criminal justice system to deal adequately with the influx of neuroscience evidence in the courtroom.

In her long-term work studying capital punishment, Denno posits that a long-maligned form of execution—the firing squad—may be a more viable alternative than the highly problematic method of lethal injection:

- Shortages of lethal injection drugs have rendered the procedure riskier and more litigation-prone than ever.
- The firing squad is the only current method of execution that involves trained professionals and results in a swift and certain death.
- The putative brutality of the firing squad—fueled by historical stereotype—appears far preferable to the prolonged torment of lethal injection drugs.

Concocting Criminal Intent

105 *Georgetown Law Journal* (forthcoming 2017)

A defendant's *mens rea*, specifically criminal intent, is the most critical element in the criminal law, yet it is an amorphous concept. The history of *mens rea* illustrates how courts have long struggled to define intent, with efforts at clarification often leading to greater confusion. As a result, prosecutors attempt to prove *mens rea* through the use of circumstantial evidence, and frequently must "concoct" the defendant's level of intent to some degree. With the emergence of neuroscience evidence, it seems that prosecutors have found the ultimate tool to do so. Yet inappropriate reliance on brain scans of a victim's injuries leads to a level of speculation and impact that defies both the purposes of the science as well as its appropriate role within the criminal justice system.

My research, however, indicates that this approach is surprisingly successful. Courts defer to prosecutors' efforts to manufacture intent out of victim brain scans that were taken and admitted for solely medical purposes. Large scale research studies of criminal cases can better reveal how and why these legal strategies exist, as shown by my unprecedented study of all criminal cases (totaling 800) that addressed neuroscience evidence over the course of two decades, from 1992 to 2012. I will refer to my research as the Neuroscience Study. The cases in the Neuroscience Study were collected employing the Westlaw and Lexis legal databases. I used information from these cases to code and analyze over 150 key factors relevant to the criminal justice system, especially *mens rea* and culpability. Over a third of these cases pertained to victims. My focus is on these victim cases, particularly how neuroscience evidence explicates the degree of a victim's injury and what bearing that injury has on efforts to assess a defendant's level of *mens rea*.

In my Neuroscience Study, nearly half of the cases involving victim neuroscience evidence are based on a theory of shaken baby syndrome (SBS), a medical diagnosis with controversial scientific underpinnings and distorted legal ramifications. The diagnosis often successfully serves as the sole foundation for a prosecutor's case, with no proof of the defendant's act or intent beyond the victim's brain scan and the accompanying medical expert testimony. Shaken baby syndrome cases thus portray a troubling phenomenon in which the key element of *mens rea* is either unclear or overlooked altogether and prosecutors are permitted to concoct intent out of brain scans that were admitted for the sole purpose of presenting the victim's injury. While reliance on circumstantial evidence is

nothing new, these cases are unusual in the extent to which prosecutors must go to construct *mens rea*. Moreover, the syndrome's history clearly indicates that it was never intended to be used in this way; indeed, this practice has been disparaged in recent years by numerous scientists, including Norman Guthkelch, the syndrome's creator.

In 1971 Guthkelch, a British pediatric surgeon, published the research that would lay the original foundation for SBS. After examining thirteen cases in which infants evidenced bleeding in the brain (subdural hematomas), Guthkelch proposed that such injuries could occur simply by manually shaking the infant, without the infant's head hitting any other surface area. Three years later, John Caffey, an American pediatric radiologist, hypothesized that the rapid acceleration-deceleration forces applied during the shaking sheared the veins inside the brain, thus causing subdural hematomas, a phenomenon he called "whiplash shaken infant syndrome." It would take another decade for the term "shaken baby syndrome" to be mentioned in a publication for the first time, and more time still for SBS to be systematically defined by the presence of three classic symptoms, or the "triad": subdural hematoma, bleeding in the retina (retinal hemorrhages), and brain swelling (cerebral edema). These symptoms can result in a significant brain injury that may cause permanent brain damage or death, especially in young children.

Proper evaluation of SBS can be detected in several ways: (1) CT scan, which can measure injuries that need immediate attention; (2) MRI, which provides a magnetic field and radio waves to show finer images of a child's brain; (3) skeletal survey, which entails administering a range of skeletal X-rays of all the bones (such as extremities, ribs, skull, pelvis, and spine) so examiners can determine the severity and type of fractures, as well as whether there have been prior fractures; (4) eye exam, which assesses the presence of bleeding or other eye injuries; and (5) blood tests, which determine if there are any genetic, metabolic, or other disorders that look similar to SBS but may provide alternative explanations for a child's injuries.

Soon after Guthkelch and Caffey's research was published, SBS was widely adopted in the medical community as a clinical diagnosis for head injury inflicted on infants. The link between SBS and criminality developed more gradually. The first SBS case, that of John Schneider, took place in 1984, but it would be one of only fifteen such appellate cases decided before 1990; in sharp contrast, there would be hundreds more cases in the early 1990s and beyond. Indeed, by the late 1990s, SBS had garnered a substantial level of "acceptance and enormously widespread popularity, with no real investigation or even question as to its

scientific validity." A constellation of factors contributed to this status, ranging from the establishment of mandatory reporting laws for health care and other professionals to the increased use of clinical medicine in legal cases, to a growing presumption that any child's unexplained injury was likely to have been inflicted.

Also by this time, the ties between SBS and the requisite elements of a crime had become firmly entrenched, forming something of a legal triad: shaking was the act that caused harm to the infant; the force with which the baby was shaken indicated the perpetrator's mental state, especially intent; and finally, the caretaker who was last with the conscious baby was the defendant. The very term "shaken baby syndrome" fuels the causal perception of these associations, with its suggestion that there is a singular origin of the act—"shaking"—and its implication of intent, since shaking a baby is only rarely accidental. By 2012 even Guthkelch published an article severely deriding how the syndrome had been misapplied over the years, particularly as a vehicle for connoting a caretaker's intent to harm. Indeed, recent findings and investigation into the original research have seriously questioned both the scientific and legal underpinnings of SBS.

There is a general consensus in much of the modern literature on SBS that the science behind the diagnosis is problematic and controversial. For example, despite many reported cases of shaken infants, there has not been a single documented instance in which someone has witnessed shaking alone cause brain injury in an infant, nor has such damage been replicated in a controlled laboratory setting. Furthermore, no study has shown that human beings are capable of creating the necessary rotational acceleration through manual shaking to cause brain injuries in infants without impact. These and other findings conflict with Guthkelch's original hypothesis that manual shaking alone can manifest in triad symptoms. As the science around SBS became more controversial, using the diagnosis to show criminal intent becomes even more problematic. In fact, overwhelmingly the literature converges on a similar theme: it is erroneous for doctors, medical experts, and subsequently courts, to infer that a defendant intentionally abused an infant based only on the presence of SBS symptoms.

Researchers now recognize that numerous conditions can mimic SBS, including congenital malformations, metabolic or genetic disorders, hematological disorders, infectious diseases, autoimmune conditions, aneurysms, stroke, and chain reactions to cardiorespiratory arrest, hypoxia, resuscitation, and seizures. As radiological imaging improves, even more infants are found to have subdural hemorrhages following birth that are not associated with any abuse whatsoever. Guthkelch points to one study that reported 46% of asymptomatic infants had subdural hemorrhages following a normal birth; for symptomatic infants with

difficult births or congenital diseases, the percentage is likely significantly higher. While most subdural bleeds resolve on their own, infants who do not improve are more likely to have a preexisting condition that may result in more brain hemorrhaging. Research on the causes and mechanisms of subdural hemorrhaging is still developing, yet much of what previously had been accepted as fact is now being called into question. It is increasingly difficult to justify deciphering the state of mind of an alleged abuser on the basis of such controversial research.

My Neuroscience Study research reveals, however, that courts are surprisingly receptive to the prosecution's efforts, notwithstanding weaknesses in the underlying science. Shaken baby syndrome cases illustrate a disturbing phenomenon in which the crucial element of *mens rea* is either muddled or missing altogether in the crime that has been charged. Yet prosecutors are effectively—and without objection from the defense—concocting intent out of victim neuroscience evidence that is admitted for solely medical purposes. My study shows prosecutorial exploitation of victim neuroscience evidence, with SBS cases representing a perfect storm of the legal and scientific factors that lead to such a strategy.

My Neuroscience Study further reveals that SBS cases are merely the more transparent examples of the criminal justice system's failure to deal adequately with the surging influx of neuroscience evidence into the courtroom. The Study's adult-victim cases provide context for the child-victim cases. While adult-victim cases are far more factually and scientifically varied, prosecutors still use neuroscience evidence in nearly one-fifth of the cases to reinforce a determination of the defendant's mental state. The adult-victim cases illustrate the benefits and drawbacks of victim neuroscience evidence when it comes to intent determinations. Some courts rely on neuroscience evidence to suggest a lower level of *mens rea* for a defendant—recklessness rather than knowledge or intent. Yet other courts can concoct a higher level of intent with no stronger proof. SBS cases of course represent an extreme situation—a microcosm of prosecutorial misuse of victim neuroscience evidence more generally, particularly when it involves determining a defendant's mental state. While the criminal law needs neuroscience to help elucidate and refine outmoded conceptions of mental state, it is clear that such innovations can come with the baggage of misuse. Large-scale research projects such as my Neuroscience Study can detect existing or potential misapplications of neuroscience with an eye toward amelioration.

The Firing Squad as "A Known and Available Alternative Method of Execution" Post-*Glossip*

49 *University of Michigan Journal of Law Reform* 749–793 (2016)
(as part of the symposium "At a Crossroads: The Future of the Death Penalty")

In *Glossip v. Gross*, 135 S. Ct. 2726 (2015), the United States Supreme Court held 5-4 that three death-row inmates failed to establish that the drug midazolam created "a substantial risk of severe pain" when used as the first of three drugs in Oklahoma's lethal injection procedure. Writing for the majority, Justice Samuel Alito explained that the evidence presented from both sides supported the district court's view: "midazolam can render a person insensate to pain" and petitioners had failed to demonstrate midazalom's inadequacy under the Eighth Amendment's Cruel and Unusual Punishments Clause. In addition, the Court provided "two independent reasons" to affirm the district court determination: first, petitioners could not "identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims"; and second, they were unable to show that the district court committed clear error in rejecting petitioners' arguments.

The Court's rationale concerning alternative methods of execution, however, potentially represents *Glossip*'s broadest impact. Even though Richard Glossip's fate remains unknown and the case's striking dissents captured much of the legal and media commentary, *Glossip* may serve as Eighth Amendment precedent given states' ongoing frustrations in finding lethal injection drugs, despite the Court's approval of midazolam.

Glossip is the second of two Supreme Court cases concerning lethal injection drugs decided in close succession. In the first case, *Baze v. Rees*, 553 U.S. 35 (2008), the Court held, in a highly splintered 7-2 decision with a plurality opinion, that Kentucky's use of a three-drug protocol, the most common lethal injection procedure in 2008, satisfied the Eighth Amendment's Cruel and Unusual Punishments Clause. Defendants had failed to demonstrate that the protocol posed a "substantial" or "objectively intolerable" risk of "serious harm" compared to "known and available alternatives." The three-drug protocol at issue in *Baze* consisted of sodium thiopental, a barbiturate anesthetic that brings

about deep unconsciousness; pancuronium bromide, a total muscle relaxant that paralyzes all voluntary muscles and causes suffocation; and potassium chloride, a toxin that induces irreversible cardiac arrest. According to *Baze*, states using "substantially similar" protocols would be on constitutionally safe ground. As a result, many observers of the death penalty anticipated that *Baze* would quell execution method challenges.

Glossip's credibility rests on the belief that *Baze* "cleared any legal obstacle to the use of [this] three-drug protocol." Yet there is no basis for that belief, quite the contrary. The three-drug protocol at issue in *Baze* is no longer viable due to ongoing and unpredictable shortages of lethal injection drugs during the years following the Court's decision. Indeed, these shortages have created far more litigation and upheaval than the wide range of lethal injection challenges that preceded *Baze*. The litigation has also targeted two developments: first, the continual efforts by departments of corrections to seek never-tried lethal injection drugs and protocols and second, a series of widely publicized botched executions, a disproportionate number of which have involved the use of midazolam. Overall, then, states have adopted wholly inappropriate drug substitutes to keep executions going despite risky and chaotic results. *Glossip* is the Court's effort to review yet another lethal injection protocol a mere seven years after *Baze*.

Yet there are several areas where the *Glossip* Court goes wrong in glaringly inaccurate or misleading ways given the vast history and literature on execution methods and their changes from the nineteenth century through the start of the twenty-first century. Justice Sonia Sotomayor's dissent touches on sound and convincing reasons why death row inmates considering the hazards associated with lethal injection may prefer the firing squad as an alternative method of execution. According to the Court's "known and available alternative method of execution" standard, as defined by both the majority opinion and Justice Sotomayor's dissent, the firing squad is the most viable "known and available alternative" that meets the delineations, however meager, outlined by the Court. Indeed, it is the only current form of execution involving trained professionals, and it delivers a swift and certain death.

This is not the first time that an argument for the firing squad has been made in recent years, but previous examinations occurred before *Glossip* and within the confines of other cultural or doctrinal delineations of the Eighth Amendment. *Glossip*'s "alternative method" requirement adds yet another dimension to execution method challenges and it strengthens the seriousness and acceptability of the firing squad as an apt means of execution. Justice Sotomayor is the first Justice to proactively and favorably compare the firing squad—or any other

execution method—to lethal injection, albeit briefly. Although legal commentators and the news media have all but bypassed Justice Sotomayor's firing squad comments, her compelling analysis highlights the extent to which she and the accompanying Justices question the lethal injection process.

Justice Sotomayor's Dissent

Justice Sotomayor's dissent stands out as the primary vehicle for critiquing the "known and available alternative standard," by thoroughly explaining why it is unjustified for the *Glossip* Court to attribute this standard so substantially to *Baze*. First, *Baze* never articulated such a standard, much less one as conditionally dependent as the *Glossip* Court makes it to out to be. Otherwise, the resulting message would have "[led] to patently absurd consequences." As Justice Sotomayor notes, "[a] method of execution that is intolerably painful—even to the point of being the chemical equivalent of burning alive—will, the Court holds, be unconstitutional *if*, and only if, there is a 'known and available alternative' method of execution." While the *Glossip* Court states that *Baze* precluded all arguments that would suggest otherwise, Justice Sotomayor stresses that "*Baze* held no such thing." For example, the *Glossip* Court refers only to the *Baze* plurality opinion to support its version of the "known and available alternative" requirement; yet none of the *Baze* concurrences, which were needed to back the *Baze* Court's judgment, pronounced a comparable perspective. Even the *Baze* plurality never stated "that *all* challenges" to a state's execution method must be subject to such a "comparative-risk" assessment. As Justice Sotomayor states, "[r]ecognizing the relevance of available alternatives is not at all the same as concluding that their absence precludes a claimant from showing that a chosen method carries objectively intolerable risks."

Justice Sotomayor nonetheless contributes an analysis of what "a known and available alternative method of execution" could be, even though she doesn't agree with the requirement. As such, her approach provides potential guidance for future courts and litigators who seemingly have no choice but to operate within the confines of *Glossip*. What Justice Sotomayor proposes could turn *Glossip* on its head: condemned inmates might reject lethal injection and "suggest the firing squad as an alternative." She hones this point by considering the evidence that would be most pertinent to inmates making this suggestion. For example, "the firing squad is significantly more reliable than other methods, including lethal injection" and "there is some reason to think that it is relatively quick and painless." While the firing squad "could be seen as a devolution to a more primitive era," and "the blood and physical violence that comes with it" a step in that direction, those characterizations do not make the firing squad

"unconstitutional." That said, the method's "visible brutality" could potentially prompt Eighth Amendment arguments.

Justice Sotomayor's final assessments of the firing squad are the most compelling because they consider the calculation of the method's cruelty versus visible violence through the eyes of a condemned inmate. As Justice Sotomayor explains, an inmate may view the "visible yet relatively painless violence" associated with the firing squad as "vastly preferable to an excruciatingly painful death hidden behind a veneer of medication." With that statement, Justice Sotomayor rightly acknowledges that lethal injection may be even more gruesome than the firing squad if only we were allowed to see behind lethal injection's "curtain." A substantial literature and case law suggests that she is correct.

The Court's Misinterpretation of Justice Sotomayor

Justice Sotomayor's dissent is detailed and comprehensive, covering a number of different topics and arguments. Yet it is intriguing that the *Glossip* majority focuses on her commentary about the firing squad, particularly given the commentary's brevity and hypothetical posture. Indeed, the *Glossip* majority completely mischaracterizes what Justice Sotomayor says about the firing squad, and also inaccurately attributes her comments to other methods of execution. According to the Court, for example, Justice Sotomayor implies that any state that uses any of the four methods of execution existing prior to lethal injection would violate the Eighth Amendment. This reasoning holds, says the majority, even though Justice Sotomayor concedes that "'there is some reason to think that [the firing squad] is relatively quick and painless.'" While Justice Sotomayor mentions neither electrocution nor lethal gas, the Court nonetheless incorporates these other methods in its analysis of her statements. Indeed, the Court interprets Justice Sotomayor's arguments as implying that "it would be unconstitutional to use a method that 'could be seen as a devolution to a more primitive era.'" Yet Justice Sotomayor says no such thing. Using this misguided approach, the Court suggests that Justice Sotomayor boxes in the choices of execution methods: past execution methods are unacceptable because they are "primitive," while present methods are unacceptable because there is no viable drug. The end result, in the Court's view, is an argument siding with eliminating the death penalty.

Justice Sotomayor, however, never makes the argument the majority attributes to her but argues just the opposite. She explicitly states that the brutality of a firing squad execution does not render the method unconstitutional and that it may be far preferable to the torment of lethal injection drugs. In addition, she does not argue against the death penalty in general and notably did not join Justice

Breyer's anti-death penalty dissent. Instead, Justice Sotomayor provides guidance for the most humane way to implement the death penalty within the context of *Glossip*. While Justice Sotomayor suggests that the firing squad may also be viewed as a "devolution" and may raise Eighth Amendment issues, her concerns about the method are warranted. For example, neither she nor any other court has provided the kind of detailed analysis of the science or strategy behind the firing squad that would assuage any and all Eighth Amendment questions. Rather, Justice Sotomayor explains why the firing squad may be a viable alternative method of execution, thereby pointing in a different direction that makes sense for legislatures and courts to consider.

The Firing Squad Alternative

The firing squad could potentially meet *Glossip*'s "alternative method" requirements of being "known," "available," and "entail[ing] a lesser risk of pain." For example, the firing squad has a long history and worldwide application ("known"); it is pervasive in many dimensions of our society ranging from law enforcement to self-protection ("available"); and there is evidence suggesting it is the quickest, least painful, and most reliable method that currently exists ("a lesser risk of pain"). As Chief Judge Alex Kozinski's dissent in *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014), suggests, the firing squad also satisfies an array of practical and constitutional concerns that counter the long-held problems associated with lethal injection procedures. While Judge Kozinski's observations were made nearly a year before *Glossip* was decided, they firmly fit within the *Glossip* "alternative method" standard.

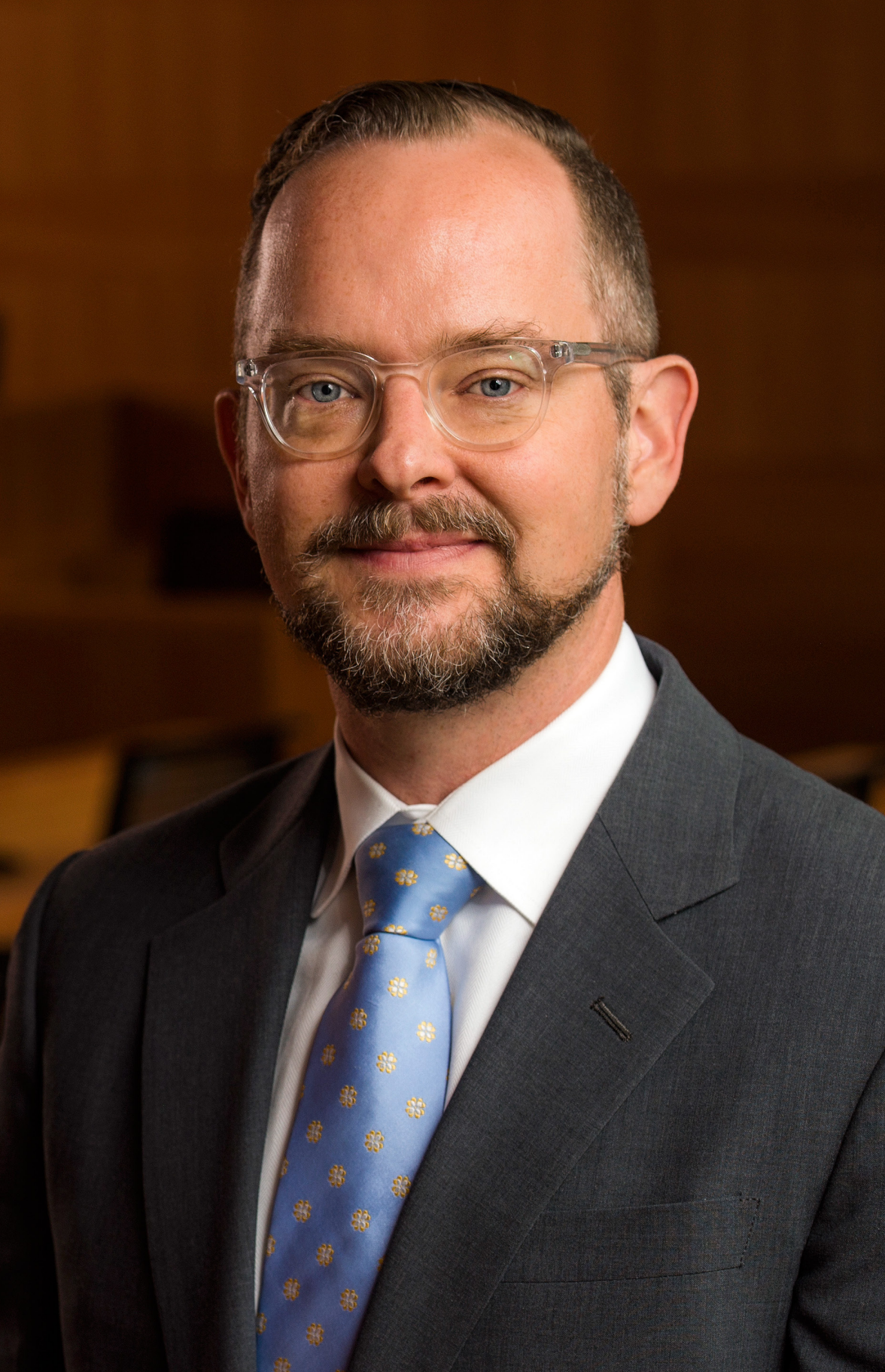
Chief Judge Kozinski acknowledges that "firing squads can be messy" because "we are shedding human blood." Regardless, lethal injection can also be "messy" and bloody in ways that medical experts, lawyers, and scholars have increasingly documented despite departments of corrections' efforts to shield the entire process in secrecy. Most importantly, observers of modern firing squad executions do not describe "mess," visible brutality," or "blood" but rather a process that may be far more "sterile" in perception and procedure than lethal injection.

Of all the execution methods in this country, perceptions and application of the firing squad are among the most contradictory. On the one hand, there is substantial evidence to suggest that the firing squad is the most humane method of execution. In Justice Sotomayor's words, it is "more reliable" as well as "relatively quick and painless." For example, there is a consensus that Gary Gilmore's 1977 execution was swift, dignified, and consistent with protocol. The same can be said of the execution of Albert Lee Taylor nearly twenty years later. According to a corrections official who observed Taylor's execution, Utah's firing squad

procedure "was carried out in as dignified a manner as [he had] ever witnessed." In addition, a *Salt Lake Tribune* reporter's description of the 2010 execution of Ronnie Lee Gardner found the scene more pristine and removed than he might have predicted. "Firing four bullets into a man's chest is, by definition, violent. If it can also be clinical and sterile, then that also happened in this execution." This same reporter never saw blood, which seemed to pool instead under Gardner's shirt. While the reporter could not tell what Gardner was feeling or if he experienced pain, in his view this was not a "messy" execution.

Of course, Judge Kozinski's "messy" reference goes beyond simply the spilling of blood. Rather Judge Kozinski hones the point that we should also have a method that treats the firing squad as a true punishment, rather than a medical illusion: "[i]f we, as a society, cannot stomach the splatter from an execution carried out by firing squad, then we shouldn't be carrying out executions at all." Together with the evidence of the firing squad's greater humaneness and sterility, this view balances Justice Sotomayor's concern that the firing squad "could be seen as a devolution to a more primitive era," or a mark of "visible brutality" prompting Eighth Amendment arguments.

Firing squad executions occur rarely. Some of the most accessible information derives from eyewitness accounts and historical anecdotes. That said, the consensus of opinion concerning firing squads comports with Justice Sotomayor's argument that they are swift and relatively pain free. While "image" may be a factor discouraging the use of firing squads, one can question lethal injection's image as well, at which point lethal injection's pretense of medical veneer can seem far more "primitive" than a pistol. Although the firing squad appears saddled with a distinct image problem, respected jurists and public opinion increasingly are coming to its reputational rescue while also pointing to the disastrous experiment that lethal injection has become.



Sean J. Griffith

Sources of corporate governance authority are shifting dramatically.

In the wake of the 2008 financial crisis, day-to-day corporate governance matters have increasingly fallen within the ambit of corporate compliance programs, while corporate law, especially Delaware law, retains its principal role in regulating mergers and acquisitions.

Sean Griffith's scholarship turns a bright light on both of these forces shaping corporate governance.

His article "Corporate Governance in an Era of Compliance" examines the unprecedented growth of compliance programs and proposes that scholars of corporate law and corporate governance treat compliance as a serious, and seriously important, field of study. The article highlights

- the origins of compliance and demonstrates its maturation into a corporate governance function;
- how compliance challenges settled theories of the firm and upsets the political economy of corporate governance function;
- problems of agency costs and information asymmetries embedded within the current structure of compliance; and
- the impact of changing enforcement tactics and increasing transparency.

On the merger front, Griffith co-authored a widely cited article on settlement practices in merger litigation, "Confronting the Peppercorn Settlement," which has been influential in changing settlement practices in Delaware and across the country. The article argues that

- the value of nonpecuniary relief in merger settlements should be measured by its effect on shareholder voting;
- because material disclosures provide information contrary to management's recommendation, disclosure-only settlements should increase shareholder voting against the transaction;
- because empirical tests fail to demonstrate that disclosures have any statistically significant effect on merger voting, disclosure-only settlements cannot be shown to provide any material benefit to shareholders; and
- courts should stop glibly awarding fees for disclosure-only settlements.

Corporate Governance in an Era of Compliance

57 *William & Mary Law Review* (2016)

American corporate governance has undergone a quiet revolution. Much of its basic role—the oversight and control of internal corporate affairs—has been overtaken by compliance. Although compliance with law and regulation is not a new idea, the establishment of an autonomous department within firms to detect and deter violations of law and policy is. American corporations have witnessed the dawn of a new era: the era of compliance.

That we now live in an era of compliance is beyond serious doubt. Over the past decade, compliance has blossomed into a thriving industry, and the compliance department has emerged, in many firms, as the co-equal of the legal department. Compliance is commonly headed by a Chief Compliance Officer (CCO) who reports directly to the Chief Executive Officer (CEO) and, often, to the board as well. Moreover, firms have gone on a hiring spree to staff compliance, with large firms adding hundreds, even thousands of compliance officers at a time.

The reorganization of American business around compliance, by itself, is not necessarily remarkable. After all, firms routinely reorganize their businesses, and such reorganizations, because they take place under the fundamental authority of the board of directors, do not challenge basic structures of authority. For example, the establishment of an Information Technology department, headed by a Chief Technology Officer, can hardly be seen as a fundamental shift in corporate governance. Compliance, however, is different. The contemporary compliance function serves a core governance function, yet its origins cannot be traced to a board delegation or other traditional source of governance authority. Unlike other governance structures, its origins are exogenous to the firm.

The impetus for compliance does not come from a traditional corporate constituency—in other words, not from shareholders, managers, employees, creditors, or customers. Instead, it comes from the government. Compliance is a de facto government mandate imposed upon firms by means of ex ante incentives, ex post enforcement tactics, and formal signaling efforts. The imposition of governance structures aimed at compliance is a novel exercise of government power. In imposing these structures, the government is not simply making rules that firms must follow, as it does when it passes new laws and regulations, nor is it adjusting

its traditional tools—the amount of enforcement and the size of sanctions—to assure compliance with existing law and regulation. Instead, through compliance, the government dictates how firms must comply, imposing specific governance structures expressly designed to change how the firm conducts its business.

Moreover, government interventions in compliance come not through the traditional levers of state corporate or federal securities law, but rather through prosecutions and regulatory enforcement actions. The resulting reforms are thus not the product of a transparent and politically accountable legislative process, nor are they the product of regulatory rule making, subject to cost-benefit analysis and public comment. Rather, they are extracted in an opaque settlement process under the Sword of Damocles. Compliance thus presents a profound challenge to theories of corporate law and corporate governance.

The contemporary compliance function subverts the notion that corporate governance arrangements both are and ought to be the product of a bargain between shareholders and managers. Compliance rewrites Ronald Coase's famous passage on the internal organization of firms. Compliance officers come into an organization not necessarily (or not entirely) at the behest of an "entrepreneur-co-ordinator, who directs production," but rather pursuant to the directive of a government enforcer. Seen through the prism of compliance, the corporation no longer resembles a nexus of contracts but rather a real entity, subject to punishment and rehabilitation at the pleasure of a sovereign. Compliance thus rejects mainstream accounts of the firm in favor of older, largely discarded theories.

Furthermore, the imposition of intra-firm governance from extra-firm sources introduces a host of outside interests and incentives into firm decision making. Once corporate governance is no longer seen as the exclusive domain of shareholders and managers, questions arise over what purpose or purposes the firm should serve. Compliance thus revives the "other constituencies" debate—that is, the argument over whether corporations should serve constituencies other than shareholders and interests other than wealth maximization. Compliance also raises the question whether the authorities pressing for corporate reforms have the right incentives and the right information to do so. If they do not, the development of compliance may merely result in the imposition of inefficient governance structures on firms.

Yet, in spite of squarely challenging current orthodoxy on corporate law and governance, compliance is largely absent from the mainstream corporate law literature. Aspects of compliance, especially those relating to the prosecution and settlement of cases against corporations, do appear in scholarship on

criminal law and regulatory enforcement. Mainstream corporate law scholarship, however, remains centrally focused on the agency cost problem, and because compliance is not principally concerned with agency costs, blithely unaware of the challenge posed by compliance to its underlying assumptions. Because it appears as an unexplained and, under current models, unexplainable phenomenon, compliance exposes deficiencies in corporate law theory. Likewise, compliance itself is undertheorized.

This Article aims to change that by launching compliance as a field of inquiry for scholars of corporate law and corporate governance. Its descriptive account documents the origins of compliance and demonstrates its maturation into a corporate governance function. The central argument in this Article is that the contemporary compliance department is the product of a de facto government mandate that, although felt most strongly by firms in highly regulated industries, has become a market-wide concern.

This Article's normative portion then draws out the implications, both theoretical and pragmatic, of the descriptive account. It demonstrates how compliance challenges settled theories of the firm and upsets the political economy of corporate governance. Fundamentally, compliance begs the foundational question of who the author of corporate governance arrangements ought to be. The Article's normative account also addresses more pragmatic problems of agency costs and information asymmetries and the implications for firm efficiency. Finally, the Article offers two directions for reform—one focused on changing enforcement tactics, the other on increasing transparency. At this stage in the debate, however, solving the problems posed by compliance may be less important than raising them. That is the fundamental contribution of this Article—to engage scholarly debate and provide a framework for dialogue between prosecutors, policymakers, and scholars of corporate law and corporate governance.

Griffith's 2015 article about the "peppercorn settlement" has been widely cited in Delaware corporate law cases and is credited, along with Professor Griffith's own shareholder objections, with changing settlement practices in merger litigation. The article was selected by Corporate Practice Commentator *as one of the top 10 corporate and securities law review articles of 2015.*

Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform

93 *Texas Law Review* 557–624 (2015) (with Jill E. Fisch and Steven Davidoff Solomon)

Deal litigation is pervasive in the United States. Multiple teams of plaintiffs file lawsuits challenging virtually every public company merger, often in multiple jurisdictions. Moreover, the frequency of merger litigation has risen sharply over the last several years. In 2012, 92% of deals over $100 million and 96% of deals over $500 million were challenged in shareholder litigation. In 2013, the frequency was even higher—97.5% of deals over $100 million were challenged through litigation, and each transaction triggered an average of seven separate lawsuits.

Although deal litigation is pervasive, these lawsuits rarely result in a monetary recovery for the plaintiff class. Rather, the vast majority end in settlement or dismissal. In most settled cases, the only relief provided to shareholders consists of supplemental disclosures in the merger proxy statement. In compensation for the benefit produced by these settlements—often worth no more, in the words of a famous jurist, than a "peppercorn"—plaintiffs' attorneys receive a fee award.[1]

The dynamic, in which every deal is challenged but only the lawyers get paid, has led to widespread skepticism concerning the value of public-company merger litigation among both academic and professional commentators. The view underlying much of this skepticism is that litigation that returns no monetary recovery to the plaintiff class must be without merit. Equating merit and monetary recovery, however, implicitly dismisses the value of nonpecuniary relief. Such

1 Solomon v. Pathe Commc'ns Corp., No. CIV. A. 12563, 1995 WL 250374, at *4 (Del. Ch. Apr. 21, 1995).

nonpecuniary relief may be valuable to shareholders, but it is hard to determine its value.

Importantly, Delaware law explicitly recognizes the potential value of nonpecuniary relief in its litigation incentive structure. Delaware courts award legal fees to plaintiffs' attorneys on the basis of lawsuits that provide nonpecuniary relief to the plaintiff class as long as that relief constitutes a corporate benefit. Nevertheless, Delaware courts recognize that the value of nonpecuniary benefits is difficult to quantify. Courts refer to the value of amendments and supplemental disclosures as "qualitative" and "intangible," meaning essentially, that they cannot be measured. Without a metric for the value of nonpecuniary relief, it is difficult to determine the utility of the litigation and, in particular, to determine the extent to which courts, by awarding fees, should encourage the pursuit of litigation that tends to result in nonpecuniary settlements.

In this Article, we offer a way out of the impasse. We propose that the value of nonpecuniary relief in merger settlements be measured by its effect on shareholder voting. Because nonpecuniary relief takes three basic forms in the context of merger litigation—settlements that amend the terms of the merger (amendment settlements), settlements that provide only supplemental disclosures (disclosure-only settlements) and settlements which provide for an increase in the merger consideration (consideration increase settlements)—we separate each and test their effect on how shareholders vote on the deal. Our core hypotheses are as follows: First, because amendments should improve the terms of the merger or the quality of the procedures used in reaching a final agreement, amendment settlements should increase shareholder voting in favor of the merger. In contrast, because forced disclosures should produce negative information about the merger, we hypothesize that disclosure-only settlements should decrease shareholder voting in favor of the merger.

Our empirical tests draw upon a hand-collected sample of 453 mergers involving publicly traded target companies announced from 2005 and completed through 2012 along with proxy-voting statistics provided to us by Institutional Shareholder Services (ISS) over the same period. Although in theory it would be best to test the effect of nonpecuniary relief by comparing shareholder votes before and after the settlement, such a comparison is not possible because shareholder votes are tallied only once, when the polls are closed at the meeting to approve the merger agreement. As a result, our tests take the form of regressions. Our regression analyses compare votes cast in cases involving amendment settlements and disclosure-only settlements to votes in other mergers.

Our tests yield two main empirical results. First, we find weak support for our first hypothesis—that is, that amendment settlements increase shareholder voting in favor of a transaction. Second, and more importantly, we find no support for the second hypothesis—that is, disclosure-only settlements do not appear to affect shareholder voting in any way. We also find only weak evidence that consideration-increase settlements increase shareholder voting in favor of a transaction. To gauge the significance of our findings, we also tested the effect of several other variables on shareholder voting, including transaction size and premium paid, the proxy advisors' recommendation and institutional ownership, and the jurisdiction of settlement. We find that transaction value and the proxy advisors' recommendation have a significant effect on shareholder voting; the other variables do not.

The implication of these findings is clear. If disclosure settlements do not affect shareholder voting, it is difficult to argue that they benefit shareholders. Accordingly, the basis upon which courts are awarding fees to plaintiffs' counsel disappears. Moreover, the illusory benefit of supplemental disclosure must be weighed against the clear cost of merger litigation—including litigation expense as well as delay and uncertainty. Accordingly, our article proposes that the Delaware courts stop awarding fees for disclosure-only settlements. This reform would reduce the incentive for plaintiffs' attorneys to bring weak merger cases. To the extent that merger disclosures are meaningfully deficient, we argue that plaintiffs should be required to litigate challenges to disclosure quality under the federal securities laws. This would have the effect of efficiently specializing litigation challenges while reducing plaintiffs' counsel's ability to use disclosure as a negotiating point to justify a fee award.

In connection with Griffith's peppercorn settlement article, he filed an amicus brief objecting to the settlement arising from a stockholder class action challenging real estate database company Zillow's acquisition of competitor Trulia.

The Court has asked for supplemental briefing on two issues. The first is what standard to apply in evaluating the relief in a disclosure-only settlement. The second is how to evaluate the scope of the release granted in such settlements.

These issues cannot be considered in isolation or without reference to the broader context in which they have arisen: the explosion of lawsuits filed in the wake of merger announcements and the devolution of those claims into "ritualized quasi-litigation." The ritual is now well known. Virtually every deal is challenged in litigation. The vast majority of these cases end in settlement, but the payment of additional consideration to the shareholder class is vanishingly rare. Instead,

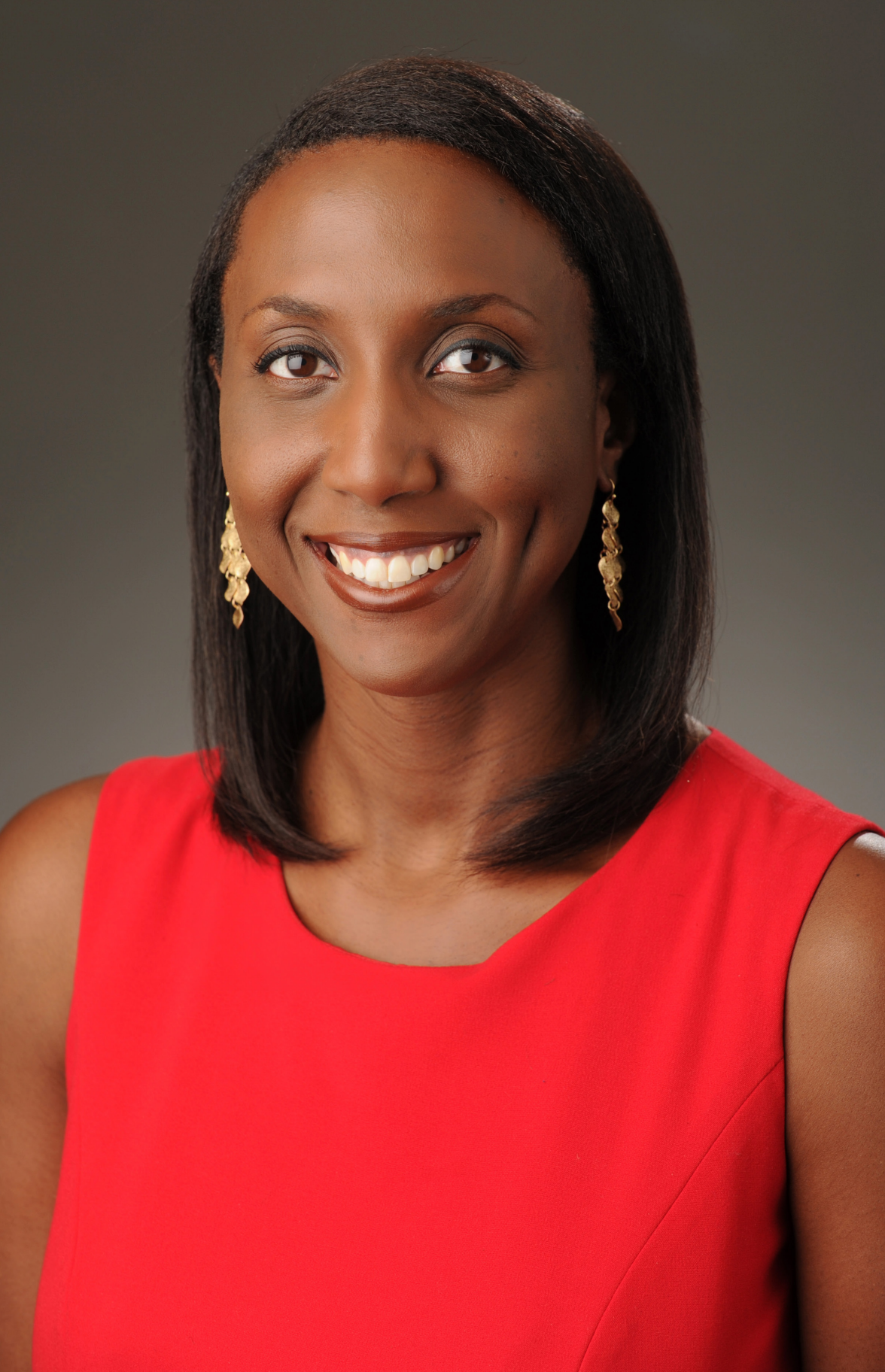
the typical settlement results in a package of supplemental disclosures for which defendants receive a broad release, variously characterized by this Court as "global," "intergalactic," "solar-systemic," and "Jovian."

The ritual is a problem for the shareholders of Delaware corporations, for the corporations themselves, and for the Court. Through it, shareholders are forced to trade potentially meaningful rights for essentially meaningless consideration and bear the cost through a deadweight loss to the cost of capital. Corporate defendants are faced with a "deal tax" on every transaction. And the credibility of the Court is undermined as it is transformed from a public forum for deciding cases and controversies on the basis of clear substantive and procedural rules into an agency charged with endorsing the product of an opaque private bargaining process, a role Lon Fuller characterized as "contract parasitic on adjudication." It is only "when a party has a genuine claim of injury" that the "judicial process should be invoked." The ritual undermines the integrity of Delaware law, implying that not only must judicial process be invoked in every announced merger, but also that there is no exit from such claims except settlement.

The devolution of merger litigation is not random or accidental. It is the systematic response of rational actors to the set of choices put before them. This choice set was created by practices that have effectively removed any substantial merit screen from merger cases. These practices can be summarized in two rough heuristics. First, if disclosure violations are alleged, then expedition is necessary to protect the shareholder franchise. Second, if the parties have agreed to a settlement without obvious, smoky-room collusion, a "peppercorn" is sufficient consideration to approve the settlement and provide defendants a broad release.

The interaction of these two heuristics turns every merger case into a strong candidate for expedition and, because of the risk thereby created to the underlying transaction, a strong candidate for settlement. However, because no vigorous litigation has preceded settlement, it is highly unlikely that the resulting settlement will correlate to the untested merits of the case. "Sweetheart settlements," in which class counsel sell out meritorious claims to harvest an easy fee, and "strike suit settlements," in which class counsel file non-meritorious claims for nuisance fees, are equally likely.

To address this nest of problems the Court should: First, recognize that changed circumstances no longer support present practices. Second, apply existing Supreme Court precedent to inject a meaningful merits filter at the time of settlement. Third, fashion a rule of proportionality between relief and release. Fourth, consider further procedural correctives to move the merit filter forward and encourage earlier termination of non-meritorious claims.



Chi Adanna Mgbako

Sex workers in Africa regularly face stigma, discrimination, and violence.

Chi Mgbako's book, *To Live Freely in This World: Sex Worker Activism in Africa*, advocates for African sex workers as members of a strong, global workers' rights movement. Contrary to mainstream depictions, especially in the media, Mgbako's book portrays these workers as rational individuals fighting for basic human and labor rights.

Her work supports the movement by showing that

- violence is not inherent to prostitution;
- the source of widespread abuse is structural;
- criminalizing sex work marginalizes sex workers and limits their labor rights, resulting in abuse in the form of state-sanctioned violence and discrimination; and
- across Africa, sex workers' rights movements continue to gain momentum, including law reform efforts to decriminalize sex work.

Mgbako's work, based on more than 200 interviews across seven countries, shines light on the vibrant sex workers' rights movement in Africa, revealing people with dignity charting their own future rather than waiting for a savior, as traditional accounts previously theorized.

EXCERPT

To Live Freely in This World: Sex Worker Activism in Africa

NYU Press, 2016

Introduction

"We Have Voices"

There's really no such thing as the 'voiceless.' There are only the deliberately silenced, or the preferably unheard.

– Arundhati Roy

Studies from throughout Africa consistently document disturbing abuses against female and male sex workers, cisgender[1] and transgender, in the form of endemic police abuse; abuses by clients who take advantage of sex workers' lack of access to justice after violent victimization; lack of labor rights resulting in unsafe working conditions; and social stigma, leading to discrimination in healthcare services.[2] Why are these horrendous abuses so rampant?

Anti-prostitution scholars and activists have long argued that every exchange of sexual services for payment is an inherently violent and coercive act that degrades women. For many of these advocates, the idea of a consenting adult sex worker is inconceivable.[3] They implicitly and explicitly argue that trafficking and sex work are one and the same, a dangerous conflation that has led to abuses of sex workers in the name of fighting trafficking.[4] Despite anti-prostitution advocates' claims, when we actually listen to the multiplicity of sex worker voices and acknowledge that we can't universalize their experiences, we learn that violence is not inherent to prostitution.

In the economically unequal world of global capitalism, where the vast majority of workers have highly limited economic opportunities, some people do in fact make the rational decision to pursue sex work. The abuses they experience in that work don't occur because the selling of sexual services is necessarily degrading or dehumanizing. The source of the abuses lies elsewhere. It is, instead, structural: Laws and policies criminalizing sex work deeply marginalize sex workers, their clients, and the industry; push sex work underground and into the shadows; and ensure that sex workers have little power over their labor, therefore remaining vulnerable to abuse and discrimination. Throughout Africa and the rest of the world, where most governments criminalize sex work and most societies stigmatize sex workers, this continues to be the case.[5]

And yet in the midst of the chronic violence, grinding stigma, and unrelenting discrimination that accompany criminalization, something surprising and beautiful has emerged. African sex workers, refusing to swallow the bitterness of their suffering, have sparked a sex workers' rights movement that is spreading like a brushfire through the continent. Theirs is the latest manifestation of a global sex worker movement, birthed in Europe and the United States over forty years ago, that has spread throughout the world.[6] It is also the continuation of a rich tradition of informal local sex worker activism. These vibrant, defiant voices should not be ignored, and yet too often they are indeed disregarded.

In the spring of 2005, when I was in my final semester as a graduate student at Harvard Law School, I took a seminar course on international women's rights. I especially loved the opportunity to hear directly from women's rights activists—the Ghanaian campaigner fighting against the harmful traditional practice of female genital cutting, the Nepalese lawyer advocating for women's increased political participation in her country, the U.S. human rights defender championing reproductive freedom. But our class on prostitution was different. Gone were the voices directly from affected communities that had so illuminated other parts of the course. Instead, we read a slew of articles by *The New York Times* columnist Nicholas Kristof on what struck me as his misguided efforts to liberate "sex slaves" from brothels in South East Asia by purchasing them.[7] We read nothing from sex workers themselves.

I was a young budding human rights advocate, and I believed fiercely in the notion of individual and community agency. The silencing of these voices unsettled me. Were sex workers the world over incapable of speaking about the complexity of their own lives? That day in class I instinctively knew that these voices must exist, and I vowed to find them.

A decade later, as a human rights professor and advocate who works in solidarity with sex worker activists and has a special affinity for the African sex work context due in part to my Nigerian heritage and professional Africanist leanings, I've experienced firsthand the vitality of the global sex workers' rights movement. Despite attempts by anti-prostitution advocates to discredit the movement,[8] sex worker activism continues to spread in Asia and the Pacific, Europe, Latin America, North America, and the Caribbean. And now in Africa as well, red umbrellas are aflutter.

Anti-prostitution advocates may think that the sex workers want nothing more than to be rescued from prostitution. But if they are asked, they will tell you

that what they want is respect for their human rights. A chorus of sex workers' voices is rising throughout the continent. South African sex workers are leading a sophisticated national legal reform campaign to decriminalize sex work. Ugandan sex worker activists have withstood fierce government crackdowns. In Namibia, the movement is forming strong alliances with LGBT activists. Brothel-based sex workers in Nigeria, taking to the streets of Lagos in the hundreds, have protested unfair working conditions. Sex worker activists throughout Africa are demanding the end of criminalization, and the recognition and protection of their human rights to safe working conditions, health and justice services, and lives free from violence, discrimination, and stigma.

These efforts are bolstered by the fact that in the past few years, influential labor, global health, human rights, and women's rights organizations have embraced sex workers' rights. United Nations agencies have issued guiding principles and studies espousing the language and goals of the sex workers' rights movement. The World Health Organization (WHO) has encouraged organizations to "[s]upport community mobilization of sex workers to respond to violence and discrimination," and in 2012 and 2014, WHO released guidelines urging states to work towards the decriminalization of sex work.[9] In 2012, the United Nations Development Programme (UNDP) and the United Nations Population Fund (UNFPA) released an important survey regarding sex work and the law in almost fifty countries in Asia and the Pacific that called for the removal of punitive laws related to the sex industry.[10] In 2013, the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) recognized "the right of all sex workers to choose their work."[11] In its *Guidance Note on HIV and Sex Work*, the Joint United Nations Programme on HIV/AIDS (UNAIDS) clearly argues that discrimination, stigmatization, and harassment from law enforcement increase sex workers' vulnerability to HIV/AIDS, and in a 2014 briefing note they assert that: "Criminalisation of sex workers or their clients negates the right to individual self-determination, autonomy and agency."[12] In 2014, the International Labour Organization (ILO) released a report stressing the importance of sex worker peer education programs.[13] United Nations Special Rapporteurs on extreme poverty, the right to health, and the right to be free from torture have all laid human rights violations against sex workers squarely at the door of criminalization, stigma, and discrimination.[14]

International independent experts in global health have also joined the influential voices supporting the goals of the sex workers' rights movement. *The Lancet*, one of the world's most respected general medical journals, has decried the marginalization of sex workers in global HIV efforts, and in a July 2012 editorial further argued that the "conflation of sex work with human

trafficking, and the disregard of sex work as work, has meant that sex workers' rights have not been properly recognised."[15] *The Lancet* also released a series of scientific reports in 2014 arguing that the decriminalization of sex work could significantly reduce HIV infections in female sex workers.[16] In a 2012 watershed report, leading health and human rights experts sitting on the Global Commission on HIV and the Law, including distinguished HIV/AIDS activist Stephen Lewis and U.S. Congresswoman Barbara Lee, powerfully argued that: "Sex workers are not fully recognised as persons before the law and are rendered incapable of holding or exercising the range of human rights available to others."[17] They continued by noting that: "Where sex workers organise, where the police don't harass them and they are free to avail themselves of quality HIV services, sex workers have lower rates of STIs, more economic power and a greater ability to get education for their children."[18] The Commission called for the full decriminalization of sex work.[19]

In 2013, Human Rights Watch, the world's leading international human rights organization, publicly affirmed that they had "concluded that ending the criminalization of sex work is critical to achieving public health and human rights goals," and in their 2014 World Report they reiterated their "push for decriminalizing voluntary sex work by adults."[20] The Open Society Foundations, one of the largest grant-making foundations in the world, has long supported grassroots sex workers' rights activism, including the campaign to decriminalize sex work in South Africa.[21]

The global membership of the Association for Women's Rights in Development (AWID), which every four years convenes one of the largest global gatherings of women's rights activists outside of the UN, for the first time ever in 2013 elected an out sex worker, Kthi Win, to its international board of directors.[22] This milestone followed Kthi's appearance at the 2012 AWID international forum in Istanbul where before a hushed audience of over 2,000 women's rights advocates from over 140 countries, with quiet confidence Kthi bravely stated: "The key demand of the sex workers' movement ... is simple. We demand that sex work is recognized as work. But we have one other key demand, specific to certain parts of the women's movement. We demand that we are not treated as victims."[23] The membership's election of Kthi to its board following this appearance was a ringing endorsement of the idea that sex workers' rights and feminism are not mutually exclusive. On June 2, 2014, in honor of the International Day for Sex Workers, the Global Coalition on Women and AIDS (GCWA), an international consortium of civil society groups focusing on women's rights, released a strong statement that called for "transformative laws which protect sex workers."[24]

The fact that the global health and human rights communities are increasingly reaching a consensus about the deep harms of sex work criminalization is significant—the more that evidence and clear-sighted reasoning inform the debate, and not emotion, the more lives will be saved. These positive developments are proof that sex worker activists in Africa and throughout the world are making important, persuasive assertions, and garnering acknowledgement and support from influential players on the world stage.

To Live Freely in This World is the first book to fully document the history and continuing activism of the sex workers' rights movement in Africa, which is the newest and most vibrant manifestation of the global sex workers' rights struggle.[25] Based on participant observation and in-depth interviews with over 200 sex workers, activists, and allies in seven African countries as diverse as Botswana, Kenya, Mauritius, Namibia, Nigeria, South Africa and Uganda, I explore how this young movement is blossoming, confronting challenges, and contributing an African perspective to feminist debates around sex work.[26] Although anti-prostitution advocates have long claimed that all sex workers are inherently violated people in need of rescue by virtuous saviors, this book tells a different story. It serves as powerful proof that African sex worker activists are determining their social and political fate through strategic, informed choices.

This book also seeks to help fill a large void in both sex work studies and African feminist scholarship. The extensive body of literature pertaining to sex workers' rights has heavily focused on the United States, Europe, Asia, and Asia-Pacific, and has lacked a comprehensive study on sex work activism in Africa. African feminist scholars have largely remained silent on the issue of sex work with a few notable exceptions. Sylvia Tamale, a Ugandan legal scholar focusing on African sexualities, has argued that the patriarchal state criminalizes sex work as a way of controlling African women's sexual activity. She contends that criminalization has been a public health disaster that ignores African women's economic realities, and she champions the need for a progressive African feminist agenda that embraces the decriminalization of sex work as a response to the patriarchal state's injurious nature and indignities.[27] Marlise Richter, a South African scholar focusing on sexual and reproductive health and rights, has argued for an Africanist sex-positive[28] approach to sex work and bemoans the lack of African feminist engagement with the issue, especially in light of devastating rates of HIV/AIDS in sex worker communities in sub-Saharan Africa, the continent most heavily affected by the epidemic:

> It is curious that, while the prevalence of female sex workers and proportion of female sex workers to the general population

> are higher in sub-Saharan Africa than in any other region of the world, African feminisms have not grappled much with the issue of sex work. This is of particular concern against the backdrop of the staggering prevalence of HIV amongst sex workers in Africa—sex workers generally have a 10-20 fold higher HIV prevalence than the general population—and the ongoing human rights violations against sex workers. Sex work and sex workers' rights are conspicuously absent from most discussions on gender in Africa, and many feminist and gender practitioners avoid the issue like the plague—thus perpetuating the stigma and silence that surround the sex industry in Africa.[29]

Although leading African feminists such as Hope Chigudu and Solome Nakaweesi-Kimbugwe have stood in staunch solidarity with African sex workers and played significant roles in the early development of sex workers' rights movements in East Africa,[30] African feminists' general silence regarding sex work has been louder than these examples of solidarity. This study, which centralizes African sex workers' understanding of their work, feminist analysis, and fight for their rights, is not only an act of solidarity with them but seeks to address the gap in feminist knowledge regarding sex work in the African context.

Although this book focuses on the struggle for sex workers' rights in Africa, it is important to note that abuses against sex workers aren't confined to the Global South—they are equally prevalent in the Global North. In New York City where I live, sex workers routinely experience abuse and lack access to justice when they are the victims of violence. In one study, eighty percent of street-based sex workers reported being the victims of violence and noted that police refused to take crimes committed against them seriously.[31] Sex workers have experienced police confiscation of their condoms from Washington D.C. to Russia.[32] The International Day to End Violence Against Sex Workers was originally inspired by the serial murders of sex workers in Seattle, Washington, that went unsolved for decades.[33] Studies have also documented entrenched violence and discrimination against sex workers in Britain, France, and other countries in the Global North.[34]

Elsewhere in the world, police abuse of sex workers is also ubiquitous: In a survey of 200 sex workers in eleven countries in Eastern Europe and Central Asia, 41.7 percent of respondents reported physical assault by law enforcement.[35] A survey of brothel-based and mobile Cambodian sex workers revealed that over 57 percent reported being raped by police officers.[36] And in 2013, Human Rights Watch released a report that received

global media attention for its documentation of widespread police torture, beatings, and arbitrary detention of sex workers in China.[37]

I chose to highlight the African context not because human rights abuses against African sex workers are unique, far from it, but because their response to this abuse is colored by an activism that is young and robust and therefore deeply compelling. In only the past several years, the African branch of the global sex workers' rights movement has exploded. Through the fresh stories of African sex worker activists, the book will highlight this unique moment. And by locating this counter-narrative in the Global South, it will challenge disempowering and one-dimensional depictions of "degraded Third World prostitutes" that are often the focus of anti-prostitution advocates' savior impulses.[38]

The book tells the story of the African sex workers' rights movement by exploring the following themes: African sex worker advocates' perspectives on long-standing feminist debates regarding prostitution, including their insistence on the acceptance of sex work as labor and the recognition of their human agency even amid limited economic opportunities (chapter 1); how social stigma and the criminalization of sex work result in human rights abuses against African sex workers, including police abuse, denial of access to justice, client abuse, lack of labor rights, and healthcare discrimination (chapter 2); and how whorephobia and sex work criminalization intersect with transphobia, homophobia, trafficking and sex work conflation, HIV-stigma, and discriminatory laws to create multiple, overlapping stigmas against African queer and trans sex workers, migrant sex workers, and HIV-positive sex workers (chapter 3).

The book then traces the history of African sex worker activism in countries at different stages of organizing, highlighting informal and formal political resistance, and the movement's successes and struggles in creating both visionary leaders and active constituents (chapter 4); the role of intersectional movement building with similarly marginalized communities, including feminist, LGBT, HIV/AIDS, labor, harm reduction, and anti-poverty groups (chapter 5); and the movement's key organizing strategies—health and legal services for diverse sex workers, community outreach to advance the notion of sex work as labor in the public imagination, and rights-based law reform efforts to decriminalize sex work (chapter 6).

I also explore the tactics and subsequent harms of political opposition from anti-prostitution activists who champion ineffective and stigmatizing rehabilitation programs targeting sex workers, conservative religious leaders who characterize sex work as both immoral and un-African, and African politicians

wielding what I term "political whorephobia," a strategy that seeks to crack down on gender dissidents (chapter 7). The epilogue highlights African sex worker activists' increasing engagement with the larger global sex workers' rights movement, including their development of innovative South-South collaborations.

I share my on-the-ground observations of sex worker activism in action and provide context and analysis as we explore the themes above. But it is the stories of sex workers' journeys into activism collected during my interviews in African cities and small towns that are the book's beating heart. Several of these stories are presented as extended first-person narratives.[39] I chose to include these first-person narratives and spotlight many sex workers' voices by quoting judiciously from my interviews because while I hope I'm considered an ally of the sex worker movement, I'm not a sex worker. And too often non-sex workers take it upon themselves to speak for sex workers when they are fully capable of doing so themselves. By elevating and centering their voices, I hope to both create a platform for them and speak in solidarity with them.

Many of the sex worker activists profiled in this book have experienced horrendous abuse. This reality has often led to the dismissal of sex workers as "broken people" whose voices we can ignore. But people who have experienced abuse are not bereft of agency. A history of personal trauma may—or may not—directly inform a person's economic choices, but it should never be used as an excuse to negate their right and ability to speak about the truth of their own lives. There are no broken people in this book. I hope the reader will see the radiating strength of the African sex workers who bring it to life and who were brave enough to allow me to listen and help bear witness. And I hope that by highlighting the deep injustice of the legal and social universe in which African sex workers live, the reader will also come to understand that even those sex workers who aren't "strong," who haven't "overcome" the obstacles of their past or the abuses they currently face, who have no activist stories of triumph to share, are just as deserving of rights by simple virtue of their humanity.

Because the interviews in this study often did reveal extreme instances of abuse, I ensured that I didn't include stories simply to elicit an emotional response from the reader by adhering to the following standard when determining whether to feature a particular case in the book: 1) The interviewee's story highlights a recurring theme regarding African sex workers' political and social realities, and 2) it creates knowledge about the link between sex work, human agency, criminalization, and the political struggle for dignity and justice. To include stories that failed this standard would have been to exploit the interviewees by participating in the cynical selling of suffering.

In order to gather the stories for this book, I conducted a wide range of interviews and engaged in participant observation during fieldwork in December 2012, March 2013, June through July 2013, November 2013, and October 2014, focusing on seven countries and twelve field sites in a mix of urban, semi-urban, and semi-rural areas in order to speak with a variety of sex workers in different settings. Urban sites were an important focus because they are hotbeds of sex worker activism. But it was also necessary to focus on non-urban areas to gain an understanding of how the movement is developing across different locations. Sites included Cape Town, South Africa; Windhoek, Namibia; Gaborone, Francistown, and Kazungula in Botswana; Kampala and Mijera in Uganda; Nairobi and Thika in Kenya; Quatre Bornes and Port Louis in Mauritius; and Lagos, Nigeria.

I chose the book's seven focus countries—Botswana, Mauritius, Namibia, and South Africa in Southern Africa; Kenya and Uganda in East Africa; and Nigeria in West Africa—in order to ensure geographic diversity and to highlight country movements that are at different stages of sex work organizing.[40] Although an in-depth analysis of the focus countries' social and political histories is beyond the scope of this book, the following brief country contexts for several of the field sites may prove useful in framing the developmental trajectory of sex work activism highlighted in this study: Countries like South Africa and Kenya, with vibrant civil societies and rich histories of activism against oppression (in South Africa against the apartheid state, and in Kenya against British colonialism), tend to provide easier launching pads for sex worker-led movements because of deeply ingrained histories of protest in the national psyches. In South Africa, for instance, sex workers I interviewed often had personal backgrounds as anti-apartheid activists and referred to their sex work activism as partly inspired by their previous struggles against the racist apartheid state. In Kenya, there is historical evidence that prostitutes played a role in the Mau Mau uprising against British colonial rule,[41] creating a historical precedent for contemporary grassroots Kenyan sex worker activism. Countries with weaker civil societies and without strong histories of social activism, like Mauritius and Botswana, provide less fertile ground for the fast rise of sex worker-led movements. Sex work activism in countries like Uganda and Nigeria must be understood in the context of their highly publicized and serious legal and social crackdowns against those viewed as gender and sexual deviants.

I gained access to sex worker interviewees with the assistance of sex workers' rights organizations such as Sisonke and the Sex Worker Education and Advocacy Taskforce (SWEAT) in South Africa, Sisonke Botswana, the Kenya Sex Workers Alliance (KESWA), Women's Organization Network for Human Rights

Advocacy (WONETHA) in Uganda, and Rights Not Rescue Trust (RNRT) and Voices of Hope Trust in Namibia, as well as HIV and harm reduction organizations such as Chrysalide and *Prévention Information et Lutte contre le Sida* (PILS) in Mauritius. I found that once these organizations had vouched for me, the sex workers they put me in touch with were incredibly open and willing to speak with me about their experiences. These sex workers would then, in turn, introduce me to more sex workers. It also helped that since 2007, as director of a law school-based human rights program, I've worked on projects with well-known sex workers' rights organizations in India, Kenya, South Africa, Malawi, and the United States. When potential interviewees learned of this work, they identified me as someone who has contributed to efforts aimed at strengthening sex work communities, which made them more comfortable sharing their stories with me.

Although the term "sex work" can and does encompass other actors within the sex industry, including porn actors and exotic dancers, African sex workers who are engaged in what is traditionally viewed as prostitution—the in-person physical exchange of sexual services for money or goods—dominate sex worker activism on the continent, and I focused my interviews on this population. In total, I interviewed 211 people for this study, including 163 adult sex workers (75 percent cisgender female; 18 percent transgender female; 7 percent cisgender male; and 4 percent migrant). The majority of the sex worker interviewees (73 percent) were involved in formal sex worker activism, and nearly all were engaged in informal resistance to criminalization. Their workplaces reflected the diversity of the African sex industry: street-based sex work; venue-based sex work in bars, nightclubs, hotels, large-scale brothels, and small-scale brothels often operating under the guise of massage parlors; independent sex work out of private homes; and sex work in border towns. I conducted interviews in various venues, sensitive to comfort and confidentiality for interviewees, including on the streets and in cars, brothels, hotels, restaurants, and the offices of sex workers' rights organizations. I also interviewed 48 UN officials, academics, non-governmental organization (NGO) workers, lawyers, and health workers who work with sex work communities. Many of the interviews were conducted individually, though some were conducted in groups or pairs, and most were tape-recorded with the interviewees' permission.[42] My graduate research assistants and I transcribed the audio recordings.

Along with formal interviews, I observed and participated in sex worker activism in action, including sex worker protest marches in South Africa and Kenya; human rights trainings in Kenya; "Creative Space" workshops in South Africa; and health and social outreach to sex workers on the streets and in indoor venues, such as massage parlors and brothels, in Mauritius and South Africa.

I have changed the names of brothels, hotels, massage parlors, and clubs that sex workers reference in their interviews. I have also used pseudonyms for most of the sex worker interviewees. However, high-profile country movement leaders who have already revealed their true identities via national and international media and other public fora, and whose work has been essential to the development of formal African sex worker activism, almost always wanted me to use their real names, which I have done.

Here are just a few of the activists you will meet in the pages that follow: Duduzile Dlamini, a charismatic leader of the South African sex worker movement, deftly convinces members of South Africa's politically powerful national trade union that sex workers are also workers doing the best they can to provide for themselves and their families and are deserving of rights. Mama Africa, the mother of the sex worker movement in Namibia, helps tell the story of setbacks faced by fledgling sex worker organizing in that southern African nation through a remembrance of the short, powerful life and untimely death of Abel Shinana—a lost, but unforgotten leader in the Namibia sex worker movement. John Mathenge, a Kenyan activist with a bracing confidence who has become the face and voice of male sex worker activism in the country, stars in a nationally televised documentary illuminating and validating the lives of male sex workers. Daisy Nakato, long a leader in the Ugandan movement, helps tell the story of a severe government crackdown on sex worker organizing that threatens to close a drop-in center that provides health and human rights services to sex workers in Gulu in northern Uganda. She speaks of how Ugandan sex workers fight back against this oppression, and because of their courage, the drop-in center still stands.

The progressive movement of history, the expansive realization of rights, is always, at its heart, a story about ordinary men and women who deeply and unwaveringly believe in the immovable core of their humanity. It is about people who have been relegated to the margins of society righteously claiming the center—an ancient but eternally important endeavor. This book seeks to explore that journey through the fresh lens of sex worker activism in Africa while pushing back against the dangerous notion that all sex workers want to be rescued from sex work.

To Live Freely in This World focuses on the strength and creativity of sex worker activists like Duduzile, Mama Africa, John, and Daisy, the identities of resistance they've formed in response to criminalization and stigma, and the luminous, defiant social movement they're building. Their collective agency will pour through the pages of this book. And I hope in the face of that

agency, policymakers, scholars, activists, students, and concerned readers will choose to engage as partners in the struggle for sex workers' rights and not as would-be saviors. This is a book about communities saving themselves by demanding their rights. Ultimately it is a universal story about how those who are most legally and socially ostracized fight back—with dignity and hope.

NOTES TO INTRODUCTION

1 Cisgender is generally defined as a gender identity that aligns with social expectations of assigned sex at birth.

2 Anna-Louise Crago and Jayne Arnott, *Rights Not Rescue: A Report on Female, Trans, and Male Sex Workers' Human Rights in Botswana, Namibia, and South Africa* (New York, NY: Open Society Institute, 2009), http://www.opensocietyfoundations.org/sites/default/files/rightsnotrescue_20090706.pdf; *Documenting Human Rights Violations of Sex Workers in Kenya: A Study Conducted in Nairobi, Kisumu, Busia, Nanyuki, Mombasa and Malindi* (Kenya: Federation of Women Lawyers in Kenya, 2008), 16-19, http://www.opensocietyfoundations.org/sites/default/files/fida_20081201.pdf; Fiona Scorgie, et al., "Human rights abuses and collective resilience among sex workers in four African countries: a qualitative study," *Globalization and Health* 9, no. 33 (2013), doi:10.1186/1744-8603-9-33; Kathambi Kinoti, "Sex Work in Southern Africa: Criminalization Provides Screen for Other Rights Violations," *Association for Women's Rights in Development*, February 20, 2009, http://awid.org/eng/Library/Review-of-Rights-not-Rescue; *"Treat Us Like Human Beings": Discrimination against Sex Workers, Sexual and Gender Minorities, and People Who Use Drugs in Tanzania* (New York: Human Rights Watch, 2013), http://www.hrw.org/sites/default/files/reports/tanzania0613webwcover_0_0.pdf; Vivienne Lalu, "Considering decriminalization of sex work as a health issue in South Africa: The experience of SWEAT," *Exchange on HIV/AIDS, sexuality and gender* (Cape Town, South Africa: Oxfam, 2007), 11-13, http://www.kit.nl/net/KIT_Publicaties_output/ShowFile2.aspx?e=1280.

3 Kathleen Barry, "Female Sexual Slavery: Understanding the International Dimensions of Women's Oppression," *Human Rights Quarterly* 3, no. 2 (May 1981), doi: 10.2307/761856; Kathleen L. Barry, *The Prostitution of Sexuality* (New York and London: NYU Press, 1996); Andrea Dworkin, "Prostitution and Male Supremacy," *Michigan Journal of Gender & Law* 1 (1993): 1–12; Melissa Farley, "Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business Of Sexual Exploitation Running Smoothly," *Yale Journal of Law & Feminism* 18 (2006): 102–36; Melissa Farley, "Prostitution and the Invisibility of Harm," *Women & Therapy* 26 (2003): 247–80, doi:10.1300/J015v26n03_06; Catharine MacKinnon, "Prostitution and Civil Rights," *Michigan Journal of Gender & Law* 1 (1993): 13–31; Catharine A. Mackinnon, "Trafficking, Prostitution, and Inequality," *Harvard Civil Rights-Civil Liberties Law Review* 46 (2011): 271–309.

4 Aziza Ahmed and Meena Seshu, "'We Have the Right Not to Be "Rescued"': When Anti-Trafficking Programmes Undermine the Health and Well-Being of Sex Workers," *Anti-Trafficking Review*, no. 1 (2012): 149–65; Melissa Ditmore, "Trafficking and Sex Work: A Problematic Conflation" (PhD dissertation, City University of New York, 2002), Proquest Central (Document Number: 276259451); Melissa Ditmore, "Sex Work, Trafficking: Understanding the Difference," *RH Reality Check*, May 6, 2008, http://rhrealitycheck.org/article/2008/05/06/sex-work-trafficking-understanding-difference/; Ann Jordan, "Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings," *Gender and Development* 10, no. 1 (2002): 28–37, doi:10.1080/13552070215891; Juhu Thukral, "To Address Human Trafficking, the United States Must Take a New Approach," *RH Reality Check*, October 2, 2012, http://rhrealitycheck.org/article/2012/10/02/in-handling-sex-trafficking-crisis-president-obama-may-not-be-getting-it-right/; Juhu Thukral, "Human Rights and Trafficking," Sh'ma: *A Journal of Jewish Ideas* 39, no. 653 (2008): 6-7; Aziza Ahmed, "Think Again: Prostitution: Why Zero Tolerance Makes for Bad Policy on World's Oldest Profession," *Foreign Policy*, January 19, 2014, http://www.foreignpolicy.com/articles/2014/01/19/think_again_prostitution.

5 "Laws and Policies Affecting Sex Work: A Reference Brief" (Open Society Foundations, New York, NY, 2012), http://www.opensocietyfoundations.org/sites/default/files/sex-work-laws-policies-20120713.pdf; *HIV and the Law: Risks, Rights and Health* (New York, NY: Global Commission on HIV and the Law, July 2012), 36-38, http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf. According to the Global Commission on HIV and the Law, of the 196 countries and territories in the world, 116 of them criminalize sex work. Only eighty countries and territories provide some form of legal protection for sex work, while thirteen countries have no information available. Ibid.

6 Kamala Kempadoo and Jo Doezema, eds., *Global Sex Workers: Rights, Resistance, and Redefinition* (New York, NY: Routledge, 1998). The history of the global sex workers' rights movement will be covered in more detail in the epilogue. The growing international sex workers' rights movement can be seen in the members of the Global Network of Sex Work Projects, which hosts over 150 organizations from Africa, Asia and the Pacific, Europe, Latin America and the Caribbean, and North America. Specifically, members hail from Antigua and Barbuda, Australia, Austria, Bangladesh, Bosnia and Herzegovina, Botswana, Brazil, Cambodia, Cameroon, Canada, China, Côte d'Ivoire, Democratic Republic of the Congo, East Timor, Ecuador, Ethiopia, Fiji, France, Georgia, Germany, Guyana, Hong Kong, Hungary, India, Indonesia, Jamaica, Japan, Kazakhstan, Kenya, Kyrgyzstan, Lithuania, Macedonia, Mexico, Montenegro, Myanmar, the Netherlands, Netherlands Antilles, Nigeria, Norway, Pakistan, Papua New Guinea, Peru, Portugal, Russia, Saint Lucia, Serbia, South Africa, Spain, Sweden, Switzerland, Tajikistan, Tanzania, Thailand, Trinidad and Tobago, Turkey, Uganda, Ukraine, the United Kingdom, the United States, and Zimbabwe. "Where Our Members Work," *NSWP: Global Network of Sex Work Projects*, n.d., http://www.nswp.org/members.

7 During a trip to Poipet, a small town in northwestern Cambodia, Nicholas Kristof met two female teenagers—Srey Neth and Srey Mom. Kristof characterized them as indebted to their brothel owners and forced to work as prostitutes. Kristof writes that he bought both Srey Neth and Srey Mom for $150 USD and $203 USD, respectively. He then drove them back to their respective home villages, where they were reunited with their families and given $100 USD each to start small businesses for income. In "Loss of Innocence," Kristof reveals that, after a fight with her mother, Srey Mom returned to work at her old brothel. Nicholas Kristof, "Girls For Sale," *New York Times*, January 17, 2004, http://www.nytimes.com/2004/01/17/opinion/girls-for-sale.html; Nicholas Kristof, "Bargaining For Freedom," *New York Times*, January 21, 2004, http://www.nytimes.com/2004/01/21/opinion/bargaining-for-freedom.html; Nicholas Kristof, "Going Home, With Hope," *New York Times*, January 24, 2004, http://www.nytimes.com/2004/01/24/opinion/going-home-with-hope.html; Nicholas Kristof, "Loss of Innocence," *New York Times*, http://www.nytimes.com/2004/01/28/opinion/loss-of-innocence.html, January 28, 2004. Critics of Kristof argued that his actions and writings regarding Srey Neth and Srey Mom oversimplified the socio-economic factors surrounding the sex industry in an attempt to justify his neocolonial intervention in these young women's lives. Katha Pollitt, "Kristof to the Rescue?," *The Nation*, February 12, 2004, http://www.thenation.com/article/kristof-rescue#; Larissa Sandy, "Just Choices: Representations of Choice and Coercion in Sex Work in Cambodia," *The Australian Journal of Anthropology* 18, no. 2 (2007): 194–206, doi:10.1111/j.1835-9310.2007.tb00088.x.

8 Kathleen Barry has called sex workers' rights activists the "pro-prostitution lobby" and argues that such activists perpetuate the continued control of sex workers by "pimps." Kathleen Barry, "Pimping: The World's Oldest Profession," *On The Issues Magazine*, Summer 1995, http://www.ontheissuesmagazine.com/1995summer/pimping.php. Gloria Steinem called sex worker activist groups and the foundations that support them in India the "trafficking lobby." "'This Trip Was Life-Changing,'" *The Telegraph*, April 22, 2012, http://www.telegraphindia.com/1120422/jsp/calcutta/story_15393912.jsp#.Uz3HJ1cVBz.

9 The Global Coalition on Women and AIDS, "Violence Against Women and HIV/AIDS: Critical Intersections: Violence against Sex Workers and HIV Prevention," Information Bulletin Series (citing the WHO HIV/AIDS Sex Work Toolkit) (World Health Organization, 2005), no. 3, http://www.who.int/gender/documents/sexworkers.pdf; WHO Department of HIV/AIDS, *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries* (World Health Organization, 2012) 8, 17, http://www.who.int/hiv/pub/guidelines/sex_worker/en/; *Consolidated Guidelines on HIV Prevention, Diagnosis, Treatment and Care for Key Populations* (World Health Organization, 2014) 91, http://apps.who.int/iris/bitstream/10665/128048/1/9789241507431_eng.pdf?ua=1&ua=1.

10 *Sex Work and the Law in Asia and the Pacific: Laws, HIV and Human Rights in the Context of Sex Work* (United Nations Development Programme, 2012), http://www.snap-undp.org/elibrary/Publications/HIV-2012-SexWorkAndLaw.pdf.

11 UN Women, "Note on Sex Work, Sexual Exploitation and Trafficking" (United Nations Entity for Gender Equality and the Empowerment of Women, 2014), http://www.nswp.org/sites/nswp.org/files/UN%20Women's%20note%20on%20sex%20work%20sexual%20exploitation%20and%20trafficking.pdf.

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13 ILO, "Leaving No One Behind: Reaching Key Populations through Workplace Action on HIV

and AIDS," (International Labour Organization, 2014), 34-36, http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/publication/wcms_249782.pdf.

14 United Nations Human Rights Council (HRC), Session 23/36, "Report of the Special Rapporteur on Extreme Poverty and Human Rights, Ms. Magdalena Sepúlveda Carmona," 12, May 17, 2013, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-36-Add1_en.pdf; United Nations Human Rights Council (HRC), Session 14/20, "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover," April 27, 2010, http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf; United Nations Human Rights Council (HRC), Session 22/53, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez," 18, February 1, 2013, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf.

15 The Lancet Editorial Board, "Sex Workers and HIV—Forgotten and Ostracised," *The Lancet* 380, no. 9838 (July 21, 2012): 188, doi:10.1016/S0140-6736(12)61197-0.

16 "HIV and Sex Workers," *The Lancet* (July 22, 2014), http://www.thelancet.com/series/HIV-and-sex-workers; Kate Shannon, et al., "Global epidemiology of HIV among female sex workers: influence of structural determinants," *The Lancet*, Early Online Publication (July 22, 2014), doi:10.1016/S0140-6736(14)60931-4.

17 *HIV and the Law: Risks, Rights and Health*, 38.

18 Ibid., 39.

19 Ibid., 10.

20 Margaret H. Wurth, et al., "Condoms as Evidence of Prostitution in the United States and the Criminalization of Sex Work," *Journal of the International AIDS Society* 16 (1), 2 (May 24, 2013), doi:10.7448/IAS.16.1.18626; *World Report 2014* 47 (Human Rights Watch, 2014), http://www.hrw.org/sites/default/files/reports/wr2014_web_0.pdf.

21 "East African Sex Workers Share Their Stories in a New Publication," *Open Society Foundations*, July 6, 2010, http://www.opensocietyfoundations.org/press-releases/east-african-sex-workers-share-their-stories-new-publication; "Fighting Violence Against Sex Workers in Central and Eastern Europe and Central Asia," *Open Society Foundations*, December 17, 2008, http://www.opensocietyfoundations.org/press-releases/fighting-violence-against-sex-workers-central-and-eastern-europe-and-central-asia; "Fostering Enabling Legal and Policy Environments for Sex Workers Health and Human Rights," *Open Society Foundations*, June 22, 2006, http://www.opensocietyfoundations.org/events/fostering-enabling-legal-and-policy-environments-sex-workers-health-and-human-rights; "Legal Empowerment Program Increases Access to Justice for Sex Workers in South Africa," *Open Society Foundations*, September 5, 2011, http://www.opensocietyfoundations.org/press-releases/legal-empowerment-program-increases-access-justice-sex-workers-south-africa.

22 Chi Mgbako, "Why the Women's Rights Movement Must Listen to Sex Workers," *RH Reality Check*, May 22, 2012, http://rhrealitycheck.org/article/2012/05/22/why-women%E2%80%99s-rights-movement-must-listen-to-sex-workers/.

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24 "GCWA: Statement of support on the International Day for Sex Workers: June 2, 2014," *Global Coalition on Women and AIDS*, June 2, 2014, http://www.womenandaids.net/news-and-media-centre/statement-of-support-on-the-international--day-for.aspx.

25 A precursor to this study is the book *Global Sex Workers: Rights, Resistance, and Redefinition*, edited by Kamala Kempadoo and Jo Doezema, which focused on sex work in Côte d'Ivoire, Ghana, South Africa, and Senegal, among many other countries in the Global South. It was the first book that explored sex worker organizing in the Global South. Another precursor is a booklet entitled, *When I Dare to be Powerful: On the Road to a Sexual Rights Movement in East Africa,* authored by Zawadi Nyong'o and published by Akina Mama wa Afrika, an East African women's rights NGO. The booklet sought to dispel the many stereotypes and misconceptions about sex workers in Africa by presenting alternative narratives from sex workers themselves. *When I Dare to Be Powerful: On the Road to a Sexual Rights Movement in East Africa* (Nairobi, Kenya: Akina Mama we Afrika, 2010), http://www.oozebap.org/dones/biblio/Sex_Worker.pdf.

26 Because sex workers are a criminalized population, it is difficult to accurately assess the number of people working in the sex industries in all of the countries in this study. Sex workers in Kenya are thought to number roughly 200,000, while sex workers in South Africa number over 182,000. "Good Practice in Sex Worker-Led HIV Programming" (Global Network of Sex Work Projects, Edinburgh, Scotland, UK, 2014), 10, 16, http://www.nswp.org/sites/nswp.org/files/Global%20Report%20English.pdf. There is very little evidence on the number of sex workers in Botswana, Mauritius, Namibia, Nigeria, and Uganda.

27 Sylvia Tamale, "Paradoxes of Sex Work and Sexuality in Modern-Day Uganda," *East African Journal of Peace and Human Rights* 15, no. 1 (2009): 69-109. Tamale notes that the literature on feminist engagement with sex work in Uganda specifically and Africa generally is very slim. Ibid., 10, 12.

28 Sociologist Carol Queen has argued that "sex-positive" feminism does not "denigrate, medicalize, or demonize any form of sexual expression except that which is not consensual." Carol Queen, "Sex Radical Politics, Sex-Positive Feminist Thought, and Whore Stigma," in *Identity Politics in the Women's Movement*, ed. Barbara Ryan (New York and London: NYU Press, 2001), 94. In general, though, my interviewees did not predominately appeal to a sex-positive or sexual liberation framework when crafting sex workers' rights arguments within the African context. They overwhelmingly placed more emphasis on a labor rights appeal and their right to work safely.

29 Marlise Richter, "Sex Work as a Test Case for African Feminism," *BUWA! A Journal on African Women's Experiences*, 2012, 66 (internal citations omitted), http://www.osisa.org/sites/default/files/sex_work_as_a_test_case_for_african_feminism62-69.pdf.

30 I explore the early history of feminist solidarity with sex worker movement building in Uganda in chapter 5.

31 *Revolving Door: An Analysis of Street-Based Prostitution in New York City* (Urban Justice Center's Sex Workers Project, 2003), 44, 47, http://sexworkersproject.org/publications/reports/revolving-door/.

32 *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities* (New York, NY: Human Rights Watch, 2012), http://www.hrw.org/sites/default/files/reports/us0712ForUpload_1.pdf; Acacia Shields, *Criminalizing Condoms: How Policing Practices Put Sex Workers and HIV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe* (Open Society Foundations, July 2012), http://www.opensocietyfoundations.org/sites/default/files/criminalizing-condoms-20120717.pdf.

33 "About December 17," *December 17: International Day to End Violence Against Sex Workers*, 2014, http://www.december17.org/about/. Gary Ridgway murdered 48 young women over the course of sixteen years during the 1980s and 1990s. Many of the women, some as young as sixteen, were sex workers or youth involved in the sex industry whom Ridgway strangled to death. He then disposed of their bodies in wooded areas around King County, Washington. It took two decades for the police to solve these murders and bring Ridgway to justice. Matthew Preusch, "Families Speak as Green River Killer Gets 48 Life Terms," *New York Times*, December 19, 2003, http://www.nytimes.com/2003/12/19/us/families-speak-as-green-river-killer-gets-48-life-terms.html?ref=garyleonridgway.

34 Kathleen N. Deering, et al., "A Systematic Review of the Correlates of Violence Against Sex Workers," *American Journal of Public Health* E-View ahead of Print (2014), doi:10.2105/AJPH.2014.301909; Michael D. E. Goodyear and Linda Cusick, "Protection of Sex Workers: Decriminalisation Could Restore Public Health Priorities and Human Rights," *BMJ* 334 (2007): 52–53, doi:10.1136/bmj.39063.645532.BE; *Westminster Sex Worker Task Group: Violence Faced by Sex Workers in Westminster: Recommendations Report* (Westminster Sex Worker Task Group, 2012), https://www.westminster.gov.uk/sites/default/files/uploads/workspace/assets/publications/FINAL-Westminster-Sex-Workers-Rep-1365592773.pdf; Kate Shannon, et al., "Prevalence and Structural Correlates of Gender Based Violence Among a Prospective Cohort of Female Sex Workers," *BMJ* 339, no. 442–49 (2009), doi:10.1136/bmj.b2939; *VIH et commerce du sexe. Garantir l'accès universel à la prévention et aux soins* (France: Conseil national du sida, Septembre 2010), 14-20, http://www.cns.sante.fr/IMG/pdf/2010-09-16_avi_fr_prevention-2.pdf.

35 *Arrest the Violence: Human Rights Abuses Against Sex Workers in Central and Eastern Europe and Central Asia* (Sex Workers' Rights Advocacy Network in Central and Eastern Europe and Central Asia, November 2009), 20, http://www.opensocietyfoundations.org/sites/default/files/arrest-violence-20091217.pdf.

36 Carol Jenkins, *Violence and Exposure to HIV Among Sex Workers in Phnom Penh, Cambodia* (USAID, March 2006), 26, tbl. 11, http://www.hivpolicy.org/Library/HPP001702.pdf.

37 *"Swept Away": Abuses Against Sex Workers in China* (Human Rights Watch, 2013), http://www.hrw.org/sites/default/files/reports/china0513_ForUpload_0.pdf. The international media extensively covered this report. See, e.g.,

Tania Branigan, "China's Anti-Prostitution Policies 'Lead to Increase in Abuse of Sex Workers,'" *The Guardian*, May 13, 2013, http://www.theguardian.com/world/2013/may/14/china-prostitution-increase-abuse-workers; Deborah Kan, "Report Says China Police Abuse Sex Workers," Interview (*Wall Street Journal*, n.d.), http://live.wsj.com/video/report-says-china-police-abuse-sex-workers/E4AB79AD-C0BB-44EF-8F2A-61B633A5C6DE.html#!E4AB79AD-C0BB-44EF-8F2A-61B633A5C6DE; Grace Li, "Rights Group Urges China to Repeal Penalties against Sex Workers," Reuters, May 14, 2013, http://www.reuters.com/article/2013/05/14/china-sexworker-idUSL3N0DV04V20130514; Louise Watt, "Sex Workers In China Subject To Police Abuse, Human Rights Watch Says," *Huffington Post*, May 13, 2013, http://www.huffingtonpost.com/2013/05/15/sex-workers-in-china-subj_n_3278228.html.

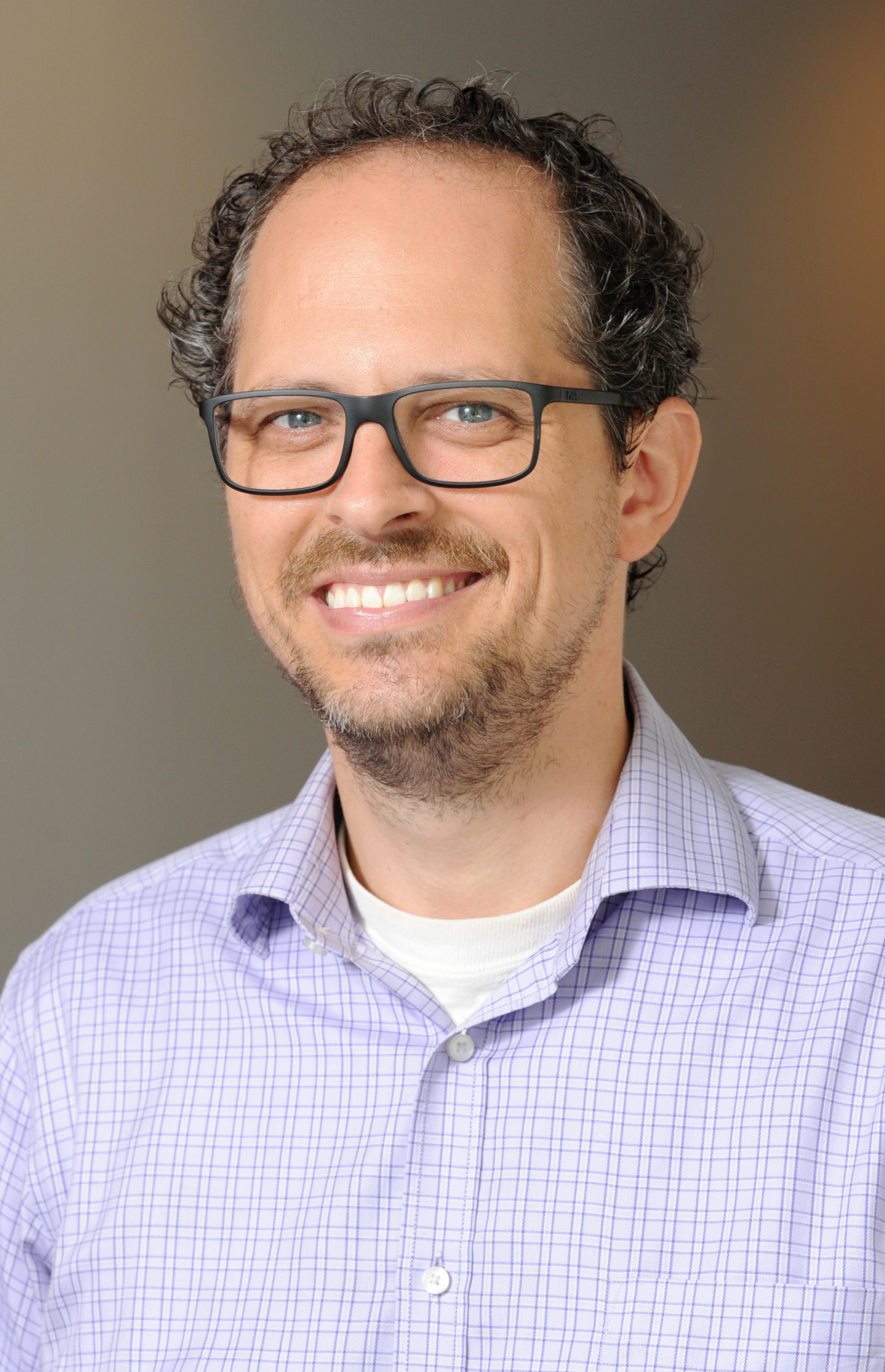
38 Jo Doezema argues that anti-trafficking activists and scholars who view and portray sex workers as disempowered victims perpetuate a single-story narrative that is not only exclusionary in nature, but also imperialist. Jo Doezema, "Ouch! Western Feminists' 'Wounded Attachment' to the 'Third World Prostitute,'" *Feminist Review* 67 (2001): 16–38. Doezema argues that the identity of "third world prostitutes" is orientalist and imperialist in nature using Liddle and Rai's definition that orientalist power is exercised discursively when the author 1) "denies the subject the opportunity for self representation" and 2) western civilization is portrayed as "more advanced." Ibid., 28 (quoting Joanna Liddle & Shirin Rai, "Feminism, Imperialism and Orientalism: the Challenge of the 'Indian Woman,'" *Women's History Review*, December 2006, 512). Abolitionist scholars often portray prostitutes as victims of their "backwards" cultures, which drive women into sex work by devaluing their humanity. *See, e.g.,* Barry, *The Prostitution of Sexuality*, 49-52 (trafficking of women "prevails especially in pre-industrial feudal societies ... where women are excluded from the public sphere. Women's reduction to sex is a fact of their status as the property of their husbands."). Doezema and others argue that, viewed through this lens of analysis, Western abolitionists can be seen as neo-imperialists seeking to "rescue" the "degraded third-world prostitute." Doezema, "Ouch! Western Feminists' 'Wounded Attachment' to the 'Third World Prostitute,'" 16–32; Svati P. Shah, "Prostitution, Sex Work and Violence: Discursive and Political Contexts for Five Texts on Paid Sex, 1987-2001," *Gender & History* 16, no. 3 (November 2004): 794–812; Prabha Kotiswaran, *Dangerous Sex, Invisible Labor: Sex Work and the Law in India* (Princeton and London: Princeton University Press, 2011).

39 I edited the six first-person narratives included in this study for length, clarity, and narrative flow, ensuring that these edits did not change the meaning or intention of the interviewees' words.

40 I did not include representation from North Africa in this study because of a lack of visible formal sex worker-led organizing in those countries.

41 I use the term "prostitute" in this study only in the historical sense, since "sex worker" was not a term used during pre-colonial or colonial times. The Mau Mau uprising against the British colonial state took place between 1952 and 1960. According to historian Luise White, in the early 1950s, around 400 prostitutes took oaths of loyalty to the Mau Mau, agreeing to collect information or contribute money to the Mau Mau revolt. Prostitutes' activism during the colonial era, White argues, was part of a significant and larger history of women's political activism. Luise White, *The Comforts of Home: Prostitution in Colonial Nairobi* (Chicago and London: University of Chicago Press, 1990), 204-207.

42 I asked the interviewees questions on a wide-range of topics, including: entry into sex work; attitudes regarding traditional feminist debates over prostitution; human rights abuses experienced by sex workers; history of formal and informal sex worker organizing; movement strategies; diversity within the movement; and the global sex workers' rights movement.



John Pfaff

There are 2.2 million people in United States prisons.

John Pfaff's data-driven research dispels myths used to explain the unprecedented 40-year boom in U.S. incarceration.

Chief among them:

- The War on Drugs drives prison growth.
- Most prisoners are incarcerated for nonviolent crimes.
- Longer sentences are the major force driving up incarceration rates.
- The "criminal justice system" is a coherent entity.
- The politics of crime are uniquely dysfunctional.

Pfaff demonstrates the significant shortcomings with each of these commonly accepted ideas and then posits a novel theory to explain the rise in the U.S. prison population.

EXCERPT

The Complicated Economics of Prison Reform

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Introduction

By now, the stratospheric, forty-year rise in the U.S. prison population is well known. From the mid-1970s to 2010, the U.S. prison population steadily and relentlessly rose from around 250,000 to 1.6 million; the incarceration rate from around 120 per 100,000 to 510 per 100,000 (and to over 700 per 100,000 when counting those locked up in jails as well as prisons). It was a surge unprecedented in American history, and unseen elsewhere in the world. The U.S. incarceration rate in the 1970s was comparable to those in Europe and Canada. But by the 2010s, the United States had earned the dubious distinction of being home to 5% of the world's population but nearly 25% of the world's prisoners.

In 2010, however, for the first time in four decades, the U.S. prison population began to decline. The drop has not been great—just under 3%—and some observers predict that total populations could still rise by as much as 3% by 2018. But the decline has nonetheless been remarkable, not just because it ended years of constant growth, but because it reflected a rare moment of true bipartisanship. At both the state and federal levels, Democrats and Republicans alike advocated for reforms aimed at restraining or even reducing prison populations. Solidly blue states like California and deeply red ones like Georgia and Mississippi enacted significant reforms, and both houses of Congress have introduced reform bills with bipartisan sponsorship.

A major question reformers raise, however, is how long will this bipartisan moment last? Many find the timing of reforms—most of which followed the 2008 financial crisis—not coincidental. The assumption is that conservative support for reform is driven primarily by the desire to save money during a time of tight state budgets and low crime rates. The obvious fear is that if the economy recovers, vital conservative support may dissipate. And this fear is not unfounded: there was concerted talk about prison reform in the aftermath of the dot-com bubble popping in 2000, but as the economy recovered, reform efforts fell by the wayside.

Two recent books on prison growth directly address the relationship between penal change and economic conditions: Hadar Aviram's *Cheap on Crime* and

Marie Gottschalk's *Caught*. Aviram's is the more optimistic of the two accounts, arguing that there is at least some potential in an economic-based reform effort. Gottschalk, on the other hand, fears not only that economic-based efforts could fail to lead to significant reforms, but that they could actually make prison life worse for inmates if states cut funding and support without cutting populations. Both books make many provocative points, but both also suffer from some surprising omissions. Ultimately, both books, and Gottschalk's in particular, are likely too pessimistic about economic-based reform, although for reasons that neither book adequately addresses.

I focus on two major themes in this Review. First, what exactly is the relationship between the current fiscal crisis and prison reform? While it is clear that the crisis has helped to push legislators and governors to enact some important reforms, it is perhaps unexpectedly unclear why this is. The fraction of state spending given to prisons is actually surprisingly low, suggesting that even in a time of tight state budgets, cutting back on prison populations will not help these budgets much. Instead, contrary to the narrative that both Aviram and Gottschalk provide, the story of post-crisis reform is likely more one of politics (and the political cover provided by the crisis) than of economic necessity. This could actually be a reason to be *optimistic* that reform efforts will survive an economic recovery.

The second issue I consider is narrower: the impact of private prison firms on prison reform. Both Aviram and Gottschalk view these firms, and their attendant lobbying, as major threats to reform efforts. And the fear is understandable. These firms earn profits off the number of inmates they hold, so they have an incentive to lobby hard to keep those numbers high. At first blush their lobbying efforts appear significant. But upon closer inspection, this concern is overstated. The correlation between relying on private prisons and state prison growth is weak, and it is hard to isolate the *marginal* importance of private prison lobbying from that by all the other often-public groups with incentives to push for tougher sentencing practices as well. Moreover, to the extent that private prisons do impede reform, the problem isn't with their for-profit status ... but with the poorly designed contracts that states sign with them.

I. The Fiscal Crisis as an Opportunity for Reform

According to the conventional wisdom about the causes of and solutions to prison growth, the financial crisis that started in 2008 has created a major opportunity to implement real reforms. It is a logical assumption to make. Crime is at a forty-year low while correctional spending is at an all-time high, giving

legislatures a strong incentive to cut back on spending, and thus (perhaps!) on prison populations. Bolstering this claim is the fact that the first decline in total prison populations since 1973 occurred in 2010, with declines persisting through 2014 (despite a slight uptick in 2013).

Yet the reality of incarceration growth is often far more complicated than the conventional wisdom suggests,[1] and both Aviram and Gottschalk confront the conventional account of fiscal crisis and reform head-on. At the same time, both Aviram and Gottschalk miss the extent to which, I think, the current fiscal-based reform effort is not *actually about* fiscal issues. The financial aspect of reform may be more of a smoke screen than it gets credit for, and once framed this way, there is more reason to be optimistic—and pessimistic—about the future of reform. But let us first look more closely at the concerns that Aviram and Gottschalk raise.

A. *The Limited Power of Fiscal-Based Reform*

As both Aviram and Gottschalk note, the total amount states have spent on corrections has risen in tandem with soaring incarceration rates. The nearly $50 billion states spend on prisons is a striking number; county governments spend an additional $30 billion on jails (which yields the widely cited $80 billion). In an era of austerity and low crime, prison spending seems like a logical budget item to scale back.

[That number, however, needs context.] While $80 billion is vast in absolute value, it comes to only 2% of the $3.6 *trillion* that state and county governments spent in 2012; if we look at spending on corrections, policing, and the court system—to account for counties spending much more on policing than corrections—then total criminal justice expenditures still come to just about $213 billion, or slightly under 6% of total spending. In other words, as Gottschalk cautions, for as much as we spend on corrections, we might not spend *enough* for budgetary pressures to make much of a real difference.

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1 For my previous criticisms of various aspects of this conventional wisdom, see generally John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 **Harv. J. on Legis.** 173 (2015); John F. Pfaff, *Federal Sentencing in the States: Some Thoughts on Federal Grants and State Imprisonment*, 66 **Hastings L.J.** 1567 (2015); John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth is Wrong, and Where We Can Go from Here*, 26 **Fed. Sent'g Rep.** 265 (2014); John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 **Ga. St. U. L. Rev.** 1239 (2011); John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices*, 13 **Am. L. & Econ. Rev.** 491 (2011); John F. Pfaff, *The Durability of Prison Populations*, 2010 **U. Chi. Legal F.** 7 3; John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 **J. Crim. L. & Criminology** 547 (2008); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 **Mich. L. Rev.** 1087 (2013); John F. Pfaff, The Causes of Growth in Prison Admissions and Populations (Jan. 23, 2012) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990508.

Moreover, the *level* of correctional spending has been fairly constant for a while now. … From the late 1970s to 1991, as both crime and prison populations were rising, so too was corrections' share of the budget. But as crime leveled out in 1991, corrections' share did as well. [There is] some variation across states … But the basic story … is that correctional spending, as a *share* of the budget, has been stable and fairly low [at under 3% of state spending] for many years.

[There] are plenty of other reasons to assume that whatever sort of fiscal pressures states feel will not translate into real reforms. First, … analysts consistently overstate the savings that come from cutting back on prison populations. The conventional estimate of savings-per-prisoner is the average cost of incarcerating someone, which is calculated by simply dividing total annual spending on corrections by the total number of prisoners; estimates come out around $17,000 to $60,000, depending on the state. But a lot of correctional spending goes to fixed costs that do not change much when one prisoner is released; Gottschalk, for example, notes that as much as 75% of correctional spending is on salaries, and states are very good at *not* laying off guards, even when closing prisons.[2] So the *marginal cost* savings from a one-inmate release are often as little as *one-fifth* the average cost, unless enough inmates are released to close a wing, thus laying off guards, cutting back on food and heating, etc.

Along these lines, … public-sector unions [also] pose a major threat to fiscal-based reforms. After all, if reforms need to justify themselves by pointing to savings, they will only work if they effectively cut payroll. And while the power of prison-guard unions is likely overstated, these unions will nonetheless resist reforms that threaten payroll and membership too deeply. And other public-sector lobbying groups will oppose reforms as well, such as the towns that hold at-risk-of-closure prisons, as well as any legislators who depend on inmates to maintain their current districts. With insufficiently large amounts of budgetary dollars at stake, these groups are better able to defend their "turf."

If the only way the budget crisis could influence prison growth was directly through its impact on the budget, I would share Aviram's and Gottschalk's skepticism that the 2008 crisis will lead to substantial reform. And it very well may not: as a general matter I expect that the reform movement will founder and underperform expectations for a wide array of reasons.[3] But there is an import-

2 In 2012, for example, Pennsylvania closed two prisons but laid off only three guards in the process. Bret Bucklen (@kbucklen), **Twitter** (Mar. 2, 2015, 9:00 AM), https://twitter.com/kbucklen/status/572441442464993280. Bret Bucklen is currently the Chief of Projections and Population Statistics in the Pennsylvania Department of Correction's Bureau of Planning, Research, Statistics, and Grants.

3 Most significantly … the insistence on aiming reforms primarily on "nonviolent drug offenders" misses the point that over half of all state prisoners are in prison for violent crimes, and that almost all long-serving inmates [have been

ant reason to push back against some of the wariness expressed by Aviram and Gottschalk. The recession may help fuel reform not because of *economics*, but because of *politics*. There are certain structural defects in the politics of crime that help explain why prison populations have boomed the way they have, and an economics-based reform effort has the rhetorical power to circumvent them in a way that may prove more durable than Aviram and Gottschalk suggest.

B. *The Politics of Punishment*

Both Aviram and Gottschalk tell a political story in which incarceration is a top-down-driven process. As Aviram states quite clearly:

> [T]he political turn to punitiveness and "tough on crime" stances was not an organic response to bottom-up public concerns about rising crime rates. Rather, public awareness of the rise in crime rates was brought about by a concerted top-down governmental effort to draw attention to those rates.

Or, as she puts it more bluntly elsewhere, "crime rates did not fuel mass incarceration[.]" [Gottschalk, too, clearly sees] rising punitiveness as a top-down policy choice motivated by issues other than crime ... Aviram and Gottschalk are not alone in de-emphasizing crime. Michelle Alexander[, for example,] does the exact same thing in her widely read *The New Jim Crow*. ...

This is a peculiar flaw, and one that leads [many] astray in appreciating how the budget crisis and prison reform truly interact. Recent empirical work suggests that (1) popular (not elite) punitiveness closely tracks crime rates, and (2) incarceration growth tracks these popular political attitudes.[4] Taken together, these results suggest that the financial crisis can lead to real reform not because of the fiscal *pressure* it *creates* but because of the political *cover* it *provides*.

First, it is important to examine, if briefly, the relationship between rising crime and rising incarceration rates. The rise in both [violent and property crime] rates

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convicted of] violent [crimes]. It will be impossible to impose deep cuts to U.S. prison populations without reforming how we manage [those convicted of violence], and no one is doing this yet. In fact, much of the rhetoric used to defend reforms for nonviolent offenders—"we are still keeping you safe by locking up the violent people!"—may foreclose reforms aimed at [people convicted of] violent [crimes] in the future.

4 A common critique of the crime-caused-prison-growth claim is that Canada and other European countries also saw steep rises in crime in the 1970s and 1980s but did not raise their incarceration rates in any comparable way. While true, all this demonstrates is that rising crime does not *mechanistically guarantee* rising prison populations. It says nothing about the claim that the reason *why* Americans decided to become more punitive was in no small part because of rising crime. So at one level rising incarceration is a policy *choice*, but perhaps one strongly influenced, or *politically* required, by (among other things) rising crime.

[from 1960 to 1991] is striking, with violent crime rates rising by 563% and property crime rates (from a much higher baseline) by 319%. And even with crime steadily dropping since 1991, crime rates in 2014 remain substantially higher than they were in 1960.

In a recent study on the relationship between popular punitiveness and prison populations, the political scientist Peter Enns provides striking evidence that ... points to errors in the elite-led story. Popular punitiveness, he finds, moves with the crime rate, and the rate of growth of this incarceration tracks that popular punitiveness. So as crime has fallen over the past twenty years, so too has the desire of the electorate to be tough on crime.

And as the electorate has become less punitive, so too have politicians. The financial crisis thus allows conservative politicians the freedom to move away from a tough-on-crime position. As Enns notes ... "the fiscal environment of the Great Recession allowed political elites who had previously advocated tough-on-crime positions to align their rhetoric with emerging public opinion without suffering a political cost with their conservative constituents."

But why do politicians need cover? If the electorate is becoming less punitive, why can't politicians "move" with them? Part of the answer might just be the nature of politics. Politicians can only move so much without seeming untrustworthy. [It's likely, however,] tough-on-crime politicians have always also been at least nominally fiscally conservative, so the cost-cutting rhetoric allows them to move left (with the voter pool) without seeming to betray their principles.

Moreover, there is some intriguing and rarely cited evidence that politicians do not actually *want* to be tough on crime—or at least not as tough as we generally think—even when crime rates are high. Thomas Stucky and coauthors, for example, have generated results suggesting that while more conservative state legislatures tend to be more punitive, and while that effect has grown over time, a key mediating factor is electoral stability. The more secure the conservative majority—when the majority is *better* able to indulge in its (allegedly punitive) policy preferences—the *less likely* it is to be punitive. Only when elections become tight and the majority is at risk do politicians become much more punitive. This suggests that punitiveness is more an electoral than a policy move.

Buttressing this idea are similar results produced by Rachel Barkow and Kathleen O'Neill, indicating that states are more likely to adopt sentencing commissions when, among other things, the legislative majority is more at risk. According to Stucky et al., politicians are more likely to be tough on crime when

electorally vulnerable, and according to Barkow and O'Neill, they are more likely to try to weaken their ability to act on the issue when—again—they are electorally vulnerable. Taken together, these results are consistent with legislators who, in general, would rather not be punitive if they can avoid it. The crisis, then, may be more useful in the way it gives politicians the *political* flexibility to push back against punitiveness.

There is another reason why politicians may need to mask genuine desires for less-punitive sanctions behind fiscal-based rhetoric, one that yields both optimistic and pessimistic predictions about the future of reform. For voters, criminal justice is a low-information, high-salience (LIHS) issue, which just means that voters do not pay much attention to the day-to-day goings on of the criminal justice system and respond only to highly shocking, and highly idiosyncratic, cases. Unfortunately, in criminal justice contexts, this creates a strong, rational bias on the part of officials to be quite tough on crime.

In fact, LIHS likely helps explain one of the more durable puzzles in penal policy, namely that politicians are consistently harsher and less rehabilitative than multiple polls show the electorate to be. Are they just ignorant…—should we just educate them better about what "the people" want? Sometimes academics and other policymakers seem to adopt this attitude, but this is not the right way to think about the issue. Politicians are not more severe than the electorate because they *do not* understand it, but because they *do*. Voters profess a desire for rehabilitation in surveys but not in the voting booth. And LIHS is likely a major reason why.

While voters say that they favor rehabilitation, they do not pay close attention to the sorts of rehabilitative or nonincarcerative policies legislators, prosecutors, judges, and parole boards adopt or their general effectiveness. Instead, they react with anger at the inevitable errors that will take place—the could-have-been-incarcerated-but-wasn't defendant who goes on to commit a sufficiently awful subsequent crime that grabs the media's attention. Thus policy actors bear most of the downside risk of leniency but get little of the upside benefit.

A similar risk does not apply to being punitive, however. Overincarceration is not punished to the same degree since it is much harder for voters to see it. It is easy to put a name and a face to both the preventable recidivist and his victim. It is much tougher to identify those who are locked up more than they need to be. Given this asymmetry in risks to the policymakers, it makes perfect sense that they would punish more than voters seem to desire.

What does all this have to do with the credit crunch? Alternatives to incarceration still carry the same risks of error as before, but the fiscal crisis provides policy actors with a better excuse for them when they inevitably happen. Rather than having to defend the diversion from prison on the grounds that it was "good policy," they can now say it was "economically essential." To the extent more punitive voters—the voters more likely to react negatively to a failed diversion—are more ... fiscally conservative, the "economically essential" excuse likely carries more weight. Thus, the current emphasis on fiscal restraint expands politicians' ability to be less punitive, even if the actual impact of reduced incarceration on the budget is slight.

To a point. Invoking financial necessity is likely far more effective when dealing with diversion failures by inmates classified as "nonviolent" than by those classified as "violent." And so it is not surprising to see that several years into the recession, almost no politicians [are] discussing changes to how we punish violent offenders, even though a majority of state inmates are classified as violent. Whatever room the crisis has provided politicians to debate how to punish nonviolent offenders, it has had much less of an effect when it comes to the (much more important) "violent" inmates.

Finally, even though fiscal tightness is often credited with driving current reform efforts, there's reason to have at least some hope that reform—at least when it comes to nonviolent offenders—may continue even if the economy improves. [A]t least twenty-nine states have seen their prison populations fall between 2008 and 2013—and their crime rates as well. Now, these results do not necessarily mean that reducing prison populations *causally reduced* crime. ... But for political purposes the correlation is likely sufficient to allow reformers, including conservative reformers, to claim that cutting prisons does not lead to increases in crime, which may provide them with the ability to push back against prison increases even as the economy recovers.

The story of fiscal crisis as political cover, however, also highlights a profound failure of the current reform efforts. ... No reform proposal, either at the state or federal level, or even proposed by any of the myriad reformist groups, has attempted to address the *structural* problems LIHS voting raises. Reformers are simply trying to pass new laws without altering the system that produced the harsh laws in the first place. What is to keep that system from [overreacting again] at the next uptick in crime?

This is not idle speculation. In 1970, Congress abolished all mandatory minimum drug sentences when it passed the Comprehensive Drug Abuse Prevention and

Control Act of 1970. Then-Texas Representative George H.W. Bush even stood up to speak in defense of their abolition. Then Congress passed a host of new drug mandatories during the 1980s and 1990s, while Bush was vice president and then president. Now both houses of Congress are working on bills that would, to varying degrees, scale back or cut federal mandatory minimums. What is to say they won't reintroduce mandatory minimums in 2025 if crime starts rising again?

State and local governments can certainly take steps to contain the risks posed by LIHS voting. Shifting from elected to appointed judges would help, for example, as could the use of fairly isolated sentencing commissions. Fleshing out exactly how to confront LIHS voting is beyond the scope of this Review, but it is worth noting that by failing to appreciate the pretextual use of the financial crisis by politicians, Aviram and Gottschalk tell stories that are at once too pessimistic (when they worry that corrections' share of the budget isn't enough to ensure real reform) and too optimistic (when they miss the more fundamental political-structural defects that persist, and which perhaps explain why politicians may have needed to exploit the crisis in the first place).

II. Private Prisons and Prison Growth

The second major economics-of-punishment issue that both Aviram and Gottschalk discuss at length is the impact of private prisons on prison growth. Over the past thirty years, companies such as Corrections Corporation of America (CCA) and the Geo Group have been managing, and at times even building, a growing number of prisons across the United States; a common plank of the standard story of prison growth is that their profit-driven desire for more and more prisoners to manage has led them to lobby for tougher and tougher sentencing laws, thus contributing in important ways to rising incarceration rates. Unfortunately, that standard account suffers from significant defects that tend to overstate the importance of private firms and highlight the wrong reason why private prisons pose problems—with important consequences for reforming private *and* public prisons alike.

Aviram perhaps makes the more forceful case for the importance of private prisons, arguing that their expansion reflects a ["seismic"] shift in U.S. penal policy. ... Yet the weakness of this claim is apparent ... when Aviram admits that "as of 2010, private prisons housed '128,195 of the 1.6 million state and federal prisoners in the United States[.]'" In other words, by the end of this "seismic shift" only 8.4% of the prison population was in private prisons in 2014—and at the state level, only 6.8%, with over half of those in just five states. Of course, private prisons may matter more than the number of prisoners they hold if we

think their lobbying makes all sentences tougher (or makes reform harder), thus increasing public prison populations as well.

This latter argument is the one that Gottschalk basically makes. She points out, correctly, that incarceration was growing well before the private firms appeared, so they cannot be blamed for the onset of mass incarceration. But, she argues, their lobbying efforts now pose a serious impediment to reform. She argues that the private prison companies actually viewed the Great Recession as an opportunity more than a risk, since they expected that state budget cuts would lead to capacity constraints and, eventually, the need for private prisons to mitigate the overcrowding. [W]hatever its theoretical potential, [however,] this concern appears to have not been realized.

A. *Private Prisons and Prison Growth*

The first major problem that the private-prisons-as-engines-of-growth story faces is that it is ... hard to detect any significant effect in the data. [T]here simply are not that many prisoners in private prisons. In terms of contribution to overall growth, between 1990 and 2008 (the peak year for the number of state prisoners in private prisons), the number of private prisoners rose by over 87,500, while the total number of state prisoners rose by almost 701,000—so 12.5% of all additional prisoners were held in private prisons.

But that does *not* mean that privatization accounted for 12.5% of the growth in prison populations. Many, if not most, of those who ended up in private prisons during those years would have been placed in public prisons had the private option not existed, so it is unfair to say that the private prison option *caused* those incarcerations. If private prisons were substantially cheaper to run, one could argue that private prisons nonetheless expanded states' fiscal ability to incarcerate, but ... there is little to no evidence that private prisons cut costs; if anything, they may be *more* expensive, which would suggest that privatization could actually have *slowed* prison growth by raising costs (although, as noted in Part I, the overall impact of incarceration on budgets is sufficiently slight that any such effect is likely minor at most).

More likely, privatization reflected more of an ideological commitment to private contracting. ... And it is likely that a political commitment to privatization is stronger in more conservative states—which are also likely to be more punitive. Thus even if we were to observe faster growth rates in more-privatized states, it would be hard to disentangle the effect of privatization from the ideological forces that led to *both* privatization *and* rising incarceration in the first place.

B. *Private Prisons, Lobbying, and the Politics of Crim*e

The numbers in the previous Section may suggest that private prison firms are not a major force behind prison growth, but they certainly do not prove that claim. So if there is convincing evidence that these firms are effective political actors, then we should be concerned that the problem is really with my numbers. The basic thrust of [this argument] is that these firms have thrown a lot of money at state legislatures, which results [in] tougher sentencing laws in general, which are designed to keep inmates in for longer terms in public and private prisons alike.

[Aviram, like Gottschalk, argues that private prison groups have developed powerful lobbying arms, pointing out that CCA alone spent over $2 million on lobbying between 2003 and 2012.] Viewed in isolation, Aviram's numbers appear quite large. But their significance declines substantially when placed in broader context. Looking beyond just CCA, between 1986 and 2014 private prison groups spent slightly more than $13 million lobbying. During that same time, the total amount spent on lobbying at the state level by all groups ran to over $36 *billion*. So private lobbying amounted to only 0.03% of all spending during that time. A drop in the bucket.

That comparison is, however, a bit unfair. Private prison groups concentrated their spending in a handful of states: nearly 40% of all spending occurred just in Florida, 12% in California, and about 5 to 6% each in Georgia, New Jersey, and Tennessee. But even in those states the overall share of lobbying by private prison groups is slight: 0.3% in Florida, 0.03% in California, 0.1% in New Jersey, 0.1% in Georgia, and 0.2% in Tennessee.

That said, I'm *still* being unfair. Successful lobbying isn't just a game of who has the most dollars. A small amount of spending can go a long way if the opposition lacks the resources or inclination to push back. But [this] is a complicated [issue]. It's true that until recently there was no group explicitly aligned against tough-on-crime positions (a role that smart-on-crime campaigns are now filling). But at the same time, state budgetary processes are much more zero-sum than at the federal level. [S]tates cannot print money, and they borrow at rates less favorable than those faced by the national government; both these facts should constrain state spending. Tellingly, at least until the past few years, state spending moved in almost perfect lockstep with state revenue, suggesting that states were genuinely limited by what they were able to bring in.

As a result of these constraints, we should expect those lobbying for tougher sentencing laws to face opposition not from explicitly soft-on-crime groups, but from

everyone else, all of whom are seeking access to a fairly limited pool of money. So education and medical lobbies likely push back against efforts to expand punishment in general, and public sector lobbies should resist privatization (even if they may favor increased punitiveness more broadly). And many such groups exert far more power, at least in dollar terms, than private prison firms. During the time when private prison groups spent $13 million on lobbying, educational groups spent over $256 million, medical groups over $360 million, and public employee lobbies over $132 million. Even in Florida, where the private prison groups concentrated their lobbying the most, the private prison groups were outspent five-to-one by the medical lobbies and two-to-one by the educational lobbies (although they did outspend the public employee lobbies by almost 70%).

Yet, despite focusing its spending in Florida, in 2012 the private prison lobby suffered a somewhat surprising defeat when the state senate voted down a bill to privatize twenty-seven prisons by a vote of twenty-one to twenty (in a chamber with only twelve Democratic senators). Privatization would have resulted in 3,500 state guards losing their jobs, and the [bill's failure] was seen as an example of a public sector union defeating the private prison lobby. And this despite the private prison lobbies outspending the public employee ones by 30% that year, $430,000 to $330,000 (and, as pointed out above, by 70% over the years 1986 and 2014).

In fact, it is worth thinking about public sector lobbying a bit more. Never mentioned in [any discussions about private prisons] is that plenty of public groups [have] a strong incentive to lobby for tougher laws as well, making it hard to estimate what is really the variable of interest, namely the *marginal* contribution of private prison lobbying to prison growth.

There are at least three reasons why public groups will lobby aggressively for expanding punishments (or against reducing them). The first is employment: prison guard unions, like private prisons, benefit from growing incarceration rates. Most notably, the California Correctional and Peace Officer Association (CCPOA) has lobbied hard for tougher sentencing laws and is thought to play a not unimportant role in California's punitiveness. And while the CCPOA may be the most powerful and effective of such lobbies, other state correctional officer associations surely matter as well; just note the success of guard unions in Florida in blocking privatization, and the guard union in Tennessee was similarly successful in blocking privatization efforts there.

Second, more-rural legislators may fight for more prisoners in the name of jobs more generally. Despite evidence to the contrary, many legislators believe that

having prisons in their districts provides meaningful employment and economic growth to their constituents, even after the prison is built. Thus they resist efforts to close them. New York State, for example, struggled for years to close empty prisons in the face of fierce opposition from the districts where those prisons were located. And these sorts of political pressures do not require any real lobbying expenditures. The legislators themselves are acutely aware of the feared, if empirically overstated, employment impact … and they are well-incentivized to resist such closures. …

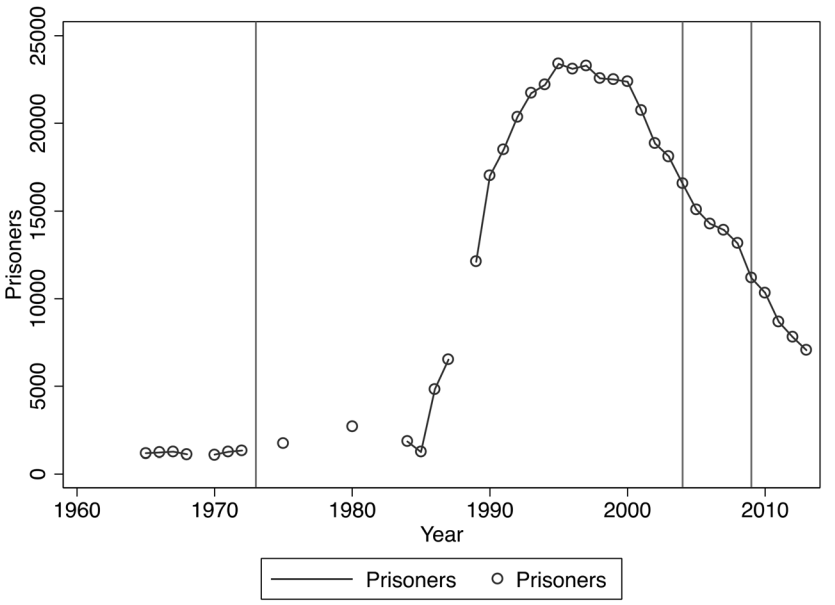
Third[,] in all but four states, legislators in districts with prisons [see] their power grow with their prisons. Outside of California (come 2020), Delaware (come 2020), Maryland (now), and New York (now), for purposes of state districting, prisoners count as residents of the areas in which they are *incarcerated*, not where they come from. Since prisoners are disproportionately urban, and prisons are disproportionately rural, this policy effectively transfers power from cities to rural areas. Rural voters in counties with prisons thus exert undue influence in state legislatures. …

A final problem with both books' takes on the impact of private prison lobbying is that both rely too heavily on the conventionally accepted claim that prison growth is driven in large part by inmates serving longer sentences. Were this claim generally correct, then successfully lobbying for longer sentences would almost mechanistically lead to more prisoners, public and private alike. But my work has shown that time served has not actually grown that much, and certainly not enough to explain the magnitude of growth we have witnessed. At least since the mid-1990s, it appears that the main engine of prison growth has been a rise in *admissions*, not *time served*, with the latter remaining fairly flat.

None of this is to say that rising admissions and longer sentences are not related, since prosecutors may use those tougher sanctions to extract pleas more efficiently. But these results do mean that the impact of any change in sentencing law, whether the product of private or public lobbying, will be mediated by what locally elected, relatively independent, county-level prosecutors choose to do. And there is at least some evidence that they are willing to ignore tougher laws when convenient to do so. Figure 3 plots the number of inmates in New York State prisons serving time for drug offenses, and the first vertical line marks 1972, the year the state adopted its draconian Rockefeller Drug Laws. Strikingly, there is almost no change whatsoever in the number of drug inmates following the laws' adoption: tougher laws, no change. Of course, prosecutors do appear to take advantage of the laws in the 1980s, though they also stop using them long before any of the subsequent reforms weakening the laws are passed (the second

and third vertical lines). So the simple more-private-prison-money-leads-to-longer-sentences story overlooks the surprisingly tricky question of how longer sentences necessarily lead to more prisoners [in general].

Figure 3 Drug Prisoners in New York State Prisons, 1965–2013



C. *The Problem Isn't Privatization, It's Contracts*

The final major flaw with [most attacks on] the evils of private prisons is that they are really looking at the wrong thing. Gottschalk in particular points out that the dangers posed by private prisons extend beyond their desire to maximize the number of beds filled each day: their guards are more poorly trained, they are less likely to provide rehabilitation programs, inmates are more likely to be exposed to violence than in public prisons, etc. And there is evidence that tougher prison conditions increase the risk of subsequent recidivism, which is perhaps good for private firms' bottom lines, but bad social policy. The concerns Gottschalk raises are all completely valid. Yet, perhaps surprisingly, none of them necessarily argues against private prisons. They just argue in favor of better contracts.

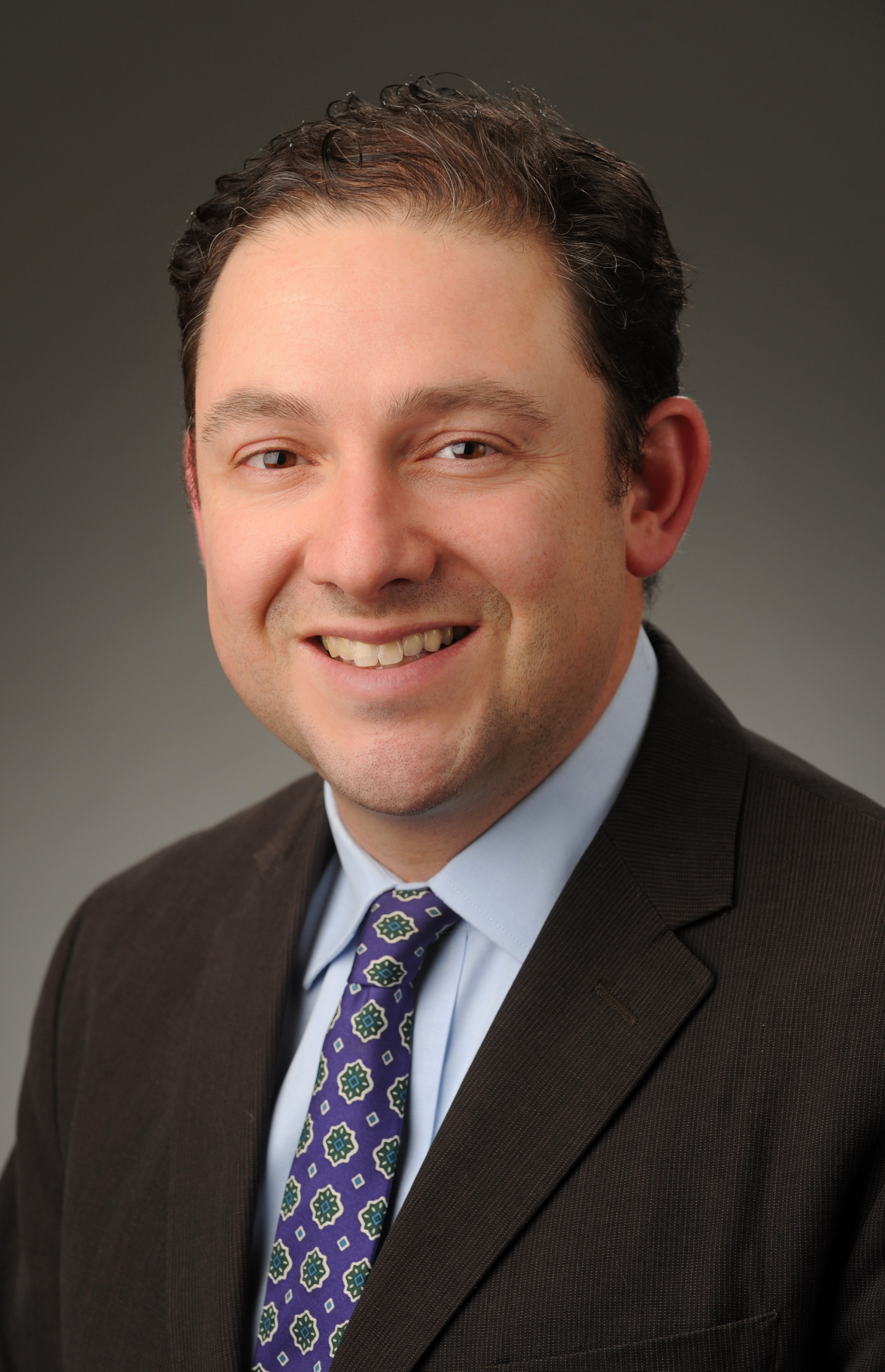
To see why, consider the following story. A state pays the wardens of its prisons a per-diem rate, and that rate is more than the cost of housing the prisoner (or the wardens at least cut costs down to make that the case). The wardens use the additional revenue to fund services outside the prison, and they do not focus much

on rehabilitation, and in fact fight against early release policies and work hard to ensure their prisons are full so their profits are higher. This is, in a nutshell, the conventional private firm, profit-motive horror story.

But what I've just described is not a private prison system at all. It is the way that the state of Louisiana contracts with local *public* sheriffs to confine state inmates in *public* county facilities. The sheriffs then use the extra savings to buy material for their deputies, even those working outside the jails. In other words, this "private firm problem" can occur entirely within the public sector, because the problem has *very little to do with privatization*, at least not directly. It is all about contract incentives.

In other words, private prisons focus on warehousing inmates as cheaply as possible because they have negotiated contracts that reward them for doing so. Write a contract that pays based on recidivism rates, not occupancy, and private prisons will focus more on training and programming and less on capacity. This is not an idle thought experiment. Though the idea of incentivizing contracts for private prisons has received fairly little academic interest, it is already being implemented in the field. Pennsylvania recently imposed recidivism-linked incentive contracts on the private firms that operate its halfway houses. If a company pushes recidivism rates sufficiently far below the historic average, it receives a bonus, while if rates drift too high for two years in a row then it loses the contract. Interestingly, the nation's largest private prison firm, CCA, recently bought four of the halfway houses operating under these contracts, suggesting that CCA thinks it can successfully manage and improve on parolee recidivism rates.

Obviously, crafting such contracts is easier said than done, so I do not want to be seen as just glibly saying "write better contracts." Designing contracts that properly align incentives will be tricky, and states should think carefully about what goals they want to measure and if recidivism is the only relevant one. But none of these undermine the basic point, namely that the ills identified by Aviram and Gottschalk, to the extent that they exist, do not reflect the problem of privatization *per se*, but rather of bad publicly written contracts.



Jed Handelsman Shugerman

Money has dominated American politics since the beginning, and reform has often led to twists, turns, and unintended consequences for our legal system.

Jed Shugerman's historical research shines new light on how independent regulatory agencies, also known as the government's fourth branch, arose from a new political dependence on powerful special interests.

His work provides the following insights:

- Nineteenth-century political parties were initially financed by patronage kickbacks. When those kickbacks were suddenly banned, politicians created new institutions—some of the foundations of the modern administrative state—to avail themselves of untapped financial resources from special interests after the kickback/assessment system fell in the 1880s.
- The Senate's creation of the Interstate Commerce Commission (ICC) in 1887 has been interpreted as the first "independent agency," a model for some of the most important institutions in modern America, such as the Federal Reserve. In context, however, it was a move toward political accountability (and control by railroad special interests) rather than toward political independence.
- The ICC caused a decisive shift from a premodern common-law model of enforcement by private plaintiffs to a modern administrative model of enforcement by public prosecutors.
- The ICC proved a decisive turning point toward the 20th-century's nationwide regulation and campaign finance politics as well as special interests focusing on control of the administrative state.

By challenging conventional wisdom, Shugerman illuminates how a sudden shift to our modern system of campaign finance shaped the foundations of modern American government.

EXCERPT

The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance

31 *Journal of Law & Politics* 139-186 (2015)

The federal executive branch has a peculiar institutional structure. U.S. Attorneys and many other high-ranking law officers are formally accountable to the executive branch (and most state prosecutors are popularly elected). In other western democracies, prosecutors are relatively independent from electoral politics and the executive branch's control.

But when it comes to economic regulation, these roles are reversed. Some of the most important areas of economic and commercial policy in the United States are delegated to "independent regulatory agencies" insulated from executive or congressional control.[1] They are considered so independent that they are sometimes called a "fourth branch" of the federal government.[2] In many parliamentary systems, economic and commercial policy is sometimes delegated to expert commissions with job security, but aside from central banking, most of those policies still must be ratified by the cabinet or parliament.

The exceptional American executive branch was not designed to be so unique. Originally, prosecutors had more structures to protect their job security, and

1 The following agencies and boards are often categorized as "independent": the Federal Reserve Board ("the Fed"), the Securities and Exchange Commission ("SEC"), the National Labor Relations Board ("NLRB"), Board of Consumer Financial Protection, Commodity Futures Trading Commissions ("CFTC"), Federal Energy Regulatory Commission ("FERC"), Federal Trade Commission ("FTC"), U.S. International Trade Commission, Postal Regulatory Commission, Federal Retirement Thrift Investment Board, and the National Credit Union Administration. The Federal Election Commission ("FEC"), the Federal Communications Commission ("FCC"), Social Security Administration ("SSA"), National Transportation Safety Commission, and the Consumer Product Safety Commission are also considered independent agencies. Economic regulation is "without a doubt, best exercised in an atmosphere of independence, rather than as part and parcel of the process of execution of the laws, exposed to all the pressures which play upon the political branches." The Economic Regulation of Business and Industry: A Legislative History of U.S. Regulatory Agencies 7 (Bernard Schwartz, ed., 1973). There is some question as to whether the independence of these agencies is due more to formal statutory protection or to political norms. *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum L. Rev. 1163 (2013).

2 *See, e.g.*, Paul Verkuil, *The Purposes and Limits of Independent Agencies*, Duke L.J. 257 (1988); Jonathan Turley, *The Rise of the Fourth Branch of Government*, Wash. Post, May 24, 2013 (http://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-ofgovernment/2013/05/24/c7faaad0-c2ed-11e2-9ef2-6ee52d0eb7c1_story.html).

regulatory agencies were adopted because they would be politically accountable, not independent. Congress created the Department of Justice while U.S. Attorneys could not be fired at will by the President, and the congressional model for independent agencies was actually a model of political dependence, when viewed in context. On the one hand, a series of accidents and unintended consequences shaped this odd balance of independence and accountability. But at the same time, a significant transformation in American party politics coincided with a key moment of design, and they fundamentally shaped these structures.

Around the time when Congress was debating core institutional arrangements in the mid-1880s, the structure of American campaign finance was rapidly shifting from a system of officeholder patronage kickbacks to our more recognizable modern system of large special interest campaign contributions. For decades, parties had been financed by a patronage machine of salary kickbacks and assessments (the coercive solicitation of funds by party officials from public employees). Reformers attacked this "spoils system" after the Civil War, and they made two major legislative advances: the 1876 Anti-Assessment Act[3] and the Pendleton Act of 1883,[4] which established the first major civil service reforms.[5] The Anti-Assessment Act prohibited assessments for all federal offices, and the Supreme Court upheld the statute's constitutionality in 1882, after party bosses had begun to be convicted.[6] Historians have concluded from the available evidence that, between 1876 and 1883, political assessments "declined precipitously."[7] Then the Pendleton Act of 1883 sharply increased the penalties for assessments, and its new civil service reforms began to cut back on the spoils system. As a result, campaign contributions by individuals and corporate interests increasingly filled the new campaign finance vacuum.

It turns out that these sudden shifts in party politics helped establish the bifurcated structure of the modern executive branch, with its "unitary" presidential power over most executive offices on the one side, and on the other side, "independent agencies" with enormous power and insulation from the President, so much so that they are often called a "fourth branch" of the federal government.[8]

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3 5 U.S.C. § 1180 (1876).

4 22 Stat. 403 (1883).

5 *See* Carl Russell Fish, The Civil Service and the Patronage 209–29 (1905); Kurt Hohenstein, Coining Corruption: The Making of the American Campaign Finance System, 1865-1883, at 13–61 (2007); Ari Hoogenboom, Outlawing the Spoils: A History of the Civil Service Reform Movement 198–252 (1961); Raymond J. La Raja, Small Change: Money, Political Parties, and Campaign Finance Reform 17–26 (2008); George Thayer, Who Shakes the Money Tree? American Campaign Financing Practices from 1789 to the Present 37–51 (1974).

6 *Ex Parte* Curtis, 106 U.S. 371, 375 (1882).

7 Hohenstein, *supra* note 4, at 24; *see also* Hoogenboom, *supra* note 4, at 226-27.

8 *See, e.g.,* Paul Verkuil, *The Purposes and Limits of Independent Agencies,* 1988 Duke L. J. 257, 257; Jonathan Turley, "The Rise of the Fourth Branch of Government," Washington Post, May 24, 2013 (http://www.

By understanding the political background of this era, it becomes clear that the "independent agencies" actually had their origins in a new political dependence on special interests. This story shows how sudden changes in campaign finance triggered dramatic changes in constitutional design and set the foundation for the modern executive branch.

This Article focuses on two pivotal events in 1886-1887 that were shaped by this transformation in campaign finance and, in turn, fundamentally shaped the modern executive branch: the repeal of the Tenure of Office Act (which re-established a more "unitary" executive and increased presidential power over most federal offices), and the creation of the Interstate Commerce Commission (the "ICC") in 1887, which began the carving out of independent agencies that eventually limited presidential power. This Article does not argue that the changes in campaign finance caused the passage of the Interstate Commerce Act, but it suggests that those changes shaped the design of the ICC and shifted more political support for a commission, rather than reliance on the courts for enforcement.

Scholars look back to the ICC as a foundation for modern administrative law and the model of the modern independent agency.[9] Legal scholars often explain that independent agencies are designed to promote expertise and bureaucratic autonomy by insulating policymaking from partisanship and political pressure.[10]

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washingtonpost.com/opinions/the-rise-of-the-fourth-branch-ofgovernment/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html).

9 *See, e.g.*, Donald L. Carper, John A. McKinsey & Bill W. West, Understanding the Law 207–08 (5th ed. 2008); Lawrence M. Friedman, A History of American Law 439 (2d ed. 1985) (stating the creation of the ICC in 1887 "has been taken as a kind of genesis" of American administrative law); Jerry L. Mashaw, Creating The Administrative Constitution: The Lost One Hundred Years of American Law 3–5 (2012) (summarizing the scholarly conventional wisdom regarding contemporary administrative law); 1 David Schultz, Encyclopedia of the United States Constitution 387 (2009); Bernard Schwartz & Erwin Webb, Administrative Law § 1.2 (A. James Casner et al. eds, 2d ed. 1984); Harold Bruff, *Presidential Power and Administrative Rulemaking*, 88 Yale L.J. 451 (1979); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189, 1189 (1986); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 Iowa L. Rev. 601, 605–06 (2005); William H. Hardie III, Note, *The Independent Agency After* Bowsher v. Synar—*Alive and Kicking*, 40 Vand. L. Rev. 903, 906–07 (1987).

10 Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 19-20 (2010) ("The main aim in creating an independent agency is to immunize it, to some extent, from political pressure. ... Thus, the New Dealers hoped to create apolitical agencies that would be guided by information and not politics."); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2376 (2006) (noting that independent agencies "were conceived as means to limit the sphere over which partisan political power could exert control"); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 Emory L.J. 423, 429 (2009) (stating that independent agencies are designed to "ensure regularity and the rule of law by depoliticizing governmental administration"); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 Duke L.J. 257, 260 (noting that independent agencies are "designed to isolate those decisionmakers from politics"); *see also* Abner Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123 (1994); Abner Greene, *Discounting Accountability*, 65 Fordham L. Rev. 1489 (1997) (discussing the constitutionality of independent agencies); *cf.* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. Rev. 459, 463 (2008) ("Independent agencies are preferred to executive agencies because long commissioner tenure, staggered terms, and political insulation are intended to facilitate a non-political environment where regulatory experts can apply their knowledge to complex

One basic model for modern American independent agencies is a commission or board whose members are appointed by the President and confirmed by the Senate to a term of six years or more, and whom the President may remove only for cause, not at will.[11] The first federal commission in this mold was the ICC.[12] The Interstate Commerce Act was the first to use the formula of job security that would continue into the statutes creating independent agencies in the twentieth century: a commissioner may be removed only for "inefficiency, neglect of duty, or malfeasance in office."[13] Their staggered six-year terms and bipartisan requirements also were a model for twentieth-century independent agencies.[14]

The existing scholarship generally contends that Congress was "shifting responsibility," decreasing its own power so that it could punt difficult issues and delegate them to a new commission.[15] The standard histories of the ICC focus mainly on the substantive aspects of the Interstate Commerce Act, but do not pay enough attention to the institutions, procedures, and enforcement. Stephen Skowronek concluded that Congress wanted to remove "policy decisions from the legislative arena. ... Indeed, ... no one interest predominated except perhaps the legislators' interest in finally getting the conflict of interests off their backs and shifting it to a commission and the courts."[16] Morris Fiorina's trilogy of articles reached the same general conclusion, and even labeled Congress's goal "SR" for "shift the responsibility" in his formal model.[17]

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policy problems.").

11 Several commissions that are often described as independent lack statutory protection of removal only for cause, and instead rely on extended terms. Securities Exchange Act of 1934 § 4(a), 15 U.S.C. § 78d (2012); 47 U.S.C. § 154(c) (2012) (stating FCC "commissioners shall be appointed for terms of five years"); 52 U.S.C. § 30106(a)(2)(A) (2014) ("Members of the [Federal Election] Commission shall serve for a single term of 6 years."); 42 U.S.C. § 2000e-4 (2012) ("Members of the [Equal Employment Opportunity] Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years."). The terms are fixed and set to have longer terms than the President who appointed the commissioners, but the statutes are silent about the conditions of dismissal—and silence has been interpreted to allow dismissal without cause. *See* Vermeule, *supra* note 1, at 1165–81; *see also* William N. Eskridge Jr. et al., Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy (5th ed. 2014); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769 (2013).

12 *See* Interstate Commerce Act of 1887 § 11.

13 *Id.*

14 *Id.*

15 *See* Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877-1920, at 145–48 (1982); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 Pub. Choice 33, 46–49 (1982) [hereinafter Fiorina, *Process*]; Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. Econ. & Org. 33, 46-47 (1986) [hereinafter Fiorina, *Uncertainty*].

16 Skowronek, *supra* note 15, at 145, 148.

17 Fiorina, *Process*, *supra* note 15, at 46-49. Fiorina asked, "What incentives lead legislators to delegate to unelected officials not only the administration but even the formulation of public policy?" Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, *in* Regulatory Policy and the Social Sciences 175, 176 (Roger G. Noll ed., 1985). Positive political theorists have offered an additional observation, but it has not been picked up by historians or legal scholars. In one brief passage, Fiorina suggests that the Senate may have had a different agenda, but this suggestion has not yet been explored in the historical sources, nor has it crossed over from positive political theory into the historical or administrative law scholarship. Fiorina, *Uncertainty*, *supra* note 12, at

My research points to the opposite interpretations. The Senate was seizing power, not avoiding it. The President was also increasing his own power as well, in stark contrast to the anachronistic notion that the ICC was conceived as an "independent agency." First, this Article focuses on the House bill, the Senate bill, and the final statute to show how the Senate's creation of the ICC was actually a power grab. The ICC originally was a move away from a far more independent enforcement model (private civil litigation in the courts) towards a model of shared political accountability (a commission nominated by the President and confirmed by the Senate for six-year terms). Baselines and context are crucial for understanding this question of independence. In the twenty-first century, the baseline is an executive agency under presidential control, and by comparison, the ICC model (presidential appointment with Senate confirmation to fixed longer terms, and dismissal only for cause) is relatively independent from presidential control. But in the late nineteenth century, the ICC really was a move away from enforcement by an independent judiciary to an executive agency that was relatively accountable to both the President and the Senate. Moreover, Congress gave the Interior Department control over the funding of the ICC and its supporting personnel, and it gave the Department of Justice control over litigating the ICC rulings. Once Congress repealed the Tenure of Office Act (at the same time it created the ICC), both the Interior Department and the DOJ were under a more unitary model of presidential power, and placed the ICC more closely in the President's power.

The curiosity here is that Senators were simultaneously surrendering other powers by repealing the Tenure of Office Act and giving up substantial control over federal offices.

This Article suggests that Senators were reacting to the new political campaign structure. Senators were elected by state legislatures until the Seventeenth Amendment in 1913.[18] Senators did not need to raise their own cash for direct public campaigning, but they had an equally pressing need to bring home patronage and assessment cash for their state and local party machines. With patronage kickbacks suddenly criminalized, Senators had less reason to hold onto their control over officers, and a reason to find new sources of funding to keep their state legislatures satisfied. When a political controversy over the Tenure of Office Act struck in 1886, the law was newly vulnerable, and Senators

46–47. *See also* Thomas W. Gilligan, William J. Marshall & Barry R. Weingast, *Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887*, 32 J.L. & Econ. 35, 47–48 (1989) (taking Fiorina's observation as an invitation, and also linking this observation to the historical literature on the development of the administrative state and independent agencies).

18 *See* U.S. Const. art. I, § 3, cl. 1–2.

abandoned it more readily. Special interest money—including railroad money—was becoming more important to political war chests, and Senators created an institution that would make the Senate long-term power brokers. In the bigger picture, Senators were increasing their overall power by playing a role in selecting and retaining the members of the ICC. Recent scholars have observed that the interests at the time—the populist reformers and the railroad executives—could not tell if the Interstate Commerce Act was a win or loss.[19] The provisions of the Act were full of compromises, and they were open-ended. This Article suggests that the procedures created by the Act were more important than the indeterminate substance, and that this indeterminacy made the President and Senate the joint winners. Their nominations and confirmations would swing the ICC one way or the other, and thus, the competing interests would have to spend to make sure the President and Senate would appoint their supporters to the Commission. On the House floor, Congressman Bragg, a critic of the Commission, connected these dots:

> [I]f Congress votes for the appointment of persons who are to determine ultimately upon the construction of the law it passes, we force railroad capital into the canvass to secure the election of a man who will bend his knee to their wishes in order to secure their support. Therefore I regard it as a dangerous exercise of power, and one which ... will ultimately hang a millstone around their necks by which they will be drowned in the deep sea.[20]

Part I explains the fall of the kickback/assessment system of party campaign finance and the resulting rise of modern campaign finance by special interests. Part II tells the story of the Tenure of Office Act's passage, revision, and sudden repeal, which establishes some important background for the ICC. In January 1887, Congress repealed the Tenure of Office Act, which meant that the Senate abandoned its power to block the President from removing "principal" executive officers, giving the President the unilateral power to dismiss Department of Justice principal officers for the first time. The repeal of the Tenure of Office Act meant that the President had more direct control over the new ICC, and executive officers who influenced the ICC and enforced its rulings had less job security. Part III turns to the ICC's creation. When the Senate surrendered its power over appointees by repealing the Tenure of Office Act, and simultaneously pushed for the ICC, it signaled a transition away from nineteenth-century

19 *See, e.g.*, Richard White, Railroaded: The Transcontinentals and the Making of Modern America 356 (2011).
20 18 Cong. Rec. 842 (1887).

campaign finance by patronage and towards twentieth-century campaign finance from industry and special interests. The conclusion offers some thoughts about the shift from private to public enforcement, from the local to the national, the history of campaign finance, the growth of presidential power, and the surprising origins of independent agencies.

I. From Patronage to Special Interests

Patronage financed the mid-nineteenth century party system. Corporations and special interests financed the twentieth century party system. The turning point was the 1880s,[21] and this transformation was the political background as the administrative state emerged. One scholar observed that the campaign finance system underwent its two most significant changes in the 1880s and 1890s, and then in the post-Watergate Era of the mid-1970s.[22]

One leading historian observed that party coalitions "were held together only by the cohesive power of public plunder."[23] Elected officials benefited from party machines, and to reward their supporters, those politicians appointed them to well-paying government offices. Parties then required those appointees (and the elected leaders) to pay a significant percentage of money—an "assessment"—back to the party. The assessment system was a key mechanism of the spoils system, and it "became the most important financial source for campaign contributions."[24] One assessment form letter from Pennsylvania demanded, "Two percent of your salary is ___. Please remit promptly. At the close of the campaign we shall place a list of those who have not paid in the hands of the head of the department you are in."[25] Philadelphia officials who earned over $10,000 a year had to pay 12 percent. In Louisiana, government officials paid a flat 10 percent. Once an official paid off his local, state, and federal party assessments, he was usually paying far more than 10 percent in total.[26] The years after the Civil War ushered in an era of rapid growth for the federal government. The number of federal employees skyrocketed in the Civil War years and during Reconstruction, and then that number doubled from 51,000 employees in 1871 to 100,000 in 1881.[27] Systematic assessments from the growing number of

21 Hohenstein, *supra* note 5, at 48.
22 *Id.*
23 *Id.* at 15.
24 *Id.* at 19; *see also* Hoogenboom, *supra* note 5, at 2–5; Robert Maranto & David Schultz, A Short History of the United States Civil Service 58–59 (1991); E.L. Godkin, *The Democrats and Civil Service Reform*, The Nation, Dec. 2, 1880, at 388.
25 Thayer, *supra* note 5, at 38.
26 *Id.*
27 Hohenstein, *supra* note 5, at 14; Morton Keller, Affairs of State: Public Life in Late Nineteenth Century America 239 (1977).

federal officeholders "provided the main and steadiest source of campaign contributions."[28] Assessments were becoming an increasingly lucrative way to finance *both* parties in the 1860s and 1870s, because even if Republicans controlled the executive branch, Senators and Congressmen wielded enormous control over appointments and patronage.

But at the same time, the growth of government employment also exposed the assessment system to new scrutiny as a source of waste and corruption. A wing of the Republican Party, the "liberal" reformist wing, was outraged by corruption scandals during the Grant administration and turned against patronage. The reformers began their attack on assessments immediately after the Civil War. Congress passed the Naval Appropriations Act, which required the dismissal of any officer who requested political payments from Navy Yard employees.[29] Then, in 1876, they steered the Anti-Assessment Act through Congress, part of a "sea change in the manner in which political parties would raise and spend campaign funds."[30] Congress was primarily focused on cutting the budget in 1876, and one source of cuts was the reduction of federal salaries. Congressmen knew that federal officers had been paying assessments from their salaries, so their solution would leave officers with the same take-home pay: reduce salaries by 10 percent, and also eliminate assessments (by criminalizing the requests) so that employees could take home the same pay, while saving the taxpayers the money that would have gone to the party machines.[31] The result was the bipartisan Anti-Assessment Act, and it passed the House by such a large margin that only a voice vote was necessary.[32]

...

The Anti-Assessment Act and the decision in *Ex Parte Curtis* together "severed political parties from their most lucrative source of campaign funds."[33] Historians have concluded from the available evidence that between 1876 and 1883, political assessments "declined precipitously."[34] The key development in 1883 was the passage of the Pendleton Act, which strengthened the prohibitions on political assessments.[35] In the congressional debates, the members of Congress declared that the assessment provisions were the most important part of the

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28 Hohenstein, *supra* note 5, at 15.
29 *Id.* at 16.
30 *Id.* at 13–14.
31 *Id.* at 21.
32 *Id.*; James K. Pollock, Jr., Party Campaign Funds 7 (1926).
33 *Id.*
34 *Id.*; *see also* Hoogenboom, *supra* note 5, at 226-27.
35 Hohenstein, *supra* note 5, at 25, 27. *See also* Regulation and Improvement of Civil Service, S. Rep. No. 46-872 (3d Sess. 1881); Hoogenboom, *supra* note 5, at 234; Keller, *supra* note 24 at 243; Ari Hoogenboom, *The Pendleton Act and the Civil Service*, 64 Am. Hist. Rev. 301, 303 (1959); *Reform Cheap for Cash*, N.Y. Times, June 9, 1876, at 4.

bill.[36] Thereafter, assessments again dropped sharply. "The post-*Pendleton* weaning of the parties from assessment-sourced funding, coupled with the growth and rising influence of national corporations within the political system, by 1896 reshaped the structure of campaign financing that would remain essentially unchanged until 1971."[37]

These events "caused both political leaders and American businessmen to reexamine their role in national campaign finance issues."[38] Just as the funds from assessments were drying up, the costs of elections were dramatically increasing in the 1880s and 1890s. Corporate spending more than replaced the assessments—it created the modern campaign finance system.[39] The prohibitions on assessments coincided with the sharp growth of corporate power, so businesses were well positioned to step in and take over party politics. Both Democrats and Republicans relied more and more heavily on corporate spending, and they found new ways to extract donations from targeted businesses. One technique was the "squeeze bill" or "frying the fat," named for holding corporations' feet to the fire and frying the fat out of them with threats of hostile legislation.[40] Party bosses in the 1880s made quid-pro-quo deals to drop the legislation after the targeted corporations paid up.[41]

In a recent history of campaign finance, Robert Mutch identified the years from 1884 to 1910 as a transitional period. The 1884 election was ruled by the "corporate capitalist system that was still taking shape."[42] Crony patronage had morphed into crony capitalism. In the 1884 election, James Blaine, the Republican nominee, had doubled down on the party's business support from major mercantile elites, Wall Street bankers, and the railroad "robber barons" such as Jay Gould. The *Brooklyn Daily Eagle* warned, "Blaine might be elected but Jay Gould would be president."[43] The *New York Times* called Blaine "the tool of Jay Gould."[44] The Democratic Party had become a "second business party" under Grover Cleveland, following the model of the Republicans.[45] His roster

36 Hohenstein, *supra* note 5, at 29-30.
37 *Id.* at 48.
38 *Id.* at 14; *see also* Hoogenboom, *supra* note 5, at 195–97; Robert D. Marcus, Grand Old Party: Political Structure in the Gilded Age, 1880-1896, at 59–100 (1971); Mark Wahlgren Summers, The Era of Good Stealings (1993); Paul P. Van Riper, History of the United States Civil Service 85, 110–11 (1958); Dean McSweeney, *Parties, Corruption, and Campaign Finance in America, in* Party Finance and Political Corruption 37, 37–60 (Robert G. Williams, ed., 2000).
39 Hohenstein, *supra* note 5, at 31.
40 Thayer, *supra* note 5, at 46–47.
41 *Id.*, at 48.
42 Robert E. Mutch, Buying the Vote: A History of Campaign Finance Reform 6 (2014).
43 *Id.* at 13.
44 *Id.*
45 *Id.* at 6.

of business supporters was not quite up to Blaine's level, but he was able to line up his own Gilded Age railroad and manufacturing barons.[46] Grover Cleveland had been a strong advocate for civil service reform, and at the same time, he led the Democratic Party to compete with the Republicans for business support.[47] The 1888 campaign was even more of the same.[48] Republicans had the edge in corporate spending, but the Democrats were catching up.[49]

The 1896 election was peak corporate involvement, an election that stands out as the most expensive election in American history (and by far the most as a matter of per capita spending or as a percentage of GDP).[50] Political financier Mark Hanna raised $3.5 million for McKinley, and McKinley's total was almost $7 million, compared to just a few hundred thousand dollars for Bryan.[51] Ever since those elections of the 1880s and 1890s, large donations from special interests have been the foundation of the American campaign finance system. That transformation in party politics shaped major decisions about power in the executive branch: with the decline of the assessment and spoils politics, the Tenure of Office Act was less valuable. Meanwhile, politicians could increase their political control over economic policy and accordingly, these politicians could attract more corporate contributions to influence policy in one direction or another. A commission of specialists—nominated by the President and confirmed by the Senate to six-year terms—was a more accountable entity than the judiciary, and the powerful railroads would need to find ways of influencing those who appointed a new commission regulating railroads.

II. The Repeal of the Tenure of Office Act

Some scholars who endorse the unitary executive theory have treated the Tenure of Office Act as a historical aberration and have suggested that its repeal was confirmation of a coherent theory of presidential power. This Article offers a new interpretation by focusing on the change in campaign finance politics and on the personalities and factional politics driving the repeal and a strange Senate acquiescence. There are a few reasons why the Senate surrendered a significant amount of political power with no obvious return, but one bottom line is that Congress had recently prohibited assessments, the Senators derived far less of a political

46 *Id.* at 14.
47 *Id.* at 12–13.
48 *Id.* at 15–16.
49 Thayer, *supra* note 5, at 39–40.
50 Matt O'Brien, *The Most Expensive Election Ever...1896?*, The Atlantic (Nov. 6, 2012), http://www.theatlantic.com/business/archive/2012/11/the-most-expensive-election-ever-1896/264649/ (adjusted dollars, based on percent of GDP and/or per capita spending).
51 Hohenstein, *supra* note 5, at 60.

or financial benefit from controlling federal offices. As other events weakened the Tenure of Office Act, Senators had less of a self-interested reason to fight to preserve it. Congress repealed the Tenure of Office Act at the same time it passed the Interstate Commerce Act. The changes in campaign finance shaped both events, but they are not directly related. Nevertheless, the repeal of the Tenure of Office Act was significant for interpreting the ICC's creation. It meant that the ICC would be controlled by a more unitary executive, and by executive officials (U.S. Attorneys and the DOJ, as well as Interior Department principal officers) with less independence and less job security.

...

The result was that the modern President wielded even stronger authority over most of the Executive branch, by being able to fire most officers at will. Independent agencies represent an exception to this power over the last few decades, and that model began with the Interstate Commerce Act.

III. The Interstate Commerce Act

A. The Creation of the Interstate Commerce Commission

The repeal of the Tenure of Office Act set up the context of a shifting debate over Senatorial power in the ICC's creation. Senators had abandoned some of their power over federal offices in general, but then they shifted their focus to winning more power over regulation by having control over the personnel on the ICC, rather than handing the interpretation of a statute over to an independent judiciary. The major railroads had more influence over the Senate, and the Senators would reap more of those political and financial benefits by increasing their influence over rail commerce over the long haul.

Farmers, merchants, and other shippers denounced the railroads' predatory pricing and demanded regulation. They complained that the railroads charged a higher rate for short hauls than for long hauls, which they alleged was price discrimination, but which railroads defended as economies of scale. States began to regulate railway rates and to create commissions.[52] The Granger movement representing agrarian interests called for federal legislation to prohibit price fixing, price "discrimination," pooling, and monopolistic practices.[53] Between 1868 and 1886, more than 150 bills were introduced in Congress for some sort of federal regulation of railroads, but they died, until the Supreme Court decided *Wabash*

52 *See* 2 American Landmark Legislation: The Interstate Commerce Act (Irving J. Sloan ed., 1976) [hereinafter Landmark Legislation].

53 *See generally* Elizabeth Saunders, Roots of Reform: Farmers, Workers, and the American State, 1877-1917 (1999).

in 1886, limiting state power on railway regulation under the dormant commerce clause doctrine.[54] The elimination of much state-level regulation sparked a broader movement for federal legislation.[55] Joining the calls from the West and South, from merchants and producers, the railroad companies recognized advantages in national solutions, in uniformity, reliability, and centralization—but only if they thought they could wield power over those new centralized powers. Railroads supported a commission they thought they could control. In the end, the Senate produced a commission that reflected more Senate control and more presidential control, though the commission was still quite vulnerable to the railroads, as well.

This Article suggests additionally that the creation of the commission itself reflected a move towards the railroads' interests, towards political control, and towards the reshaping of the Senate's power.[56] To this end, this Article focuses more closely on the institutional design of the commission. The Democratic House, favoring more agrarian interests against the railroads, repeatedly passed the Reagan Bill, named for John Reagan, the Texas Democrat who had been fighting against railroad power for over a decade. Reagan had strong support in the South and West, but strong opposition from the Northeast and the railroad industry.[57] Meanwhile, merchants and consumers joined the call for some kind of federal solution after the Supreme Court's decision in *Wabash*. The Reagan Bill focused primarily on the standard set of substantive limitations on railway rates.[58] It required railways to charge reasonable rates, it prohibited rate discrimination, pooling, differentiation between short hauls and long hauls, and it required companies to publish schedules and rates.[59] But its provisions for enforcement should not be overlooked: the bill stated explicitly that these provisions would be enforced by private plaintiffs who had been damaged by violations, and who could choose to sue in *state* or *federal* court.[60] Private plaintiffs could turn to U.S. Commissioners (a kind of marshal)

54 Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886).

55 Robert E. Cushman, Independent Regulatory Commissions 40–41 (1941); Lawrence Friedman, A History of American Law 394 (2d ed. 1973); Skowronek 147–51.

56 Fiorina offered a suggestion about the Senate: "If the power of confirmation is significant, and I think it is, then other things equal, senators should be more confident of their future capacity to influence the administrative process and therefore should provide greater support for delegation than congressmen." Fiorina, *supra* note 12, at 33, 46–47 (1986). *See also* Gilligan et al., *supra* note 17, at 47–48 (citing Fiorina for the proposition that "[a] commission was valuable to senators because the Senate confirms appointees to the commission and therefore could bias appointees in the railroads' favor.") Historians, administrative law scholars, and American Political Development ("ADP") scholars have not picked up on the suggestion that the Senate had an opposite impulse: adopting a commission would keep the Senate in the game through the confirmation and reconfirmation process.

57 17 Cong. Rec. 7751–56 (1886). For party and geographical analysis *see To Pass S.1532, An Act to Regulate Interstate Commerce*, Govtrack.US, https://www.govtrack.us/congress/votes/49-1/h193 (last visited July 15, 2015). *See also A Biographical Congressional Directory: 1774 to 1903* (1903).

58 H.R. 6657, 49th Cong. (1886) (Reagan bill).

59 *Id.*

60 *Id.*

for help with subpoenas and finding witnesses, but it included no provisions for public prosecution or government litigation. Reagan strongly opposed any proposals for commissions.[61] Instead, his bills "called for direct recourse to the courts."[62] Reagan explained on the House floor: "The bill which we report to the House … is based upon the theory of furnishing civil remedies in the courts of ordinary jurisdiction to parties for the most conspicuous grievances complained of in railroad management."[63] Reagan's committee explained that it would be preferable to enforce regulations "through the instrumentality of the ordinary courts of justice … than by the orders of a commission."[64]

…

On the House floor, Reagan explained why he trusted federal courts and not commissioners, though this is surprising from a populist: federal judges had broad jurisdiction, and there were many more of them, whereas five commissioners would specialize in railroad regulation.[65] It would be far easier for the railroads to concentrate their resources on capturing a small, specialized commission, rather than the diffuse generalist courts.[66] The commission's specialization would effectively paint a target on it for the railroads to exert their political pressure. There were too many judges with too diffuse a docket to justify the railroads spending heavily to influence judicial nominations. But the railroads would surely concentrate on controlling the five seats on a railroad commission.[67]

There is no smoking gun connecting the supporters of the commission to an agenda to extract railroad campaign contributions. But there is something of a bloody knife: the opponents of the commission made this link …

There was one other significant way in which the ICA reflected more accountability within the executive branch. Cullom placed the ICC within the Interior Department, and had the Secretary of the Interior pay the salaries and expenses.[68] The final bill gave even more authority to the Secretary of the Interior over budget,

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61 Kolko, *supra* note 133, at 43; Skowronek, *supra* note 13, at 144.

62 Skowronek, *supra* note 13, at 144.

63 H. R. Rep. No. 49-902, at 1 (1886).

64 *Id.* at 1, 3.

65 *Id.*

66 *Id.* ("[If] we trust the President to appoint our judges, [then] why not to appoint railroad commissioners? The answer to this is that judges are not selected to deal with one single great interest, but for the general administration of the law, embracing all questions for judicial determination under the Constitution, treaties and law of the United States; while these commissioners are to deal with questions which relate to the duties of common carriers alone, but questions of daily occurrence, and interests involving billions of dollars, concentrated in a few persons, some of whom have proven themselves utterly unscrupulous.").

67 Moreover, even if many federal judges were pro-railroad, plaintiffs—the farmers, producers, and shippers—could "forum shop" among the federal trial courts, taking advantage of the diffusion of trial judges to pick a more sympathetic judge.

68 *Id.* at § 15.

employees, and salaries.[69] Between the President's authority over the Interior and the Department of Justice, the ICC would be constrained by the political branches, not independent from them. At the same time, some defenders of the Reagan bill and private enforcement warned that the Cullom commission-public enforcement model was far too vulnerable to capture by the railroads and control by the President.[70] One Congressman warned, "But it seems to me that it is utterly indefensible legislation, upon whatever theory of this bill you proceed, to create commissioners with the power [over cities and railroads] with an exposure to temptation in the way of corruption which would not stand at millions and hundreds of millions of dollars."[71]

...

The point is that the Senate was focused on defining its own role and its own power over executive power in this precise moment. The Senate as an institution abandoned one kind of power—the power to block removals—that was outdated and out of sync with the new prohibitions on assessments and with a new era of campaign finance. Having lost some patronage power, the Senate found access to special interests and their cash. The Senators relied on a traditional power, the confirmation process (and of course, re-confirmation process when terms were running out), to expand their authority in a new frontier: economic regulation.

Conclusion: Histories of Presidential Power and the Modern Administrative State

Money matters. The history of campaign finance shaped American government in fundamental ways. When the parties relied on assessments on officeholders' salaries, politicians fought over control over those offices, and protected their shared power over the executive branch. When that funding was banned, politicians lost interest in most middling offices, but created new institutions to tap into new financial resources: special interests, in the form of mammoth railroad corporations. They created a new model for executive power—not in terms of independence, but precisely a model of political influence in the context of the late nineteenth century and the alternative of judicial power. A congressman critical of the ICC argued that Congress as "forc[ing] railroad capita" into the appointment process, and would be "hang[ing] a millstone around the [commissioners'] necks."[72] Today's independent agencies have their roots in nineteenth-century political accountability and the emerging power of special interests.

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69 An Act to Regulate Commerce (ICA), ch. 104, 24 Stat. 379, 386 (1887).
70 Cong. Rec., 47th Cong., 1st Sess. (1882), appendix 141.
71 18 Cong. Rec. 639, 49th Cong., 2nd Sess. (1887).
72 18 Cong. Rec. 842 (1887).

To recap, there were three main reasons why Congress's creation of the ICC was a move towards political accountability more than a move towards political independence. First, the Senate bill's commission model must be contrasted with the alternative, the House bill's judicial enforcement model, rather than with the anachronistic twentieth-century executive branch model. Even if commissioners served staggered six-year terms with more job security than executive appointees, they were still more politically accountable than Article III judges. Even if regulatory enforcement ended in court, Congress delegated rule-making and interpretive process to the commissioners, not the judges. Second, the enforcement mechanism was much more accountable. The House bill's model relied on private plaintiffs bringing civil suits based on statutory claims. Congress instead adopted the Senate bill's reliance on the Department of Justice for enforcement. Third, Congress also assigned the power over the ICC's budget and staffing to the Interior Department. As a result, the ICC depended heavily on executive power and the administration's political support. And given how Congress had just repealed the Tenure of Office Act, those executive officials had less job security and were suddenly more accountable to presidential administration than they had been before.

...

Let's consider the long-term effect of these two bills together, the repeal of the Tenure of Office Act and the Interstate Commerce Act. If the Senate had continued to protect the Tenure of Office Act in the late nineteenth century, it might have entrenched its power into the Progressive Era. When the Supreme Court turned its attention to similar provisions covering postmasters in *Myers v. United States* in 1926, those provisions would not have been outliers; they would have been a long-standing norm since the passage of the original Tenure of Office Act in 1867. It is not inevitable that the Supreme Court would have overturned long-term, widespread practices. Moreover, the Senate could have adapted such power for a new age of professionalization and increasing job security for experts. Framed in this way (rather than being badly framed by Senator Edmunds and Duskin in 1886), the Tenure of Office Act may have been viewed as more legitimate and useful. The point is that an alternative structure of the administrative state was more than just imaginable, and modern administrative state might have followed a more inter-branch path with much more Senate oversight over enforcement and regulation.

Here are two key points: First, despite the claims of historians and American political development scholars, the independent agency did not begin with the ICC in 1887. Bureaucratic autonomy and professional independence did not emerge fully formed, and in fact, the Senate and the President were not committed to autonomy and independence. The House version of independence was private and decentralized. The ICC's creation was only possible because the Senate, the President, and

the railroads were confident that they could shape and control this new institution. But at the same time, they were also deeply committed to this new institution having expertise and legitimacy. Only over time, as the ICC earned more trust were the political branches assured that they could grant the ICC more independence. The political branches also realized that the ICC needed more power, and they were willing to trust the ICC with that increased power. The story of the Federal Reserve and other independent agencies of the "Fourth Branch" of Government follows a similar evolutionary path from accountability toward independence.

Second, independence is a relative concept, and the ICC's "independence" is a function of which baseline one assumes. The Democratic House bills had relied on a private enforcement model in federal and state courts.[73] It would have been hard to construct a more independent model of regulation in the nineteenth century than a system of enforcement by private plaintiffs before life-tenured judges. The state courts were not independent from politics, because most state judges were elected to short terms, but they were obviously independent from the federal government, and many state judges had become more populist and anti-railroad.[74] The significance of the ICC is that expectations changed dramatically over time. The Senate intended to create an accountable agency at a time when judicial power was the alternative, and at a time when a commission gave them more access to special interest money.

They also created a decisive shift from a pre-modern common law model of enforcement by private plaintiffs to a modern administrative model of enforcement by public prosecutors, and a shift from local private contracting parties as merchants and producers to national public interests of consumers and national economic growth. Instead of being a model of independence, the ICC introduced more political accountability and more influence by corporate interests. This moment was a decisive turning point away from the early party system, away from local patronage politics, and towards the twentieth century's nationwide regulation, nationwide campaign finance politics, and special interests focusing on control of the administrative state. This story shows how sudden shifts in campaign finance changed the structure of American government and laid the foundation for our peculiar executive branch.

73 H.R. 6657, 49th Cong. § 7 (1886) (Reagan bill).

74 Barry Friedman, The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution (2009); Jed Handelsman Shugerman, The People's Courts: Pursuing Judicial Independence in America 144–58 (2012).

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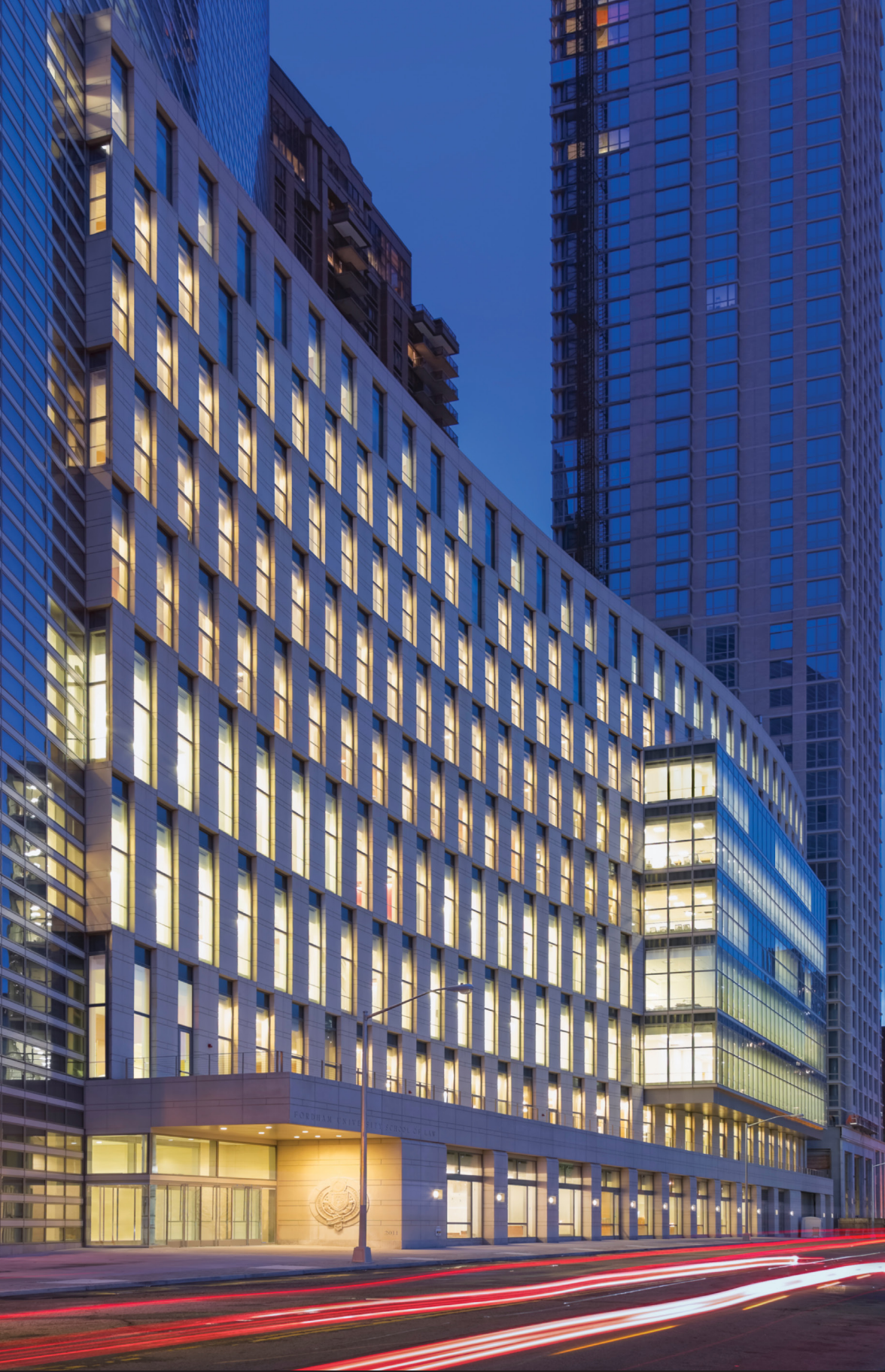

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