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Articles

Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City

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At least since the early twentieth century, informal specialized prostitution courts have tried to double as social welfare agencies. For this reason, prostitution courts illustrate in particularly explicit ways how public welfare administration and criminal court administration share similar ideas and practices and how these ideas and practices reinvent themselves over time. This Article traces three moments of prostitution court reform in New York City: the New York Women's Court that opened in Manhattan in 1910, the Midtown Community Court that opened in Manhattan in 1993, and four new prostitution courts that opened in New York City in 2013. It examines how court reformers in each moment used informal procedure to promote social welfare, social control, and individual responsibility, and it ties each approach to changing conceptions of the American welfare state. Ultimately, the Article argues that the genealogy of prostitution courts illuminates for the present how court reformers are using the language of trauma to negotiate the welfare logics of today.

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Introduction

Over the last three decades, government services for the poor and marginalized have dwindled at the same time as the population of people in prison has dramatically increased. But we have not simply witnessed the retrenchment of particular welfare state programs alongside the

intensification of carceral ones.[1] Today, the criminal justice system provides its own welfarist institutions. In particular, informal 'problem-solving' courts administer social services to drug addicts, homeless people, people with mental illness, prostitution defendants, juveniles, veterans, and other vulnerable populations in an effort to protect them from exploitation and abuse, as well as to discourage them from antisocial and criminal behavior. Michael Dorf has thus remarked that 'it does not take a great leap of the imagination to envision a not-so-distant future in which much of what front-line courts do is monitor the delivery of services.'[2]

This Article presents a genealogy of prostitution courts in New York City in order to argue that informal criminal courts do not simply monitor or connect defendants to social services; rather they reflect and reconstitute state welfare programs and state social controls under different temporal economic and political conditions. Indeed, in the United States, criminal courts doubling as social agencies do not only portend the future, they also invoke the past. In the early twentieth century, before the rise of a modern national administrative welfare state, Progressive-era 'socialized' courts explicitly functioned as welfarist institutions. These courts articulated particular conceptions of the deserving poor, justifications for material and psychological interventions, and practices of rehabilitation and moral reform.

During the Progressive era, prostitution represented a paradigmatic category of crime newly understood as a matter of social responsibility and thus of criminal court reform. Progressive-era reformers, broadly involved in efforts 'to correct the imbalance of economic power associated with the new industrial order,'[3] argued that concentrated and exploitative markets for sex combined with exploitative and immoral labor markets to victimize women. In 1910, amidst a widespread effort to 'socialize' urban municipal courts, New York court reformers launched the country's first Women's Court in Manhattan, which promised to provide prostitution defendants with

1. Several scholars read welfare retrenchment and the expansion of criminal law together (to be sure, in complex, incomplete, and disaggregated ways). *See generally* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007); BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2011); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009); Julilly Kohler-Hausmann, *Guns and Butter: The Welfare State, the Carceral State, and the Politics of Exclusion in the Postwar United States*, 102 J. AM. HIST. 87, 88–89 (2015).

2. Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 944 (2003). Dorf has also described problem-solving courts as "more akin to decentralized administrative agencies than to conventional adjudicators. Michael C. Dorf, *An Institutional Approach to Legal Indeterminacy* 1 (Columbia Law Sch. Pub. Law & Legal Theory Paper Grp., Paper No. 02-44, 2002), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=326780 [https://perma.cc/SS8P-FS6N].

3. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 106 (3d ed. 2008).

moral and social pedagogy and a measure of material aid. The Women's Court largely failed to enact this rehabilitative vision. But the arguments for state paternalism that the court embodied both reflected and prefigured broader demands for state intervention to mitigate the insecurity and instability produced by unregulated markets—claims that, in the mid-1930s, shaped the rise of a modern administrative welfare state, including, for example, protections for different groups of labor and the creation of a minimum means-tested (if also stigmatized) public assistance program meant to achieve a measure of poverty alleviation.

It would not be until the 1990s that the United States would witness another wave of criminal courts designed explicitly as social governance agencies that rivaled Progressive-era courts in scope and ambition. Analysts and advocates widely (indeed hyperbolically) described these new courts as state welfare programs. Timothy Casey, for example, observed that '[t]he failure of various agencies has led to the dumping of *all social problems* into the laps of the courts."[4] Or, as Judge Peggy Hora put it: "Should we be the ones to be providing these social services and interventions? I don't know. But I will tell you one thing. Nobody else is doing it, and if not us, who? And if not now, when?"[5]

Of course, when contemporary socialized—this time called 'problem-solving'—courts emerged at the end of the twentieth century rather than at the beginning, they did so under very different political, economic, and social conditions. As such, they reflected and reinforced an ethos of individual, rather than social, responsibility that was transforming state welfare at the time into more market-inflected and minimalist governance programs. From this perspective, prostitution defendants were treated as an unexceptional class of low-level offenders suffering from mental illness and drug addiction. And problem-solving courts offered them social services alongside new social controls—typically, programs designed to teach them how to make more informed and responsible choices to 'change their lifestyles. "[6]

This responsibilization model has remained the dominant welfarist frame for many, if not all, American problem-solving courts. That is, until very recently. In 2013, the state of New York created new problem-solving

4. Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1516 (2004) (emphasis added); *see also* Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 128 (2001) (pointing to "[b]reakdowns among social and community institutions" as creating a void for problem-solving courts to fill).

5. Judge Peggy Hora, Address at the Fordham Urban Law Journal Eleventh Annual Symposium on Contemporary Urban Challenges (Mar. 1, 2002), *in* 29 FORDHAM URB. L.J. 2011, 2030 (2002).

6. Michele Sviridoff et al. Dispensing Justice Locally: The Impacts, Cost and Benefits of the Midtown Community Court 1.11 (Sept. 2002) (unpublished report), https://www.ncjrs.gov/pdffiles1/nij/grants/196397.pdf [https://perma.cc/GF4E-ZDHW].

prostitution courts, which it called Human Trafficking Intervention Courts (HTICs).[7] As their name suggests, the courts' creators did not envisage prostitution defendants primarily as irresponsible offenders who needed to be taught better ways of living. Instead, they conceived of them as victims of human trafficking. This is true of not only those who satisfy the statutory definition of being sex-trafficked, but of 'ordinary' prostitution defendants as well.

And here is the crucial innovation: in order to create a new alternative court based on victimization rather than responsibilization, feminist court reformers redescribed prostitution as a product not of market exploitation but of *family trauma*. It is because, they argued, prostitution defendants suffer from childhood sexual assault and violence at the hands of intimate-partner pimps that they need a court to provide trauma-informed care. As such, HTICs offer social services without necessarily demanding that defendants bootstrap themselves as self-responsible actors or that service providers measure success exclusively as cost savings to the criminal justice system—in part challenging, I will argue, in part reinforcing, dominant welfare logics today.

This Article offers a genealogy of prostitution courts in New York City in order, then, to illustrate how criminal court reform and public welfare administration share similar modes and practices of governance and how these modes and practices reinvent themselves over time.[8] It sketches three different moments of prostitution court reform in New York City: the 1910s and 1920s, the 1990s, and today. What unifies these three periods are the similar ways in which court reformers articulated especially intensive commitments to informal criminal courts as important tools of social problem-solving even as these courts of course respond to very different economic and political conditions.

This Article thus does not provide an overarching social history. Instead, by closely examining New York City prostitution courts in three periods, it more modestly traces three interrelated ideas. First, the Article traces how court reformers use informal procedure as a means of transforming the self-understanding and social behavior of prostitution defendants: in the Progressive era, via programs for moral and behavioral reform; in the 1990s, via programs to teach individual responsibility; and today via trauma-based social controls—which involve a complex mix of paternalism and self-determination. Second, the Article traces how underlying these uses of informal procedure are changing representations of prostitution defendants themselves: from potentially (but not always) market

7. Press Release, Hon. A. Gail Prudenti, Chief Administrative Judge, N.Y. State Unified Court System, NY Judiciary Launches Nation's First Statewide Human Trafficking Intervention Initiative (Sept. 25, 2013), https://www.nycourts.gov/press/PR13_11.pdf [https://perma.cc/FTL2-4C4P].

8. WACQUANT, *supra* note 1, at 14.

victims to petty market participants to dedifferentiated trauma victims. And, third, the Article traces how different representations of prostitution are intertwined with changing ideas about social responsibility and welfare state programs, including the role of criminal courts within them.

To that end, the Article begins in Part I by exploring how procedure in the Women's Court in Manhattan was informed by a view of prostitution as a symbol and product of capitalism's excesses—a view of prostitution that was shared by those both on the right and the left of the political spectrum. This understanding of prostitution as a product of capitalist excess, in turn, prefigured the rise of national programs of public assistance based on arguments about market instability, exploitation, and dependency. In Part II, the Article examines the rise of contemporary problem-solving courts in the 1990s and describes the logic of their operation. These courts, the Article argues, deployed models of individual responsibility that were reshaping public welfare programs more broadly at the time. The Article then proceeds to illustrate how problem-solving courts for prostitution defendants in New York City have been transformed in the present by new, popular conceptions of prostitution as an effect of trauma.

The Article concludes with a question: are the HTICs part of a larger 'trauma-informed' reconfiguration of social welfare both within criminal adjudication and beyond? The answer to this question—which we can know only from practice unfolding on the ground—matters. The more criminal courts administer social services today, the more these services are based not on income inequality but rather on entering the criminal justice system as a particular kind of 'deserving' defendant. When feminist court reformers described prostitution defendants as victims of trauma—rather than, say as in the early twentieth century, victims of precarious labor-market conditions—they leveled a critique of family violence that simply had little to say about capitalism, political economy, or social-egalitarian arguments for redistribution. This critique has been remarkably effective in garnering state resources and motivating court reform. Its success has helped to transform select criminal courts into social service providers on the basis of psychological disability (post-traumatic stress disorder), not poverty.[9] But

9. To be sure, numerous scholars have observed how dominant contemporary strands of feminism use *injury* to make claims upon the state (and elsewhere). *E.g.*, WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY (1995); *see also* JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 6, 9 (2006). Scholars have also observed how these feminist arguments have disengaged from broader political-economic critiques of state-organized capitalism as well as from broader defenses of social-democratic welfare state polices and economic justice. *See generally* NANCY FRASER, FORTUNES OF FEMINISM (2013). I build here on these insights to illustrate how in this particular court reform context, some feminists have used trauma to motivate the distribution of public and private resources based on a sensibility of victimization, *see also* Amy J. Cohen & Aya Gruber, *Governance Feminism in New York's*

precisely because trauma-related disorders follow from a social etiology, a minority of actors within the HTICs are simultaneously attempting to use arguments about trauma to create more complex, even solidaristic, relations of dependency and welfare, including by indexing failed social and economic systems. The HTICs, the Article thus ventures, embody renewed demands for social responsibility and more expansive forms of state protection, but ones that are mediated by the politically capacious—but also, we shall see, politically constrained—language of trauma.

I. Victims of the Market: The 1910s and 1920s

A. A Note on Methods

I begin this genealogy with early twentieth-century urban courts because they offer a baseline to consider how criminal court reformers understand the virtues of informal court procedure and the dangers of commercial sex, and how these differences mark when and why populations are understood as deserving of state welfare under changing social and political conditions. More specifically, I suggest that Progressive-era socialized courts offer a baseline to consider how criminal courts use informal procedure to combine state welfare with social control and individual responsibility in order to manage and care for the poor.

Of course, these terms—social welfare, social control, and individual responsibility—are all ideal types that easily bleed together to animate alternative forms of criminal adjudication: social welfare may be (indeed, it nearly always is) conditioned on programs of social control; social control may encourage individual responsibility. But at a high enough level of generality, these ideal types hold sufficiently distinct descriptive purchase—worth a quick sketch—because, I will argue, what a genealogy of New York City prostitution courts illustrates is how these constructs do not stay stable over time.

By *social welfare*, I mean how courts in collaboration with state agencies and private institutions offer material services that offenders themselves desire, such as assistance in finding shelter, employment, or achieving immigration status.

By *social control*, I mean how courts, also in collaboration with other state and nonstate actors, administer moral and social enculturation and pedagogy including forms of supervision, examination, therapy, and training. These pedagogical forms are designed to reorient and alter how offenders behave and how they understand themselves and their social relations and obligations. I should add: for Progressives there was nothing particularly

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Human Trafficking Intervention Courts, *in* GOVERNANCE FEMINISM: A HANDBOOK (Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir eds. forthcoming), yet others have used trauma to articulate more systemic-reformist positions.

pernicious about what was then a commonly used term. Social control described a purposeful effort by planners to use state and private power to adjust social relations among individuals, the market, and their communities in order to advance a cohesive social order, including by helping the poor and needy function within it.[10]

Finally, by *individual responsibility*, I mean the extent to which courts treat crime, poverty, and rehabilitation as the subject of an individual's autonomous control—that is, a choice that is *not* overwhelmed by extrinsic social, economic, and biological forces and conditions.

Ultimately, I argue that we gain insights into the conditions of the present by tracing how these elements of court reform shift and combine in different ways over time. But, to be clear, my claim is not simply that we have witnessed a shift from the 'deserving poor' to the 'deserving trauma victim' (although there has been that). Nor do I want too easily to suggest that things could be otherwise—for example, that court reformers today could revive a Progressive-era critique of unregulated capitalism (with all of its complexities and contradictions) as a primary justification motivating prostitution court reform. Rather, I employ a genealogical approach in order to illustrate some of the temporal constraints that inform how criminal courts act as social welfare agencies and, more specifically, how dominant state welfare narratives shape and are produced and sometimes challenged in the rhetoric and practice of criminal court reform.[11] Framed in this way, it becomes clear how contemporary court reformers are using the language of trauma as a tool to negotiate the welfare logics of today.

My argument about the present builds on a range of primary research, including court observations and interviews with judges, prosecutors, defense attorneys, social workers, and court reformers, several of which were jointly undertaken with Aya Gruber and Kate Mogulescu (all joint interviews are indicated in the footnotes). To that end, I draw in this Article on some of our forthcoming work that describes and critically analyzes the HTICs.[12]

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10. WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 72 (6th ed. 1999); MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 59, 83 (2003); *see generally* EDWARD ALSWORTH ROSS, SOCIAL CONTROL: A SURVEY OF THE FOUNDATIONS OF ORDER (1908).

11. I build here on Ben Golder's exposition of the genealogical method. *See generally* Ben Golder, *Contemporary Legal Genealogies*, *in* CONTEMPORARY LEGAL THOUGHT (Justin Desautels-Stein & Chris Tomlins eds. forthcoming 2017).

12. Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV (forthcoming 2017) (on file with author). We offer an extensive examination of practice in four NYC HTICs, and we argue that because of their welfarist bent, the HTICs may provide new justifications for arrest and incarceration, limit alternative and redistributivist forms of social assistance, and reinforce stigmatizing ideologies about selling sex.

Here I analyze the HTICs through a genealogical lens and one focused on trauma.

B. Prostitution and the Rise of Socialized Courts

That prostitution became the subject of court reform in the first decades of the twentieth century is unsurprising. At the turn of the twentieth century, new 'socialized' courts were among the primary local-governance institutions configured to respond to the social problems spurred by industrialization, urbanization, and immigration, particularly for matters involving juveniles, (poor and immigrant) families, and sex (fornication, adultery, prostitution).[13] In other words, these courts targeted ordinary problems—small claims, domestic relations, petty crime, sexual immorality—that disrupted public order and private life: 'petty causes, that [are] the everyday rights and wrongs of the great majority of an urban community.'[14]

In contrast to eighteenth- and nineteenth-century police courts, socialized courts were thus not understood as dispute-resolution institutions whose primary responsibility was to keep the peace and adjudicate conflict: that is, no longer as 'passive arbiter[s]' but as institutions with 'a profound social duty' to 'treat[]' social ills.[15] Indeed, early twentieth-century jurists self-consciously rejected the formalist preferences of their nineteenth-century predecessors who, as Amalia Kessler has shown, embraced adversarial procedure precisely to encourage individualistic, egalitarian relationships and, in turn, to discourage values such as paternalism, dependency, and state care.[16] Early twentieth-century jurists—most prominently, Roscoe Pound—reasoned that formal procedures reflected and reinforced outmoded cultural preferences against government intervention at a time when informal procedure was needed instead to 'secure social interests' in modern, overcrowded, and heterogeneous cities.[17]

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13. *See generally* JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? (1983); CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT (1985); WILLRICH, *supra* note 10.

14. CHARLES W. ELIOT, LOUIS D. BRANDEIS, MOORFIELD STOREY, ADOLPH J. RODENBECK & ROSCOE POUND, PRELIMINARY REPORT ON EFFICIENCY IN THE ADMINISTRATION OF JUSTICE 29 (1914).

15. MUN. COURT OF CHI., SEVENTH ANNUAL REPORT OF THE MUNICIPAL COURT OF CHICAGO 87 (1913).

16. *See* AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877, at 337 (2017) (tracing the "legacy of the nineteenth-century rise of adversarialism"); Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES L. 423, 476–77 (2009).

17. *See* Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 305–06, 315, 319, 321, 323–24 (1913).

Socialized courts were thus conceived as new kinds of informal social welfare institutions where judges could apply 'the scientific principles developed in Medicine, Psychology, and Sociology' to reform the behaviors of individuals and groups,[18] and bring 'the good intentions and organized efforts of private citizens to bear upon social problems."[19] To that end, these courts embraced an increasingly socialized conception of conflict, poverty, and crime that linked the problems of individual defendants to broader social questions such as industrial conditions, minimum wage, sanitation, recreation, family life, overcrowded housing, and mental incapacity.[20] New juvenile, family, and morals/women's courts housed social workers, doctors, psychiatrists, and volunteers from (often sectarian) philanthropic institutions ready to dispense social services alongside medical and psychological testing.[21] And these courts created new forms of supervision, including parole, probation, and indeterminate commitments to state institutions replete with moral and industrial training.[22]

When it came to prostitution, Progressive-era court reformers described female sellers of sex as paradigmatic victims of social and economic forces beyond their control and thus deserving of "expert and specialized treatment' rather than punishment.[23] Between roughly 1910 and 1920, nearly all major urban jurisdictions in the United States created women's courts to proffer 'care and treatment"[24] to the mostly lower class women arrested on prostitution-related (and a few other) charges.[25] Sympathetic magistrates

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18. Louise Stevens Bryant, *A Department of Diagnosis and Treatment for a Municipal Court*, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY 198, 198 (1918).

19. RAYMOND MOLEY, TRIBUNES OF THE PEOPLE: THE PAST AND FUTURE OF THE NEW YORK MAGISTRATES' COURTS 4 (1932).

20. *See, e.g.*, WILLRICH, *supra* note 10, at xxi.

21. *See, e.g., id.* at xxvii, xxix; Amy J. Cohen, *The Market, the Family, and ADR*, 2011 J. DISP. RESOL., at 91, 100–03.

22. *See generally* REGINALD HEBER SMITH, JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES (1919); GEORGE E. WORTHINGTON & RUTH TOPPING, SPECIALIZED COURTS DEALING WITH SEX DELINQUENCY: A STUDY OF PROCEDURE IN CHICAGO, BOSTON, PHILADELPHIA AND NEW YORK (1925); Mary E. Paddon, *The Inferior Criminal Courts of New York City*, 11 J. AM. INST. CRIM. L. & CRIMINOLOGY 8 (1920); Edward F. Waite, *Courts of Domestic Relations*, 5 MINN. L. REV. 161 (1921); Charles Zunser, *The Domestic Relations Courts*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 1926, at 114. *See also* JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990, at 33–38 (1993).

23. W. BRUCE COBB, INFERIOR CRIMINAL COURTS ACT OF THE CITY OF NEW YORK, ANNOTATED cmt. at 112 (1925).

24. THE COMM. OF FOURTEEN, REPORT OF THE COMMITTEE OF FOURTEEN IN NEW YORK CITY 11 (1912).

25. Freda F. Solomon, Progressive Era Justice: The New York City Women's Court, Paper for the Seventh Berkshire Conference on the History of Women (June 19–21, 1987) (unpublished manuscript).

were supposed to connect defendants with charitable organizations and various kinds of state services. But, as we shall see, these courts mixed forms of social welfare with social control and punishment in rather seamless ways. For example, upon arrest, a young woman might find herself attached to a probation officer tasked with helping her find a job or shelter at a philanthropic home; she could also be subject to mandatory forms of psychological and medical testing, including compulsory in-patient venereal disease treatment; and she could be credibly warned that upon another arrest she would face a punitive workhouse sentence.

The New York Women's Court in Manhattan was the first such American experiment in the social governance of prostitution through a criminal court—as one reformer put it, '[t]he enlightened, philanthropic and progressive social element of the community rebelled against such an intolerable condition' where traditional courts 'could in no-wise furnish help to the unfortunate women.'[26] I thus begin in subpart C by describing how a particular group of Progressive-era reformers socialized the problem of prostitution. I then turn in the following subparts to the New York Women's Court that followed.

C. Prostitution and the Problems of the Market

There is an enormous literature on prostitution in the Progressive era.[27] This was a moment when reformers of many ideological stripes supported efforts to suppress prostitution through programs of legal, judicial, and penal reform.[28] Feminists, who understood prostitution as an expression of patriarchy and the political and economic limitations confronting women, lobbied for a single standard of sexual morality,[29] which many, in turn, tied

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26. Anna Moscowitz, *The Night Court for Women In New York City*, 5 WOMEN LAW. J. 9, 9 (1915). She proceeded to criticize the court for the application of legal procedure more than social treatment. *Id.*

27. *See, e.g.*, PAMELA HAAG, CONSENT: SEXUAL RIGHTS AND THE TRANSFORMATION OF AMERICAN LIBERALISM 63 (1999). Not to mention, there is also an enormous literature—rife with historical debates—on the Progressive Era itself, roughly 1890–1920. *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 239–41 (1990).

28. Previously, prostitution, while a crime in most states, was often tolerated by city officials and police. Many American cities hosted segregated districts where brothels and prostitutes submitted to informal rules that, for example, required registration, medical examinations, and various restrictions on how to conduct the trade. However, '[b]etween 1893 and 1917 seventy-eight places officially endorsed [a] policy of repression . . . closing open vice resorts. HOWARD B. WOOLSTON, 1 PROSTITUTION IN THE UNITED STATES: PRIOR TO THE ENTRANCE OF THE UNITED STATES INTO THE WORLD WAR 103–08, 113, 120 (1921); *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 224, 227 (1993); Neil Larry Shumsky, *Tacit Acceptance: Respectable Americans and Segregated Prostitution, 1870-1910*, 19 J. SOC. HIST. 665, 665 (1986).

29. This was a direct assault on eighteenth- and nineteenth-century understandings of prostitution as largely a personal matter, even as a "necessary evil" that provided an outlet for male

to the women's suffrage movement: an idea aptly captured in the slogan '[v]otes for women and chastity for men.'[30] Many feminists joined a loose coalition of 'social purity' and then later 'social hygiene' reformers who also attacked prostitution for its corrosive effects on individual health and personal morality as well as the moral health of the nation.[31] This coalition included, for example, purity feminists such as Women's Christian Temperance Union members as well as socially conservative reformers concerned with preserving the patriarchal family.[32] A powerful strand of social purity reformers, often including business and civic leaders as well as clergy members and physicians, organized themselves into municipal 'vice commissions' to investigate and publicize the problem of prostitution.[33] By 1917, vice commissions had published reports in forty-four American cities—all of which called for women's courts.[34]

Common to all these reformist factions was the idea that prostitution symbolized new and exceedingly capacious forms of industrial capitalism. As historian Ruth Rosen elaborates, in the early twentieth century, prostitution became an increasingly organized and rationalized business that reflected and reinforced larger problems of materialism, consumerism, and commodification that new forms of industrialization and urbanization had introduced into American life.[35] To be sure, this argument assumed more leftist and more centrist articulations. Left feminists such as Emma Goldman indicted prostitution as an effect of capitalism writ large: it was '[e]xploitation, of course; the merciless Moloch of capitalism that fattens on underpaid labor.'[36] Radical socialist and anarchist feminists argued that

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sexuality and preserved the Victorian character of the American home. RUTH ROSEN, THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900–1918, at 5–6 (1982).

30. Mariana Valverde, *Social Purity*, *in* INTERNATIONAL ENCYCLOPEDIA OF HUMAN SEXUALITY 1332 (2015). On the many strands of feminist reformers, see ROSEN, *supra* note 29, at 51–68 (Chapter 4: The Lady and the Prostitute).

31. Valverde, *supra* note 30, at 1 ("Social purity reformers believed that consumer capitalism's temptations posed new and grave threats not only to individual virtue and health, but also to the health and moral fibre of the nation.").

32. *Id.*

33. Vice committees hired undercover investigators to collect data and compile reports on the state of the underground economy, recount their discoveries to police and prosecutors, and even confront suspects themselves. *See, e.g.*, ROSEN, *supra* note 29, at 14–15; TIMOTHY J. GILFOYLE, CITY OF EROS: NEW YORK CITY, PROSTITUTION, AND THE COMMERCIALIZATION OF SEX, 1790–1920, at 268–69 (1992); WOOLSTON, *supra* note 28 at 263–64.

34. Solomon, *supra* note 25.

35. She argues that not only the cultural meaning, but also the economic form, of prostitution had changed. What was once a small-scale economic exchange managed mostly by sellers of sex themselves had become a larger scale, rationalized business. ROSEN, *supra* note 29, at 69–70.

36. EMMA GOLDMAN, THE TRAFFIC IN WOMEN AND OTHER ESSAYS ON FEMINISM 20 (1970).

wage slavery and sexual slavery, like capitalism and patriarchy, were two sides of the same coin.[37]

By contrast, for many middle-class social purity reformers, commercial sex reflected instead the excesses of consumer capitalism: the invasion of the market too far into the home, or as one vice committee put it, the 'commercialization of almost every phase of human interest, undermining the patriarchal and social structures that had previously protected women and the family.[38] From this perspective, laissez-faire capitalism, the depredations of new unchecked forms of consuming pleasure and leisure, and poor working conditions for women who increasingly labored in industrial America combined to undermine a moral capitalist and social order. Here, the prostitute was understood as a victim of unconstrained capitalism in at least two ways. She was exploited when she participated in the vice market itself, not only by the pimps and procurers who lived off her earnings but also by numerous other commercial interests (from costumers to midwives) that took advantage of her position as a consumer in the underground economy: 'for everything she buys she pays more than a double price in actual dollars.'[39] She was also exploited by legitimate but immoral labor markets.[40] Not only were wages in factories and department stores insufficient, but long hours and unsanitary working conditions produced 'enfeebling influences on [female] will power.'[41] Exhausted and 'nervous' women, reformers argued, were more susceptible to sexual immorality.[42]

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37. *See id.*; *see also* OLIVE SCHREINER, WOMAN AND LABOR 102–06 (1911); CHARLOTTE PERKINS STETSON, WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATION BETWEEN MEN AND WOMEN AS A FACTOR IN SOCIAL EVOLUTION 63–64 (1898).

38. LOUISVILLE VICE COMM'N, REPORT OF THE VICE COMMISSION: SURVEY OF EXISTING CONDITIONS WITH RECOMMENDATIONS TO THE HONORABLE JOHN H. BUSCHMEYER, MAYOR 20 (1915); *see also* Roy Lubove, *The Progressives and the Prostitute*, 24 HISTORIAN 308, 309–10 (1962).

39. George J. Kneeland, *Commercialized Vice*, PROC. ACAD. POL. SCI. CITY N.Y., July 1912, at 127, 128.

40. *See* MARK THOMAS CONNELLY, THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA 30–32 (1980) (describing the "'the wages-and-sin' issue" more generally); *see also* WILLRICH, *supra* note 10, at 181–83 (describing the women's wage campaign led by vice reformers and women's organizations in Chicago).

41. THE VICE COMM'N OF CHICAGO, THE SOCIAL EVIL IN CHICAGO: A STUDY OF EXISTING CONDITIONS 45 (1911).

42. *Id.* at 199. Commentators debated the link between low wages, long working hours, and sexual immorality. For reports and articles advancing a causal connection, see, for example, *id.* at 198–213 (enumerating the difficulties working women faced in making a livable income and the temptations toward prostitution to fill the economic gap); ILLINOIS SENATE VICE COMM., REPORT OF THE SENATE VICE COMMITTEE 23, 28 (1916) (finding that "poverty is the principal cause, direct and indirect, of prostitution' and that "thousands of girls are driven into prostitution because of the sheer inability to keep body and soul together on the low wages received by them"); Maude Glasgow, *On the Regulation of Prostitution, with Special Reference to Paragraph 79 of the Page Bill*, 92 N.Y. MED. J. 1320, 1323 (1910) ("The ranks of the prostitutes we know are recruited from

These early twentieth-century arguments against capitalist exploitation in both licit and illicit labor markets were thus highly gendered. They reflected a broader Progressive-era challenge to nineteenth-century free-labor orthodoxy *and* the particular and more limited ways this challenge constituted women as special subjects of state protection,[43] including by intertwining market exploitation with sexual exploitation. Indeed, when in 1908 the Supreme Court upheld a ten-hour workday law for women[44] (after striking one down three years earlier for men),[45] the majority reasoned that a woman's 'physical structure and a proper discharge of her maternal functions justify legislation to protect her from the *greed* as well as the *passions* of man.'[46]

In what follows, I briefly describe the views of a powerful group of (center-right) antivice and social hygiene reformers in New York City who played a significant role in creating the Women's Court based on such ideas of female dependency and commercial exploitation. In 1900, these crusaders organized the country's first vice commission, the Committee of Fifteen, to investigate prostitution.[47] The Committee's lengthy report, *The Social Evil*, concluded that 'instead of punishment for the unfortunate women, laws and courts should be used 'to better [their] conditions.'[48] In 1905, the Committee of Fourteen replaced the Committee of Fifteen and continued its court-reform (and several other law- and policy-reform) missions.[49] Whereas early

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the mostly poorly paid occupations, where the strain of making ends meet proves too great for the half starved, anaemic girl, who succumbs to temptation when a life of ease and comfort is offered to her."); Edwin V. O'Hara, *Minimum Wage Legislation*, 4 WOMEN LAW. J. 49, 49 (1915) ("I believe that it can be said, justly, that wages in the vast field of retail trade rest upon knowledge that the payroll is eked out by the social evil."). For reports and articles questioning the link, see 15 MARY CONYNGTON, DEP'T OF COMMERCE & LABOR, REPORT ON CONDITIONS OF WOMAN AND CHILD WAGE-EARNERS IN THE UNITED STATES: NO. 645, RELATION BETWEEN OCCUPATION AND CRIMINALITY OF WOMEN 79–114 (1911) (disputing the connection); THE COMM. OF FOURTEEN IN N.Y. CITY, DEPARTMENT STORE INVESTIGATION REPORT OF THE SUB-COMMITTEE 3, 11 (1915) (describing popular accounts of low wages and immoral working conditions as causes of prostitution but finding "no abnormal immorality" at Macy's, a department store with mostly adequate working conditions); *Are Low Wages Responsible for Women's Immorality?*, 54 CURRENT OPINION 402, 402 (1913) (debating the issue).

43. *See* MINOW, *supra* note 27, at 254–55; AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 232–33, 322–23 (2010).

44. Muller v. Oregon, 208 U.S. 412, 416, 423 (1908).

45. Lochner v. New York, 198 U.S. 45, 64–65 (1905).

46. WILLRICH, *supra* note 10, at 181 (citing *Muller*, 208 U.S. at 422) (emphasis in WILLRICH).

47. THOMAS C. MACKEY, PURSUING JOHNS: CRIMINAL LAW REFORM, DEFENDING CHARACTER, AND NEW YORK CITY'S COMMITTEE OF FOURTEEN, 1920–1930, at 16 (2005).

48. THE COMM. OF FIFTEEN, THE SOCIAL EVIL WITH SPECIAL REFERENCE TO CONDITIONS EXISTING IN THE CITY OF NEW YORK 218, 220 (Edwin R.A. Seligman ed., 2d ed. 1912) (1902).

49. For more detail on the New York Committee of Fourteen, see MACKEY, *supra* note 47, at 15–34. For a contemporary history, see Rev. John P. Peters, President of the Committee of Fourteen, *The Story of the Committee of Fourteen of New York*, 4 J. SOC. HYGIENE 347 (1918).

nineteenth-century jurists and legislators often 'stressed personal choice and responsibility, both for the prostitute and her patron,'[50] the Committee of Fourteen (and its elite feminist bedfellows) helped to create, in both popular and legal consciousness, a class of criminal defendants presumptively understood as market victims. As an association of women's organizations put it, it was precisely because prostitution is not 'just a personal matter, a transaction between two 'free-willed' people, that the New York Women's Court was needed as 'a protection both to the girl and the city.'[51]

D. New York City Vice Reformers and Commercial Exploitation

To make the case for social and legal intervention, New York City vice reformers repeatedly stressed a single point: prostitution had become a large-scale *commercialized business* run by 'middlemen who are profit sharers in vice.'[52] Committee of Fourteen President Rev. John P. Peters, for example, summarized the conclusion of a lengthy 1910 study as follows: '[T]he social evil in New York City is an elaborate system fostered by business interests, a commercialized immorality, not immorality resulting from emotional demand, and that consequently what must be fought is not vice per se, but vice as a gainful business.'[53] In 1913, John D. Rockefeller, Jr. who wielded a good deal of informal influence among Committee members, launched the Bureau of Social Hygiene.[54] The Bureau commissioned social worker George Kneeland to investigate the state of commercial sex in New York City. Kneeland, who began writing for the Committee, provided meticulous support for the claim that '[i]t is idle to explain away [prostitution] on the ground that [it is] the result[] of the inevitable weakness of human nature' rather it is 'widely and openly exploited as a business enterprise, complete with stock exchanges that circulate shares in brothels based on calculations

50. Robert E. Riegel, *Changing American Attitudes Toward Prostitution (1800–1920)*, 29 J. HIST. IDEAS 437, 437 (1968); *see also* FRIEDMAN, *supra* note 28, at 224; ROSEN, *supra* note 29, at 5–6; Shumsky, *supra* note 28, at 665.

51. *The Humanities Back of the Women's Court*, N.Y. TRIB. Nov. 30, 1919, at E4 [hereinafter *Humanities*].

52. THE COMM. OF FOURTEEN, THE SOCIAL EVIL IN NEW YORK CITY: A STUDY OF LAW ENFORCEMENT, at xxxv (1910).

53. Peters, *supra* note 49, at 371 (describing the conclusions of THE COMM. OF FOURTEEN, *supra* note 52).

54. *See* DAVID J. PIVAR, PURITY AND HYGIENE: WOMEN, PROSTITUTION, AND THE 'AMERICAN PLAN,' 1900–1930, at 47, 124 (2002). As Pivar explains: 'An opportunity had presented itself to redefine boundaries of tolerance for business in an urban community. Rockefeller, like others in the business community, drew such lines between legitimate and illegitimate commercial business. *Id.* at 174. For an overview of the Bureau, see *The Bureau of Social Hygiene*, 20 OUTLOOK 287, 287–88 (1913).

of risk, profit, and capital appreciation.[55] Reporting for the American Social Hygiene Association, Maude Miner, an important anti-prostitution feminist and court reformer in New York argued much the same: 'The demand for prostitution exists not alone because of the passions of man, but because exploiters of vice are making money from stimulating the demand and raising it to meet the artificially stimulated supply.'[56] That is, all these reformers deemed it crucially important to observe that market intermediaries had made twentieth-century prostitution into a large-scale commercial venture organized like any other 'shrewdly managed' businesses that aimed to 'artificially' stimulate demand and supply.[57]

It was precisely this level of business organization, New York City vice reformers argued, that made prostitution into sex trafficking or 'white slavery'—a term used in the late nineteenth century to describe the exploitative conditions of Northern industrial labor and that in the early twentieth century had come instead to mean the distinctively sexual exploitation of women and girls (white as well as immigrant and nonwhite).[58] In response, reformers enacted protective legislation beginning with the U.S. accession to the International Agreement for the Suppression of the White Slave Traffic of 1904 (entered into force in the United States in 1908)[59] and, following the international treaty, the enactment of the federal Mann Act in 1910.[60] As David Langum explains, lawmakers often defined white slavery

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55. GEORGE J. KNEELAND, COMMERCIALIZED PROSTITUTION IN NEW YORK CITY 51, 124 (1913). Kneeland, for example, describes a delicatessen on Seventh Avenue:

> All the forces for the conduct of the business of prostitution in parlor houses are here, scheming, quarreling, discussing profits, selling shares, securing women, and paying out money for favors received. The value of houses is debated, the income from the business, the expenses of conducting it, the price of shares to-day or to-morrow, or in the future, if this or that happens.

Id. at 61.

56. Maude E. Miner, *Report of Committee on Social Hygiene*, 1 J. SOC. HYGIENE 81, 83 (1914).

57. KNEELAND, *supra* note 55, at 84.

58. HAAG, *supra* note 27, at 69; *see also infra* notes 100–101 and accompanying text. A 1909 article in *McClure's Magazine* illustrates how popular writers emphasized both business organization and immigration to describe white slavery. George Kibbe Turner, *The Daughters of the Poor: A Plain Story of the Development of New York City as a Leading Center of the White Slave Trade of the World, Under Tammany Hall*, 17 MCCLURE'S MAGAZINE 45, 59 (1909) ("The trade of procuring and selling girls in America—taken from the weak hands of women and placed in control of acute and greedy men—has organized and specialized after its kind exactly as all other business has done. All but twelve or fifteen per cent are of foreign birth or parentage.").

59. International Agreement for the Suppression of the "White Slave Traffic," May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

60. The Mann Act, which criminalizes transporting any girl or woman across state lines "for the purpose of prostitution or debauchery, or for any other immoral purpose," was based on the interstate commerce clause and the international white slavery treaty. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)); DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 40–

as 'coerced prostitution.'[61] Many vice reformers, however, equated coercion simply with commercialization and business organization.[62] Harry Woolston, also recruited by the Bureau, observed the phenomenon: even when 'girls remain in the business not unwillingly. he noted, vice reformers have 'extend[ed] the term white slavery to include practically the whole field of commercialized vice.'[63]

Indeed, even as federal investigations failed to find evidence of formal syndicates or corporations—only individual procurers and pimps[64]—vice reformers offered evidence of informal economic organization as its own proof of trafficking and exploitation. For example, a 1910 New York grand jury investigation of white slavery (led by Rockefeller) concluded that 'individuals acting for their own individual benefit' are 'known to each other and are more or less informally associated' in 'associations and clubs [that] are analogous to commercial bodies in other fields.'[65] 'Incorporated syndicates' and 'international bands, the report thus concluded, are comprised of "such informal relations."'[66]

Pamela Haag has thus argued that the primary innovation of early twentieth-century white-slavery discourse was to conflate impersonal economic relations—"commerce"—with exploitation and control. In her words:

> The presence of 'commerce' replaced 'chaste character' as presuppositional proof of woman's *coercion* The discourse was

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41 (1994). Panic about sex trafficking also prompted a series of (nativist) immigration reports and reform efforts. *See, e.g.*, Egal Feldman, *Prostitution, the Alien Woman and the Progressive Imagination, 1910-1915*, 19 AM. Q. 192, 196 (1967); CONNELLY, *supra* note 40, at 49–60 (describing 1907 and 1910 amendments to the 1903 federal immigration act, designed to enhance the criminalization of prostitution-related immigration offenses).

61. LANGUM, *supra* note 60, at 42.

62. Of course, in 1917, the Supreme Court broadened the reach of the Mann Act in a seemingly different way when it upheld the prosecution of *non*commercial nonmarital sex across state boundaries. Caminetti v. United States, 242 U.S. 470, 496 (1917). But as David Langum explains, this case should not be read as an assault on sexual immorality apart from commercialization; the holding, he submits, reflected the then-popular idea (which persisted into the 1920s) that 'sexual immorality was but a stepping-stone toward professional prostitution. LANGUM, *supra* note 60, at 128–29; *see also* WOOLSTON, *supra* note 28, at 174 (asserting that among "right-thinking citizens [the decision] has been applauded as a means of lessening the traffic in women under any excuse").

63. WOOLSTON, *supra* note 28, at 159–60. He continues: 'In this sense the meaning is much broader than that in which it is used in international agreements regulating the trade in women. *Id.* at 160.

64. *See, e.g.*, IMMIGRATION COMM'N, NO. 196, IMPORTING WOMEN FOR IMMORAL PURPOSES 30 (1909) ("The belief that a single corporation is largely controlling this traffic in the United States is doubtless a mistake.").

65. GRAND JURY FOR THE JAN. TERM OF THE COURT OF GEN. SESSION OF THE CTY. OF N.Y. IN THE MATTER OF THE INVESTIGATION AS TO THE ALLEGED EXISTENCE IN THE CTY. OF N.Y. OF AN ORGANIZED TRAFFIC IN WOMEN FOR IMMORAL PURPOSES, WHITE SLAVE TRAFFIC 6 (1910).

66. *Id.*

> not geared toward *moral* persuasion against prostitution—a common feature of late nineteenth-century sexual reform—but toward an epistemological revision, an effort to cast commercial sexuality as a prima facie violence.[67]

This 'epistemological revision' clearly influenced law reform—spawning, for example, a dramatic increase in states with "white slave laws," from five in 1890, to twenty-two in 1910, and forty-eight in 1921.[68] Abraham Flexner, also recruited by Rockefeller and the Bureau, explained that social tolerance for "voluntary immoral relations even if the women regularly earn their livelihood in that way' gave way to new "laws against the exploitation of prostitution for the benefit of third parties" when public opinion was made to understand how prostitution reflects "the commercial interest of the exploiter.'[69]

But even if, as Haag has argued, white slavery presupposed that prostitutes were victims of impersonal economic forces rather than agents of their own self-interest, practice on the ground confounded this new discursive commitment—making court reform for prostitutes a more complex endeavor. To begin, women's own responses to the multiple studies reformers commissioned made it difficult for the Committee of Fourteen to sustain any totalizing description. Kneeland, for example, referenced one well-known study and reported that '[t]he surprising thing is that very few directly economic reasons are given' to explain what led women "into an immoral life.'[70] And it would seem that even fewer women themselves suggested white slavery.[71] Some women, Kneeland reported, "deliberately select a pimp' for business help.[72] Woolston was more explicit: 'The atmosphere of the stock exchange is pervasive. When a girl realizes that she can secure many desirable things by the exercise of a little business judgement, the way is open to capitalize her personal charms.'[73] Thus for vice reformers, the

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67. HAAG, *supra* note 27, at 65.

68. JOSEPH MAYER, THE REGULATION OF COMMERCIALIZED VICE: AN ANALYSIS OF THE TRANSITION FROM SEGREGATION TO REPRESSION IN THE UNITED STATES 31 (1922).

69. Abraham Flexner, *Next Steps in Dealing with Prostitution*, 1 J. SOC. HYGIENE 529, 533 (1915).

70. KNEELAND, *supra* note 55, at 185 (describing a study of prostitutes from New York City sentenced to the State Reformatory for Women at Bedford Hills).

71. According to Rosen, who analyzed multiple Progressive-era studies, "of 3,117 prostitutes, only 2.8 percent specifically cited white slavers and 11.3 percent accused men (lovers, seducers, etc.) of having actively forced, seduced, or betrayed them into prostitution. ROSEN, *supra* note 29, at 145. On white slavery, Rosen explains that "[a]lthough its incidence during the Progressive Era was highly exaggerated, [it] does play a part in the story of prostitution, ' but around, she ventures, less than ten percent of the prostitute population. *Id.* at xiv, 133.

72. KNEELAND, *supra* note 55, at 89.

73. WOOLSTON, *supra* note 28, at 307. He writes: "Prostitution seems the easiest way to make money, after the woman has overcome her repugnance to it. Apparently, most of the women interviewed intend to continue, so long as they can support themselves in this fashion. *Id.* at 72–73.

moral case for economic victimhood was hardly complete: the prostitute was at once a sympathetic market victim due to a combination of economic necessity and the many 'commercial interests' that exploited her, but also potentially a degenerate market participant due to her own desire for surplus commodities and new forms of consumption.

As the following sections explore, this distinction—arguments for sympathy, dependency, and state intervention based on large-scale forms of commercial exploitation, on the one hand, and moral condemnation and personal responsibility based on market participation, on the other—ordered a good deal of practice in the New York Women's Court.

E. The New York Women's Court

Vice reformers made clear that commercialized sex in New York City had not only corrupted the institutions of the market but also the state. Reports circulated that police, judges, and bondsmen collaborated to detain women at night on false prostitution charges in order to encourage them to pay a bond to secure their release pending a court hearing the following day.[74] It was in response to such allegations that Manhattan first opened a specialized Night Court in 1907 to hear prostitution offenses immediately after arrest.[75] That same year the Committee of Fourteen organized a subcommittee to investigate 'the relation of the magistrates' courts to the women of the street [in New York City].'[76]

In 1910, with much advocacy from the Committee, New York enacted the Inferior Criminal Courts Act (known as the Page Law, named after its Chairman, Senator Alfred R. Page).[77] The Act separated the Manhattan night court into separate courts for male and female offenders in order to 'give an opportunity for concentration of effort in relation to cases of women and [to] enable those philanthropically inclined more effectively to give their

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74. *See, e.g.*, Franklin Matthews, *The Farce of Police Court Justice in New York: Magistrates, Lawyers, Ward Heelers, Professional Bondsmen, Clerks of the Court and Probation Officers Join to Make a Mockery of the "Supreme Court of the Poor,"* BROADWAY MAGAZINE, Feb. 1907, at 511, 517.

75. *See* STATE OF N.Y. NO. 54, FINAL REPORT OF THE COMMISSION TO INQUIRE INTO THE COURTS OF INFERIOR CRIMINAL JURISDICTION IN CITIES OF THE FIRST CLASS 47 (1910) [hereinafter FINAL REPORT NO. 54]. The report explained:

> The purpose of [the night court] was to put a stop to the evil known as the station-house bond. It was claimed that certain of the police and certain bondsmen were in league, so that by constant arrests of prostitutes these women were compelled to get bail in order to be released until the following morning, and for that bail to pay heavily to the professional bondsmen.

76. THE COMM. OF FIFTEEN, *supra* note 48, at xi.

77. Inferior Criminal Courts Act of the City of New York, Laws of New York, 1910, ch. 659 (hereafter citations to the Inferior Criminal Courts Act are from the annotated version of the Act, reproduced in COBB, *supra* note 23); MACKEY, *supra* note 47, at 24.

assistance to the prisoners as well as to the magistrates and probation officers."[78] In 1919, the city transformed the Women's Night Court into the Women's Court with daytime hours (at the urging of women's organizations that argued that consolidated nighttime activity created a spectacle for onlookers as well also easy opportunities for procurers looking for recruits).[79]

Reformers lauded the court's welfarist mission. Committee Executive Secretary Frederick Whitin, who regularly attended court sessions,[80] hailed the Women's Court for "deal[ing] more wisely and hence more effectively with the social evil,"[81] and his colleague on the Committee, Lawrence Veiller (famous for his work improving housing conditions for the poor), called it 'one of the great humanitarian institutions' in New York.[82] Mary Paddon, Secretary of the Committee on Criminal Courts of the Charity Organization Society (chaired by Veiller), likewise explained that magistrates with special expertise in prostitution would 'sincerely try to decide what is best for the future of the individual before them as well as for the community."[83]

Despite such praise for the Women's Court, the Inferior Criminal Courts Act was controversial. It instantiated new forms of judicial social control strongly supported by the Committee but opposed by some feminists. First, the Act empowered magistrates to fingerprint all arrested women[84] and thus, as the Committee repeatedly encouraged, to keep track of recidivist offenders committed to profiting from the life and to distinguish such offenders from

78. *See* FINAL REPORT NO. 54, *supra* note 75, at 50. The Women's Court had jurisdiction over prostitution offenses as well as petty larceny and wayward girls. COBB, *supra* note 23, cmt. at 273–74. For more details, see Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: History and Organization*, 7 BROOK. L. REV. 133, 173 & n.241 (1937).

79. Paddon, *supra* note 22, at 11; *Humanities*, *supra* note 51, at E4.

80. MACKEY, *supra* note 47, at 25. The Committee regularly advised judges and commissioned reports tracking arrests and dispositions, and proposed recommendations "to make the work of the [c]ourt more effective. THE COMMITTEE OF FOURTEEN IN N.Y. CITY, ANNUAL REPORT FOR 1915, at 13 (1916) [hereinafter ANNUAL REPORT 1915]. As one observer wrote, Committee members 'dominated the Women's Court because they considered its business part of their special province.' MOLEY, *supra* note 19, at 118; *see also* MACKEY, *supra* note 47, at 206 (describing the Committee's 'daily long-standing contact with the Women's Court").

81. Frederick H. Whitin, *The Women's Night Court in New York City*, ANNALS AM. ACAD. POL. & SOC. SCI. Mar. 1914, at 181, 181; *see also* THE COMMITTEE OF FOURTEEN IN N.Y. CITY, ANNUAL REPORT FOR 1916, at 54 (1917) ("On the basis of an intimate knowledge extending now over many years, the Secretaries [of the Committee] believe this Court to be most effective in suppressing commercialized vice and in saving many women.").

82. MACKEY, *supra* note 47, at 159. On Veiller's role in enacting housing legislation, see MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 171–78 (1986).

83. Paddon, *supra* note 22, at 12.

84. COBB, *supra* note 23, at 279 (Inferior Criminal Courts Act § 78). On the use of finger printing generally, see BD. OF CITY MAGISTRATES OF THE CITY OF N.Y. (FIRST DIV.), ANNUAL REPORT FOR THE YEAR ENDING DECEMBER 31, 1912, at 20–21 (1913) [hereinafter ANNUAL REPORT 1912].

sympathetic victims.[85] Women's groups, however, pointed to the discriminatory effects of fingerprinting all arrested women. The 1909 New York code of criminal procedure made it easier to convict sellers of sex for solicitation,[86] and that year more than 1,500 women, but none of their customers, had been arrested for prostitution.[87] Likewise the Committee openly supported a lax and discretionary approach to arrest and prosecution because 'a conviction in [the Women's Court], it argued, 'is frequently the means of turning the woman from the life of shame.'[88] Feminists, by contrast, demanded greater procedural protections and more rigorous and uniformly applied evidentiary standards for arrest and prosecution.[89]

Even more controversial, the Inferior Criminal Courts Act empowered magistrates to order convicted defendants to submit to physical exams and to detain diseased women for up to a year.[90] Medical testing, the Women's Prison Association and several other feminist organizations argued, made the Women's Court 'a 'clearing house' for prostitutes, marking those who were 'safe for public use.'[91] Mandatory medical testing was declared unconstitutional in 1911,[92] although magistrates could threaten to withhold

85. *See* Whitin, *supra* note 81, at 184–85; ANNUAL REPORT 1912, *supra* note 84, at 20; *see also* Frederic Bierhoff, *The Problem of Prostitution and Venereal Diseases in New York City*, 93 N.Y. MED. J. 557, 560 (1911) ("I believe that the woman who has been a successful public prostitute—that is, one who has been able to make enough money to buy her the comforts and the finery and drink which she wants, is rarely won permanently from that life.' (emphasis omitted)). As Pivar recounts, Bierhoff, a physician, had a longstanding influence on Whitin. PIVAR, *supra* note 54, at 96.

86. Specifically, the 1909 code classified prostitution as a form of vagrancy (expanding an 1882 definition of prostitution as a form of disorderly conduct). N.Y. CRIM. PROC. § 887(4) (1909). George Worthington and Ruth Topping suggest "that much less proof is necessary to convict under [the vagrancy definition]. George E. Worthington & Ruth Topping, *The Women's Day Court of Manhattan and the Bronx, New York City*, 8 J. SOC. HYGIENE 393, 403 (1922); *see also* WILLOUGHBY CYRUS WATERMAN, PROSTITUTION AND ITS REPRESSION IN NEW YORK CITY: 1900–1931, at 20 (1932) (describing a 1915 amendment to section 887 to further "simplify the task of the police in securing evidence").

87. PIVAR, *supra* note 54, at 100 (describing the views of the Woman's Prison Association). I should add: Patronizing a prostitute did not become a criminal offense in New York until 1965. *See* Pamela A. Roby, *Politics and Criminal Law: Revisions of the New York State Penal Law on Prostitution*, 17 SOC. PROBS. 83, 93 (1969) (tracing legislative debates). Thomas Mackey details efforts in the 1920s by the Committee of Fourteen and their feminist allies to prosecute customers, first, with a failed test case under § 887(4), and then by sponsoring a failed "customer amendment" to the law. *See generally* MACKEY, *supra* note 47, at 29–30.

88. ANNUAL REPORT 1915, *supra* note 80, at 14–15.

89. *See, e.g.*, Bertha Rembaugh, *Problems of the New York Night Court for Women*, 2 WOMEN LAW. J. 45, 45 (1912); *Night Court Suggestions*, 5 WOMEN LAW. J. 13, 13 (1915).

90. COBB, *supra* note 23, at 280–81 (Inferior Criminal Courts Act § 79).

91. GILFOYLE, *supra* note 33, at 258.

92. People *ex rel.* Barone v. Fox, 96 N.E. 1126, 1126 (N.Y. 1911); GILFOYLE, *supra* note 33, at 258–59.

bail if they wanted a defendant to submit to an exam, and in 1918 compulsory testing was reenacted and upheld in new form.[93]

Other early procedural reforms, even as they intensified the social controls available to the court, were less contested. In 1912, New York abolished the practice of levying fines as punishment for prostitution, in turn expanding often indeterminate forms of sentencing and parole.[94] Replacing fining with custodial sentences was perceived as necessary to extricate the court from the business of vice. As one study later summarized this policy decision: "Fining makes the city a partner in the business in that it becomes a sharer in the proceeds. It has been well stated that such a system makes of the city a 'super-pimp.'"[95]

Indeed, in a particular historical moment when the social problem of prostitution was often articulated in the language of big business and market exploitation, it was a pressing question for court reformers whether the Women's Court was participating in the markets it was supposed to suppress (quite different, we shall see, from the contemporary concern with whether courts are re-traumatizing the victims they are supposed to heal). For this reason, the history of the Women's Court is often told, as Chief City Magistrate John Murtagh put it, as 'an effort to counteract the scandal and corruption that have historically characterized the city's efforts to deal with the problem of prostitution."[96] In what follows, I do not describe the many scandals that beset the court. Instead, I briefly sketch the core procedural features that were supposed to guide its welfarist practice.

F. Court Practice

1. The 'Individual Method' as Social and Moral Classifications.—The women processed through the court did not receive a blanket presumption of

93. *See infra* note 126 and accompanying text.

94. ANNUAL REPORT 1912, *supra* note 84, at 24–25 ("Not a dollar of such blood money ought ever go into the City Treasury.").

95. Worthington & Topping, *supra* note 86, at 429; *see also* Miner, *supra* note 56, at 89 (describing fining as "a license system"); Maude E. Miner, *Two Weeks in the Night Court*, 22 SURVEY 229, 230 (1909) ("Imposing fines brings into the city coffers money it should not be willing to accept . . .").

96. John M. Murtagh, *Problems and Treatment of Prostitution*, 23 CORRECTION 3, 3 (1958). Murtagh argued that corruption on the court continued until 1950. In 1932, a widely publicized inquiry described a "ring" in the Women's Court comprising of unscrupulous lawyers, bondsmen, "fixers," policemen, and their stool pigeons that profited from false arrests and extortion aided by "the inexplicable inaction of the Magistrates. SAMUEL SEABURY, FINAL REPORT IN THE MATTER OF THE INVESTIGATION OF THE MAGISTRATES' COURTS IN THE FIRST JUDICIAL DEPARTMENT AND THE MAGISTRATES THEREOF, AND OF ATTORNEYS-AT-LAW PRACTICING IN SAID COURTS 125 (1932) [hereinafter SEABURY REPORT]; *see also* MOLEY, *supra* note 19, at 119–28 (describing corruption).

victimization as white slavery and commercialization discourse might suggest. Instead, they were classified and sorted in numerous ways. Here, to begin, is a snapshot of the court in action:

> [T]he main entrance to the building is thronged with women offenders, shyster lawyers, professional bondsmen, men who appear to be pimps
>
> A low iron railing separates the spectators from the court proper. Immediately in front of the railing are two rows of benches which during court hours are occupied by members of the vice squad, probation officers, welfare workers, etc.[97]

Of these 'women offenders' efforts were made to send juveniles to private institutions such as the Florence Crittenton home or the Waverley House so that they could await trial under the supervision of social workers and probation officers.[98] Adults were sent to a female detention center where they were in turn separated by the character of the offense as well as by race.[99] Reformers knew well that white slavery was a misnomer[100] (indeed, evidence suggests that nonwhite women were disproportionately arrested on prostitution charges),[101] and social workers and private organizations were organized in sectarian fashion: 'Catholic, Protestant, Jewish and Colored.'[102]

In advance of sentencing, probation officers were then charged with learning something of a defendant's moral character, abilities, and health in order to aid magistrates in assessing her 'honesty or dishonesty[,] her demeanor, her lack of defiance, her apparent state of intelligence, and the character of the offense committed.'[103] Maude Miner, the first female probation officer in the Women's Court, called this the '*individual method* of dealing with girls and women.'[104] These assessments were supposed to produce information about how open to 'moral influence' defendants appeared.[105] As Miner explained, '[i]t is not merely a question of age or

97. WORTHINGTON & TOPPING, *supra* note 22, at 292.

98. *Id.* at 295; MAUDE E. MINER, SLAVERY OF PROSTITUTION: A PLEA FOR EMANCIPATION 162–64 (1916).

99. WORTHINGTON & TOPPING, *supra* note 22, at 295; *see also* COBB, *supra* note 23, at 271–72 (Inferior Criminal Courts Act § 77) ("[I]n such detention place the young and less hardened shall be segregated, so far as practicable, from the older and more hardened offenders.").

100. *See* HAAG, *supra* note 27, at 69.

101. *See* WILLRICH, *supra* note 10, at 205–06 (describing a "racist system of public morals enforcement" in the Chicago Morals Court in the 1920s).

102. WORTHINGTON & TOPPING, *supra* note 22, at 297.

103. *Id.* at 314; ANNUAL REPORT 1912, *supra* note 84, at 21.

104. MAUDE E. MINER, THE INDIVIDUAL METHOD OF DEALING WITH GIRLS AND WOMEN AWAITING COURT ACTION 9–11 (1922).

105. MINER, *supra* note 98, at 198.

experience or number of arrests, but of poisoned minds, diseased bodies and weakened wills.'[106]

As such, probation officers, Miner argued, should elicit the defendant's story at length, including details of her childhood, education, religion, 'health and habits[,] home and family, [and] her first steps in immorality.'[107] Other professionals, she advised further, should conduct a comprehensive physical and mental exam that furnishes information not simply about the defendant's health and mental capacity but also her 'abilities, limitations, and general efficiency.'[108] Practice in the court, it would seem, often fell short of this vision (Miner repeatedly complained that investigations were insufficiently individualized and superficial).[109] But Chief Magistrate William McAdoo made clear his sentences were motivated by Miner's general commitments:

> Every conscientious and right-thinking magistrate, however experienced, will, I think, admit how difficult it is, in many cases, to satisfy his conscience and his intelligence in fixing the measure of punishment without investigation and identification of the defendant. With the use and the services of the probation officers, properly applied, and the taking of fingerprints the whole status of the defendant can be definitely and conclusively ascertained before judgment is pronounced.[110]

As the following section suggests, McAdoo's estimation of the "whole status of the defendant' rested, in no small part, on whether she was understood as market victim or market participant.

2. Social Control as Moral and Behavioral Reform for Deserving Market Victims.—Social controls followed from social and moral classifications. Probation was reserved for 'a very limited group of the younger girls who are physically, mentally, and morally fit to go out into society without commitment to an institution.'[111] Miner illustrated a compelling case: A 'small, pale-faced girl drops her head and tears come into her eyes. 'I did it to support my little baby and me. [S]he excites our interest and sympathy. She is a girl whom we can help.'[112] McAdoo offered another example. He described a young woman in need of money

106. Maude E. Miner, *Probation Work for Women*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1910, at 27, 28.

107. MINER, *supra* note 98, at 165.

108. *Id.* at 169.

109. MINER, *supra* note 104, at 9–11.

110. ANNUAL REPORT 1912, *supra* note 84, at 21.

111. Miner, *supra* note 56, at 89.

112. Miner, *supra* note 95, at 229.

for family members 'in great want' in the old country who 'after a short probationary period was entirely reformed.'[113] In both cases, these women were easily understood as market victims—acting out of economic necessity to earn money for their families. They were therefore placed under the care of probation officers who were supposed to connect them to social agencies (hospitals, dental clinics, relief societies, churches), help find them legitimate employment, and generally supervise "their efforts to lead honest lives."[114] Miner, for example, describes her own extensive efforts to find the girls placed under her care food and temporary housing.[115]

Defendants with multiple convictions could receive purely punitive sentences to the workhouse on Blackwell's Island (either a determinative sentence of up to six months or indeterminate sentences of up to two years with the possibility of parole).[116] Here, McAdoo explained, he distinguished between different kinds of market actors: "the professional disorderly woman, determined to make her living by this infamous trade' yet perhaps capable of reform versus 'the incorrigible streetwalker, who has been many times convicted and who is apparently beyond all reformatory influences poisoning the community morally and physically for the amount of money she could make out of it.'[117] The incorrigible streetwalker was punished for her transgressions and sent to the workhouse.[118]

The professional disorderly woman—who appeared to the court somewhere in between these two poles of incorrigible market actor and compelling market victim—was potentially subject to the most intensive social controls: she was granted an opportunity to reform with intensive 'moral and industrial training.'[119] She could receive an indeterminate sentence of up to three years at a state or private institutional reformatory with parole at the parole commission's discretion based on a series of social and behavioral classifications.[120] Miner, for example, describes how the State Reformatory for Women at Bedford aimed to help women develop as

113. CITY MAGISTRATES' COURTS OF THE CITY OF N.Y. (FIRST DIV.), ANNUAL REPORT FOR THE YEAR ENDING DECEMBER 31, 1914, at 21 (1915) [hereinafter ANNUAL REPORT 1914].

114. MINER, *supra* note 98, at 202, 212.

115. *Id.* at 163–64.

116. COBB, *supra* note 23, at 320 (Inferior Criminal Courts Act § 89(4)); Parole Commission Act, ch. 579, § 4, *in* 10 SUPPLEMENT TO ANNOTATED CONSOLIDATED LAWS OF THE STATE OF NEW YORK (1915).

117. ANNUAL REPORT 1914, *supra* note 113, at 20–21.

118. *Id.* at 21.

119. *See* Miner, *supra* note 56, at 89.

120. COBB, *supra* note 23, at 318–20 (Inferior Criminal Courts Act § 89(1)–(2)); Parole Commission Act, ch. 579, §§ 4–5. Reformatories included The Roman Catholic House of the Good Shepherd, The Protestant Episcopal House of Mercy, The New York Magdalen Benevolent Society, and the State Reformatory for Women at Bedford. For descriptions, see Worthington & Topping, *supra* note 86, at 476–87.

'social being[s]' prepared for reintegration into legitimate social life.[121] "The best results, Miner argued, 'are obtained in classifying women within the reformatory not by their offenses, but according to their character, health, mental characteristics, and adaptabilities for certain kinds of work.'[122] Useful distinctions thus included "healthy and diseased, women of normal mentality, psychopathic women and feeble-minded women, mothers with babies, colored and white women, and moral and immoral women of various degrees of experience."[123] Based on these distinctions, reformatory staff would set about

> the tremendous task of inculcating new habits of work and training for future employment, developing mental resources and desire for wholesome amusement, teaching self-control and principles that govern right living, and laying that deep spiritual foundation which will determine ultimate failure or success.[124]

Or at least that was Miner's vision: spiritual pedagogy and industrial training to remoralize individual character and inculcate the productive skills and behaviors deemed appropriate to particular classes and categories of women.

That said, after the United States entered World War I, concerns about the moral and social lives of fallen women gave way to a second set of concerns and controls in the name of public health.[125] In 1918, a war-time public health law reauthorized mandatory medical testing.[126] The presence of venereal disease would soon eclipse the court's other social missions. Magistrates, who now received the results of medical testing at sentencing, would offer women with venereal disease the chance to submit to in-patient hospital treatment *if* they appeared eligible for probation. (The magistrate would later hear evidence of how defendants 'demeaned' themselves during treatment to determine whether they continued to merit probation.)[127] Other infected women, including first offenders, could receive 100-day sentences in reformatories or in the workhouse—for no reason other than this was the number of days thought sufficient to weather the course of most infections.[128]

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121. MINER, *supra* note 98, at 238–40.

122. *Id.* at 233.

123. *Id.*

124. *Id.* at 237.

125. *See* ROSEN, *supra* note 29, at 33–36.

126. In 1918, the federal Chamberlain–Kahn Act empowered local health boards to detain people suspected of venereal disease to protect America's troops, and it authorized new state legislation. Chamberlain–Kahn Act, Pub. L. No. 65-193, 40 Stat. 845, 886–87 (1918). Based on this Act, New York passed a public health law that mandated that anyone convicted of a prostitution-related offense be reported to the Board of Health that the Women's Court used to authorize medical testing. W. Bruce Cobb, *The Women's Court in its Relation to Venereal Diseases*, 6 J. SOC. HYGIENE 83, 87–88 (1920).

127. WORTHINGTON & TOPPING, *supra* note 22, at 312.

128. One magistrate explained:

3. Routinization and Critique.—By the 1920s, it would seem that procedure in the Women's Court had become mostly routinized based on the results of medical testing and recidivism rates rather than 'the individual method' Miner and other feminists desired.[129] And for all of its social welfarist rhetoric, it would also seem that most defendants processed through the Women's Court experienced traditional forms of punishment. Between 1911 and 1929, records of court dispositions suggest that workhouse sentences hardly dropped below 50%. Between 1911 and 1920 workhouse sentences ranged between roughly 55% and 80%; reformatory sentences ranged from around 2% to 15%; and probation ranged from roughly 5% to 30%.[130] Between 1920 and 1929, workhouse sentences ranged from 44.5% to 62.2%; reformatory sentences ranged from 6.5% to 16.9%; and probation ranged from 26.9% to 36.8%.[131]

Woolston suggests that this high percentage of workhouse sentences reflected limited reformatory space more than retributivist impulses.[132] For feminist reformers, however, this defense was beside the point. As Anna Moscowitz Kross, the first female magistrate in the Women's Court, put it: 'The most ardent supporters of the Women's Court are forced to concede that its work of rehabilitation, through probation officers and cooperating social agencies, has at best been very limited. '[133] She blamed the 'vindictive spirit' of the Committee of Fourteen for a court system that was 'punitive and repressive' rather than paternalistic in the more enlightened manner of the juvenile court.[134] That 'the state has always been paternalistic toward its children, Kross explained, 'should [not] preclude from its beneficence a

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> Whereas it is no doubt true that in theory the 100-day sentence is not proper because it requires a consideration of the physical condition of the defendant rather than her delinquency, yet as practiced at the present time, it appears that this sentence is applied to the class of defendants to whom the magistrate might well be justified in giving a sentence of that length.

Id. at 337. Over a six-month period in 1920, of the 230 confirmed cases of venereal disease, over half were treated solely at the hospital and over one-third were treated at least partially during sentenced time at the workhouse. *Id.* at 340–41.

129. *See, e.g.*, THE COMM. OF FOURTEEN IN N.Y. CITY, ANNUAL REPORT FOR 1921, at 20–21 (1922).

130. THE COMM. OF FOURTEEN IN N.Y. CITY, ANNUAL REPORT FOR 1920, at 35 fig. (1920).

131. WATERMAN, *supra* note 86, at 74 tbl.

132. WOOLSTON, *supra* note 28, at 74.

133. Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: Suggested Improvements*, 7 BROOK. L. REV. 411, 444 (1938). For a detailed description of Anna Moscowitz Kross's criticisms of the court over the first three decades of its operation, see Mae C. Quinn, *Revisiting Anna Moscowitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the 'Problem' of Prostitution with Specialized Criminal Courts*, 33 FORDHAM URB. L.J. 665, 677–87 (2006).

134. ANNA M. KROSS, *The New Plan*, *in* REPORT ON "PROSTITUTION AND THE WOMEN'S COURT" 4, 12 (1935).

class of its citizenry that is just as much in need of mental and social guidance as its siblings.'[135] In the mid-1930s, she called for the abolition of the Women's Court and lobbied extensively for an alternative vision: a medical–psychological–legal tribunal that would deploy medical–social workers rather than police to apprehend women, and that would exhaustively investigate rather than prosecute them.[136] Rules of evidence, she argued, would not apply because only treatment, not punishment, would follow—just as in the juvenile court where the sole "object of the court is [the defendant's] welfare.'[137]

Of course, as the history of the juvenile court makes all too clear, treatment and punishment, like social welfare and social control, are not opposite but rather mutually constitutive projects.[138] And the particular ways they intertwine express a broader cultural and political context.[139]

G. The New York Women's Court and the American Welfare State

In the 1910s and early 1920s, court reformers cast their own efforts to suppress prostitution as part of a movement for 'a new body of law which expresses a growing social conscience with reference to wealth, power and official responsibility' in response to 'economic and political and industrial changes.'[140] The Women's Court was thus created amidst elite and popular concerns about unregulated, concentrated, and exploitative labor and consumer markets in legitimate as well as illegitimate sectors of the economy. In this way, the court reflected a broader Progressive-era ambition to deploy arguments about the dangers of unregulated capitalism as the basis for social and legal reform. It also reflected a broader Progressive-era trend to transform the role of lower courts in society. New centralized municipal courts developed specialized socialized branches to manage the problems of urban industrial life. As we have seen, in the Women's Court, idealistic court reformers hoped to identify deserving defendants and to adjust their self-

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135. *Id.* at 39.

136. ANNA M. KROSS, *Foreword*, *in* REPORT ON "PROSTITUTION AND THE WOMEN'S COURT," *supra* note 134, at 5; ANNA M. KROSS, *The Women's Court Today: A Challenge*, *in* REPORT ON "PROSTITUTION AND THE WOMEN'S COURT," *supra* note 134, at 2; *see also Mrs. Kross Opposed to Women's Court*, N.Y. TIMES, Oct. 19, 1934, at L25; *Mrs. Kross Scores Vice Case Methods*, N.Y. TIMES, Jan. 14, 1934, at F24; *see generally The New Plan*, *in* REPORT ON "PROSTITUTION AND THE WOMEN'S COURT," *supra* note 134.

137. KROSS, *supra* note 135, at 57–58.

138. *See generally* LYNNE CAROL HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES 118 (1980); MARY E. ODEM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885–1920 (1995); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (40th Anniversary ed. 2009) (1969).

139. *See, e.g.*, GARLAND, *supra* note 1, at 10; Kohler-Hausmann, *supra* note 1, at 88–89.

140. THE COMM. OF FOURTEEN, *supra* note 52, at xiv.

understandings and social behavior. They envisioned a transformed woman: someone with 'a job which will pay a decent living wage a new home, new friends, new interests, and the morale she lost [restored].'[141] This was the case, I should stress, both for feminist court reformers and Committee members, even if they disagreed about for whom and how such aid should be forthcoming.

It is in this sense that the New York Women's Court should be understood broadly as part of a new generation of courts that, as Michael Willrich has argued, laid 'an urban seedbed for the modern administrative welfare state.'[142] To be sure, it would seem that the Women's Court actually administered few redistributivist forms of social welfare, even if probation officers were formally tasked with bringing goods like shelter, employment, and healthcare to sympathetic defendants. Raymond Moley, who advised Franklin D. Roosevelt and coined the phrase the 'New Deal,'[143] squarely criticized the Women's Court in a book devoted to assessing Progressive-era courts as 'Tribunes of the People.'[144] Like other commentators, he concluded that the court failed to provide 'socially constructive work affecting the health, employment, or the recreation of offenders.'[145] It is nonetheless the case, as I have illustrated here, that the Women's Court was motivated by a set of arguments about exploitation and the need for state protection created by new industrial and commercial conditions—arguments that both reflected and prefigured more general claims for state aid that would become institutionalized during the New Deal.[146] As Aziz Rana has argued, during the New Deal, lawmakers

> presented the historical dependence of women not as an exceptional status to be contrasted against republican citizenship but as typical of the general position confronting all Americans. Regardless of gender or race, citizens faced assorted economic and social crises that could

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141. Kross & Grossman, *supra* note 133, at 444.

142. WILLRICH, *supra* note 10, at xxi.

143. MACKEY, *supra* note 47, at 34.

144. MOLEY, *supra* note 19 (citing SEABURY REPORT, *supra* note 96, at 149–51). The Seabury Report proceeds to criticize court officers more broadly for "routine handling at best," lacking "human warmth, sympathy and understanding in dealing with [the] girls. SEABURY REPORT, *supra* note 96, at 150.

145. MOLEY, *supra* note 19, at 154 (citing SEABURY REPORT, *supra* note 96, at 149–51).

146. In 1932, Roosevelt famously declared that the aim of government was "to assist in the development of an economic declaration of rights, an economic constitutional order"—one in which, as Sidney Milkis and Jerome Mileur explain, '[t]he traditional emphasis in American politics on individual self-reliance should give way to a new understanding of the social contract in which the government guaranteed individual men and women protection from the uncertainties of the marketplace. Sidney M. Milkis & Jerome M. Mileur, *Introduction: The New Deal, Then and Now*, *in* THE NEW DEAL AND THE TRIUMPH OF LIBERALISM 1, 3 (Sidney M. Milkis & Jerome M. Mileur eds., 2002) (debating the extent to which Roosevelt's ambition to create an economic constitutional order in fact influenced the American welfare state).

> be addressed only by state supervision. The benefit of social inclusion lay precisely in state protection.[147]

In the 1930s, arguments for state protection increasingly assumed two kinds of administrative forms. The first form was provisions aimed at unemployed laborers—many of whom had become understood as victims of markets made unstable because they were regulated by corporations unchecked by states.[148] At the federal level, aid aimed at laborers began in the early 1930s with New Deal public-works programs and then, in 1935, became a reasonably robust set of programs for many (albeit certainly not all) workers, including old-age insurance (Social Security) and unemployment compensation enshrined in the Social Security Act. (To be sure, these social provisions are rarely considered 'welfare' even though benefits are not proportional to the taxes beneficiaries pay.)[149] The second category, also enshrined in the Social Security Act, provided public assistance—'welfare'—for a subset of the "deserving' poor understood as entitled to some protection from the demands of wage labor, most classically widows with children (a measure, I should add, influenced by state and city experimentation with 'mothers' pensions'—that is, payments to widows and deserted mothers supported by purity feminists in part to protect against the temptations of selling sex).[150] What was then called Aid to Dependent Children was both more miserly and more stigmatizing than public aid programs for workers, leading in the 1930s to what Linda Gordon has described as a two-tiered and gendered welfare state.[151]

Women in their identities as *prostitutes* could claim neither welfare category—wage worker or dependent mother. I have argued nonetheless that, in the first few decades of the twentieth century, the Women's Court illustrated an experiment in the broader welfarist logics of its time. In its rhetoric, albeit often not in its practice, the court aimed to 'help' women whose lives were made marginal and unstable by poverty and commercial exploitation through programs of moral and social enculturation and occasionally a small measure of material aid.

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147. RANA, *supra* note 43, at 323.

148. *See* MICHAEL J. PIORE & CHARLES F. SABEL, THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY 73–78 (1984).

149. LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935, at 5 (1994).

150. PIVAR, *supra* note 54, at 55–56. On maternalist public social provisions created between 1900 and the early 1920s, and their role in influencing (albeit in incomplete and limited ways) broader American social welfare programs, see THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 534–36 (1992).

151. *See* GORDON, *supra* note 149, at 6–12.

H. Institutionalization: The 1940s and Beyond

The Progressive era marked a high-water moment of judicial experimentation in lower civil and criminal courts. As we have seen, in urban jurisdictions throughout the United States, such courts were not simply instruments of dispute resolution or criminal adjudication but new institutions of social governance. However, by the time of the New Deal, socialized courts had begun a gradual period of institutionalization and de-ideologization—one that took place against the backdrop of a more developed, administrative, and nationalized welfare state.

Critics of these courts would increasingly deploy arguments about civil liberties and procedural due process to challenge the judicial discretion and procedural informality introduced by Progressives—in the courts in which such informality persisted—an effort perhaps, as Willrich suggests, to reconstruct boundaries between 'criminality and dependency, welfare and policing.'[152] Such attacks against the individual injustices of informal proceedings culminated in the 1960s with a famous assault on the juvenile court.[153]

However, many other courts created during the Progressive era did not meet with such a dramatic demise. To the contrary, over the course of the 1940s and 1950s they became regularized as part of a court bureaucracy that was neither particularly informalized nor socialized. As Christine Harrington puts it, '[c]riticism of the socialized courts after 1940 focuses on the fact that they were appendages of traditional judicial institutions rather than genuine alternatives to the adversarial process.'[154]

This was certainly the case for the New York Women's Court. In 1957, Chief Magistrate John Murtagh and Sara Harris (a professional writer) published a book describing a rather unexceptional criminal court.[155] Procedure had improved, they argued: legal-aid attorneys now represented indigent defendants and everyone was assured a speedy trial.[156] The court also boasted the aesthetics of judicial formalism:

> [p]roceedings are conducted in an imposing mahogany-walled, many-windowed courtroom designed in the best of taste and in accordance with the finest judicial standards. The magistrate presides on a

152. WILLRICH, *supra* note 13, at 321.

153. The juvenile court, the most enduring anti-adversarial court created by Progressives, met with a famous procedural overhaul following the Supreme Court decision, *In re Gault*, in 1967. 387 U.S. 1 (1967).

154. HARRINGTON, *supra* note 13, at 62.

155. *See generally* JOHN M. MURTAGH & SARA HARRIS, CAST THE FIRST STONE (1957).

156. *Id.* at 244.

> mahogany bench in the front center. The witness chair is to his left, and counsel tables are in front of the bench.[157]

At the same time, however, Murtagh and Harris complained that the court remained a "revolving door' and 'merely a way station between the jail and the street' where few women encountered any sort of meaningful welfare or assistance.[158]

In the 1950s, Murtagh's indictment of the Women's Court was motivated by a very different social understanding of prostitution than that of his Progressive-era predecessors. Rather than a *social* evil—a symbol of the commercialization and commodification of American life—he recast prostitution as private sin. 'It is not the business of the State, he argued, 'to intervene in the purely private sphere but to act solely as the defender of the common good. Morally evil things so far as they do not affect the common good are not the concern of the human legislator. '[159] Murtagh thus did not call for court reform from above. To the contrary, he repeatedly lobbied New York law-reform commissioners for a measure of decriminalization. The state, he argued, should prevent open and notorious scandal rather than attempt to restrain 'sins against sexual morality committed in private by responsible adults. '[160]

In 1967, in part due to Murtagh's efforts, prostitution briefly became a violation (not a crime) with a fifteen-day maximum sentence rather than, as it had been since 1909, a form of criminal vagrancy punishable by up to three years in a reformatory.[161] (In 1969, it was revised into a class B misdemeanor crime with a ninety-day maximum sentence, a classification which persists until now.)[162] Also in 1967, the New York Women's Court closed, entirely unceremoniously, as part of a bureaucratic reorganization of criminal court administration.[163]

The reformist pendulum has continued to swing. Today, we have a second era of informal "socialized' courts that again include in their ambit the intensification of the prosecution and treatment of prostitution defendants. Like their predecessors, new specialized prostitution courts combine social welfare, social control, and individual responsibility, but in different and changing ways.

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157. *Id.* at 245.

158. *Id.* at 244–45.

159. *Id.* at 300 (quoting *Homosexuality, Prostitution and the Law: The Report of the Roman Catholic Advisory Committee*, DUBLIN REV. Summer 1956, at 57, 61).

160. *See id.* at 300–01; *see also* John M. Murtagh, Report on the Women's Court to Mayor of the City of New York (Feb. 14, 1955), *excerpted in* MURTAGH & HARRIS, *supra* note 155, at vi.

161. Roby, *supra* note 87, at 87–90. *See* N.Y. CRIM. PROC. LAW § 887(4) (1909) (defining "vagrant"); COBB, *supra* note 23, at 318–20 (Inferior Criminal Courts Act § 89(1)–(2)).

162. Roby, *supra* note 87, at 86–87 n.14; N.Y. PENAL LAW § 230.00 (McKinney 1969).

163. Roby, *supra* note 87, at 93 n.45.

II. From Market Participants to Victims of Family Trauma: 1990s to Now

A. Problem-Solving Courts and Welfare State Retrenchment

Compensatory efforts to reinstall informalism in criminal adjudication began as early as the 1970s in the wake of procedural due process reform, determinate sentencing, and retributive criminology.[164] A select group of reformers proposed experiments in 'diversion, where certain low-level offenders were supposed to receive treatment rather than punishment (constrained now by formal procedural safeguards such as transparent guidelines to justify a diversionary sentence).[165] But during the 1970s and 1980s, most widespread informal and anti-adversarial procedural innovation focused on civil courts—often by describing these courts as overtaxed and ineffective, and by proposing 'alternatives' such as mediation.[166] These innovations reflected the work of a range of actors on the left, right, and center of the political spectrum who converged on the limits of adjudication to address highly contextual and individualized problems, and who argued instead for para-professional, open-ended, collaborative, and flexible processes to foster problem-solving from below.[167] In the 1980s, the strand of alternative dispute resolution activism that became institutionalized within American civil courts reflected the dominant economic and political sensibilities of the time: these were dispute-resolution processes designed to increase the privacy and autonomy of the individual, to rationalize and enhance the efficiency of state and federal judicial systems, and to decrease the role for the state in domestic and commercial affairs.[168]

It was not until the mid-1990s that the United States again witnessed a coordinated effort to transform lower criminal courts as explicit agents of social governance. Here, the uptake of informal, participatory, and decentralized procedural reform in civil courts combined with an explosion of broken-windows policing and public-order arrests to focus attention on what reformers likewise described as overtaxed and ineffective misdemeanor

164. AUERBACH, *supra* note 13, at 121, 127.

165. *See, e.g., id.*; HARRINGTON, *supra* note 13, at 24–29; *see also* PAMELA J. UTZ, SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT, at xiv (1978) (presenting a case study of "an alternative model of plea negotiation' where 'negotiation between prosecution and defense takes on the character of a process of collaborative assessments of cases").

166. *See, e.g.*, Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 114–16 (1976).

167. For an elaboration of some of the multiple and competing strands of the early ADR movement, see Amy J. Cohen & Michael Alberstein, *Progressive Constitutionalism and Alternative Movements in Law*, 72 OHIO ST. L.J. 1083, 1091–93 (2011).

168. *See generally* Amy J. Cohen, *Revisiting* Against Settlement*: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143 (2009).

criminal courts.[169] 'Every legal right of the litigants is protected, all procedures followed, New York Chief Judge Judith Kaye complained of traditional criminal courts, 'yet we aren't making a dent in the underlying problem.'[170]

Proponents of problem-solving courts thus aimed to provide alternative forms of criminal adjudication that could address 'chronic social, human, and legal problems'—typically by encouraging judges to convene collaborative negotiations between prosecutors, defense attorneys, and social workers that result in social service-oriented sentences.[171] Greg Berman and John Feinblatt, founders of the New York Center for Court Innovation (CCI)—a think tank that has spearheaded most New York problem-solving courts—put the aspiration as follows: problem-solving courts 'broaden the focus of legal proceedings, from simply adjudicating past facts and legal issues to changing the future behavior of litigants and ensuring the future well-being of communities.'[172] Litigants subject to new forms of court-administered social welfare and social control included people categorized as members of groups deserving social interventions: homeless, mentally ill, youth. They also included people who commit low-level crimes generally, such as drug possession, vandalism, forms of family dysfunction, shop-lifting, public drunkenness, and prostitution—'the everyday rights and wrongs of the great majority of an urban community' once again.[173]

Several scholars have thus described contemporary problem-solving courts as welfare institutions, arguing that they apply social services in troubling ways from inside criminal courts.[174] Many have likewise argued,

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169. For the origins of broken-windows policing, see James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 29.

170. Judith S. Kaye, *Making the Case for Hands-On Courts*, NEWSWEEK, Oct. 11, 1999, at 13.

171. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 126 (2001). In 2000, two American judicial organizations passed a resolution to '[c]all these new courts 'Problem-Solving Courts,' [because] the collaborative nature of these new efforts deserves recognition. Conf. of Chief Justs. & Conf. of St. Ct. Admins. *CCJ Resolution 22 & COSCA Resolution IV: In Support of Problem Solving Courts* (Aug. 3, 2000), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Resolution-PSC-Aug-00.ashx [https://perma.cc/CY83-498P].

172. Berman & Feinblatt, *supra* note 171, at 126. The Center for Court Innovation is 'a public/private partnership between the New York State Unified Court System and the Fund for the City of New York.' It functions as a research and development branch of the court system focused on implementing diversionary, problem-solving court programs. *See Who We Are*, CTR. FOR CT. INNOVATION, http://www.courtinnovation.org/who-we-are [https://perma.cc/ZX3U-HM7Y]. Berman is currently the executive director of CCI. John Feinblatt is the former executive director of CCI and former Chief Advisor on criminal justice to Mayor Bloomberg.

173. ELIOT, BRANDEIS, STOREY, RODENBECK & POUND, *supra* note 14, at 29.

174. For example, writers have leveled the following criticisms at problem-solving courts—that they: individuate structural problems, see Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 425 (2009) [hereinafter Miller, *New Penology*]; Jane M. Spinak, *A*

as Richard Abel put it, that '[t]he primary business of informal institutions is social control, expanding the reach of the state into the lives of the poor and marginalized through discourses of care.[175] Likely for both of these reasons, numerous scholars have compared contemporary problem-solving courts to the socialized courts of the Progressive era, especially the resurgence of informal procedure within them. Several describe Progressive-era courts as 'the original problem-solving courts' and hence as 'a cautionary tale' for our time.[176] Some scholars have even observed 'uncanny parallel[s]' between problem-solving courts and the New York Women's Court itself.[177] In 2006, Mae Quinn compared the Women's Court to the Midtown Community Court—the first contemporary problem-solving court to focus on prostitution—as 'a stark example of how history is repeating itself.'"[178]

But arguments about social welfare and social control can illuminate a critical comparison of informal criminal courts over time only if we know the particular forms and purposes that such welfare and controls assume. I argue

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Conversation About Problem-Solving Courts: Take 2, 10 U. MD. L.J. RACE RELIGION GENDER & CLASS 113, 119–24 (2010); Corey Shdaimah, *Taking a Stand in a Not-So-Perfect World: What's a Critical Supporter of Problem-Solving Courts to Do?*. 10 U. MD. L.J. RACE RELIGION GENDER & CLASS 89, 103–04 (2010); devolve responsibility to individuals and families to manage problems under neoliberal state restructuring, see Amy J. Cohen & Ilana Gershon, *When the State Tries to See Like a Family: Cultural Pluralism and the Family Group Conference in New Zealand*, 38 POL. & LEGAL ANTHROPOLOGY REV. 9 (2015) (canvassing criticisms); undermine due process as they apply "penal-welfarist techniques upon the poor and disposed," see Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1569 (2004); make social services contingent on arrest and legal coercion, see Stacy Lee Burns, *The Future of Problem-Solving Courts: Inside the Courts and Beyond*, 10 U. MD. L.J. RACE RELIGION GENDER & CLASS 73, 84 (2010); Gruber, Cohen & Mogulescu, *supra* note 12; Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63, 91–92 (2002); and potentially eclipse redistributivist forms of welfare not administered by criminal courts, see generally Gruber, Cohen & Mogulescu, *supra* note 12.

175. Richard Abel, *Introduction*, *in* 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 1, 5 (Richard L. Abel ed., 1982); *see, e.g.*, Burns, *supra* note 174, at 84; Casey, *supra* note 4, at 1474.

176. Casey, *supra* note 4, at 1464; *see also* Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1515–16 (2003) (describing parallels between contemporary drug courts and early juvenile courts); Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2097 (2002) (comparing problem-solving courts to "the more general rehabilitative experiment in the 1930s"); Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 259 (2008) (arguing that the "rationale for today's problem-solving courts" is "remarkably similar" to early juvenile courts).

177. Carl Baar & Freda F. Solomon, *The Role of Courts: The Two Faces of Justice*, 15 CT. MANAGER 19, 24 (2000) (describing 'fascinating parallels between problem-solving court reform in the 1990s and court reform in the early twentieth century' including an 'uncanny parallel' between "the community court movement in New York City and the New York City Women's Court"); *see also* Quinn, *supra* note 133, at 666 (arguing that a New York problem-solving court and the New York Women's court present "remarkable parallels").

178. Quinn, *supra* note 133, at 697.

here that contemporary problem-solving courts in fact demonstrate how *differently* court-centered social governance was understood when it re-emerged in the 1990s against the backdrop of the administrative welfare state's decline—or perhaps rather more accurately against the backdrop of the transformation of welfarist ideas. This period witnessed the ascendancy of the idea that markets, far more than state law, can solve social problems, and that individual entrepreneurship, far more than state intervention, can optimize personal well-being.

Contemporary court reformers—seeking the betterment of defendants and their communities no less than their Progressive-era predecessors—thus brought very different governance ideas to the work of court reform. As David Garland observes, the politics of this period 'put in place a quite different framework of *economic freedom and social control.*'[179] In the criminal justice arena, this period did not simply witness longer and increasingly punitive custodial sentences; the 1990s, in fact, also 'saw a quite significant increase in the numbers of treatment programmes provided to offenders.'[180] But, as I shall elaborate below, whereas treatment-oriented Progressive-era courts offered programs of moral and behavioral reform to adjust deviant social behaviors that undercut an idea of a good social–moral order, problems-solving courts aspire to teach individual responsibility to cure the individual pathologies that undercut an idea of a good-ordered self[181]: social control as a form of enhancing individual capacity for economic freedom, so to speak.

There is by now a voluminous literature on problem-solving courts, including attention to the good deal of variation among them.[182] I thus briefly

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179. GARLAND, *supra* note 1, at 100.

180. *Id.* at 170.

181. *See generally* JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 178–80 (2001).

182. Several scholars have also observed how problem-solving courts have been increasingly institutionalized. *See, e.g.*, Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1501 (2003). It is thus particularly surprising how little data appears to exist about their comparative presence or resources in the American criminal justice system. According to the National Center for State Courts there are roughly 14,000–16,000 (civil and criminal) courts in the United States. Janet G. Cornell, *Limited Jurisdiction Courts—Challenges, Opportunities, and Strategies for Action*, TRENDS ST. CTS. http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/courts-and-the-community/3-6-limited-jurisdiction-courts.aspx [https://perma.cc/R2TC-ZEWU]. According to the National Drug Court Resource Center, in 2015, there were 3,133 drug courts and in 2014 there were 1,272 other kinds of problem-solving courts in the United States and its territories. *How Many Drug Courts Are There?*, NAT'L DRUG CT. RESOURCE CTR., http://www.ndcrc.org/content/how-many-drug-courts-are-there [https://perma.cc/XD2Q-YRRJ]; *How Many Problem-Solving Courts Are There?*, NAT'L DRUG CT. RESOURCE CTR., http://www.ndcrc.org/content/how-many-problem-solving-courts-are-there [https://perma.cc/C84F-SUL6]. Drug courts are likely the best funded. In 1999, drug courts received $40 million in aggregate federal funding and in 2009 they received

describe three overarching characteristics—a commitment to individual context, social control defined as individual responsibility, and systemic attention to efficiency—that shape most problem-solving courts to this day.

My aim here is threefold. First, describing these characteristics helps to illustrate how problem-solving courts differ from Progressive-era socialized courts—combining social welfare, social control, and individual responsibility in different ways and via different means. Second, I show how in the 1990s and early 2000s these characteristics influenced how problem-solving courts approached the 'social problem' of prostitution in clear and decisive ways. Third, and most significantly, I argue that over the last five to eight years, prostitution has become an *exception* to this still-dominant responsibilization model. New prostitution courts, now called Human Trafficking Intervention Courts, have challenged each one of these characteristics and, in so doing, present us with a new kind of contemporary welfarist criminal court that has revived, but also transformed, earlier arguments about female dependency and state intervention.

B. Core Procedural Characteristics of Problem-Solving Courts

1. Individual Context.—Proponents describe differentiated interventions as the hallmark of problem-solving courts: a flexible specialized approach to judging against the mass production of cases. Issa Kohler-Hausmann has persuasively argued that conventional misdemeanor courts in fact mark and sort offenders based on their contacts with the system.[183] Numerous professionals in conventional misdemeanor courts nonetheless profess to *feel* like they are working on an assembly line. As one judge explained: 'Instead of cans of peas, you've got cases. You just move 'em, move 'em, move 'em.'[184] Against this model (or rather experience) of

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almost $90 million. WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST. PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 5 (2011), http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.PDF [https://perma.cc/7V9Q-NL7K]. Statewide Drug Court Coordinator Valerie Raine explains that in New York, because funding for courts is allocated generally among judicial districts, it is "extremely difficult" to estimate comparative funding for problem-solving courts (which also often includes grant funding that fluctuates significantly). E-mail from Valerie Raine, Esq., Statewide Drug Court Coordinator, NYS Unified Court System, to author (Sept. 29, 2015) (on file with author).

183. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 646 (2014).

184. Greg Berman, *'What is a Traditional Judge Anyway?' Problem Solving in the State Courts*, 84 JUDICATURE 78, 80 (2000) (comments of Hon. Kathleen A. Blatz, Chief Justice, Supreme Court of Minnesota); *see also* GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 25–28 (2005) (describing how court actors experience their work as a form of "mcjustice"); JAMES L. NOLAN, JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT 8–9 (2009) (describing dissatisfaction

adjudication, problem-solving courts propose to tailor interventions to the specific social and individual characteristics of the offender. Many use 'computer technology to make sure that judges have access to in-depth profiles of defendants' that include recidivism rates, social histories such as drug addiction and mental illness gathered in clinical intake interviews, and potentially the information contained in service provider reports for defendants previously mandated to court social services.[185] Berman and Feinblatt put the aspiration as follows: 'Should each of these offenders receive the same sanction? Shouldn't judges and attorneys have the tools to respond differently in each of these cases? [T]here's no reason why justice has to be one-size-fits-all.'[186]

Problem-solving courts thus inherited Miner's call for an individual method. But, as the following section suggests, the aim of such assessments is not to sort offenders based on social–moral classifications as much as to produce information about individual pathology and individual capacity for responsibility.

2. Social Control as Individual Responsibility.—In his extensive work on problem-solving courts, sociologist James Nolan traces a broad shift in criminal law from understanding crime in social–moral terms to individual-pathological ones where offenders are understood to suffer from a disorder that requires treatment.[187] This shift, Nolan argues, reflects a broader therapeutic turn within American culture,[188] and one that resonates with the emphasis on the self and self-reliance increasingly expressed in the 1980s and 1990s in the economy.[189] As such, to merit diversion to a problem-solving court, an offender must be understood not only to suffer from an individual pathology but also as someone willing to instill within himself

among conventional-court judges); Deborah Chase & Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 FAM. CT. REV. 209, 209 (2009) (finding, based on a survey of 355 judges, that judges in drug and family problem-solving courts report greater satisfaction and that they were more likely to understand their role as helping litigants with their problems).

185. BERMAN & FEINBLATT, *supra* note 184, at 36.

186. *Id.* at 33.

187. *See generally* NOLAN, *supra* note 181, at 133–54 (Chapter Six: The Pathological Shift). As Nolan puts it: 'The drug court demands a therapeutically revised form of confession: 'I am sick' instead of 'I am guilty. *Id.* at 142.

188. *Id.* at 47.

189. *See, e.g.*, Jackson Lears, *Afterword*, *in* RETHINKING THERAPEUTIC CULTURE 211, 213 (Timothy Aubry & Trysh Travis eds. 2015).

desires for self-improvement—that is, a 'responsibilized' and 'accountable' agent who is given privileged 'opportunities' for rehabilitation.'[190]

To that end, defendants—rather than subjects of state care upon whom treatment is imposed, as in Progressive-era courts—are transformed into instruments of their own recovery. Treatment mandates are thus designed not only to help stop the underlying criminal behavior but also to enhance individual responsibility and choice.[191] Drug courts, for example, aim not simply to achieve the cessation of drug use but to impart skills in self-management and goal achievement by purposefully monitoring whether and how defendants show up to court appearances, attend and participate in treatment programs, and cooperate with treatment staff.[192] Anthropologist Victoria Malkin observed similar practices in a problem-solving community court. She explains that '[f]rom the initial court appearance to the subsequent mandates, defendants are reminded that the choices they make and the subsequent consequences are theirs and theirs alone.'[193] From this perspective, learning to be a reformed criminal actor is not unlike learning to be a good market actor.

As a matter of institutional design, treatment interventions are also often justified in a relentlessly liberal language of autonomy and choice including the choices the offender made that resulted in a criminal charge. Bruce Winick, a pioneering theorist of problem-solving courts, explains that offenders 'are in these difficult situations because of their own actions.'[194] They themselves choose treatment: '[T]hey were not arrested as a vehicle for forcing them into treatment, but because they possessed drugs or committed some other crime. [E]xtending to them the additional option of accepting a rehabilitative alternative does not make the choice they will then face a

190. Benedikt Fischer, *'Doing Good with a Vengeance': A Critical Assessment of the Practices, Effects and Implications of Drug Treatment Courts in North America*, 3 CRIM. JUST. 227, 236 (2003).

191. NOLAN, *supra* note 181, at 37–38 (distinguishing the therapeutic ethos applied in problem-solving courts from older theories of rehabilitation).

192. For detailed descriptions, see Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 846–48 (2000). For critical perspectives, see, for example, Miller, *New Penology*, *supra* note 174, at 425 (arguing that the drug court's adoption of "individual self-control and self-esteem as the primary causes of drug crime and relapse plac[es] the onus on individuals to alter their conduct"); Frank Sirotich, *Reconfiguring Crime Control and Criminal Justice: Governmentality and Problem-Solving Courts*, 55 U. NEW BRUNSWICK L.J. 11, 24 (2006) ("Individuals before problem-solving courts are taught to become responsible subjects by techniques of self that emphasize individual agency and autonomy. Thus a form of regulation is engendered in which the offender is enlisted in the process of his or her own control.").

193. Victoria Malkin, *The End of Welfare as We Know It: What Happens When the Judge is in Charge*, 25 CRITIQUE ANTHROPOLOGY 361, 380 (2005).

194. Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1074 (2003).

coercive one.'[195] Berman and Feinblatt likewise stress the consent-based nature of treatment. Indeed, they analogize defendants to consumers who can choose among, and thus influence, the market for sentencing options. "[P]roblem-solving courts must have a finely attuned sense of the local legal marketplace, they explain, 'to make sure that the deal they are offering defendants is reasonable enough to provide an incentive to participate.'[196] On this view, treatment is a choice that enhances, rather than constrains, offender autonomy and hence responsibility.

3. *Efficiency and Measurable Effects.*—Finally, problem-solving courts adopt effectiveness and economic efficiency as core principles of court reform and strive to demonstrate these principles through 'measurable goals.'[197] As CCI explains, problem-solving courts 'cost money', the benefits of providing social services and community restitution must therefore be 'enough to offset the expense.'[198] For drug courts, common measures include recidivism rates and retention in mandated treatment programs.[199] For community courts, measures of success include 'drops in crime rates, reductions in arrest-to-arraignment processing times, improved community service compliance rates, and community service labor contributed to the community' as well as harder to measure positive effects on economic development.[200] Here, judicial attention to the individual offender combines with a practice of data collection and quantifiable performance standards so that the effects of problem-solving courts on criminal behavior can be understood and monitored in aggregate statistical terms. For Berman and Feinblatt, measuring concrete costs and benefits in a transparent and economistic fashion itself sets problem-solving courts apart from Progressive-era ones.[201]

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195. *Id.*

196. BERMAN & FEINBLATT, *supra* note 185, at 176.

197. *Id.* at 57.

198. JOHN FEINBLATT ET AL., CTR. FOR COURT INNOVATION, NEIGHBORHOOD JUSTICE: LESSONS FROM THE MIDTOWN COMMUNITY COURT 12–13 (1998).

199. For examples, see MICHAEL REMPEL ET AL., CTR. FOR COURT INNOVATION, THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS, AND IMPACTS 85–88, 111 (2003); STEVEN BELENKO, THE NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., RESEARCH ON DRUG COURTS: A CRITICAL REVIEW, 2001 UPDATE 51–52 (2001). *See also* Greg Berman & Anne Gulick, *Just the (Unwieldy, Hard to Gather, but Nonetheless Essential) Facts, Ma'am: What We Know and Don't Know About Problem-Solving Courts*, 30 FORDHAM URB. L.J. 1027, 1031–33 (2003) (measuring court success via increased retention rates in mandatory treatment programs, decreased recidivism rates, and cost savings compared to traditional adjudication, among other factors).

200. FEINBLATT ET AL., *supra* note 198, at 13.

201. BERMAN & FEINBLATT, *supra* note 185, at 57.

To conclude this subpart, problem-solving courts as they developed in the 1990s reflect and reinforce the larger ethos of personal responsibility and efficiency that was then transforming the administration of welfare more broadly. As numerous scholars have observed, during this period social service provision (if not the idea of the social good itself) became defined through ideas of self-empowerment, self-sufficiency. and individual participation and responsibility.[202] In 1996, for example, the federal government dismantled the primary means-tested welfare program (Aid to Dependent Families with Children) that provided cash aid to families that met income qualifications and replaced it with the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)—what commentators widely describe as workfare rather than welfare.[203] Welfare became not an entitlement but rather a contractual relationship: recipients receive benefits in exchange for working as well as in exchange for meeting other obligations such as 'work tests' and 'individual responsibility plan[s]' designed to impart the skills and habits of good market actors.[204] Individuals who fail to comply face reduced benefits and penalties. Indeed, as Kaaryn Gustafson explains, '[t]he new welfare policies threatened that those who failed to play by the rules—by meeting mandatory work requirements, by abiding by behavior reforms, and by reporting all details of income and household composition—would be harshly punished with new penalties.'[205]

Problem-solving courts exemplify this logic. The services and benefits these courts provide are based on a particular set of social controls: an individual's responsibility to use his own resources to manage risk and engage in self-improvement rather than the state's obligation to meet social needs, and they combine incentives for state services with sanctions and punishments. As I illustrate in the following subpart, in the 1990s and early 2000s these ideas clearly influenced how New York problem-solving courts sought to represent and manage prostitution.

C. Prostitution in the Midtown Community Court

In the 1990s, when court reformers again created specialized court programs to prosecute prostitution defendants, the social context for selling

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202. *See generally* Malkin, *supra* note 193, at 368; BARBARA CRUIKSHANK, THE WILL TO EMPOWER: DEMOCRATIC CITIZENS AND OTHER SUBJECTS (1999); Nikolas Rose, *The Death of the Social? Re-figuring the Territory of Government*, 25 ECON. & SOC'Y 327 (1996).

203. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 42 U.S.C. §§ 601–17, 619 (2012)).

204. *See* AMIR PAZ-FUCHS, WELFARE TO WORK: CONDITIONAL RIGHTS IN SOCIAL POLICY 58–59, 107–08, 120–22 (2008).

205. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 661 (2009); *see also* Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 357–62 (2014).

sex had dramatically changed. Moral panic about big business, organized commerce, and sex trafficking had disappeared—or at least it had disappeared from the concerns of court reformers in New York. Court reformers described decentralized, mostly spot, street prostitution markets.[206] They argued that the primary problem with these markets was not that they victimized women or mimicked the most troubling aspects of unregulated capitalism in the underground economy, but rather that they happened on the streets in all-too-obvious ways harming *other*, more desirable markets—that is, prostitution as a form of social disorder undermining the commercial viability, safety, and 'community' of New York City.[207]

To be sure, in the 1970s and 1980s radical feminists had revived a moral assault on pornography and prostitution that included arguments that prostitution was a form of sexual slavery.[208] But as far as I can discover, such arguments failed entirely to influence early problem-solving prostitution diversionary court programs. As Gruber and I elaborate elsewhere, in a highwater moment of broken-windows policing, prostitution appeared akin simply to other 'quality of life' offenses in New York City problem-solving courts—in turn laying the ground for the victim-based critique that would follow.[209]

In this subpart, I describe how the first problem-solving court to address prostitution proposed to operate as a welfarist institution. In 1993, CCI launched the Midtown Community Court (MCC) in Manhattan and charged judges with tailoring interventions based on a range of personal information about defendants including recidivism rates but also data 'gathered by pre-arraignment interviewers.'[210] Judges were supposed to use this information

206. Robert Victor Wolf, *New Strategies for an Old Profession: A Court and a Community Combat a Streetwalking Epidemic*, 22 JUST. SYS. J. 347, 348–49 (2001); Sviridoff et al., *supra* note 6, at 4.1.

207. *See, e.g.*, ROBERT V. WOLF, CTR. FOR COURT INNOVATION, DEFINING THE PROBLEM: USING DATA TO PLAN A COMMUNITY JUSTICE PROJECT 3 (1999).

208. This assault split second-wave feminists into two camps: those who saw the selling of sex as uniquely and intrinsically oppressive of women (a form of slavery under patriarchy), see generally KATHLEEN BARRY, FEMALE SEXUAL SLAVERY (1979) and CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989), and those who argued for its destigmatization as a form of work, attentive however to labor abuses and calling for class- and race-based analysis of the sex industry, for example, Jo Doezema, *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy*, *in* GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 34, 37–40 (Kamala Kempadoo & Jo Doezema eds. 1998). For more detail, see Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1351–54); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 307–14 (1995); Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409, 1418–39 (2011).

209. Cohen & Gruber, *supra* note 9.

210. DAVID C. ANDERSON, U.S. DEP'T OF JUSTICE, IN NEW YORK CITY, A 'COMMUNITY COURT' AND A NEW LEGAL CULTURE 8 (1996).

to 'assess[] how defendants will handle community service assignments and what social programs they might need.'[211] To that end, the MCC boasted 'an array of professional helpers on-site—counselors, educators, nurses, job trainers, and drug-treatment providers to address the problems—addiction, homelessness, unemployment—that are often associated with criminal behavior.'[212] Even more, Berman and Feinblatt emphasized that the MCC took 'special pains to create social service interventions targeted to the unique issues of prostitutes, many of whom suffer from drug abuse, domestic violence, low self-esteem, and other chronic problems.'[213]

'Social service interventions, however, followed a particular temporal logic. Despite the MCC's commitment to individual investigation, most prostitution defendants were cast generally as self-interested market actors (albeit market actors with an array of individual problems). As such, social controls took two basic forms. First, reformers used informal, discretionary court procedure to craft alternative market incentives—namely, court mandates designed to make it harder for defendants to turn a profit at work.[214] In particular, the MCC scheduled community-service sentences (which included tasks like cleaning toilets or stuffing envelopes)[215] during evening or night-time hours, not only to provide "restitution to the community' but also to "put a strain on prostitutes' 'work' schedules' and, as a result, to "reduce[] their income.'[216] Indeed, court researchers reasoned these alternative sanctions made it 'more difficult for prostitutes and would-be customers to make transactions. This decline in the number of potential customers in turn resulted in depressed prices for sex acts, and diminished incomes for prostitutes.'[217] To be sure, all penal deterrence strategies aim to make the costs outweigh the benefits of crime, but in this case the MCC deployed rather literal economic logics.

Second, at the same time as they worked to make prostitution less remunerative, reformers designed treatment programs to teach prostitution defendants market-oriented skills like risk assessment and personal responsibility. In the MCC, first-time offenders were sentenced to 'a session of health education—part of the court's efforts to make prostitutes face up to the dangers and risks of their lifestyle.'[218] In the Red Hook Community Court in Brooklyn (also piloted by CCI), Malkin described health classes to

211. *Id.*
212. BERMAN & FEINBLATT, *supra* note 185, at 63.
213. *Id.* at 64.
214. *See* Sviridoff et al., *supra* note 6, at 4.29.
215. Wolf, *supra* note 206, at 355.
216. Sviridoff et al., *supra* note 6, at 4.29.
217. *Id.*
218. BERMAN & FEINBLATT, *supra* note 185, at 93.

teach prostitution defendants about STDs and the risks of not using condoms.[219] As Berman and Feinblatt explained of these mandates more generally, they were designed to help prostitution defendants 'understand the long-term risks of their behavior' as well as to make resources available for those particular defendants who were 'willing to make a commitment to get off the streets.'[220] Other court researchers similarly described services for prostitutes focused 'on building self-esteem, goal setting and planning for the future.'[221] Indeed, Berman and Feinblatt featured the recollections of one MCC defendant who described how her social worker counseled her: 'You're so much better than this. Do you want to finish college? You're not going to be pretty forever. You've got your son to think about.'[222]

Most prostitution defendants thus received community service coupled with counseling and pedagogy designed to teach skills in risk assessment, personal responsibility, and self-improvement.[223] But offenders could face incarceration if they did not complete their service mandates.[224] Recidivists faced incarceration as well; if a computer screen placed before the judge flashed 'persistent misdemeanor' (anyone with four or more convictions in the MCC), a prostitution defendant could receive a jail sentence, typically longer than she would receive in a conventional court.[225]

Finally, CCI devoted significant resources to measuring effects in a language that was predominantly efficiency driven. In an extensive investigation, a group of seven court researchers, Michele Sviridoff et al., reported that over a year and a half, prostitution arrests declined by 56%.[226]

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219. Malkin, *supra* note 193, at 381–82; *see also* THE URBAN JUSTICE CTR., REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY 75 (2003), http://sexworkersproject.org/downloads/RevolvingDoor.pdf [https://perma.cc/J6UR-BXTQ] (quoting a representative from a New York District Attorney's office describing a similar program with "training for women on self-respect, drug rehab, [and] health issues including HIV and other STDs").

220. BERMAN & FEINBLATT, *supra* note 185, at 64.

221. ERIC LEE & JIMENA MARTINEZ, CTR. FOR COURT INNOVATION, HOW IT WORKS: A SUMMARY OF CASE FLOW AND INTERVENTIONS AT THE MIDTOWN COMMUNITY COURT 5 (1998).

222. BERMAN & FEINBLATT, *supra* note 185, at 134.

223. In the first 18 months, the MCC sentenced 95% of prostitution defendants to community and/or social services compared to only 25% in the conventional criminal court downtown. Sviridoff et al., *supra* note 6, at 1.9.

224. *Id.* at 3.7 n.4 (reporting that of prostitution defendants sentenced to community service, 52% of those that did not complete their service mandates were sentenced to jail).

225. BERMAN & FEINBLATT, *supra* note 185, at 93–94 (describing a case of a recidivist offender who received thirty days in jail; the Judge explains, '[W]hen I've been trying to help them and they keep prostituting, I have no problem putting them in jail"). According to Sviridoff et al., "the Midtown Court handed out a smaller proportion of jail sentences than Downtown, but jail sentences at Midtown were three times as long (fifteen days compared to five days). Sviridoff et al., *supra* note 6, at 4.3–4.4.

226. Sviridoff et al., *supra* note 6, at 1.10. Arrests declined even further over the following eighteen months. *Id.* at 4.30.

They argued this decline was at least one-third attributable to the court.[227] According to their interview data, many defendants had decided that "it had become too difficult to work two jobs—on the streets and at the courthouse."[228] In response, some left Manhattan to work in boroughs without a problem-solving court, others moved indoors or tried to serve only regular customers, and some small number stopped working altogether.[229] As a result, the authors concluded, "*markets*—and the potential to make money—were shrinking."[230]

CCI tried to quantify this impact. MCC's approach was "resource-intensive, Berman and Feinblatt conceded, but it was offset by cost savings to the court system and improvements to community life.[231] Financial savings stemmed primarily from fewer arrest and arraignments (which cost about $1,000 per person) and secondarily from reduced jail costs.[232] (Reduced jail costs were not terribly significant because conventional courts did not incarcerate at high rates and because "secondary" jail sentences"—sentences for defendants who failed to complete service mandates—increased in the MCC.)[233] Benefits to the "community," however, potentially included "multiplier effects" such as "changes in property value and rents for residential, retail, and office uses; changes in patterns of people and business moving into and out of the Court's catchment area; or change in the frequency of police calls for service about Midtown quality-of-life problems."[234]

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227. Other potential causal factors included changes in policing and changes in street drug markets that also depressed street prostitution markets. *Id.* at 2.30, 4.4, 4.30 n.29.

228. *Id.* at 1.11.

229. *Id.* at 4.23, 4.29.

230. *Id.* at 4.4 (emphasis added).

231. BERMAN & FEINBLATT, *supra* note 184, at 64. They write:

> There is no denying that this approach is resource-intensive: the Midtown Community Court is home to a range of on-site services that simply don't exist in most criminal courts. Some government and nonprofit service providers agree to place staff at the court at no extra cost, recognizing that the Court can guarantee them thousands of clients each year. In other cases, the Court must pay for additional services to meet the needs of its defendants. In the project's first three years, these additional costs were born[e] primarily by private funders. At the end of this "demonstration" period, local government assumed these costs, convinced by Midtown's results that it was an investment worth making.

Id.

232. Sviridoff et al., *supra* note 6, at 4.30 n.29 ("Given a conservative estimate of $1,000 per case in arrest-to-arraignment expenditures, a net reduction of 1,500 arrests results in a system savings of $1.5 million."). The authors proceed to argue that it is reasonable to attribute a third of these savings to the work of the MCC. *Id.*

233. *Id.* at 3.5–.10. The authors explain that for prostitution (and some other crimes) "[p]rimary jail savings were comparatively small and the costs associated with an increased likelihood of secondary jail eradicated primary jail savings. *Id.* at 3.10.

234. *Id.* at 1.3, 1.18.

As Garland observes, over the past several decades, welfare practices in criminal courts have become "more conditional, more offence-centred, more risk conscious, presenting offenders who are subject to a 'welfare mode' of criminal adjudication (such as treatment and probation) less as "socially deprived citizens' or as clients "in need of support' than as 'risks who must be managed' and measured.[235] As we have seen, Garland's description aptly characterizes the MCC.

That is, until very recently. In 2012, CCI published a report describing prostitution defendants in the MCC precisely as *clients* with *social service needs* because they experience *trauma*.[236] Intriguingly, however, the report elides the court's own transformation. 'Street prostitution, it begins, 'was a significant problem in Midtown Manhattan when the Midtown Community Court opened in 1993.'[237] But rather than describe roughly fifteen years of responsibilizing interventions, the report instead proceeds to argue that '[t]he *court quickly recognized* that people arrested for prostitution had all kinds of social service needs, which included drug treatment, employment services, and housing. In response, staff screen each client, looking for histories of trafficking and underlying trauma and then connecting participants to appropriate services.'[238]

Chief of Policy and Planning, Judge Judy Harris Kluger, proposed a similar elision. She argued before the New York City Council that the HTICs—of which the MCC is now one—reflect 'nothing new, only the 'theory behind [New York's] successful problem-solving courts.'[239] But as the following subparts suggest, compared to virtually all other problem-solving court interventions, the New York City HTICs in fact embody a qualitatively different reformist orientation—specifically one that challenges dominant contemporary welfarist ideas of personal responsibility and efficiency.

D. Making Sex Trafficking into Domestic Trauma

In October 2013, when Chief Judge Jonathan Lippman announced the statewide roll-out of the new Human Trafficking Intervention Courts, he

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235. GARLAND, *supra* note 1, at 175.

236. SARAH SCHWEIG, DANIELLE MALANGONE & MIRIAM GOODMAN, CTR. FOR COURT INNOVATION, PROSTITUTION DIVERSION PROGRAMS 4 (2012).

237. *Id.*

238. *Id.* (emphasis added; internal quotations omitted).

239. *How Do the Human Trafficking Intervention Courts Address the Needs of New York City's Runaway and Homeless Youth Population?: Oversight Hearing Before the Comm. on Youth Servs.* New York City Council 11–12 (Dec. 12, 2013) [hereinafter *Council Hearing 12/12/13*] (statement of Judge Judy Kluger). In the 1990s, Kluger herself served as an MCC judge, but none of her current rhetoric about female victimization appears present at that time (at least none that I can uncover). She has declined to speak with me.

explained that appropriate cases involving a prostitution-related offense would be heard by 'a presiding judge who is trained and knowledgeable in the dynamics of sex trafficking and the support services available to victims.'[240] (Anyone charged with buying sex or trafficking sex was ineligible.) He commended the work of several actors and organizations for creating these new courts. These included prominent prostitution-abolitionist feminists—that is, feminists committed to the idea that all sex work is coerced and should be abolished—including Judge Kluger who developed HTIC practice protocols, as well as staff at the abolitionist organization Sanctuary for Families (where Kluger is now the executive director) such as advocates Lori Cohen and Dorchen Leidholdt. He also thanked CCI, the Judicial Committee on Women in the Courts, particularly for its publication of the 2013 *Lawyer's Manual on Human Trafficking*, and 'judicial pioneers' Fernando Camacho and Toko Serita.[241] Because all politics are local, I describe the creation of the New York City HTICs primarily through the advocacy and reform efforts of these particular actors and organizations.

Here, as previously, I describe the views of only legal and policy elites involved in New York City court reform and not the prostitution defendants arrested by the New York Police Department. Again, I do so because I am interested in tracing how the rhetorics of criminal court reform and public welfare administration have changed over time in analogous ways. But I should add nonetheless that the defendants processed through the HTICs comprise a particular slice of the people who sell sex in New York City.[242] The majority are poor women of color,[243] and their lives, I would venture, are

240. Jonathan Lippman, *Announcement of New York's Human Trafficking Intervention Initiative*, CTR. CT. INNOVATION (Sept. 25, 2013), http://www.courtinnovation.org/research/announcement-new-yorks-human-trafficking-intervention-initiative [https://perma.cc/PT5P-GGJ5].

241. *Id.*

242. For a classic account of the diversity and market stratification among sellers of sex (in San Francisco in the late 1990s), see generally Elizabeth Bernstein, *What's Wrong with Prostitution? What's Right with Sex Work? Comparing Markets in Female Sexual Labor*, 10 HASTINGS WOMEN'S L.J. 91 (1999). Ronald Weitzer recently reviewed several micro-level studies of sex and labor trafficking and likewise argued that there is a great deal of lived variation—"from extreme physical and psychological abuse, severe economic exploitation, and terrible working conditions to fully consensual and collaborative agreements"—that characterizes relationships that may be legally defined as trafficking in different countries. Ronald Weitzer, *Human Trafficking and Contemporary Slavery*, 41 ANN. REV. SOC. 223, 239 (2015).

243. *See* Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1336 n.14) (citations omitted). We explain that:

> From 2010 to 2014, 87.4% of the individuals arrested in New York City for Prostitution, P.L. § 230.00, or Loitering for the Purpose of Engaging in a Prostitution Offense, P.L. § 240.37, the two charges that merit inclusion in the HTICs, were identified by the arresting agency as Black, Hispanic or Asian. In that same period, 79.9% were identified as female. However, the gender assigned by the arresting agency does not always comport with an individual's actual gender identity. This

invariably constrained by a complex intersection of economic, social, and family conditions.[244]

So how did these actors and organizations make the case for a new kind of problem-solving court? Gruber, Mogulescu, and I have previously argued that the HTICs emerged in the context of a number of recent changes in the political and legal environment.[245] These changes include a highly publicized international campaign against sex trafficking that often aimed to conflate sex trafficking with all forms of transnational and domestic prostitution, in part by drawing on a (complex) paradigm of coercive control articulated by domestic violence advocates.[246] They also include a partial turn away from broken-windows quality-of-life policing in response to criticisms of mass incarceration[247]—even as, or precisely because, lawmakers have simultaneously promised to intensify the prosecution of violent offenders, here, traffickers.[248]

To only briefly summarize some of these shifts here, in the late 1990s and early 2000s an international movement launched an extensive campaign against international sex trafficking, often in foreign locations where it was easier for advocates to imagine and describe a complete and essentialized victim.[249] This campaign was spearheaded by many Western feminists, but unlike the domestic sex wars of the 1970s and 1980s, it was increasingly articulated in the language of human rights.[250] These efforts produced

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percentage would be significantly higher were transgender women identified as female rather than male in arrest data.

244. *See, e.g.*, Amy J. Cohen & Aya Gruber, *An Accidental Governance Feminist: An Interview with Kate Mogulescu*, *in* GOVERNANCE FEMINISM: A HANDBOOK, *supra* note 9. Mogulescu, as founder and supervising attorney of the Exploitation Intervention Project at the Legal Aid Society of New York, describes a constellation of economic and social challenges that her clients face.

245. Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1339–56).

246. *Id.* (manuscript at 1348–56).

247. New York City recently enacted the Criminal Justice Reform Act, which offers alternatives to criminal penalties for "broken-window" offenses such as public urination, open alcohol containers in public, and excessive noise. Criminal Justice Reform Act N.Y.C., N.Y. (June 13, 2016); *Mayor de Blasio Signs the Criminal Justice Reform Act*, NYC (June 13, 2016), http://www1.nyc.gov/office-of-the-mayor/news/530-16/mayor-de-blasio-signs-criminal-justice-reform-act [https://perma.cc/39LH-FT5V].

248. Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1386–88); *see also infra* note 260.

249. *See* Mariana Valverde, *The Rescaling of Feminist Analyses of Law and State Power: From (Domestic) Subjectivity to (Transnational) Governance Networks*, 4 U.C. IRVINE L. REV. 325, 332–33 (2014).

250. For an overview, see, for example, Prabha Kotiswaran, *Beyond Sexual Humanitarianism: A Postcolonial Approach to Anti-Trafficking Law*, 4 U.C. IRVINE L. REV. 353, 356–57 (2014). *See also* Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 289 (2011).

significant institutional effects: in 2000, a U.N. protocol[251] and federal anti-trafficking legislation in the United States,[252] and in 2007, an anti-trafficking law in New York.[253]

But it was not simply this explosion of international anti-sex-trafficking activism—repatriated home—that shaped the HTICs as new kinds of problem-solving courts. It was also, I will suggest, the highly specific ways in which advocates described sex trafficking as—quite literally—*a form of family violence* that persuaded lawmakers and court administrators that '[w]omen who are arrested for prostitution in the Bronx are not, in fact, prostitutes. They are victims of sex trafficking' in need of trauma-informed care.[254]

In particular, advocates encouraged policy makers to consider that much trafficking happens at a family-sized criminal scale. Rather than picture 'an organized crime ring,' the *Lawyer's Manual on Human Trafficking*, for example, instructs readers to think of '[a] family business' or 'Mom and Pop' trafficking operations.'[255] Advocates argued further that such operations recreate the structure of abusive families (of various kinds) as a technique of control. As Liedholdt explained:

> The trafficker positions himself as the head of the household, the paterfamilias who is in charge of the other family members, who take the roles of subordinate wife and children. These roles are reinforced by the traffickers' terminology: Victims are instructed to call their pimps 'Daddy' and their fellow victims 'wife-in-laws.' Asian trafficking victims are often instructed to refer to their traffickers respectfully as 'older brother' or 'older sister.' Violence and verbal abuse are justified as the patriarch's prerogative, indeed his duty, to discipline a disobedient spouse and unruly children. Not only do traffickers frequently make their victims their lovers, showering on them all of the trappings of romantic seduction, in a number of

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251. G.A. Res. 55/25 (II), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000).

252. *E.g.*, Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 101–13, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 7101–13 (2012)).

253. 2007 N.Y. Laws 2753 § 2 (codified at N.Y. PENAL LAW § 230.34 (McKinney 2008)).

254. *Combatting Sexual Exploitation in NYC: Examining Available Social Services: Oversight Hearing Before the Comm. on Women's Issues and Comm. on Gen. Welfare,* New York City Council 2 (June 27, 2011) [hereinafter *Council Hearing 6/27/11*] (written statement of Sarah Dolan, Advocate Counselor, Sanctuary for Families).

255. Dorchen A. Leidholdt & Katherine P. Scully, *Defining and Identifying Human Trafficking*, *in* LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR TRAFFICKING VICTIMS 27, 38 (Jill Laurie Goodman & Dorchen A. Leidholdt eds. 2013).

> instances they have been known to marry their victims in order to cement their control.[256]

From this perspective, prostitution, sex trafficking, and family violence are all shaped by indistinguishable logics. As Lori Cohen put it: '[T]he ways in which pimps exercise power and control over prostituted victims are often identical to the ways in which batterers control their intimate partners.'[257] Women stay in abusive situations because of affective ties, and abused women, in turn, become vulnerable to prostitution as an 'extreme' form of intimate-partner abuse and control.[258] Or, as Judge Kluger elaborated, 'Similar to victims of other forms of domestic violence, trafficking victims often experience the same power and control, manipulation and cyclical violence that leads them to believe that their abusers love, protect and provide for them.'[259]

Thus whereas Progressive-era vice reformers argued for expansive understandings of sex trafficking based on the scale and degree of impersonal and anonymous business organization and capitalist exploitation, contemporary anti-trafficking advocates emphasize the degree of affective, intimate, and psychological influence. They do so specifically by building on the work of domestic violence legal reformers who reject "an understanding of domestic violence based on discrete violent acts' and likewise arguing for a legal definition of sex trafficking based on 'perpetrators' on-going tactics of power and control, *many nonphysical and not overtly violent.*'[260]

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256. Dorchen A. Leidholdt, *Human Trafficking and Domestic Violence: A Primer for Judges*, JUDGES' J. Winter 2013, at 16, 21.

257. *Council Hearing 6/27/11*, *supra* note 254, at 105 (statement of Lori Cohen, Senior Staff Attorney, Sanctuary for Families); *see also Hearing Before the Comm. on Women's Issues*, New York City Council 133–34 (Apr. 25, 2012) [hereinafter *Council Hearing 4/25/12*] (statement of Dorchen Leidholdt, Director of Center for Battered Women's Legal Services at Sanctuary for Families).

258. *See, e.g.*, *Council Hearing 12/12/13*, *supra* note 239, at 12 (statement of Judge Judy Kluger) ("As our knowledge and understanding of domestic violence has grown, we have come to recognize that human sex trafficking is possibly its most extreme form."); Amanda Norejko, *Representing Adult Trafficking Victims in Family Offense, Custody, and Abuse/Neglect Cases*, *in* LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR TRAFFICKING VICTIMS, *supra* note 255, at 193, 193 ("Many victims are recruited into commercial sexual exploitation by a husband or boyfriend, who acts as the victim's pimp. This form of trafficking is a subset of domestic violence, as the tactics used to maintain control over intimate partners are frequently taken to extremes to compel victims into prostitution."); Amy Barasch & Barbara C. Kryszko, *The Nexus Between Domestic Violence and Trafficking for Commercial Sexual Exploitation*, *in* LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR TRAFFICKING VICTIMS, *supra* note 255, at 83, 85 ("While the tactics of batterers and traffickers are similar, the power and control used over trafficking victims are often more extreme.").

259. *Council Hearing 12/12/13*, *supra* note 239, at 14–15 (statement of Judge Judy Kluger).

260. Leidholdt & Scully, *supra* note 255, at 29 (emphasis added). In response to such arguments, the New York legislature recently reclassified sex trafficking from a class B felony to a

This discursive emphasis on individual and intimate forms of influence penetrated policy making. For example, in a 2006 New York City council meeting debating state anti-trafficking legislation, some councilmembers explicitly distinguished individual pimps from people who were *actually* traffickers. As one argued, 'the pimps are small time to me. The traffickers are the ones who have enough money to get a boat and bring over at least 100 young ladies from other countries, and bring them here.'[261] In 2011, by contrast, councilmembers invoked intimate partners, not organized crime, to describe the problem of trafficking against free trade. For example, one explained, 'many people from a libertarian perspective, take a perspective 'Oh, it's free trade , but the reality is, it's not free trade, right? If someone has an 18 year old boyfriend and they're being forced into it.'[262] Or a prosecutor explained how she had newly come to understand many cases of trafficking as reflecting intimate forms of vulnerability: 'It's like, if you love me you'd do this.'[263]

This new emphasis on intimate forms of violence and control also meant that new institutions were recruited into anti-trafficking projects.[264] For example, New York City Family Justice Centers, a city initiative to combat domestic violence, now train all their staff 'to recognize signs of trafficking,'[265] the Manhattan District Attorney's Office trains all assistant D.A.s who prosecute domestic violence to look for signs of trafficking when

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class B *violent* felony (the category of first degree rape) even when commercial sex is induced without physical compulsion. *See* Trafficking Victims Protection and Justice Act (TVPJA), 2015 N.Y. Sess. Laws ch. 368 (McKinney). The Act was passed by the New York State Legislature in March 2015 and was signed into law by New York's Governor in October of 2015. *Assembly Bill A506*, N.Y. ST. SENATE (2015), https://www.nysenate.gov/legislation/bills/2015/a506 [https://perma.cc/Y6E6-FSXV].

261. *Resolution Calling Upon the State of New York to Recognize that Human Trafficking is a Crime: Hearing Before the Comm. on Women's Issues*, New York City Council 69 (Sept. 28, 2006) [hereinafter *Council Hearing 9/28/06*] (statement of Councilmember Darlene Mealy). In response, New York State Assemblyman William Scarborough, a cosponsor of what would soon be New York's anti-trafficking law, explained his view that the law should not distinguish between these two "equally heinous" crimes. *Id.* at 69–70.

262. *Oversight: Combatting Sex Trafficking in NYC: Examining Law Enforcement Efforts—Prevention and Prosecution: Oversight Hearing Before Comms. on Pub. Safety and Women's Issues*, New York City Council 127 (Oct. 19, 2011) [hereinafter *Council Hearing 10/19/11*] (statement of Councilmember David Greenfield).

263. Interview with Kimberly A. Affronti, Deputy Bureau Chief, Queens Cty. Dist. Attorney's Office, in Queens, N.Y. (June 24, 2014) (joint interview) (on file with author).

264. *See, e.g.*, Barasch & Kryszko, *supra* note 258, at 83–90 (arguing that "[d]omestic violence providers are uniquely positioned to extend their missions to include assisting trafficking victims").

265. *Council Hearing 6/27/11*, *supra* note 254, at 35–36, 43 (statement of Alexandra Patino, Executive Director, New York City Family Justice Center in Queens).

they are prosecuting domestic violence cases,[266] and the New York Human Resources Administration Office now screens job seekers for trafficking signs alongside signs of domestic violence.[267]

Or to put this all another way: by domesticating international sex trafficking—in *both* senses of the word—anti-trafficking advocates transformed the rhetorical and institutional landscape available to court reformers. As the following subpart explores, it was precisely from within this landscape of intimate-partner violence and family trauma that a new breed of court reformers emerged.

E. Family Trauma and Court Reform

Nearly all accounts of the HTICs begin with the pioneering work of Judge Fernando Camacho who used trauma-based theories of domestic violence to change how he adjudicated prostitution cases. He explained that he witnessed a tremendous amount of 'dissociation' among prostitution defendants in his courtroom—a term trauma professionals use to describe how victims may disconnect from painful experiences in the past or present.[268] As such, in 2002, he began to offer service-based dispositions alongside 'patience and compassion.'[269] His colleagues, he explained, treated prostitution defendants as criminal market actors, that is, as people who 'want to be out there, enjoy what they are doing, [and] like making the money. and therefore need "a few days in jail to clean up the streets' or perhaps a few classes where "someone lectures about how awful prostitution is.'[270] By contrast, Camacho learned to think instead 'from a domestic violence area, understanding why victims act in certain ways, and how batterers are able to control their victim's behavior [and] why these people had no ability to just get up and walk away.'[271] From Camacho's perspective, a prostitution defendant needed a court that could act like a compassionate parent or a functional family would. In his words: '[S]he needed someone to show her someone cared about what she was doing with

266. *Council Hearing 4/25/12*, *supra* note 257, at 62 (statement of Karen Friedman-Agnifilo, Executive Assistant District Attorney, Manhattan District Attorney's Office).

267. *Council Hearing 6/27/11*, *supra* note 254, at 76–79 (statement of Marie B. Phillip, Executive Director, Office of Domestic Violence, Designated Human Trafficking Liaison, Human Resources Administration).

268. *See, e.g.*, Katherine M. Iverson et al., *Predictors of Intimate Partner Violence Revictimization: The Relative Impact of Distinct PTSD Symptoms, Dissociation, and Coping Strategies*, 26 J. TRAUMATIC STRESS 102, 103 (2013); David A. Sandberg et al., *Dissociation, Posttraumatic Symptomatology, and Sexual Revictimization: A Prospective Examination of Mediator and Moderator Effects*, 12 J. TRAUMATIC STRESS 127, 129 (1999).

269. Interview with Fernando Camacho, Court of Claims Judge and Acting Supreme Court Justice, Suffolk Cty. Court of Claims, N.Y. (Dec. 17, 2014) (joint interview) (on file with author).

270. *Id.*

271. *Id.*

her life, was upset with her when she did bad and praised her when she did something positive.'[272]

Camacho operated largely on his own in Queens until 2008, when CCI began to develop a similar view that it institutionalized explicitly around family, intimate-partner, and childhood trauma. New staff members Courtney Bryan and Robyn Mazur had previously defended battered women in the civil and criminal justice system.[273] Battered Women's Syndrome is a trauma-based theory that posits that women who experience domestic violence develop a form of post-traumatic stress disorder (PTSD) that includes learned helplessness.[274] Just as advocates use this idea to defend women who harm their batterers, Bryan and Mazur proposed to extend this violence–trauma nexus to a broader swath of criminal defendants with histories of gender-based, domestic, or childhood abuse. In 2010, they received a grant from the Department of Justice's Office of Violence Against Women that focused generally on victims of domestic violence and sexual assault. They used the grant to, among other things, change how the MCC provided services to women arrested for prostitution 'because at that time, Bryan explained, 'the judicial response to prostitution was not centered around the recognition that many of the [defendants] have histories of and may be current[ly] [subjected to] gender-based violence.'[275] The overarching focus of the grant and the subsequent programming was not yet singularly sex trafficking, Bryan explained. What united new efforts to advocate for victims of domestic violence, childhood sexual assault, and sex trafficking in the criminal justice system was trauma.[276]

In 2010, CCI hired a social worker, Miriam Goodman, trained in trauma theory to revamp how the MCC provided services to prostitution defendants. Goodman credits as a foundational influence for the pilot project Judith Herman's *Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror*—a text that reads domestic violence

272. Amy Muslim et al., Ctr. for Court Innovation, The Commercial Sexual Exploitation of Children in New York City: Formative Evaluation: The New York City Demonstration 72 (Sept. 2008) (unpublished report) (quoting Judge Camacho), https://www.ncjrs.gov/pdffiles1/nij/grants/225084.pdf [https://perma.cc/WUZ6-9QVB].

273. *Staff*, CTR. CT. INNOVATION, http://www.courtinnovation.org/staff [https://perma.cc/U4MX-LLFG].

274. The theory was pioneered by psychologist Lenore Walker. *See generally* LENORE E. WALKER, THE BATTERED WOMAN (1979). For a nuanced elaboration of how particular strands of feminism have popularized and entrenched ideas of psychological trauma within legal discourse and institutions, see Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1201–14 (2010).

275. Interview with Courtney Bryan, Project Dir., Midtown Cmty. Court, Ctr. for Court Innovation, in Manhattan, N.Y. (June 23, 2014) (on file with author).

276. *Id.*

together with war to develop a feminist theory of PTSD.[277] The basic idea is that trauma occurs when a victim experiences the impossibility of action (either resistance or escape) against overwhelming force.[278] In the aftermath of such force, people often experience intense feelings of loss of control and disconnection and their physiological reactions to stimuli may become 'overwhelmed and disorganized'"[279]—indeed as one early theorist put it: '[T]he whole apparatus for concerted, coordinated and purposeful activity is smashed. '[280] In 2012, Goodman coauthored a study that found that 'over 80 percent of the women arrested for prostitution in Manhattan report some form of past or present victimization, including childhood sexual abuse, sexual and/or physical assault, or domestic violence. '[281] As such, she and her CCI collaborators argued, it made sense to understand prostitution defendants as trauma survivors.[282]

CCI began hosting trainings to encourage prosecutors and judges to think broadly about the terms "force, fraud, and coercion' (the legal standard for sex trafficking under federal law).[283] Goodman presented trafficking scenarios that criminal justice professionals would likely perceive as domestic violence—an experience of trauma, she reasoned, already familiar to court personnel. She then used these scenarios to illustrate why women do not leave 'intimate-partner pimps" and why a decision to sell sex is often coercively controlled: that is, trafficking in other terms.[284] Mazur made the same point in her trainings: 'Once again the parallel to [domestic violence], don't think she is not a victim, her behavior is trauma-related. '[285]

A similar shift was taking place at the Red Hook Community Court in Brooklyn. In 2008, a new clinical director, Julian Adler, trained in law and social work, 'brought a personal interest in the relationship between psychological trauma and addiction, which led to a new focus on identifying

277. JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR (1992). Interview with Miriam Goodman, Assistant Dir. for Anti-Trafficking & Trauma Initiatives, Ctr. for Court Innovation, in Manhattan, N.Y. (July 1, 2015) (on file with author). [hereinafter Interview with Miriam Goodman (July 2015)].

278. HERMAN, *supra* note 277, at 34.

279. *Id.*

280. *Id.* at 35 (quoting ABRAM KARDINER & HERBERT SPIEGEL, WAR STRESS AND NEUROTIC ILLNESS 186 (1947) (describing combat neurosis) (emphasis omitted)).

281. SCHWEIG, MALANGONE & GOODMAN, *supra* note 236, at 3.

282. Interview with Miriam Goodman, Assistant Dir. for Anti-Trafficking & Trauma Initiatives, Ctr. for Court Innovation, in Manhattan, N.Y. (June 24, 2014) (joint interview) (on file with author) [hereinafter Interview with Miriam Goodman (June 2014)].

283. *Id.*

284. *Id.*

285. Interview with Robyn Mazur, Dir. of Special Projects, Violence Against Women, Ctr. for Court Innovation, in Manhattan N.Y. (June 23, 2014) (on file with author).

and treating trauma among Red Hook defendants, especially women involved in prostitution.'[286] According to Adler, at the time most problem-solving courts operated from a unidimensional model driven by drug treatment that emphasized traditional and stigmatized ideas of mental health and pathology and a medical view of addiction, including attention to how defendants may try to manipulate service providers and other court personnel. From this perspective, he explained, 'treatment is all about kicking the [criminal] habit and avoiding relapse.'[287]

Along with other social workers experienced in domestic violence, Adler helped to catalyze a broader shift within criminal court reform to see defendants as complex trauma survivors, often including the trauma of childhood sexual abuse. From this perspective, neither traditional ideas of mental illness and addiction nor rational-actor ideas of agency and choice suffice to explain or treat a good deal of crime, including prostitution. Instead, particular kinds of criminal choices, Adler argued, reflect trauma and PTSD. 'Debates about agency versus constrained agency notwithstanding, Adler asserted, 'on its face, I think engaging in sex work is traumatic for many people.'[288] Thus he and his staff began referring prostitution defendants to a trauma-informed outpatient mental health clinic.[289] In 2013, social worker Kate Barrow joined Red Hook and introduced a trauma-informed assessment form (that she had developed with Goodman while working at the MCC) to change how clinicians produce knowledge about defendants in court.[290] Questions asked at Red Hook include indications of PTSD such as: 'Have you experienced a harm? Have you ever had an experience where you felt really scared, where you have dreams or nightmares about something scary that happened to you?'"[291]

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286. CYNTHIA G. LEE ET AL., A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER 41 (2013).

287. Interview with Julian Adler, Dir. of Research-Practice Strategies, Ctr. for Court Innovation, in Manhattan, N.Y. (July 2, 2015) (on file with author); *see also* Ursula Castellano, *Courting Compliance: Case Managers as 'Double Agents' in the Mental Health Court*, 36 LAW & SOC. INQUIRY 484 (2011). Castellano explains how in mental health courts where "recovery stems from treating the offender's individual pathology,' case managers scrutinize whether the 'client is being truthful, forthcoming, and admitting mistakes [T]he failure of the offender to properly disclose—either by lying, lying by omission, or not admitting wrongdoing—was classified as a serious violation of the terms of program participation. *Id.* at 501.

288. Interview with Julian Adler, *supra* note 287.

289. *Id.*

290. Interview with Kate Barrow, Dir. of Staff Training & Dev. Ctr. for Court Innovation, in Brooklyn, N.Y. (Apr. 9, 2015) (on file with author).

291. *Id.* Here, for example, is some language from the form:

> In your life, have you ever had any experience that was so frightening, horrible, or upsetting that, in the past month, you:
>
> Have had nightmares about it or thought about it when you did not want to?

Around the same time, CCI reformers in Queens were also using trauma 'as a hook' to rethink the prosecution of women in mental health and drug courts by 'building on principles that come from the domestic violence world.'[292] All women diverted into these courts would be screened for domestic violence and sexual assault.[293] Katie Crank, the Assistant Director for Gender and Justice Initiatives, helped to adapt and implement the clinical assessment tool developed by Goodman and Barrow to ask female defendants, for example, whether they experience constraints on their movement and resources, and whether they have had troubling childhood experiences.[294] Based on this assessment, women may be offered trauma-informed counseling and social services. As Crank explained: 'This was really kind of a seismic shift: thinking of women who are appearing in the systems as defendants as also victims of trauma.'[295] The shift required judges and prosecutors to think about how trauma influences the choices people make, whether those choices are controlled by a pimp, trafficker, or (other kind of abusive) domestic partner, and thus to stop 'think[ing] about recidivism as the only measure of success or failure for a defendant's recovery.'[296]

As these three examples suggest, it was the uptake of trauma as a specific and newly intelligible clinical diagnosis in New York City problem-solving courts, combined with popular outrage about sex trafficking, that made it possible for reformers to transform how problem-solving courts treated prostitution defendants. As Bryan put it, around 2010, arguments about trauma, domestic violence, and sex trafficking all overlapped, making court reform possible in new ways.[297] To be sure, problem-solving courts have since their inception used mental health diagnoses to influence the form and methods of criminal adjudication in a welfarist direction. But from the perspective of all the reformers described here, trauma and PTSD diverge significantly from other more stigmatized personality disorders commonly identified in problem-solving courts. This is because PTSD, they argue, reflects an ordinary response to external violence. Following Judith Herman,

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Tried hard not to think about it or went out of your way to avoid situations that reminded you of it?

Were constantly on guard, watchful, or easily startled?

Felt numb or detached from others, activities, or your surroundings?

Red Hook Adult Assessment Form (on file with author).

292. Interview with Katie Crank, Assistant Dir., Gender & Justice Initiatives, Ctr. for Court Innovation, in Manhattan, N.Y. (July 1, 2015) (on file with author).

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. Interview with Courtney Bryan, *supra* note 275.

Goodman, Mazur, Adler, and others suggest that many kinds of defendant behaviors—that prosecutors and judges may understand as antisocial and hence as risk factors for crime and recidivism—are in fact normal reactions to family and intimate-partner violence and trauma.[298] Or as ethnographer Allan Young explains, unlike other mental health diagnoses, 'PTSD reserves one feature for itself: the eponymous event.'[299] The traumatic event, in turn, changes the social meaning of symptomatic behavior—"responsibility shifts from [one's] will or mind to an external locus.'[300] Feminist court reformers used this argument about the distinctiveness of trauma to introduce a different (and rather complex) set of ideas about how problem-solving courts should administer counseling and welfare in ways that break from responsibilization.

F. The Human Trafficking Intervention Courts

Like in all problem-solving courts, judges in the HTICs are encouraged to invite prosecutors, defense attorneys, and service providers to collaborate in order to reach mutually agreeable service mandates. Also like all problem-solving courts, the HTICs staff representatives from numerous social service organizations to implement these mandates. As prosecutor Kim Affronti explains of her courtroom:

> Every Friday we have at least eight programs represented by at least one service provider appearing in our courtroom, GEMS, Mount Sinai, SAVY Restore, Garden of Hope, New York Asian Women's Center, Hidden Victims Project, Community Healthcare Network, as well as the pro-bono project launched in July of 2014 by the Mayor's Office to Combat Domestic Violence, and Sanctuary for Families [301]

These providers offer counseling as well as other more material services such as free medical care, free legal and immigration aid, and—as much as possible—assistance in accessing education, job training, shelters, and low-income housing. Indeed, a recent New York City budget hearing featured judges, defense attorneys, prosecutors, and social workers all lobbying

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298. Interview with Miriam Goodman (July 2015), *supra* note 277; Interview with Julian Adler, *supra* note 287; Interview with Robyn Mazur, *supra* note 285; *see also* Miriam Goodman & Robyn Mazur, *Identifying and Responding to Sex Trafficking*, *in* A GUIDE TO HUMAN TRAFFICKING FOR STATE COURTS 89, 93–95 (2014). They argue that popular evidence-based (risk-need-responsivity) tools that measure risk of recidivism—via factors such as antisocial behavior, attitudes, associations, and personality characteristics—are misapplied when applied to victim-defendants of trafficking.

299. Allan Young, *Reasons and Causes for Post-Traumatic Stress Disorder*, 32 TRANSCULTURAL PSYCHIATRIC RES. REV. 287, 289 (1995).

300. *Id.*

301. *Effectiveness of Human Trafficking Intervention Courts: Oversight Hearing Before the Comm. on Courts & Legal Servs. and the Comm. on Women's Issues*, New York City Council 102–03 (Sept. 18, 2015) [hereinafter *Council Hearing 9/18/15*] (statement of Kim Affronti, Queens District Attorney's Office).

lawmakers for appropriations for shelter beds, longer term housing options, healthcare provisions, job training, and immigration services for HTIC defendants[302] (prompting the city to allocate a modest grant of $750,000 for the 2016 fiscal year to service providers working in the New York City HTICs).[303]

What is distinctive about the HTICs from a court reform perspective is not that they aim to provide prostitution defendants with services—that aspiration defines alternative prostitution courts—but rather how the welfare logics that operate in the HTICs have changed. I make this case here by illustrating how the HTICs combine *de*contextualization with trauma-based theories of social control and confusion about measurable goals and efficiency.

1. Decontextualization.—Like all problem-solving courts (and Progressive-era socialized courts before them), the HTICs promise attention to the individual offender and to the social context informing her prosecution. As Judge Kluger told lawmakers at a city council hearing on the HTICs, '[e]verything is on a case-by-case basis [because] we don't make general rules in how cases are handled, but the judges understand the dynamics.'[304] But as we have seen, few alternative criminal courts in fact execute this commitment. In the HTICs, however, the challenge is different. As Gruber, Mogulescu, and I observe, the HTICs purposefully deploy a decontextualized understanding of all defendants as trafficking victims.[305]

They do so in large part because trauma-informed court reformers argue that trauma may be hidden and defendants may be—indeed often are—unwilling to disclose any evidence of past or present abuse. As such, Bryan offers, "there is no reason to treat defendants differently: we don't want to have a court that only serves trafficking victims that we can tell."[306] Mazur

302. *Preliminary Budget Hearing: Hearing Before the Comm. on Courts & Legal Servs.*, New York City Council 10 (Mar. 27, 2015) [hereinafter *Council Hearing 3/27/15*].

303. *See Council Hearing 9/18/15*, *supra* note 301, at 6 (statement of Chairperson Rory I. Lancman). For some sense of the numbers of people processed through the NYC HTICs potentially accessing its social services, in 2015, there were 1,616 arrests for prostitution or loitering for the purposes of prostitution (0.84% of total misdemeanor arrests). This number, however, includes people with multiple arrests as well as people who may not have entered the HTIC system perhaps because the DA declined to prosecute, they took a plea on arraignment, or perhaps because they had a combination of other charges that made them HTIC ineligible. *See* N.Y. State Div. of Criminal Justice Servs. Computerized Criminal History System (Jan. 2016), *in* e-mail from Dean Mauro, N.Y. State Div. of Criminal Justice Servs. Office of Justice Research & Performance (Mar. 28, 2016, 08:12 EST) (on file with author) [hereinafter DCJS NYC 2016].

304. *Council Hearing 12/12/13*, *supra* note 239, at 41 (statement of Judge Judy Kluger) (describing how judges would respond to recidivist offenders).

305. Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1376–77).

306. Interview with Courtney Bryan, *supra* note 275.

similarly argues that court benefits should not turn on evidence or self-disclosure of trauma and abuse. 'I kind of have a presumption of abuse, she says flatly.[307] In cases of prostitution 'we feel like it's a hidden victim.'[308]

A presumption of trauma is precisely what justifies the courts' double-prosecutorial and service-oriented mission. Prostitution defendants are arrested and prosecuted based on factual evidence of violating New York statutory provisions against prostitution or against loitering for the purpose of engaging in a prostitution offense.[309] But then they are offered a lenient, even noncriminal, and service-based disposition *without* evidence of abuse or coercion. For a criminal court, this is an uneasy position. Consider this conversation between Councilmember Williams and Judge Kluger during a New York City Council meeting explaining how the HTICs work.

> Williams: [H]ere we're talking about human trafficking in particular, not prostitution in general. I wanted to understand the definition that is used when you're figuring out who is trafficked and who is not.
>
> Kluger: That's a great question and by and large we work under the assumption that anyone who's charged with this kind of crime is trafficked in some way.

Williams, puzzled by the idea that a criminal court would consider all criminal defendants trafficking victims, repeats his question.

> Williams: So I just want to understand is there a line between what for this program is considered trafficked and just prostitution
>
> Kluger: So trafficking is a crime and traffickers can be charged [B]ut we don't make an assessment on each person who's charged [with prostitution] that you were or were not trafficked Anyone who comes into these courts services charged with prostitution or prostitution-related offenses are able to *get the services and get the favorable resolution that we hope will come out of this*. There is no artificial bar that says well, we don't think you were trafficked [310]

Many HTIC stakeholders work to maintain this idea of an undifferentiated victim deserving of a beneficial disposition. Social workers

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307. Interview with Robyn Mazur, *supra* note 285.

308. *Id.* Judge Serita makes the same point: '[B]ecause there is such tremendous difficulty identifying victims of trafficking, the courts provide the same services to all defendants who come before the court.' *Council Hearing 9/18/15*, *supra* note 301, at 19 (statement of Judge Toko Serita).

309. N.Y. PENAL LAW §§ 230.00, 240.37 (McKinney 2008).

310. *Council Hearing 12/12/13*, *supra* note 239, at 38–40 (emphasis added); *see also Council Hearing 3/27/15*, *supra* note 302 (statement of Judge Toko Serita) ("Because of the tremendous difficulty identifying victims of trafficking we provide the same services to all the defendants interested in programs with the court based on an understanding that some may disclose their victimization later but that virtually all of them fall into categories that place them at high risk of being trafficked.").

concerned with client privacy argue for generic service mandates that do not require individualized psychological assessments or reports.[311] Defense attorneys, who explain that defendants rarely share evidence of victimization—and often do not understand themselves in this language—likewise want to protect their clients from prosecutors who may seek evidence to prosecute abusers or to justify more intensive service mandates.[312] Thus, as one HTIC judge explained, 'it's really rare' that specific evidence of victimization or trauma comes to judicial attention.[313]

2. Social Control Based on Theories of Trauma.—Thus we have a court prosecuting an undifferentiated mass of trauma victims who may or may not identify as such. Unsurprisingly then, the HTICs' trauma-based approach to social control is its most complex and ambiguous innovation. On the one hand, it is grounded in totalizing psychological descriptions of the victimizing effects of trauma—most especially childhood trauma. On the other hand, social workers simultaneously use the language of trauma to advance client self-determination. This apparent contradiction requires some careful explication.

a. The Prostitution Defendant as Traumatized Child.—As the dialogue between Councilmember Williams and Judge Kluger above suggests, prostitution-abolitionist court reformers know well that a collapse of all prostitution into trafficking is tricky terrain. Trafficking describes the moment when economic transactions cease to be market exchange (not free trade but forced labor)—a case they simply cannot make for all defendants in HTICs, especially without facts of coercion or abuse. Perhaps for this reason, abolitionist advocates do not analogize prostitution defendants to slaves so much as to children—that is, to people without the legal capacity and culpability (even if they formally have the freedom) to engage in certain kinds of transactions—an analogy, I argue, that has transformed HTIC models of social control.

Here is how this analogy unfolds. Advocates argue that most adult defendants enter prostitution as children, which is itself an effect and experience of trauma (a constantly invoked statistic based, I should add, on shaky empirical support).[314] For example, Norma Ramos, Executive Director

311. Interview with Kate Barrow, *supra* note 290; Interview with Miriam Goodman (June 2014), *supra* note 282.

312. Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1375–77).

313. Interview with John T. Hecht, Presiding Judge, Brooklyn Human Trafficking Intervention Court, in Brooklyn, N.Y. (June 25, 2014) (joint interview) (on file with author).

314. The most cited source for the claim that most individuals enter prostitution as young adolescents is a 260-page report written with funding from the DOJ. RICHARD J. ESTES & NEIL

of the Coalition Against Trafficking in Women (a prostitution-abolitionist group) explained to lawmakers: 'Keeping in mind that the average prostituted women enters prostitution at age 14[,] it is severe childhood trauma that sets a woman up for being vulnerable to prostitution.'[315] Or as Sarah Dolan, an advocate at Sanctuary for Families (also a prostitution-abolitionist group) asserts, 'children often remain in conditions of prostitution as adults because they are so deeply traumatized that they see no alternative.'[316] From this perspective, the prostitution defendant is, as Judith Herman writes of survivors of childhood trauma more generally, 'the child grown up.'[317] '[T]he child victim, now grown, Herman explains, 'seems fated to relive her traumatic experiences not only in memory but also in daily life.'[318] Thus, when Ramos tells lawmakers that prostitution defendants are properly understood as 'ex-children, she is staking a psychological, if not literal, description: ex-children are people whose childhood personalities, inexorably shaped by traumatic events, persist into adulthood in stunted and maladaptive ways.[319]

This idea of the prostitution defendant as an ex-child is also a legal claim. Advocates argue that the fact of high incidences of childhood prostitution also means that most adults in prostitution meet a legal definition of trafficking victim. Dolan's colleagues Dorchen Liedholdt and Katherine Scully elaborate:

ALAN WEINER, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S. CANADA AND MEXICO (2002). The authors' own caveat about the limitations of their data did not travel as the report circulated widely among advocates. *See id.* at 143–44 (stating that a different methodology and more resources would be needed to perform "a national prevalence and incidence survey" to produce "an actual headcount"). For some criticisms of the study, see Chris Hall, *Is One of the Most-Cited Statistics About Sex Work Wrong?*, ATLANTIC (Sept. 5, 2014), https://www.theatlantic.com/business/archive/2014/09/is-one-of-the-most-cited-statistics-about-sex-work-wrong/379662/ [https://perma.cc/KZ86-DFCU]; Michelle Stransky & David Finkelhor, *How Many Juveniles Are Involved in Prostitution in the U.S.?*, CRIMES AGAINST CHILD. RES. CTR. (2008), http://www.unh.edu/ccrc/prostitution/Juvenile_Prostitution_factsheet.pdf [https://perma.cc/3TZ7-KUYL].

315. *Council Hearing 9/28/06*, *supra* note 261, at 182 (statement of Norma Ramos, Executive Director, Coalition Against Trafficking in Women).

316. *Council Hearing 6/27/11*, *supra* note 254, at 3 (statement of Sarah Dolan, Advocate Counselor, Sanctuary for Families).

317. HERMAN, *supra* note 277, at 110.

318. *Id.* at 111.

319. *Council Hearing 4/25/12*, *supra* note 257, at 165 (statement of Norma Ramos). Ramos beseeched lawmakers:

> Please do not take the easy road out and just focus on children, it is important and all the advocates before me addressed the importance of including women. [W]e must not turn our backs on those *ex-children*, is who I call them, who will more than likely still remain in prostitution

Id. (emphasis added).

> Experts estimate that the average age of entry into prostitution for females is twelve to fourteen. Anyone prostituted as a child is by definition a trafficking victim under both the Trafficking Protocol and the federal anti-trafficking law. Since most adults in prostitution were initially prostituted as children (age seventeen or younger) and since prostituted children are necessarily victims of trafficking, one could reasonably conclude that the majority of prostituted adults have been subjected to sex trafficking at some point in their lives.[320]

On this view, adult sellers of sex, even when they are self-employed, perpetually retain their legal status as childhood victims. Dolan illustrates the point by describing a client, Lakeesha, who was first arrested for prostitution at 15 after she had run away from home to escape an abusive stepfather, and who '[l]ike many domestic sex trafficking victims, believed that her trafficker was her boyfriend.'[321] Dolan continues:

> Now at 20, Lakeesha is still in prostitution although not under pimp control. Some might contend that Lakeesha has become a free agent and is no longer a trafficking victim, but those of us at Sanctuary [for Families] believe otherwise. Adult women in prostitution who first experience sexual exploitation as children (which we may assume to be the majority of prostituted women, since the average age of entry into prostitution is 13), should be recognized and protected as trafficking victims.[322]

This position isn't simply advanced by advocates. It has been institutionalized by the New York City HTICs. A presumption that 'most,' 'the majority of,' or the 'average' adult defendant has experienced either childhood sexual assault or the selling of sex as a minor is precisely what justifies diversionary and service-oriented sentences. As the Executive Assistant District Attorney in Manhattan, Karen Friedman-Agnifilo, explains: '[W]e've found even if our case[s] are involving adult victims, most of them started when they were minors, or when they were young. So, even though today it doesn't involve a child trafficking victim, they were trafficked at some point in their life.'[323] Or as a former CCI official puts it:

> Just knowing the average age of entry into prostitution in the US is fourteen or fifteen that's actually de facto coercive control and trafficking under our law. Therefore the assumption is that every

320. Leidholdt & Scully, *supra* note 255, at 33. In their words: '[L]earning that a woman has been in prostitution should create a presumption that she is a trafficking victim.' *Id.* at 34.

321. *Council Hearing 6/27/11*, *supra* note 254, at 2–3 (statement of Sarah Dolan, Advocate Counselor, Sanctuary for Families).

322. *Id.* at 3.

323. *Council Hearing 4/25/12*, *supra* note 257, at 54 (statement of Karen Friedman-Agnifilo, Executive Assistant District Attorney, Manhattan District Attorney's Office).

> person with these charges could have a nexus with trafficking and they should be in specialized courts with dedicated prosecutors, dedicated defense attorneys, specialized services and trained judicial staff.[324]

But if the adult prostitution defendant is 'the child grown' victim, it would seem perverse to teach her to develop a more hardheaded relation to risk or to take responsibility for her bad choices, just as it would seem perverse as the basis for administering welfare to exploited children. Precisely for this reason, the New York City HTICs have instantiated new trauma-informed models of court-mandated treatment.

b. Trauma-Informed Care.—Service providers widely suggest they use court mandates to foster supportive and noncommodified social relationships. As Julie Laurence of Girls Educational and Mentoring Services (GEMS) (a service provider that helped launch the HTIC initiative) explains of her clients:

> They've experienced family trauma and disconnect[ion]. They've been neglected and abused often for years prior to their exploitation and they as children and young adults are desperately craving love, attention, and support. Of course pimps and traffickers play upon the need for connection and belonging creating a faux family and often creating intense relationships that seem to initially and superficially meet those needs.[325]

From this perspective, a primary aim of service interventions is to create new forms of social connection. 'Leaving those [exploitative] relationships, Laurence continues, 'therefore takes building new ones, healthy ones with consistent supportive adults who don't ask anything from them, who don't exploit them and see you as valuable as a human being not a commodity. '[326]

To that end, social workers (employed or contracted by the courts) use counseling sessions *not* to teach defendants about risk and responsibility, as in the early MCC, but rather to build trust and especially community. 'Traumatic events, Herman argues, 'destroy the sustaining bonds between individual and community', for this reason '[t]he solidarity of a group provides the strongest antidote to traumatic experience. '[327] To make space for new more solidaristic social connections, social workers may devote an entire first session to discussing stereotypes—for example, inviting conversation about relational constructs such as 'prostitute' and 'pimp' or

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324. Interview with Kristine Herman, Strategic Initiatives Specialist, Brooklyn Def. Servs. (June 10, 2014) (joint interview) (on file with author).

325. *See Council Hearing 3/27/15*, *supra* note 302, at 27–28 (statement of Julie Laurence, Chief Program Officer, Girls Educational and Mentoring Servs. (GEMS)).

326. *Id.* at 28.

327. HERMAN, *supra* note 277, at 214.

'social worker' and 'client.'[328] In subsequent sessions, they may broach topics such as safety, identifying feelings, and setting boundaries.[329] And, when possible, social workers will try to address some of the defendants' concrete material needs—for example, getting a driver's license, scheduling a doctor's appointment, or finding a domestic violence shelter. Judge Camacho likewise describes his understanding of good trauma-informed social services as building from social relationships:

> The first session we take her for ice cream. The second session, we simply walk around the park. Third time they come in we take them to the movies. Fourth time, we take them to the hospital for a checkup. The fifth time we try to get them to go get a Social Security card. Sixth time, we take them to Children's Services to try to get their kids back. It's a process. It's about getting them somehow, not directly, but still getting them to understand and appreciate that [the service providers] care about them. That you care about them and they trust you, gaining their confidence.[330]

Nor do social workers describe any of the counseling or services they offer as a 'voluntary choice' made by an autonomous and responsible defendant as an alternative to a traditional criminal disposition. As Goodman puts it: 'For our clients, counseling sessions are court mandates.'[331] And mandates, rather than viewed as their own experience of practicing responsibility—for example, via penalties for late or missed appointments (a common and purposeful practice in other problem-solving courts)—are supposed to be applied with flexibility and creativity in ways that recognize 'the constraints of [defendants'] real lives.'[332] Theories of trauma have thus demonstrably changed the models for social treatment that prostitution defendants are supposed to encounter in court.

But here is what makes this treatment model rich, complex, and even transgressive. The trauma-informed programs pioneered by Goodman and

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328. Interview with Miriam Goodman (July 2015), *supra* note 277.

329. *Id.* *see also* SCHWEIG, MALANGONE & GOODMAN, *supra* note 236, at 5. Other classes may include arts education to allow clients to engage in creative outlets and relaxation techniques. *Id.*

330. Interview with Fernando Camacho, *supra* note 269.

331. Interview with Miriam Goodman (July 2015), *supra* note 277.

332. *Hearing 9/18/15*, *supra* note 301, at 126 (statement of Avery McNeil, Bronx Defenders). Judge Serita says much the same:

> A lot of times, if somebody is having problems fulfilling the mandate, we want to find out what the reason is. The reason might be because they have so many things going on they are completely overwhelmed by the circumstances of their lives. They may have, you know, children in foster care. They may be going through homelessness. They may be having problems with their exploiters, and so we want to find out information about what is going on with their current situation.

Id. at 45–46 (statement of Judge Toko Serita).

her colleagues do not presume totalizing or infantalizing victimization even as they move away from models of responsibilization. Consider how one experienced social worker, who has worked with HTICs throughout New York City (and wishes to remain anonymous), understands her role—it's a nuanced position, so I elaborate it at some length.

To begin, this social worker ventures that many of her clients began working for someone, such as a boyfriend, as a teenager, but then proceeded to work on their own: 'So often they start as victims of trafficking but then they get to a certain age and they no longer choose to work for someone.'[333] She nonetheless lobbies court actors to understand that the defendants' acts are coerced, not volitional, in part because of the trauma they experienced in families as children—so far a very familiar position. For example, she explains that she must constantly educate judges and prosecutors that 'the significant amount of trauma [means that] often this is not a choice for a person who is exploited. Often times, people enter [prostitution] because of exploitation from very early ages, including by sexually abusive families and caregivers.'[334]

But in her interactions with prostitution defendants, her therapeutic stance is more complex: here she works to advance client agency and choice. Despite these traumatic histories, she continues, 'Our clients do not want to be seen as someone who was exploited. If you ask them if they are working for someone they will tell you no, I'm working on my own.'[335] In counseling sessions, she therefore makes clear that she respects client self-determination: 'We respect the fact that they're earning money and this is the way they are choosing to do so. Some people are making more money doing sex work than they would in other jobs.'[336] As such, she would only ever counsel a client to 'keep yourself safe' while working.[337] In other words, cultivating a trauma-informed practice involves simultaneously recognizing defendants as victims and agents: people who are not (and should not be legally) responsible for all their choices even as they *have* the autonomy to make them. As the basis for administering social welfare and social control, trauma theory thus invites a break from both an overly pathologized and overly responsibilized subject in favor of a more complex encounter with the human condition.

I observed this position repeatedly among trauma-informed social workers. From their perspective, it is not that concepts like responsibility,

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333. Interview with NYC Social Worker, in Brooklyn, N.Y. (June 26, 2014) (joint interview) (on file with author).

334. *Id.*

335. *Id.*

336. *Id.*

337. For example, "Go with your regular [customers], don't take the chance of meeting an undercover cop and getting arrested again." *Id.*

agency, and choice are unimportant to prostitution defendants (or for that matter to children). It is just that these concepts are not understood as the basis of problematic behavior, nor can they be leveraged as their own form of treatment and recovery in any sort of easy or pedagogical way. Rather, they must be incrementally and carefully cultivated through the therapeutic relationship—because agency and choice are precisely the experiences of the self that trauma denies. As a model of social control and therapeutic enculturation, trauma thus makes space for dependency *and* self-determination. Or at least trauma as it is understood by a particularly sophisticated set of New York City HTIC clinicians working to change how criminal courts administer social welfare and therapeutic treatment.

c. A Note About Trauma in Court Practice.—That all said, I would be remiss to conclude this section on trauma-based social controls without mentioning that in actual court practice, arguments about trauma often take more simplistic, incomplete, and coercive forms. Prostitution defendants who complete a trauma-informed counseling program of the kind described above are supposed to receive a lenient and service-based disposition: optimally an offer of an adjournment contemplating dismissal (ACD). If defendants who are offered an ACD are not rearrested within six months, then the charge is supposed to be dismissed and sealed.[338] In 2014, 47% of prostitution cases in New York City received an ACD compared to 13% in 2008.[339] While this increase in ACDs is significant, it also means that many defendants leave their 'human trafficking interventions' marked with a criminal disposition.

As I explore in detail with Gruber and Mogulescu, defendants who are not offered ACDs may have multiple offenses, including drug offenses as well as offenses involving property or physical violence.[340] Activists wishing for lenient outcomes must thus argue that recidivism and multiple or complex charges likewise reflects trauma and victimization—an argument that often competes unsuccessfully with mandates for individual responsibility and accountability that continue to predominate in criminal court—even paradoxically in a court that is designed for trafficking victims.[341]

Moreover, even when victim-based advocacy prevails, in New York City HTICs rather blunt forms of paternalism can follow, including criminal incarceration. Here, for example, are some of the cases that Gruber, Mogulescu, and I catalogue. We describe cases where judges and

338. See Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1362) for elaboration.

339. In 2014, 7% of prostitution defendants received jail sentences compared to close to 20% in 2008. *See* DCJS NYC 2016, *supra* note 303.

340. Gruber, Cohen & Mogulescu, *supra* note 12 (manuscript at 1372–74).

341. *Id.*

prosecutors have kept prostitution defendants in jail explicitly to prevent them from reuniting with intimate partner pimps who are abusing them. In one instance a recidivist prostitution defendant (originally incarcerated by the arraignment judge as a flight risk) spent twelve days in jail until a defense team could persuade the prosecutor of an adequate alternative housing arrangement.[342] In another case, a defendant who had disclosed that she had been trafficked by an intimate partner was jailed while awaiting residential drug treatment. Specifically, the prosecutor stated: 'I do not want to see Ms. F going back to her ex-boyfriend, whatever she thinks he is. In my eyes, that's the person that's exploiting her and that's just not a good situation, Judge. I am going to ask that she be[] remanded [to jail].'[343] The Court agreed: 'She certainly cannot go back to her ex-boyfriend who's abusive so that is not an option.'[344]

And to be sure, even as defense attorneys report that many defendants value new trauma-informed court-mandated services, they simultaneously explain that defendants experience all welfare dispensed in the HTICs as inextricably linked to arrest and incarceration.[345] As one public defender told us:

> Last week, a client of mine walked out of the courtroom after her court appearance extremely upset. The judge was concerned, called me up to the bench, and said, 'Whatever it is your client needs—be it food, shelter, clothing—make sure she gets help. When I met my client outside the courtroom, she explained to me that she was upset about the judge saying that if she didn't complete services she would get 15 days jail.[346]

Thus, as we make clear, the welfarist mandate of the New York City HTICs does not mean that the women brought before the court evade penal sanctions. To the contrary, not unlike the New York Women's Court, new social controls—here informed by theories of trauma—have produced new justifications for welfare *and* new justifications for penal supervision and incarceration.[347]

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342. For details, see *id.* at 27–28.

343. *Id.* at 45 (quoting transcript of Record, Criminal Court Proceeding, Docket No. 2011QN053666 (Queens Cty. Crim. Ct., Jan. 15, 2015)).

344. *Id.*

345. *Id.* at 47–48.

346. *Id.* at 37 (quoting Interview with Zoe Root, Attorney, Bronx Defs., in N.Y., N.Y. (June 26, 2014)).

347. Given the common "net-widening" criticisms of problem-solving courts, I should add that the total number of arrests for prostitution and loitering for the purposes of engaging in a prostitution offense has declined (along with a general decline in misdemeanor arrests in New York City). In 2015, New York City made 1,616 arrests for prostitution and loitering, a 20% decrease from 2014

d. Measuring Exactly What?—Finally, when asked about the overarching goal of the HTICs as a new kind of problem-solving court, numerous proponents suggest they aim to "minimize re-traumatization."[348] Unsurprisingly, this aim has bewildered those who want to measure success via traditional court benchmarks such as recidivism rates and cost savings to the criminal justice system via an 'economic style of reasoning' that today dominates penal administration.[349] Indeed, at a recent city council hearing the Chairperson invited 'testimony from different stakeholders regarding what might be the appropriate metrics or qualitative measures to evaluate the service providers.'[350] One CCI official proposed that stakeholders would need "to identify and achieve performance measures and metrics for our programming that are responsive to the context of the women and transgender individuals receiving counseling and support, for example, tracking how many individuals 'engage in counseling voluntarily following the completion of their mandate.'[351] Other CCI clinicians have proposed to track the 'strides these women and girls make in diversion programs, such as whether they have protection orders against traffickers, places to live, jobs, or simply whether they call the court to check in with their social service program.[352]

G. Trauma and the Welfare State?

This Article has compared three moments of specialized prostitution court reform in New York City: the Women's Court during the first part of the twentieth century, the Midtown Community Court of the 1990s, and the Human Trafficking Intervention Courts of today. It did so in order to illustrate how different representations of the 'social problem' of prostitution combine with different models of procedural informalism to mix social welfare, social control, and individual responsibility in three different slices of court reform—and in ways, I will suggest, that not only illuminate features of alternative criminal courts but that perhaps also raise questions about the contemporary American welfare state.

Prostitution, we have seen, engages a set of human relations and transactions that reformers sometimes analogize to the market, sometimes to the family. In the early twentieth century, court reformers described the

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(when it made 2,018 arrests) and an almost 28% decrease since 2013 (when it made 2,238 arrests), when the HTICs were first opened. DCJS NYC 2016, *supra* note 303.

348. Interview by Aya Gruber with Toko Serita, Presiding Judge, Queens Cty. Human Trafficking Intervention Court, in Queens, N.Y. (June 24, 2014) (on file with author).

349. GARLAND, *supra* note 1, at 190.

350. *Council Hearing 9/18/15*, *supra* note 301, at 7 (statement of Chairperson Rory I. Lancman).

351. *Id.* at 32 (statement of Afua Addo, Women's Servs. Coordinator, Hidden Victims Project).

352. SCHWEIG, MALANGONE & GOODMAN, *supra* note 236, at 7.

problem of prostitution as a product of exploitation in both labor and commercial markets. And they launched the New York Women's Court as part of a broader reformist orientation to expand state intervention in the market alongside economic and social protection—when state intervention and state protection were becoming politically popular ideas. In the 1990s, as social welfare was increasingly designed instead to compel individual responsibility, court reformers described the problem of prostitution as part of a broader 'quality of life' epidemic eroding market stability and community life, and they proposed to offer prostitution defendants better tools to manage risk and engage in self-care. By contrast, the architects of today's New York City HTICs removed prostitution from a market paradigm—where today dominant state-welfare and regulatory ideas remain minimalist. And they placed it squarely within a family trauma/domestic violence paradigm, which feminists have established as a more robust site of government intervention—indeed, even as an exception to welfare-state retrenchment at least when there are people in families understood as victims.[353] As such, rather than the possibility of market exploitation that justified the work of the Women's Court in the 1910s and 1920s, the New York City HTICs rely upon the probability, if not the certainty, of family trauma; now 'people arrested for prostitution ha[ve] all kinds of *social service needs*.'[354]

It would seem that today this model is spreading. In 2013, CCI helped to spearhead the Human Trafficking and State Courts Collaborative to help other states replicate HTICs.[355] Several states, including Texas, Ohio, Illinois, Louisiana, and Tennessee, currently host specialized prostitution courts informed by a trauma-based/anti-trafficking model.[356] In 2015, CCI

353. The PRWORA, for example, exempts domestic violence victims from key provisions (such as time limits on welfare eligibility, family caps—that limit funding to a mother who gives birth to a child while on welfare—and child support requirements) that are intended to condition support on the exercise of personal responsibility and to limit the total support a family can receive from the state. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 602(a)(7) (2012) (domestic violence option); *id.* § 608(a)(7)(C) (hardship exception).

354. SCHWEIG, MALANGONE & GOODMAN, *supra* note 236, at 4 (emphasis added).

355. *Resources*, HUM. TRAFFICKING & THE ST. CTS. COLLABORATIVE, http://www.htcourts.org/resources.htm [https://perma.cc/G8CD-S9T7].

356. *See, e.g.*, NEW LIFE: PROSTITUTION DIVERSION INITIATIVE, http://www.pdinewlife.org [https://perma.cc/ZH2F-SEA8] (Texas); Alan Johnson, *Outside Review Praises Franklin County Court for Human-Trafficking Victims*, COLUMBUS DISPATCH (Sept. 4, 2015), http://www.dispatch.com/content/stories/local/2015/09/04/outside-review-praises-franklin-county-court-for-human-trafficking-victims.html [https://perma.cc/ZGS2-VW92] (Ohio); *Caddo District Attorney's Office Offers Prostitution Diversion Program*, KSLA NEWS (Mar. 1, 2016), http://www.ksla.com/story/31237617/caddo-district-attorneys-office-offers-prostitution-diversion-program [https://perma.cc/KXB3-7RBC] (Louisiana); Press Release, Cook Cty. State's Attorney's Office, Cook County Unveils New Prostitution and Trafficking Intervention Court (May 29, 2015), http://www.statesattorney.org/press_ProstitutionAndTraffickingInterventionCourt.html

published a "planning toolkit' for states to design prostitution courts based on a 'trauma-informed approach. '[357] Also in 2015, Chief Judge Lippman (along with numerous institutions including the State Justice Institute, the Conference of Chief Justices, and the Conference of State Court Administrators) hosted in Manhattan a 'National Summit on Human Trafficking and the State Courts' that boasted over 300 judges and court administrators from 46 U.S. states.[358] That same year Congress enacted the Justice for Victims of Trafficking Act, which authorizes the Attorney General to provide grants to create problem-solving courts, including 'specialized and individualized treatment program[s]' for juveniles charged generally with crimes and also identified as potential trafficking victims.[359] In addition to court reform, criminal justice advocates increasingly justify proposals for prison and sentence reform by arguing that a range of criminal offenses committed by incarcerated girls and women 'are rooted in the experience of abuse and trauma. '[360]

Trauma diagnoses and trauma-informed care, especially for girls and women, is also spreading to state and federal service providers beyond the criminal justice system—a perhaps predictable development given how, as this Article has argued, logics of welfare and criminal justice administration often intertwine. For example, in 2005, the federal Substance Abuse and Mental Health Service Administration (SAMHSA) created a National Centre for Trauma-Informed Care, which, in 2009, launched a Federal Partners Committee on Women and Trauma.[361] The Committee encourages federal agencies (e.g. Education, Health and Human Services, Labor, Justice, Housing and Urban Development) to adopt a trauma perspective to inform their practices and service provision.[362] In New York, CCI worked with the

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[https://perma.cc/Y7G3-WVJY] (Illinois); Stacey Barchenger, *Nashville Launches Human Trafficking Court*, TENNESSEAN (Jan. 26, 2016) http://www.tennessean.com/story/news/2016/01/26/nashville-launches-human-trafficking-court/79296388/ [https://perma.cc/AD6M-QZRM] (Tennessee).

357. *See generally* CTR. FOR COURT INNOVATION, RESPONDING TO SEX TRAFFICKING IN YOUR JURISDICTION: A PLANNING TOOLKIT (2015).

358. *Chief Judge Opens Human Trafficking Summit*, DAILY RECORD (Oct. 9, 2015), http://nydailyrecord.com/2015/10/09/chief-judge-opens-human-trafficking-summit [https://perma.cc/LFY5-HWQF].

359. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 203(b)(4)(C) (2015).

360. HUMAN RIGHTS PROJECT FOR GIRLS ET AL., THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS' STORY 7 (2015).

361. *Background*, THE FED. PARTNERS COMM. ON WOMEN & TRAUMA, https://www.blsmeetings.net/traumainformednation/index.cfm?action=background [https://perma.cc/8LAX-4MRE].

362. *See* FED. PARTNERS COMM. ON WOMEN & TRAUMA, WOMEN AND TRAUMA: REPORT: A FEDERAL INTERGOVERNMENTAL PARTNERSHIP ON MENTAL HEALTH TRANSFORMATION 17–18, 21, 32, 37 (2011); FED. PARTNERS COMM. ON WOMEN & TRAUMA, WOMEN AND TRAUMA: TRAUMA-INFORMED APPROACHES: FEDERAL ACTIVITIES AND INITIATIVES 8 (2013); *see also*

State Education Department to provide education and job placement services to individuals not only 'diagnosed as intellectually or developmentally challenged or disabled' but also diagnosed as suffering from trauma.[363]

Indeed, Adler, now CCI Director for Research-Practices Strategies, observes that 'everyone is talking about trauma-informed care' in the criminal justice system and beyond.[364] 'But why at this moment,' he astutely asks, 'do we have this new common sense?'[365] Adler's query is particularly intriguing given Herman's argument that the kind of harm that becomes intelligible as *trauma* is itself a contextual, historical, and political question.[366]

A comparison between the New York City HTICs and the MCC prostitution diversion program in the 1990s suggests a double-edged response, and one that perhaps also tells us something about welfare politics and ideas today. On the one hand, the HTICs have enabled feminist court reformers to provide social welfare to prostitution defendants in ways less beholden to ideas of individual responsibility, cost–benefit calculations, and medicalized expertise. Cast more generally, it would seem that trauma allows progressive criminal justice reformers to install different ethical relationships and moral obligations into penal welfare institutions. Goodman, for example, trains her clinical court staff to 'bear witness' to human suffering which, in turn, 'requires court staff to risk connecting to their clients. It means really caring about them and understanding them as complicated humans.'[367] From this perspective, witnessing and working to alleviate human suffering also requires a measure of anti-expertise. 'We don't use a medical model that suggests the therapist knows better,' Goodman continues, 'we treat the client as her own expert and we actually believe her when others would likely not.'[368] 'What this means,' she concludes, 'is that we have to acknowledge that, as complicated humans, we aren't different from them.'[369]

In other words, trauma theory pushes against a late twentieth-century welfare ethos embodied in the first wave of problem-solving courts, which

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SAMHSA'S TRAUMA & JUSTICE STRATEGIC INITIATIVE, SAMHSA'S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 12–14 (2014) (providing guidance and recommendations for reform practice and service provision in areas such as child welfare, education, criminal and juvenile justice, primary health care, and the military).

363. *Council Hearing 9/18/15*, *supra* note 301, at 98 (statement of Afua Addo, Women's Servs. Coordinator, Hidden Victims Project).

364. Interview with Julian Adler, *supra* note 287.

365. *Id.*

366. HERMAN, *supra* note 277, at 9.

367. Interview with Miriam Goodman (July 2015), *supra* note 277. She credits this practice to LAURA VAN DERNOOT LIPSKY & CONNIE BURK, TRAUMA STEWARDSHIP: AN EVERYDAY GUIDE TO CARING FOR SELF WHILE CARING FOR OTHERS (2009).

368. Interview with Miriam Goodman (July 2015), *supra* note 277.

369. *Id.*

suggests that people live risky, vulnerable, and criminal lives either because they fail on their own merits or because of stigmatizing forms of mental illness. It instead casts prostitution defendants as normal subjects who experience overwhelming and external violent interpersonal conditions, and it enables social workers and other service providers to practice forms of solidarity with them. It is for this reason, I suspect, that trauma appeals to many left-progressive actors as a model for blending social welfare with social control from within the constraints of a criminal court—particularly when compared to other problem-solving and conventional court alternatives.

But if trauma is attractive to some court actors because it offers a new ethical and moral script for social service provision to people who are poor, it is also, I suspect, attractive to many others—*and this is the other hand*—because as a script for providing welfare, trauma includes its own contemporary limits. Indeed, as a reason to justify welfare, trauma need not engage with class or market analysis at all. Today, as people in their identities as both market actors and family members continue to rely mostly on self-care, it was by collapsing prostitution into arguments about family and sexual trauma that important prostitution-abolitionist feminist court reformers successfully made demands on the state. In so doing, they described prostitution defendants as vulnerable ex-children—that is, as people who suffer from childhood sexual assault rather than as people who suffer from precarious labor-market conditions.

Or to put this observation another way, to create the New York City HTICs as social welfarist courts, prominent abolitionist feminist court reformers made arguments about the psychological effects of sexual, physical, and affective family violence and childhood trauma. In so doing, they made a particular kind of psychological disability (rather than market instability) a legal and policy justification for treatment and aid. As Adler explains, 'the current standard [for trauma-informed counseling in the criminal justice system] is you focus on some kind of traumatic event or events and the sequelae in terms of the various symptoms which we can see codified in the DSM-V and other places.'[370] This is the clinical standard—

370. Interview with Julian Adler, *supra* note 287. The Diagnostic and Statistical Manual of Mental Disorders (DSM)-V, published in 2013, reclassified PTSD from an anxiety disorder to a disorder under a new heading: "Trauma- and Stressor-Related Disorders. *See* AM. PSYCHIATRIC ASS'N, POSTTRAUMATIC STRESS DISORDER (2013), http://www.dsm5.org/Documents/PTSD%20Fact%20Sheet.pdf [https://perma.cc/QPL3-RBY2]. As Adler suggests, to define PTSD, the DSM-V details particular behavioral symptoms thought to follow from an event (either directly experienced, witnessed, or learned about) that involves "actual or threatened death, serious injury, or sexual violence." The manual elaborates:

> The directly experienced traumatic events include, but are not limited to, exposure to war as a combatant or civilian, threatened or actual physical assault (e.g., physical

treating memories and behavioral reactions to a traumatic event—even if, as is surely sometimes the case, people arrested for selling sex experience only general and *un*eventful socioeconomic exploitation and constraint.

For this same reason, the New York City HTICs largely cut against efforts to legalize and regulate prostitution as a form of labor and work. But my argument here is different. Trauma discourse, I am suggesting, circulates as a reformist idea for welfare provision today because it is underspecified in social and political meaning. It allows left-progressive service providers to take a break from the demands of teaching individual responsibility to their clients and instead invites them to see aid recipients more sympathetically as victims of forces beyond their control—a perhaps especially welcome shift in a moment of intense global financial instability. At the same time, however, trauma discourse need not challenge welfare retrenchment and responsibilization models in any broad or systemic way. To the contrary, trauma can nest within these powerful contemporary discourses because it offers a reason to make an exception.

To be sure, and again because of its capacious social meaning, there are efforts to radicalize and expand trauma discourse from within. Kate Barrow, for example, wants trauma to inspire court reformers to think beyond individual perpetrators of violence: 'We should problematize the idea of that one man who we are locking up. We often pretend that we have fixed the problem while ignoring the impact of less obvious forms of trauma, such as trying to choose between whether you eat or get your medical care covered. We can overlook these situations as legitimately traumatic because you didn't have a pimp putting you out on the corner.'[371] Or as Anne Patterson, a social worker and advocate employed by a trauma-informed service provider that works closely with New York City HTICs, argues: 'One of the greatest collateral consequences of the trauma-informed emphasis is that it is so about individual survival, surviving individual acts of violence that are perpetrated

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> attack, robbery, mugging, childhood physical abuse), threatened or actual sexual violence (e.g., forced sexual penetration, alcohol/drug-facilitated sexual penetration, abusive sexual contact, noncontact sexual abuse, sexual trafficking), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war, natural or human-made disasters, and severe motor vehicle accidents. For children, sexually violent events may include developmentally inappropriate sexual experiences without physical violence or injury. Witnessed events include, but are not limited to, observing threatened or serious injury, unnatural death, physical or sexual abuse of another person due to violent assault, domestic violence, accident, war or disaster Indirect exposure through learning about an event is limited to experiences affecting close relatives or friends and experiences that are violent or accidental The disorder may be especially severe or long-lasting when the stressor is interpersonal and intentional (e.g. torture, sexual violence).

AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5, at 309.81(A) & cmt. (5th ed. 2013).

371. Interview with Kate Barrow, *supra* note 290.

against you rather than structural violence.'[372] Adler likewise suggests that 'there's a push by many [trauma practitioners and theorists] to think more broadly in terms of environmental or neighborhood or ecological factors. But I don't think that's the norm.'[373]

That is, these court reformers and trauma-trained clinicians suggest that a theory of trauma could enable advocates to describe numerous classes of people in the criminal justice system (and perhaps in the welfare system beyond) as simultaneously agents and victims: for example, people who make choices that are constrained by the overwhelming distress of living under unstable economic conditions and the absence of social provisions. But in the New York City HTICs, it would seem that trauma is understood mostly not in this way: in official court practice, judges and prosecutors recognize particular kinds of traumatic interpersonal and sexual violence but not traumatic economic and social state and non-state systems.

Conclusion

In the early twenty-first century, as in the early twentieth century, urban criminal courts are engaged in explicit projects of social governance. Once again, certain practices defined as crimes are understood as effects of forces beyond individual control and, once again, court reformers debate what, if anything, in the mutually constitutive practices of punishment, welfare, and rehabilitation, this fact should mean. This Article has traced how social understandings of the relevant external factors thought to compel (or motivate) the selling of sex have changed over time. It has also traced how these changing understandings have inspired different attempts to deploy informal court procedure to intertwine social welfare with social control and individual responsibility. In the process, the Article has argued, informal low-level criminal courts have themselves influenced what categories of people constitute the deserving poor and via what practices and techniques such people are to be reformed and remade.

At the beginning of the twentieth century, court reformers in New York proposed to help reform the moral character and social behavior of

372. Interview with Anne Patterson, Dir., STEPS to End Family Violence, in E. Harlem, N.Y. (Apr. 9, 2015) (on file with author).

373. Adler also points to a disconnect between the clinical skills and training of trauma practitioners and more systemic interventions: 'Also, what do you do with [environmental or neighborhood or ecological factors]? How do you alleviate those symptoms?" Interview with Julian Adler, *supra* note 287. Patterson likewise argues:

> To some extent [the individual emphasis] is practical; we feel like we have some influence on a single person's trauma symptoms. There are a lot of interventions designed to alleviate individual trauma symptoms, but there are no interventions designed to effectively address the influence of sort of multi-generational structural trauma. You can sit down with someone and do a course of EMDR [Eye Movement Desensitization and Randomization] and that can create great relief.

Interview with Anne Patterson, *supra* note 372.

prostitution defendants via probation and public and private institutional reformatories—at least when defendants could be framed as market victims. At the end of the century, court reformers instead proposed to spend public and private resources to teach individual responsibility to prostitution defendants broadly understood as petty market participants. These two moments of welfarist court reform unfolded under dramatically different political and economic conditions. The first two decades of the twentieth century witnessed the rise of social law and policy in response to the limits of classical liberalism; the last two decades witnessed the rise of neoliberalism in response to the limits of the social welfare state.

Today, the New York City HTICs administer social services and counseling to prostitution defendants because they suffer from family, sexual, and childhood trauma. These courts thus ground new arguments for social welfare and social control on a distinctive theory of psychological disability—even as this theory sometimes penetrates legal institutions in ways that exceed (or purposefully disrespect) a clinical definition. Indeed, it is in part for this reason that court reformers and social workers can use the language of trauma in an effort to create new, more solidaristic relations from within criminal courts including via political-economic critiques of existing systems.

This story is still beginning.[374] Many questions remain. In a moment of increasing capitalist crisis, could calls for trauma-informed care in fact lend support to broader egalitarian struggles including by linking prostitution not to criminalization but to labor-market critique? In a moment of escalating crisis about "over-criminalization, could a trauma-informed model spread beyond the HTICs to change the mix of social welfare, social control, and individual responsibility applied in other problem-solving courts, such as

374. Of course, the uptake of PTSD in law is not new. Over twenty years ago, Alan Stone argued that '[n]o diagnosis in the history of American psychiatry has had a more dramatic and pervasive impact on law and social justice than post-traumatic stress disorder.' Alan A. Stone, *Post-Traumatic Stress Disorder and the Law: Critical Review of the New Frontier*, 21 BULL. AM. ACAD. PSYCHIATRY L. 23, 23 (1993). Stone proceeded to catalogue the numerous and complex ways that advocates have tried to use PTSD to establish insanity, diminished capacity, and self-defense in criminal law, especially for crimes committed by veterans and women victims (as well as to bolster the victims' rights movement). *Id.* at 24–29. If the story of trauma is still unfolding, it is because the HTICs in part reflect a broader moral impulse to change how problem-solving courts produce knowledge about dependent subjects—beyond specific instances of doctrinal reform. As such, the HTICs potentially suggest that today PTSD is accomplishing different social and legal work. As Young argues, PTSD "is not timeless, nor does it possess an intrinsic unity. Rather, it is glued together by the practices, technologies, and narratives with which it is diagnosed, studied, treated, and represented and by the various interests, institutions, and moral arguments that mobilized these efforts and resources. ALLAN YOUNG, THE HARMONY OF ILLUSIONS: INVENTING POST-TRAUMATIC STRESS DISORDER 5 (1995).

drug and veterans courts, and to criminal defendants more broadly?[375] Goodman, for example, argues that the current focus on prostitution and women 'is an opportunity to expand the conversation and programming' including to 'men of color who witness systemic violence in their neighborhoods and communities and then commit crimes.'[376] Will the uptake of trauma in the criminal justice system mean court reform for them?

To be sure, the New York City HTICs process a tiny fraction of the city's misdemeanants, and they emerged in the shadow of a highly politicized (and gendered) international anti-trafficking campaign. These courts are thus highly specific. But perhaps they are not entirely exceptional, especially as they offer insight into how court actors today understand what counts as a pioneering practice and set of reforms.

Gar Alperovitz has described our present political moment as one of 'prehistory. In so doing, he analogizes to the many disaggregated local, municipal, and state experiments that characterized the Progressive era—disparate and decentralized undertakings that nonetheless paved the way for

375. Trauma discourse is spreading to parallel court reform initiatives but in different ways with different justificatory rhetorics. For example, since 2008, specialized veterans courts have been opening throughout the country offering treatment mandates and lenient dispositions for a range of misdemeanor and felony charges for veterans understood as suffering from PTSD—indeed, it was war (specifically in Vietnam) that in 1980 propelled psychologists to recognize PTSD as a formal clinical diagnosis. *See* YOUNG, *supra* note 374, at 3–5. Here arguments about social responsibility stem from ideas about national service rather than interpersonal violence, although it would seem that trauma has done less in veteran than prostitution courts to disrupt a responsibilization model. *See* Robert T. Russell, *Veterans Treatment Courts*, 31 TOURO L. REV. 385, 388–90 (2015) (explaining that veterans courts are explicitly modeled after drug courts including progressively harsher sanctioning for infractions of service mandates); Kristine A. Huskey, *Reconceptualizing "the Crime' in Veterans Treatment Courts*, 27 FED. SENT'G REP. 178, 182 (2015) (describing connections between PTSD, traumatic brain injury, and criminal behavior, and criticizing veterans courts for nonetheless treating veterans like offenders in drug and mental health courts). For veterans, Huskey argues, "more responsibility for the underlying conditions [should] be shouldered by the community and the nation." *Id.*

I should also add: A current controversy plaguing veterans' courts is a clash of traumas. Domestic violence advocates have argued to exclude veterans who batter family members from specialized treatment courts. *See, e.g.*, Pamela Kravetz, Note, *Way off Base: An Argument Against Intimate Partner Violence Cases in Veterans Treatment Courts*, 4 VETERANS L. REV. 162, 166–67 (2012); Claudia Arno, Note, *Proportional Response: The Need for More—and More Standardized—Veterans' Courts*, 48 U. MICH. J.L. REFORM 1039, 1063–64 (2015) (describing an attempt to persuade Nevada lawmakers to enact a blanket exclusion of veterans charged with domestic violence offenses from veterans courts). Others have argued for inclusion precisely because domestic violence can be an effect of PTSD. *E.g.*, Linda J. Fresneda, *The Aftermath of International Conflicts: Veterans Domestic Violence Cases and Veterans Treatment Courts*, 37 NOVA L. REV. 631, 650–56 (2013). Judge Russell suggests that the Buffalo Veterans Court distinguishes between offenders who commit domestic violence when it is "related to their service, including as an effect of PTSD and traumatic brain injury, versus "those with a predisposition for domestic violence" (though he does not explain how court personnel identify the difference). Russell, *supra*, at 395.

376. Interview with Miriam Goodman (June 2014), *supra* note 282.

a new discursive and material (and, of course, imperfect) state welfarist frame.[377] If the HTICs index anything about the present writ large, it is a renewed yearning for social responsibility and state protection, but one that is mediated, moderated, and made politically acceptable by the, as of yet, underdetermined language of trauma.

377. Gar Alperovitz, *Inequality's Dead End—And the Possibility of a New, Long-Term Direction*, NONPROFIT Q. (Mar. 10, 2015), https://nonprofitquarterly.org/2015/03/10/inequality-s-dead-end-and-the-possibility-of-a-new-long-term-direction/ [https://perma.cc/2J3E-BYTV].

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Liberty in Loyalty

A Republican Theory of Fiduciary Law

Evan J. Criddle*

Conventional wisdom holds that the fiduciary duty of loyalty is a prophylactic rule that serves to deter and redress harmful opportunism. This idea can be traced back to the dawn of modern fiduciary law in England and the United States, and it has inspired generations of legal scholars to attempt to explain and justify the duty of loyalty from an economic perspective. Nonetheless, this Article argues that the conventional account of fiduciary loyalty should be abandoned because it does not adequately explain or justify fiduciary law's core features.

The normative foundations of fiduciary loyalty come into sharper focus when viewed through the lens of republican legal theory. Consistent with the republican tradition, the fiduciary duty of loyalty serves primarily to ensure that a fiduciary's entrusted power does not compromise liberty by exposing her principal and beneficiaries to domination. The republican theory has significant advantages over previous theories of fiduciary law because it better explains and justifies the law's traditional features, including the uncompromising requirements of fiduciary loyalty and the customary remedies of rescission, constructive trust, and disgorgement.

Significantly, the republican theory arrives at a moment when American fiduciary law stands at a crossroads. In recent years, some politicians, judges, and legal scholars have worked to dismantle two central pillars of fiduciary loyalty: the categorical prohibition against unauthorized conflicts of interest and conflicts of duty (the no-conflict rule), and the requirement that fiduciaries relinquish unauthorized profits (the no-profit rule). The republican theory explains why these efforts to scale back the duty of loyalty should be resisted in the interest of safeguarding liberty.

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Introduction

Fiduciary relationships are ubiquitous in American law,[1] but judges and legal scholars have struggled in the past to explain precisely when, why, and how fiduciary duties apply.[2] Conventional wisdom holds that a relationship triggers the fiduciary duty of loyalty whenever one party (the principal) has reposed special trust and confidence in another (the fiduciary), thereby exposing herself or others (the beneficiaries) to a heightened risk of injury.[3] Yet, aside from a handful of well-established fiduciary relationships such as trustee–beneficiary, guardian–ward, and attorney–client, there is considerable uncertainty about just how broadly the duty of loyalty extends.[4] Equally troubling, the nature and scope of the duty of loyalty have become matters of intense debate. Some experts argue that the duty of loyalty requires fiduciaries merely to avoid conflicts of interest and relinquish profits to their principals,[5] while others defend a much more robust conception of loyalty that would include obligations to deliberate and pursue beneficiaries' interests with affirmative devotion.[6] Scholars disagree, as well, over the

1. Fiduciary duties arise, for example, in the law governing trusts, agency, corporations, partnerships, pensions, investment banking, bankruptcy, charities and nonprofits, family relationships, guardianship, employment, legal representation, and medical care. *See generally* TAMAR FRANKEL, FIDUCIARY LAW (2011) (discussing these and other fiduciary relationships).

2. *See* Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 972, 976 (2013) (observing that "we know relatively little about the justification for fiduciary duties' and '[t]he boundaries of fiduciary obligation are poorly defined").

3. *See, e.g.*, Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992) ("A fiduciary relation arises only if 'one person has reposed trust and confidence in another who thereby gains influence and superiority over the other.'" (quoting Amendola v. Bayer, 907 F.2d 760, 763 (7th Cir. 1990))).

4. *See* Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1045 (1991) (observing that "the precise nature of the fiduciary relationship remains a source of confusion and dispute").

5. *See, e.g.*, MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 59 (2010) (affirming that "fiduciary duties are proscriptive rather than prescriptive"); Stephen A. Smith, *The Deed, Not the Motive: Fiduciary Law Without Loyalty*, *in* CONTRACT, STATUS, AND FIDUCIARY DUTY 213, 213–14 (Andrew S. Gold & Paul B. Miller eds. 2016) (arguing that the duty of loyalty is comprised exclusively of the no-conflict and no-profit rules and that loyalty is not a concern of fiduciary law).

6. *See, e.g.*, Peter Birks, Lionel Cohen Lecture, *The Content of Fiduciary Obligation*, 34 ISR. L. REV. 3, 11–12 (2000) ("[T]he best way into the trustee's obligation is through the word 'altruism. The trustee is under an obligation to act in the interest of another."); Stephen R. Galoob & Ethan J. Leib, *Intentions, Compliance, and Fiduciary Obligations*, 20 LEGAL THEORY 106, 107 (2014) ("A fiduciary whose deliberation is not shaped [by the fiduciary obligation to her beneficiary] does not live up to her fiduciary obligation, no matter what else she does."); Daniel Markovits, *Sharing* Ex Ante *and* Ex Post*: The Non-Contractual Basis of Fiduciary Relations*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 209, 220–23 (Andrew S. Gold & Paul B. Miller eds. 2014) [hereinafter PHILOSOPHICAL FOUNDATIONS] (citing marriage as the paradigmatic fiduciary relationship because spouses bear robust duties of loyalty to one another that may "evolve, and become more demanding, as circumstances develop").

extent to which parties may modify or waive the duty of loyalty by contract,[7] and whether the 'pulpit-thumping rhetoric' courts use to describe fiduciary duties promotes or undermines the rule of law.[8] These debates are beginning to spill over from academic commentary into judicial decisions, legislation, and uniform laws, sowing inconsistency and uncertainty in American fiduciary law.[9]

This Article argues that the fiduciary duty of loyalty comes into clearest focus when viewed through the lens of republican legal theory.[10] The central message of republican legal theory is that legal norms and institutions are necessary to safeguard individuals from 'domination, understood as subjection to another's alien control (*arbitrium*).[11] Fiduciary power is dominating in this sense if a fiduciary is capable of acting 'without reference to the interests, or the opinions, of" her principal and beneficiaries.[12] Fiduciary law's classic duty of loyalty combats domination, I argue, by ensuring that a fiduciary's actions are legally required to track the terms of her mandate and the interests of her beneficiaries.[13]

Although private law scholars have generally neglected the link between republicanism and fiduciary law in the past,[14] the republican foundations of

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7. *Compare* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993) (arguing that fiduciary duties are fundamentally contractual duties), Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 447–49 (1998) (arguing that fiduciary duties are default contractual rules), *and* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 655–56 (1995) (asserting that 'fiduciary law is contractarian' and fiduciary duties are "default norms imposed in juridical relations"), *with* Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1780–89 (2001) (arguing for limits on contractual waiver by contending that permitting a fiduciary "to opt out of [the commitment to pursue the beneficiary's interests and not her own] undermines both the very foundation and the source of the economic value of the concept of a fiduciary relationship"), Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 249 (1995) ("[T]he core duty-of-loyalty rules should not be subject to a general waiver."), *and* Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 71 (2005) (arguing that courts should not enforce broad exculpatory clauses of fiduciary duties).

8. Langbein, *supra* note 7, at 629. *Compare* CONAGLEN, *supra* note 5, at 107–09 (rejecting moralistic rhetoric in fiduciary jurisprudence as an irrelevant distraction), *with* Blair & Stout, *supra* note 7, at 1809–10 (defending fiduciary law's affirmation of moral and social norms).

9. *See infra* subpart II(E).

10. The interpretive methodology employed in this Article is inspired by John Rawls's concept of "reflective equilibrium, in that it takes the law's core features at face value and seeks to distill the basic normative structure underlying them. JOHN RAWLS, A THEORY OF JUSTICE 20 (1971).

11. PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 55 (1997).

12. *Id.*

13. *See id.* (observing that under republican theory 'an act of interference will be non-arbitrary,' and accordingly nondominating, "to the extent that it is forced to track the interests and ideas of the person suffering the interference").

14. By way of illustration, a recent collection of essays on the "philosophical foundations of fiduciary law" does not contain a single reference to republicanism as a normative theory of

fiduciary law have been hiding in plain sight for centuries. Generations of republican judges,[15] political theorists,[16] and legal theorists[17] have invoked

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fiduciary obligation. *See generally* PHILOSOPHICAL FOUNDATIONS, *supra* note 6. In previous writings on public fiduciary theory, Evan Fox-Decent and I have drawn explicit connections between republicanism and fiduciary law. *See, e.g.*, EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 103–04 (2016) (developing a republican fiduciary theory of international legal norms). To my knowledge, however, this Article is the first to develop these connections systematically and defend republicanism as an alternative to theories of fiduciary law that are premised upon classical liberalism.

15. *See, e.g.*, Taylor v. Beckham, 178 U.S. 548, 577 (1900) (describing public offices as "mere agencies or trusts"); Stone v. Mississippi, 101 U.S. 814, 820 (1880) ("[T]he power of governing is a trust committed by the people to the government."); Trist v. Child, 88 U.S. (1 Wall) 441, 450 (1874) ("The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good.").

16. *See, e.g.*, 1 MARCUS TULLIUS CICERO, DE OFFICIIS 87 (Walter Miller, trans. 1913) (characterizing the "administration of the government" as "like the office of a trustee" and "must be conducted for the benefit of those entrusted to one's care, not of those to whom it is entrusted"); THE FEDERALIST No. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961) (affirming that all public institutions serve as "agents and trustees of the people"); THE FEDERALIST No. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The delicacy and magnitude of trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs speak for themselves."); JAMES HARRINGTON, THE OCEANA AND OTHER WORKS 147 (1656) ("As an estate in trust becomes a man's own, if he be not answerable for it, so the power of a magistracy not accountable to the People, from whom it was receiv'd, becoming of private use, the Common-wealth loses her liberty."); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 142–43, at 75–76 (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690) (describing legislative power as a "trust" committed to the legislature for the benefit of the commonwealth); JOHN MILTON, *The Tenure of Kings and Magistrates*, *in* POLITICAL WRITINGS 3, 10 (Martin Dzelzainis ed., Claire Gruzelier trans., 1991) (1649) (describing "the power of Kings and Magistrates" as "derivative, transferr'd, and committed to them in trust from the People, to the Common good of them all, in whom the power yet remaines fundamentally, and cannot be tak'n from them."); PETTIT, *supra* note 11, at 8 ("The commonwealth or republican position sees the people as trustor, both individually and collectively, and sees the state as trustee: in particular, it sees the people as trusting the state to ensure a dispensation of non-arbitrary rule. "); QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 109–11 (1998) (discussing "the idea of the state as the name of an artificial person whose representatives are authorized to bear the rights of sovereignty in its name"); 2 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS 267 (Ronald Hamowy ed., Liberty Fund 1995) (1755) (describing government as "[a] great and honourable Trust" in which "Honesty, diligence, and plain sense, are the only talents necessary for the executing of this Trust; and the public Good is its only End").

17. *See generally, e.g.*, CRIDDLE & FOX-DECENT, *supra* note 14, at 103–04 (developing an interpretive theory of sovereignty under international law as a fiduciary relationship between a state and its citizens); EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY 112 (2011) (discussing the state–subject fiduciary relationship); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 295–97 (2013) (characterizing sovereigns as trustees of humanity at large); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEXAS L. REV. 441, 446 (2010) (arguing that federal administrative law should promote "fiduciary representation, in which federal officers exercise authority for the benefit of a state's subjects); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006) (reframing the problem of agency discretion around the concept of fiduciary duty); Evan J. Criddle,

private fiduciary relationships such as guardianship, agency, and trusteeship to explain by analogy how state authority can be reconciled with individual liberty. Just as fiduciary law prevents private law fiduciaries from exercising arbitrary power over the interests of their beneficiaries,[18] republicans argue that public law safeguards liberty by ensuring that public officials wield their entrusted powers as a 'public trust'—i.e., subject to fiduciary norms of loyalty and care.[19] Thus, republican legal theory is premised on the idea that the primary purpose of private fiduciary law—like public law—is to safeguard freedom from domination.

In contrast, most legal scholars and judges today accept as an article of faith that fiduciary law is devoted exclusively to deterring material harm—an idea that resonates with classical liberalism rather than republicanism.[20] The classical liberal theory of fiduciary law holds that there is nothing inherently wrongful about fiduciary self-dealing, provided that conflicted transactions do not harm beneficiaries' material interests.[21] Viewed from this perspective, fiduciary law prohibits unauthorized conflicts of interest solely as a prophylactic measure to deter harmful opportunism and compensate for

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Standing for Human Rights Abroad, 100 CORNELL L. REV. 269 (2015) (arguing that states may employ interstate countermeasures as fiduciaries to protect the human rights of foreign nationals abroad); Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN'S L.J. 259 (2005) (arguing that the fiduciary character of a state's relationship with its people provides a justification for its legal authority); Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845 (2013) (arguing that legislators are fiduciaries to the public for the purposes of insider-trading law); Gary Lawson et al., *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014) (describing the Constitution as a fiduciary document requiring equal protection of all citizens); Ethan J. Leib et al., Essay, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013) (offering a fiduciary theory of the judicial office); Ethan J. Leib et al., *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91 (2013) (applying fiduciary political theory to redistricting); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820 (2016) (assessing the utility and limitations of fiduciary political theory); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1088–91 (2004) (arguing that the U.S. Constitution is premised on a fiduciary conception of public authority); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013) (arguing that political representatives should be treated as fiduciaries for purposes of redistricting).

18. *See* PETTIT, *supra* note 11, at 31–32 (explaining that for republicans the 'great evil' that legal and political institutions must combat is "domination, defined as "exposure to the arbitrary will of another, or living at the mercy of another").

19. *See* Natelson, *supra* note 17, at 1088–91 (listing fiduciary duties potentially applicable to public officials).

20. *See infra* Part II. This Article uses the term "classical liberalism, " to distinguish the theory from other "liberal' theories that are more closely aligned with republicanism. *See* Alan Ryan, *Liberalism*, *in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 360, 360 (Robert E. Goodwin, Philip Pettit & Thomas Pogge eds., 2d ed. 2012) (emphasizing liberalism's diversity).

21. *See infra* subpart II(A).

courts' inability to discern whether particular conflicted transactions undermined beneficiaries' interests.[22]

This classical liberal theory of fiduciary law, like the republican theory, boasts a venerable pedigree. It features prominently in *Keech v. Sandford*,[23] the English Chancery Court's celebrated 1726 decision which ushered in the modern era of Anglo–American fiduciary law.[24] It also supplies theoretical ballast for the first major American fiduciary law case, *Davoue v. Fanning*.[25] And it has inspired generations of legal academics in the United States to try to explain and critique fiduciary law from a purely economic perspective.[26] Nonetheless, as an interpretive theory of fiduciary law—one that purports to explain and justify the law's core features from its own internal point of view—the classical liberal theory is unconvincing.

Classical liberalism struggles, in particular, to explain and justify two signature features of the fiduciary duty of loyalty: the categorical prohibition against unauthorized conflicts of interest and conflicts of duty (the 'no-conflict rule"), and the requirement that fiduciaries must relinquish profits obtained through conflicted transactions (the "no-profit rule").[27] As other commentators have observed, there are good reasons to question the consensus among scholars of law and economics that these rules are designed

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22. *See, e.g.*, CONAGLEN, *supra* note 5, at 62 (asserting that "the fiduciary doctrine is prophylactic *in its very nature*"); Henry E. Smith, *Why Fiduciary Law Is Equitable*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 6, at 261, 261, 263–64 (characterizing fiduciary law's prophylactic rules as an outgrowth of equity); Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1045–46 (2011) (arguing that "the nature of fiduciary governance as a system of deterrence [is] meant to minimize agency costs").

23. (1726) 25 Eng. Rep. 223

24. *Id.* at 223–24.

25. 2 Johns. Ch. 252, 257 (N.Y. Ch. 1816).

26. *See, e.g.*, Richard R.W. Brooks, *Knowledge in Fiduciary Relations*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 6, at 225, 228–35 (discussing the "economics of knowledge" and its importance in explaining the fiduciary relationship); Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to Anti-Contractarians*, 65 WASH. L. REV. 1, 29 (1990) (explaining fiduciary duties in the context of contracting problems); Cooter & Freedman, *supra* note 4, at 1074 (applying the economic "principal-agent" model to the concept of fiduciary relationships); Easterbrook & Fischel, *supra* note 7, at 427 (concluding a 'fiduciary' relation is a contractual one, and applying "economic assessments of contractual terms and remedies' to fiduciary duties); Robert Flannigan, *The Economics of Fiduciary Accountability*, 32 DEL. J. CORP. L. 393, 393 (2007) (concluding that when applying the economic perspective to the concept of fiduciary duty, "ancient principle" is confirmed, and does not imply an "alteration of the conventional position"); Oliver Hart, *An Economist's View of Fiduciary Duty*, 43 U. TORONTO L.J. 299, 313 (1993) (applying economic theory to the issue of "the scope of fiduciary duty"); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 677–83 (2004) (utilizing economic theory, particularly the "principal-agent problem, and applying agency-cost theory to trust law). *See generally* Sitkoff, *supra* note 22 (synthesizing economic theory and fiduciary law).

27. *See, e.g.*, Bray v. Ford [1896] AC 44 (HL) 51 (Lord Herschell) (appeal taken from AC) (Eng.) ("It is an inflexible rule of a Court of Equity that a person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.").

to achieve optimal harm minimization.[28] More fundamentally, classical liberalism's focus on deterrence is an awkward fit with fiduciary law because the paradigmatic fiduciary remedies—constructive trust and disgorgement—are restitutionary remedies, not punitive remedies.[29] Taking classical liberalism's normative commitments seriously, therefore, would seem to invite legislators and judges to strip fiduciary law down to its foundations and reengineer fiduciary duties and remedies from the ground up.

It should come as no surprise, therefore, that this reengineering process is already well underway in the United States. Inspired by classical liberalism, the Delaware Supreme Court has replaced the no-conflict and no-profit rules in corporate law with an 'entire fairness' test that allows corporate directors to conclude self-interested transactions without the consent of either the corporation's disinterested directors or its shareholders.[30] The past two decades have also seen a growing number of states discard the no-conflict and no-profit rules in agency law and parts of trust law.[31] These departures from fiduciary law's traditional requirements have been premised on the idea that courts should intervene in fiduciary relationships only as strictly necessary to rescue beneficiaries from material harm.[32]

The republican theory developed in this Article challenges classical liberals' efforts to dismantle traditional fiduciary rules and remedies. As this Article will demonstrate, the fiduciary duty of loyalty reflects the concerns of republicanism rather than classical liberalism. The republican theory of fiduciary law resonates with the venerable idea that fiduciaries in both private and public law occupy a distinctive office that is constituted, defined, and regulated by law.[33] Unlike classical liberalism, republicanism bolsters the

28. *See infra* subpart II(D).

29. *See infra* subpart II(D).

30. *See infra* text accompanying notes 136–37.

31. *See infra* text accompanying notes 141–47.

32. *See* Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 823 (1983) (noting that "courts will intervene in the fiduciary relation by requiring the fiduciary to act with loyalty and skill, in the entrustor's best interests").

33. *See* SHELDON AMOS, THE HISTORY AND PRINCIPLES OF THE CIVIL LAW OF ROME 291 (Fred B. Rothman & Co. reprt. 1987) (1883) (observing that under Roman law '[t]he office of guardian was regarded as a service of public moment, and not of mere private convenience or arrangement,' being imposed 'as a public burden or duty to be rendered to the State"); 1 CICERO, *supra* note 16, at 85 ("For the administration of the government, like the office of a trustee, must be conducted for the benefit of those entrusted to one's care, not of those to whom it is entrusted."); Joshua Getzler, *Rumford Market and the Genesis of Fiduciary Obligations*, *in* MAPPING THE LAW 577, 584–85 (Andrew Burrows & Alan Rodger eds. 2006) (arguing that the English Chancery Court's introduction of '[t]he idea that profit from [a private fiduciary] should be barred can plausibly be connected to [Chancellor] King's experience battling the abuses of [public offices] in Chancery"); *id.* at 595–96 (explaining how English legal norms governing private and fiduciary offices developed in tandem during the eighteenth and nineteenth centuries); Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837, 1847 & n.39 (2009)

traditional duty of loyalty with its associated remedies by showing how fiduciary law neutralizes the domination that would otherwise arise in asymmetric relationships premised upon trust and confidence. A fiduciary's power to exercise entrusted power for and on behalf of her principal (or pursuant to authority entrusted to her by law) would engender domination but for the fact that fiduciary law compels a fiduciary to honor her principal's instructions and her beneficiaries' interests. The republican theory thus frames the fiduciary duty of loyalty as a liberty-enhancing safeguard that denies fiduciaries the formal legal capacity to exercise arbitrary power. To the extent that American law remains committed to the republican ideal of liberty as freedom from domination, legislators and judges today should take care to preserve and reinforce fiduciary law's traditional legal requirements and remedies.

The republican theory also clarifies fiduciary law's proper scope, explaining why some interpersonal relationships that pose a risk of harmful opportunism qualify as fiduciary relationships (e.g. trustee–beneficiary), while others do not (e.g., manufacturer–consumer).[34] In particular, republicanism offers a simple test for identifying fiduciary relationships: *Fiduciary duties apply whenever a party has been entrusted with power over another's legal or practical interests.*[35] The fiduciary duty of loyalty governs relationships that meet this test because without this obligation a fiduciary would have the capacity to work a double wrong: she could both (1) harm her beneficiary's legal or practical interests and (2) violate the trust reposed in her by treating fiduciary power as an instrument for advancing her own purposes. A fiduciary's capacity to commit the second type of wrong—breach of trust—represents a unique form of domination and therefore justifies fiduciary law's distinctive legal obligations and remedies. While other species of private law such as contract, tort, property, and unjust enrichment are capable of neutralizing the domination entailed in a private party's capacity for harmful opportunism in an arm's-length relationship, only fiduciary duties and remedies are calibrated to ensure that fiduciaries lack the capacity to betray trust in a fiduciary relationship.

(emphasizing how this republican conception of the fiduciary office shaped early American political theory). Scholars of business organization law have observed similarly that Anglo–American corporations began as public entities chartered for public purposes. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 129–30 (3d ed. 2005) ("Banks, insurance companies, water companies, and companies organized to build or run canals, turnpikes, and bridges made up the overwhelming majority of these early corporations."); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970, at 17 (1970) ("From the 1780's well into mid-nineteenth century the most frequent and conspicuous use of the business corporation . . . was for one particular type of enterprise, that which we later called public utility . . . .").

34. *See, e.g.*, Burton v. R.J. Reynolds Tobacco Co., 397 F.3d 906, 911–13 (10th Cir. 2005) (holding that cigarette manufacturers are not fiduciaries for consumers under Kansas law).

35. *See infra* subpart III(A).

The remainder of this Article develops the republican theory of fiduciary law in several stages. Part I offers a brief primer on legal republicanism, summarizing the tradition's distinctive conception of liberty as freedom from domination. Part II introduces the classical liberal theory of fiduciary law and explains how the classical liberal theory has shaped the development of English and American fiduciary law. Part II also explains why theories of fiduciary law that are based on classical liberalism—including economic theories—do not offer a persuasive, interpretive account of the duty of loyalty. Lastly, Part III explains how the republican theory both bolsters and clarifies the traditional fiduciary duty of loyalty. In particular, the republican theory offers an interpretively persuasive account of the normative foundations of fiduciary law, it provides a simple test for identifying fiduciary relationships, it clarifies the fiduciary duty of loyalty, and it furnishes a principled justification for judicial deference to fiduciaries' discretionary judgments. In each of these respects, republicanism lays a firm theoretical foundation for fiduciary law's traditional features.

To be clear, although this Article advances the thesis that fiduciary law's traditional structure reflects republican principles, it does not set out to prove that judges in England, the United States, or other former British colonies have deliberately drawn upon republican principles as they have developed contemporary fiduciary law. Nor does it attempt to show that republicanism can explain or justify every statute, regulation, or judicial decision involving fiduciary duties. Some features of American fiduciary law—particularly in the law governing corporations and other business associations—have clearly drifted away from the republican theory. This Article does make the case, however, that the traditional fiduciary duty of loyalty addresses republican concerns about arbitrary power, and it aims to persuade the reader that fiduciary jurisprudence could achieve greater coherence through deeper engagement with the republican ideal of liberty as freedom from domination.

I. Republican Legal and Political Theory: A Primer

To understand the role that republican theory has played, and might yet play, in fiduciary law, we must first appreciate what makes the republican tradition distinctive. Over the centuries, the term 'republicanism' has been used to capture a diverse collection of ideas, including popular sovereignty; representative government; the constitutional separation of legislative, executive, and judicial powers; civic virtue; inclusive public deliberation; and universal citizenship.[36] Indeed, the republican tradition has come to embrace

36. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541–42, 1586 (1988); *see also* Samantha Besson & José Luis Martí, *Law and Republicanism: Mapping the Issues*, *in* LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES 3, 8 (Samantha Besson

so many diverse trends and voices that debates among the tradition's adherents threaten at times to overshadow the tradition's core contribution to legal and political theory.[37] At its heart, however, republicanism offers a distinctive account of the source and purpose of state authority. Specifically, it asserts that all public officials and institutions derive their authority from their people for the purpose of securing individual liberty.[38] The state fulfills its mission to secure liberty when it enacts and enforces laws that protect its people from 'domination.'[39]

To fully appreciate the republican ideal of liberty as freedom from domination, it may be helpful to unpack what this term means for republicans. The leading contemporary exponents of republicanism, Philip Pettit and Quentin Skinner, have explained that domination for republicans is subjection to another's 'arbitrary power' or 'alien control.'[40] If another person can interfere in your choices as they like with impunity, you are dependent on their will and 'not *sui juris*—or not 'your own person'—in the expression from Roman Law.'[41] You are no longer capable of acting as 'your own man,' freely exercising 'your own right.'[42] Instead, you are 'under the power of a master' (*in potestae domini*)—effectively a slave rather than a fully emancipated, self-determining agent.[43]

& José Luis Martí eds. 2009) (describing some of the core themes of republicanism) [hereinafter LEGAL REPUBLICANISM].

37. For a recent dustup over the meaning of "republicanism," compare RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 50–51 (2016) (using the term "republicanism' to capture libertarianism), with Jack M. Balkin, *Which Republican Constitution?*, 31 CONST. COMMENT. 31 (2017) (reviewing RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016)) (contrasting Barnett's libertarianism with founding-era republicanism based on freedom from domination).

38. *See* PETTIT, *supra* note 11, at 8 ("The commonwealth or republican position sees the people as trustor, both individually and collectively, and sees the states as trustee ").

39. M. N. S. SELLERS, THE SACRED FIRE OF LIBERTY: REPUBLICANISM, LIBERALISM AND THE LAW 71–72 (1998) (describing James Madison's republican vision of liberty).

40. Philip Pettit, *Republican Freedom: Three Axioms, Four Theorems*, *in* REPUBLICANISM AND POLITICAL THEORY 102, 102 (Cécile Laborde & John Maynor eds. 2008); Quentin Skinner, *Freedom as the Absence of Arbitrary Power*, *in* REPUBLICANISM AND POLITICAL THEORY, *supra*, at 83, 84–86; *see also* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 1 (2012) (emphasizing "the evil of subjection to another's will").

41. PETTIT, *supra* note 40, at 7. The term "*sui juris*" is often translated as "free from power,' meaning not subject to another's domination. *E.g.*, MAX KASER, ROMAN PRIVATE LAW 76 (Rolf Dannenbring trans., 4th ed. 1984).

42. Skinner, *supra* note 40, at 86.

43. Phillip Pettit, *Law and Liberty*, *in* LEGAL REPUBLICANISM, *supra* note 36, at 39, 44; *see also* LOCKE, *supra* note 16, § 22, at 17 (asserting that liberty entails not being "subject to the inconstant, uncertain, unknown, arbitrary will of another man"); 2 TRENCHARD & GORDON, *supra* note 16, at 430 ("Liberty is, to live upon one's own terms; slavery is, to live at the mere mercy of another ").

Importantly, republicans contend that domination is wrongful even if the empowered party never affirmatively interferes with the dependent party's choices. The mere fact that the empowered party has the *capacity* for arbitrary interference underscores the dependent party's vulnerability, impressing upon the dependent party's mind the need to remain within the power holder's good graces. The dependent party therefore faces 'a continual state of uncertainty and wretchedness, characterized by the need for constant invigilation, self-abasement, and self-censorship.[44] This condition of subservience persists even if the empowered party does not exercise her power in an arbitrary manner. Accordingly, subjection to a virtuous king or benevolent slave master is incompatible with liberty, notwithstanding the fact that the king or slave master may always choose to exercise power altruistically for the benefit of their subordinates. In these relationships, the mere presence of alien control is sufficient to render the subject or slave unfree.[45]

The republican conception of liberty as freedom from domination might appear at first glance to be incompatible with government. Republicans argue, however, that public authority does not constitute 'alien control' if the state is properly 'checked' to ensure that it does not serve as an instrument of arbitrary control.[46] A state that interferes with private choices on a nonarbitrary basis to secure a regime of secure and equal freedom does not dominate its people. The key question for republicans, therefore, is whether public institutions are hedged by sufficient legal and political safeguards to ensure that they lack the formal and practical capacity to exercise power in an arbitrary manner. If state action is 'forced to track the avowed or avowal-ready interests of the interferee, it is not arbitrary in the relevant sense and therefore does not constitute a form of alien control.[47] Thus, republicans assert that the state can make, adjudicate, and enforce laws that constrain individual autonomy without undermining liberty, provided that robust safeguards are in place to guarantee that the state cannot disregard the public interest with impunity.[48]

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44. 2 TRENCHARD & GORDON, *supra* note 16, at 430; *see also* Pettit, *supra* note 40, at 103 (emphasizing that alien control "invigilate[s] the choices of the controlled agent").

45. *See, e.g.*, SELLERS, *supra* note 39, at 71 (observing that James Madison in the *Federalist Papers* "attributed tyranny to an excess of power, even in service of the common good").

46. Pettit, *supra* note 40, at 117–18.

47. *Id.* at 117.

48. Some contemporary republicans, following a strand of republicanism that can be traced back to Aristotle, contend that individuals, to be fully free, must participate in developing the laws that govern them so that these laws can be understood as the product of their own authorship. *See, e.g.*, MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 322–23 (1996) (arguing that current disenchantment with American politics can be alleviated by replacing the liberal, "voluntarist conception of freedom" with a return to republican ideas of self-government and civic engagement); Charles Taylor, *Cross-Purposes: The Liberal-*

Laws that deny public institutions the formal authority to wield alien control are necessary to secure republican liberty. but they are not sufficient to ensure that the state lacks the practical capacity for domination. Robust legal and political institutions are also necessary to reduce the incidence of arbitrary interference *ex ante* and ensure *ex post* that the state cannot exercise alien control with impunity. Republicans therefore emphasize the importance of structural safeguards such as popular elections and inter-branch checks and balances as safeguards for individual liberty.[49] The role of courts within republican theory is to affirm legal rules that formally rule out domination, while enforcing these rules in a manner that minimizes domination in practice. Because courts—like other public institutions—have the practical capacity for arbitrary interference, republicans have argued that judicial intervention should be calibrated to guard against overreach, ensuring that judicial intervention in public governance minimizes overall net domination.[50]

An important lesson of the republican tradition is that individual liberty in the private sphere is also a product of effective institutional design. Republican freedom is 'an explicitly political notion of freedom, Martin Loughlin observes; 'rather than being a natural or intrinsic human characteristic, liberty is created through governmental action, as the state makes and enforces laws to protect individuals from being subject to others' arbitrary power.[51] Consequently, legal norms and institutions are necessary to protect individuals from domination in the private sphere, just as they are necessary to protect individuals from state domination.[52]

Communitarian Debate, *in* LIBERALISM AND THE MORAL LIFE 159, 165 (Nancy L. Rosenblum ed., 1989) ("In order to have a free society, one has to replace this coercion with a sense that the political institutions in which [citizens] live are an expression of themselves. The 'laws' have to be seen as reflecting and entrenching their dignity as citizens, and hence to be in a sense extensions of themselves."). However, most republicans consider it "more important *not to have* a master than to *be* a master." ISEULT HONOHAN, CIVIC REPUBLICANISM 184 (2002). When legal norms and institutions require public officials to exercise their entrusted powers in a manner that is calculated to advance the public interest, republicans contend that these officials relate to the public not as masters but as public servants. *Id.* at 158–61.

49. *See, e.g.*, PETTIT, *supra* note 11, at 100–01 (noting Alexander Hamilton's assertion that "legislative balances and checks" and "the representation of the people in the legislature by deputies of their own election are means, and powerful means, by which the excellencies of republican government be retained and its imperfections lessened or avoided' (quoting THE FEDERALIST NO. 9, at 72–73 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

50. *See* Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1418 (2008) ("[A] decision by courts to intervene in the political process should be reconceptualized as a domination-minimizing institutional tradeoff Not only does this tradeoff result in an overall net minimization of domination, it also constrains judicial intervention to the most serious instances of domination. In this way, the antidomination model guards against the danger of judicial overreaching.").

51. MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 174 (2010).

52. *See* John Braithwaite & Philip Pettit, *Republicanism and Restorative Justice: An Explanatory and Normative Connection*, *in* RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 145,

Although republican legal and political theorists have lavished attention on public law, private law's equally vital role in securing freedom from domination has received less scrutiny.[53] The clear implication of republican theory, however, is that private law also may promote liberty by ensuring that individuals are not consigned to live at the mercy of others. As Pettit has explained, contract law is necessary 'not just to facilitate voluntary agreements among different agents, but to play a regulative role in disallowing contracts that involve terms under which one party has the possibility of dominating the other.'[54] Tort law duties of care regulate the domination that would arise if private parties could harm their neighbors negligently, recklessly, or intentionally with impunity.[55] Similarly, the law of unjust enrichment arguably responds to the threat of alien control by compelling individuals to restore property in their possession to the rightful owner.[56] Property law likewise can be understood to enshrine rights and duties and supplies remedies to prevent private parties from wielding unilateral control over others' legally protected interests in resources.[57] Thus, viewed from a republican perspective, private law enshrines legal rules that deny private parties the formal capacity for domination, while tasking courts with enforcing these rules in a manner that is calculated to minimize overall net domination in practice.[58]

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149 (Heather Strang & John Braithwaite eds., 2000) (arguing that the "republican ideal of freedom as non-domination" requires "restraining the private power . . . whereby people can be effectively protected, informed and empowered in relation to one another").

53. *See generally, e.g.*, LEGAL REPUBLICANISM, *supra* note 36 (providing excellent essays on republican approaches to constitutional law, criminal law, and international law, but ignoring private law). Although private law scholars rarely invoke republicanism expressly, David Dyzenhaus observes that republican liberty is 'akin to the sense of freedom' defended by Kantian private law theorists such as Ernest Weinrib and Arthur Ripstein. *See* David Dyzenhaus, *Liberty and Legal Form*, *in* PRIVATE LAW AND THE RULE OF LAW 92, 95–96 (Lisa M. Austin & Dennis Klimchuk eds., 2014).

54. PETTIT, *supra* note 11, at 165.

55. *See* David F. Partlett, *The Republican Model and Punitive Damages*, 41 SAN DIEGO L. REV. 1409, 1417–18 (2004) (suggesting that tort law responds to republican concerns about domination).

56. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 1 cmt. b (AM. LAW INST. 2011).

57. *See* PETTIT, *supra* note 11, at 135 (arguing that nondomination best protects private-property rights).

58. Republicans have debated whether nondomination is best understood as a constraint on an agent's actions or as a value to be maximized. *See* PETTIT, *supra* note 11, at 97–106 (distinguishing these approaches and defending a consequentialist theory). This Article advances a mixed approach. It endorses the nonconsequentialist view that law, to be legitimate, must respect republican liberty by enshrining formal conduct rules that unequivocally affirm each individual's right to freedom from domination. *See infra* subparts III(A)–(D). Because nondomination must be secured in practice through fallible legislatures and courts, however, the Article asserts that nondomination must also operate as a maximand for the design of decision rules to govern judicial review. *See infra* subpart III(E). A thoroughly consequentialist republican theory might generate different conclusions regarding the optimal design of fiduciary conduct and decision rules.

Generations of republican political theorists have argued that fiduciary duties, in particular, preserve freedom from domination.[59] For example, Pettit asserts that an agent with power of attorney does not dominate her principal because she is permitted to exercise this power 'only on condition that the interference promises to further [her principal's] interests, and 'according to opinions of a kind that [the principal] share[s].'[60] Consequently, an agent does not relate to her principal 'as a master, but rather as an extension of the principal's own self-mastery.[61] As Part III of this Article explains in greater detail below, the legal requirements of fiduciary loyalty formally rule out alien control in fiduciary relationships by requiring a fiduciary to exercise her entrusted power in a manner that respects the interests of her principal and beneficiaries. The norms and institutions of fiduciary law thus safeguard republican freedom by ensuring that a fiduciary lacks the formal and practical capacity to interfere arbitrarily in the affairs of her principal and beneficiaries with impunity.

In sum, republicanism offers a distinctive theory of the purpose of legal institutions based on the ideal of liberty as freedom from domination. According to republicans, private parties suffer a special wrong whenever their legal interests are subject to another's arbitrary control, irrespective of whether that control results in wrongful interference.[62] Legal norms and institutions are necessary under republican theory to ensure that the powerful are unable to interfere arbitrarily in others' affairs with impunity. Fiduciary law thus contributes to the establishment of a free society by emancipating principals and beneficiaries from domination at the hands of those who hold entrusted power over their legal or practical interests.

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59. *See* sources cited *supra* note 16.

60. PETTIT, *supra* note 11, at 23.

61. *Id.*

62. Republicans disagree about whether noninterference and nondomination are both essential components of republican freedom. *See* Philip Pettit, *Keeping Republican Freedom Simple: On a Difference with Quentin Skinner*, 30 POL. THEORY 339, 342 (2002) (arguing that republican freedom is concerned solely with domination, while acknowledging Skinner's claim that republicans historically understood freedom to encompass both nondomination and noninterference). Some theorists argue that nonarbitrary interference does not compromise freedom, see, for example, PETTIT, *supra* note 11, at 75–76 (arguing that '[f]reedom as non-domination is compromised by domination and by domination alone,' not by interference or the 'influence of conditioning factors'), while others reject this thesis. *See, e.g.*, Christian List & Laura Valentini, *Freedom as Independence*, 126 ETHICS 1043, 1059 (2016) (criticizing republican theories, like Pettit's, that recast constraints on freedom as no restriction of freedom, '[c]ontrary to ordinary-language use'); Evan Fox-Decent, Freedom as Independence 19–23 (unpublished manuscript) (on file with author) (articulating and defending a version of republican freedom that includes freedom from interference). This Article endorses the view that nonarbitrary interference compromises freedom, but that such interference is wrongful only if it reflects alien control.

II. Classical Liberalism in Anglo–American Fiduciary Law

Despite the longstanding association between fiduciary concepts and republican legal and political theory, private law scholars today rarely mention republicanism as a possible theoretical framework for explaining, justifying, or critiquing fiduciary law. Although academics and judges often identify factors such as power, trust, dominance, and vulnerability as defining features of fiduciary relationships,[63] they tend to characterize the no-conflict and no-profit rules as 'prophylactic' measures that are designed to address the risk of harmful opportunism (per classical liberalism),[64] rather than as liberty-enhancing safeguards that rule out domination (per republicanism).

This Part examines classical liberalism's enduring influence on Anglo–American fiduciary law. It begins by laying out the tradition's vision of liberty as freedom from interference. It then considers how classical liberalism has shaped fiduciary law's development in England and the United States, and it examines how legal scholars today—including leading practitioners of law and economics—have endeavored to explain and justify fiduciary duties and remedies based on the normative commitments of classical liberalism. Lastly, this Part explores several important critiques of classical liberalism as an interpretive theory of fiduciary law, and it explains how the theory's exclusive focus on wrongful interference has encouraged legislatures and courts to set aside fiduciary law's traditional no-conflict and no-profit rules in some areas of American fiduciary law.

A. Classical Liberalism and Fiduciary Duty

Contemporary republicans typically present their vision of liberty as an alternative to classical liberalism, which focuses on 'freedom as noninterference.'[65] Whereas republicans consider a power holder's mere *capacity* for arbitrary interference to undermine liberty (whether or not it results in actual interference), proponents of classical liberalism contend that individual freedom is compromised if (and only if) a person's choices are

63. *See, e.g.*, Frame v. Smith, [1987] 2 S.C.R. 99, 102 (Can.) (Wilson, J., dissenting) (emphasizing unilateral power and vulnerability); Frankel, *supra* note 32, at 809–10 (characterizing "abuse of power" as "the central problem" of fiduciary law); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1483 (2002) (suggesting that "the strength of [fiduciary law's] protection varies inversely with the potential for self-help on the part of the vulnerable party").

64. *See, e.g.*, Smith, *supra* note 22, at 262–71 (describing features of fiduciary law as equitable constraints on opportunism); Smith, *supra* note 63, at 1402 (explaining how the duty of loyalty, which serves as the essential aspect of fiduciary duty, serves to mitigate against opportunistic behavior by fiduciaries).

65. *See, e.g.*, PETTIT, *supra* note 11, at 40–50 (contrasting "liberty as non-domination" from liberty "as non-interference").

actually constrained by another.[66] According to classical liberals, it is the incidence or risk of choice-constraining interference—not alien control per se—that renders a person unfree. Consequently, a person may be unfree without suffering actual interference only to the extent that another has actually interfered, or is likely to interfere, in their affairs to their detriment.[67]

In some respects, the republican conception of freedom is narrower than the classical liberal conception. Unlike classical liberals, republicans consider an individual's formal subjection to a benevolent slaveholder to be a form of unfreedom even if the slaveholder was disposed to treat the slave well and refrain from interference in the slave's choices.[68] In other respects, however, the classical liberal conception of freedom is narrower than its republican alternative. For example, any interference in matters of personal choice—not just arbitrary interference—compromises freedom under classical liberalism. Accordingly, classical liberals tend to view laws that constrain citizens' choices as limitations on personal freedom even if the laws are necessary to protect all members of society from domination.[69] Although they recognize that legal institutions are often necessary to protect individual autonomy from private interference, classical liberals consider state intervention in the private sphere to be appropriate only to the extent that there is an actual risk of interference in matters of personal choice.[70]

Viewed from the perspective of classical liberalism, fiduciary duties guard against the possibility that fiduciaries may harm their principals and beneficiaries by interfering in their legally privileged choices. Most fiduciaries have a unique capacity for harm because they are enlisted precisely to carry others' choices into execution.[71] Accordingly, classical liberals argue that the duty of loyalty is designed to address the threats of material harm that arise within fiduciary relationships by requiring fiduciaries to respect their principals' choices and their beneficiaries'

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66. *See, e.g.*, MATTHEW H. KRAMER, THE QUALITY OF FREEDOM 157 (2003) (identifying freedom simply as the ability to perform an action).

67. Ian Carter, *How Are Power and Unfreedom Related?*, *in* REPUBLICANISM AND POLITICAL THEORY, *supra* note 40, at 58, 61–63; Matthew H. Kramer, *Liberty and Domination*, *in* REPUBLICANISM AND POLITICAL THEORY, *supra* note 40, at 31, 42–44.

68. *See* Cécile Laborde & John Maynor, *The Republican Contribution to Contemporary Political Theory*, *in* REPUBLICANISM AND POLITICAL THEORY, *supra* note 40, at 1, 4–5 (describing Skinner's and Pettit's arguments that benevolent slave owners still subject their slaves to unfreedom).

69. *See, e.g.*, Carter, *supra* note 67, at 65–66 (arguing that there is no reason to privilege the common interest over one's personal interest when determining what counts as an instance of unfreedom "unless this reason consists in a moral point of view"); Charles Larmore, *A Critique of Philip Pettit's Republicanism*, 11 PHIL. ISSUES 229, 234 (2001) (offering taxation as an example of state interference for the common good that results in a loss of individual freedom).

70. *See* Kramer, *supra* note 67, at 42 ("[T]he soft-hearted dominator's superiority is not in itself a source of unfreedom; everything hinges on what the dominator does with his superiority.").

71. Frankel, *supra* note 32, at 808–10.

interests.[72] Arguably, the first principle of agency law, for example, is that an agent is required to follow her principal's instructions.[73] Trustees likewise are obligated to honor the terms of their trust agreement,[74] and corporate officers and directors are bound to respect the requirements of their corporate charter and bylaws.[75] When a principal does not give her fiduciary precise instructions, the fiduciary is required to honor the principal's choices by exercising her discretionary powers to advance the principal's objectives and protect beneficiaries' interests.[76] These features of fiduciary law are arguably consistent with classical liberalism's theory of freedom as noninterference.

Proponents of classical liberalism contend that there is nothing inherently wrongful about a fiduciary engaging in conflicted transactions, provided that the transactions are consistent with the principal's objectives and do not undermine the beneficiary's material interests.[77] For example, an investment manager might find that she can maximize profit for an investor–beneficiary by investing in a commercial venture in which she also has a personal financial stake. According to classical liberals, the reason why fiduciary law requires the investment manager to disclose and receive her beneficiary's consent to the conflicted transactions has to do with the challenge of monitoring a fiduciary's performance: it is often difficult for investors and courts to discern whether a particular conflicted transaction was actually the best option available to the fiduciary.[78] Rather than saddle the investor with determining whether a fiduciary's self-dealing has harmed her material interests, the no-conflict rule's categorical prohibition against unauthorized conflicted transactions forces the investment manager to obtain the investor's fully informed consent *ex ante* or face court-ordered rescission or disgorgement *ex post*.[79] Classical liberalism thus presents fiduciary law's

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72. *See, e.g.*, CONAGLEN, *supra* note 5, at 32–50, 61–62.

73. RESTATEMENT (THIRD) OF AGENCY § 8.09 (AM. LAW INST. 2006) (requiring an agent to comply with all lawful instructions from the principal).

74. *See* RESTATEMENT (THIRD) OF TRUSTS § 76(1) (AM. LAW INST. 2007) (requiring the trustee to administer the trust lawfully and diligently in accordance with the terms of the trust).

75. *See, e.g.*, Henrichs v. Chugach Alaska Corp., 250 P.3d 531, 533 (Alaska 2011) (affirming that a corporate director breached his duty of loyalty by, *inter alia*, "refusing to comply with corporate bylaws").

76. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 76(2) (requiring the trustee to identify the duties and powers of the trusteeship, and to effect returns and other benefits for the beneficiaries of the trust).

77. *See, e.g.*, CONAGLEN, *supra* note 5, at 108–09, 113–25 (asserting that a fiduciary can breach her duty of loyalty without acting immorally); John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 934–35 (2005) (arguing that conflicts of interest are not "inevitably harmful").

78. *See, e.g.*, Langbein, *supra* note 77, at 938 (noting that categorically prohibiting conflicts of interest may be appropriate when abuses are difficult to detect).

79. *See* CONAGLEN, *supra* note 5, at 120 (asserting that the no-profit rule is a "prophylactic" rule that reflects courts' recognition "that when a fiduciary has made an unauthorized profit out of his fiduciary position there will *commonly* or *ordinarily* be a conflict between duty and interest");

traditional no-conflict and no-profit rules as a pragmatic response to the epistemic challenge of discerning whether conflicted transactions actually respect the principal's choices and promote the beneficiary's best interest.

B. The Rise of Modern Fiduciary Law

The classical liberal theory of fiduciary law can be traced back to the English Chancery Court's seminal 1726 decision, *Keech v. Sandford*.[80] At issue in the case was a lease to Rumford Market, which had been devised to a trustee to hold in trust for an infant.[81] When the lease was set to expire, the trustee allegedly sought to renew the lease on the infant's behalf.[82] The lessor refused to renew the lease, however, objecting that he would not be able to defend his interests in court against an infant lessee in the event of the lease's breach.[83] Finding the path to renewing the lease in the infant's favor blocked, the trustee opted to renew the lease on his own behalf.[84] This action had the effect of disrupting the infant beneficiary's 'customary, non-legal, but none the less firm entitlement [under the principle of 'tenant's right'] to roll over finite leases and thus maintain possession over long stretches of time across

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R.P. MEAGHER ET AL. EQUITY: DOCTRINES AND REMEDIES 186 (5th ed. 2015) (discussing the availability of the remedies of rescission and disgorgement to victims of the breach of fiduciary duties); LEONARD I. ROTMAN, FIDUCIARY LAW 279 (2005) (emphasizing the necessity of obtaining the principal's express and informed consent before a fiduciary may enter into a self- or other-interested transaction); *cf.* Langbein, *supra* note 77, at 964–65 ("An agent who wants to proceed with a conflicted transaction need only persuade the principal to authorize it (which, of course, the principal will resist, unless he or she determines the transaction to be in his or her best interest).").

80. (1726) 25 Eng. Rep. 223; *see also* Cooter & Freedman, *supra* note 4, at 1045 n.1 (characterizing *Keech* as fiduciary law's 'seminal case"). Although this Article does not afford the space for an in-depth look at the history of the fiduciary concept, it bears noting that the republican conception of fiduciary loyalty predates the classical liberty theory. *See, e.g.*, 1 CICERO, *supra* note 16, at 85 (noting that one of Plato's rules for those in charge of public affairs was to "keep the good of the people so clearly in view that regardless of their own interests they will make their every action conform to that"). Indeed, the introduction of formal fiduciary obligations in Roman law arguably enshrined Cicero's republican conception of the fiduciary relationship—albeit long after the demise of the Roman Republic. *See* R. D. MELVILLE, A MANUAL OF THE PRINCIPLES OF ROMAN LAW RELATING TO PERSONS, PROPERTY, AND OBLIGATIONS 187–208 (3d. ed. 1921) (discussing the legal obligations of guardians under Roman law); David Johnston, *Trusts and Trust-like Devices in Roman Law*, *in* ITINERA FIDUCIAE: TRUST AND TRUEHAND IN HISTORICAL PERSPECTIVE 45, 51 (Richard Helmholz & Reinhard Zimmermann eds. 1998) (discussing the Roman law of *fideicommissium*). *But see* ALAN WATSON, THE SPIRIT OF ROMAN LAW 98, 117, 158 (1995) (arguing that Roman law was pragmatic, unsystematic, and untethered from philosophy); Michele Graziadei, *Virtue and Utility: Fiduciary Law in Civil and Common Law Jurisdictions*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 6, at 287, 288 (arguing that Roman fiduciary law reflected an "economy of honor").

81. *Keech*, 25 Eng. Rep. at 223.

82. *Id.*

83. *Id.*; *see also* Joshua Getzler, *Rumford Market and the Genesis of Fiduciary Obligations*, *in* MAPPING THE LAW, *supra* note 33, at 577, 581 (explaining why various causes of action could not be levied against an infant lessee).

84. *Keech*, 25 Eng. Rep. at 223.

lives and generations.'[85] By renewing the lease in his own name and thereby breaking the inter-generational chain of possession, the trustee frustrated the very purpose of this trust.

Responding to these concerns, Chancellor King ordered the trustee to hold all profits from the lease in a constructive trust for the infant.[86] The Chancellor acknowledged the extraordinary nature of his determination that 'the trustee is the only person of all mankind who might not have the lease.'[87] Nonetheless, he stressed that 'if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to *cestui que* use.'[88] A general prohibition against conflicted transactions was necessary, in other words, to guard against the likelihood that trustees would abuse their positions of trust and confidence for their own gain at the beneficiaries' expense.[89]

Despite its antiquated facts and terse reasoning, *Keech* continues to be cited widely for the proposition that the fiduciary duty of loyalty operates as a prophylaxis against harmful opportunism.[90] Consistent with Chancellor King's reasoning, conventional wisdom holds that the no-conflict and no-profit rules are deliberately over-inclusive measures that deter fiduciaries from engaging in opportunism.[91] By prohibiting all self-interested transactions and profit taking without a beneficiary's informed consent—regardless of a fiduciary's intent and irrespective of whether the beneficiary has suffered actual harm—fiduciary law eliminates a fiduciary's incentives to abuse her position for her own gain.[92] The no-conflict and no-profit rules

85. Getzler, *supra* note 83, at 582.

86. *Keech*, 25 Eng. Rep. at 223–24.

87. *Id.* at 223.

88. *Id.*

89. Pleadings in the case suggest that the trustee may have bribed the lessor to deny renewal to the infant beneficiary in favor of the trustee. Joshua Getzler, *'As If.' Accountability and Counterfactual Trust*, 91 B.U. L. REV. 973, 984 (2011).

90. *See, e.g.*, CONAGLEN, *supra* note 5, at 121–22 (stating that, after *Keech*, the no-conflict rule "developed into a clear principle of fiduciary doctrine"); ROTMAN, *supra* note 79, at 61–62; Getzler, *supra* note 83, at 586 (describing *Keech* as "the *fons et origo*" of the doctrine prohibiting fiduciary profit taking).

91. *See, e.g.*, R.P. MEAGHER ET AL., EQUITY: DOCTRINES AND REMEDIES 111 (1st ed. 1975) (asserting that *Keech* frames the duty of loyalty as a prophylactic rule that "imposes a duty to avoid a situation of possible conflict between interest and duty"); T.G. Youdan, *The Fiduciary Principle: The Applicability of Proprietary Remedies*, *in* EQUITY, FIDUCIARIES AND TRUSTS 93, 105 (T.G. Youdan ed., 1989) (arguing that the "twin policies of prophylaxis and of surmounting the evidence problem may justify the finding of personal liability in a fiduciary where his gain is not shown to correspond to any loss to the principal" (footnote omitted)).

92. *See In re* Primedia Inc. Derivative Litig., 910 A.2d 248, 262 (Del. Ch. 2006) ("[T]he duty of loyalty 'does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for purposes of removing all temptation, extinguishes all possibility of profit flowing from the breach

also prevent a fiduciary from exploiting the fact that she 'controls all evidence of the relationship and can easily conceal wrongdoing from the vulnerable party or the court.'[93] Thus, *Keech* 'has been received as embodying a policy of prophylaxis, or preventative sanction through profit stripping that takes away all incentive for a fiduciary to consider how he might gain from his position.'[94]

Nearly two centuries after *Keech*, this theory of fiduciary law received perhaps its most iconic expression in *Bray v. Ford*,[95] an 1896 case from the English House of Lords.[96] The defendant in the case was the Vice-Chancellor of Yorkshire College who was found to have violated his fiduciary duty by simultaneously receiving payment for services rendered as the College's solicitor.[97] In his opinion, Lord Herschell affirmed the 'inflexible rule' that a fiduciary may not 'put himself in a position where his interest and duty conflict.'[98] Turning to the basis for this rule, Lord Herschell doubled down on Chancellor King's theory of the no-conflict and no-profit rules as a prophylaxis against harmful opportunism:

> It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing.[99]

The idea that the duty of loyalty operates as a prophylaxis against harmful opportunism also informed the early development of American fiduciary law. In *Davoue v. Fanning*, 'the foundational American case recognizing and enforcing the then-recently-settled English [no-profit] rule,'[100] Chancellor Kent explained the rule as follows:

> The *cestuy que trust* is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself.

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of confidence imposed by the fiduciary relation.' (quoting Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939))).

93. Getzler, *supra* note 83, at 586.

94. *Id.*

95. Bray v. Ford [1896] AC 44 (HL) 51 (Lord Herschell) (appeal taken from AC) (Eng.).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 51–52.

100. Langbein, *supra* note 77, at 944.

> There may be fraud, and the party [may] not [be] able to prove it. It is to guard against this uncertainty and *hazard* of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestuy que trust* to come, at his own option, and without showing actual injury This is a remedy which goes deep, and touches the very root of the evil.[101]

In sum, these three cases—*Keech*, *Bray*, and *Davoue*—demonstrate that courts in the United Kingdom and the United States have defended the no-conflict and no-profit rules from the very beginning as measures for prophylactically protecting beneficiaries from harm. Courts recognized that fiduciary power posed a serious risk of opportunism because many conflicted transactions would, in fact, undercut beneficiaries' interests, but that it would often be difficult, if not impossible, for a court to discern after the fact whether this was so in any particular case. Consistent with classical liberalism, therefore, courts sought to explain and justify the no-conflict and no-profit rules based primarily on concerns for safeguarding beneficiaries from harmful interference.

C. Classical Liberalism in Contemporary Fiduciary Theory

Legal scholars today continue to develop theories of fiduciary law that reflect the normative commitments of classical liberalism. Some scholars argue that fiduciary duties are designed to promote fidelity to a principal's choices.[102] Others emphasize how fiduciary duties prevent harm to beneficiaries' material interests.[103] What unites these two camps is the shared assumption that the purpose of fiduciary law is to safeguard freedom from interference.

Consider first the idea that fiduciary law promotes fidelity to a principal's choices. This vision of fiduciary law has been elaborated most extensively in Matthew Conaglen's monograph with the suggestive title *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties*.[104] Conaglen argues that fiduciary duties are 'a subsidiary and prophylactic form of protection for non-fiduciary duties'—principally, those that arise via contract.[105] In Conaglen's view, the duty of loyalty's

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101. Davoue v. Fanning, 2 Johns. Ch. 252, 261 (N.Y. Ch. 1816).

102. *See, e.g.*, CONAGLEN, *supra* note 5, at 202 (asserting that the proscriptive nature of fiduciary duties indicates that they are concerned principally with "removing temptations, such as inconsistent interests or duties, which have a tendency to sway the fiduciary away from proper performance of non-fiduciary duties").

103. *See* Cooter & Freedman, *supra* note 4, at 1047 (suggesting that fiduciary law serves to protect principals against "two distinct forms of wrongdoing: first, the fiduciary may misappropriate the principal's asset or some of its value (an act of malfeasance); and second, the fiduciary may neglect the asset's management (an act of nonfeasance)").

104. *See generally* CONAGLEN, *supra* note 5.

105. *Id.* at 4.

proscriptive no-conflict and no-profit rules do not codify the requirements of morality; fiduciaries may profit from unauthorized conflicted transactions in a variety of contexts, he argues, without acting immorally.[106] Nonetheless, these rules are necessary as a practical matter, he argues, to prophylactically eliminate temptations that might compromise a fiduciary's faithful performance of her assigned tasks.[107]

A second line of scholarship, which has been particularly influential in the United States, seeks to explain and justify the fiduciary duty of loyalty based on economic theory. Scholars of law and economics argue that the fiduciary duty of loyalty protects beneficiaries from a classic 'agency problem' the risk that a fiduciary will harm their interests by misappropriating their assets or profit-making opportunities to their detriment.[108] Early economic theories of fiduciary law claimed that courts used fiduciary duties as gap fillers for incomplete contracts to compensate for parties' inability to design contracts that completely specify their respective obligations.[109] Over time, scholars have refined this contractarian account by characterizing fiduciary duties as 'off-the-rack' or 'standard form' contractual default rules that protect unsophisticated parties, enhance the efficiency of contract negotiation, and lower beneficiaries' bonding and monitoring costs.[110] Fiduciary duties are good candidates to serve as default rules, these scholars contend, because they are the kind of legal obligations

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106. *See id.* at 106–41 (asserting that "a breach of fiduciary duty may be committed without the fiduciary necessarily acting immorally").

107. *See id.* at 39–40, 61–62 (using the no-conflict and no-profit principles to advance the argument "that fiduciary doctrine is prophylactic *in its very nature*, as it is designed to neutralise influences likely to sway the fiduciary"); Smith, *supra* note 5, at 224 ("The rationale for [fiduciary duties] is to prevent fiduciaries from breaching their mandates.").

108. *See, e.g.*, Cooter & Freedman, *supra* note 4, at 1047 (applying "the principal-agent model to the fiduciary relationship' and noting that "misappropriation is governed by the duty of loyalty"); Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 6, at 197, 198–99, 201 (discussing how the "benefits [of a fiduciary] come at the cost of being made vulnerable to abuse" and analyzing how the duty of loyalty lessens that risk).

109. *See, e.g.*, Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992) (suggesting that the courts impose fiduciary duties when "it is a reasonable inference that had the parties in advance negotiated expressly over the issue they would have agreed that the agent owed the principal the high duty [of loyalty]"); Easterbrook & Fischel, *supra* note 7, at 426 (suggesting "that the duty of loyalty is a response to the impossibility of writing contracts completely specifying the parties' obligations"); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 25 (1991) (arguing that "fiduciary duties should properly be seen as a method of gap-filling in incomplete contracts").

110. *See* Butler & Ribstein, *supra* note 26, at 11 (regarding fiduciary duties as consistent with "an appropriate implied standard form provision that anticipates what the parties would have drafted if they had focused on the situation"); Easterbrook & Fischel, *supra* note 7, at 426–27 (arguing that fiduciary duties lower transaction, monitoring, and specification costs); Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 387 (2007) (describing corporate law as "a convenient set of off-the-rack rules that help solve problems").

that a sophisticated party would demand whenever they repose special trust and confidence in another.[111] By making fiduciary duties default rules, fiduciary law also minimizes information costs to third parties, such as creditors, who transact with a fiduciary.[112]

Scholars who apply economic theory to fiduciary law tend to agree with Conaglen that the no-conflict and no-profit rules are over inclusive, because they deter fiduciaries from pursing some self-interested transactions that would actually promote their beneficiaries' best interests.[113] Nonetheless, they argue that the 'prophylactic' character of these rules is a necessary response to the significant information asymmetries between fiduciaries, beneficiaries, and the judiciary.[114] Thus, in contrast to Conaglen, who focuses on respecting a principal's choices, scholars of law and economics emphasize the duty of loyalty's deterrent and protective function in preventing fiduciaries from harming beneficiaries' material interests.

Despite their different points of departure, these two accounts of fiduciary law both approach the duty of loyalty from a classical liberal perspective. Both assume that fiduciary duties are concerned exclusively with safeguarding parties' freedom from interference. Both characterize the no-conflict and no-profit rules as 'over inclusive' because the rules may deter fiduciaries from pursuing some desirable transactions.[115] Accordingly, both endorse Lord Herschell's suggestion that the no-conflict and no-profit

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111. *See* Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 YALE L.J. 277, 280–81 (1998) (classifying standard fiduciary rules as "default mechanism[s]" and arguing that "fashioning a [fiduciary] rule that replicates (at least functionally) the allocation that the parties themselves would have bargained for ex ante should be an important goal of the courts").

112. *See* John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1678 (1989) (arguing that "standardization of contract terms through the use of mandatory legal rules reduces information costs for investors"); Sitkoff, *supra* note 108, at 205 (concluding that fiduciary obligations "minimize third-party information costs").

113. *See, e.g.*, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 543 (2d ed. rev. 1993) ("The principal object of the [no-profit] rule is preventative "); Langbein, *supra* note 77, at 932–33 (arguing that the no-conflict rule results in overdeterrence); Sitkoff, *supra* note 109, at 201 ("[T]he functional core of fiduciary obligations is *deterrence*.").

114. *See, e.g.*, Cooter & Freedman, *supra* note 4, at 1048 ("Because a fiduciary's misappropriation is profitable and difficult to prove, it is appropriate for fiduciary law to infer disloyalty from its appearance."); Talley, *supra* note 111, at 282 (arguing that fiduciary law's prophylactic rules are justifiable on the basis that "an optimal legal rule in a private-information environment may consciously permit some inefficiencies in order to obviate even greater efficiency losses"); Youdan, *supra* note 91, at 105 (arguing that the "twin policies of prophylaxis and of surmounting the evidence problem may justify the finding of personal liability in a fiduciary where his gain is not shown to correspond to any loss to the principal" (footnote omitted)).

115. *See* Talley, *supra* note 111, at 282 (noting that "the optimal legal rule will tend to be over-inclusive"); *cf.* CONAGLEN, *supra* note 5, at 68 (discussing how fiduciary duties can "capture situations in which no true wrong has been committed").

rules 'might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing.'[116] At the end of the day, however, both accounts accept that the traditional duty of loyalty is necessary as a prophylactic measure to minimize the serious risks of harm that arise within fiduciary relationships.[117]

D. Challenges to the Classical Liberal Theory

Despite classical liberalism's many virtues as an interpretive theory of fiduciary law, it is not a natural fit with traditional fiduciary rules and remedies. Some key features of fiduciary relationships run at cross-purposes with the ideal of freedom as noninterference, including the discretionary authority that fiduciaries often exercise over their principals' interests. There are also good reasons to question whether the inflexible no-conflict and no-profit rules offer an optimal strategy for combatting harmful opportunism. Moreover, the traditional fiduciary remedies of constructive trust and disgorgement do not track the optimal deterrence conception of fiduciary loyalty. For these and other reasons, it is unlikely that classical liberalism can offer a complete justification for the traditional duty of loyalty with its associated remedies.

Under classical liberalism, any form of interference in matters of personal choice constitutes a threat to freedom.[118] Yet fiduciary law entrusts many fiduciaries—including guardians and investment managers—with broad discretionary powers to make decisions for and on behalf of their principals.[119] These fiduciaries are not charged solely with carrying their principals' choices into execution; instead, they make choices *for* their principals and beneficiaries.[120] Indeed, it is no great exaggeration to say that a fiduciary's intercession in her principal's domain of personal choice is the entire *raison d'être* for these categories of fiduciary relationships. Fiduciary decision making might be less problematic from a classical liberal perspective when it occurs with a principal's informed consent. Some fiduciary relationships, however, are established by legislation, judicial decree, or unilateral undertaking, rather than through the parties' voluntary

116. Bray v. Ford [1896] AC 44 (HL) 51 (Lord Herschell) (appeal taken from AC) (Eng.).

117. *See* CONAGLEN, *supra* note 5, at 70–71 (asserting that the purpose of fiduciary doctrine is to "provide prophylactic protection" to minimize harm); Sitkoff, *supra* note 22, at 1049 (declaring that "the law requires the fiduciary to be other-regarding" and elaborating that "[w]hat is meant by other-regarding is defined by default fiduciary duties of loyalty").

118. *See supra* subpart II(A).

119. *See, e.g.*, FRANKEL, *supra* note 1, at 42–53 (examining traditional examples of fiduciary relationships and the responsibilities and discretion in each).

120. *Id.*

choice.[121] These relationships sidestep a principal's decision making by placing her interests under another's power without her consent. They also impose legal duties that constrain the fiduciary's choices.[122] The best argument for these choice-constraining features of fiduciary law, from the perspective of classical liberalism, may be that they are default rules that correspond to the hypothetical bargain that a reasonable fiduciary would make with her principal. As this Article explains in Part III, however, the triggering conditions and terms of this 'hypothetical bargain' are best understood as reflecting republican concerns about fiduciaries' capacity for arbitrary interference, rather than the classical liberal ideal of freedom from interference.

Just as classical liberalism struggles to explain fiduciary authority and fiduciary duties, there are good reasons to reject the classical liberal thesis that optimal deterrence can fully explain or justify the duty of loyalty with its associated remedies. Economic theory suggests that successful deterrence depends upon the expected sanction equaling or exceeding the expected gain from a fiduciary's indiscretions.[123] However, the expected value of unauthorized conflicted transactions will always exceed the expected value of disgorged assets. The reasons for this are obvious. Some beneficiaries will never become aware that their fiduciary has engaged in self-dealing. Others will lack a sufficient stake in the matter to justify incurring litigation costs, or they will decline to pursue judicial relief for idiosyncratic personal reasons. As long as the probability of effective judicial enforcement is less than 100%, the traditional fiduciary remedies of rescission, constructive trust, and disgorgement will fail systematically to deter harmful opportunism *ex ante*.[124] Thus, if the no-profit rule were designed as a deterrence mechanism, we would expect it to be backed by harsher penalties than rescission, constructive trust, and disgorgement.

More troubling still, it is unclear as a purely empirical matter whether the no-conflict and no-profit rules actually promote beneficiaries' material interests. Some legal scholars have speculated that these rules are more likely to harm beneficiaries' interests overall by deterring loyal fiduciaries from

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121. *See* Walter G. Hart, *The Development of the Rule in* Keech v. Sandford, 21 L.Q. REV. 258, 258 (1905) (observing that "a vendor of land is [deemed by law] to be a constructive trustee for the purchaser" between contract formation and conveyance); Miller, *supra* note 2, at 982 n.37 (citing as examples the relationships between parents and children and between a trustee and beneficiary of a declaratory trust).

122. *See* FRANKEL, *supra* note 1, at 101–77 (examining the duties of fiduciaries, including the duties of care and loyalty).

123. *See* A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89, 91 (1984) ("An individual will engage in [an] activity if his private gain exceeds the expected sanction.").

124. *See* Lionel Smith, *Deterrence, Prophylaxis and Punishment in Fiduciary Obligations*, 7 J. EQUITY 87, 91 (2013).

concluding profit-enhancing (or loss-minimizing) transactions.[125] Although the no-conflict and no-profit rules may prevent some self-dealing, critics have argued that it 'also reduces—and in all likelihood to a greater extent—the number of instances in which fiduciaries who are inclined to act loyally can act on their inclinations.'[126] Extending this argument, it is possible that the no-conflict and no-profit rules might also frustrate the 'due performance of non-fiduciary duties' in some settings by deterring fiduciaries from pursuing transactions that would best satisfy their principals' instructions.

John Langbein has pursued this critique of the no-conflict and no-profit rules with particular vigor.[127] Langbein characterizes the no-conflict rule as '*Bleak House* law, born of the [English Chancery Court's] despair' over its inability to distinguish faithful trust administration from fraud.[128]

> Today, by contrast, in the wake of fusion and the reform of civil procedure, courts dealing with equity cases command effective fact-finding procedures.[129]
>
> Accordingly, much of the concern voiced by [Chancellor Kent and others]—that without the [no-conflict] rule the beneficiary would be 'not able to prove' trustee misbehavior—is archaic.[130]

In Langbein's view, therefore, the duty of loyalty's 'prophylactic' rules are no longer necessary to protect beneficiaries from fiduciary opportunism and may actually harm beneficiaries' interests by taking desirable conflicted transactions off the table.

One final critique of the classical liberal theory of fiduciary law merits brief consideration. As other scholars have noted, there is a fundamental conceptual mismatch between classical liberalism's conception of the no-profit rule as a prophylactic deterrent measure and the paradigmatic remedies for unauthorized profits: constructive trust and disgorgement.[131]

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125. *See, e.g.*, Langbein, *supra* note 77, at 988 (arguing that the present formulation of fiduciary loyalty forsakes the underlying purpose of the duty by ignoring that conflicted transactions sometimes advance a beneficiary's best interest).

126. Smith, *supra* note 5, at 126 n.15. Melanie Leslie argues that this concern is vastly overstated because fiduciaries would decline to pursue conflicted transactions only in the exceedingly rare cases where the costs of obtaining beneficiaries' informed consent would outweigh the expected gains. *See* Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541, 550 (2005).

127. *See* Langbein, *supra* note 77, at 951–52 (arguing that the rules result in "overdeterrence"—'[b]y penalizing trustees in cases in which the interest of the trust beneficiary was unharmed or advanced, the rule deters future trustees from similar, beneficiary-regarding conduct").

128. *Id.* at 947.

129. *Id.*

130. *Id.*

131. *See, e.g.*, Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another*, 130 L.Q. REV. 608, 625–31 (2014) (explaining that viewing the no-profit rule as prophylactic is incompatible with the theories behind constructive trusts and disgorgement).

Traditionally speaking, courts have conceptualized disgorgement as a restitutionary remedy rather than a punitive remedy.[132] The purpose of disgorgement is simply to effectuate the return of assets that have been wrongfully withheld.[133] Constructive trust likewise applies when a party has been 'unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant or in violation of the claimant's rights.'[134] Under the classical liberal theory, however, it is unclear why profits generated by conflicted transactions or misappropriated business opportunities would belong, strictly speaking, to beneficiaries rather than to the public fisc. That a beneficiary may suffer harm from the opportunism that generates fiduciary profits is self-evident. Yet compensatory damages, punitive damages, and criminal sanctions would seem to be the appropriate remedies to make a beneficiary whole and deter future indiscretions—not constructive trust and disgorgement.[135] Taking classical liberalism seriously would therefore require an extreme makeover of fiduciary duties and remedies.

E. Classical Liberalism's Challenge to Fiduciary Law

These lessons have not been lost on legal scholars, legislators, and judges in the United States. As the mismatch between classical liberalism's normative commitments and fiduciary law's rules and remedies has become increasingly apparent, some legal scholars, judges, and legislators have taken steps to reshape American fiduciary law in the image of classical liberalism. Over the past several decades, classical liberal thinking has profoundly shaped the fiduciary law of business organizations, as state legislatures and courts have dismantled key features of the duty of loyalty. For example, under the latest formulation of the Delaware Supreme Court's 'entire fairness' test, corporate directors may authorize self-dealing transactions without obtaining informed consent from either the disinterested directors or the corporation's shareholders, as long as they can convince courts after the fact that the transactions were substantially fair.[136] Moreover, when a court

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132. *See, e.g.*, SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989) (explaining that disgorgement "may not be used punitively").

133. *See id.* ("[D]isgorgement primarily serves to prevent unjust enrichment.").

134. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55(1) (AM. LAW INST. 2011).

135. *See, e.g.*, Bardis v. Oates, 14 Cal. Rptr. 3d 89, 100–08 (Cal. Ct. App. 2004) (awarding compensatory and punitive damages, recognizing the availability of disgorgement, and noting the availability of substantial criminal penalties for breach of fiduciary duty). Conaglen has argued that disgorgement can be rehabilitated as a fiduciary remedy if it is conceptualized as a purely prophylactic measure. *See* CONAGLEN, *supra* note 5, at 76. As Lionel Smith has explained, however, Conaglen's theory still raises the over-inclusivity and under-inclusivity concerns associated with deterrence accounts. *See* Smith, *supra* note 124, at 93, 95.

136. DEL. CODE ANN. tit. 8, § 144(a)(3) (2017); *see also* Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993) (defining the aspects of the entire fairness test as applied to breaches of fiduciary

in Delaware determines that a conflicted transaction violates the entire fairness test, 'the remedy is the difference between the fair value determined by the court and the value actually conveyed' (consistent with classical liberalism), rather than full disgorgement of all profits (as required under the traditional no-profit rule).[137] These departures from the traditional duty of loyalty resonate with the classical liberal view that state intervention in the private sphere is warranted only to the extent that it is absolutely necessary to prevent officers and directors from harming a corporation's material interests.

Drawing inspiration from Delaware corporate law, Langbein has argued that trust law's no-conflict and no-profit rules should also be reframed as a rebuttable presumption.[138] Under Langbein's proposed approach, unauthorized conflicted transactions would not be subject to rescission, constructive trust, or disgorgement if a trustee can establish that the transactions promoted her beneficiaries' best interests relative to other available opportunities.[139] Implicit in this proposal is a simple premise: there is nothing inherently immoral about a fiduciary profiting from a conflicted transaction, provided that the transaction also increases the beneficiaries' profits (or minimizes losses) relative to other opportunities. After all, why should courts demand that fiduciaries act in the *sole* interest of their beneficiaries if a conflicted transaction would inarguably promote the beneficiaries' *best* interests? Taking the normative commitments of classical liberalism at face value, it is hard to see why courts must apply the no-conflict and no-profit rules with '[u]ncompromising rigidity.'[140]

Recent developments suggest that Langbein's critique of the no-conflict and no-profit rules is gaining traction at the state level. For example, the Model Business Corporation Act and the Uniform Business Organizations Code have been revised in recent years to allow fiduciaries to conclude conflicted transactions without their beneficiaries' approval if they can

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duty); Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (explaining the entire fairness test as an overall look at whether the transaction met the aspects of fair dealing and fair price, and which factors play into that determination).

137. D. Gordon Smith, Fiduciary Law and Entrepreneurial Action 3 (unpublished manuscript) (on file with author); *see also* Int'l Telecharge, Inc. v. Bomarko, Inc., 766 A.2d 437, 440–42 (Del. 2000) (explaining that in a merger action, the court must appraise the actual value of the shares in determining damages); *In re* Dole Food Co. Stockholder Litig., 2015 WL 5052214, at *44–46 (Del. Ch. Aug. 27, 2015) (explaining that the damages awarded in a breach of fiduciary duty case can be determined by the difference between the fair value of the shares as determined by the court and the value actually conveyed for said shares).

138. Langbein, *supra* note 77, at 931–33.

139. *Id.*

140. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). *But see* Leslie, *supra* note 7, at 72 (arguing that Langbein's approach "would strike a fatal blow to the duty of loyalty as a moral norm, and would thus increase instances of trustee opportunism, at least at the margins").

convince courts that the conflicted transactions were objectively 'fair.'[141] The Uniform Trust Code likewise no longer presumes that a trustee who purchases investments from related entities has violated her duty of loyalty.[142] Although transactions between a trustee and her relatives, agents, and other close associates are 'presumed to be affected by a conflict between personal and fiduciary interests,'[143] this presumption can be rebutted 'if the trustee establishes that the transaction was not affected by a conflict between personal and fiduciary interests.'[144] Similarly, the Uniform Power of Attorney Act and the Uniform Probate Code no longer apply the no-conflict rule to principal–agent relationships.[145] Dozens of states and the District of Columbia have embraced these changes, implicitly endorsing the classical liberal idea that if beneficiaries have suffered 'no harm' there is 'no foul' requiring judicial relief.[146] As long as a fiduciary has acted 'with care, competence, and diligence for the best interest of the [beneficiary], the thinking goes that the beneficiary has no cause to complain.[147]

The classical liberal theory of fiduciary loyalty is also beginning to shape federal law. Over the past year, the fiduciary status of investment advisers has become a topic of heated political debate following the Department of Labor's (DOL) promulgation of a final rule designating certain retirement investment advisers as fiduciaries (the 'Fiduciary Rule").[148] Under intense lobbying from the financial services community, majorities of both houses of Congress voted to revoke the Fiduciary Rule in 2016, only to see the measure vetoed by President Barack Obama.[149] Several

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141. *See* MODEL BUS. CORP. ACT § 8.61(b)(3) (AM. BAR ASS'N 2005) (providing that conflicted transactions need "to have been fair to the corporation"); UNIF. BUS. ORG. CODE § 8-507 (UNIF. LAW COMM'N 2011) (providing that a conflicted transaction is not voidable if "the covered party shows that the transaction is fair to the trust").

142. UNIF. TRUST CODE § 802(f) (UNIF. LAW COMM'N 2010). Commentary accompanying this provision states that it "creates an exception to the [no-conflict and no-profit rules] for trustee investment in mutual funds. *Id.* § 802 cmt.

143. *Id.* § 802(c).

144. *Id.* § 802 cmt.

145. UNIF. PROB. CODE § 5B-114(d) (UNIF. LAW COMM'N 2010); UNIF. POWER OF ATT'Y ACT § 144(d) (UNIF. LAW COMM'N 2006). *But see* RESTATEMENT (THIRD) OF AGENCY §§ 8.01–.06 (AM. LAW INST. 2006) (retaining the traditional no-conflict rule).

146. On business organizations, see, for example, 7 COLO. REV. STAT. § 7-108-501(2)(c) (2016); 29 D.C. CODE § 29-1205.07 (2016); ME. REV. STAT. ANN. tit. 13–C § 872(2)(C) (2016); 47 S.D. CODIFIED LAWS § 47-1A-861.1(3) (2007). On principal–agent relationships, see, for example, ARK. CODE ANN. 28-68-114(d) (West 2017); DEL. CODE ANN. tit. 12 § 49A-114(d) (West 2014); 13 OHIO REV. CODE ANN. § 1337.34(D) (West 2016); VA. CODE ANN. § 64.2-1612(D) (2012).

147. UNIF. POWER OF ATT'Y ACT § 114(d).

148. Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,997 (Apr. 8, 2016) (codified at 29 C.F.R. § 2510.3–21 (2016)) [hereinafter Fiduciary Rule].

149. *See* Tammy Duckworth, Opinion, *Isn't Honesty the Best Policy?*, N.Y. TIMES (June 10, 2016), https://www.nytimes.com/2016/06/11/opinion/isnt-honesty-the-best-policy.html?_r=0

lawsuits were later filed against DOL,[150] including one in which the U.S. Chamber of Commerce and other industry groups sought to prevent the Fiduciary Rule's enforcement on the grounds that the rule creates 'unwarranted burdens and liabilities' for financial advisers.[151] To date, none of these legal challenges to the Fiduciary Rule have been successful.[152] In the meantime, however, congressional Republicans introduced a bill to delay the Fiduciary Rule's effective date for two years.[153] Incoming President Donald Trump also issued a memorandum, instructing DOL to review the Fiduciary Rule for possible revision or rescission.[154] White House representatives and some congressional leaders defended the President's move, arguing that reconsideration was justified because in their view the Fiduciary Rule threatened to limit the investment choices available to retirement investors and increase management costs.[155] Although this

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[https://perma.cc/68DM-TKGF] (stating "Republican majorities in the House and Senate pushed through a bill to block the Department of Labor's rule. On Wednesday [June 8th, 2016], President Obama rightly vetoed it.").

150. *See* Jacklyn Wille, *Labor Department Faces Five Lawsuits Over Fiduciary Rule*, BLOOMBERG BNA (June 9, 2016), https://www.bna.com/labor-department-faces-n57982073912/ [https://perma.cc/K5YT-FGED] (describing lawsuits).

151. Complaint at 2, Chamber of Commerce v. Perez, No. 16-cv-1476 (N.D. Tex. June 1, 2016), http://www.financialservices.org/uploadedFiles/FSI_Content/Advocacy_Action_Center/DOL/DOL-Fiduciary-Rule-Complaint.pdf [https://perma.cc/4K2T-4N92].

152. Chamber of Commerce v. Hugler, No. 16-cv-1476, 2017 WL 514424, at *1 (N.D. Tex. Feb. 8, 2017).

153. *See* David Trainer, *The Truth Behind the Push To Delay Fiduciary Rule*, FORBES (Jan. 17, 2017), http://www.forbes.com/sites/greatspeculations/2017/01/17/the-truth-behind-push-to-delay-fiduciary-rule/#c9cc79d4b100 [https://perma.cc/6LVH-E98L] (discussing the bill introduced by Representative Joe Wilson and providing a link to it).

154. Presidential Memorandum on Fiduciary Duty Rule, Memorandum for the Secretary of Labor § 1(b) (Feb. 3, 2017), https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule [https://perma.cc/MQ8U-X3GY] [hereinafter TRUMP MEMORANDUM]. At the time of this writing, the press has reported that the President intends to take action to delay implementation of the Fiduciary Rule to facilitate this review. *See The Trump Administration Reportedly Plans To Delay the 'Fiduciary' Rule for 180 Days*, FORTUNE (Feb. 10, 2017), http://fortune.com/2017/02/10/trump-administration-labor-department-fiduciary-rule-delay/ [https://perma.cc/3PH5-8BNS] (discussing these developments).

155. *See* Press Release, House Fin. Servs. Comm., Statement from Hensarling and Wagner on President Trump's Action to Delay Harmful Fiduciary Rule (Feb. 3, 2017), http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=401458 [https://perma.cc/LG8C-NWPB] (quoting Financial Services Committee Chairman Jeb Hensarling as claiming that eliminating the Fiduciary Rule would "empower Americans to make their own financial decisions" and lower management costs for retirement investors); Jonnelle Marte, *Trump Calls for Review of Long-Awaited Rule Meant To Protect Retirement Savers*, WASH. POST (Feb. 3, 2017), https://www.washingtonpost.com/news/get-there/wp/2017/02/03/trump-to-target-long-awaited-rule-meant-to-protect-retirement-savers/?tid=a_inl&utm_term=.6206b3a7ee55 [https://perma.cc/P7EC-2FX5] (citing comments of White House Press Secretary Sean Spicer that the rule would have limited the amount of financial services available to the public); Press Release, White House Office of the Press Sec'y, Remarks by President Trump at Signing of Executive Order on Fiduciary Rule (Feb. 3, 2017), https://www.whitehouse.gov/the-press-office/2017/02/03/remarks-president-trump-signing-executive-order-fiduciary-rule

characterization of the Fiduciary Rule's impact is controversial, to say the least,[156] the critical point for present purposes is what it reveals about the terms of contemporary debates over fiduciary loyalty. Without exception, critics of the Fiduciary Rule presume that classical liberal values—investor choice and private wealth maximization—are the only relevant normative considerations.

Some fiduciary law scholars in the United States have expressed consternation about the growing movement to rein in the fiduciary duty of loyalty.[157] By and large, however, they have defended fiduciary law's traditional rules and remedies without challenging the normative commitments of classical liberalism.[158] Consequently, debates over the wisdom of preserving and extending fiduciary law's no-conflict and no-profit rules have become mired in empirically contested claims about whether fiduciary duties and remedies optimally deter opportunism.[159] The republican tradition offers a more promising theoretical foundation for explaining, justifying, and defending fiduciary law's conventional rules and remedies. To build upon this foundation, however, courts and policy makers will have to set aside some cherished myths about the purpose and function of fiduciary duties, including Chancellor King's oft-repeated dictum that the duty of loyalty is an over-inclusive prophylactic rule. In the discussion that follows, this Article shows how the republican theory of fiduciary law furnishes an interpretively compelling alternative to classical liberalism. The republican theory supports the traditional features of fiduciary loyalty, including the proscriptive no-conflict and no-profit rules, and it justifies fiduciary law's distinctive remedies.

[https://perma.cc/QV2Y-ZX7K] (quoting Representative Ann Wagner's comment: "What we're doing is we are returning to the American people their control of their own retirement savings").

156. Contrary to the protestations of its critics, the Fiduciary Rule does not limit investor choice in any meaningful sense; it merely requires investment advisers to obtain investors' informed consent to particular conflicts of interest. *See generally* Fiduciary Rule, *supra* note 148. Supporters observe, moreover, that the Rule promotes investors' interests because "conflicted advice" from retirement-investment advisers "lowers investors' returns by as much as 1 percentage point a year—a loss of $17 billion annually for IRA investors alone." Eileen Ambrose, *New Rules to Improve Retirement Investing*, AARP BULL. May 2016, http://www.aarp.org/money/investing/info-2016/rules-protect-retirement-investments.html [https://perma.cc/S3LF-PS2T] (citing figures from the White House Council of Economic Advisers).

157. *See, e.g.*, Melanie B. Leslie, *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 CARDOZO L. REV. 2713, 2742–43 (2006) (arguing that modifying or eliminating fiduciary rules undermines beneficiaries' interests).

158. *See, e.g.*, Leslie, *supra* note 126, at 544 (challenging amendments to the Uniform Trust Code on the grounds that they would harm future beneficiaries rather than challenging classical liberalism itself).

159. *Compare* Langbein, *supra* note 77, at 940–41 (arguing that some traditional fiduciary rules and remedies were suboptimal in the context of trust law), *with* Leslie, *supra* note 7, at 70–71 (defending traditional fiduciary rules and remedies).

III. A Republican Theory of Fiduciary Law

Unlike classical liberalism, republicanism persuasively explains and justifies the traditional features of contemporary fiduciary law. As this Part will show, the juridical structure of American fiduciary law reflects republican principles, from the idea that 'breach of trust' constitutes a distinctive legal wrong[160] to courts' reliance on equitable remedies that are calibrated precisely to neutralize domination.[161] Although classical liberalism has chipped away at traditional fiduciary rules and remedies over the past several decades—particularly with respect to the fiduciary duties of business associations[162]—American fiduciary law as a whole continues to reflect republicanism's normative commitment to freedom from domination.

Republican themes also appear in contemporary fiduciary law scholarship. As fiduciary legal theory has matured in recent years, some theorists have pushed back against classical liberalism, arguing that fiduciary duties cannot be fully apprehended from the perspective of preventing harmful interference. Some have suggested that fiduciary duties and remedies reflect formal juridical features of fiduciary relationships.[163] Others have emphasized the need to protect vulnerable parties from subjection to fiduciaries' unilateral power.[164] Still others have emphasized the

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160. *See, e.g.*, CAL. PROB. CODE § 16440 (West 2005) (describing a trustee's violation of the duty of loyalty as a "breach of trust"); United States v. Carter, 217 U.S. 286, 306 (1910) (emphasizing that if a fiduciary "acquires any interest adverse to his principal without a full disclosure, it is" actionable as "a betrayal of his trust and a breach of confidence"); Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 813 F. Supp. 2d 489, 521–22 (S.D.N.Y. 2011) (emphasizing the betrayal of trust in fiduciary disloyalty).

161. *See, e.g.*, Lewis v. Pension Benefit Guarantee Corp., 2016 WL 3676099, at *6–7 (D.D.C. July 6, 2016) (affirming disgorgement as a remedy for breach of fiduciary duty); *In re* Opus East LLC, 528 B.R. 30, 106–07 (Bankr. D. Del. 2015) (emphasizing that constructive trust is an appropriate remedy for breach of fiduciary duty); Holliday v. Weaver, 2016 WL 3660261, at *2 (mem. op.) (Tex. App.—Dallas 2016, no pet.) ("Where there has been a clear and serious violation of a fiduciary duty, equity dictates not only that the fiduciary disgorge his fees, but also all benefit obtained from use of those fees.").

162. *See supra* notes 136–37, 141–47 and accompanying text.

163. *See, e.g.*, Paul B. Miller, *The Fiduciary Relationship*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 6, at 63, 67 (noting that "fiduciary duties *have* historically been 'necessarily referable to a relationship'"); Lionel D. Smith, *Can We Be Obliged to Be Selfless?*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 6, at 141, 141–42 (discussing the idea that the legal requirement of loyalty should not be called a duty).

164. *See, e.g.*, ROTMAN, *supra* note 79, at 84 (analyzing Frame v. Smith, [1987] 2 S.C.R. 99, 99 (Can.) (Wilson, J. dissenting)); Deborah A. DeMott, Essay, *Relationships of Trust and Confidence in the Workplace*, 100 CORNELL L. REV. 1255, 1259–60 (2015) (commenting that fiduciary relationships "require or engender trust by the beneficiary with a correlative potential for abuse by the fiduciary, often effected through deceptive or disingenuous means"); Smith, *supra* note 64, at 1483 (noting that "[t]he law provides protection against opportunistic behavior, and the strength of that protection varies inversely with the potential for self-help on the part of the vulnerable party"); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 4–5 (1975) ("The wide leeway afforded to the fiduciary to affect the legal position of the principal in effect puts

'entrustment' of other-regarding power as a defining feature of fiduciary relationships.[165] Each of these contributions gestures toward a republican theory in which fiduciary duties and remedies are calculated to safeguard parties' freedom from domination. Nonetheless, the fact that judges and private law scholars have not expressly connected fiduciary law to republicanism's distinctive conception of legal order has impeded previous efforts to develop a coherent interpretive theory of fiduciary law.

This Part shows how republicanism can explain fiduciary law's traditional duties and remedies while also supplying a robust normative justification for these features. The republican theory furnishes answers to some of the most important and controversial questions in fiduciary theory today, including: (A) the normative foundations of fiduciary law; (B) the distinguishing features of fiduciary relationships; (C) the requirements of fiduciary loyalty: (D) the theoretical basis for fiduciary law's traditional remedies; and (E) the theoretical basis for fiduciary law's divergent conduct and decision rules. Taking a step back, however, the republican theory's most important contribution may be to situate fiduciary law within a rich philosophical account of the relationship between public institutions, private relationships, and private law.[166] As this Part will show, private fiduciary theory has much to learn from public law theory. Whereas private law theory has underscored the interpersonal nature of fiduciary relationships and has provided the most granular analysis of the duty of loyalty's applications, public law theory offers the sharpest account of what it means to hold a fiduciary office properly, which is to say, subject to republican norms of nondomination.[167]

A. The Normative Foundations of Fiduciary Law

The republican theory posits that fiduciary law *empowers* principals, while also *emancipating* principals, beneficiaries, and fiduciaries alike from domination. Fiduciary law is concerned not merely with promoting the performance of non-fiduciary obligations or preventing material harm, as

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the latter at the mercy of the former, and necessitates the existence of a legal device which will induce the fiduciary to use his power beneficently.").

165. FRANKEL, *supra* note 1, at 4–6; *see also* J. C. SHEPHERD, THE LAW OF FIDUCIARIES 35 (1981) (describing as essential to a fiduciary relationship the acquisition and use of power by one person on the condition that it be used in the best interests of another); Matthew Harding, *Trust and Fiduciary Law*, 33 OXFORD J. LEGAL STUD. 81, 82–87 (2013) (arguing that "thick" trust, which is characterized by the entrustment of discretionary power, characterizes some types of fiduciary relationships).

166. Whether fiduciary duties can successfully eliminate domination in practice depends, of course, on whether they are implemented through legal and political institutions that are congenial to nondomination. This Article discusses some implications of this challenge in subpart III(E) below.

167. I am grateful to Evan Fox-Decent for suggesting this formulation.

some theorists have assumed. Rather, it secures freedom from domination by affirming that all people are *sui juris*—free and equal agents whose legal and practical interests are entitled to respect.

1. Empowerment.—Fiduciary law empowers principals in several different ways. First, it enables principals to extend their agency through fiduciaries who exercise legal powers and assert legal rights on their behalf.[168] A principal may decide to entrust a fiduciary with authority to conclude transactions on her behalf with third parties (agency);[169] manage and distribute her assets upon her death (testamentary trusts);[170] distribute her assets to unspecified third parties for charitable purposes (charitable trusts);[171] participate in a commercial enterprise (corporations);[172] or tend to the physical, emotional, educational, and religious upbringing of her children (guardianship).[173] In each of these settings, fiduciary law makes vicarious representation possible by empowering a principal to authorize another party to exercise legal rights and assume obligations on her behalf.

Fiduciary law also empowers principals in situations where they lack the legal or practical capacity to designate a fiduciary to act on their behalf. For example, children generally lack legal capacity to assert their own legal rights, and they are unable to designate an adult to exercise these rights on their behalf.[174] Fiduciary law addresses this dilemma by providing legal mechanisms whereby adults (e.g. guardians) are assigned to serve as fiduciaries until children reach adulthood.[175] Consider also how fiduciary

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168. *Cf.* Robin Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759, 761 (2016) (arguing that contract law "aims to empower people to use promises as tools to influence one another's actions and thereby to meet a broad range of human needs and interests").

169. RESTATEMENT (THIRD) OF AGENCY § 1.01, §§ 2.01–2.02 (AM. LAW INST. 2006).

170. *See* RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. LAW INST. 2007) (defining a trust as a category of fiduciary relationships); *id.* § 17 (discussing the creation of testamentary trusts).

171. *See id.* § 28 (listing the purposes for which a charitable trust may be established as such).

172. *See* Note, *Incorporating the Republic: The Corporation in Antebellum Political Culture*, 102 HARV. L. REV. 1883, 1894 (1989) [hereinafter *Incorporating the Republic*] (quoting John Quincy Adams's 1832 defense of the corporation as a "truly republican institution" that enabled broad participation in capitalist enterprise in a society where "[v]ery few, scarcely any, individuals had command of wealth and credit competent to the formation of [manufacturing] establishments" (quoting 8 CONG. DEB. app. at 84 (1832) (statement of John Quincy Adams))).

173. *See, e.g.*, COLO. REV. STAT. § 15-14-202(1) (2017) ("A guardian may be appointed by will or other signed writing by a parent for any minor child the parent has or may have in the future.").

174. *See* Frederic B. Rodgers, *Court-Appointed Counsel in Civil Cases*, 40 JUDGES' J. Winter 2001, at 22, 23 ("Children lack legal capacity to sue and be sued, and courts have the power to appoint a guardian or next friend to defend their interests in civil suits.").

175. *See id.* It may seem counterintuitive to characterize fiduciary law as "empowering" children, given that the law does not ordinarily require guardians to follow the choices of children under their care. Children would be disempowered indeed, however, if their guardians lacked the capacity to serve as fiduciary representatives to exercise their legal rights on the children's behalf.

law responds when a ship runs aground, imperiling cargo that does not belong to the shipmaster. Although shipmasters do not ordinarily have contractual relationships with cargo owners, courts have held that shipmasters who are unable to communicate with cargo owners may sometimes sell the cargo to a third party, acting as an agent of necessity for the cargo owners, in order to protect the goods' value.[176] In such cases, fiduciary law empowers principals by ensuring that their legal rights can be exercised on their behalf even when they lack the legal or practical capacity to select their own fiduciary.

In other settings, fiduciary law empowers private parties by enabling them to benefit from the exercise of legal powers that they do not independently possess. For example, when multiple investors commit assets to a pooled investment fund, each retains an equitable interest in the profits generated by the fund, but no particular investor has the right to decide unilaterally how the fund will be distributed.[177] Accordingly, when an investment manager winds up a pooled fund and distributes assets, she exercises a power that none of the contributing investors can claim independently. Although the investment manager's authority to resolve investors' competing claims to pooled funds is called into existence by investors' mutual consent, it is not derived from investors' independent legal powers; instead, it is constituted and regulated by fiduciary law itself.[178]

Similarly, when parties appoint an arbitrator to resolve a dispute, the arbitrator exercises a legal power that neither party would have the right to exercise independently under the general principle that no private party is authorized to serve as judge and party to the same cause (*nemo iudex in sua causa*).[179] Like the investment manager for a pooled fund, an arbitrator's authority to resolve disputes is called into existence by the parties' common consent, but it involves the exercise of a power that private parties do not

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176. *See, e.g.*, The "Gratitudine" (1801) 165 Eng. Rep. 450, 455–56; 3 C. Rob. 240, 255–58 (holding that a shipmaster may pledge cargo as collateral to finance the ship's repairs "in cases of instant and unforeseen and unprovided [sic] necessity," where "the character of agent [of the cargo's owner] is forced upon [the shipmaster]"); *Australasian Steam Navigation Co. v Morse* [1872] 8 Moore PC (NSW) 482, 491–92 (Austl.) (holding same, provided the communication with the cargo owner is impossible); China Pacific SA v. Food Corp. of India [1981] 3 All ER 688 (HL) 693 (Lord Diplock) (appeal taken from AC) (Eng.); *see generally* CRIDDLE & FOX-DECENT, *supra* note 14, at 132–34 (discussing fiduciary duties in the context of emergencies).

177. *See* RESTATEMENT (THIRD) OF TRUSTS § 65(1) (AM. LAW INST. 2007) (providing for the termination of a trust if all beneficiaries consent); *id.* § 79 (providing that the trustee of a pooled investment has a duty to the beneficiaries of the trust that governs the trustee's investments, not a duty to any one particular investor).

178. *See id.* § 90 cmt. a (noting that trustees have a duty to "preserve the trust property and to make it productive," but failing to enumerate duties to a particular investor).

179. *See* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 428 (1995) (characterizing this principle as "a mainstay of our system of government"); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) (identifying "certain vital principles in our free Republican governments," including the prohibition against "a law that makes a man a Judge in his own cause").

independently possess.[180] This power to arbitrate among the rivalrous claims of multiple beneficiaries is quintessentially fiduciary in nature.[181]

Fiduciary law thus reflects an implicit normative commitment to individual empowerment. By allowing principals to designate fiduciaries to act on their behalf, fiduciary law empowers beneficiaries to accomplish purposes that they could not achieve as easily—or could not achieve at all, legally or practically speaking—without a fiduciary's assistance. This commitment to individual empowerment is consistent with republicanism's respect for individual agency[182] as long as it does not compromise others' equal freedom.[183]

Fiduciary law also empowers fiduciaries but in a very different way than it empowers principals. It empowers fiduciaries in the limited sense that they receive authorization to exercise legal rights that they would not otherwise be entitled to exercise in their personal capacity. Fiduciary law authorizes a fiduciary to exercise fiduciary power solely in an institutional or official capacity—as holder of an office that is constituted and regulated by law—for a prescribed, other-regarding purpose.[184] Fiduciary power is categorically different from principals' power because fiduciaries are not free to pursue their own ends; a constitutive feature of fiduciary power is that the law permits its exercise only in a manner that is faithful to the fiduciary's mandate and solicitous of beneficiaries' legal and practical interests.[185] Fiduciary law thus confers power on fiduciaries to act in a manner that affects others' legal

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180. *See* James Allsop, *The Authority of the Arbitrator*, 30 ARB. INT'L 639, 648 (2014) (describing the power of the arbitrator, which, while derived from the agreement of the parties, necessarily encompasses authority the parties themselves do not have, such as the power to determine the parties' rights in the dispute).

181. *See* Atkins v. Bert Bell/Pete Rozelle NFL Player Retirement Plan, 694 F.3d 557, 569 (5th Cir. 2012) (explaining that "a trustee deadlock over [the Employment Retirement Income Security Act (ERISA)] eligibility matters *must* be submitted to [an arbitrator as fiduciary]" (quoting NLRB v. Amax Coal Co., 453 U.S. 322, 338 (1981)); U.S. DEP'T OF LABOR, ADVISORY OP. 79-66A, at 1–3 (Sept. 14, 1979) (concluding that an arbitrator who decides the question of a participant's entitlement to ERISA plan benefits acts as a fiduciary); *cf.* Leib et al., *supra* note 17, at 718–19 (arguing that the judicial office should be understood as a public trust).

182. A commitment to individual empowerment is not unique to republicanism. This feature of fiduciary law is compatible with classical liberalism and a variety of other normative theories.

183. Republicanism thus supports liberty-reinforcing constraints on individual empowerment, including reasonable antitrust regulations. *See Incorporating the Republic*, *supra* note 172, at 1893–902 (discussing nineteenth-century debates over whether the corporation, "with its potential for dominant market power," was congenial to republican freedom).

184. *See* CRIDDLE & FOX-DECENT, *supra* note 14, at 18–19 (discussing the institutional, purposive, and other-regarding characteristics of fiduciary power); Getzler, *supra* note 83, at 585 (observing that Chancellor King's "idea that profit from office should be barred [in fiduciary relationships] can plausibly be connected to [his] experience battling [corruption of public offices]").

185. *See* SHEPHERD, *supra* note 165, at 35 (defining fiduciary power as conditioned on using such power in the best interests of another).

and practical interests, while constituting that power juridically in a manner that formally rules out alien control.

2. Emancipation.—As a practical matter, of course, fiduciaries are creatures of flesh and blood and therefore susceptible like all humankind to the deadly sins of greed and sloth. Under republican theory, therefore, it is not enough for fiduciary law to prescribe legal rights and duties that affirm a universal right to freedom from domination in the abstract. To secure liberty in a practical sense, the law must also furnish appropriate causes of action and effective remedies to protect beneficiaries against a fiduciary's self-dealing and waste.[186] Legal sanctions that deter fiduciaries from abusing trust may be particularly valuable as checks against domination. But perfect deterrence is not a prerequisite for republican liberty. A legal system can secure freedom from domination even if it does not prevent all abuses from occurring *ex ante*, as long as it supplies robust accountability mechanisms to defuse domination *ex post* by guaranteeing that fiduciaries are unable to exercise arbitrary control with impunity.[187]

Fiduciary duties emancipate principals by ensuring that their liberty is not compromised by fiduciary power. Whenever the law entrusts a party with power over others' legal or practical interests, the duty of loyalty prevents this power from being held in a manner that engenders domination. A fiduciary does not dominate her principal if the law requires her to exercise entrusted power in a manner that tracks the principal's 'avowed or avowal-ready interests, to borrow Pettit's formulation.[188] A fiduciary must follow her principal's 'avowed interests, as reflected in her express instructions, and she must act with reasonable diligence and prudence to achieve her principal's 'avowal-reading interests, as reflected in her broader objectives and purposes.[189] Focusing on a principal's 'avowed or avowal-ready interests' in this manner respects a principal's independent agency by requiring that exercises of fiduciary power be interpretable always as empowering a principal to accomplish her own purposes. The duty of loyalty thus safeguards a principal's liberty by ensuring that she remains in a position of formal self-mastery with respect to her fiduciary's exercise of entrusted power.

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186. *See, e.g.*, CONAGLEN, *supra* note 5, at 254–68 (discussing judicial applications of fiduciary principles and theories for determining whether fiduciary duties should be recognized and enforced by the law).

187. *See* CRIDDLE & FOX-DECENT, *supra* note 14, at 271 (characterizing impunity as "domination institutionalized").

188. Pettit, *supra* note 40, at 117.

189. *See* CONAGLEN, *supra* note 5, at 104 (noting that some view the core fiduciary duty as acting in the best interests of the beneficiary, under the tacit assumption that such interests may be either express or implicit).

Fiduciary duties also protect beneficiaries from domination. Absent the duty of loyalty, a fiduciary would have the capacity to subject beneficiaries' equitable interests to her own arbitrary control by exercising fiduciary power in a manner that was indifferent to these interests. Beneficiaries would therefore interact with their fiduciaries from an unequal position of vulnerability and subservience.[190] In appreciation of the fiduciary's dominating power, beneficiaries would be forced to maintain constant vigilance against the threat of fiduciary misconduct. They might feel the need to engage in self-abasement or self-censorship in order to remain within the trustee's good graces. Indeed, they might feel compelled to offer kickbacks or other material inducements as security against the risk of fiduciary self-dealing.[191] The duty of loyalty rescues beneficiaries from this position of abject vulnerability by arming them with legal claims that affirm their equitable interest in fiduciaries' fidelity to the principal's instructions and purposes.

Modern fiduciary law also safeguards fiduciaries from domination, ensuring that the requirement to pursue others' purposes and interests does not enslave fiduciaries to their principals and beneficiaries. Most fiduciary relationships today are established through a voluntary undertaking, with fiduciaries receiving handsome remuneration for services performed.[192] And fiduciaries are generally free to exit the relationship if they become dissatisfied with the terms under which they labor.[193] Thus, while fiduciary law demands that fiduciaries exercise fiduciary power exclusively for other-regarding purposes, it does not safeguard the liberty of principals and beneficiaries at the expense of fiduciaries' equal freedom.

Skeptics might object that the republican tradition's focus on domination—the mere capacity for arbitrary interference—devotes too little attention to a fiduciary's wrongful *exercise* of power and the material *harm* that may result from this exercise. The republican theory developed in this Article recognizes, however, that domination is not the only threat to freedom that justifies legal regulation; a fiduciary also wrongs her principal and

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190. *See, e.g.*, Nat'l Westminster Bank PLC v. Morgan [1985] AC 686 (HL) 609 (Lord Scarman) (appeal taken from AC) (Eng.) (asserting that fiduciary relations arise where one party is subject to another's dominating influence).

191. *See, e.g.*, Hylton v. Hylton (1754) 28 Eng. Rep. 349, 350; 2 Ves. Sen. 548, 548–49 (suggesting that if courts did not apply the no-conflict rule, trust beneficiaries might feel compelled to offer kickbacks to secure a smooth transfer of the estate).

192. *See* Talley, *supra* note 111, at 300 (observing that "no one is *required* to become a corporate fiduciary; she consents to do so voluntarily, and only then in exchange for compensation that makes entering such a relationship worthwhile").

193. A court-ordered constructive trust is an exception to this rule, but this relationship generally functions as a "restitutionary proprietary remedy" rather than a free-standing fiduciary relationship. LAC Minerals Ltd. v. Int'l Corona Resources Ltd., [1989] 2 S.C.R. 574, 577–80 (Can.).

beneficiaries if she exercises entrusted power in a manner that is indifferent to their interests. In previous writings, Evan Fox-Decent and I have described the arbitrary exercise of fiduciary power as 'instrumentalization, and we have argued that the Kantian principle of noninstrumentalization complements the principle of nondomination in specifying the normative requirements of a republican legal order.[194] Both noninstrumentalization and nondomination are essential benchmarks for evaluating whether a legal system meets the normative requirements of a republican legal order. By ruling out a fiduciary's formal capacity for arbitrary control and providing remedies responsive to the actual exercise of arbitrary control, fiduciary law satisfies both the principle of nondomination and the principle of noninstrumentalization.

Contrary to the classical liberal theory, however, fiduciary law's formal structure is not devoted to protecting beneficiaries from material harm. A fiduciary who treats entrusted power as a means to her own ends wrongs her beneficiaries even if her actions do not harm their interests—for example, when an investment manager purchases highly profitable investments for a client, but, in the process, also receives undisclosed kickbacks without the client's consent. Conversely, a fiduciary may harm her beneficiaries' interests without committing any wrong—for example, when an investment manager selects prudent investments, but the investments unexpectedly lose value. Consistent with the republican theory, the fiduciary duty of loyalty prohibits fiduciaries from subjecting entrusted power to their own alien control; it does not fully insure beneficiaries' interests against harm.

Republicanism thus clarifies the fiduciary relationship's unique threat to liberty. What distinguishes fiduciary relationships from ordinary arm's-length relationships is that a fiduciary receives power in 'trust' (*fides*) for another.[195] The power entrusted to a fiduciary is, by definition, not her own; rather, she receives entrusted power in an official capacity on the condition that she exercise the powers associated with her office in a manner that is consistent with her purposive mandate. The fiduciary mandate circumscribes the outer limits of a fiduciary's authority to hold and exercise entrusted power. Accordingly, an agent who treats fiduciary power as a means to advance her own ends dominates her principal by arbitrarily displacing the principal's decisions concerning how her own legal rights and powers will be exercised. Similarly, a trustee who treats fiduciary power as a means to advance her own ends wrongs her beneficiaries by asserting alien control over their legal and practical interests. This corruption of the fiduciary office

194. CRIDDLE & FOX-DECENT, *supra* note 14, at 78.

195. *See* Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1, 28 (2006) ("The Latin root of fiduciary—'fides'—means 'faith, as in trust, reliability, or faithfulness ").

constitutes a distinctive form of domination—the betrayal of trust—that justifies fiduciary law's distinctive duty of loyalty with its associated remedies.

The idea that 'betrayal of trust' lies at the heart of fiduciary loyalty resonates with the familiar refrain in American jurisprudence that fiduciary relationships are distinguished by 'trust and confidence.'[196] All fiduciary relationships involve trust and confidence in the strictly formal, legal sense that fiduciaries exercise powers that are entrusted to exercise. Parties to fiduciary relationships may also subjectively trust one another to meet their respective obligations,[197] but 'the fact that one person subjectively trusted another—is neither necessary for nor conclusive of the existence of a fiduciary relationship.'[198] In determining whether or not a relationship is fiduciary, courts do not ask whether the parties actually trust one another in a subjective sense; instead, they simply ask whether a party has received power over another's legal or practical interests in 'trust and confidence'—i.e., on the condition that the power be exercised exclusively for the other's benefit.[199] Within such relationships, the fiduciary duty of loyalty ensures that fiduciaries cannot expose their principal and beneficiaries to domination by subjecting entrusted power to their own alien control.

Some scholars argue that the primary purpose of fiduciary law is to inculcate social norms, encouraging fiduciaries to practice loyalty and care out of a sense of moral obligation.[200] The implicit corollary of this view is

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196. *E.g.*, Advocare Int'l LP v. Horizon Labs., Inc., 524 F.3d 679, 695–96 (5th Cir. 2008) (noting that the court below had instructed the jury that "a fiduciary duty may arise informally from a 'relationship of trust and confidence'"); Amendola v. Bayer, 907 F.2d 760, 763 (7th Cir. 1990) (observing that even in the absence of a formal fiduciary relationship, a constructive trust may be recognized by the court where a relationship of "trust and confidence" exists); *see also* Gerdes v. Estate of Cush, 953 F.2d 201, 205 (5th Cir. 1992) (characterizing "the position of trust" as the fiduciary relationship's distinguishing feature).

197. *See* Harding, *supra* note 165, at 84–85 (emphasizing this feature of fiduciary relationships).

198. *Hosp. Prods. Ltd. v U.S. Surgical Corp.* (1984) 156 CLR 41, ¶ 69 (Austl.). Parties to relational contracts often exercise trust in one another, yet a fiduciary relationship is not triggered unless one of the parties has conferred power on the other on the condition that the power be held and exercised exclusively for other-regarding purposes. *See id.* (using the example of the contractor–subcontractor relationship to illustrate this point).

199. *See* Evans v. Taco Bell Corp. 2005 WL 2333841, at *12 (D.N.H. Sept. 23, 2005) (explaining that 'confidence' in this context does not equate with simple reliance on another to perform a bargained-for service, but denotes a '*special* confidence reposed in one who is bound to act in good faith and with due regard to the interests of the one reposing the confidence' ' (quoting Lash v. Cheshire Cty. Sav. Bank, 474 A.2d 980, 982 (1984))).

200. *See, e.g.*, Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1266 (1999) (noting that "[a]lthough the regulatory function of these legal rules is important, the social norm of loyalty that the legal rules support and define is critical to the efficient operation of the duty of loyalty"); Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 857 (identifying fiduciary duties as "broad standards," which are "all-encompassing" as moral obligations "pervasively to act loyally, in good

that fiduciary law could be discarded in a world where all fiduciaries could be trusted to refrain from opportunism.[201] The republican theory challenges this view. Fiduciary virtue might be desirable, but it is not strictly necessary to preserve freedom from domination. As long as legal norms and institutions ensure that a fiduciary cannot engage in opportunism with impunity, a fiduciary's motivations for loyal or disloyal behavior are legally and practically irrelevant.[202] Nor is a fiduciary's commitment to social norms sufficient to secure liberty. The classic examples of the virtuous king and benevolent slave master illustrate that domination can be present even if a power holder's intentions and actions are above reproach.[203] Even if all fiduciaries were angels, fiduciary law would still be necessary as a formal matter to affirm that loyalty and care are *legal* obligations and not merely social conventions that depend for their fulfillment on a fiduciary's unilateral discretion, personal morality, or good will.

Republicanism thus offers a robust interpretive account of the normative basis for fiduciary loyalty. Under the republican theory, the duty of loyalty is not merely a subset of contractual obligations or property rules, as some scholars have suggested.[204] It is not a prophylactic requirement intended to promote the performance of non-fiduciary obligations.[205] Nor is its primary purpose to lower transaction costs in private bargaining,[206] provide a framework for optimal deterrence,[207] or promote voluntary adherence to social norms.[208] Instead, the requirements of fiduciary loyalty serve primarily

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faith, and with due care"); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997) (comparing Delaware courts' opinions on fiduciary duties to sermons and parables which serve as a form of instruction to practitioners).

201. *See* Eisenberg, *supra* note 200, at 1274 ("[I]f all corporate actors fully internalized the social norm of loyalty and gave full effect to that norm, the costs of both legal sanctions and monitoring and bonding systems would be unnecessary ").

202. *See* SELLERS, *supra* note 39, at 67 (noting John Adams's observation that in a republican system liberty may flourish "even among highwaymen").

203. *See* Pettit, *supra* note 43, at 44 ("From the earliest Roman days, the republican tradition insisted that being under the power of a master—*in potestate domini*—meant being un-free, even if that master was quite benevolent and allowed you a great deal of leeway.").

204. *See, e.g.*, Avihay Dorfman, *On Trust and Transubstantiation: Mitigating the Excesses of Ownership*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 6, at 339 (discussing the duty of loyalty as arising out of property rules); Easterbrook & Fischel, *supra* note 7, at 426 (arguing that fiduciary loyalty is a subset of contract obligations); Langbein, *supra* note 7, at 657–59 (contending that fiduciary loyalty is fundamentally contractarian); *cf.* Smith, *supra* note 63, at 1402 (asserting that fiduciary loyalty is based on the respect of a "*critical resource* belonging to the beneficiary").

205. *See* CONAGLEN, *supra* note 5, at 4 (articulating a theory that fiduciary duties are "designed to assist with ensuring proper performance of non-fiduciary duties").

206. *See, e.g.*, Butler & Ribstein, *supra* note 26, at 28–30 (describing how fiduciary obligations reduce the need for contracting parties to negotiate over remote contingencies).

207. *See, e.g.*, Cooter & Freedman, *supra* note 4, at 1052 (analyzing deterrence problems in the context of fiduciary obligations).

208. *See, e.g.*, Rock, *supra* note 200, at 1016 (describing fiduciary duties as standards meant to influence the social behavior of directors, officers, and lawyers).

to emancipate private parties by defining and regulating fiduciary power in a manner that formally precludes domination from corrupting the fiduciary relationship.

B. Identifying Fiduciary Relationships

Private law theorists have struggled in the past to devise principled criteria for distinguishing fiduciary relationships from non-fiduciary relationships.[209] Courts have held that certain categories of private relationships always trigger fiduciary duties, including agent–principal, trustee–beneficiary, guardian–ward, director/officer–corporation, attorney–client, and doctor–patient.[210] Other categories of private relationships, such as employer–employee, are sometimes held to trigger fiduciary duties, but sometimes not, depending upon case-specific features of the relationships between specific parties.[211] Legislatures and courts have not always been clear and consistent, however, in their efforts to explain which relationships qualify as 'fiduciary. As a result, fiduciary law's borders remain theoretically and doctrinally nebulous.

In recent years, legal scholars have proposed a variety of tests for distinguishing fiduciary relationships from non-fiduciary relationships. Some have argued that fiduciary duties are a product of contractual agreement or voluntary undertaking.[212] As discussed previously, however, the voluntarist theory struggles to account for fiduciary relationships that arise without parties' express or implied consent. Rather than consider the parties' actual intentions, courts tend to ascribe fiduciary duties to specific relationships based on whether one of the parties has reposed special 'trust and confidence' in the other.[213] Where this feature is present, courts commonly hold that the duty of loyalty applies even if the party who holds entrusted power persistently rejects the implication that she bears fiduciary

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209. *See, e.g.*, Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 923–24 (concluding that fiduciary relationships lack a common theoretical basis). *See generally* Miller, *supra* note 2 (reviewing theories based on contract, property, and vulnerability, and offering a legal-formalist alternative).

210. *See* DeMott, *supra* note 164, at 1258 (observing that "fiduciary-duty analysis usually proceeds categorically").

211. *See id.* (explaining that assessments of ad hoc fiduciary status in the employment context depend "on fact-specific inquiries"); Matthew T. Bodie, *Employment as Fiduciary Relationship*, 104 GEO. L.J. (forthcoming 2017) (analyzing employer fiduciary duties based on the specific facts of an employment relationship).

212. *E.g.*, Easterbrook & Fischel, *supra* note 7, at 427 (concluding that a fiduciary relationship "is a contractual one"); James Edelman, *When Do Fiduciary Duties Arise?*, 126 L.Q. REV. 302, 310–13 (2010) (arguing that voluntary undertaking is a necessary condition for fiduciary obligation); Hansmann & Mattei, *supra* note 7, at 447–49 (arguing that fiduciary duties are default contractual rules).

213. *See* sources cited *supra* note 196.

duties.[214] While classical liberals might welcome a rule that would make consent a prerequisite for the assumption of fiduciary duties, this approach has not gained traction in the courts.

Another theory of the fiduciary relationship, advanced most forcefully by Paul Miller, posits that fiduciary relationships share a distinctive juridical structure.[215] In Miller's view, what makes fiduciary relationships special is the fiduciary's discretionary power over another party's legally protected rights.[216] Because the legal rights that a fiduciary exercises belong to the beneficiary rather than fiduciary, '[t]he fiduciary may not treat fiduciary power as an unclaimed means or as a personal means.'[217] Instead, the fiduciary must treat her beneficiary always as entitled to all benefits generated by her exercise of the entrusted power.

Miller's juridical theory offers a powerful framework for identifying some fiduciary relationships, but it struggles to make sense of other relationships that are universally accepted as fiduciary. As Miller's theory predicts, many fiduciaries do hold discretionary power to exercise another's legal rights, including trustees, corporate officers, guardians, and investment managers.[218] In these relationships, it is certainly plausible to think that the fiduciary duty of loyalty reflects the principle that beneficiaries are legally entitled to the full fruits of any exercise of their own rights. Returning to examples discussed previously, however, it is hard to make the case that an arbitrator exercises the parties' respective legal rights when she renders a judgment or that an investment manager exercises investors' legal rights when she winds up a pooled fund, although in both contexts the fiduciary's actions may limit her beneficiaries' subsequent choices in ways that impact their legal interests.[219] Equally problematic for Miller's theory, courts have also held that advisers may qualify as fiduciaries even if they lack formal

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214. *See* SHEPHERD, *supra* note 165, at 66 (observing that when "fiduciary duties are attached by operation of law," they apply even "in the face of express rejection of those very same duties by the fiduciary").

215. *See* Miller, *supra* note 163, at 69–75.

216. Miller uses the term '[p]ersonal legal capacity' rather than rights, but the message is essentially the same. *Id.* at 71.

217. Miller, *supra* note 2, at 1021.

218. *See* Miller, *supra* note 163, at 71 (observing that fiduciaries may be entrusted with power, *inter alia*, to "enter into legally binding relationships for another . . . acquire, invest, use, administer, or alienate property owned by or held for another; . . . to make decisions relating to the health and personal welfare of another; [and] to institute legal proceedings to enforce or seek vindication of legal rights for another").

219. Miller might respond that a fiduciary in these contexts wields rights that beneficiaries possess collectively, even though they cannot claim these rights individually. But this response begs the question: why can groups of beneficiaries claim rights that their members do not possess individually?

authority to exercise their advisees' legal rights.[220] Thus, while Miller may be correct that a person is a fiduciary if she has discretionary power to exercise another's legal rights, it does not necessarily follow that a person *must* hold such authority to qualify as a fiduciary.

Some other scholars and judges have argued that what distinguishes fiduciary relationships from other relationships is a fiduciary's discretionary power over beneficiaries' interests, a power which renders beneficiaries uniquely vulnerable to opportunism.[221] This emphasis on power, vulnerability, and opportunism resonates with fiduciary law's historical roots in equity.[222] The trouble with basing fiduciary duties on such vague concepts as power, vulnerability, and the threat of opportunism, however, is that these factors are present in *all* private relationships. Hence, some further limiting principle is needed to prevent the fiduciary concept from swallowing all of private law. To fill this void, we need a theory of the fiduciary relationship that is capable of justifying fiduciary duties without imposing these duties indiscriminately as a one-size-fits-all solution to every threat of opportunism that arises in the private sphere.

The republican theory advanced in this Article furnishes a simple definition of the fiduciary relationship that is distinct from the contractarian, legal-formalist, and generic-opportunism accounts. Under the republican theory, *a party is a fiduciary if she has been entrusted with power over another party's legal or practical interests*. For the sake of clarity, it may be helpful to break this definition down into its various component parts to allow for closer inspection.

1. Entrustment.—A defining feature of any fiduciary relationship is entrusted power.[223] Power is 'entrusted' if it does not belong to a party by right but is nonetheless committed to her administration. Power may be entrusted to a fiduciary by a voluntary assignment from a principal (e.g., attorney), by judicial appointment (e.g., receivership), or by the independent operation of law (e.g., agent of necessity). The power may belong by right

220. *See, e.g.*, SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191–92 (1963) (finding a fiduciary relationship between investment advisers and clients).

221. *See, e.g.*, Frame v. Smith, [1987] 2 S.C.R. 99, 102 (Can.) (Wilson, J., dissenting) (asserting that indicia of a fiduciary relationship include: "(1) The fiduciary has scope for the exercise of some discretion or power. (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests. (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power."); DeMott, *supra* note 164, at 1259 ("Fiduciary relationships stem from or create disparities of power and information, such that the relationship's beneficiary is or becomes vulnerable to the [fiduciary].").

222. *See, e.g.*, Flannigan, *supra* note 26, at 393 ("The conventional function of fiduciary regulation is to control opportunism in limited access arrangements. That function has never been disputed."); Smith, *supra* note 22, at 261 ("Equity as anti-opportunism explains not only the general tenor, but the overall structure and particular features of fiduciary law.").

223. *See* FRANKEL, *supra* note 1, at 4–5 (emphasizing entrustment as a distinguishing feature of fiduciary relationships).

to the principal (e.g. agency) or to a beneficiary (e.g., guardianship), or it may be called into existence by the independent operation of law (e.g. arbitration). Regardless of the mechanism that triggers the entrustment of fiduciary power, the critical feature of entrusted power is held *in trust*; it is not committed to the unilateral discretion of the one who holds it. Entrustment is a necessary feature of fiduciary relationships under the republican theory because it facilitates the distinctive form of domination that fiduciary loyalty is designed to neutralize: a party's capacity to betray trust by exercising alien control over entrusted power.

2. Power.—Fiduciary power is a form of authority. It may be de jure or de facto. A fiduciary holds de jure power if her mandate authorizes her to exercise another's legal rights or powers (e.g., agency) or other powers conferred by law (e.g., arbitration). A fiduciary holds de facto power if she is in a position, as a practical matter, to dictate how another's legal rights or powers will be exercised (e.g., investment adviser). Fiduciary power may be limited to purely nondiscretionary ministerial tasks, or it may entail authorization to make discretionary judgments. As this Article will explain further below, bringing nondiscretionary power within the ambit of fiduciary loyalty is important under the republican theory because fiduciary law's distinctive remedies are necessary to remedy the domination entailed in a fiduciary's infidelity to a nondiscretionary mandate.[224]

3. Over Another Party's Legal or Practical Interests.—A relationship is fiduciary only if a person holds power relative to another person's legal or practical interests. Under the republican theory, it is a fiduciary's empowered position relative to her principal and beneficiaries that raises the threat of alien control.[225] A fiduciary's power to set aside the choices of her principal and disregard the legal and practical interests of her beneficiaries would constitute domination, but for fiduciary law's emancipating intervention.[226]

4. Some Applications.—The republican theory's definition of the fiduciary relationship elucidates the scope of fiduciary law's domain in a variety of respects.

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224. *See infra* section III(C)(2).

225. Frankel asserts:

> The [fiduciary] relation may expose the entrustor to risk even if he is sophisticated, informed, and able to bargain effectively. Rather, the entrustor's vulnerability stems from the *structure* and *nature* of the fiduciary relation. The delegated power that enables the fiduciary to benefit the entrustor also enables him to injure the entrustor, because the purpose for which the fiduciary is allowed to use his delegated power is narrower than the purposes for which he is capable of using that power.

Frankel, *supra* note 32, at 810.

226. *See* Nat'l Westminster Bank PLC v. Morgan [1985] AC 686 (HL) 709 (Lord Scarman) (appeal taken from AC) (Eng.) (asserting that fiduciary relations arise where one party is subject to another's dominating influence).

The republican theory confirms the conventional wisdom that some categories of private relationships always satisfy the republican theory's criteria. For example, all trustees are entrusted with power over others' legal or practical interests. Although some trustees hold more discretionary power than others, all bear a fiduciary duty of loyalty because the office of trustee, by definition, involves the entrustment of power over others' legal or practical interests.[227] Other fiduciary relationships that always satisfy these criteria include agent–principal, officer/director–corporation, partner–partner, guardian–ward, and attorney–client.[228] Because these relationships always meet the republican theory's criteria, they are suitable for categorical treatment as 'status-based fiduciary relationships' under the republican theory.[229]

The republican theory also explains why generations of republican judges, politicians, and political theorists have confidently asserted that public officials and institutions are fiduciaries.[230] Like fiduciaries under private law, public officials and institutions are entrusted with power over the legal and practical interests of their people.[231] Consequently, they bear fiduciary obligations to exercise their entrusted power in a manner that satisfies the requirements of fiduciary loyalty.

In addition, the republican theory supports recognizing investment advisers as fiduciaries for their clients. Formally speaking, many investment advisers are not legally authorized to choose investments for their clients.[232] Nonetheless, courts have held that investment advisers are fiduciaries because they hold themselves out to their clients as experts who will act in clients' best interests, thereby inducing their clients to entrust them with responsibility to assist them in an official advisory capacity.[233] This line of cases is difficult to square with theories of the fiduciary relationship that focus exclusively on a fiduciary's exercise of de jure authority,[234] but they

227. *See Trustee*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "trustee" as "[s]omeone who stands in a fiduciary or confidential relation to another; esp., one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary").

228. *See* Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 349 (2009) (listing and detailing different types of fiduciary relationships).

229. Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 241–42 (2011).

230. *See* sources cited *supra* notes 15–16.

231. *See generally* CRIDDLE & FOX-DECENT, *supra* note 14 (covering the fiduciary duty of public officials under international law); FOX-DECENT, *supra* note 17.

232. Arthur B. Laby, Advisers as Fiduciaries 1 (unpublished manuscript) (on file with author).

233. *See, e.g.*, SEC v. Capital Gains Research Bureau, Inc. 375 U.S. 180, 191–94 (1963) (describing the fiduciary relationship between investment advisers and clients and confirming Congress's designation of investment advisers as fiduciaries).

234. *See, e.g.*, Hodgkinson v. Simms, [1994] 3 S.C.R. 377, 386 (Can.) (Sopinka, McLachlin & Major, JJ., dissenting) (arguing that an investment adviser is not a fiduciary because the advisee formally "retains the power and ability to make his or her own decisions").

harmonize easily with the republican theory's insight that fiduciary law is equally concerned with domination that arises in relationships involving de facto power. Although an investment adviser's client retains formal control over her investment decisions, the investment adviser receives entrusted de facto power to guide and shape those decisions.[235] Under the republican theory, therefore, the investment adviser–advisee relationship triggers fiduciary obligations to provide 'disinterested' advice and receive informed consent to any conflicted transactions.[236]

The republican theory thus explains why the current arguments for setting aside DOL's Fiduciary Rule are unpersuasive.[237] Under the republican theory, fiduciary duties apply to retirement-investment advisers not for the purpose of achieving optimal deterrence of harm (as reflected in a conventional cost–benefit analysis)[238] but rather to neutralize the domination that would arise if investment advisers had the capacity to wield alien control over their clients' legal and practical interests. Fiduciary law's traditional no-conflict and no-profit rules are strictly necessary, under republican legal theory, to prevent domination from corrupting adviser relationships that are premised on trust and confidence.[239]

Some fiduciaries exercise a combination of de jure and de facto power over their beneficiaries' interests. For example, when a patient authorizes a surgeon to operate on her body, making discretionary decisions as the operation unfolds, the surgeon exercises de jure power entrusted by the patient herself. The surgeon therefore assumes fiduciary obligations to honor the patient's instructions and purposes, act with solicitude toward the patient's avowed or avowal-ready interests, and exercise the care and skill expected of members of her profession. Even before surgery begins, however, the surgeon is a fiduciary for her patient when she provides advice on possible treatment options. Although the surgeon–adviser does not wield formal control over her patient's choices, the structure of the advisement relationship is one in which the patient entrusts the surgeon with de facto

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235. *See, e.g.*, Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992) (explaining a fiduciary relationship arises when "one person has reposed trust and confidence in another who thereby gains influence and superiority over the other," and that such a relationship is seen when "the agent has expert knowledge the deployment of which the principal cannot monitor" (quoting Amendola v. Bayer, 907 F.2d 760, 763 (7th Cir. 1990))).

236. *Capital Gains*, 375 U.S. at 188–92.

237. *See supra* notes 153–57 and accompanying text.

238. This is not to say, however, that the Fiduciary Rule cannot survive cost–benefit analysis. *See* Chamber of Commerce v. Hugler, No. 16-cv-1476, 2017 WL514424, at *32–35 (N.D. Tex. Feb. 8, 2017) (concluding that DOL's assessment of the Fiduciary Rule's costs and benefits was reasonable); Fiduciary Rule, *supra* note 148, at 20,949–52, 20,952 tbl.1 (explaining how the Fiduciary Rule "will mitigate conflicts, support consumer choice, and deliver substantial gains for retirement investors and economic benefits that more than justify its costs").

239. The Fiduciary Rule exempts investment advice that is merely incidental to certain arm's-length transactions. Fiduciary Rule, *supra* note 148, at 20,948.

power to shape and constrain her choices regarding her own medical care. The surgeon is a fiduciary for her patient, therefore, regardless of the fact that the patient retains both the formal right and the practical capacity to reject her advice. Focusing on the threat of arbitrary control in this manner explains not only when and how fiduciary duties apply to physicians but also to other relationships such as attorney–client that combine de jure powers with the provision of professional advice.

An increasingly important type of de facto power that may generate fiduciary duties is access to confidential information.[240] Private parties often entrust confidential information to a fiduciary within the context of a broader fiduciary relationship—for example, when a criminal defendant shares inculpatory information with her defense attorney or a patient allows a physician to collect sensitive data concerning her physical or emotional health. When attorneys, physicians, counselors, and clerics accept confidential information, they are entrusted with de facto power over the practical interests of the party who shares the information, with the expectation that they will use the information exclusively for the benefit of the sharing party.[241] As such, these relationships of trust and confidence activate the fiduciary duty of loyalty, requiring the recipient to use confidential information solely to advance her beneficiaries' avowed or avowal-ready interests.[242] Conversely, when parties share confidential information in contexts that do not involve the expectation that the recipient will use the information to promote the other's best interests (e.g., sharing confidential business data during arm's-length merger negotiations), fiduciary duties do not apply.[243]

Fiduciary relationships formed solely by the entrustment of power over confidential information are an example of what courts and commentators

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240. *See* Brooks, *supra* note 26, at 239–40 (describing "information fiduciaries" as having both an affirmative duty to collect and use personal information as well as a duty to observe confidentiality standards). *See generally* Jack M. Balkin, Lecture, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016) (discussing the tension between "personal privacy in the digital age" and companies' interest in collecting, analyzing, and distributing customers' personal information).

241. *See, e.g.*, DeMott, *supra* note 209, at 882 ("[A] fiduciary's duties go beyond mere fairness and honesty; they oblige him to act to further the beneficiary's best interests."); Smith, *supra* note 63, at 1402, 1441 (explaining that "fiduciary relationships form when one party acts *on behalf of* another party with respect to a *critical resource* belonging to the [second party], ' for example, confidential information in doctor–patient, attorney–client, and clergy–parishioner relationships).

242. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 16, 49, 60 (AM. LAW INST. 2000) (discussing lawyers' fiduciary duties to keep confidences); MARK A. HALL ET AL., MEDICAL LIABILITY AND TREATMENT RELATIONSHIPS 169–97 (3d ed. 2013) (discussing the duty of patient confidentiality).

243. *See, e.g.*, Dirks v. SEC, 463 U.S. 646, 662 n.22 (1983) (citing with approval Walton v. Morgan Stanley & Co. 623 F.2d 796, 798–99 (2d Cir. 1980) (holding that the possession of confidential information within the context of an arm's-length merger negotiation is not sufficient to generate a fiduciary relationship and that liability would not attach in the event of its disclosure)).

have sometimes described as 'ad hoc"[244] or 'informal"[245] fiduciary relationships. Ad hoc fiduciary relationships arise when a particular relationship does not fall within a status-based category of fiduciary relationships (e.g., agency, trust) but nonetheless qualifies for the duty of loyalty based on features specific to the relationship.[246] The republican theory suggests that courts should identify ad hoc fiduciary relationships by asking a simple question: does a party hold entrusted power over another's legal or practical interests?

This test confirms current jurisprudence in a variety of respects. Consistent with established case law, the republican theory affirms that used car dealers are not ordinarily fiduciaries for their customers,[247] cigarette manufacturers are not ordinarily fiduciaries for their consumers,[248] and restauranteurs are not ordinarily fiduciaries for their patrons.[249] Although each of these relationships involves significant information asymmetries, generating a risk of opportunism, the relationships are all presumptively arm's-length; none by definition involves an entrustment of power from one party to another to be exercised under a purposive and other-regarding mandate.[250] Consequently, these relationships do not ordinarily render either party vulnerable to the specific type of opportunism that triggers fiduciary duties and remedies. The injuries that arise within these relationships can be remedied, instead, through other regimes such as contract law, tort law, property law, and criminal law.[251]

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244. *E.g.*, Galambos v. Perez, [2009] 3 S.C.R. 247, 276 (Can.); DeMott, *supra* note 164, at 1261.

245. *E.g.*, Advocare Int'l, LP v. Horizon Labs., Inc., 524 F.3d 679, 695 (5th Cir. 2008).

246. *See, e.g.*, Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992) ("[F]iduciary duties are sometimes imposed on an ad hoc basis [when] a person solicits another to trust him in matters in which he represents himself to be expert as well as trustworthy and the other is not expert and accepts the offer and reposes complete trust in him ' (citations omitted)).

247. *Cf.* Guenther v. Snap-On Tools Corp., No. 90 C 4436, 1995 WL 137061, at *2–4, *9 (N.D. Ill. Mar. 28, 1995) ("While the law recognizes certain relationships as being fiduciary, the relationship between franchisor and franchisee is not among them."), *vacated in part by* 1996 WL 84182 (N.D. Ill. Feb. 22, 1996).

248. *See* Burton v. R.J. Reynolds Tobacco Co., 397 F.3d 906, 911–13 (10th Cir. 2005) (concluding that "ordinary transactions for the sale of cigarettes do not, as a matter of Kansas law, create fiduciary relationships").

249. *See* Evans v. Taco Bell Corp. No. Civ. 04CV103JD, 2005 WL 2333841, at *13 (D.N.H. Sept. 23, 2005) (concluding it is 'obvious' that no fiduciary relationship exists between fast-food restaurants and their customers).

250. *See, e.g.*, Carey Elec. Contracting, Inc. v. First Nat'l Bank of Elgin, 392 N.E.2d 759, 763 (Ill. App. Ct. 1979) ("Normal trust between friends or businesses, plus a slightly dominant business position, do not operate to turn a formal, contractual relationship into a confidential or fiduciary relationship.").

251. *See, e.g.*, Engle v. Ligett Group, Inc., 945 So. 2d 1246, 1276–77 (Fla. 2006) (denying class certification to a large group of tobacco plaintiffs, but allowing the individual plaintiffs to proceed with suit based on injuries resulting from the use of tobacco products); *Taco Bell Corp.*, 2005 WL 2333841, at *5–12 (discussing the application of negligence and strict liability causes of action to

Harder cases for the republican theory include mechanic–client and contractor–homeowner—i.e., relationships in which a property owner commits their property to another's care with the expectation that the latter will improve the property for the owner's benefit. Courts have concluded that auto mechanics and home contractors are not ordinarily fiduciaries for their clients because their services 'occasion no fiduciary-like trust or equivalent reposing of faith.'[252] Some commentators have questioned the accuracy and coherency of this conclusion, arguing that clients do, in fact, entrust auto mechanics and home contractors with de jure and de facto power over their property interests, much as patients entrust physicians with de jure and de facto power over their bodies.[253] Although this Article does not afford the space necessary to resolve this debate definitively, the republican theory suggests that auto mechanics and home contractors qualify as fiduciaries only if these relationships are conditioned, in actual practice, on the understanding that the service providers receive authority *in trust* for their clients' exclusive benefit. If property owners do not 'entrust' their property to mechanics and contractors in this robust sense, the fiduciary duty of loyalty does not apply.

C. The Requirements of Fiduciary Loyalty

Fiduciary relationships trigger a number of legal duties, including the duty of care, the duty to keep and render accounts, and the duty to furnish critical information,[254] but the heart of fiduciary law is its distinctive duty of loyalty. Despite its centrality to the theory and practice of fiduciary law, the concept of fiduciary 'loyalty' remains ambiguous and contested. As Andrew Gold has demonstrated, courts have employed a variety of different conceptions of fiduciary loyalty, including honoring a hypothetical bargain, fidelity to the instructions and purposes, affirmative devotion to

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injuries the plaintiff allegedly suffered from consuming food prepared by a Taco Bell employee with Hepatitis A); United States v. Sullivan, 498 F.2d 146, 149–50 (1st Cir. 1974) (upholding the embezzlement conviction of a union employee who "possessed [a] fiduciary obligation with respect to union funds and assets"); Karl A. Boedecker & Fred W. Morgan, *Strict Liability for Sellers of Used Products: A Conceptual Rationale and Current Status*, 12 J. PUB. POL'Y & MARKETING 178, 179–84 (1993) (reviewing cases involving strict liability claims for sales of used cars and discussing the rationales behind the holdings).

252. Thompson v. Wis. Cty. Mut. Ins. Corp. No. 95-3107-FT, 1996 WL 330363, at *1 (Wis. Ct. App. June 18, 1996) (per curiam); *see also Guenther*, 1995 WL 137061, at *9 (rejecting the idea in dicta that "disparity of knowledge would make an auto mechanic or home-repair contractor the fiduciary of his less knowledgeable customer"). *But see* Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz, 31 F. Supp. 3d 237, 257–61 (D.D.C. 2014) (holding that if an individual obtained an internship with an organization in order to take compromising video of the organization, the individual would owe a fiduciary duty of confidentiality if he "understood himself to be bound by and violating a duty of confidentiality and non-disclosure").

253. *See, e.g.* Smith, *supra* note 5, at 227–28.

254. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 76–84 (AM. LAW INST. 2007) (enumerating and discussing the specific duties owed by a trustee to the beneficiaries of the trust).

beneficiaries' interests, fairness and evenhandedness, and the avoidance of conflicts.[255] Taking into account the many fields where the duty of loyalty applies and the powerful remedies available for its breach, it is no great exaggeration to suggest that clarifying the requirements of fiduciary loyalty ranks among the most important challenges for private law theory today.

The republican theory of fiduciary law offers new tools for addressing this challenge. By grounding fiduciary loyalty in freedom from domination, the republican theory helps to explain and justify the duty of loyalty's traditional requirements of fidelity to instructions and purposes, affirmative devotion to beneficiaries' interests, avoidance of conflicts of interest, and fair and evenhanded treatment of beneficiaries.[256] The republican theory thus supports the conventional American view that the duty of loyalty has both proscriptive and prescriptive dimensions,[257] and it calls into question recent efforts to dismantle the categorical no-conflict and no-profit rules in favor of flexible presumptions and standards that reflect the normative commitments of classical liberalism.

1. Fidelity to Instructions and Purposes.—Consider first the suggestion that the duty of loyalty requires a fiduciary to 'be true' to her principal's instructions and purposes.[258] According to the republican theory, a fiduciary may exercise entrusted power only in a manner that is consistent with the instructions and purposes enshrined in her official mandate.[259] To safeguard principals and beneficiaries from domination, the fiduciary must respect instructions and purposes that communicate the principal's avowed and avowal-ready interests.[260] Hence, a fiduciary's acceptance, assertion, or exercise of entrusted power over another's legal or practical interests automatically triggers a legal requirement to be true to the terms of the trust reposed.

The republican theory rejects the popular view that the duty of loyalty does not apply in the absence of discretion.[261] Under the republican theory,

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255. Andrew S. Gold, *The Loyalties of Fiduciary Law*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 6, at 176, 178–83.

256. As Lionel Smith has explained, the "duty of loyalty" is best understood as a legal *requirement* that applies to the exercise of fiduciary power—rather than, strictly speaking, a legal *duty*. Smith, *supra* note 124, at 142.

257. In contrast, Australian courts have held that fiduciary duties are exclusively proscriptive. *Pilmer v Duke Grp. Ltd.* (2001) 207 CLR ¶ 74 (Austl.); *Breen v Williams* (1996) 186 CLR 71, 113 (Austl.).

258. Gold, *supra* note 255, at 180–82.

259. *See, e.g.*, US Sprint Commc'ns Co. v. Thompson, Civ. A. No. 91-2089-O, 1992 WL 350233, at *2 (D. Kan. Oct. 2, 1992) (holding that an agent "violated his fiduciary duty to follow explicit instructions" by entering unauthorized transactions).

260. *See* Harding, *supra* note 165, at 93–95 (arguing that the no-conflict rule rests on "the requirements of respect [which] forbid using other people as means to one's own ends").

261. *See, e.g.*, Miller, *supra* note 163, at 72 ("[P]owers are ordinarily considered fiduciary only if they are *discretionary*."); DeMott, *supra* note 209, at 901 ("If the relationship does not confer

a person is a fiduciary if she holds entrusted power over another's legal or practical interests, even if that entrusted power does not involve discretionary judgment.[262] For example, an agent who is given a purely ministerial charge to deposit money in her principal's bank account is entrusted with de jure power to act on her behalf. If the agent instead absconds with the money and invests it for her own profit, she breaches her fiduciary duty of loyalty.[263] The agent is liable not only for breach of contract and conversion of her principal's property but also for breach of the duty of loyalty. Accordingly, a court may order rescission of the agent's transactions, or it may order the agent to hold the purchased investments in constructive trust and disgorge any profits she accrued through her self-dealing pursuant to fiduciary law's no-profit rule.[264] While contract law and property law are capable of redressing the harm caused by the agent's wrongful interference with her principal's choices, only fiduciary law is designed to redress the breach of trust entailed in the fiduciary's opportunistic instrumentalization of her entrusted power.[265] Thus, the duty of loyalty applies regardless of whether a fiduciary exercises discretionary or nondiscretionary power.

2. Affirmative Devotion to Beneficiaries' Interests.—The republican theory also supports a requirement that fiduciaries pursue the best interests of their beneficiaries with affirmative devotion.[266] Fiduciary relationships are distinct from ordinary contractual relationships, as Daniel Markovits has explained, because a contract promisor is required only to 'honor her contract, while a 'fiduciary must take the *initiative* on her beneficiary's behalf" and 'make new sacrifices in the face of unforeseen developments.'[267]

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discretion on the 'fiduciary, then his actions are not subject to the fiduciary constraint."); Weinrib, *supra* note 164, at 4 (asserting that "the fiduciary must have scope for the exercise of discretion"). *But see* Arthur B. Laby, Book Review, 35 L. & PHIL. 123, 130–34 (2016) (reviewing PHILOSOPHICAL FOUNDATIONS, *supra* note 6) (criticizing the "discretionary power" theory of fiduciary relationships).

262. *See* Laby, *supra* note 261, at 132 (arguing that there are "many instances when courts impose fiduciary duties on persons and firms shorn of discretionary power over another,' such as investment advisers, lawyers, and physicians who are acting in an advisory capacity).

263. *See* IT Corp. v. Gen. Am. Life Ins. Co. 107 F.3d 1415, 1421–22 (9th Cir. 1997) (observing that nondiscretionary 'control over assets' is sufficient to trigger fiduciary duties under ERISA); McDermott v. Party City Corp. 11 F. Supp. 2d 612, 627 (E.D. Pa. 1998) (explaining that "an agent who embezzles from his principal may be in breach of the [fiduciary] duty imposed by operation of law").

264. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. b, illustr. 2 (AM. LAW INST. 2011) (observing that such remedies are available in a similar scenario where embezzled funds are used to purchase real property).

265. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 93, 100 (AM. LAW INST. 2007) (defining breach of trust and trustee liability for such a breach).

266. Evan Fox-Decent and I refer to this requirement elsewhere as the principle of "solicitude." *See* CRIDDLE & FOX-DECENT, *supra* note 14, at 98 (describing the principle of solicitude as concern for the other's "legitimate interests").

267. Markovits, *supra* note 6, at 216, 222.

The duty of loyalty thus requires a fiduciary to tailor her actions to advance her beneficiaries' best interests.

A number of courts have asserted that the requirement of affirmative devotion requires alignment between a fiduciary's intentions and her beneficiaries' interests.[268] In *Stone v. Ritter*,[269] for example, the Delaware Supreme Court famously took the position that a corporate 'director cannot act loyally towards the corporation unless she acts in the good faith belief that her actions are in the corporation's best interest.'[270] Fiduciary loyalty therefore demands that a fiduciary exercise entrusted power in a manner that she believes will promote the best interests of her beneficiaries.[271]

Purely as a matter of interpersonal ethics, the logic of *Stone v. Ritter* is unassailable: a fiduciary does not act loyally if she does not believe her actions advance her beneficiaries' best interests. But should affirmative devotion be enshrined as a legal obligation? The republican theory suggests that the answer is 'yes. This conclusion may not seem particularly surprising, given the emphasis that republicans place on the importance of cultivating civic virtue.[272] But the reasons why affirmative devotion is a *legal* requirement require further elaboration.

Under the republican theory, the legal requirement of affirmative devotion is not concerned with elevating a fiduciary's moral rectitude for its own sake, nor is it merely a means for reducing the likelihood of harm to beneficiaries' interests. Fiduciaries are required to give due regard to their beneficiaries' interests because this approach safeguards beneficiaries' freedom from domination.[273] A fiduciary who reserved the right to exercise entrusted power based on reasons unrelated to her mandate and the interests of her beneficiaries would subject the interests of her principal and

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268. *See, e.g.*, Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (explaining that the fiduciary duty of loyalty encompasses an obligation to act in good faith, which requires a fiduciary to act "in the good faith belief that her actions are in the corporation's best interest"); *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006) ("The good faith required of a fiduciary includes not simply the duties of care and loyalty but all actions required by a true faithfulness and devotion to the interests of the [beneficiary].").

269. 911 A.2d at 362.

270. *Id.* at 370 (quoting Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003)).

271. Smith, *supra* note 124, at 148.

272. *See, e.g.*, Besson & Martí, *supra* note 36, at 22–24 (extolling civic virtues such as "respect for and loyalty to the law [and] the republic's institutions, respect for pluralism and for others' preferences and opinions[,]" and the pursuit of "the common good through political participation' as necessary to enable and promote the political participation of an active and motivated citizenry required by republican liberty). *See generally* PHILIP PETTIT, THE ROBUST DEMANDS OF THE GOOD: ETHICS WITH ATTACHMENT, VIRTUE, AND RESPECT (2015) (developing these themes).

273. *See* Evan J. Criddle & Evan Fox-Decent, *Keeping the Promise of Public Fiduciary Theory: A Reply to Leib and Galoob*, 126 YALE L.J. F. 192, 199 (2016) ("[F]iduciary rules and remedies in the United States reflect the republican principle of non-domination.").

beneficiaries to alien control.[274] The republican theory thus supports the Delaware Supreme Court's view that a fiduciary's affirmative devotion to her beneficiaries' best interests is an indispensable requirement of fiduciary loyalty.

Contrary to the views of some fiduciary scholars, however, the duty of loyalty does not require that a fiduciary's motives for action be wholly uncompromised by self-regarding interests.[275] Recall that the purpose of private law, under the republican theory, is to ensure that a private party's legal and practical interests are not subject to another's arbitrary control. The loyalty requirement of affirmative devotion safeguards freedom from domination, in part, by obligating a fiduciary to act in a manner that she reasonably believes in good faith will maximize her beneficiaries' interests. When a fiduciary satisfies this requirement, her solicitude to the interests of her beneficiaries ensures that she does not exercise alien control. From the beneficiaries' perspective, it does not matter whether the fiduciary's primary motivation for acting loyally is a desire for remuneration, fear of legal sanctions, or other self-regarding considerations.[276] As long as the fiduciary exercises her entrusted authority in a manner that she reasonably believes will advance her principal's directives and her beneficiaries' best interests, the principal and beneficiaries cannot complain that they are subject to domination.[277] From the perspective of republican legal theory, therefore,

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274. *See, e.g.*, Miller, *supra* note 2, at 993 (asserting that a breach of fiduciary duty may be conceptualized as a harmful interference with the beneficiary's personal interests).

275. *But see* Lionel Smith, *The Motive, Not the Deed*, *in* RATIONALIZING PROPERTY, EQUITY AND TRUSTS 53, 69 (Joshua Getzler ed., 2003) ("The fiduciary obligation of loyalty requires the fiduciary to act with a particular motive: in general, she must act (or not act) in what she perceives to be the best interests of the person to whom the duty is owed."); Leib & Galoob, *supra* note 17, at 1835–38 (asserting a conscientious- motivation requirement such that "certain ways of conforming to fiduciary duties do not count as living up to fiduciary norms" if not based in the best interests of the principal). Smith, in particular, argues that the no-conflict and no-profit rules are necessary to compensate for courts' inability to surmount the inscrutability of a fiduciary's true motivations. *See* Smith, *supra*, at 74 ("The prophylactic rules are triggered by situations in which it may be especially difficult to know with what motive the fiduciary acted, because the fiduciary is subject to conflicting motivational pressures.").

276. *See* Criddle & Fox-Decent, *supra* note 273, at 203 ("As long as a fiduciary performs her entrusted duties with due regard for her principal's instructions and her beneficiaries' best interests, the law does not care [what] the reasons motivating her actions are. As long as the fiduciary does not assert the prerogative to wield entrusted power in a manner that is indifferent to her beneficiaries' interests, she does not subject her beneficiary to instrumentalization or domination."). This is not to suggest, of course, that a fiduciary's motivations are unimportant from the perspective of republican *ethics*. *See* PETTIT, *supra* note 272, 44–48 (arguing that republican virtues impose robust ethical demands).

277. *See* PETTIT, *supra* note 11, at 212 (quoting John Trenchard's observation that people "are Free, where their Magistrates act by Rules prescribed them by the People: And they are Slaves, where, their magistrates choose their own Rules, and follow their Lust and Humours").

the better view is that fiduciary loyalty is concerned with a fiduciary's actions and intentions, not her motivations.[278]

The requirements of fidelity and affirmative devotion do not apply in equal measure to all fiduciary relationships. As Gold and Miller have observed, some fiduciaries are entrusted with power primarily for the purpose of advancing the interests of designated beneficiaries (e.g. guardianships), while others receive broad purposive mandates that do not specify discrete beneficiaries (e.g., charitable trusts).[279] When fiduciary relationships fall on the latter end of the spectrum, the requirement of fidelity to instructions will predominate over the requirement of affirmative devotion to beneficiaries' best interests in some aspects of a fiduciary's performance. The relative salience of fidelity and affirmative devotion thus depends upon the purpose and design of particular fiduciary relationships.

3. Fairness and Evenhandedness.—The duty of loyalty also emancipates beneficiaries from domination by ensuring that they are treated fairly and evenhandedly in fiduciary relationships involving rivalrous beneficiary claims. For example, when investors commit their resources to a hedge fund, they face not only the threat that the manager might engage in self-dealing but also the possibility that the manager might arbitrarily confer a disproportionate share of the profits on some favored investors to the detriment of others. In such cases, 'the discrete fiduciary duty of loyalty is necessarily transformed into duties of fairness and reasonableness.'[280] This requirement of fair and evenhanded treatment emancipates beneficiaries with rivalrous interests by requiring fiduciaries to exercise entrusted power in a manner that respects the beneficiaries' formal equality.

4. Conflict Avoidance.—The republican theory of fiduciary law also provides a strong counterpoint to classical liberalism's argument for diluting the duty of loyalty's uncompromising no-conflict and no-profit rules. As discussed in Part II, classical liberalism posits that there is nothing inherently immoral about a fiduciary profiting from a conflicted transaction, as long as the transaction also benefits the principal. Accordingly, classical liberalism characterizes the no-conflict and no-profit rules as prophylactic checks

278. *See* Markovits, *supra* note 6, at 220 ("Legal obligations—both contractual and fiduciary—turn on intentions not motivations.").

279. Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 517 (2015).

280. FOX-DECENT, SOVEREIGNTY'S PROMISE, *supra* note 17, at 34–35; *see also* RESTATEMENT (THIRD) OF TRUSTS § 79(1)(a) (AM. LAW INST. 2007) (providing that "the trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust"); P.D. Finn, *The Forgotten 'Trust' The People and the State*, *in* EQUITY: ISSUES AND TRENDS 131, 138 (Malcolm Cope ed., 1995) ("It is uncontroversial fiduciary law that where a fiduciary serves classes of beneficiaries possessing different rights, the fiduciary is required to act *fairly* as between different classes of beneficiary in taking decisions which affect the rights and interests of the classes *inter se*.").

against opportunism: by prohibiting all self-interested transactions and profit taking without a principal's consent—regardless of a fiduciary's intent or whether the beneficiary has been harmed—fiduciary law eliminates a fiduciary's incentives to abuse her position and lowers the principal's monitoring and bonding costs. Experts have argued that these rules also correct for information asymmetries by preventing a fiduciary from exploiting the fact that she 'controls all evidence of the relationship and can easily conceal wrongdoing from the vulnerable party or the court.'[281] Yet, as Langbein has argued, in theory these concerns can all be addressed in a less onerous way: by placing the burden squarely on fiduciaries to demonstrate that unauthorized conflicted transactions maximized beneficiaries' profits (or minimized losses) relative to other available opportunities.[282]

The republican theory of fiduciary law flatly rejects this reasoning. According to the republican theory, an agent, trustee, or corporate director has no legal authority to use fiduciary power in the service of her own ends and, accordingly, may not retain any profits that result from transactions associated with the fiduciary office.[283] The other-regarding character of the fiduciary office requires a fiduciary to reserve any surplus generated by conflicted transactions for the benefit of her principal.[284] A fiduciary's withholding of this surplus to any degree constitutes a betrayal of trust that is inimical to the other-regarding character of the fiduciary relationship. This abuse of trust is wrongful even if it does not harm the beneficiaries' material interests.[285] Accordingly, a party who holds fiduciary power may not use that power to advance her own self-interest unilaterally (i.e., without informed consent), *even if such action indisputably promotes her beneficiaries' interests*.

Significantly, if a fiduciary truly believes that a conflicted transaction will best promote her beneficiaries' interests, the no-conflict and no-profit

281. Getzler, *supra* note 83, at 586.

282. Langbein, *supra* note 77, at 981.

283. *See* ERNEST VINTER, A TREATISE ON THE HISTORY AND LAW OF FIDUCIARY RELATIONSHIP AND RESULTING TRUSTS 11 (3d ed. 1955) (reviewing the history of the no-conflict and no-profit rules of fiduciary duty). The no-conflict and no-profit rules do not, however, preclude a fiduciary from receiving reasonable fees for services rendered pursuant to contract or with judicial approval.

284. *See* Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 563 (2006) ("A fiduciary who wrongfully makes a personal gain through the use of his position, or of property or information that he holds through his position, must disgorge that gain to his beneficiary even if the beneficiary has suffered no loss from the wrong.").

285. For a helpful discussion of the distinction between wrongs and harms, see ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 30–56 (2009).

rules do not actually preclude the transaction from taking place;[286] the fiduciary need only take whatever steps are necessary to prevent the potential conflict from introducing domination. The fiduciary may disclose the potential conflict and obtain beneficiaries' advance consent to the transaction's terms, thereby authorizing her to withhold profits acquired in a personal capacity through the transaction.[287] Or she may voluntarily relinquish all profits accrued in her personal capacity in order to satisfy her fiduciary obligation to reserve all surplus generated by the transaction for her beneficiaries.[288] Either choice would eliminate the conflict of interest, defuse the fiduciary's capacity for alien control, and thereby satisfy the fiduciary duty of loyalty. There is no inherent conflict, therefore, between a fiduciary acting in her beneficiaries' 'sole interest' while also advancing their 'best interests.

The republican theory thus opposes classical liberalism's call to scale back or eliminate fiduciary law's traditional no-conflict and no-profit rules. In particular, it shows how Delaware's 'entire fairness' test, which permits corporate directors to engage in self-interested transactions without informed consent, subjects corporations (and thereby, indirectly, their shareholders) to domination.[289] It also explains why recent efforts to scale back the duty of loyalty in agency and trust law should be resisted in the interest of safeguarding liberty.

5. The Mandatory Core.—Although this Article cannot address every aspect of the duty of loyalty, one final contribution of the republican theory merits brief consideration: the theory's novel justification for fiduciary law's 'mandatory core.'[290] Some scholars of law and economics have argued that all fiduciary duties are contractual default rules and therefore should be freely waivable with beneficiaries' informed consent.[291] Others have asserted,

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286. *See* RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c (AM. LAW INST. 2007) (explaining the specific exemptions to the no-conflict rule, including transactions allowed by consent of all beneficiaries).

287. *See* RESTATEMENT (THIRD) OF AGENCY § 8.06(1) (AM. LAW INST. 2006) (providing that an agent may obtain a material benefit arising out of her position when she obtains her principal's consent).

288. *Id.* § 8.02 cmt. e (describing available remedies when an agent obtains a material benefit arising out of her position without having secured her principal's consent).

289. *Compare* DEL. CODE ANN. tit. 8, § 144(a)(3) (2016) (explaining the "entire fairness" test, where a corporate director may engage in conflicted transactions without informed consent of beneficiaries), *with* PETTIT, *supra* note 11, at 31–41 (discussing the republican tradition and its association with nondomination).

290. Sitkoff, *supra* note 22, at 1046.

291. *See, e.g.*, Butler & Ribstein, *supra* note 26, at 71–72 (arguing for a new concept of the corporation that recognizes the power of private ordering, market forces, and "private controls on managerial conduct," while deemphasizing the role of fiduciary duties); Easterbrook & Fischel, *supra* note 7, at 427, 431–32 (theorizing that "a 'fiduciary' relation is a contractual one" and that courts "setting out to protect principals from their agents *must* use the hypothetical contract

however, that economic theory can support treating some loyalty requirements as mandatory rules.[292] In arguably the most sophisticated economic defense of mandatory rules, Robert Sitkoff asserts that the duty of loyalty's 'mandatory core' serves two functions: (1) it 'insulates fiduciary obligations that the law assumes would not be bargained away by a fully informed, sophisticated principal';[293] and (2) it provides 'clean lines of demarcation across types of legal relationships, among other things to minimize third-party information costs.'[294] Viewed from this perspective, classical liberalism can support mandatory rules as autonomy-reinforcing safeguards that address the risks of harm that arise in fiduciary relationships.

The republican theory offers a different justification for fiduciary law's mandatory core. Although republicanism generally supports allowing principals to structure fiduciary relationships in ways that deviate from fiduciary law's baseline rules, this concession to individual choice has a nonnegotiable limit: Fiduciary relationships may not be structured in a manner that subjects beneficiaries' legal or practical interests to a fiduciary's unfettered alien control.

This bedrock nondomination principle explains and justifies the current features of fiduciary law's mandatory core. It supports the rule that a principal may not authorize a fiduciary to act in bad faith or otherwise violate the terms or purposes of the fiduciary relationship.[295] Nor may beneficiaries waive the fiduciary duty to provide information relevant to informed consent.[296] The nondomination principle also reinforces courts' common practice of construing waivers of fiduciary duties narrowly to ensure that consent is fully informed.[297] These features of contemporary fiduciary law

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approach" to determine whether fiduciary duties apply); Langbein, *supra* note 7, at 658 (observing that fiduciary duties are prevailingly, if not obviously, contractarian; "[c]ontract is there, but not always at first glance"); Sitkoff, *supra* note 22, at 1046 ("[V]arious fiduciary duties are for the most part *default rules* that apply unless the parties have agreed otherwise.").

292. *See, e.g.*, Sitkoff, *supra* note 22, at 1046 (theorizing "*mandatory rules*" of the "fiduciary obligation that cannot be overridden by agreement").

293. Sitkoff, *supra* note 108, at 205.

294. *Id.*; *see also* Coffee, *supra* note 112, at 1624 ("[T]hird-party effects justify a certain minimum level of judicial paternalism ").

295. *See* Sample v. Morgan, 914 A.2d 647, 663–64 (Del. Ch. 2007) (holding that stockholder ratification is not a "blank check" for conflicted transactions that cannot plausibly be interpreted as advancing the corporation's best interests); RESTATEMENT (THIRD) OF TRUSTS § 96(1)(a) (AM. LAW INST. 2007) (providing that an exculpation clause is unenforceable if it purports to relieve a trustee "of liability for a breach of trust committed in bad faith or with indifference to the fiduciary duties of the trustee, the terms or purposes of the trust, or the interests of the beneficiaries").

296. *See, e.g.*, *Sample*, 914 A.2d at 664–67 (holding that director ratification cannot preclude a claim for breach of fiduciary duty if the directors failed to disclose material facts).

297. *See* Deborah A. DeMott, *Defining Agency and its Scope (II)*, *in* COMPARATIVE CONTRACT LAW: BRITISH AND AMERICAN PERSPECTIVES 396, 398 (Larry A. DiMatteo & Martin Hogg eds. 2016) ("[A] principal's consent to conduct that would otherwise breach a fiduciary duty requires

are necessary to prevent principals and beneficiaries from placing their legal and practical interests under fiduciaries' 'uncontrolled discretion.'[298] Just as courts will not enforce contracts in which one person consents to become another's slave or involuntary servant,[299] principals and beneficiaries may not contract to subject their legal or practical interests to a fiduciary's alien control through general waivers of fiduciary duties.

D. Understanding Fiduciary Remedies

Another important contribution of the republican theory is the link it forges between the formal legal character of fiduciary power and the remedies that courts have traditionally offered to address breaches of the duty of loyalty. Fiduciary theorists who embrace classical liberalism tend to characterize traditional fiduciary remedies, such as constructive trust and disgorgement, as supracompensatory measures that deter opportunism.[300] In contrast, the republican theory suggests that these remedies are appropriate to support the principle that a fiduciary is legally incapable of holding or exercising fiduciary power except in trust for her principal and beneficiaries.[301]

The republican theory's account of fiduciary remedies closely tracks Paul Miller's juridical theory of fiduciary remedies.[302] In a series of path-breaking publications, Miller has argued that the distinctive feature of fiduciary relationships is that a fiduciary 'stands in substitution for the beneficiary or a benefactor in exercising a legal capacity that is ordinarily derived from the beneficiary or benefactor's legal personality.'[303] Because in Miller's view the legal rights exercised by a fiduciary are vested in the

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specificity."); Miller, *supra* note 2, at 1006 (observing that "broad waivers or contractual clauses purporting to completely exclude fiduciary liability are usually read down or held void").

298. *In re* Will of Allister, 545 N.Y.S.2d 483, 486 (N.Y. Sup. Ct. 1989).

299. *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime shall exist within the United States, or any place subject to their jurisdiction.").

300. *See, e.g.*, Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1115–16 (1988) (discussing how stricter fiduciary rules help "deter conduct by the fiduciary that is inconsistent with the welfare of the beneficiaries"); Smith, *supra* note 64, at 1404 ("[F]iduciary law can be justified on the grounds that it deters opportunistic behavior."); *cf.* James J. Edelman, *Unjust Enrichment, Restitution, and Wrongs*, 79 TEXAS L. REV. 1869, 1876 (2001) (asserting that courts apply "disgorgement damages" to fiduciary relationships because "there is a profound need for deterrence not fulfilled by compensatory damages").

301. *See, e.g.*, SHEPHERD, *supra* note 165, at 93 ("The essence of this theory of fiduciary relationships is that powers are a species of property, which can be beneficially owned by one person while being exercised by another person, who may be referred to as the legal owner of the power.").

302. *See* Miller, *supra* note 163, at 69 (defining '[a] fiduciary relationship [as] one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary)").

303. *Id.* at 70–71.

principal or beneficiary rather than the fiduciary, '[t]he fiduciary may not treat fiduciary power as an unclaimed means or as a personal means.'[304] Instead, the fiduciary must treat her beneficiary always as the exclusive beneficiary of her exercise of entrusted power. Miller argues that disgorgement is an appropriate remedy for fiduciary disloyalty, because within a fiduciary relationship '[n]o one is entitled to gain from the execution of a fiduciary mandate save the beneficiary; to the extent that there are such gains, they belong to the beneficiary.'[305] In Miller's view, therefore, the no-profit rule reflects the simple principle that a beneficiary is entitled to enjoy the full benefits of the exercise of her own legal powers.[306]

The republican theory refines Miller's juridical account of fiduciary remedies by elucidating its implicit normative underpinnings. Consistent with Miller's account, fiduciary remedies affirm that fiduciaries may not dominate their beneficiaries by treating entrusted fiduciary power as an instrument for advancing their own interests without beneficiaries' consent.[307] Giving beneficiaries the option to seek rescission of unauthorized conflicted transactions promotes freedom from domination by affirming that fiduciaries lack the legal capacity to use fiduciary power for their own benefit unilaterally. If beneficiaries conclude that an unauthorized conflicted transaction was, in fact, the best option for maximizing their own profits (or minimizing losses), they may elect to leave the transaction intact and compel the fiduciary to hold, and ultimately disgorge, any profits generated by the transaction.[308] Constructive trust and disgorgement thus prevent the fiduciary from dictating unilaterally the terms under which profits generated by a conflicted transaction will be divided between herself and her beneficiaries. Collectively, these traditional fiduciary remedies prevent a fiduciary from wielding alien control over her beneficiaries' legal and practical interests.

The republican theory clarifies why disgorgement is justified in settings where fiduciary disloyalty produces gains that principals and beneficiaries would not be entitled to generate for themselves. Consider the case of a fiduciary who accepts bribes from a third party. Courts routinely hold that public officials who accept bribes violate their duty of loyalty and must relinquish bribes to their government employers.[309] Disgorgement of bribes

304. Miller, *supra* note 2, at 1021.

305. Paul B. Miller, *Justifying Fiduciary Remedies*, 63 U. TORONTO L.J. 570, 616 (2013).

306. *Id.* at 616–17.

307. *See, e.g.*, *id.* at 585 (noting that a fiduciary is subject to fiduciary liability when the fiduciary allows his own interests or those of a third party to "actually or potentially conflict with the interests of the beneficiary").

308. *See* MEAGHER ET AL., *supra* note 79, at 186.

309. *See, e.g.*, United States v. Carter, 217 U.S. 286, 306 (1909) (requiring an agent to account to his principal for any benefit received in "violation of his duty"); United States v. Drumm, 329

exposes a tension within Miller's juridical account of fiduciary law because a public official cannot be understood in any meaningful sense to have been entrusted with authority to collect bribes.[310] Moreover, as Deborah DeMott has observed, even if the concept of entrusted power

> is defined more broadly, perhaps as the power to deal with third parties on the principal's behalf, the facts that the power was used for an illegal end, and thus that the principal could not itself directly use the power to the same end, make it hard to explain why the proceeds of the transaction belong to the principal.[311]

Federal courts wrestled with this question during the late 1980s, when they were asked to decide whether bribery constituted a form of fraud under the federal mail fraud statute.[312] In *McNally v. United States*,[313] the Supreme Court reversed the conviction of a Kentucky state official who had participated in a self-dealing patronage scheme because the jury in the case had not been asked to decide whether the official had defrauded the state of any money or property.[314] The Court based its decision, in part, on the idea that the state lacked an ownership interest in kickbacks from government contractors.[315] Justice Stevens conceded this point in his dissent, but he argued that the defendant, as a state official, was duty bound to deliver anything he received 'as a result of his violation of a duty of loyalty to the principal.'[316] He therefore asserted that '[t]his duty may fulfill the Court's 'money or property' requirement in most kickback schemes.'[317] Following *McNally*, however, lower federal courts overwhelmingly rejected Justice

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F.2d 109, 113 (1st Cir. 1964) (holding an agent accountable for "all profits in excess of his lawful compensation"); United States v. Project on Gov't Oversight, 572 F. Supp. 2d 73, 75–77 (D.D.C. 2008) (noting that an agent with two "paymasters" necessarily creates a conflict of interest and that failing to disclose and seek approval for the additional payment constituted a breach of fiduciary duty warranting disgorgement); Jersey City v. Hague, 115 A.2d 8, 11–15 (N.J. 1955) (allowing the recovery of money taken wrongfully from the principal by the agent through restitution, thus preventing the "unfaithful public official' from wrongfully profiting).

310. *Compare* Miller, *supra* note 163, at 70–71 (suggesting that fiduciary power derives from a beneficiary's legal capacities), *with* Miller, *supra* note 305, at 600 (asserting that disgorgement of bribes can be justified based on a beneficiary's "quasi-proprietary" right to fiduciary loyalty itself).

311. DeMott, *supra* note 209, at 912–13.

312. 18 U.S.C. § 1341 (2012); *see also id.* § 1346 (defining "scheme or artifice to defraud' as including a 'scheme or artifice to deprive another of the intangible right of honest services").

313. 483 U.S. 350 (1987).

314. *Id.* at 360–61.

315. *Id.* at 351, 360.

316. *Id.* at 365–66, 377 n.10 (Stevens, J. dissenting) (quoting RESTATEMENT (SECOND) OF AGENCY § 403 (AM. LAW INST. 1958)).

317. *Id.* Justice O'Connor joined all of Justice Stevens's dissent except the concluding section that contained this proposal. *Id.* at 362.

Stevens's duty-based theory.[318] Following Judge Posner's lead,[319] several circuits reasoned that disgorgement of bribes might be justified under fiduciary law as a deterrence measure, but they flatly rejected the idea that this remedy could be based on a governmental property interest in bribes.[320]

The republican theory developed in this Article offers a different justification for fiduciary law's disgorgement remedy and, in so doing, clarifies why the government is entitled to demand disgorgement of bribes as a civil remedy for breach of fiduciary duty. Consistent with Miller's juridical theory, the republican theory takes disgorgement on its own terms as a remedy for wrongful withholding of property rather than as a prophylactic or compensatory measure. The republican theory avoids the implausible suggestion that the government has a property right in bribes. Instead, the disgorgement remedy tracks the other-regarding character of the fiduciary office itself: when acting within the scope of her office, a fiduciary is legally incapable of accepting assets except in trust for her beneficiaries.[321] As the Supreme Court has explained in another landmark corruption case, *United States v. Carter*,[322] disgorgement 'results not from the subject-matter but from the fiduciary character of the one against whom it is applied.'[323] Hence, disgorgement is not dependent upon a finding that the government would be entitled to receive bribery payments in the absence of a public official's disloyalty, nor is it contingent upon a finding or presumption that the

318. *See, e.g.*, United States v. Walgren, 885 F.2d 1417, 1422–24 (9th Cir. 1989) (rejecting the "duty of loyalty" theory that would make a government employee guilty of mail fraud against his employer for accepting bribes); United States v. Shelton, 848 F.2d 1485, 1491–92 (10th Cir. 1988) (en banc) (holding that the constructive trust theory is not sufficient to sustain a mail fraud conviction for lost intangible rights); United States v. Ochs, 842 F.2d 515, 525–27 (1st Cir. 1988) (noting that the Supreme Court effectively rejected Justice Stevens's argument in *McNally* and that the courts may not "recharacterize every breach of fiduciary duty as a financial harm"); United States v. Holzer, 840 F.2d 1343, 1346–48 (7th Cir. 1988) (finding that the placement of bribe money into a constructive trust does not make it government property for the purpose of a mail fraud conviction). *But see* United States v. Runnels, 833 F.2d 1183, 1186–88 (6th Cir. 1987) (holding that bribes are "a benefit which properly belongs to the [state], which is the principal, rather than the official, officer, or employee, who is merely a fiduciary-agent"), *rev'd and vacated en banc*, 877 F.2d 481 (6th Cir. 1989).

319. *See Holzer*, 840 F.2d at 1348 (Posner, J.) ("A constructive trust is imposed on the bribes not because [a public servant] failed to account for money received on the state's account but in order to deter bribery by depriving the bribed official of the benefit of the bribes.").

320. *Walgren*, 885 F.2d at 1422–24; *Shelton*, 848 F.2d at 1491–92.

321. *See* RESTATEMENT (SECOND) OF AGENCY § 403 (AM. LAW INST. 1958) ("If an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal."); RESTATEMENT (FIRST) OF RESTITUTION § 197 (AM. LAW INST. 1937) ("Where a fiduciary in violation of his duty to the beneficiary receives or retains a bonus or commission or other profit, he holds what he receives upon a constructive trust for the beneficiary.").

322. 217 U.S. 286 (1910).

323. *Id.* at 306.

government suffered financial or other material harm from the bribery.[324] Under the republican theory, the fact that a public official's entrusted position of authority enables him to obtain bribes is enough to trigger the requirement that he hold the assets in trust and relinquish them to his employer for the public's benefit. The violation of this requirement wrongs a fiduciary's beneficiaries by betraying the other-regarding terms of the fiduciary's entrusted power, irrespective of whether beneficiaries suffer material harm.[325] Disgorgement in this context thus affirms the fiduciary character of public offices by ensuring that "[t]he citizen is not at the mercy of his servants holding positions of public trust."[326]

E. The Divergence of Fiduciary Conduct and Decision Rules

The republican theory also helps to explain the deferential standards of review that courts have applied across many fields of fiduciary law. Although courts often assert that fiduciaries must pursue their principals' objectives with "utmost good faith," observing "the highest standards of honor and honesty,"[327] they rarely find a breach of fiduciary duty absent evidence of egregious abuse. Perhaps the best known example of this phenomenon is corporate law's "business judgment rule," which requires courts to accept business decisions that disinterested directors have made deliberatively and in good faith—even if those decisions ultimately harmed the interests of the corporation or its stockholders.[328] Corporate law is hardly unique, however, in its deferential approach to fiduciary decision making. Courts also apply a healthy measure of deference to fiduciaries' discretionary

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324. *See* Hawaiian Int'l Fins. Inc. v. Pablo, 488 P.2d 1172, 1175 (Haw. 1971) (stating that the rule against a fiduciary retaining a bonus, commission, or other profit from third parties "is applicable although the profit received by the fiduciary is not at the expense of the beneficiary" (quoting RESTATEMENT (FIRST) OF RESTITUTION § 197 cmt. c (AM. LAW INST. 1937)).

325. *See* Bos. Deep Sea Fishing & Ice Co. v. Ansell [1888] 39 Ch. D. 339 at 357 (Eng. & Wales) (Cotton, L.J.) (concluding that "where an agent without the knowledge or assent of [the] principal, receives money from the person with whom he is dealing, he is doing a wrongful act" and must relinquish the money to the principal).

326. Driscoll v. Burlington-Bristol Bridge Co. 86 A.2d 201, 222 (N.J. 1952).

327. Grossberg v. Haffenberg, 11 N.E.2d 359, 360 (Ill. 1937); *see also* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (defining a director's duty of loyalty as an "unyielding fiduciary duty to [pursue the purposes and interests of] the corporation and its shareholders"), *overruled on other grounds*, Gantler v. Stephens, 965 A.2d 695 (Del. 2009); Guth v. Loft, Inc. 5 A.2d 503, 510 (Del. 1939) (describing the duty of loyalty as a "rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, affirmatively to protect the interests of the corporation").

328. *See* D. Gordon Smith, *The Modern Business Judgment Rule*, *in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 83, 83 (Claire A. Hill & Steven Davidoff Solomon eds. 2016) (describing the traditional business judgment rule as a mechanism to shield corporate directors from liability for "honest mistakes" when the directors made the decision in a careful, loyal, and good-faith manner).

judgments in other contexts, including trust law[329] and bankruptcy law.[330] These deferential standards of review have produced a stark divergence between the legal 'conduct rules' that formally regulate fiduciary performance (e.g., diligence, affirmative devotion) and the deferential 'decision rules' that govern judicial review in some contexts (e.g., negligence, intentional malfeasance).[331]

The republican theory lends support for the idea that a fiduciary's 'duty of the finest loyalty' is a genuine legal obligation rooted in the fiduciary relationship itself, and not merely an aspirational moral or social norm.[332] The strict conduct rules that flow from this general obligation (e.g., fidelity to instructions, affirmative devotion to beneficiaries, and fairness and evenhandedness) safeguard liberty by ensuring that a fiduciary lacks the formal legal capacity to use entrusted power as a form of alien control over the legal or practical interests of her beneficiaries. These conduct rules pervasively regulate fiduciary power, constituting fiduciary relationships juridically in a manner that formally rules out domination.

At the same time, the republican theory is sensitive to the fact that formal conduct rules are not sufficient to secure freedom from domination in practice. Recall that for republicans, liberty is constituted not only by liberty-affirming conduct rules but also by effective legal and political institutions. The republican theory's success depends in no small part, therefore, on courts implementing fiduciary law in a manner that promotes liberty.

The challenge for republicans is that judges, like other fiduciaries, have the practical capacity to exercise arbitrary power.[333] To guard against the threat of judicial domination, courts must calibrate fiduciary law's decision rules to prevent judicial oversight from increasing overall net domination in

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329. *E.g.*, Crabb v. Young, 92 N.Y. 56, 66 (N.Y. 1883) ("[W]hile trustees are held to great strictness in their dealings with the interests of their beneficiaries, the court will regard them leniently when it appears they have acted in good faith, and if no improper motive can be attributed to them, the court have even excused an apparent breach of trust, unless the negligence is very gross.").

330. *See, e.g.*, *In re* Healthco Int'l, Inc., 136 F.3d 45, 50 n.5 (1st Cir. 1998) ("[The] judge is not to substitute her judgment for that of the [bankruptcy] trustee, and the trustee's judgment is to be accorded some deference." (quoting *In re* Moorhead Corp. 208 B.R. 87, 90 (B.A.P. 1st Cir. 1997))).

331. *See, e.g.*, Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 437–38 (1993) (commenting on the variance between "standards of conduct" that set forth how to perform an activity and "standards of review" that govern the associated litigation in corporate law); Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. 519, 521–22 (2012) ("Courts often opine on the relatively demanding standard of conduct, but their judgments must be based on the more forgiving standard of review.").

332. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

333. *See* Getzler, *supra* note 83, at 598 (noting Peter Birks's concern that moralistic formulations of fiduciary loyalty may "descend into a formless anarchy of opinion, serving as 'a prelude to power-mongering and tyranny").

fiduciary relationships.[334] Yasmin Dawood refers to this approach to judicial oversight as the 'antidomination model' of judicial review.[335]

Under the republican theory's antidomination model and consistent with prevailing practice, judicial deference to fiduciary judgments turns on two considerations. First, courts should respect the fact that in a variety of contexts the law entrusts fiduciaries with discretionary authority to decide what particular measures will best advance their principals' purposes and their beneficiaries' interests.[336] Second, courts should take into account that they are poorly equipped to evaluate whether some fiduciary decisions satisfy the duty of loyalty. How much judicial deference is appropriate in a particular context depends upon the interplay between these two considerations.

Whenever a fiduciary exercises entrusted discretionary power, the republican theory supports highly deferential decision rules. For example, courts wisely apply a strong form of deference when they review guardians' discretionary judgments regarding the interests of their wards.[337] The law entrusts guardians with sweeping responsibility to ascertain and develop strategies to advance the best interests of their beneficiaries.[338] By virtue of their regular contact with their wards, guardians are typically in a better position than judges to discern what measures will maximize their wards' idiosyncratic preferences.[339] Corporate law's business judgment rule reflects similar concerns. Courts defer to corporate directors' discretionary business decisions because directors are primarily responsible to decide what measures will best advance their corporation's purposes, and courts usually lack the information and expertise necessary to second-guess those decisions.[340] Were courts to conduct de novo review of such decisions, they

334. *See* Dawood, *supra* note 50, at 1418 (arguing that the purpose of judicial intervention is "to prevent the *most* dominating action with judicial intervention that is the *least* dominating").

335. *Id.*

336. *See, e.g.*, UNIF. POWER OF ATT'Y ACT § 114(d) (UNIF. LAW COMM'N 2006) (providing that, as long as the fiduciary acts in the best interests of the principal, the fiduciary is not subject to liability).

337. *See, e.g.*, J.A. *ex rel.* Atkins v. Ja-Ru, Inc., No. 08 Civ. 3640 (DAB)(KNF), 2011 WL 990167, at *2 (S.D.N.Y. Mar. 15, 2011) ("A court's role in reviewing a proposed infant compromise is to ensure the settlement is 'fair and reasonable and in the infant plaintiff's best interests. (quoting Edionwe v. Hussain, 777 N.Y.S.2d 520, 522 (N.Y. App. Div. 1996))).

338. *See, e.g.*, Stahl v. Rhee, 643 N.Y.S.2d 148, 153 (N.Y. App. Div. 1996) ("In a case where reasonable minds may legitimately differ, the judgment of the infant's natural guardian should prevail.").

339. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 602 (1979) (explaining that the law has historically recognized that "natural bonds of affection" result in parents acting in their children's best interests); *Atkins*, 2011 WL 990167, at *3 (giving 'significant [judicial] deference' to the infant-plaintiff's mother regarding what settlement proposal was in the best interests of her son).

340. *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (observing that "[t]he business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors").

would substitute more dominating judicial review for less dominating fiduciary decision making. Accordingly, courts may safeguard liberty most effectively in these contexts by giving fiduciaries a wide berth and interceding only when beneficiaries present clear and convincing evidence of abuse or neglect.[341]

What if a decision has not been entrusted to a fiduciary's discretionary judgment, but the fiduciary possesses expertise that is relevant to the inquiry and superior to that of the court? Consider, for example, the case of a corporate director who is accused of failing to pursue her corporation's best interests in good faith.[342] Courts are usually poorly equipped to second-guess a corporate director's testimony that she actually believed in good faith that her actions would advance the corporation's best interests.[343] In such cases, the republican theory counsels that courts should offset their own capacity for arbitrary interference by according respectful consideration to a fiduciary's judgments. But courts should not retreat too far. At a minimum, they should require a corporate director to demonstrate that her decision-making process was not unreasoned, uninformed, patently irrational, or intentionally or recklessly indifferent to the corporation's interests. As the Delaware Supreme Court has explained, '[t]he presumptive validity of a business judgment is rebutted in those rare cases where the decision under attack is 'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith. '[344] By placing the burden on a fiduciary to articulate a nonarbitrary rationale for her decisions, courts can protect beneficiaries from being dominated by their fiduciaries while simultaneously minimizing their own capacity to exert alien control over the fiduciary relationship.

Conversely, when neither of the two considerations favoring deference applies, courts should not hesitate to enforce fiduciary law's 'unbending and inveterate' conduct rules without according any special deference to the fiduciary.[345] De novo review is the appropriate standard, therefore, when evaluating whether a trustee or corporate director has engaged in fraud or

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341. *See, e.g.*, *In re* Beidel Estate, 13 Pa. D. & C.2d 29, 31 (Pa. Orphans' Ct. 1958) ("It is the task of the guardian in the performance of its duties to determine whether a proposed expenditure is necessary for the care, maintenance or education of the minor. The Court should not be asked to perform the guardian's function.").

342. *See, e.g.*, *In re* Walt Disney Co. Derivative Litig. 906 A.2d 27, 66–67 (Del. 2006) ("A failure to act in good faith may be shown where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation ' (quoting with approval *In re* Walt Disney Co. Derivative Litig. 907 A.2d 693, 755 (Del. Ch. 2005))).

343. *See, e.g.*, *In re* PSE & G S'holders Litig. 801 A.2d 295, 315 (N.J. 2002) (accepting board member testimony denying any negligence in the absence of contradictory evidence).

344. Parnes v. Bally Entm't Corp. 722 A.2d 1243, 1246 (Del. 1999) (quoting *In re* J.P. Stevens & Co. Inc. S'holders Litig. 542 A.2d 770, 780–81 (Del. Ch. 1988)).

345. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

self-dealing in violation of their duty of loyalty.[346] Such matters are not entrusted to a fiduciary's discretionary judgment, and judges are better qualified to resolve them in a nonarbitrary manner. Hence, de novo review of these issues is the best approach for minimizing overall net domination.

Determining the optimal degree of separation between fiduciary law's conduct and decision rules is obviously a very complex, context-sensitive challenge that this Article cannot fully work out in the limited space that remains.[347] For present purposes, the critical point to appreciate is simply that the republican theory offers resources for tackling this problem. In particular, it underscores that judicial standards of review must account for the comparative threats that fiduciary power and judicial power pose to freedom from domination. Although the republican theory affirms that fiduciary law's uncompromising conduct rules are genuine legal obligations, it supports deferential decision rules in many settings to ensure that judicial review does not increase overall, net domination in the fiduciary relationship. The republican theory thus clarifies how legislatures and courts should design judicial standards of review to maximize freedom from domination.

Conclusion

Fiduciary law is predicated on the idea that '[n]o man can serve two masters' 'the same person cannot act for himself, and at the same time, with respect to the same matter, as agent for another, whose interest might be in conflict with his' nor can he be allowed to profit by his own wrong, even if such be only constructive wrong.'[348] For nearly three centuries, jurists throughout the common law world have tried to justify this fundamental precept based on classical liberalism's vision of freedom as noninterference, arguing that fiduciary law serves a prophylactic function, deterring fiduciary self-dealing and redressing the material harm caused by fiduciary opportunism. Yet, as scholars who operate within this tradition have begun to recognize, classical liberalism does not offer a particularly compelling justification for preventing a fiduciary from serving two masters—her beneficiaries and herself—in transactions where both sides demonstrably

346. *See, e.g.*, Scrushy v. Tucker, 70 So. 3d 289, 312–13 (Ala. 2011) (holding that Delaware's business judgment rule does not apply to fraud or other illegal activity).

347. I take up this challenge in a forthcoming essay. *See* Evan J. Criddle, *Fiduciary Law's Mixed Messages*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW (Andrew S. Gold & D. Gordon Smith eds. forthcoming 2018).

348. City of Minneapolis v. Canterbury, 142 N.W. 812, 814 (Minn. 1913) (quoting Stone v. Bevans, 92 N.W. 520, 520 (Minn. 1902)); *see also* Pepper v. Litton, 308 U.S. 295, 311 (1939) (stressing that a director "cannot by the intervention of a corporate entity violate the ancient precept against serving two masters").

stand to profit.[349] Nor can classical liberalism credibly explain why constructive trust and disgorgement are appropriate remedies for fiduciary disloyalty. Viewed purely from the perspective of classical liberalism, therefore, it is tempting to dismiss fiduciary law's signature features as outdated relics of equity's *Bleak House* era.[350]

This Article has explained why the classical liberal critique of traditional fiduciary duties and remedies is unpersuasive. Fiduciary law's unique structure reflects a republican commitment to freedom from domination. Fiduciaries are not entitled to serve two masters—their beneficiaries and themselves—because fiduciary power would compromise beneficiaries' liberty if it were not exercised for their exclusive benefit. When fiduciaries engage in conflicted transactions without their beneficiaries' informed consent, they may or may not *harm* their beneficiaries' material interests, but they always *wrong* their beneficiaries by treating their office as an instrument for advancing their own unilateral interests in breach of the trust reposed in them. The traditional fiduciary remedies of rescission, constructive trust, and disgorgement are perfectly suited to rectify this kind of wrong and thereby eliminate the domination that would otherwise plague fiduciary relationships. Fiduciary law thus safeguards liberty in relationships of trust and confidence by empowering private parties and emancipating them from domination.

349. *See* Langbein, *supra* note 77, at 934–35 (disputing Bogert's assertion that '[i]t is *not possible* for any person to act fairly in the same transaction on behalf of himself and in the interest of the trust beneficiary").

350. *See supra* note 128–30 and accompanying text.

Book Reviews

How I Learned to Stop Worrying and Love Nudges

THE ETHICS OF INFLUENCE: GOVERNMENT IN THE AGE OF BEHAVIORAL SCIENCE. By Cass R. Sunstein. New York, New York: Cambridge University Press, 2016. 234 Pages. $29.99.

Jeffrey J. Rachlinski*

Imagine yourself commuting home from work in the near future.[1] As you start your car, an audible recording reminds you that nine fatalities occur every day due to distracted driving,[2] all of which can be avoided by switching off your phone. When you fail to switch off your phone, your car (having had sensors installed to detect the phone, as required by the National Highway Traffic Safety Administration) reminds you that texting and driving causes 341,000 accidents each year.[3] Although you are in a hurry, you sigh and switch off your phone before driving off.

Your phone is partly the reason you are in a hurry. It is Election Day, and a social media app encouraged you to make a public commitment to your Facebook friends to vote on the way home from work. Several of your friends have already sent you texts (on the phone you have now switched off) to remind you of this promise. Anyway, President Sunstein is running for a second term, and you support many of the welfare-enhancing initiatives of the last four years—even the annoying reminder in your car. You are also late because you spent time late in the workday at a mandatory meeting with your company's retirement planner. Minor changes to retirement-savings-taxation regulations created an opportunity for you to save an extra few hundred dollars a year in your retirement account, so long as you rearranged your savings plan. Regulations required your employer to meet with all affected employees because email requests to the employees to update their plans induced an inadequate fraction of younger workers to take advantage of the potential savings.

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1. Readers should regard the first seven paragraphs as a hypothetical fiction, based on many of the concepts behind "nudging" as discussed in CASS R. SUNSTEIN, THE ETHICS OF INFLUENCE: GOVERNMENT IN THE AGE OF BEHAVIORAL SCIENCE (2016).

2. Erin Schumaker, *10 Statistics That Capture the Dangers of Texting and Driving*, HUFFINGTON POST (June 8, 2015), http://www.huffingtonpost.com/2015/06/08/dangers-of-texting-and-driving-statistics_n_7537710.html [https://perma.cc/U936-3AES].

3. *Id.*

Being in a hurry you decide that you do not have time to cook, so you stop at a drive-through fast-food restaurant. You order a cheeseburger and fries, even though the menu advises you that the calorie count, salt content, sugar content, and saturated-fat levels of your meal vastly exceed the recommended norms for a healthy life. Indeed, the employee taking your order asks you, as is now required, whether you would not prefer a healthy salad instead of the fries or a chicken burger instead of the cheeseburger. The menu screen also informs you that your meal is reducing your life expectancy by one hour relative to having the salad and chicken.[4] With another sigh, you decide that you might need that extra time and change your order.

No nudging at the voting booth. At one time voters were asked to swipe a credit card and make a donation to the American Red Cross before voting. But people reacted negatively to that, even though they could opt out by signing a statement indicating that they preferred not to donate. So the program was eliminated. Each voter gets a pamphlet on how to vote by mail in the future, however. That program arose when research indicated that Election Days produce an average of twenty-four extra traffic fatalities each year.[5] A proposal to force registered voters to reregister, so as to make them choose whether to vote by mail or in person, failed after preliminary studies suggested that many would simply fail to reregister, thereby suppressing voter turnout. The Federal Election Commission seemed willing to tolerate the excess fatalities to keep voter turnout high. Only new registrants must make such a choice.

You finally get home. You sort through your mail to find two utility bills. The monthly electric bill was at one time paid automatically (you were forced to consider that option when you moved to your apartment), but no more. The electric company discovered that informing their customers each month of the amount of energy consumption reduced overall demand for energy.[6] Your bill shows that your apartment used more energy than 62% of your neighbors in the same building. A yellow frowny face accompanies this statistic. You turn off the hall light behind you and read about the latest electricity-choice program that the electric company insists you must assess. If you do nothing, you will be enrolled in a green energy program that costs 3% more than your current plan, but also reduces carbon emissions. You are

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4. Assuming a six-ounce cheeseburger. *See* Michael Blastland & David Spiegelhalter, *Measuring MicroLives*, SLATE (Sept. 8, 2014), http://www.slate.com/articles/Health_and_science/medical_examiner/2014/09/calculating_life_expectancy_on_the_micro_level_the_impact_of_smoking_red.html [https://perma.cc/GL4N-M5XE] (indicating that one portion or three ounces of red meat reduces life expectancy by one "microlife" or thirty minutes).

5. Donald A. Redelmeier & Robert J. Tibshirani, Research Letter, *Driving Fatalities on US Presidential Election Days*, 300 JAMA 1518, 1518 (2008).

6. *See* P. Wesley Schultz et al., *The Constructive, Destructive, and Reconstructive Power of Social Norms*, 18 PSYCHOL. SCI. 429, 430–33 (2007) (describing a field experiment in which households decreased their energy consumption after receiving feedback about their energy consumption).

tight on money, and consider opting out, but the flyer contains a picture of a drowning polar bear. Feeling bad for the pathetic creature, you put the materials aside and decide to think about it later. Your water bill also tells you that you use more water than 36% of your neighbors. A yellow smiley face accompanies this statistic—better than the median! Cool, you think, showering with your spouse is paying off.

All this nudging has made you thirsty, so you reach for a beer before settling down to watch the election returns. Beer was more fun without the mandated picture of a decayed liver that now accompanies all alcoholic beverages,[7] but you decide it is worth the loss of expected life (thirty minutes, according to the label) to down a cold one. You turn on the TV which advises you that taking a twenty-minute walk before settling in on the couch will increase your expected life. It will do this again in an hour if you keep watching. Frowning, you nevertheless settle in to see if the nation will elect a president who can find more ways to improve your life.

Welcome to the Republic of Nudge. Relative to years past, its citizens are thinner, vote in greater numbers, die less often in traffic accidents, save more for retirement, impose a smaller carbon footprint, and suffer from fewer chronic diseases like cancer and diabetes. They eat their vegetables, pay their bills on time, contribute to charity, and save for tomorrow. They do not smoke, waste energy, or take out payday loans. Are they happy? They have a little less fun, on average, but the unhappiness that arises from serious illness and poverty in old age afflicts fewer of their numbers, so aggregate happiness is higher. Even though the Republic has implemented nudges that address obesity, personal-financial mismanagement, and climate change, its top behavioral scientists are, as yet, unable to keep its citizens from engaging in some of life's biggest mistakes. Notably, the Republic of Nudge still suffers from racial discord, a nagging crime rate, and a 50% divorce rate. Its leaders, seemingly unable to nudge themselves, also still embroil the nation in international entanglements—costing the nation in blood and treasure—and continue to underfund urban schools and infrastructure.

What do you think of the Republic of Nudge? Many aspects are admirable. It avoids many mandates common to its paternalistic neighbor, the United States of No. The United States of No bans smoking, mandates retirement contributions, fines its citizens for failing to vote, imposes a sugary-beverage tax, and maintains a nationwide constraint on the consumption of fossil fuels. The Republic of Nudge regards such intrusions as unnecessary intrusions on personal liberty. The Republic of Nudge resorts to mandates, taxes, and fines only when a careful assessment of less intrusive nudges seem not to have the desired effect on its citizens' behavior.

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7. Adoption of this regulation would require overturning *R.J. Reynolds Tobacco Co. v. Food & Drug Administration*, 696 F.3d 1205 (D.C. Cir. 2012).

The foundations of the Republic of Nudge arose from collaboration between law professor Cass Sunstein and behavioral economist Richard Thaler.[8] These scholars initially ushered in the era of nudging with a discussion of policies that they labeled 'libertarian paternalism.'[9] The concept of libertarian paternalism is easily illustrated with data on eating patterns in cafeterias. Sunstein and Thaler noted that careful research indicated that people in cafeteria lines are more apt to select a dessert when the desserts are located at the beginning of the lunch line than at the end.[10] They reasoned that if the cafeteria managers were interested in facilitating healthy eating habits (as might be the case for the cafeteria at a large company, which might want to lower its health insurance premiums), they could simply move the dessert to the end of the line—after the salads and other low-fat, low-calorie options.[11] This would reduce overall consumption of dessert while still providing it to those diners who truly love dessert so much that they will eat it no matter where it is (or perhaps those who exercise often and can manage the extra calories well). Moving dessert is paternalistic, as the manager is trying to induce a particular behavior, but also libertarian, as it preserves the option of eating dessert.[12]

A few years later, these same authors memorialized and expanded their libertarian paternalism approach into the book *Nudge*.[13] As the comedian George Carlin once opined, concise labels carry more of a punch,[14] and the idea took off. The core concept behind nudging is designing the environment in which people make choices so as to facilitate decisions that enhance well-being. Hard prohibitions are not nudges. Neither are traditional economic

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8. *See* Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

9. *Id.* at 1190–91 (discussing libertarian paternalism in the context of employee savings plans and noting that those "nudged' in the direction of saving via an opt-out program tend to be better off).

10. Sunstein and Thaler discuss this example. *Id.* at 1184. Studies of nudges involved in eating are numerous. *See generally* BRIAN WANSINK, SLIM BY DESIGN: MINDLESS EATING SOLUTIONS FOR EVERYDAY LIFE (2014) (suggesting strategies for optimizing 'eating environments" for less and better eating). For a study specifically discussing the location of desserts and healthier alternatives, see Norbert L.W. Wilson et al. *Food Pantry Selection Solutions: A Randomized Controlled Trial in Client-Choice Food Pantries to Nudge Clients to Targeted Foods*, 38 J. PUB. HEALTH ADVANCE ACCESS 1, 2–6 (2016) (proving that placing protein bars in the front of the dessert line nudges some people to make a better dessert choice).

11. Sunstein & Thaler, *supra* note 8, at 1166, 1184.

12. *Id.* at 1184.

13. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

14. George Carlin opined that referring to combat stress as 'shell shock" rather than "post-traumatic stress disorder" would likely focus more attention on the difficulties suffered by some veterans. Ilona Meagher, *A George Carlin Classic on Combat PTSD*, PTSD COMBAT (Jan. 13, 2008, 11:27 AM), http://ptsdcombat.blogspot.com/2008/01/george-carlin-classic-on-combat-ptsd.html [https://perma.cc/5YV4-ABBB].

tools like taxes and incentives.[15] The idea behind a nudge is not to avoid bribes and penalties, but to create an environment in which wise choices can flourish. The book spawned hundreds of academic papers, many with experimental tests for various nudges in a wide range of areas.[16]

More importantly, numerous governments began recruiting behavioral scientists to their ranks to invent and to implement nudges. As the introduction to Professor Sunstein's spirited defense of the use of nudging by governments, *The Ethics of Influence: Government in the Age of Behavioral Science* ("*Ethics of Influence*") notes:

> In recent years, 'nudge units,' or 'behavioral insight teams,' have been created in the United States, the United Kingdom, Germany, and other nations. All over the world, public officials are using the behavioral sciences to protect the environment, promote employment and economic growth, reduce poverty, and increase national security.[17]

Professor Sunstein himself was appointed to the position of administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget in President Obama's first term.[18] Although the position lacks a catchy title, it consists of overseeing all major federal regulations in the United States.[19] While we do not truly live in the Republic of Nudge (not yet, anyway), Sunstein's position injected 'nudging' squarely into administration policy. This influence culminated in the adoption of Executive Order 13,707, which encourages federal agencies to identify opportunities to alter federal programs to take advantage of potential nudges that might improve welfare.[20]

In *Ethics of Influence*, Professor Sunstein addresses the concerns raised by the growing use of nudges by governments. One can quibble at the outset that addressing ethical concerns now is a bit like an ethical discussion of whether to create an atomic weapon after 1945, but that would be unfair. Professor Sunstein has addressed ethical concerns about nudging from the outset.[21] This volume is best understood as part of a series of books Professor

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15. SUNSTEIN, *supra* note 1, at 21.

16. *See, e.g.*, Max Ernest-Jones et al., *Effects of Eye Images on Everyday Cooperative Behavior: A Field Experiment*, 32 EVOLUTION & HUM. BEHAV. 172, 177 (2011) (suggesting that images displaying eyes have a high potential for nudging observers towards cooperative behavior).

17. SUNSTEIN, *supra* note 1, at 21.

18. *Id.*

19. *See* Office of Mgmt. & Budget, *Office of Information and Regulatory Affairs (OIRA) Q&A'S*, WHITE HOUSE (Nov. 2009), https://www.whitehouse.gov/omb/OIRA_QsandAs [https://perma.cc/FX4K-WFX4] (explaining how OIRA vets agency regulations using cost–benefit analysis).

20. Exec. Order No. 13,707, 80 Fed. Reg. 56365, 56365 (Sept. 18, 2015).

21. Sunstein & Thaler, *supra* note 8, at 1199–201.

Sunstein has authored on nudging;[22] it represents an effort to consolidate his responses to ethical critiques.

Despite concerns about whether governments should use nudges, no one truly questions the efficacy of nudges. Nudges work. They sometimes work extremely well. Professor Thaler's retirement-saving nudge, 'Save More Tomorrow,' for example, is a highly effective mechanism to increase retirement savings.[23] Although nudging might not be as effective as mandates,[24] Professor Sunstein has no difficulty with mandates when the evidence shows that nudges are not effective enough.[25] But nudges alone can be surprisingly powerful.

Therein lies the ethical concern. Nudges can get millions to behave in ways that they otherwise would not. Is it appropriate for a government to direct its citizens' choices in the ways that nudges allow? Prohibitions, incentives, and mandates are all well-recognized tools of government, of course. So what could be wrong with less intrusive alternatives? The most common objection is that they treat citizens like children. The comparison between the concept of 'choice architecture' and a Montessori school is strangely compelling. Montessori classrooms are designed to guide children into learning by making educational tasks look like games.[26] The classroom structure enables kids to make choices that facilitate their education. The kids are not told to do math at particular times designated by the teacher, the 'math work' is simply laid out in an available part of the room and described in a way to make it attractive. The Republic of Nudge, in a sense, is a big Montessori classroom. The structure of the society is designed to facilitate desirable conduct.

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22. In addition to NUDGE, *supra* note 13, itself, see generally CASS R. SUNSTEIN, CHOOSING NOT TO CHOOSE: UNDERSTANDING THE VALUE OF CHOICE (2015); CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT (2013); and CASS R. SUNSTEIN, WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM (2014).

23. Richard H. Thaler & Shlomo Benartzi, *Save More Tomorrow™: Using Behavioral Economics to Increase Employee Saving*, 112 J. POL. ECON. S164, S185 (PAPERS IN HONOR OF SHERWIN ROSEN: A SUPPLEMENT TO VOLUME 112) (2004).

24. *See* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1598 (2014) (arguing that behavioral-law-and-economics policy directives, like increased disclosure, do not always effectively override the tendency of individuals to make poor decisions).

25. SUNSTEIN, *supra* note 1, at 5 ("To be sure, coercion has an important place, even in the freest societies.").

26. According to the American Montessori Society:

> Components necessary for a program to be considered authentically Montessori include multiage groupings that foster peer learning, uninterrupted blocks of work time, and guided choice of work activity. In addition, a full complement of specially designed Montessori learning materials are meticulously arranged and available for use in an aesthetically pleasing environment.

Introduction to Montessori Method, AM. MONTESSORI SOC'Y, http://amshq.org/Montessori-Education/Introduction-to-Montessori [https://perma.cc/7TSY-VPLH].

The essence of the critique is thus that the government should do more to educate its citizens to make well-informed choices, rather than simply structure the choice to guide them with a hidden benevolent hand.[27] Professor Sunstein has heard this argument many times before and marshals powerful replies. The response begins with the observation that educational programs are often not effective.[28] Importantly, they are ineffective for predictable reasons. Well-designed nudges respond to defects in how people reason and behave. Consider that automatic-enrollment retirement plans work well because of the nature of procrastination. Without automatic enrollment, people commonly fail to sign up for economically beneficial retirement plans, even though they intend to do so and recognize their benefits. The reason is that they are rationally myopic.[29] It takes time to understand the retirement plan and complete the paperwork. The benefit of being enrolled in the plan accrues slowly over time. The costs of waiting one more day is perhaps only a few dollars in retirement savings that will be realized years later, whereas the cost in time and effort to complete the paperwork is immediate and notable. Each day, it thus feels reasonable enough to put off the trouble of signing up yet another day. Understanding the benefits of signing up for the retirement plan does not ameliorate the problem of myopia. Indeed, a full understanding might make the problem worse, as the informed beneficiaries know that each day of delay costs them very little.[30] Automatic enrollment thus addresses a human weakness, thereby working more effectively for the beneficiary.

The failure to embrace environmentally friendly behaviors provides a similar example. Many people say they favor the use of renewable energy, even when it is somewhat more expensive than fossil fuel energy sources.[31] If utilities offer cheaper dirty energy as a default, then consumers might procrastinate and delay switching to their preferred green option. Loss aversion might also make the default sticky.[32] When people make choices, they are attentive to departures from the status quo—and especially attentive to a loss from such departure.[33] By switching to green energy, people can

27. SUNSTEIN, *supra* note 1, at 33.

28. *Id.* at 34.

29. *See* Ted O'Donoghue & Matthew Rabin, *Choice and Procrastination*, 116 Q.J. ECON. 121, 149 (2001) (explaining that people procrastinate when the costs of delay seem low and complete tasks when the costs of delay seem high).

30. *Id.*

31. *See* Cass R. Sunstein & Lucia A. Reisch, *Automatically Green: Behavioral Economics and Environmental Protection*, 38 HARV. ENVTL. L. REV. 127, 135 (2014) (describing a study that compared the number of Germans who said they would use green energy if presented with the choice to the number of Germans who actually chose to use green energy).

32. SUNSTEIN, *supra* note 1, at 172.

33. *See* Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 1983 APA Award Addresses, 39 AM. PSYCHOLOGIST 341, 342 (1984) (explaining why people are reluctant to bet for equal stakes).

satisfy their desire to help the planet; switching to a more expensive form of energy highlights the extra cost. But consider if the default is the more expensive, green energy choice with an option to switch to save money by switching to the less expensive dirty energy. People process the savings as a gain. Sacrificing a foregone gain is less compelling than avoiding a loss.[34] Hence, more people are apt to pursue an environmentally friendly strategy when green energy is a default. As with the problem of procrastination, the problem is not lack of information.

For both the problem of procrastination and loss aversion, the ethical concern that the Republic of Nudge infantilizes its citizens fades somewhat. Its citizens are not suffering from a lack of information that can be cured with an educational campaign. In fact, the government is not even trying to get them to change their preferences. Rather, the government is simply trying to arrange the structure of choice so as to allow citizens to act on preferences that they already possess, in spite of cognitive limitations.

Neither is the Republic of Nudge treating its citizens as objects to further governmental goals. Professor Sunstein is careful throughout to maintain a deep respect for the 'nudged. The nudges he lauds most vigorously facilitate the expression of individual preferences.[35] People get more of what they actually want in an environment that helps them make choices. Indeed, Executive Order 13,707 says nothing about directing behavior. It simply directs agencies to identify ways to make government programs more user-friendly.[36]

Human-factors analysis provides a helpful analogy. Imagine you are designing a cooktop for an appliance company.[37] The cooktop has four burners—two in front and two in back. The four control nobs run from top to bottom on the right-hand side. The control nobs can correspond to the burners they control in any configuration. You could design the cooktop so that the back control nob governs the front-right burner (the one most commonly used), but that would be foolish. Users will intuitively believe that the front-right burner is governed by the closest control nob (and likely also expect the back-left burner to be governed by the backmost control). It strikes no one as infantilizing the user of the cooktop to design the stove with an intuitive set of controls. Neither is it infantilizing to design a program to facilitate the expression of preferences for retirement savings or environmental quality.

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34. SUNSTEIN, *supra* note 1, at 172 ("[L]oss aversion may have an especially significant effect, certainly in the case of green defaults.").

35. *Id.* at 11.

36. Exec. Order No. 13,707, 80 Fed. Reg. 56365, 56365 (Sept. 18, 2015).

37. The example comes from DON NORMAN, THE PSYCHOLOGY OF EVERYDAY THINGS 75–79 (1988).

The cooktop example also illustrates the truly bullet-proof argument Professor Sunstein makes to defend the ethics of nudging. Defaults—and hence nudges—are inevitable.[38] Sunstein cites this contention to brand arguments against the ethics of nudging us 'pointless.'[39] Someone must make a choice about where to put the dessert, which control governs which burner on the cooktop, whether a new employee defaults into a retirement plan, and whether a public utility offers green or dirty energy as a default choice. Defaults are inevitable. Should they not be chosen in a way that facilitates choices that benefit the decision makers?

Behavioral economics is thus the genie that has been loosed from the bottle. Without any understanding of the consumptive consequences of the location of dessert in the cafeteria line, the choice of where to put dessert is unimportant. The understanding of how procrastination works, how loss aversion influences behavior, and countless other phenomena of judgment and choice, however, renders the choice meaningful. A cafeteria manager who recognizes that more desserts get eaten when placed at the front of the line inevitably makes a choice that has consequences for the diners' health. How can one then defend putting the dessert first? Once a government agency recognizes that an unnecessarily complex form deters citizens from obtaining free health care for children or the Earned Income Tax Credit, it becomes difficult to see any ethical case for retaining the complexity.

Some nudges require a more robust defense. Setting green energy as a default instead of cheaper dirty energy, for example, demands some greater justification. In the cafeteria, everyone is slightly better off (or much better off, depending upon how much they struggle with their weight) by having dessert at the end where it remains available as a choice that imposes no additional costs on those who still want dessert (everyone still has to walk through the same line). Changing energy plans, however, requires effort, and people delay opting out of the default plan even if they prefer something else. Poor individuals might feel that they need the savings that come with the dirty energy plan but procrastinate and lose out on the savings for long periods. Furthermore, the time and effort in switching plans imposes a cost on everyone who switches. Before a government can justify imposing a green default (or a dirty one, for that matter), it must assess the benefits of setting green energy as the default in terms of the savings on those who would otherwise have to switch to green against the harm imposed on those who would switch to dirty energy. This cost–benefit analysis is manageable but might be challenging. A government agency that mistakenly concludes that the benefits of green energy outweigh its costs might end up imposing a costly, undesirable default. So long as the government can reasonably assess the relative attractiveness of the two options to its citizens and assess the

38. SUNSTEIN, *supra* note 1, at 15–16.

39. *Id.* at 15.

transaction costs of switching and the consequences of procrastination, then an ethical government should try to identify the best default.

The nudges that create the greatest ethical concerns are those in which the government is making a clear effort to induce behavior contrary to people's preferences. Suppose the government knows that more people prefer dirty energy to green energy, but it would like more consumers to use green energy. Would setting green as a default be acceptable? The answer depends on why the government favors green energy. If dirty energy imposes some externality that is not borne by the consumers or the producers, then the nudge would be morally acceptable, so long as the harm that the externality poses exceeds the costs to the consumers who are induced by the nudge to use the disfavored alternative. Indeed, the nudge might be a more acceptable choice than a tax or regulatory mandate that forces dirty energy to clean up. Taxes and mandates can be more regressive than a green default, as they impose costs on consumers with regard to their wealth.[40] So long as poorer consumers spend the time and effort needed to opt out (a questionable, but measurable assumption), then regressive effects can be avoided or at least minimized.

But what about nudges in which the government has a moral claim of its own to make? Imagine that Professor Sunstein loses his bid for the presidency of the Republic of Nudge, and a social conservative like Ted Cruz takes control of the administrative state. The Cruz administration dislikes abortion.[41] Unwilling to wait for judicial appointments to the Supreme Court that would overturn *Roe v. Wade*[42] and allow his administration to push a prohibition on abortion through Congress, President Cruz wants to reduce the number of abortions. Along with a favorable Congress, he passes an anti-abortion nudge requiring that all women seeking an abortion view an ultrasound of the fetus and listen to its beating heart.[43] Each woman must also get counselling on adoption—specifically she is paired with a family who agrees that they will adopt her baby. She must then be shown a projected image of what her baby will look like at six months, five years, and then at age eighteen. Are such nudges justified in a country in which a majority favors legalized abortion (and yet which elected Ted Cruz)? What about

40. *Compare* SUNSTEIN, *supra* note 1, at 179 (proposing financial subsides and making opt out "both salient and clear" as ways to solve any distributional issues with a green default nudge), *with* Arik Levinson, *Energy Efficiency Standards Are More Regressive than Energy Taxes: Theory and Evidence* 2 (NBER Working Paper No. 22956, 2016), http://faculty.georgetown.edu/aml6/pdfs&zips/RegressiveMandates.pdf [https://perma.cc/9JTA-6DHJ] (stating that "energy taxes like carbon and gas taxes are regressive and efficiency standards are also regressive").

41. This is (obviously) a hypothetical, at least at the moment.

42. 410 U.S. 113 (1973).

43. Several states have similar requirements. *See Requirements for Ultrasound*, GUTTMACHER INST. (Feb. 1, 2017), https://www.guttmacher.org/state-policy/explore/requirements-ultrasound [https://perma.cc/ARY9-8MU4] (describing states in which women are required to or are given the option to view a fetal ultrasound before undergoing an abortion).

nudges that automatically change a woman's last name to that of her husband (subject to opt out)?[44] What about nudges that automatically send gun-permit applications to all adults, along with instructions on how to purchase an inexpensive firearm and obtain lessons on proper use and handling of a gun? What about forcing all high school seniors to meet with a military recruiter and affirmatively decline military service? The Republic of Nudge can look very different with the outcome of just one election.

Professor Sunstein has a clear response to these concerns. He contends that society is in no danger of being nudged too hard to the right (or left, for that matter). Professor Sunstein reports a wide range of survey data indicating that people disfavor nudges that run contrary to their underlying attitudes.[45] If his data are right, then strong nudges on abortion would face a great deal of political opposition in a country that favors abortion rights. Indeed, he specifically tested the favorability of nudges related to abortion and to changing women's last names. Although opposition to these nudges was greater among self-reported Democrats than Republicans, a large number of Republicans would oppose an extreme abortion nudge.[46] A behaviorally informed, socially conservative administration would have to first find a way to change the political landscape underlying these issues before it could advance these kinds of policies.

This defense paints nudges as yet another tool of government—no more objectionable than mandates or taxes. A democratic government that is trying to create a moral order that most of its citizens disfavor has all of these tools at its disposal but is wrong to try to use them beyond its political mandate. Indeed, when one contrasts nudges with prohibitions and taxes, nudges seem quite defensible. As Professor Sunstein puts it, 'if freedom and welfare matter, coercion is often best avoided.'[47] Nudges allow an opt out and thus burden individual liberty far less than more heavy-handed measures. To be sure, nudges can be so overbearing that they might be considered just as repressive as prohibitions. Consider, for example, the efforts by the state of Alabama during the 1950s to publish the names and addresses of members of the National Association for the Advancement of Colored People.[48] One can argue this nudge was designed to induce people to withdraw from the organization (since membership clearly risked extreme reprisals), but the Supreme Court had no difficulty seeing this as imposing an unreasonable

44. Professor Sunstein discusses this nudge. SUNSTEIN, *supra* note 1, at 127. The remaining "nudges" in this paragraph are hypothetical.

45. *See id.* at 116–58 (elaborating on empirical data regarding people's approval of nudges).

46. *Id.* at 127, 133.

47. *Id.* at 5.

48. NAACP v. Alabama, 357 U.S. 449, 451–52 (1958).

burden on association rights.[49] Extreme abortion nudges might also be viewed as unduly burdensome on an individual woman's right to choose.[50]

Therein lies the core of the defense of nudges as a simple tool of government that can be justified on utilitarian grounds. For those more concerned with personal liberty without regard to utilitarianism, nudges can be defended as less burdensome than the instrumentalities that governments already use to coerce behavior.

The argument still needs a little cleaning up. Some object that all of this nudging would leave an infantilized populace, unable to learn to make choices on its own. Intuitively, the best way to learn is by doing, and so making decisions should make us better decision makers.[51] Learning requires feedback, and thus making bad choices in settings in which the adverse consequences are limited can perhaps be a valuable experience.[52] Hard evidence that would provide direct support of this thesis is hard to come by, however. Professor Sunstein notes that reliance on GPS navigation systems (which he identifies as a nudge)[53] likely reduces users' facility with maps.[54] Beyond that example, studies in which people fall prey to a cognitive mistake and then learn to identify and to avoid their mistakes are scarce.[55] We have no way of knowing whether the citizens of the Republic of Nudge really will grow into feeble decision makers.

In any event, under Professor Sunstein's utilitarian approach, the concern that people will lose their ability to make good choices would merely constitute another factor in the costs and benefits of nudging.[56] Before imposing a nudge, a sound government would consider the extent, if any, to which it reduces aggregate decision-making skill among its intended beneficiaries. The cost–benefit analysis for such a concern would be especially challenging because the problem lies in the cumulative effect of many nudges. Identifying the nudge that broke the camel's brain might prove to be impossible. But so long as hard evidence that a government is truly

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49. *Id.* at 462.

50. *See* SUNSTEIN, *supra* note 1, at 133 (noting that voters considered the "values of choosers" when evaluating nudges).

51. *See* Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1622–23 (2006) (expressing concern with interventions that inhibit "the development of the regulated parties' decision-making skills").

52. For a review, see *id.* at 1627–33.

53. SUNSTEIN, *supra* note 1, at 20 ("A GPS device nudges ").

54. *See id.* at 60 ("[U]se of the GPS can make it harder for people to know how to navigate the roads.").

55. Klick & Mitchell, *supra* note 51, at 1625–26 provide the most assertive arguments supporting the idea that people must be allowed to make mistakes so as to learn. Although they articulate a theoretical framework to support the point, *id.* at 1627–41, they provide no examples that relate to any of the specific nudges Professor Sunstein endorses.

56. SUNSTEIN, *supra* note 1, at 62 (assessing whether "the costs of education justify the benefits").

harming decision-making skills does not emerge, then the concern is merely hypothetical. And if such evidence did emerge, it would provide the means for assessing this additional cost in the analysis.

A more difficult objection lies in considering the more expansive implications of nudging. If nudging people towards better choices is morally sound, then an ethical government should also consider restricting the use of nudges from the private sector that undermine social welfare. Madison Avenue must find Professor Sunstein's description of nudges amusingly modest. Lacking the coercive authority needed to force people to buy their products, virtually all of marketing consists of nudges. Tobacco companies conveyed images of independent thinking in their advertisements precisely to counteract reasoned warnings.[57] Supermarkets make bread in-store, placing bakeries near the entrance, precisely to kick-start shoppers' appetites.[58] Furthermore, they arrange their soup in a random order because people buy more soup that way than when soup is arrayed alphabetically.[59] Retail clothing stores know that their customers most commonly turn right upon entering the store and so place items they want to move on the immediate right of the entrance.[60] Real estate agents show undesirable houses to potential homebuyers before taking them to homes that they truly want to sell so as to make the target homes look better by contrast.[61] The socially undesirable nudges in the financial industry are now so well recognized that they have spawned their own regulatory body as a response—the Consumer Financial Protection Bureau.[62] And retailers everywhere set their prices to end in a '9' so as to encourage sales.[63]

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57. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1489–92 (1999) (documenting the tobacco industry's behind-the-scenes control and manipulation of "independent" scientists and journalists).

58. Rebecca Rupp, *Surviving the Sneaky Psychology of Supermarkets*, NAT'L GEOGRAPHIC: THE PLATE (June 15, 2015), http://theplate.nationalgeographic.com/2015/06/15/surviving-the-sneaky-psychology-of-supermarkets/ [https://perma.cc/59NF-U3VL].

59. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 748 & n.545 (1999).

60. *See* Malcolm Gladwell, *The Science of Shopping*, GLADWELL.COM (Nov. 4, 1996), http://gladwell.com/the-science-of-shopping/ [https://perma.cc/A39F-H33N] (discussing the "Invariant Right," the theory that human beings prefer to keep to the right when walking or entering new places, and its utilization by various corporations).

61. ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 14 (rev. ed. 1993).

62. *See* Adam C. Smith & Todd Zywicki, *Behavior, Paternalism, and Policy: Evaluating Consumer Financial Protection* 13–15 (Mercatus Ctr., George Mason Univ., Working Paper No. 14-06, 2014) (detailing the motivations for creating the Consumer Financial Protection Bureau).

63. *See* Bradley J. Ruffle & Ze'ev Shtudiner, *99: Are Retailers Best Responding to Rational Consumers? Experimental Evidence*, 27 MANAGERIAL & DECISION ECON. 459, 459, 461 (2006) (noting the ubiquity of retail prices ending in "99" and acknowledging that such practice may be directly related to consumer purchases). *See generally* Eric T. Anderson & Duncan I. Simester, *Effects of $9 Price Endings on Retail Sales: Evidence from Field Experiments*, 1 QUANTITATIVE MARKETING & ECON. 93 (2003) (discussing the existing research on the ubiquity of prices ending in nine and conducting field experiments to measure the practice's effectiveness).

Unlike the nudges that Professor Sunstein endorses, these private nudges are not tested with cost–benefit analysis to ensure that they further overall well-being. It seems unlikely that any of them would survive cost–benefit analysis. Marketing nudges are intended for the private benefit of the companies that create them, not for the public good. These nudges do not make us thinner or healthier. They induce us to eat too much, smoke too much, and spend too much.[64] They often appeal to our basest intuitions and distract us from rational decision making.[65] Restricting such nudges is thus perhaps a much more serious undertaking than creating new nudges. Long before the Republic of Nudge tries to facilitate green energy, for example, it could reduce overall consumption enormously (and hence conserve energy) by forcing retailers to refrain from many of the more devious marketing strategies. Mandating that gas stations state prices that are divisible by ten cents could reduce fuel consumption far more than efforts to induce consumers to buy more fuel-efficient cars. Professor Sunstein's data show that people somewhat dislike nudges that trigger misleading intuitions.[66] But he only tests public nudges.[67] Surely private nudges are just as objectionable. In short, the arguments that support the ethical grounds on which the Republic of Nudge can found its system justify a much more robust set of restrictions on product marketing than the Consumer Financial Protection Bureau and the Federal Trade Commission have ever imagined.

Furthermore, the nudges that Professor Sunstein endorses hardly scratch the surface of bad judgment. Nudges that facilitate retirement savings are apt to make the upper-middle class save more for retirement, but a majority of the American public currently report living 'paycheck-to-paycheck' and have no extra wealth to save (today or tomorrow).[68] For many Americans, the real financial problem is that they lack enough education to obtain the kind of employment in which they can benefit from a little nudging. The choices they made in their youth—to drop out of high school, to have a child at a young age, not to attend college, or to commit crimes that made them difficult to employ—undermine their well-being much more than the issues that the suggested nudges can address. Most people needed nudges (or shoves) when they were young. Although Professor Sunstein tells us that nudging can demonstrably reduce rates of smoking and obesity, thereby

64. *See supra* notes 57–59 and accompanying text.

65. *See* SUNSTEIN, *supra* note 1, at 94 (explaining that certain advertisements cause consumers to "use their emotional reactions").

66. *Id.* at 119.

67. *See id.* at 122–23, 126, 128–29 (testing American attitudes toward nudges such as educational campaigns, environmental and public health policy, and manufacturing labels).

68. Angela Johnson, *76% of Americans Are Living Paycheck-to-Paycheck*, CNN MONEY (June 24, 2013), http://money.cnn.com/2013/06/24/pf/emergency-savings/ [https://perma.cc/YWU5-6FYS].

saving many lives,[69] the decision to abuse illegal drugs or alcohol has vastly more negative consequences. And what about marriage? Many marriages end unhappily in divorce, thereby imposing a universe of unpleasant consequences on the couple and any children they might have had together. Given the nearly ludicrous degree of optimism expressed by couples about the likelihood of divorce (99% of betrothed couples assert that they are less likely to get divorced than the average couple),[70] cognitive error clearly plays an enormous role in the decision to marry. If nudging its citizens to use green energy is ethically defensible, then why does the thought of a government that nudges its citizens on the most crucial choices—the ones in which the costs of bad choices are the greatest—give pause?

And therein lies the primary ethical concern with nudging. The nudges that Professor Sunstein discusses are all defensible. But it is the totality of nudging that raises ethical hackles. Do we really want to live in the Republic of Nudge? Does the description at the outset feel comfortable? And if so, does a more robust program to remedy life's more challenging choices seem attractive? I suspect that to most of us, it does not. We simply do not want our government thinking the way that the Republic of Nudge thinks. Perhaps we do not want our lives to be channeled so neatly all the time in every little corner of our existence. Oddly, we tolerate it at the supermarket and shopping malls. For better or worse—and it is probably worse—we like to see advertisements with attractive people, like to smell bread at the supermarket, and probably even like to sort through soup (although I personally find deliberately disorganized soup aggravating). It is hard to document an orderly, ethical argument for this messy, destructive ecological landscape that we inhabit. But too much public order gnaws at the soul in a way that is hard to capture.

To be sure, we do not live in the Republic of Nudge. Nor are we likely to do so anytime soon. Too many people resonate with Ronald Reagan's assertion that the nine most terrifying words in the English language are: 'I'm from the government, and I'm here to help.'[71] We do live in the marketplace of nudge, and we will likely continue to do so for some time. The society saturated with healthy nudges that the opening paragraphs of this Book Review describe would require more than one executive order. It would demand a rethinking from the ground up as to government's purposes.

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69. SUNSTEIN, *supra* note 1, at 59.

70. *See* Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (reporting that the median response of those about to be married was 0% when assessing whether they personally would get divorced).

71. This quote is commonly attributed to Ronald Reagan. *The President's News Conference: August 12, 1986*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=37733 [https://perma.cc/JJ9B-VX83].

In the political and social world in which we currently exist, Professor Sunstein's arguments win the day. The kinds of nudges that have become commonplace are apt to pass muster on cost–benefit grounds and on political acceptability. His survey data shows as much.[72] And perhaps they provide a needed counterweight to the many nudges marketers employ, even as they make some aspects of a complex world more user-friendly. Government agencies will also curb some of the more extreme nudges in the marketplace—the ones that are easily identifiable as errors and as detriments to our economic well-being.[73] Critics will doubtless persist, but it is perhaps the nudge-saturated landscape that may lie ahead in some distant future that they fear the most. Professor Sunstein can perhaps best respond by engaging more with the limits of ethical nudging. This book makes a good start in showing that some kinds of nudges are politically unacceptable. The use of a limited array of nudges as a standard tool of government agencies is probably here to stay. The future should perhaps explore more of these limits to satisfy those who worry that they will someday wake up in the Republic of Nudge.

72. *See supra* note 67 and accompanying text.

73. The use of cartoon characters such as "Joe Camel" in cigarette advertisements, for example, draws excessive attention from children and thus facilitates marketing tobacco to kids. Hanson & Kysar, *supra* note 57, at 1481–82. The use of teaser rates by credit cards, which takes advantage of biases associated with "anchoring," also takes heavy advantage of cognitive errors. *See* Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1376 (2004); *see also* Linda Sapadin, *The Anchoring Effect: How It Impacts Your Everyday Life*, PYSCHCENTRAL (July 24, 2013) https://psychcentral.com/blog/archives/2013/07/27/the-anchoring-effect-how-it-impacts-your-everyday-life/ [https://perma.cc/D82E-ZLB7].

Is Mass Incarceration History?

FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA. By Elizabeth Hinton. Cambridge, Massachusetts: Harvard University Press, 2016. 464 pages. $29.95.

Jonathan Simon*

Introduction: The End of Mass Incarceration

'The Owl of Minerva spreads its wings only with the falling of the dusk.'[1]

Despite Hegel's ultimately reassuring premise, it never seemed inevitable that the emergence of mass incarceration as a proper historical subject would occur simultaneously with its institutional and political demise. History, as a scientific and humanistic tradition with its own methodologies, sources, and conventions, inevitably keeps some distance on the present. Typically, a generation or two has passed before a truly significant political development, like the New Deal or the Cold War, escapes the pull of presentist hagiography (or demonology) and comes under the full possession of professional historical gaze, after journalism and political science have had their varying efforts at neutralizing the present. In contrast, the point at which a significant political phenomenon has lost its dominance over the present is a much less regular or inevitable pattern.[2] And yet, the

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1. G.W.F. HEGEL, PHILOSOPHY OF RIGHT 16 (Stephen Houlgate ed., T.M. Knox trans., Oxford Univ. Press 2008) (1821).

2. *See* Jeffrey S. Adler, *Less Crime, More Punishment: Violence, Race, and Criminal Justice in Early Twentieth-Century America*, 102 J. AM. HIST. 34, 35 (2015) (quantitatively studying the relationship between crime and punishment in the early twentieth century); Robert T. Chase, *We Are Not Slaves: Rethinking the Rise of Carceral States Through the Lens of the Prisoners' Rights Movement*, 102 J. AM. HIST. 73, 74–75 (2015) (surveying prisoners' rights movements in the South in the 1970s and 1980s "through the lens of prisoner-initiated civil rights complaints and social protest"); Miroslava Chávez-García, *Youth of Color and California's Carceral State: The Fred C. Nelles Youth Correctional Facility*, 102 J. AM. HIST. 47, 48 (2015) (discussing the use of scientific research methods to prevent and suppress crime in California in the early twentieth century); Kali Nicole Gross, *African American Women, Mass Incarceration and the Politics of Protection*, 102 J. AM. HIST. 25, 26 (2015) (outlining the historical treatment of African-American women in the prison system); Torrie Hester, *Deportability and the Carceral State*, 102 J. AM. HIST. 141, 141 (2015) (describing how immigration-related crimes have come to represent the leading cause of imprisonment in the federal system, overtaking drug-related crimes); Kelly Lytle Hernández et al. *Introduction: Constructing the Carceral State*, 102 J. AM. HIST. 18, 20–21 (2015) (introducing the historical background of mass incarceration); Elizabeth Hinton, *'A War within Our Own Boundaries' Lyndon Johnson's Great Society and the Rise of the Carceral State*, 102 J. AM. HIST. 100, 112 (2015)(describing the legacy of the Great Society's "punitive transformation of domestic

recent wave of historical analysis of mass incarceration, a development that began in the 1970s, happens to be emerging at a moment of political questioning more profound than at any time since the late 1960s and early 1970s. From the Supreme Court's powerful condemnation of California's overcrowding[3] to the Black Lives Matter movement's growing presence in the streets and voting booths of major cities, the contemporary carceral state is under attack.

While there is no guarantee that we will in fact see substantial institutional change in the size and nature of the carceral state, the emerging historiography of mass incarceration has been shaped by the very possibility of that change and has lessons that could be crucial in strengthening the growing movement for reform. Elizabeth Hinton's impeccably researched study of federal crime policy from the Kennedy through Reagan Administrations is the most telling account yet of this new history of the American carceral state.[4] This has been a topic of considerable interest to political scientists and criminologists since the 1990s,[5] but Hinton is able to

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urban policy" and its effect on African-Americans and the youth of America); Julilly Kohler-Hausmann, *Guns and Butter: The Welfare State, The Carceral State, and the Politics of Exclusion in the Postwar United States*, 102 J. AM. HIST. 87, 87–88 (2015) (arguing for "approaching the dramatic growth of the carceral system and welfare state retrenchment of recent decades as historically intertwined phenomena"); Matthew D. Lassiter, *Impossible Criminals: The Suburban Imperative of America's War on Drugs*, 102 J. AM. HIST. 126, 127–28 (2015) (reviewing how the war on drugs has safeguarded young, usually white, middle-class drug users and penalized urban minority operations); Alex Lichtenstein, *Flocatex and the Fiscal Limits of Mass Incarceration: Toward a New Political Economy of the Postwar Carceral State*, 102 J. AM. HIST. 113, 113–14 (2015) (discussing how historians have begun to define mass incarceration as a defining and troubling feature of the twentieth century); Donna Murch, *Crack in Los Angeles: Crisis, Militarization, and Black Response to the Late Twentieth-Century War on Drugs*, 102 J. AM. HIST. 162, 163 (2015) (examining the history of the response of African-American communities in Los Angeles to the militarization of the war on drugs); Micol Siegel, *Objects of Police History*, 102 J. AM. HIST. 152, 152 (2015) (exploring the history of the Office of Public Safety, a now-inactive federal agency, whose former employees have led the militarization of U.S. police forces); Timothy Stewart-Winter, *Queer Law and Order: Sex, Criminality, and Policing in Late Twentieth-Century United States*, 102 J. AM. HIST. 61, 61–62 (2015) (studying the "neglected intersection of the histories of sexuality and the carceral state" in the 1970s); Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 703–04 (2010) (examining the social, political, and economic impact of mass incarceration in the twentieth century).

3. Brown v. Plata, 563 U.S. 493, 545 (2011).

4. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016).

5. *See, e.g.*, KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 28–43 (1997) (describing the history of crime control in the United States and the use of the crime issue in national politics by Republicans); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 55–60 (2001) (describing the American critique of correctionalism that emerged in the 1970s); RUTH WILSON GILMORE, GOLDEN GULAG: PRISON, SURPLUS, CRISIS AND OPPOSITION IN GLOBALIZING CALIFORNIA 5–7 (2007) (discussing the growth and costs of California's prison system, which grew almost 500% between 1982 and 2000 and built twenty-three new major prisons between 1984 and 2007); STUART A. SCHEINGOLD, THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY 75–88

draw on confidential memos and other materials from the National Archives and presidential libraries to draw a far more precise picture than ever before of what national leaders believed they knew about crime and how they intended to act on the problem. Her account, likely to be the most definitive one for years to come, confirms the centrality of political considerations to the shaping of mass incarceration as urged by earlier studies, while giving us a much more detailed and pointed analysis of what those political considerations were.

In particular, Hinton's analysis places concern over the political and social threat of collective violence by black youth growing up in segregated neighborhoods of concentrated poverty at the very heart of crime as a national problem[6] and as the focal point of increasingly punitive 'solutions' from Kennedy to Bush I (and if her history continued through both Bushes).[7] Trying to prevent black youth from turning to crime and contain those involved with crime with aggressive policing and excessive incarceration became in many respects America's chief domestic objective from the Vietnam War to the wars in Iraq and Afghanistan.[8] This obsessive fear of black youth and totalizing national commitment to their surveillance and control makes all of the contemporary talk from national leaders about trying to rebuild trust between police and young people of color ludicrous so long as the war on crime continues.

Hinton's study comes at a time when most of the action from scholars in trying to explain mass incarceration has moved to state and even local levels.[9] While the carceral state in our federalist system is primarily one of state and local governments, Hinton's account begins during a period when the federal government, particularly its Executive Branch, made a concerted effort to alter the size and character of local criminal justice agencies, including police departments, courts, and correctional systems throughout the United States.[10] Premised on what was depicted as a serious and growing

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(1984) (considering the history of the politicization of crime and law and order); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 89–106 (2007) (describing the legislative shift beginning in 1968 from the war on poverty to the war on crime); FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 156–75 (1991) (discussing the impact of criminal justice policies that were designed to affect prison populations in the United States).

6. HINTON, *supra* note 4, at 219–20.

7. *Id.* at 2–4, 314–21.

8. *See id.* at 2–3 (describing the policy shift from a progressive trajectory to more aggressive and exhaustive policing practices targeting black urban areas that began during the Johnson Administration).

9. *See generally* MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2010) (discussing Arizona's historical use of punitive strategies to combat crime); Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731 (2010) (studying the effect of prison litigation on mass incarceration in Florida).

10. HINTON, *supra* note 4, at 87–89, 163–79.

threat of violent crime localized in large cities throughout the nation, the war on crime involved the dispersal of billions of dollars (nearly two billion per year in contemporary dollars, three-quarters of which went into policing between 1965 and 1981)[11] as well as the creation of model laws and policies that the money helped to promote—policies that had previously been considered unwise or unconstitutional (including preventive pretrial detention and mandatory minimum sentences).[12] Political scientists studying the war on crime in its early stages already concluded it had largely failed in its goals of improving the effectiveness of law enforcement or reducing crime (something Hinton's research reaffirms),[13] but as Hinton documents, it was an enormously successful exercise in state building.[14] Creating fear as a byproduct of its success at putting crime at the very center of American life, the war on crime became self-perpetuating and continued during the first two decades of this century even as crime indexes dropped to historic lows[15] and fear of crime largely diminished as a national political issue. Only today, a half-century after the key events and decisions that produced the war on crime, and in the face of repeated scandals of racism, inhumanity, and failure by the carceral state, have we seen growing social-movement resistance to end that war.[16]

Although historiographical-research time frames (based in large part on archival access policies) determine that her narrative ends some twenty-five years prior to the present moment,[17] Hinton's themes connect directly to the growing discontent with the systems of punitive policing and mass incarceration, and carry clear implications for those who would seek to reform or radically change those systems. Chillingly for reformers and radicals alike, almost all of the ideas being circulated in the name of 'reforming' the carceral state today were already parts of the thinking that shaped the war on crime and are thus quite unlikely to alter its fundamental character.

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11. *Id.* at 2.

12. For earlier studies of the war on crime, see SCHEINGOLD, *supra* note 5, at 196–97 (discussing sentencing guidelines and the effects they may have on future criminal court reform).

13. MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1968-1978, at 5–6 (1980) (discussing the failure of the Safe Streets Act of 1968).

14. HINTON, *supra* note 4, at 333–35.

15. Matt Ford, *What Caused the Great Crime Decline in the U.S.?*, ATLANTIC (Apr. 15, 2016), http://www.theatlantic.com/politics/archive/2016/04/what-caused-the-crime-decline/477408/ [https://perma.cc/KTB3-7B2M].

16. *See, e.g.*, *Platform*, MOVEMENT FOR BLACK LIVES, https://policy.m4bl.org/platform/ [https://perma.cc/EG52-KJRQ].

17. *See* Exec. Order No. 12,958, 60 Fed. Reg. 19825, 19828–29, 19832 (Apr. 17, 1995) (requiring most classified information to be made public after twenty-five years); Matt Elton, *When Does History End?*, HISTORYEXTRA (Oct. 28, 2009), http://www.historyextra.com/feature/when-does-history-end [https://perma.cc/8EJP-4QDD] (presenting views of history professors on when an event is subject to historical analysis, such as, in the view of one scholar, thirty years).

After reviewing Hinton's major findings, this Book Review turns first to Hinton's historiographical contributions and second to her lessons for those who would like to make history by ending mass incarceration.

I. From War on Poverty to War on Crime

In Hinton's convincing account, the road from a federal campaign to eliminate entrenched poverty in the United States to a much larger one aimed at fighting crime by policing and punishing people in poverty was a remarkably short one, and the long war on crime and drugs pursued since then has been a boringly repetitive one.[18] From its beginnings in the Kennedy Administration, the 'war on poverty' was braided closely with questions of crime, and particularly, delinquency.[19] The latter was taken to be a product of lacking opportunities for integration into the mainstream of social and economic life in combination with the reinforcing stigma of criminalization and punishment.[20] The attempted solutions were efforts to accelerate the exposure of these same youths to mainstreaming opportunities. The upbeat name for this concept was 'Mobilization for Youth'—a program aimed at young people generally in poor neighborhoods.[21] At its most ambitious level, and never in more than a small portion of the nation's needy areas, this effort placed federal grants into the hands of frontline antipoverty organizations and community organizers ("community action workers' in the terminology of the moment) to socially organize and politically empower poor families and communities.[22] Five years later in the Johnson Administration, and despite that President having made an even louder commitment to waging war on poverty than his predecessor, efforts to mobilize youth in poverty had been substantially superseded and assimilated into a far larger effort to maintain surveillance and control over black youth living in neighborhoods of concentrated poverty.[23]

This newly dubbed 'war on crime' was to be run through the law enforcement-oriented Department of Justice, and its foot soldiers, rather than

18. *See* HINTON, *supra* note 4, at 3–4 (describing the quick evolution from Kennedy's attack on delinquency to Johnson's "War on Poverty" to Nixon's punishing policies).

19. *See id.* at 3, 12, 20–48 (describing the history and development of Kennedy's attack on delinquency and its role as the beginning of increasing efforts to reduce poverty and crime).

20. *See id.* at 45–46 (describing the antidelinquency efforts which included providing social services in settings that would reduce stigma while addressing the societal problems such as illiteracy and unemployment that often resulted in delinquency).

21. *See id.* at 39–48 (detailing President Kennedy's efforts to reduce the risk of youths to fall into delinquency through "Mobilization for Youth").

22. *See id.* at 49 (noting that the urban intervention was a relatively small effort, only funding programs in sixteen cities, with goals to transform both urban social institutions and individuals).

23. *See id.* at 61–62 (describing the efforts to merge the war on crime and the war on poverty).

'community action workers, were big city police forces,[24] perhaps the most antiblack organized force in America in those years of still-expanding civil rights. Its goals remained mixed at first, to mainstream youth perceived as at risk of becoming involved in crime but also to confront, arrest, and punish those black youths whose potentiality for crime crossed over into criminal behavior.[25] Even before the feverish year of 1968 and Nixon's dog whistling 'law and order' campaign,[26] the die was largely cast. Poverty elimination would have to wait for a successful effort to reestablish urban social control over segregated neighborhoods of concentrated poverty. The Nixon Administration would accelerate this already rapid shift by introducing model laws for the District of Columbia aimed at increasing police power and the punitive potential of criminal convictions, and pivoting from Johnson's overwhelming investment in policing toward a more balanced portfolio of police, courts, and corrections departments.[27] Ford and Carter would bring important innovations toward ever-lengthening prison sentences and an increasingly fortified urban–suburban landscape.[28] Yet all of this remains largely in the tight operating principles of the war-on-crime logic that Hinton sees in place of the very appointment of the Johnson Administration's much vaunted National Commission on Law Enforcement and the Administration of Justice.[29] What happened?

Hinton places even more emphasis than previous accounts have on the political significance of the pattern of urban riots or uprisings that, beginning with the Watts Riots in Los Angeles in 1965, shook America's large- and medium-sized cities and the political landscape through most of the summers into the early 1970s.[30] Unlike the more generalized idea of 'crime in the streets' into which they obviously played, urban riots galvanized very specific concerns of collective violence directed against white society and its governmental forces (particularly the police). In fact, to the extent that these events had a political logic, it was one very much aimed against big-city police whose forms of order maintenance had always involved routine racial

24. *See id.* at 56–57, 61–62, 87–88, 99 (describing President Johnson's Law Enforcement Assistance Act of 1965 and the large amount of training and monetary aid sent to police forces as a result of the program).

25. *See id.* at 103–06 (describing President Johnson's adoption of a "middle ground" between more social programs and improvements in law enforcement).

26. *See id.* at 134 (explaining that lawmakers had "already begun to retreat from social welfare interventions" during the Johnson Administration).

27. *See id.* at 134–38, 163–79 (providing an overview of President Nixon's actions regarding crime, including the District of Columbia Court Reorganization Act of 1970 and large investments into police, courts, and corrections departments).

28. *Id.* at 252–53, 305–06 (noting that President Ford's efforts to reduce crime related mostly to sentencing and incarceration, while Presidents Carter's efforts centered among police–community tensions and relations).

29. *Id.* at 80–81.

30. *Id.* at 66–77, 108, 115, 131–33 (detailing the Watts Riots, surrounding events, and resulting consequences).

harassment and, in the increasingly turbulent 1960s, were becoming more violent and confrontational.[31] Ironically, the major solution the Johnson Administration promoted, notwithstanding much talk of investment and rebuilding, was even larger, better equipped, and more lethal police forces.[32]

If riots could be seen as protests of the inadequate pace of antipoverty policy and the unmediated tyranny of virtually all-white urban police forces (and the often white supremacist political machines to which they were attached), they were an even more potent weapon in the hands of those who argued that criminality arising from the 'tangle of patholog[ies]' associated with segregated neighborhoods of concentrated poverty was a threat to national security.[33] Even the sympathetic liberals of the Johnson Administration saw the riots as signs that antipoverty programs, at least at the individualized behavioral level to which post-New Deal liberal politics consigns them, might not stem the tide of black violence in time to prevent, if not a revolution, at least a fatal rupture of support for the Johnson agenda nationally.[34] Much like the increasingly grim conflict in Vietnam to which a wide variety of observers drew parallels,[35] the war on crime would have to reestablish a coercive balance of control before more hopeful efforts to win the hearts and minds of young residents of segregated neighborhoods of concentrated poverty could be attempted. The strategy would prove futile in both domestic and foreign policy, but it would take far longer to declare the war on crime a failure.

The riots were important also because they reinforced the racialized criminology that formed the core intellectual framework for the war on crime. In this analysis, drawn from the midcentury and at least initially from liberal social scientists like Daniel P. Moynihan, James Q. Wilson, and Edward Banfield, crime as a problem stemmed from the transformations of the modern city and the rise of what a later generation would call the

31. *See id.* at 67–68 (detailing the destruction that occurred during the Watts uprising and noting that the damage was concentrated on stores and shops owned by whites, while public buildings in the black neighborhoods suffered minimal damage).

32. *Id.* at 87.

33. *Id.* at 58–61.

34. The Johnson Administration saw the riots as evidence black nationalists and revolutionaries were gaining ground and that his liberal social agenda was in danger. His solution was to accelerate the war on crime. *Id.* at 112.

35. *See* Michael W. Flamm, *From Harlem to Ferguson: LBJ's War on Crime and America's Prison Crisis*, ORIGINS: CURRENT EVENTS IN HIST. PERSP. (Apr. 2015), http://origins.osu.edu/article/harlem-ferguson-lbjs-war-crime-and-americas-prison-crisis [https://perma.cc/H3EW-E6DF] (quoting a New York City detective as stating: 'I hope this doesn't happen, but more Americans may get killed in Harlem this summer [1964] than in Vietnam"); Robert Higgs, *The Vietnam War and the Drug War: America's Futile Crusades*, INDEP. INST. (Apr. 20, 1995), http://www.independent.org/newsroom/article.asp?id=330 [https://perma.cc/2BSD-XV8N] (noting the parallels between the Vietnam war and the war on drugs).

'underclass.'[36] Captured perhaps most enduringly by Moynihan's imagistic concept of the tangle of urban pathologies (read urban as black), this theory saw the deformed black family produced by the aftermath of slavery and, more recently, the Great Migration (single parent, female headed) as the key source of a demographic and cultural tide of nonconformity and violence that threatened American society and certainly the claims of liberalism to govern it.[37] The riots proved that this tide was already present and capable of overwhelming the local police forces (many if not most of the riots involved national guards force being mobilized by the Governor and in some cases federal troops ordered by the President).[38] To avoid a military commitment perhaps many times the scale of Vietnam, it would be necessary to permanently bolster the scale and military capacity of local police, while counterbalancing the dangerous population through aggressive use of arrest and imprisonment.[39]

As much as this is a book about mass incarceration, it is also a book about policing and particularly the way that expanding policing in the 1960s and 1970s paved the road to a larger prison population in the 1980s and 1990s. It is essential that we link mass incarceration to the kind of aggressive preemptive policing that has been a major product of the war on crime and that forms the core of what today is becoming intolerable to many Americans about our carceral state. Johnson and Nixon shared an obsession with growing and transforming American police forces, which both presidents saw as the frontline troops who could contain the crime threat of alienated black youth.[40] In addition to expanding the size of police forces and giving them the kind of military equipment necessary for fighting Vietnam-like counterinsurgency wars,[41] the war on crime, early on, embraced a transformation of policing toward preemptive confrontation with the 'enemy. an enemy increasingly defined as all black young men in segregated neighborhoods of concentrated poverty. The enormous influence of George Kelling and James Q. Wilson's 1982 'Broken Windows' article

36. *See, e.g.*. WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 3–4 (1987) (explaining the difficulty describing or classifying the problems of minorities in the inner city).

37. *See* OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 15–19, 29–45 (1965) (widely known as *The Moynihan Report*) (discussing the "tangle of pathology" resulting from family structures caused by a history of slavery and discrimination).

38. *See, e.g.*. HINTON, *supra* note 4, at 64 (noting the use of the Army and National Guard to reinforce police officers in South Central Los Angeles during the Watts Riots).

39. *See id.* at 87–88 (discussing the militarization and increase in manpower of state and local law enforcement arising from federal funding in the wake of the Watts Riots).

40. *See id.* at 87–88, 140 (discussing Johnson's and Nixon's commitments to investing in local law enforcement).

41. *Id.* at 87–88.

has led to the association of this kind of policing with that decade and since,[42] but Hinton draws direct lines from the Johnson–Nixon war-on-crime centers in the Justice Department to this new model.[43] It is from these origins in the intersection between the war on poverty and the war on crime that the new policing received its indelible ambiguity as to whether it is about policing that is responsive to minority communities ("community policing, 'problem centered policing"),[44] or whether it is about policing that is responsive to technocratically set management objectives (CompStat, predictive policing, hotspots policing).[45] It has always been both but with the heaviest commitment to the latter.

This new policing model largely superseded a model that had just recently been invented under the modernizing influence of two influential chiefs that typified midcentury commitments to professionalization of policing, William Parker of Los Angeles and O.W Wilson of Chicago, and based on more efficient and rational management of car-based patrols.[46] This approach was intended to increase response time and recapture discretionary hours left to police conduct in area-based patrols. Even if it did not do much to reduce crime by increasing arrests, motorized patrol in time might have had a good influence on police racism and violence against people of color since it subjected police to the centralized controls of dispatchers.[47] Instead, the new imperatives of the war on crime made what had seemed modern outmoded and allowed a radically transformed version of the "old time' foot-patrol model to return in the form of a deeply hostile sort of counterinsurgency policing.[48]

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42. *See* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [https://perma.cc/J59L-Q6WE].

43. HINTON, *supra* note 4, at 289.

44. *See* BUREAU OF JUSTICE ASSISTANCE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION, NAT'L CRIM. JUST. REFERENCE SERV. at vii (Aug. 1994), https://www.ncjrs.gov/pdffiles/commp.pdf [https://perma.cc/MP5R-8CD7] (defining community policing as a policing policy consisting of community partnership and problem solving); *What is POP?*, CTR. FOR PROBLEM-ORIENTED POLICING, http://www.popcenter.org/about/?p=whatiscpop [https://perma.cc/S3CK-Y6TX] (defining problem-oriented policing as an approach that targets discrete problem areas and subjects those areas to 'microscopic examination' to develop an effective strategy in addressing the problems).

45. HINTON, *supra* note 4, at 23 (discussing CompStat and other statistical programs that aid police in predicting criminal activity).

46. *Id.* at 182. Parker was deeply racist, and Wilson was not. Both ran departments so deeply committed to white supremacy at that point that the Chiefs' philosophies may have mattered little. *Id.* at 70; *see* Gary Potter, *The History of Policing in the United States, Part 5* (July 23, 2013), http://plsonline.eku.edu/insidelook/history-policing-united-states-part-5 [https://perma.cc/QLN4-9SVQ] (reporting why Wilson's race-neutral vision of police professionalism actually resulted in routinely targeting young, minority males).

47. HINTON, *supra* note 4, at 182.

48. *See id.* at 160, 183, 338 (discussing the drastic increase in foot patrolmen, a majority of whom were white and concentrated in urban areas, that occurred during the war on crime and the

Some of Hinton's best work is tracing ideals forged in Washington to their implementation in places like Detroit, Los Angeles, and other large cities experiencing the dislocations of deindustrialization and middle-class suburbanization even as the Great Migration continued to bring blacks from the South to cities in the Midwest and West.[49] Some of these programs, funded by the Law Enforcement Assistance Administration (LEAA) and based on this preemptive model, like Detroit's STRESS program (for Stop the Robberies, Enjoy Safe Streets), and Los Angeles CRASH (for Community Resources Against Street Hoodlums), and the federal government's Office of Drug Abuse Law Enforcement (ODALE), have been discussed by previous studies of the crime war,[50] but never with as much detail and connection between model and outcome. In retrospect the contradictions of these programs were hiding in the plain sight of their acronyms. Who was supposed to enjoy the 'safe streets' produced by STRESS? Certainly not the young men of color who were confronted, humiliated, and sometimes killed outright. The community whose resources would be used to attack 'street hoodlums' obviously did not include young black men living in segregated neighborhoods of concentrated poverty.

If police were the foot soldiers of America's parallel Vietnam, then young black men living in segregated neighborhoods of concentrated poverty were the Viet Cong—the enemy. The question of how many of them were hardcore combatants whose security could only be achieved through death or incapacitation and how many of them were alienated youths who could be nudged back into channels of social integration created a space for some contestation within the overall war-on-crime paradigm, but the consensus was clear on the question of dangerousness of this population and agreed that this danger lay in the traits low-income urban youth had as a population and not in their individual characteristics.[51] In the Johnson Administration, Youth Service Bureaus were imagined to be 'institutional substitutes for parents' where police officers could help replace the lost, normative force of proper two-parent households.[52] By the Ford Administration, the focus would be more on targeting 'hard-core' youth offenders for permanent

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resulting '[d]isproportionate numbers of African Americans that received criminal records and prison sentences").

49. *See generally id.* at 180–217.

50. *See generally* EDWARD J. EPSTEIN, AGENCY OF FEAR: OPIATES AND POLITICAL POWER IN AMERICA 18–20 (2d ed. 1990) (remarking on the ODALE's odd origins and 'extra-legal' powers); Edward J. Littlejohn, *Law and Police Misconduct*, 58 U. DET. J. URB. L. 173, 208–19 (1981) (discussing the rise and fall of STRESS); Mark D. Rosenbaum & Daniel P. Tokaji, *Healing the Blind Goddess: Race and Criminal Justice*, 98 MICH. L. REV. 1941, 1942 (2000) (reviewing DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999)) (pointing to the "lawlessness of the CRASH Unit and the numerous dubious convictions obtained as a result").

51. HINTON, *supra* note 4, at 115.

52. *Id.* at 117.

incapacitation through federal prosecution and long-term imprisonment.[53] Yet throughout, liberals and conservatives agreed that this population (and public safety) would be best served through exposure to ever greater 'treatments' of aggressive policing.[54]

The chapters on the Ford and Carter Administrations were some of the most rewarding for this author. I had naïvely suggested in my own study of the war on crime that these post-Watergate years saw some relaxation on the grip of battling crime by the American Presidency and its Pentagon-like Department of Justice.[55] In fact, both accelerated the war on crime even while seeking to bring a more technocratic and less ideological tone to it. Consistent with both trends, the Ford Administration sought to increase the focus on particularly dangerous persons, supposed 'career criminals' (or at least those with a long record of being arrested for crimes) or gang members, that offered the prospect of a more efficient war on crime (although this focus was mostly added on to existing criminalization), marking perhaps the beginning of the 'new penology' as Feeley and I described the trend toward risk rationalization inside the carceral state.[56]

Hinton's story of the path toward mass incarceration is so bleak and so determined that it is difficult to notice that she also points frequently to the paths not taken and now long covered by the 'success' of mass incarceration as a project.[57] The Kerner Commission, appointed by President Johnson after the Detroit and Newark riots in 1967, described the emerging war on crime as heading toward a 'spiral' of segregation, violence, and police force' suggesting that only a substantial effort to break the back of urban segregation could escape that cycle.[58] Inside the segregated neighborhoods of concentrated poverty, activists like the Black Panthers proposed their own versions of antipoverty and crime programs.[59] Either of these projects might have had just as much success against crime and collective violence as the war on crime (which had very little), while having the great benefit of not

53. *Id.* at 248–49.

54. *Id.* at 254–55.

55. *See* SIMON, *supra* note 5, at 54 (describing the Ford and Carter Administrations as "a time-out in the escalation of the war on crime," and noting that both administrations "sought to model an executive of limitations and legality").

56. *See* Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 458–59 (1992) (describing the shift in American incarceration strategy toward statistical prediction, concern with groups, strategies of management, and labeling the new strategy as the "new penology").

57. *See* HINTON, *supra* note 4, at 27–32 (discussing the alternative strategies considered by the Kennedy and Johnson Administrations that would have focused on urban-youth issues more comprehensively).

58. *Id.* at 124–27. Perhaps reflecting Johnson's own contending ideas, the Kerner Commission included many more civil rights-oriented liberals than the earlier and more determinative Crime Commission. *Id.* at 127.

59. *See id.* at 206 (noting how the Los Angeles chapter of the Black Panther Party provided free healthcare, food, and other much-needed services in segregated urban neighborhoods).

leading us inexorably toward mass incarceration. In retrospect, it seems difficult to believe that any of these projects could have moved fast enough to head off the urban riots of the late 1960s which were anchored in the increasingly violent attacks of racist big-city police forces against black communities (a violence anchored, in turn, in police resistance to changing social norms brought on by the rise of the Civil Rights Movement). This is especially true when you consider how much federal policy outside the crime arena was altering the fate of the great cities. These policies, including promoting the movement of the middle class to segregated all-white suburbs, carving freeways through dense urban corridors to facilitate suburbanization and interstate markets, the deindustrialization of the major Northern cities facilitated by that subsidized transportation network, and the antiunion tilt of federal labor law after the 1940s, left central cities in a precarious state on the eve of the 1960s.[60] The emerging, post-modern city was an awkward balance between fortified central business districts, dependent on freeways and suburban shoppers, and segregated neighborhoods of concentrated poverty, places inherently susceptible to crime and difficult to police based on traditional (foot patrol) or modern (car patrol linked to dispatch) methods.[61]

Hinton adopts a thoroughly and justifiably skeptical view of crime statistics in this period. Convinced crime was rising rapidly, especially in the large cities, national leaders made improving the collection of crime reports a major priority for improving the police. Of course this led to rises, sometimes substantial rises, in reported crime rates, precisely the outcome that was driving fear of crime.[62] The war on crime contributed to crime in even more insidious ways, such as effect that aggressive decoy operations made on the homicide rate in cities like Detroit.[63] Yet what we know today about the environmental and situational roots of crime suggests serious crime probably did go up significantly in segregated neighborhoods of concentrated poverty during the 1960s and 1970s as criminogenic conditions met a policing strategy that was uncertain and shifting (and implemented by a

60. *See* THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 4 (First Princeton Classics ed. 2014) (introducing the various explanations for the decline of Northern cities).

61. *See* MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 226–36 (2d ed. 2006) (discussing the "spatial apartheid" now visible in many post-modern cities).

62. *See* HINTON, *supra* note 4, at 85 (noting how disproportionately high police attention paid to segregated neighborhoods in the 1960s resulted in an increase in reported crimes).

63. *See id.* at 191–202 (detailing how Detroit law enforcement's decoy program "demonstrated the violent consequences of decoy squads"). This came to mind recently when reporting on Brazil and the Rio Olympics noted that police killings in Rio amounted to 16% of the homicides in 2014. Nash Jenkins, *Brazilian Police Killed More Than 5,000 Civilians in Rio Between 2005 and 2014, Report Says*, TIME (Aug. 4, 2015), http://time.com/3983338/brazil-police-killed-civilians-rio/ [https://perma.cc/3Q87-8KEA].

policing work force that at that time in history was undeniably dominated by straight-up racists).[64]

While Hinton's approach is the right one for a history of state power, we still lack a proper history of the war on crime from the popular perspective. The wave of urban histories of the post-war period has given us a clear view of the disarray created even before reported crime rates began to go up.[65] Hinton has given us a newly precise picture of how Washington-based planners saw their objectives and obstacles from the Pentagon of the war on crime. We next need new histories of urban popular forces and their experience of criminalization itself; naturally these archives never open (or close).

II. Historiography of Mass Incarceration

We are in the midst of a wave of mass incarceration history. Hinton's study of the war on crime comes several years after a widely discussed special issue of the *Journal of American History* devoted to the history of mass incarceration.[66] Heather Thompson's history of the Attica Prison uprising and its influence on the shape of the American carceral state was published in August of 2016.[67] All of these differ from earlier histories of particular prisons or even state prison systems because they make mass incarceration as such the subject and attempt to increase our understanding of both the causal mechanisms that triggered and sustained it, and the lost possibilities for a different present covered over by the success of mass incarceration. Hinton's study exemplifies many features that are crucial to doing the history of broad governmental programs like the war on crime that can get lost between the appeals of social history on the one hand and more traditional history of legislation on the other.

A. The Importance of Ideas and Specific Intellectuals

Ideas and the academic entrepreneurs behind them matter greatly in Hinton's analysis. Looming especially large is the trio of James Q. Wilson, Edward Banfield, and Daniel Moynihan. The first two were political

64. *See* Jonathan Simon, *Policing After Civil Rights: The Legacy of Police Opposition to the Civil Rights Movement for Contemporary American Policing*, *in* THE SAGE HANDBOOK OF GLOBAL POLICING 373, 373–87 (Ben Bradford et al. eds., 2016) (outlining the historical relationship between race relations and law enforcement).

65. *See* SUGRUE, *supra* note 60, at 5–6, 143–52 (discussing the deteriorated condition of Northern cities, specifically Detroit, post-World War II).

66. *See* sources cited *supra* note 2.

67. HEATHER ANN THOMPSON, BLOOD IN THE WATER: THE ATTICA UPRISING OF 1971 AND ITS LEGACY (2016). *See generally* DAN BERGER, CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA (2014) (examining the history of black activism and organizing in prison); KERAMET REITER, 23/7: PELICAN BAY AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT (2016) (exploring the history of the Pelican Bay prison in California).

scientists (Banfield was Wilson's doctoral supervisor[68]), both interested primarily in race and the governance of the post-war cities, especially in policing. Banfield is best remembered for his sulfurous but fascinating portrait of the contradictions underlying urban social policy in the 1960s.[69] Wilson, the student, would be much more important to the actual policy stream, promoting the idea that a modest but significant increase in the actual use and length of imprisonment could substantially reduce then-rising rates of reported crime and later the idea of "broken windows" policing.[70] Later still, in the 1990s, Wilson promoted racialized ideas about what had driven the high reported crime rates of the late 1980s,[71] and in the work of one of his students, John DiLulio, promoted the most ideological of all the war-on-crime constructions, the 'super-predators'—juveniles who were brought up in the female-headed homes common in segregated neighborhoods of concentrated poverty.[72] Moynihan, a sociologist who would become a central domestic policy advisor to both the Johnson and Nixon Administrations and eventually a long-serving U.S. Senator from New York, authored the famous internal memo known as the Moynihan Report, which blamed high crime levels on long-term damage done to the black family structure by slavery and its aftermaths.[73] While somewhat different in their specific projects, Wilson and Moynihan shared a common focus on the black family and what Moynihan called the 'tangle of pathology' that tied blacks living in segregated neighborhoods of concentrated poverty to crime.[74] Hinton argues that the common policy conclusion was an ever-tightening

68. HINTON, *supra* note 4, at 185.

69. *See generally* EDWARD C. BANFIELD, THE UNHEAVENLY CITY (2d ed. 1970).

70. *See* James Q. Wilson, *'What Works?' Revisited: New Findings on Criminal Rehabilitation*, PUB. INT. Fall 1980, at 3, 17 (suggesting that stricter punishments may produce desirable changes in the "serious, chronic delinquent"); Kelling & Wilson, *supra* note 42 (advocating police efforts to maintain "order" and enforce the letter of the law may, in turn, reduce the rates of violent and other serious crimes).

71. *See* JAMES Q. WILSON & RICHARD J. HERRENSTEIN, CRIME AND HUMAN NATURE: THE DEFINITIVE STUDY OF THE CAUSES OF CRIME 461–68 (1985) (acknowledging the higher rates of crime among African-Americans and discussing several explanatory theories); James Q. Wilson, *Crime*, *in* BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 115, 123 (Abigail Thernstrom & Stephan Thernstrom eds. 2002) (connecting higher per capita crime rates in black populations to the "weak character" of "poor, badly educated, fatherless children").

72. John J. DiLulio Jr. *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), http://www.weeklystandard.com/the-coming-of-the-super-predators/article/8160 [https://perma.cc/8W3Y-SJSG] (connecting the emergence of 'super-predators' to "moral poverty," including families with "no father in the home").

73. *See generally* DANIEL PATRICK MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965).

74. *See id.* at 29–30 (asserting that the "resurgence" of post-slavery black populations would be "doomed to frustration unless the viability of the Negro family is restored"); Wilson, *supra* note 71, at 123 (blaming the "weak character" at the root of black crime largely on the prevalence of "unmarried mothers" and "fathers who will [not] help raise their children").

noose of policing and prison around the necks of young black males living in these pathology-tangled neighborhoods.[75]

Hinton's thorough exploration of the intellectual grounds of the war on crime highlights many other significant social science interventions, not all of them as intentionally oriented toward enhancing the scale of the carceral state as the previous three (Wilson, Moynihan, and DiLulio). In the early days of what became the war on poverty, the work of sociologists Lloyd Ohlin and Richard Cloward promoted the idea of direct interventions aimed at reversing the social and economic isolation that channeled youth in segregated neighborhoods of concentrated poverty toward crime.[76] While not aimed at promoting law enforcement strategies, the underlying theory that conditions associated with black, segregated neighborhoods were criminogenic underscored the potential threat if antipoverty approaches failed. Hinton persuasively suggests that there was little to prevent this logic from supporting a police-first approach to controlling poverty-based crime.[77]

One of the most important and underrecognized social scientists that Hinton covers here was the late Marvin Wolfgang of the University of Pennsylvania, whose ideas have not been nearly as controversial as Wilson's but pointed toward the same racial strategy and whose statistical studies of the distribution of arrests among a cohort of Philadelphia boys born in 1945 (the baby-boomers) helped to crystalize the threat posed by black youth.[78] Wolfgang's headline finding that a small percentage of the youth accounted for more than half the total arrests in the cohort has shaped many dreams since of targeting imprisonment on a group of career criminals, high-rate offenders, or super-predators.[79] Wolfgang's research and its reception crystalizes many of Hinton's themes. His funding was coming from the war on crime, and his uncritical reliance on police arrests allowed the filter of police selection and distribution to shape who the dangerous, high-rate persistent youth would be (black males from segregated neighborhoods of concentrated poverty).[80]

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75. *See* HINTON, *supra* note 4, at 58–62 (discussing the ever-increasing surveillance and police patrols that occurred in segregated neighborhoods that resulted in racial inequalities).

76. *See* RICHARD A. CLOWARD & LLOYD E. OHLIN, DELINQUENCY AND OPPORTUNITY: A THEORY OF DELINQUENT GANGS 150–52 (3d prtg. 1963) (hypothesizing that, were disadvantaged adolescents given ample "legitimate means" of achieving success and were "illegal or criminal means" not readily available, criminal subcultures would not develop amongst those adolescents).

77. *See* HINTON, *supra* note 4, at 84 (recounting that despite input from "a few amenable academics" in the 1960s, "the criminal justice and law enforcement community almost exclusively shaped" the government's perspective on crime).

78. *See* MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT 245 (1972) (finding that, more than education level, changes in residence and school, and I.Q., race and socioeconomic status "were most strongly related to the offender-nonoffender classification").

79. *See id.* at 248 (finding that 18% of the cohort were "chronic offenders, responsible for more than 50% of offenses, and that nonwhites were five times more likely to be chronic offenders).

80. *See* HINTON, *supra* note 4, at 224–26 (highlighting federal policy makers' disregard of Wolfgang's reliance on contact with police as a proxy for delinquency, despite "the fact that African

Hinton highlights some moments when social science offered truth telling that might have provided reasons to resist the embrace of mass incarceration. Most notable are two policy experts who combined law and criminology, an interdisciplinarity rare at that time and now, James Vorenberg[81] of Harvard Law School and Frank Zimring,[82] then of Chicago and more recently of U.C. Berkeley; both criticized efforts at prediction and preemption as misbegotten and likely to reinforce patterns of racial disadvantage. While both were funded by war-on-crime research funds, their policy warnings were largely ignored.[83]

Of course the ideas that triumphed turned out to be highly productive precisely because they promoted forms of governmental action against the crime threat, as it was coming to be politically defined, without creating the direct public strategy on the economic and social isolation of these communities that the Kerner Commission called for in its 'enrichment' strategy.[84] Yet, it would be a mistake to see these intellectual interventions as serving simply an ideological purpose of providing a patina of social science respectability to a control agenda forged on other ground and by other strategists (although some examples like the 'super-predator' concept that emerged from Wilson's thought via DiLulio clearly fit an ideological role). These intellectual interventions were politically effective because they offered anticrime strategies that provided real objectives for federal investments to shape local policing and imprisonment strategies around. In that sense, social scientists in the war on crime are examples of what Michel Foucault called 'specific intellectuals' in contrast to the 'universal intellectual' whose broad ideas reshape fundamental principles.[85] Specific intellectuals—Robert Oppenheimer was one of Foucault's memorable examples[86]—use their theoretical knowledge to forge practical projects

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Americans were more likely to be stopped by police on 'suspicion, to be assaulted verbally or physically, and to be arrested").

81. *Id.* at 123 (quoting then-Crime Commission Director Vorenberg as warning against creating "a self-fulfilling prophecy" by labeling youth as delinquents).

82. *Id.* at 241 (quoting Professor Zimring as warning of the likelihood that the 1980s would see disparate numbers of minority youth in juvenile and adult correctional facilities).

83. *See id.* at 123 (rebuking war-on-crime policy makers, including Vorenberg himself, as "largely blinded" from policy alternatives "outside of the punitive realm").

84. *See id.* at 126 (discussing the Kerner Commission's evaluation of available policy options and noting the Commission's preference for structural changes).

85. Michel Foucault, *Truth and Power*, Interview with Alessandro Fontana & Pasquale Pasquino, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977, at 109, 128–29 (Colin Gordon ed., 1980) ("The 'universal' intellectual derives from the jurist or notable, and finds his fullest manifestation in the writer, the bearer of values and significations in which all can recognize themselves. The 'specific' intellectual derives from quite another figure, not the jurist or notable, but the savant or expert.").

86. *See* SILVAN S. SCHWEBER, EINSTEIN AND OPPENHEIMER: THE MEANING OF GENIUS 198 (2008) (discussing Foucault's initial classification of Oppenheimer as a 'specific intellectual' for his work as a 'scientist-statesman' on the first two atomic bombs before Oppenheimer reverted

around which governmental capacities can be concentrated, like the Manhattan Project.[87] While based on a shockingly thin empirical basis, the winning ideas behind the war on crime created practical linkages between the crime threat and ways of redeploying and expanding existing governmental capacities (policing and incarceration).[88] Viewed as a legal phenomenon—law breaking—war on crime is an impossible metaphor to realize. Reconstructed as a sociological phenomenon—black youth in segregated neighborhoods of concentrated poverty—a war on crime was all too practical.

B. Technologies of Carceral Power

Another strength of Hinton's historiographical strategy is its description of the way administrative policies and legal amendments created new and unprecedented governmental capacities to surveil and incarcerate citizens. Two of the most important were stop-and-frisk policing and mandatory minimum sentences.[89] The first was a modification of the motorized-patrol approach to policing that was being promoted as a modern bureaucratic alternative to the old foot-patrol policing when the war on crime began. Now instead of responding to dispatched calls for assistance, police in cars or on foot would use their own authority to engage individuals that they suspected of being involved in crime, generally on starkly racial grounds.[90] Along with even more aggressive methods like the use of undercover police as decoys, the new methods decoupled convictions (and thus potential imprisonments) from the responses of ordinary residents and produced a flow of potential prisoners far larger than could be produced by solving the kinds of serious crimes people report to the police. The Supreme Court removed any potential legal impediments through its decisions upholding virtually complete police discretion to use any kind of criminal violation as the basis for their stops, removing any potential judicial check on aggressive police use of this power.[91]

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back to a "universal intellectual" concentrating on "the nature of scientific knowledge and on the relation between science and society" after his security clearance was revoked).

87. Foucault, *supra* note 85, at 127–28 (discussing the specific intellectual's ability to intervene in discourse due to specific and relevant knowledge).

88. *See* Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015), http://time.com/3746059/war-on-crime-history/ [https://perma.cc/ZE3Y-35HX] (detailing the expansion of federal action in local policing and incarceration policies through programs of agencies such as the Law Enforcement Assistance Administration).

89. HINTON, *supra* note 4, at 82, 138.

90. *See id.* at 128–29 (relating the Kerner Commission's findings that the techniques used by police patrols including stop-and-frisk may be used indiscriminately, resulting in racial harassment).

91. *See* Illinois v. Wardlow, 528 U.S. 119, 124–26 (2000) (finding unprovoked flight from an area of heavy narcotics trafficking may justify being detained by the police); Terry v. Ohio, 392 U.S. 1, 22–24 (1968) (explaining that a police officer may detain an individual on the basis of reasonable suspicion that the individual may have or is about to commit criminal behavior even though the officer does not yet have probable cause to make an arrest). Even noncriminal violations

Mandatory minimums—an idea developed in the first Nixon crime bills,[92] expanded in the Reagan years, and heavily promoted to the states[93]—distorted the whole structure of sentencing upward. In many instances they were built into complex matrix systems fixing a sentencing range based on crime level and criminal history score. These systems were designed originally to assure horizontal equity among individuals, but now incorporated extreme punishments with no judicial discretion to respond to significant individual differences. As Hinton notes, a certain kind of color-blind antidiscrimination principle had become a core part of the national canon in the 1980s, and mandatory sentences could be seen as protecting individuals from disparate judicial treatment due to race (although it did nothing to control prosecutorial selection).[94]

C. *Resistance*

Hinton's story, although anchored in the strategies of the federal government, does not ignore the role of resistance. We have already discussed her focus on urban uprisings as—even more than any perceived rise in individual violent crimes—helping to define the war on crime.[95] Most of the riots began as collective protest action against the existing indignities imposed by the policing of the 1960s, generally triggered by an in-itself-not-extraordinary attempt to exercise police arrest powers.[96] The result was a further strengthening of the most offensive elements of that policing model. Political activists within the black community, like the Black Panthers, tried to discipline resistance to police violence into sustainable legal practices but were met with criminalization and sometimes murder.[97] They also offered alternative security proposals for segregated neighborhoods of concentrated poverty that did not rely on enhanced policing but instead on community organization.[98] These stories of resistance, long covered over by the success of the mass incarceration project, are important to recover as we consider what should succeed it. The Black Panthers' appeal to create popular patrols

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such as traffic stops have been found to justify searches for drugs, see for example, Ohio v. Robinette, 519 U.S. 33, 38–39 (1996) (allowing for searches of a person's car for contraband following a speeding violation without having to explain that individuals may be free to leave), and California v. Acevedo, 500 U.S. 565, 579 (1991) (eliminating the previous requirement for a warrant when searching closed containers in automobiles).

92. HINTON, *supra* note 4, at 138.

93. *Id.* at 272.

94. *Id.* at 271.

95. *See supra* text accompanying notes 27–38.

96. HINTON, *supra* note 4, at 55–56.

97. *See id.* at 149, 205–07 (describing the methods used by law enforcement to disrupt the activities of the Black Panther Party and similar activist groups).

98. *See id.* at 9 (describing the Black Panthers as calling for "armed self-defense, as well as the difference between how black activists and federal, state, and local authorities responded to crime).

to protect black neighborhoods from both crime and police may have new relevance as we consider the paradox that despite extraordinary levels of public spending on police, most homicides go unsolved in segregated neighborhoods of concentrated poverty.

III. Ending Mass Incarceration

Hinton's account is both sobering and inspiring for those of us who want to see the current interest in criminal justice reform achieve enough momentum to undo the tremendous changes in the American carceral state wrought by the war-on-crime era. Her comprehensive account of the now-forgotten first half of the war on crime (the Clinton Era would add another layer, including 100,000 more urban police)[99] raises serious questions about whether many of the most popular reform approaches can truly break with the past. Yet in capturing the criminological climate of the mid-1960s with some nuance, Hinton reminds us that significant reductions in the use of imprisonment and the need for major reforms of policing both seemed possible, even urgent, on the eve of the war on crime despite rising crime rates.

A. Evidence Based Law Enforcement

One of the most resonant themes in criminal justice reform today is refocusing policing and incarceration based on empirically tested strategies.[100] In part, the emphasis on recidivism and how to reduce it is a counterbalance to the extremism of the 1990s when laws like California's Three-Strikes gave prosecutors largely unaccountable discretion to decide when to use life sentences.[101] But establishing empirical evidence for effective policing and rehabilitative programs was also a major goal of federal funding during the first half of the war on crime.[102] This wave of research tended to reproduce the patterns established by police and

99. *See* David Yassky, Opinion, *Unlocking the Truth About the Clinton Crime Bill*, N.Y. TIMES (Apr. 9, 2016), https://www.nytimes.com/2016/04/10/opinion/campaign-stops/unlocking-the-truth-about-the-clinton-crime-bill.html [https://perma.cc/3TTV-SY4N] (relating the specifics of the 1994 Crime Bill signed by President Clinton).

100. *See, e.g.*, KAMALA D. HARRIS, SMART ON CRIME: A CAREER PROSECUTOR'S PLAN TO MAKE US SAFER, 179–81 (2009) (detailing the use of data collection and other empirical methods in discouraging and reducing open-air drug dealing in High Point, North Carolina).

101. FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 26–27 (2001) (detailing prosecutors' ability to use the strike system to ensure higher sentences).

102. *See* HINTON, *supra* note 4, at 79–86 (chronicling the role of Johnson's Crime Commission in developing research to help produce effective legislative policy in the early years of the war on crime).

prosecutorial discretion in the form of arrest and conviction statistics and to undermine hopes for alternatives like rehabilitation.[103]

An important component of these evidence-based strategies is their focus on statistical risk assessment. In the face of chronic overcrowding in many of the nation's prison systems (including the federal system) and jails, actuarial risk assessment is being reexamined with enthusiasm by reformers as a way to reduce incarcerated populations while rationalizing a system that, from the pretrial phase to the distribution of lengthy prison sentence enhancements, has little rational relationship to risk.[104] The revival of what Malcolm Feeley and I called 'the new penology' is another sign of how deeply the legitimacy of the U.S. carceral state has been shaken.[105] Yet as Hinton's history reminds us, this refocusing of law enforcement and custody on "high risk' categories of people who can reliably be identified using ready-at-hand bureaucratic information is the repetition of a theme that has run throughout the war on crime period—that of beating crime by incapacitating its most active participants. Repeatedly, and despite relying on somewhat different theories and methods, this search for the dangerous has always rediscovered the priority of maintaining surveillance and control over young black people, especially men living in segregated neighborhoods of concentrated poverty. There is every reason to fear that renewed actuarialism would "rediscover' the same priorities. After all, as Hinton argues throughout, the intensification of policing of these suspect classes in these neighborhoods has produced in criminal records a knowledge foundation for an enduring, indeed inescapable, racial profile.[106]

B. War on Violence

Another way that reformers are seeking to save the carceral state from its current legitimacy crisis by rationalizing it is by refocusing the war on crime to violence by abandoning the war on drugs, which was a diversion.[107] In fact, the system has steadily been deemphasizing the war on drugs since the end of the 1990s (although as a legal matter it remains fully in place and weaponized),[108] and our long experiment in incentivizing policing drug

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103. *See id.* at 85–86 (explaining that the statistics the Crime Commission relied upon to develop policing and incarceration policies were highly skewed toward affirming then-existing views about such policies).

104. Feely & Simon, *supra* note 56, at 460–61.

105. *See id.* at 456 (noting that the new penology is a response to the increase in demands "for rationality and accountability").

106. *See* HINTON *supra* note 4, at 23–25 (describing a system, which utilized lists of minorities, that police used to profile and then justify arrests and overpolicing of communities).

107. Jonathan Simon, Essay, *Law's Violence, the Strong State, and the Crisis of Mass Imprisonment (for Stuart Hall)*, 49 WAKE FOREST L. REV. 649, 673–75 (2014).

108. *See id.* at 660–62 (noting that the proportion of African-Americans imprisoned for drug crimes had decreased from 38.5% in 1991 to 36.8% in 2001 and that, by 2006, the war on drugs

seizures almost certainly was a diversion from solving serious and violent crimes (not to mention alienating most of the community members whose cooperation would be necessary to solve those crimes). Yet as Hinton's account deftly shows, the war on drugs was always bound up with the same racialized construction of the serious crime problem that has been growing in political and scientific authority since the Kennedy Administration.[109] The war on drugs was always rationalized as a way to harness federal funds and legal authority to go after local persons that were believed to be involved in serious and violent crime.[110] As defenders of 'broken windows' policing continue to argue even now, aggressive policing against drugs and other 'low-level' crimes can provide a lever on serious crime through various theoretical mechanisms of deterrence and incapacitation.[111] Moreover, a refocusing on violent crime is almost certain to retain the racialized concentration of policing and the racial makeup of the carceral population while naturalizing a punitive sentencing structure that makes little sense in terms of penological objectives.

C. Supervision

The very disrepute that incarceration—especially imprisonment—now endures is such that a tempting pathway of reform is to substitute forms of carceral supervision over people convicted or convictable of crimes as an alternative to incarceration. Historically, probation as an alternative or sequel to jail, or as a substitute for imprisonment (when it follows prison carceral supervision it is often known as parole but terminology differs from state to state) has meant being subject to special conditions, more or less active supervision by a correctional agent, and the possibility of deeper sanctioning, including incarceration, based on a summary administrative procedure.[112] It has often been associated with efforts to help those being supervised achieve a sustainable crime-free life in the community but with deeply inadequate

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was "under substantial political attack with successful initiatives in several states in favor of treatment as an alternative to jail or prison for drug crimes").

109. *See* HINTON, *supra* note 4, at 12, 21–22 (commenting on the "Kennedy administration's 'total attack' on delinquency" as beginning "a series of direct government interventions' in black communities, which led to the "mass incarceration generation' of children born after the Civil Rights Era).

110. *See id.* at 215–16 (pointing out that the main rationalization for arresting black Americans for petty crimes was to prevent inevitable future violent or more serious crimes).

111. Kelling & Wilson, *supra* note 42 (discussing the link between unchecked disorderly behavior, trust in the police, and serious crime).

112. *See, e.g.*, MICH. COMP. LAWS ANN. § 771.4 (West 2016) (providing for the discretionary grant or revocation of probation); N.Y. CRIM. PROC. LAW § 410.91 (McKinney 2017) (requiring that a parole recipient "be placed under the immediate supervision of the department of corrections and community supervision and must comply with the conditions of parole"); TEX. CODE CRIM. PROC. ANN. art. 42.12 (West 2015) (providing for community supervision in some proceedings).

resources to make a credible job of that.[113] Politically shifting from incarceration to supervision avoids crossing the potential red line of declaring these highly criminalized people no longer a presumptive menace to society, and therein lies its true failing as a solution to the present crisis. As Hinton shows, carceral supervision, either by police or probation (or the whole of what Victor Rios calls the 'youth control complex"),[114] has been the overarching goal of the federal government's war on crime.[115] These methods go back to the Progressive Era, when they were imagined as a necessary extension of social control over immigrants and minority citizens whose capacity for self-government was doubted by the scientific racism then part of the dominant intellectual framework of state power.[116] The war on crime brought the federal government and its financing and expertise into expanding this sector. The emphasis on incarceration was a distinct part of this overall strategy. A shift back to greater reliance on supervision may save the system some money and avoid some of the inhumanity brought on by overcrowding of prisons, but it leaves whole communities in daily exposure to degrading treatment by the carceral state. Almost anyone living in a segregated neighborhood of concentrated poverty is exposed to having their home searched or car stopped because they are, or are near someone, under correctional supervision. Carceral supervision also remains a major pathway to incarceration.

D. Abolition

If recovering the fuller history of the war on crime requires us to abandon some of the narrowest understandings of mass incarceration and therefore question the adequacy of some of the politically easiest approaches to reforming the American carceral state, it also invites us to consider whether a far more substantial departure might be possible. As Hinton shows, the consensus within the carceral state and its related fields of expertise on the eve of the war on crime was for substantial shifts in the dominant twentieth-century models of carceral control.[117]

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113. *See* Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 256–57 (2004) (outlining the staggering number of ex-offender reentries to communities that do not have the adequate resources to supervise and assist integration into civilian life).

114. VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS, at xiv (2011).

115. *See* HINTON, *supra* note 4, at 3, 17, 34 (explaining that the main goal of these enhanced crime-stopping initiatives was supervision and control of black communities, specifically black youths).

116. ANTHONY M. PLATT, THE CHILDSAVERS: THE INVENTION OF DELINQUENCY 36–45 (Expanded 40th Anniversary ed., Rutgers Univ. Press 2009) (1969).

117. *See* HINTON *supra* note 4, at 7–25 (chronicling the shift in perspectives leading up to the war on crime that created a mindset that focused primarily on crime in black communities).

Urban police-professionalization-oriented police executives imagined a new, more modern, and organizational model of policing built around the automobile and radio dispatch. By pulling police out of their embedded positions in neighborhood precincts, the new approach promoted in Los Angeles and Chicago sought to shorten response times and arrest more suspects in action rather than waiting for victims to discover crimes often hours after the events.[118] This model also was used to break up an older model based on local police stations and foot-based patrols that was long associated with both corruption and racial arbitrariness.[119] It was also promoted as capable of deterring crime through shortening response times and increasing the chances of police observing a crime in progress.[120] By the 1980s it would be framed as the failed old order against which a neotraditionalist model of problem-oriented community policing was posed as an answer.[121]

In retrospect this reform view appears to have overstated the degree to which this model was ever fully implemented or tested and understated how much it was overtaken by a war on crime that promoted more aggressive neighborhood policing that could be disguised as community policing. Going forward, we could do worse things than reinvent mid-twentieth-century efforts to make police truly modern and bureaucratic. As an organization, policing never has been made fully bureaucratic in the Weberian sense of being subject to rules and accountability as police shootings in questionable circumstances[122] and continuing scandals around

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118. *See id.* at 182 (noting the significant shift from the prevailing ideas of the immediate postwar period in which reliance on police cars was more common because it allowed greater mobility and quicker emergency responses than foot patrols).

119. *See id.* at 187–88 (explaining how the mobility and professionalization of the police force was a response to the high-corruption and turnover rates propagated by community policing in the nineteenth century).

120. *See id.* at 182 (stating that the rationale behind the shift to motor vehicles was decreased response times to emergencies and crimes as they were being committed).

121. *See id.* at 182, 186–87 (describing the failure of mobilized patrols as a result of the disconnect created between the police and their communities, and explaining the rationale behind the increase in foot patrols in problem areas as an effort to try and combat crime by monitoring identified problem areas).

122. *See* Christine Hauser, *Man, 73, Shot Dead by Officer Had a Crucifix, Not a Gun, Police Say*, N.Y. TIMES (Dec. 15, 2016), https://www.nytimes.com/2016/12/15/us/man-73-shot-dead-by-officer-had-a-crucifix-not-a-gun-police-say.html [https://perma.cc/35ZK-ELR6] (reporting that an elderly man with dementia was shot by police and that he was holding a crucifix instead of a gun); Ashley Southall, *District Attorney Asks for Grand Jury in Police Killing of Deborah Danner*, N.Y. TIMES (Dec. 5, 2016), https://www.nytimes.com/2016/12/05/nyregion/district-attorney-asks-for-grand-jury-in-police-killing-of-deborah-danner.html [https://perma.cc/8A2R-6LVF] (explaining why a district attorney asked for a special grand jury in a case involving an officer who breached protocol when he shot a sixty-six-year-old black woman who was acting erratically); Liam Stack, *Video Released in Terence Crutcher's Killing by Tulsa Police*, N.Y. TIMES (Sept. 19, 2016), https://www.nytimes.com/2016/09/20/us/video-released-in-terence-crutchers-killing-by-tulsa-police.html?_r=0 [https://perma.cc/LM44-W4X2] (discussing the shooting of an unarmed black

homophobic and racist text messages in San Francisco exemplify.[123] Returning police to a more responsive role and using technologies to break up racialized presumptions that shape law enforcement through forms of randomization might provide at least a valuable interim approach to breaking the hold of racial profiling on contemporary policing.

Conclusion

Observers frequently mistake the policies of the federal government as the story of government in our nation. This is especially true of criminal law and punishment, where government is particularly inapt. The vast majority of prisoners are under state custody. and the laws and policies that imprisoned them are the products of state legislatures, county prosecutors, and local police. Indeed, it takes a concerted, multifront campaign for the federal government to influence—let alone transform—something as intrinsically state and local as the American carceral state. Elizabeth Hinton's *From the War on Poverty to the War on Crime: The Making of Mass Incarceration* provides a far more detailed account and strong interpretation of the extraordinary campaign led by a series of presidential administrations of both parties and, importantly. championed by the presidents themselves and their attorneys general. This project of reversing the presumptive rise in crime, especially in American cities, seemed unlikely from the start given that the kinds of crimes receiving political attention—robberies, burglaries, and homicides—are among the most local of activities, and as noted, completely under local authorities to recognize (or not) and respond to. Although this project never succeeded by its own terms in reducing crime rates, which didn't begin to fall significantly until the mid-1990s and then appeared unrelated to war-on-crime innovations, it did work to transform the American carceral state into the punitive juggernaut it had become by the turn of the twentieth century and largely remains.

That it worked is a triumph of soft power in the interest of hard power; the power of incentives, ideas, and identities to drive a vast investment of state and local dollars in prisons and the infrastructure of criminal courts necessary to keep them filled. The first step in this, one taken early in the Johnson Administration, was to make police officers the key "recruiters' for participants in the federal government's effort to pacify the big cities ahead of multiple uprisings or even a sustained insurgency.[124] With federal funds

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man in Tulsa as he allegedly walked away from officers with his hands up). *See generally* MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds. 1968).

123. Scott Glover & Dan Simon, *'Wild Animals' Racist Texts Sent by San Francisco Police Officer, Documents Show*, CNN (Apr. 26, 2016), http://www.cnn.com/2016/04/26/us/racist-texts-san-francisco-police-officer/ [https://perma.cc/95M5-9BZX] (detailing text messages sent to and from a police officer that disparaged blacks, hispanics, Indians, gay police officers, and residents of a largely minority and low-income district).

124. *See supra* note 33 and accompanying text.

supporting the hiring of more police officers and providing more hardware for them to use to suppress rioting and arrest criminal suspects, the scale of urban policing expanded enormously in the decade between the mid-1960s and mid-1970s. This happened despite grave concerns within the federal government itself about the incompetence and racism of local police forces and with no substantial commitment to reform them. Under Nixon this criminalization wave was reinforced, and the goal of turning those arrests into successful prosecutions and convictions, and imposing longer prison sentences was firmly established as best practice.[125] By the time Ford took over from Nixon, after the latter's own conduct became subject to criminal accusations and the likelihood of impeachment increased, mass incarceration as a project was already fully weaponized and ready to go, firmly embraced by both parties, with a few issues, like the death penalty, subject to party debate.

By the time Presidents Reagan and George H.W. Bush renewed the war-on-drugs brand and tied it to the new folk devils of urban decline (crack-cocaine dealers and users), prison populations in the states were rising rapidly, and the core focus on youth of color in segregated neighborhoods of concentrated poverty was firmly established.[126] The Reagan–Bush rhetoric made it easy for contemporaneous observers to blame the increasingly visible problem of prison population growth on right-wing politics and its obsession with the dangers and moral impurities of drugs.

Hinton's meticulous recovery of the first phase of the war on crime arrives at a perfect time to help ground the debate about future criminal justice reform. Many of the most 'promising' and politically popular reforms involve rolling back the war on drugs that Reagan and Bush branded and which President Clinton sustained with his eager expansion of the police force.[127] Many of these proposals, if implemented more fully, would move us back toward the war-on-crime strategies of the Ford and Carter years. That might remove the most discredited and indefensible features of mass incarceration, but it would leave the basic political project of governing American cities through the surveillance and carceral control of the potential criminality of black (and other marginalized) youth fully operational. While progress requires action at the state level, Hinton reminds us why we need a national movement to end the war on crime.

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125. *See supra* note 27 and accompanying text.

126. HINTON, *supra* note 4, at 314–21 (tying the emergence of crack to "the cumulative impact of twenty years of disinvestment, neglect, and overpolicing" and also noting that the Anti-Drug Abuse Act, adopted by the Reagan administration and supported by Bush in his presidential bid, "specifically designate[s] 'high risk youth' as a primary target group" and noting "the explosion in prison populations during the 1990s").

127. *See supra* note 99 and accompanying text.

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Notes

A Home of One's Own. The Fight Against Illegal Housing Discrimination Based on Criminal Convictions, and Those Who Are Still Left Behind*

'The ache for home lives in all of us, the safe place where we can go as we are and not be questioned.

—Maya Angelou

Introduction

Housing discrimination against men and women with criminal records is ubiquitous in American society. Considering America imprisons more of its population than any country in the world,[1] the effects of this discrimination are enormous. More than 29% of the adult population—roughly 70 million people—have state convictions on their records,[2] and one estimate calculates that around 3.5 million people have been convicted of a crime that would lead to automatic exclusion from public housing within the past five years.[3] Until recently, housing discrimination, in spite of the ramifying hardships it imposed on such a large percentage of the population, was considered entirely legal and went virtually unchallenged.

But things have begun to change. The U.S. Department of Housing and Urban Development (HUD) recently clarified that these bans likely constitute illegal discrimination under the Fair Housing Act,[4] and an ongoing lawsuit

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* To Marlon, Carlos, Divine, Eddie, Ronald, Andre, El-Sun, Robert, and the millions of other men and women who fight daily for their dignity and rights as currently or formerly incarcerated people. Your work is oxygen.

1. *Criminal Justice Facts*, SENT'G PROJECT, http://www.sentencingproject.org/criminal-justice-facts [https://perma.cc/6GYG-VCXC].

2. NAT'L EMP'T LAW PROJECT, RESEARCH FACT SHEET: RESEARCH SUPPORTS FAIR-CHANCE POLICIES 7 n.1 (2016), http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf [https://perma.cc/SX3G-RRZU].

3. CORINNE CAREY, HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 33 & n.107 (2004), https://www.hrw.org/reports/2004/usa1104/usa1104.pdf [https://perma.cc/3PZW-JNGH].

4. HELEN R. KANOVSKY, U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL-ESTATE RELATED TRANSACTIONS 10 (Apr. 4,

against a New York City housing provider, squarely addressing the illegality of these policies, promises to create precedent for future litigation around the country.[5] Other reforms, through litigation and legislation, are also on the rise. For example, lawsuits have begun to challenge the length of time that housing providers are able to look back into an individual's criminal record (known as a 'lookback period") in order to deny housing, and they have reduced lifelong lookback periods to five or ten years depending on the offense.[6] Additionally, advocates challenging 'blanket bans'—bans that exclude anyone who has ever been convicted of a misdemeanor or felony—have been pushing instead for housing providers to weigh factors such as length of time since conviction and evidence of rehabilitation in order to determine housing eligibility.[7]

Yet the changes that these reforms promise may not ultimately affect the individuals most in need of stable housing—men and women who have just been released from jail or prison and who have nowhere to go. Studies have consistently shown that individuals released into stable homes have a significantly greater chance of successfully reintegrating into society, while those released into unstable and short-term housing are at risk of spiraling into a cycle of instability and recidivism that 'threatens to transform spells of incarceration or homelessness into more long-term patterns of social exclusion.'[8] Therefore the current reforms may benefit individuals who have already succeeded in reintegrating into society, but they fail to address the immediate need for stability of the men and women who have just been released.

This Note attempts to identify the problems created by housing bars based on criminal convictions, the various reform efforts currently at work, and the potential inadequacies of the reforms based on the needs of those most at risk for recidivism. To that end, Part I discusses the prevalence of housing discrimination in both the private and public housing sectors. Part II pulls from social science to demonstrate the effects of unstable housing or

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2016), https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf [http://perma.cc/89SR-TZNX] [hereinafter, HUD Guidance] (suggesting that "arbitrary and overbroad criminal history-related bans" that result in unjustified discrimination likely violate the Fair Housing Act).

5. First Amended Complaint at 2, Fortune Soc'y, Inc. v. Sandcastle Towers Hous. Dev. Fund Corp., No. 1:14-cv-06410 (E.D.N.Y. May 1, 2015).

6. *See, e.g.*, Cardenas v. Apartment Inv. & Mgmt. Co. Cause No. 380,393 (Co. Ct. at Law No. 2, Bexar Cty. Jan. 7, 2015) (unpublished order) (on file with author).

7. *See* HUD Guidance, *supra* note 4, at 6 (stressing that blanket bans are likely to violate Title VII); Rebecca Oyama, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 212–15 (2009) (arguing that blanket bans violate Title VIII).

8. Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUB. POL'Y 139, 141–42 (2004).

homelessness on individuals just released from jail or prison. Part III outlines the various reform strategies that advocates are using to challenge these bars, and Part IV discusses both the positive effects of these reforms and their failure to assist those most in need of relief. Finally, Part V attempts to identify potential solutions to bridge the gap between the limits of the ongoing reform efforts and the need to provide housing for individuals who have just been released back into society.

I. Housing Discrimination Against Individuals with Criminal Convictions

'We do not allow people convicted of felonies to live here. This was the response of a Texas public housing provider to a questionnaire asking how long an applicant with a criminal record would have to wait before he could be considered for public housing.[9] Similarly, a private landlord in Texas stated on a real-estate forum: 'I do not rent to convicted felons or registered sex offenders. Period. No exceptions.'[10] While the attitudes represented by these two statements are not representative of all housing providers, they are by no means uncommon. Discrimination against people with criminal records[11] has not only been considered constitutional, it has been thought necessary to ensure community safety. Enabled by easy and increasingly inexpensive access to criminal-record data, landlords now regularly screen potential tenants' criminal records and can reject individuals with convictions based on almost any criteria they create.[12]

This discrimination has long been considered legal because it is not based on a protected status—race, sex, national origin, or religion. And

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9. MARIE CLAIRE TRAN-LEUNG, SARGENT SHRIVER NAT'L CTR. ON POVERTY L. WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 1 (2015) http://www.povertylaw.org/files/docs/WDMD-final.pdf [https://perma.cc/3WWB-LN44].

10. John T. Comment to *Renting to a Felon*, BIGGER POCKETS, https://www.biggerpockets.com/forums/81/topics/106939-renting-to-a-felon [https://perma.cc/3MZE-WP6N].

11. Throughout this paper, I will refer to formerly incarcerated people, or people with criminal convictions, in a way that emphasizes their humanity, as requested by Dr. Divine Pryor and Eddie Ellis of Center on NuLeadership for Urban Solutions. Open Letter from Eddie Ellis, Center on NuLeadership for Urban Solutions, http://centerfornuleadership.org/cnus/wp-content/uploads/2013/11/CNUS-lang-ltr_regular.pdf [https://perma.cc/ZR4Y-X8AA] ("The worst part of repeatedly hearing your negative definition of me, is that I begin to believe it myself '*for as a man thinketh in his heart, so is he.* It follows then, that calling me inmate, convict, prisoner, felon, or offender indicates a lack of understanding of who I am, but more importantly *what I can be.* I can be and am much more than an 'ex-con, or an 'ex-offender, or an 'ex-felon.'").

12. Marie Claire Tran-Leung, *Beyond Fear and Myth: Using the Disparate Impact Theory Under the Fair Housing Act to Challenge Housing Barriers Against People with Criminal Records*, 45 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 4, 5–6 (2011). One study conducted by the National Multi-Housing Council—an organization of large apartment companies—revealed that 80% of its members screen prospective tenants for criminal histories. Oyama, *supra* note 7, at 191–92.

because collateral consequences of a criminal conviction are classified as civil penalties, no mechanism exists to challenge them within the criminal justice system.[13] Furthermore, defense attorneys, prosecutors, and judges have no obligation to inform a criminal defendant about the collateral consequences that may result from their guilty plea.[14] As a result, collateral consequences, including housing discrimination, remain invisible to many individuals charged with crimes, and when visible, are elusive to legal challenge.

Housing discrimination occurs in both public and private housing, severely limiting the housing options for someone with a criminal record, regardless of whether that criminal record is evidence of a long-past life or a fresh reminder of the effects of drug addiction and poverty.

A. Public Housing

All public housing providers are required by federal mandates to impose permanent bans on applicants who have been convicted of manufacturing methamphetamine on federally assisted property and applicants who are required to register as sex offenders for life.[15] Beyond those two mandatory permanent bans, public housing authorities have discretion to admit individuals with criminal records, but they also have discretion to develop more stringent screening policies.[16] Federal guidelines instruct that public housing authorities may reject applicants who have engaged in any of the following activities *during a reasonable time* before submitting their application:

1. Drug-related criminal activity:
2. Violent criminal activity:
3. Other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing-agency employees.[17]

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13. The controlling test for determining whether a penalty is civil or criminal is a two-pronged inquiry set forth in *United States v. Ward*, 448 U.S. 242, 248–49 (1980), which instructs courts to first determine legislative intent as to whether a sanction is to be classified as civil or criminal; and second, if civil, to employ a seven-factor analysis articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167–68 (1963), to determine whether the purpose or effect of the sanction is so punitive as to be considered criminal.

14. *See, e.g.*, United States v. Yearwood, 863 F.2d 6, 8 (4th Cir. 1988) (deciding that requiring defense counsel to advise defendants on collateral consequences would be unreasonably burdensome); Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976) (holding that "collateral consequences flowing from a guilty plea are so manifold that any rule requiring a district judge to advise a defendant . . . would impose an unmanageable burden on the trial judge").

15. TRAN-LEUNG, *supra* note 9, at 7.

16. *Id.* at 8.

17. 42 U.S.C. § 13661 (2012).

Although this last factor is not supposed to be enforced as a catch-all, it has been used by some housing authorities to create bans on applicants whose 'arrest or conviction record indicates that the applicant may be a negative influence on other residents, or applicants who have convictions for 'immoral conduct of any type.'[18] These vague and confusing categories may lead potential applicants to forego applying for housing altogether, even if they may in fact be eligible. Human Rights Watch spoke to a homeless woman in Birmingham who has seen this phenomenon firsthand: 'A lot of people don't apply because they know they got a felony and they're not going to get [it].'[19] Vague standards may also give housing authorities the discretion to deny applicants for illegal reasons—for example, a housing provider might find that a white applicant with an old marijuana charge will not be a 'negative influence on other residents,' while a black applicant with a similarly old charge would be.[20]

Furthermore, neither Congress nor HUD has given guidance on how long the 'reasonable time' between a criminal conviction and submitting a housing application should be. Housing authorities vary widely in the time barriers placed on different categories of criminal conduct, and many contain no time limits on using a person's criminal history to deny admission, sometimes excluding individuals for minor offenses from many years prior.[21]

While lifetime bans and other unreasonable lookback periods discriminate against individuals who have been out of prison for years or more, the 'One Strike and You're Out' Act creates a dilemma for those just released and their families. The 'One Strike and You're Out' Act requires housing authorities to include a clause in leases declaring that

> any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.[22]

This has been construed as a strict liability law allowing eviction if the housing authority discovers criminal activity.[23] The tenant need not be the

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18. TRAN-LEUNG, *supra* note 9, at viii.

19. CAREY, *supra* note 3, at 71.

20. *See id.* at 4 (criticizing the language as overbroad and, therefore, subject to abusive application). Of course, this type of discrimination is illegal, as it is disparate treatment based on race. HUD Guidance, *supra* note 4, at 10. But it is difficult to document and may often be unconscious on the part of the housing provider. Vague criminal categories, however, give consciously or unconsciously racist housing providers a tool with which to discriminate.

21. CAREY, *supra* note 3, at 50–51.

22. 42 U.S.C. § 1437d(*l*)(6) (2012).

23. *See, e.g.*, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002).

one allegedly engaging in criminal conduct—it could be a tenant's child, grandchild, or guest—and the criminal activity need not occur on the premises. Thus, a tenant could be evicted based on the criminal activity of a guest, miles away, that the tenant was unaware of.[24]

But most individuals returning from prison have few resources and must live with family for some time postrelease. Indeed, a long-term study conducted by the Vera Institute of Justice of forty-nine individuals released from New York prisons found that 80% were living with a relative two days after release.[25] The "One Strike and You're Out' Act serves to deter individuals from providing a home for family members returning from jail or prison. The tenant may be subject to eviction if the newly released friend or family member is perceived as a threat to the "health, welfare, or safety' of the housing project.[26] Additionally, the tenant bears the risk of a strict liability eviction if the friend or family member ever reoffends.[27] For these reasons, public housing, which is for most recently released people the only affordable option, is virtually unobtainable.

B. Private Housing

Because of the highly restrictive practices of public housing authorities, private housing may be the only option for stable housing for recently released individuals, assuming they can afford it.[28] Private housing accounts for 97% of the total U.S. housing stock.[29] Without family resources, buying property immediately upon release will be out of the question, so most individuals look to rent privately owned apartments.[30] Additionally, once an

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24. Heidi Lee Cain, *Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 138–39 (2003). Indeed, this is exactly how the Act has been used. For example, in *Department of Housing and Urban Development v. Rucker*, the Supreme Court upheld the "One Strike and You're Out" Act in a case in which the Oakland Housing Authority evicted individuals who had no knowledge of their guests' criminal activity. 535 U.S. at 127–30. Similarly, one New Orleans grandmother was attempting to retrieve her grandchildren from her home when she was maced by a woman, who she then punched before being taken to the hospital. Though she was never arrested or charged, her public housing provider moved to evict her from her public housing. FORMERLY INCARCERATED & CONVICTED PEOPLE'S MOVEMENT, COMMUNITIES, EVICTIONS & CRIMINAL CONVICTIONS 10 (2013), https://www.prisonlegalnews.org/media/publications/convicted_ppl_mvmnt_evictions_and_convictions_report_2013.pdf [https://perma.cc/E6PM-XXRK].

25. MARTA NELSON ET AL. VERA INST. OF JUSTICE, THE FIRST MONTH OUT: POST-INCARCERATION EXPERIENCES IN NEW YORK CITY 8 (1999), http://archive.vera.org/sites/default/files/resources/downloads/first_month_out.pdf [https://perma.cc/83U8-26R4].

26. Cain, *supra* note 24, at 162.

27. *Id.*

28. *See id.* ("Private housing leases are not subject to the 'One Strike and You're Out' housing policy."). However, a landlord may place a comparable clause in the terms of the lease. *Id.*

29. Oyama, *supra* note 7, at 183.

30. *See* Sarah Spangler Rhine, *Criminalization of Housing: A Revolving Door that Results in Boarded Up Doors in Low-Income Neighborhoods in Baltimore, Maryland*, 9 U. MD. L.J. RACE

individual has been out of prison for several years and has been able to gain education or employment, he or she may look to private apartments as a more affordable alternative to buying property. But several factors have made this option even less attainable for individuals with criminal records. First, stigma underlies any justification for discriminating against individuals with criminal convictions.[31] In this context, stigma refers to a person's reluctance to interact, either socially or economically, with an individual with a criminal record.[32] This stigma might manifest as a belief that the individual has bad moral character or is undeserving of help and support. Even if a potential landlord believes that individuals can change, a preoccupation with risk might lead to denial of housing.[33] While this stigma may fade with the passage of time and as individuals are able to demonstrate their rehabilitation, the prevalence of life-long bans in both public and private housing illustrates the persistent effects of this stigma.

Landlords may justify banning individuals with criminal convictions by citing concerns about the safety of their tenants and the perception of their apartments as safe and 'crime-free. The notion that screening for criminal records leads to safer neighborhoods has taken such a firm hold that some police departments run training programs for landlords on how to screen tenants, and local groups may publish the names of landlords who do not participate in these programs.[34] However, the vast majority of landlords do not understand how to read the technical language and abbreviations used in criminal records, nor do they know how to analyze predictors of criminal behavior.[35] For example, many private apartments impose lifetime bans on individuals with felony convictions, even though studies show that seven

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RELIGION GENDER & CLASS 333, 333–34 (2009) (noting the difficulties communities have maintaining housing for imprisoned individuals who, upon release, have limited incomes). Lack of resources means men and women returning from jail or prison are often only able to afford apartments in substandard conditions. *Id.*

31. TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 125 (2007) ("It is clear that being convicted of a crime and sent to prison carries a stigma, and being a criminal can become a person's master status.").

32. Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 520 (1996).

33. Andrew Henley, *Abolishing the Stigma of Punishments Served*, CENTRE FOR CRIME & JUST. STUD. (Sept. 1, 2014), http://www.crimeandjustice.org.uk/publications/cjm/article/abolishing-stigma-punishments-served [https://perma.cc/964D-JS4C].

34. Oyama, *supra* note 7, at 192; Mark Walker, *Finding a Home After Prison Tough for Released Felons*, USA TODAY (Feb. 28, 2015), http://www.usatoday.com/story/news/nation/2015/02/28/another-barrier-prison-finding-home/24197429/ [https://perma.cc/CNY7-XTTZ] ("Sioux Falls adopted the Crime-Free Multi-Housing Program in March 1997. The program is based on a national program that originated in Mesa, Ariz. in 1991. Since then, it's spread to about 2,000 cities in 48 states, five Canadian provinces, England, Nigeria, and Puerto Rico.").

35. Oyama, *supra* note 7, at 189.

years postrelease, individuals with felony convictions are no more likely to commit a crime than a person with no convictions.[36]

Landlords also fear legal liability for crimes committed by tenants with criminal records known to the landlord. This type of liability first emerged in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,[37] in which a tenant prevailed against her landlord after being robbed and assaulted in the building's hallway.[38] Since that time, suits against landlords for criminal activities on premises have been increasingly common.[39] Generally, landlords have no duty to police the premises, and courts are reluctant to find landlords liable in these situations.[40] But it is possible that a court will determine that the criminal activity was foreseeable to the landlord based on the proximity of past criminal activities and other factors.[41] This possibility alone has made landlords much more hesitant about leasing to someone with a criminal record. As one landlord bluntly stated: 'Everyone deserves a second chance, but odds are that they are not getting it from me. '[42]

Landlords have also become increasingly able to access criminal records for potential tenants. Counties and states are centralizing and automating criminal-history records, and companies are capitalizing on this by offering their services, at low cost, to landlords.[43] All of these policies serve to keep individuals with criminal convictions, even decades-old convictions, out of private apartments.

C. *Compounding Racial Discrimination in Housing*

Housing discrimination against people with criminal convictions is more prevalent for people of color because people of color are disproportionately represented in the criminal justice system. African-Americans are incarcerated at almost six times the rate of whites,[44] and

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36. Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQ. 64, 80 (2007).

37. 439 F.2d 477 (D.C. Cir. 1970).

38. *Id.* at 486–87.

39. Cain, *supra* note 24, at 160.

40. *Id.*

41. *Id.* at 161.

42. Pete T. Comment to *Renting to a Felon*, BIGGERPOCKETS, https://www.biggerpockets.com/forums/81/topics/106939-renting-to-a-felon [https://perma.cc/3MZE-WP6N].

43. *See, e.g.*, TransUnion, *Criminal Report*, SMART MOVE, https://www.mysmartmove.com/SmartMove/tenant-background-report.page [https://perma.cc/VVS8-AS66] ("Making sure that you can trust your tenants is important. That's why we access millions of criminal records to provide tenant background checks that help property owners steer clear of problem renters.").

44. NAACP, *Criminal Justice Fact Sheet*, NAACP, http://www.naacp.org/pages/criminal-justice-fact-sheet [https://perma.cc/P844-CV37].

Latinos are incarcerated at almost three times the rate of whites.[45] Additionally, nearly half of black males are arrested by the age of twenty-three.[46] So it is not surprising that discriminating against people with criminal records disproportionately affects people of color. What is less understood is the way that this discrimination overlaps with longstanding racial discrimination against people of color in housing.

Black Americans have fought, and continue to fight, a long and hard battle against racial discrimination in American neighborhoods. A 2012 report by HUD concluded, '[t]here can be no question that the housing circumstances of whites and minorities differ substantially. Whites are more likely to own their homes, to occupy better quality homes and apartments, and to live in safer, more opportunity-rich neighborhoods.'[47] In paired-testing studies of equally qualified white and minority home seekers, HUD found that 'white homeseekers are more likely to be favored than minorities. Most important, minority homeseekers are told about and shown fewer homes and apartments than whites.'[48] This occurred for minority testers who presented themselves as 'unambiguously well-qualified.'[49] But other research has shown that discrimination increases when minority testers present themselves as more marginally qualified home seekers.[50] Since people of color returning from jail or prison will likely not have the financial or social resources to be 'unambiguously well-qualified' in their search for housing, they can expect to face increased racial discrimination in addition to the discrimination that stems from having a criminal record.

While the effects of race and criminal justice involvement have not been well studied in housing, studies have confirmed overlapping effects of race and criminal records in employment. In one study, black and white male testers applied to jobs using the same résumé.[51] However, half of the men indicated on the résumé that they had been to prison.[52] The results showed that within each race, a criminal conviction made an applicant less likely to

45. Jose Luis Morin, *Inequities for Latino in Criminal Justice*, YOUNG LATINO MALES, http://cronkitezine.asu.edu/latinomales/criminal.html [https://perma.cc/H88R-JFCJ].

46. Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas [https://perma.cc/JY5T-KU9S].

47. MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV. HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, at xii (2013), https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf [https://perma.cc/5XS8-MVWZ].

48. *Id.* at 1.

49. *Id.* at xii.

50. *Id.* at xiii (citing William C. Hunter & Mary Beth Walker, *The Cultural Affinity Hypothesis and Mortgage Lending Decisions*, 13 J. REAL ESTATE FIN. & ECON. 57 (1996)).

51. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 947–48 (2003).

52. *Id.*

get a callback.[53] However, the most startling result comes from the interracial comparisons: white men *with* criminal convictions were more likely to get callbacks than black men *without* criminal convictions.[54] More pertinent for this Note, of the four categories, black men with criminal convictions were the least likely to get callbacks.[55]

These results, while revealing, cannot necessarily be transferred to housing discrimination. First, lifelong blanket bans on criminal convictions are race neutral—they discriminate against everyone with a criminal record. Thus, while racial disparities in the criminal justice system are implicated here, additional racial discrimination likely is not. However, in more nuanced situations—when a landlord or public housing authority has discretion in whether to admit someone with a criminal record—it is highly likely that a white person with a criminal record will be favored over a person of color with a criminal record.

II. The Effects of Unstable or Substandard Housing

As the above Part describes, finding public or private housing for an individual with a criminal record presents enormous challenges at all stages of reentry—whether one day out or twenty years out. But while this discrimination may be discouraging for those who have been out for years, they have likely been able to amass evidence of their rehabilitation and cultivated relationships with individuals with financial or social capital who can help them find housing. Furthermore, a person who has been able to stay out of jail or prison for years is likely further removed from the influences—be they drugs, poverty, or unhealthy relationships—that would lead him or her back to crime and prison. But for individuals just released from prison, the ability or inability to find housing has crucial consequences. Stable housing has been referred to as the 'lynchpin that holds the reintegration process together.'[56] As such, individuals who are unable to find stable housing are significantly more likely to recidivate than others. One study found that within a year of release those without stable housing were more than twice as likely to commit another crime as those with stable housing.[57]

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53. *Id.* at 955–59.

54. *Id.* at 958.

55. *Id.*

56. JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 219 (2005).

57. Julian M. Somers et al., *Housing First Reduces Re-Offending Among Formerly Homeless Adults with Mental Disorders: Results of a Randomized Controlled Trial*, PLOS ONE, Sept. 2013, at 6–7, http://journals.plos.org/plosone/article/asset?id=10.1371%2Fjournal.pone.0072946.PDF [https://perma.cc/ZK4L-H2MA].

Another study discovered that each move after release increased a person's likelihood of rearrest by 25%.[58]

What has been less explored though is *why* stable housing is so key in the reentry process. What are the effects of an inability to find stable housing on an individual's day-to-day life? His job prospects, his parole supervision, his educational goals? Unsurprisingly, stable housing is integral to all of these, and a lack of stable housing can derail even the most determined individual.

A. Homelessness and Unstable Housing Increase the Risk of Recidivism

Each year, nearly 650,000 individuals are released from prisons in our country, and over seven million more are released from jails.[59] A substantial minority of these men and women will use a homeless shelter within two years of release.[60] While nationwide statistics are not available on how many individuals are released from jails and prison without housing, studies estimate the percentage to be at least 10%.[61] In urban areas this percentage is even higher, reaching 30%–50% in San Francisco.[62]

Furthermore, research has consistently shown that homelessness contributes to a higher risk for reincarceration. In one study, 11.4% of the 49,000 people in the study experienced homelessness in the two years following release,[63] and almost 33% returned to prison.[64] Unsurprisingly, considering the additional housing discrimination faced by African-Americans, this study also found that African-Americans were more likely than any other racial group to face homelessness and were subsequently more likely to recidivate.[65]

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58. RE-ENTRY POLICY COUNCIL, THE COUNCIL OF STATE GOV'TS, PUBLIC-HOUSING AUTHORITIES (PHAS) AND PRISONER RE-ENTRY 1 (2006), http://www.reentry.net/library/item.110320-Public_Housing_Authorities_and_Prisoner_Reentry [https://perma.cc/YZ3Y-E5S4].

59. RE-ENTRY POLICY COUNCIL, THE COUNCIL OF STATE GOV'TS, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY 3 (2009), https://csgjusticecenter.org/wp-content/uploads/2013/03/Report-of-the-Reentry-Council.pdf [https://perma.cc/GDR7-VTQ2].

60. *See, e.g.*, Metraux & Culhane, *supra* note 8, at 139–40, 144 (reporting that 11.4% of the nearly 50,000 people released from New York State prisons to New York City from 1995 to 1998 entered a homeless shelter within two years after release and that "9.3%, 10.5%, and 6.3% of all state prison releases in Massachusetts directly preceded a shelter stay in 1997, 1998, and 1999, respectively").

61. Maria Foscarinis & Rebecca K. Troth, *Reentry and Homelessness: Alternatives to Recidivism*, 39 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 440, 443 (2005).

62. *Id.*

63. Metraux & Culhane, *supra* note 8, at 144.

64. *Id.*

65. *See id.* ("Blacks, who comprised a little more than half of the study group, were the only racial/ethnic subgroup to have proportions of persons with subsequent shelter stays (12.9%) and reincarcerations (34.6%) that were higher than the overall group proportions.").

Furthermore, individuals who are unable to find stable housing are much more likely to abscond from parole. In the Vera Institute study, individuals without stable housing were seven times more likely to abscond from parole within the first month following release than individuals with stable housing.[66] The study quoted a participant who was unable to find housing, describing the difficulties he faced: 'To get housing, I learned you gotta have a lot of money or be on public assistance, and the second way takes forever I can go live places, but either there are alcohol and drugs there, or the rent is astronomical.'[67]

Reincarceration subsequently increases the risk for homelessness. One study estimated that nearly a quarter of the homeless population had a felony conviction.[68] This pattern creates a cycle that 'threatens to transform spells of incarceration or homelessness into more long-term patterns of social exclusion.'[69] Studies emphasize the first month postrelease as the most critical period for an individual to have stable housing to avoid reincarceration.[70] Unfortunately, it is also the period when an individual will be least likely to obtain it. A study that examined homelessness and recidivism for individuals released from jail and prison in New York City over a two-year period found that of the individuals who experienced homelessness, over half experienced it within the first month postrelease.[71] Yet studies also demonstrate that individuals released into homeless shelters or unstable housing have a more difficult time reintegrating into the community than those with stable housing.[72] Indeed, another study revealed that 21.5% of the sample of incarcerated people reported being homeless the night before their arrest.[73]

Of course, just because an individual is able to stay with family or friends upon release does not necessarily mean that his situation is stable or desirable. These situations are often short lived, for a variety of reasons. Some families who live in public housing will not welcome a returning

66. NELSON ET AL., *supra* note 25, at 9.

67. *Id.*

68. Gelberg et al., *Mental Health, Alcohol and Drug Use, and Criminal History Among Homeless Adults*, 145 AM. J. PSYCHIATRY 191, 194 (1988).

69. Metraux & Culhane, *supra* note 8, at 142.

70. *See* RE-ENTRY POLICY COUNCIL, *supra* note 56, at 272 ("[T]he first month after release from prison is a vulnerable and critical period during which the risk of becoming homeless and/or returning to criminal justice involvement is high. Entering an unstable housing situation during this first month can destabilize an individual's re-entry process and ability to remain crime-free altogether.").

71. Metraux & Culhane, *supra* note 8, at 144.

72. *See, e.g.*, NELSON ET AL. *supra* note 25, at 9 ("[P]eople who expected to go directly from jail or prison to a shelter were more than seven times more likely to abscond from parole during the month.").

73. David Michaels et al., *Homelessness and Indicators of Mental Illness Among Inmates in New York City's Correctional System*, 43 HOSP. & COMMUNITY PSYCHIATRY 150, 152 (1992).

family member because it puts their eligibility status at risk.[74] Others simply do not trust or are deeply disappointed in the individual. One nineteen-year-old participant in the Vera Institute study, Reggie, described being released and finding his family's home locked and empty.[75] They had gone to Disneyland. When he went to see his grandmother, she refused to hug him, and when he started to cry, she said: 'You did this to yourself.'"[76] When Reggie's family returned from Disneyland, they let Reggie stay with them, but by the end of the month still had not given him a key.[77]

By contrast, individuals who receive stable and supportive housing upon release are much less likely to reoffend. One study showed that the rate of return to jail or prison dropped by 40% when homeless, mentally ill individuals received supportive housing.[78] In a more qualitative study, the Vera Institute found that 'people with strong, supportive families are more likely to succeed than those with weak or no family support. '[79]

B. Specific Effects of Unstable Housing on Reentry

That homelessness and unstable housing lead to an increased risk of recidivism is clear. But what are the specific reasons for this increased risk? While the inability to find stable housing will affect individuals in different ways, depending on their own unique circumstances, what follows is an outline of the most common effects as experienced by a hypothetical man released from prison on parole. We'll call him Dave.

1. Parole.—Dave, like most individuals returning from prison, does not gain full status as a citizen, as he is on parole (similarly, individuals returning from jail may be serving a sentence of probation). This means that their behaviors are limited and monitored—behaviors that for individuals not on parole would be entirely legal become parole violations punishable by a return to prison.

For Dave, these requirements may pose an immediate barrier to obtaining housing if anyone in Dave's family, with whom he plans to live, has a criminal conviction. Most parole regulations state that parolees may

74. JEREMY TRAVIS ET AL. URBAN INST. JUSTICE POLICY CTR., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 35 (2001), http://research.urban.org/UploadedPDF/from_prison_to_home.pdf [https://perma.cc/7S8S-V3EY].

75. NELSON ET AL., *supra* note 25, at 11.

76. *Id.*

77. *Id.*

78. TED HOUGHTON, CORP. FOR SUPPORTIVE HOUS. THE NEW YORK/NEW YORK AGREEMENT COST STUDY: THE IMPACT OF SUPPORTIVE HOUSING ON SERVICES USE FOR HOMELESS MENTALLY ILL INDIVIDUALS 4 (2001), http://shnny.org/uploads/NY-NY_Agreement_Cost_Study_2001.pdf [http://perma.cc/QTN6-PU8M].

79. NELSON ET AL., *supra* note 25, at 10.

not associate with other people with criminal convictions.[80] If Dave is African-American or Latino, this problem may be more acute. Considering the heavy criminalization of black and brown communities, the chance that Dave's father, mother, or siblings have had some sort of involvement in the criminal justice system is considerable. Even in the absence of a criminal conviction, if a family member uses drugs or is involved in any kind of crime, Dave may not be able to live there, as most parole regulations allow parole officers to search Dave's home at any time.[81] Furthermore, if Dave is in recovery for drug or alcohol abuse, he may not want to live with family members who are abusing drugs, regardless of this parole restraint.

If Dave's family lives in public housing, they will risk losing this housing by allowing Dave to stay with them. While they may allow Dave to stay there despite this risk, the potential for eviction might create stress in an already stressful transition, straining emotional ties instead of repairing them. Additionally, if the public housing contains a high level of criminal activity, a parole officer might deem it inappropriate for Dave and not allow him to live there.

For any of these reasons, then, Dave may find himself without a place to stay. And in a catch-22, a lack of housing alone may be a violation of parole.[82] Dave can go to a city homeless shelter, where he might find a bed depending on their availability and the shelter's restrictions against people with criminal records.[83] Here, however, Dave may encounter the drug and alcohol use and other criminal activity that he must avoid.[84] If Dave can't distance himself from this criminal activity and is swept up by police, he will have to report this arrest (or even contact short of arrest) to his parole officer.

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80. A typical regulation of this sort is found in the New York Parole Regulations: 'A releasee will not be in the company of or fraternize with any person he knows to have a criminal record or whom he knows to have been adjudicated a youthful offender except for accidental encounters in public places, work, school or in any other instance with the permission of his parole officer.' N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.2(g) (1985).

81. Also from the New York Parole Regulations: 'A releasee will permit his parole officer to visit him at his residence and/or place of employment and will permit the search and inspection of his person, residence and property.' *Id.* § 8003.2(d).

82. Rhine, *supra* note 30, at 345.

83. *See* Statement of Interest of the United States at 3 & n.8, Bell v. City of Boise, No. 1:09-cv-540-REB (D. Idaho Aug. 6, 2015) (outlining plaintiffs' argument that criminalizing public sleeping in a city with insufficient shelter space for its homeless population violates the Eighth Amendment).

84. See, for example, Emmett's story in *The First Month Out*: "Emmett said the shelter he lived in was 'disgusting. The bathrooms don't work. Half the people aren't registered there. They climb in through the window at night and deal and use drugs.'" NELSON ET AL., *supra* note 25, at 9.

Even if Dave is never ultimately charged, or the charges are dismissed, the arrest alone can be a violation of parole.[85]

2. Emotional Drain.—Assuming Dave is able to stay with his family in a less-than-satisfactory situation or the homeless shelter without relapsing or having contact with the police, he is still at a disadvantage, as the stress of trying to avoid living on the streets 'becomes a primary preoccupation for many individuals.'[86] This focus diverts attention from the other aspects of Dave's reentry, such as finding employment, getting back into school, and reestablishing connections with family and friends.[87] For example, one of the participants in the Vera Institute study, Tonya, said she 'could not think about getting a job' because she was living in a shelter and had recently been diagnosed HIV positive.[88] The longer that Tonya (and Dave) wait to find employment and otherwise stabilize their lives, the more likely it is that they will violate their parole, succumb to the conditions around them, or otherwise recidivate. Dave's struggle to find stable housing will almost certainly deplete his sense of responsibility and control over his reentry.[89] This is consistent with the Vera Institute study, which found that the participants who felt like rearrest was most likely 'need to develop a greater sense of control over their own actions—coming, perhaps, from successes that they can attribute to themselves—before they will feel that the decision to avoid prison is in their hands.'[90]

3. Employment.—Once Dave sets his mind to finding employment, though, he will be presented with new challenges. If he is in a shelter, he may not have any way for potential employers to contact him without revealing where he stays.[91] Dave might have a friend whose number he can give out and who will take messages for him, but he might not. If Dave is living on the streets, the challenges mount, as it will be difficult for Dave to maintain his hygiene and look presentable when applying for jobs;[92] and he

85. 'A releasee will notify his parole officer immediately any time he is in contact with or arrested by any law enforcement agency. A releasee shall have a continuing duty to notify his parole officer of such contact or arrest.' N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.2(f).

86. Oyama, *supra* note 7, at 184.

87. *Id.*

88. NELSON ET AL., *supra* note 25, at 17.

89. *See* Oyama, *supra* note 7, at 196 (explaining how a recently released prisoner's inability to find housing can lead to recidivism).

90. NELSON ET AL., *supra* note 25, at 28.

91. This is similar to Emmett's situation in the Vera Institute study: 'Since Emmett lived in a shelter, it was difficult for prospective employers to reach him—and he might not have wanted them to know where he lived. *Id.* at 12.

92. Christine Schanes, *Homelessness Myth #1: Get a Job!*, HUFFINGTON POST (Nov. 17, 2011), http://www.huffingtonpost.com/christine-schanes/homelessness-myth-1-get-a_b_339500.html [https://perma.cc/F8LZ-Z8RZ].

will have no address, as well as no callback number, to put on an application.[93] A prospective employer might also want to see some sort of official identification for Dave, but if he does not already have an I.D. it will be difficult for him to obtain one.

4. Identification.—Dave will need identification for many purposes: landlords may request it when he applies for apartments, employers may require it when he applies for jobs, and he'll need it when applying for social security and other public assistance.[94] But if Dave doesn't have stable housing, he'll have a difficult time getting an I.D. To obtain a state I.D. Dave will need to show proof of his residency in the state. He'll have to furnish documentation that he likely does not have, precisely because he does not have a stable residence. For example, Texas requires *two* of the following items,[95] which have been categorized by the reason for their inaccessibility:

Requires a stable address

> Current deed, mortgage, monthly mortgage statement, mortgage payment booklet, or a residential rental/lease agreement
>
> An electric, water, natural gas, satellite television, cable television, or non-cellular phone bill dated within (90) days of the date of application
>
> Current homeowners or renters insurance policy or homeowners or renters insurance statement
>
> Mail from financial institutions; including checking, savings, investment account, and credit card statements dated within (90) days of the date of application
>
> Mail from a federal, state, county, or city government agency dated within (90) days of the date of application
>
> Current documents issued by the U.S. military indicating residence address

Requires some level of income

> Texas motor vehicle registration or title

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93. A homeless advice blog recommends getting a pager and a UPS mailbox for these purposes, but both of these things cost money, and without a job or other resources, they are unobtainable. *Employment*, SURVIVAL GUIDE TO HOMELESSNESS (Oct. 28, 2004), http://guide2homelessness.blogspot.com/2004/10/employment.html [https://perma.cc/JA84-7Q64].

94. As the Vera Institute noted, many recently released participants "were stymied in their attempts to work or apply for public assistance because they lacked basic identification. NELSON ET AL., *supra* note 25, Executive Summary.

95. 37 TEX. ADMIN. CODE § 15.49 (2015).

Texas boat registration or title

Current automobile insurance policy or an automobile insurance statement

W-2 or 1099 tax form from the current tax year

Current automobile payment booklet

Pre-printed paycheck or payment stub dated within (90) days of the date of application

Prohibited by status as convicted felon

Valid, unexpired Texas voter registration card

Texas concealed handgun license

Other

Document from the Texas Department of Criminal Justice indicating the applicant's recent release or parole

Selective Service card

Medical or health card

Texas high school, college, or university report card or transcript for the current school year

Current Form DS2019, I-20 or a document issued by the U.S. Citizenship and Immigration Services

Texas does make an effort to acknowledge the difficulty that Dave might have obtaining a state I.D. by allowing him to use his release papers from the Texas Department of Criminal Justice, but the state still requires Dave to have an additional document in order to prove his residency. If Dave is in the military he will be able to meet this requirement, as he will if he is eligible for and has an SSI or Medicaid card. However, note that the Social Security Administration can take three to five months to process an application,[96] thereby increasing the time that Dave will have to live without proper identification. Furthermore, Texas requires that these documents contain Dave's name and *residential* address, meaning that if Dave is homeless and uses a P.O. box to receive mail, he is no closer to obtaining his I.D.[97]

96. Foscarinis & Troth, *supra* note 61, at 444.

97. "Both documents must contain the individual's name and residential address. *Texas Residency Requirements for Driver Licenses and ID Cards*, TEX. DEP'T PUB. SAFETY, https://www.dps.texas.gov/DriverLicense/residencyReqNonCDL.htm [https://perma.cc/32ZE-KMXH].

If Dave is simply unable to provide two of the listed documents, he can sign an affidavit swearing his residency within the state, but he must be accompanied by an individual with proper identification who can attest to Dave's residency, and he must have a notarized letter from a not-for-profit, transitional house, or homeless shelter certifying that Dave receives services and mail there.[98] Thus, while it is not impossible for Dave to obtain proper identification, the process is daunting in its complexity. If Dave is anything less than determined, he will likely be stymied during his initial attempts to get an I.D.

5. Education.—Similarly, if Dave wants to go back to school, he will be frustrated by the residency requirements at community colleges to get in-state tuition. Many of the documents required to establish local residency present recently released people with problems similar to those discussed above.[99] Thus, even if Dave is released from prison and determined to get his education, he may be forced to pay significantly higher tuition—unable

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98. *Texas Residency Affidavit*, TEX. DEP'T PUB. SAFETY, http://www.txdps.state.tx.us/internetforms/Forms/DL-5.pdf [https://perma.cc/7TMG-F2HC].

99. At Austin Community College, for example, Dave would have to present one item from "List A" and one item from "List B." Both present obvious barriers to individuals just released from prison.

> List A
> Employer-provided employment verification, proof of self-employment or living off earnings statement.
> Ownership in real property sole or joint.
> Marriage to a person who has established and maintained domicile in Texas.
> Ownership in a Business in part or whole in Texas.
>
> List B
> Utility bills in name of the person.
> Texas high school transcript.
> Transcript from a Texas institution.
> Texas driver's license or Texas I.D. card showing origination date.
> Texas voter registration card showing origination date.
> Pay stubs.
> Bank statements.
> Written statements from one or more social service agencies.
> Lease or rental of residential real property in the name of the person.

Texas Residency Documentation, AUSTIN COMMUNITY C. http://www.austincc.edu/apply-and-register/admission-steps/residency-information/texas-residency-documentation [https://perma.cc/6AWS-64XM].

The problems that Dave will have providing a document from "List A" are easy to see—he must either be married, own a business, own property, or have proof of income. And the difficulties with "List B" are similar to those discussed with state I.D.s.

to register as a resident of the state in which he lives—simply because of his status as a recently released person.

6. Criminalization.—If Dave can't find housing with friends or family, and has no access to a homeless shelter, he will live on the streets, leaving him vulnerable to another set of restrictive and exclusionary laws and practices.[100] In response to increasing levels of homelessness, cities around the country have enacted laws 'essentially making homelessness illegal.'[101] Dave could be fined or jailed for sitting, sleeping, or lying down in public spaces—acts 'which most homeless people have no choice but to do in public, especially since most cities do not have adequate shelter space.[102] The constitutionality of these laws is currently being litigated, since they arguably criminalize a status, in contravention of *Robinson v. California*.[103] In fact, the United States Department of Justice (DOJ) has recently issued a 'Statement of Interest' in a case brought by homeless people against the City of Boise, Idaho, for ordinances criminalizing homelessness. The DOJ stated that these ordinances are unconstitutional if there is inadequate shelter space because there are not enough beds for the entire homeless population or if there are restrictions at the shelters disqualifying certain groups of homeless people.[104] However, most of these city ordinances are still in full effect. If Dave finds himself living on the streets, his ability (and incentive) to meet all of his parole requirements will likely plummet, and his chances of rearrest will skyrocket.

C. Effects on the Community

Unsurprisingly, the pervasive formal and informal punishments for individuals released from prison have repercussions beyond the targeted individual. As one advocate has noted, the effects on local housing markets start with arrest: because of targeted policing and criminalization of poor

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100. While this Note does not focus on the effects of specific categories of criminal convictions, it is worth noting that all of the issues described above are exacerbated for people convicted of sex offenses. With regard to homelessness, if someone convicted of a sex offense is living on the streets, they will be in immediate violation of their requirement to register, likely sending them back to prison. Rhine, *supra* note 30, at 350.

101. Foscarinis & Troth, *supra* note 61, at 441–42.

102. *Id.* Statement of Interest of the United States, *supra* note 83, at 2–3.

103. 370 U.S. 660 (1962). *Robinson* held that laws criminalizing addiction violated the Eighth Amendment in part because an addict would be "continuously guilty of this offense" and also because addiction "may be contracted innocently or involuntarily," given that "a person may even be a narcotics addict from the moment of his birth. *Id.* at 666–67, 667 n.9.

104. Statement of Interest of the United States, *supra* note 83, at 4. Although not stated explicitly in the statement, this language could easily be interpreted to include groups of homeless individuals excluded because of their criminal record.

communities of color, 'entire neighborhoods' are imprisoned.[105] This destabilizes the housing market in those neighborhoods, for 'the larger community may have trouble maintaining housing for the incarcerated individuals.'[106] In addition, when those who were imprisoned return to their communities, they have 'limited income and [are] desperate for a place to live, leading to a market for substandard housing.[107] Individuals who do not have criminal convictions also suffer from this effect, as they must live in substandard housing that might otherwise be better maintained.

Similarly, stigma attaches to entire neighborhoods that send a large number of residents to prison and then receive them back. Businesses and residents flee, which lowers property prices, resulting in a local economy reflective of the suffering of its residents.[108] These communities lose the 'grounding social forces that typically bond communities together.'[109]

In communities already suffering from myriad social problems, such as unemployment, disadvantaged schools, and homelessness, an influx of formerly incarcerated individuals and the problems they face may lead to a breakdown in community structure, support, and organization. The 'coercive mobility hypothesis' states that high rates of incarceration, concentrated in poor communities, 'will destabilize social networks in those communities, thereby undermining informal social control and leading to more crime.'[110] A lack of affordable and supportive housing for individuals returning from incarceration is a key piece of this cycle of violence, crime, and community destabilization.

III. Current Pushback Against Housing Discrimination

Although housing discrimination against individuals with criminal convictions has been practiced openly and, most thought, legally, the practice has come under increasing fire and scrutiny in the last few years. This Part describes the various methods that advocates are using to attack the status quo. First, the Part describes current litigation strategies—disparate impact litigation through the Fair Housing Act and suits against public housing providers who have unreasonable lookback periods. Next, the Part summarizes some (though not all) recent legislation from around the country, from a Texas law that reduces potential liability for housing providers who rent to people with convictions to laws that allow people with convictions to apply for 'certificates of recovery.

105. Rhine, *supra* note 30, at 334–35.
106. *Id.*
107. *Id.*
108. CLEAR, *supra* note 31, at 126, 135.
109. Oyama, *supra* note 7, at 197.
110. CLEAR, *supra* note 31, at 149.

A. Fair Housing Act

The Fair Housing Act prohibits discrimination in the sale or rental of homes or apartments on the basis of race, color, religion, sex, disability, familial status, or national origin.[111] A policy can violate the Fair Housing Act if it has a disparate impact on any of these protected classes, even if the landlord had no intention to discriminate against that class.[112] While some real estate investors and landlords have been aware of potential disparate impact claims based on criminal records, most have thought they would be unsuccessful.[113] Advocates, however, have thought otherwise and published several guides within the last decade encouraging lawyers to file disparate impact suits against landlords employing these practices.[114]

In 2014, the Fortune Society (Fortune), a New York-based reentry organization, took up the cause and filed a suit directly attacking these practices.[115] In *Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp.*[116] Fortune sued a large private rental company under the Fair Housing Act for its blanket ban against individuals with criminal convictions. Fortune argues that this ban has a disparate impact on black and Latino men and women, who make up 95% of those served by Fortune.[117] While litigation is ongoing, the plaintiffs (and others contemplating suit) received two boons in the last two years: a Supreme Court decision confirming that the Fair Housing Act supports disparate

111. 42 U.S.C. § 3604 (2012); HUD Guidance, *supra* note 4, at 1.

112. HUD Guidance, *supra* note 4, at 2.

113. *See, e.g.*, Robert J. Wise, *Felons & Fair Housing – How Discrimination Can Include the 'Disparate Impact' Rule*, EZLANDLORDFORMS (Jan. 27, 2017), https://www.ezlandlordforms.com/articles/educational/1/135/felons-and-fair-housing-how-discrimination-can-include-the-disparate-impact-rule/ [https://perma.cc/V3SV-JKMU] (arguing that "it is apparent that felons are not similar to [classes that] are presently protected," and that plaintiffs "would not be able to offer 'a viable alternative that satisfies the defendant's policy objectives while reducing the discriminatory impact'"); Dulcey S., *Would You Rent to a Felon?*, RENTEC DIRECT (July 12, 2013), https://www.rentecdirect.com/blog/would-you-rent-to-a-felon/ [https://perma.cc/L77T-C6WS] ("Is a landlord being totally unreasonable to think that a felony conviction says something relevant about what kind of tenant that person might be?").

114. *See, e.g.*, MERF EHMAN, INSTS. PROJECT OF COLUMBIA LEGAL SERVS. FAIR HOUSING DISPARATE IMPACT CLAIMS BASED ON THE USE OF CRIMINAL AND EVICTION RECORDS IN TENANT SCREENING POLICIES (2015), http://www.columbialegal.org/DisparateImpactManual2015.pdf [https://perma.cc/JW2V-8EZ3]; FORMERLY INCARCERATED & CONVICTED PEOPLE'S MOVEMENT, *supra* note 24; TRAN-LEUNG, *supra* note 9.

115. Mireya Navarro, *Lawsuit Says Rental Complex in Queens Excludes Ex-Offenders*, N.Y. TIMES (Oct. 30, 2014), http://www.nytimes.com/2014/10/31/nyregion/lawsuit-says-rental-complex-in-queens-excludes-ex-offenders.html?_r=0 [https://perma.cc/B568-QKGF].

116. No. 1:14-cv-6410 (E.D.N.Y. Oct. 30, 2014).

117. First Amended Complaint, *supra* note 5, at 2, 6.

impact suits and guidance from HUD stating that blanket bans likely violate the Fair Housing Act.[118]

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[119] the Supreme Court upheld the practice of using disparate impact theory under the Fair Housing Act.[120] Even though every federal court of appeals had interpreted the Fair Housing Act as permitting disparate impact suits, the Court's decision was still surprising, as the Roberts Court has 'rolled back many protections of the civil rights era, and housing advocates worried the Court would do the same here.[121] But happily, the Court did not, and its decision removes any question about the validity of disparate impact suits, taking with it any potential defense on these grounds. Additionally, the recognized validity of disparate impact suits under the Fair Housing Act will help create uniformity in "an increasingly incoherent body of case law.'[122]

HUD's guidance will likely impact ongoing and future litigation. While not binding on courts, the opinions of HUD are certainly influential. The guidance addresses the potential illegality of housing discrimination against people with criminal convictions by analyzing each step in a disparate impact claim. These types of claims will now use a three-step burden-shifting framework. First, a plaintiff must show that a policy has a disparate impact on people of color.[123] To do this, Helen Kanovsky, then general counsel for HUD and author of the statement, cites national statistics showing the disproportionate conviction rates among black and Latino men and women.[124] Having established a discriminatory effect, the burden then shifts to the defendant to show that the practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.[125] The statement emphasizes that the challenged policy must actually address the asserted interest—in other words, defendants cannot simply state that discrimination is necessary for the safety of their tenants without showing that the bans put in place actually create a safer environment: 'Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk

118. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc. 135 S. Ct. 2507, 2516, 2526 (2015); HUD Guidance, *supra* note 4, at 6.

119. 135 S. Ct. 2507 (2015).

120. *Id.* at 2518–22, 2526.

121. Alana Semuels, *Supreme Court vs. Neighborhood Segregation*, ATLANTIC (June 25, 2015), http://www.theatlantic.com/business/archive/2015/06/supreme-court-inclusive-communities/396401/ [https://perma.cc/L28K-BS7V].

122. Villas W. II of Willowridge v. McGlothin, 841 N.E.2d 584, 599 (Ind. Ct. App. 2006) (quoting Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 439 (1998)).

123. HUD Guidance, *supra* note 4, at 3.

124. *Id.* at 3–4.

125. *Id.* at 4.

than any individual without such a record are not sufficient to satisfy this burden.'[126]

Applying this test, HUD made several findings. First, a housing provider that excludes people on the basis of arrests that did not result in conviction 'cannot satisfy its burden.'[127] As support, HUD quotes the Supreme Court's assertion that '[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.'[128]

Second, HUD found unequivocally that "[a] housing provider that imposes a blanket prohibition on any person with any conviction record—no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then—will be unable to meet this burden.'[129] While acknowledging that a more tailored approach could meet the burden, HUD emphasized that a housing provider must still show that its policy 'accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.'[130] As guidance, HUD states that policies that do not take into consideration the nature of the criminal conduct or the time since the criminal conduct occurred will be unlikely to satisfy this standard.[131] However, this means that a tailored approach that considers the type of criminal convictions and the time elapsed since the convictions might be able to meet the burden of having a legitimate, nondiscriminatory purpose.

In the third step of this burden-shifting framework, the plaintiffs can show that even if the housing providers' policies are legitimate, less discriminatory alternatives to achieving the same purposes exist.[132] HUD suggests that one less discriminatory alternative would be individualized assessment of mitigating information relating to an individual's criminal record.[133] According to HUD, this assessment should include (1) the facts or circumstances of the crime(s), (2) the age of the individual at the time of the crime(s), (3) evidence that the applicant has a good tenant history, and (4) rehabilitation efforts.[134]

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126. *Id.* at 5.
127. *Id.*
128. *Id.* (quoting Schware v. Bd. of Bar Examiners, 353 U.S. 232, 241 (1957)).
129. *Id.* at 6.
130. *Id.*
131. *Id.* at 7.
132. *Id.*
133. *Id.*
134. *Id.*

Much is still left to be resolved regarding HUD's recommendations for public and private housing owners. But there is no doubt that the pronouncement's impact on current and future litigation will be great.[135]

B. Other Litigation Strategies for Public Housing

While disparate impact suits will apply equally against public and private housing providers, public housing providers accept certain obligations when they take federal funds that may also provide some relief from housing discrimination.

1. Unreasonable Lookback Periods.—When housing providers accept federal funds to provide subsidized housing, they become subject to federal law regulating public housing.[136] This federal law requires that public housing providers create "reasonable' lookback periods for criminal convictions when assessing applicants.[137] Frustratingly for advocates, the law does not define what constitutes a 'reasonable' period.[138] But the fact that federal law imposes indefinite bars against only two narrow categories of criminal conduct (sex offenses and methamphetamine production) 'strongly suggests a preference for reasonable time limits over limitless review.'[139] Yet many public housing providers have enacted limitless lookback periods or have neglected to include any lookback periods in their written criteria.[140] These policies discourage individuals with criminal records from applying at all, and when individuals do apply, 'the policy

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135. While HUD's pronouncement might have taken some housing providers off guard, there was precedent for their determination. Over twenty years ago, the U.S. Equal Employment Opportunity Commission (EEOC) released guidelines regarding the use of criminal records in employment decisions. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, No. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012).The Commission found, similar to HUD, that blanket bans had a discriminatory effect and, under Title VII of the Civil Rights Act, could not be justified by employers' hiring concerns. Oyama, *supra* note 7, at 200–02. Thus, the EEOC stated that employers should not base hiring decisions on criminal records absent a relation between the job and the conviction. *Id.* at 200–01.After the EEOC's decision, scholars immediately recognized the similarities between Title VII and Title VIII (which includes the Fair Housing Act) of the Civil Rights Act, and the potential impact of the EEOC's decision on housing policies. *See, e.g.*, Tran-Leung, *supra* note 12, at 7 (contending that "housing providers' screening of applicants on the basis of past criminal arrests and convictions has similar deficiencies' to, and advocates should emulate challenges to, employers' screening).

136. 29 U.S.C. § 794(b) (2012).

137. TRAN-LEUNG, *supra* note 9, at v.

138. Rebecca Burns, *No Second Chances When It Comes to Housing*, TRUTHOUT (Mar. 15, 2015), http://www.truth-out.org/news/item/29584-no-second-chances-when-it-comes-to-housing [https://perma.cc/TQL3-SPYE].

139. TRAN-LEUNG, *supra* note 9, at 11.

140. *Id.*

provides little to hold project owners accountable when they rely on criminal records rendered irrelevant by age.'[141]

Although federal law is also unclear about whether applicants have a right to challenge what they view as unreasonable lookback periods, a Texas lawsuit against the Apartment Investment and Management Company (AIMCO), one of the nation's largest providers of subsidized housing, took on the issue.[142] Several years ago, Maria Cardenas was charged with failure to identify to law enforcement—a misdemeanor.[143] She accepted a plea of no contest, completed the requirements mandated by the court, and moved on with her life.[144] But three years later, Ms. Cardenas, who is disabled, attempted to rent a federally subsidized apartment and was denied by two of AIMCO's properties.[145] AIMCO's policy barred Cardenas for life because of her three-year old misdemeanor conviction.[146]

Last year, however, a Bexar County Court held that this policy violated federal law because it did 'not provide for denial to federally assisted housing on the basis of criminal activity engaged in by the applicant during a *reasonable time* preceding the date the applicant would otherwise be selected for admission.'[147] The court ordered AIMCO to 'immediately revise their rental selection guidelines' for tenants applying with criminal convictions.[148] Although the court did not give guidance regarding what would be a more reasonable lookback period, the court further ordered AIMCO to reconsider Ms. Cardenas's application after revising their policies, implying that the court thought Ms. Cardenas might be eligible for housing.[149]

Similar success was had in a lawsuit in Travis County (Austin) when a public housing provider was held to have violated the reasonable lookback period provision: the provider had lifetime bans for all misdemeanor assaults.[150] They were also ordered to revise their policies to make them 'reasonable,' and the lookback period was reduced to ten years.[151]

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141. *Id.* at 12.

142. Cardenas v. Apartment Inv. & Mgmt. Co. No. SA–12–CV–962–XR, 2012 WL 6004212 (W.D. Tex. Nov. 29, 2012).

143. *Id.* at *1.

144. *Id.*

145. *Id.* at *2.

146. *Id.*

147. Cardenas v. Apartment Inv. & Mgmt. Co., Cause No. 380,393, at 2 (Co. Ct. at Law No. 2, Bexar Cty. Jan. 7, 2015) (emphasis added) (unpublished order) (on file with author).

148. *Id.* at 3.

149. *Id.*

150. James v. Park Place at Loyola Apartments, Cause No. C-1-CV-10-012572, at 1–2 (Co. Ct. at Law No. 2, Travis Cty. July 31, 2013) (unpublished final judgment) (on file with author).

151. E-mail from Fred Fuchs, Hous. Attorney, Tex. Rio Grande Legal Aid, to author (May 2, 2016) (on file with author).

While the orders in these cases still allow for an uncomfortable amount of discretion when housing providers revise their lookback periods, as demonstrated by a ten-year ban for a misdemeanor, these suits show that lifetime bans in public housing are vulnerable to attack. And once lifetime bans are off the table, advocates can begin fighting for lookback periods that really do allow individuals with criminal records to overcome their past.

2. Requirement to Affirmatively Further Fair Housing.—Another somewhat amorphous, but potentially litigable, requirement imposed on public housing providers is the duty to administer housing programs in a manner that "affirmatively further[s] fair housing."[152] HUD describes this duty as

> taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity. replacing segregated living patterns with truly integrated and balanced living patterns [153]

The rule does include language seeming to limit its application to protected classes, stating that housing providers must "foster inclusive communities free from barriers that restrict access to opportunity *based on protected characteristics*."[154] This limitation might explain why the rule has not been invoked in litigation challenging discrimination against those with criminal records. However, with the increasing awareness of the racial dynamics involved in criminal-conviction discrimination, making the connection between protected classes and those being refused housing because of criminal convictions will become easier.

Furthermore, the rule mandates that public housing providers conduct an "Assessment of Fair Housing' that identifies barriers to fair housing 'pertaining to patterns of integration and segregation; racially and ethnically concentrated areas of poverty: disparities in access to opportunity: and disproportionate housing needs, as well as the contributing factors to those issues."[155] HUD then reviews the assessment and deems it acceptable or unacceptable.[156] Because of the administrative mechanism for enforcing the rule, it is unclear whether an individual cause of action based solely on the

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152. U.S. DEP'T OF HOUS. & URBAN DEV., AFFH FACT SHEET: THE DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING (2015).

153. *Id.*

154. *Id.* (emphasis added).

155. *Id.*

156. *Id.*

rule would be allowed.[157] Regardless, the language of the rule can certainly be used to bolster legal arguments against discriminatory policies.[158] Additionally, advocates can put pressure on HUD to use its enforcement power as a way to force housing providers to change their policies.

C. *Non-Judicial Reforms*

Litigation is not the only area in which changes are taking place regarding criminal records and housing determinations. Increasing public awareness about the racial motivations behind, and the utter failure of, the war on drugs, as well as awareness of the many challenges facing formerly incarcerated individuals, has led to a wide variety of reforms in state legislatures, city councils, and administrative agencies.[159]

In Texas, for example, H.B. 1510 passed in 2015, which limits the liability landlords face for potential crimes committed by renters with nonviolent felony convictions.[160] Since landlords often use this fear of liability as a reason to not take risks on individuals returning from prison, H.B. 1510 and similar laws might alleviate that concern. However, the law does not guarantee that housing providers will loosen their policies, so the law's impact is uncertain.[161]

In New Orleans, the Housing Authority of New Orleans (HANO) recently approved a sweeping new policy related to criminal background

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157. NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 61 (2008), http://www.civilrights.org/publications/reports/fairhousing/future_of_fair_housing_report.pdf [https://perma.cc/LJQ9-NJ66] ("Although plaintiffs have successfully brought numerous Section 3608 claims in federal court against HUD (using the Administrative Procedure Act) and against state and local housing agencies pursuant to the general civil rights statute, 42 U.S.C. § 1983, most courts have found no 'direct' cause of action against HUD or HUD grantees under this provision, and based on recent decisions on the use of § 1983 to enforce federal statutes, some courts are becoming reluctant to entertain a claim based on § 3608 against state or local government entities.").

158. Tran-Leung, *supra* note 12, at 10.

159. RAM SUBRAMANIAN ET AL., CTR. ON SENTENCING & CORR., RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION 2009–2019, at 5, 19 (2014), http://www.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v3.pdf [https://perma.cc/FZF9-9DS3] ("In recent years, however, the veil of invisibility has slowly lifted. With rising awareness of the increasing number of people under correctional supervision and, therefore, an ever-increasing number reentering society, state policymakers, legal practitioners, advocates and the American public have become more concerned about the issue of offender reentry and more supportive of rehabilitative and reentry services, particularly those which prevent recidivism. (citations omitted)).

160. 2015 Tex. Sess. Law Serv. 2092 (West) (codified at TEX. PROP. CODE ANN. § 92.025 (West 2016)); Erik Barajas, *New Law Could Change to Allow Felons to Rent Apartments*, ABC13 EYEWITNESS NEWS (Aug. 6, 2015), http://abc13.com/news/law-could-change-to-allow-felons-to-rent-apartments/907237/ [https://perma.cc/L2EF-ZZF4].

161. Barajas, *supra* note 160.

checks.[162] While this policy has been three years in the making, it closely tracks the recommendations set forth by the HUD statement. The policy eliminates an outright ban on individuals with criminal convictions, instead establishing an individualized review process.[163] Initially, HANO housing providers will consider the severity of the crime and the time since conviction in order to determine whether to admit or further evaluate the applicant.[164] For recent or serious crimes, a panel will consider several factors, including rehabilitation efforts, ties to the community, and current employment status.[165]

In a different context, a bill passed in Arizona would have allowed homeowners to rent their homes to individuals without conducting criminal background checks, regardless of the rules put in place by the homeowner's associations to which they belong.[166] Since many homeowner's associations belong to 'crime-free programs, which partner with local law enforcement to ban convicted felons, sex offenders and drug dealers, this law would have allowed homeowners to skirt those restrictions.[167] The bill sparked controversy, pitting the rights of homeowners against those of their neighbors and their homeowner's association, but it was struck down in state court as an unconstitutional amendment to a campaign finance bill.[168]

Other states have started allowing people with criminal convictions to apply for 'certificates of recovery. which can be given to third parties as evidence of rehabilitation.[169] Some states require that an individual wait twelve months after release before applying, while others allow applications while the individual is still incarcerated.[170] Decisions would be made based on a showing of programs completed and behavior in prison.[171]

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162. Richard A. Webster, *HANO Approves New Criminal Background Check Policy*, NOLA.COM (Mar. 29, 2016), http://www.nola.com/politics/index.ssf/2016/03/hano_approves_new_criminal_bac.html#incart_m-rpt-2 [https://perma.cc/BUC4-MYEU].

163. *Id.*

164. Mathilde Laisne, *In New Orleans, the Housing Authority Is Helping People with Criminal Convictions Rejoin Families*, VERA (Mar. 30, 2016), https://www.vera.org/blog/in-new-orleans-the-housing-authority-is-helping-people-with-criminal-convictions-rejoin-families [https://perma.cc/4CR6-EL92].

165. *Id.*

166. *New Law Opens Rental Market for Convicted Felons*, CBS5 (July 15, 2014), http://www.cbs5az.com/story/22848798/new-law-opens-rental-markets-for-convicted-felons [https://perma.cc/Y4SV-EZPS].

167. *Id.*

168. *Id.*

169. SUBRAMANIAN ET AL., *supra* note 159, at 11.

170. *Id.* at 18–19 (noting that North Carolina requires applicants to wait twelve months after release, while Ohio allows individuals to apply up to one year prior to release).

171. *Id.*

Since 2009, at least seventeen states have passed laws expanding 'access to information' for incarcerated or formerly incarcerated people.[172] These include laws requiring that people leaving prison receive information on how their convictions might impact their civil rights, what reentry resources are available to them, and whether expungement or sealing remedies might be available to them.[173] In Indiana, a law specifies that a third-party criminal-background provider can only provide information relating to a conviction; they cannot disclose arrests, charges that did not lead to a conviction, or outdated or inaccurate information.[174]

These reforms show an increasing willingness to view those labeled as 'criminals' or 'felons' as individuals with strengths and goals. However, these reforms are slight compared to the problem, and in no way do they ease all, or even many, of the barriers faced by individuals coming home from prison. There is much more to be done.

IV The Good, the Bad, and the Nonexistent

Housing discrimination against individuals with criminal convictions has been so rampant, so widely accepted, and so misinformed that at this point any reform of the practice is progress. However, much can be learned from social scientists who have studied reentry and, more importantly, from the individuals who have transitioned out of prison—whether successfully or not. Advocates need to consciously work to bridge the gap between the reforms that seem most accessible under current law and the needs of those most affected by housing discrimination. This Part attempts to identify this gap, while acknowledging the good that will come from current reforms.

A. The Good

The current reforms have the potential to positively influence two groups of people: those who have successfully reentered society and have gone years without reoffending, and those who have committed relatively minor offenses or have substantial mitigating factors.

Litigation around reasonable lookback periods in public housing and reforms mandated by Fair Housing Act litigation will ensure that people's criminal records do not stymie their housing applications for the rest of their lives. It is unclear what lookback periods will be deemed reasonable, or to what degree a 'less discriminatory alternative' will limit housing providers' ability to consider past criminal activity. What is clear is that the first to go will be lifetime bans for most categories of offenses.

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172. *Id.* at 27.
173. *Id.*
174. *Id.* at 28.

When housing providers are forced to rewrite their lookback period policies, advocates should not be satisfied with a twenty-year lookback period just because it is not a lifetime ban. Instead, advocates should aggressively fight against any policy that looks back more than seven years,[175] at most, for violent felony convictions. Advocates can cite widely accepted studies showing that individuals who have been out for seven years are no more likely to commit a crime than a person who has never been to prison.[176] For nonviolent felonies and misdemeanors, the lookback period should be significantly shorter than seven years. This will ensure that those who have proved that they are rehabilitated and are productive members of society will not be hobbled by their past.

The second category of individuals who will certainly benefit from current reforms are those whose offenses are minor or who have mitigating factors weighing in favor of admission to housing. This stems from the final part of the disparate impact burden-shifting framework, which requires plaintiffs to provide less discriminatory alternatives in order to succeed. The recommendations made by HUD and the relief requested by the *Fortune Society* lawsuit suggest that a less discriminatory alternative will be an individualized evaluation of each applicant with a criminal history, considering factors like 'the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts.'[177]

These factors presume, to a certain degree, that the conviction is older (considering length of time since it occurred, postrelease conduct, and evidence of rehabilitation), that the individual was young when the crime occurred (considering the age of the person at the time of the offense), that the conviction was not violent or aggravated (considering the nature of the conviction), and that the individual was able to afford or maintain stable housing in the past (considering a good tenant history).

This means that individuals who were convicted of minor offenses, perhaps in their youth, but who have since demonstrated their rehabilitation, should be granted housing. The multiple factors also mean that someone convicted of a violent felony, but who has, either in prison or since release, clearly demonstrated his transformation, could be granted housing. In other words, it requires housing providers to consider people with criminal convictions as individuals who have their own stories and the potential for transformation. But the factors also indicate that individuals with convictions

175. Even this is long—HUD has recommended a five-year lookback period for serious crimes. TRAN-LEUNG, *supra* note 9, at v.

176. Kurlychek et al., *supra* note 36, at 80.

177. HUD Guidance, *supra* note 4, at 7.

should be able to explain their conviction or stand out in some other way. The average person returning from prison, who left an impoverished community and returns to one, and who was incarcerated in a prison with little or no programming or educational opportunities, will have a hard time making these factors work for him, regardless of his desire to successfully reintegrate into society.

But a more radical alternative to the individualized assessment proposed by HUD exists and should not be overlooked by advocates. As discussed above, disparate impact litigation requires housing providers to prove that their policies *work*—something they have never had to do before. Advocates should take full advantage of this requirement. The HUD statement emphasized this requirement, pointedly stating that '[b]ald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual *without such a record* are not sufficient to satisfy this burden.'[178] Because housing providers have never had to provide such evidence, few studies have been conducted on the subject. But there is some indication that current bars do not, in fact, produce safer communities.

A study from Knoxville, Tennessee, found that a new screening policy implemented by the public housing authority had very little effect on crime.[179] The housing authority barred anyone with a conviction for murder, attempted murder, or sex offenses, and screened on a case-by-case basis anyone with other felonies or public-order crimes within the previous three years.[180] Researchers found that this policy had little impact on crime: while property crimes decreased, aggravated assaults went up, and murder and rape rates remained consistent.[181] Another study, conducted in Seattle with homeless people who were given access to supportive housing, found that criminal records had no predictive value in determining housing success.[182]

Advocates can also argue that because of the strong association between stable housing and success in reintegration, 'dismantling housing barriers against people with criminal records will likely increase rather than decrease public safety.'[183] While housing providers may argue that this is an overly broad assertion and is not representative of crime within housing complexes,

178. *Id.* at 5 (emphasis added).

179. John W. Barbrey, *Measuring the Effectiveness of Crime Control Policies in Knoxville's Public Housing: Using Mapping Software to Filter Part I Crime Data*, 20 J. CONTEMP. CRIM. JUST. 6, 25 (2004).

180. *Id.* at 15.

181. *Id.* at 19–23.

182. Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, 60 PSYCHIATRIC SERVS. 224, 229 (2009).

183. Tran-Leung, *supra* note 12, at 6.

they will have the burden of proving—in a more specific manner—that their policies do decrease criminal activity.

B. The Bad and the Nonexistent

Although many individuals will certainly benefit from the current and future reforms taking place, many of those who need stable housing the most will still find themselves barred, for several reasons.

First, a more theoretical issue. Advocates fighting these policies are starting in a bad place. As it currently stands, the vast majority of private and public housing providers bar individuals with criminal convictions.[184] Many have blanket bans, and others have policies that effectively serve as blanket bans. Thus, the prospect of reducing a blanket ban to a ten-year ban, or to a consideration of several factors, is a vast improvement. But if, in practice, the ten-year ban still excludes most people searching for housing, or the weighing of several factors still leads to the denial of housing for the majority of people with criminal convictions, not much has changed. Instead, advocates should recalibrate their base line: not from what currently exists, but from what will give relief to as many individuals as possible. From that base line, they should yield only to those policies that housing providers are able to prove really serve public safety.

This theoretical point leads to the practical concerns with the current reforms. One major problem is that the reforms will mostly benefit individuals who have already succeeded in reintegrating into society. For example, if someone has stayed out of jail or prison long enough to get outside of a three-year lookback period, he is also outside of the highest risk period for homelessness and recidivism. Or, if an individual is able to convince a housing provider that he is rehabilitated because he has steady employment and a positive tenant history, he will likely also have more resources—whether monetary or social—to pull from in order to find housing.

But the reforms largely ignore the population that needs stable housing the most and is at the highest risk of recidivating: those who have just been released. As discussed above, studies have repeatedly found that the most crucial period for men and women upon release is the period immediately following release.[185] If a person is unable to find stable housing at that time, his chances of spiraling into a cycle of homelessness and recidivism increase dramatically. Yet the current and proposed reforms do little to alleviate this burden. A person just released will inevitably fall into any lookback period that is in place, and he may not have had the time or resources to demonstrate

184. *See supra* notes 13–17, 28–33 and accompanying text.

185. *See supra* notes 60–77 and accompanying text.

his rehabilitation. Advocates need to be responsive to the needs of this population and must demand reforms that will allow successful reintegration for all—not just those who have enough resources or who are lucky enough to make it through the most difficult period of transition.

Another potentially problematic element of the reforms is the continuing reliance on tenant history—both before and after incarceration—as a factor in determining eligibility for housing.[186] While a landlord certainly has a right to investigate whether their prospective tenant will pay the rent and not engage in behavior detrimental to the community. the use of eviction history may itself be subject to disparate impact litigation.[187] Women and people of color are disproportionately impacted by eviction, and having an eviction or housing dispute on one's record serves to place individuals on a 'blacklist' for future housing applications.[188] While the disparate impact of eviction records and the solution to this problem are beyond the scope of this Note, this is just one example of how the proposed solutions to criminal-conviction discrimination may in fact entrench other discriminatory practices.

In order to ensure that legal solutions to this problem really do provide relief, advocates need to work with social scientists who can measure the results of policy changes—both in terms of who is able to get housing and whether crime rates change as a result. Additionally. advocates need to ensure that they are not accepting solutions simply because they are slightly better than the system we now have. Questioning the very premise that discrimination against individuals with criminal records increases public safety is a good start.

V Bridging the Gap

Regardless of how diligent lawyers are in responding to the needs of those most affected by housing bars, litigation cannot be expected to completely eradicate barriers to housing for people with convictions. For one, studies may find that barring some individuals with criminal convictions, after an individualized consideration, does actually serve public safety in a particular housing community. effectively rebutting a disparate impact challenge on those grounds. For another, courts may be reluctant to remove all discretion from housing providers' consideration of criminal convictions, even if studies don't support the providers' contentions.

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186. Both the HUD Statement and the *Fortune Society* lawsuit suggest using tenant history as one factor in determining housing eligibility for individuals with criminal convictions. HUD Guidance, *supra* note 4, at 7; First Amended Complaint, *supra* note 5, at 6.

187. In fact, one of the disparate impact guides for criminal histories also includes a guide to challenging the use of eviction records. EHMAN, *supra* note 114, at 1, 20.

188. *Id.* at 4–5.

Thus, advocates, legislators, and concerned citizens—prioritizing the voices of those who have experienced reentry—must work together to create solutions that will meet housing providers in the middle. In other words, if housing providers will remove blanket bans and unreasonable lookback periods and start honestly considering applicants with criminal records, the government should work to develop systems that give applicants an opportunity to demonstrate their rehabilitation and desire for reintegration. What follows are some suggestions, supported by social science and reentry advocates, on how to do this.

A. Expansion of Reentry Services

Instead of releasing men and women who have received little information or assistance while incarcerated into communities that have few to no resources to assist in reintegration, services should be built up both before and after release to help people make this transition.

1. Prerelease Services.—One oft-cited recommendation to help people as they reenter is to develop or expand existing prerelease services in jails and prisons. One of the most consistent findings in the Vera Institute study was that while individuals just released from prison had strong motivation to turn their lives around, they needed to be better prepared before release.[189] This preparation involves "start[ing] the process of connecting with employers who will hire ex-offenders; get[ting] the identification they will need to find a job or cash a check; sign[ing] up for Medicaid coverage so they can enroll in drug treatment; and [getting] assessed and referred for mental health services."[190]

Some jails and prisons have prerelease agreements with the Social Security Administration, which allows the application process for SSI—Supplemental Security Income—and food stamps to begin prior to release.[191] If an incarcerated person is eligible, she will begin receiving her benefits immediately upon release instead of waiting three to five months for the Social Security Administration to process her application.[192] This creates some cash flow that can generate stability immediately upon release. These resources should be available to all people in jail or prison so that when they are released they have the capability of immediately finding a home, getting a job, and entering drug or mental health treatment.

189. NELSON ET AL., *supra* note 25, Executive Summary.

190. *Id.*

191. Foscarinis & Troth, *supra* note 61, at 445.

192. *Id.* at 444–45.

2. Expanded Resources and Culture Shift for Parole Officers.—Once individuals are released, they are usually placed under the supervision of a parole officer.[193] Parole officers often deal with heavy caseloads, and the high turnover rate in the profession indicates rapid burnout.[194] As a result, many parole officers are unable or unwilling to provide anything more than perfunctory monitoring when the critical need is for substantive assistance and information about available resources.[195] Lowering caseloads and increasing the resources available to parole officers could make parole supervision a tool for success instead of a threat of punishment. Additionally, parole officers could be a resource to recently released individuals in need of housing: as more housing options become available, parole officers could serve as reentry counselors with centralized knowledge about available housing placements.

Parole officers also need to understand the particular challenges facing individuals as they reenter, especially the challenges of those with unstable housing. For example, an inability to find stable housing should never, in and of itself, be a parole violation; parole officers should be aware of the risks that instability gives rise to, such as the increased risk of police involvement if someone is forced to stay at a homeless shelter. Additionally, since imprisonment for a parole violation leads to increased risk for homelessness and subsequent reincarceration upon release, parole officers should rarely use incarceration as a punishment for parole violations.[196]

3. Private Reentry Services.—Reentry service providers—especially those who are able to provide emergency and transitional housing for those most in need—are incredibly helpful resources for individuals returning from prison. The Fortune Society in New York City serves as a model agency, with a 'holistic, one-stop model of service provision.'[197] In addition to providing emergency, transitional, and permanent housing for select categories of formerly incarcerated people, Fortune provides career counseling, job training and placement, educational classes, drug treatment, assistance with family reunification, and mental health treatment, among other services.[198] In 2015, Fortune served almost 6,000 people returning to

193. Of the forty-nine participants in the Vera Institute study, forty-six were on parole. NELSON ET AL., *supra* note 25, at 25.

194. OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, STRESS AMONG PROBATION AND PAROLE OFFICERS AND WHAT CAN BE DONE ABOUT IT 2, 4 (2005).

195. NELSON ET AL., *supra* note 25, at 25.

196. Metraux & Culhane, *supra* note 8, at 150 ("[B]eing imprisoned on a parole violation increased the hazards for both a shelter stay and a reincarceration.").

197. *Programs*, FORTUNE SOC'Y, https://fortunesociety.org/#programs [https://perma.cc/MF33-BNGX].

198. *Id.*

New York City from jail or prison, and housed over 400 people.[199] While these numbers are impressive, they are only a fraction of the estimated 125,000 people released from jail and prison into New York City every year.[200] Furthermore, most communities around the country do not have large-scale, one-stop reentry programs like Fortune and struggle to meet the increased demands for reentry services for the large number of people released each year.[201]

Organizations like Fortune should be replicated around the country to ease the burdens faced by people coming out of jail or prison, and to give those who are ready to transform their lives the tools with which to do so. However, regardless of the amount of prerelease and postrelease services and programs made available to incarcerated people, the fact remains that individuals need stable and safe housing as soon as they walk out of jail or prison. The services offered to motivated men and women during the day will mean little if they have to face a park bench or a cot in a homeless shelter at night. Cities and states have a responsibility to their citizens to ensure that every individual who leaves jail or prison has access to a safe and stable home.

B. Prohibit Housing Discrimination Based on Criminal Records

The simplest way to ensure that individuals coming home from prison have access to housing is to prohibit housing providers from discriminating on the basis of criminal records. Cities and states are able to pass legislation prohibiting this type of discrimination, and, in fact, Madison, Wisconsin has passed legislation like this. The Madison ordinance generally prohibits private landlords from considering criminal convictions unless they bear a 'substantial relationship to tenancy.'[202] A model law proposed by the Legal

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199. THE FORTUNE SOCIETY, ANNUAL REPORT 2014–2015, at 2 (2016), https://fortunesociety.org/2016/02/11/the-fortune-society-annual-report-2014-2015/ [https://perma.cc/Q7LC-UFJS].

200. NELSON ET AL., *supra* note 25, Executive Summary.

201. Richard Greenwald, *Making Prisoner Reentry Work*, CITY J. (July 20, 2009), http://www.city-journal.org/html/making-prisoner-reentry-work-10593.html [https://perma.cc/B558-7YFB] ("[C]ities often don't have the infrastructure or capacity to offer the range of services that people need to stay out of prison. Communication about funding allocations and ex-offenders' needs can be poor among state, county, and local authorities and service providers. Most communities struggle to establish a coherent central entity that can provide a comprehensive map of services and hold various agencies accountable for funding and performance."); *see, e.g.*, Thomas Mentzer, *Former Prisoners Returning to Chicago Lack Services, Support*, URB. INST. (Sept. 14, 2005), http://webarchive.urban.org/publications/900839.html [https://perma.cc/XHJ4-STTK].

202. CITY OF MADISON DEP'T OF CIVIL RIGHTS, ARREST AND CONVICTION RECORD AND HOUSING DISCRIMINATION IN THE CITY OF MADISON (2011), https://www.cityofmadison.com/dcr/documents/ConvRecHousingBro-Eng.pdf [https://perma.cc/HGB9-G6YZ].

Action Center, based in part on the Madison ordinance, would prohibit the denial of housing based on any conviction—whether or not it has a substantial relationship to tenancy—if more than two years have passed since the applicant was released from jail or prison.[203]

Even if private housing were accessible to most, regardless of criminal convictions, it would not be financially obtainable for most people coming home from jail or prison. This is where supportive housing becomes important.

C. Supportive Housing

Supportive housing combines affordable housing with social services to help marginalized populations live with 'stability. autonomy and dignity. '[204] Studies have shown that not only is supportive housing successful in reducing recidivism, it is also significantly cheaper than the shelters, jails, and prisons used by those who cycle from homelessness to incarceration.[205]

Metraux and Culhane, in their large-scale study of 49,000 individuals released into New York City from jails and prisons, found that 'the key intervention point appears to be at the time of release. '[206] They suggest that 'efforts to prevent homelessness among released prisoners should focus on the transitional period occurring right after prison and should focus on persons who demonstrate a history of unstable housing. '[207] Furthermore, because of the costs associated with homelessness and reincarceration, 'providing housing and support services lowers these costs considerably. '[208] Many of the pre-existing supportive-housing initiatives focus on homelessness or mental illness and are not directly focused on individuals with criminal convictions. However, because of the large overlaps between these populations, it is possible to draw some conclusions about the effectiveness of supportive housing for those with criminal convictions.

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203. JULIA SINGER BANSAL, CONN. OFFICE OF LEGISLATIVE RESEARCH, 2016-R-0023, UPDATED REPORT: HOUSING FOR ADULTS WITH CRIMINAL RECORDS 6 (2016), https://www.cga.ct.gov/2016/rpt/pdf/2016-R-0023.pdf [https://perma.cc/LS69-VXBD].

204. Ctr. for Supportive Hous. *What is Supportive Housing?*. http://www.csh.org/supportive-housing-facts/introduction-to-supportive-housing/ [https://perma.cc/4A3G-J9FC].

205. John M. Glionna, *Utah Is Winning the War on Chronic Homelessness with 'Housing First' Program*, L.A. TIMES (May 24, 2015), http://www.latimes.com/nation/la-na-utah-housing-first-20150524-story.html [https://perma.cc/98UV-EJ55] (comparing the cost of housing and social services per year—$11,000—to the cost of hospital and jail stays per year—$17,000).

206. Metraux & Culhane, *supra* note 8, at 150, 154.

207. *Id.* at 153.

208. *Id.*

Housing First is a model designed to end homelessness by placing individuals in stable, long-term housing as quickly as possible.[209] Once an individual is in a stable home, he or she is offered a variety of supportive services, depending on his need. "A central tenet of the Housing First approach is that social services to enhance individual and family well-being can be more effective when people are in their own home.'[210] Housing First models have cropped up in cities across the country and are viewed as effective tools to fight both temporary and chronic homelessness. For example, Utah has reduced the population of chronically homeless people by 91% through its Housing First program.[211] However, some cities exclude individuals with criminal convictions from participating in Housing First.[212] This means that those whose intersecting disadvantages—involvement with the criminal justice system, homelessness, and likely mental illness or drug addiction—make it incredibly difficult for them to find housing on their own will be left out of perhaps the most effective program for ending the cycle of homelessness and incarceration.

Yet the beneficial effects of Housing First for people with criminal convictions have been demonstrated in a study conducted in Vancouver. While the Housing First program being studied targeted homeless individuals with mental illness, 67% of the almost 300 participants also had involvement with the criminal justice system within the previous ten years.[213] The participants with criminal convictions had committed an average of more than eight offenses within the prior ten years and would thus be considered "habitual offenders.'[214] Following placement in stable housing, though, rates of reconviction dropped significantly, compared to a control group.[215] For those in 'scattered site' housing (in which participants are dispersed in market accommodations), reconviction rates fell to less than one-third the rate of the control group, and for participants placed in 'congregate' housing (in which participants are supported together in a single building), reconviction rates fell to almost half the rate of the control group.[216] A similar study conducted in New York City also showed a precipitous decline in

209. NAT'L ALL. TO END HOMELESSNESS, WHAT IS HOUSING FIRST? (2006), http://www.endhomelessness.org/page/-/files/1425_file_WhatisHousingFirst_logo.pdf [https://perma.cc/NM7F-DKY5].

210. *Id.*

211. Glionna, *supra* note 205.

212. *See, e.g.*. Rhine, *supra* note 30, at 355 (explaining Baltimore's Housing First program, which uses vouchers that can exclude homeless applicants based on criminal history).

213. Somers et al., *supra* note 57, at 1.

214. *Id.* at 4.

215. *See id.* at 8 (concluding that the study results showed that placement in a Housing First program significantly decreased recidivism rates as opposed to usual care).

216. *Id.* at 6.

incarceration for homeless and mentally ill individuals placed in supportive housing—a 74% decline in prison 'use' and a 40% decline in jail 'use.'[217]

Although these studies focus on homeless individuals with mental illness, there is little reason to doubt that programs like Housing First would have similarly beneficial effects on populations with criminal convictions, regardless of mental health status. Housing First delivers stable, long-term housing and social services—two things that have been shown to be crucial for successful reintegration. Thus, cities and states should greatly expand the use of programs like Housing First and should remove all restrictions based on criminal convictions. Furthermore, these programs should be available to individuals immediately upon release from jail or prison, not after individuals become homeless.

D. Transitions

An important feature of Housing First is its long-term availability, granting permanent housing to homeless men and women who often have many intersecting disabilities or disadvantages that make them unemployable. However, supportive-housing programs designed for individuals with criminal convictions should recognize that this population likely has more potential to obtain gainful employment and otherwise move on with their lives, obviating the need for permanent supportive housing. One way to assist this transition is for social workers at supportive-housing programs to establish positive relationships with housing providers in the community who are willing to accept applications from individuals in supportive housing. This could create a pipeline for individuals that have been deemed ready to transition out of supportive housing, sending them to housing providers that understand their situation and have had positive experiences with this population in the past.

Cities, states, and the federal government can also help individuals transition from supportive housing to public or private housing in more structured ways. One relatively simple move is to issue certificates of recovery or rehabilitation to individuals who have successfully gained steady employment, completed certain programming, or otherwise demonstrated their rehabilitation, and to then require housing providers to consider those certificates when screening applicants. Many states already utilize certificates of this kind, including California, New York, New Jersey, Georgia, and Connecticut, and their use is growing.[218] Most of these states use the certificates to help individuals secure employment, but they could easily be used in the context of housing. For example, the Connecticut Office

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217. HOUGHTON, *supra* note 78, at 4.

218. SUBRAMANIAN ET AL. *supra* note 159, at 12 (finding that nine states had enacted legislation regarding certificates of recovery from 2009 to 2014).

of Legislative Research recently recommended requiring public and private housing landlords to assume, 'unless there is evidence to the contrary, that a person with a certificate of employability is not an unsuitable tenant because of his or her criminal record.'[219]

Housing providers could also be incentivized to accept individuals who are transitioning from supportive housing by expanding programs like Connecticut's Department of Housing's Security Deposit Guarantee Program.[220] This program, designed 'for low-income individuals who do not have sufficient savings for a security deposit, promises to pay the security deposit if the tenant leaves the apartment in a damaged condition or owing rent.[221] A similar program could be initiated for individuals transitioning from supportive housing, offsetting some of the risk that a landlord takes when giving a person a second chance. Similarly, state and federal governments could offer housing providers a tax break for accepting applicants with recent criminal convictions.

These are just a few of the many creative solutions that could be developed if legislators took seriously the project of providing housing for men and women coming home from prison. The combination of expanded reentry services, supportive housing, and incentives for housing providers could eradicate the current cycle of homelessness and incarceration, thereby fulfilling the promise that an individual who serves her time will be accepted back into society with respect and dignity.

Conclusion

The incarceration of over two million Americans, most of whom are released back into society, means that a staggering 700,000 people are released from prison each year.[222] Most return to poverty-ridden and unstable communities, where the problems that resulted in their incarceration are compounded by the label of 'felon' or 'ex-convict. So it should come as little surprise that two-thirds of those released are rearrested within three years, and three-quarters are rearrested within five years.[223]

In recent years, growing awareness of the ineffectiveness of mass incarceration has led to reforms that promise to reduce our country's reliance on prisons. But we cannot successfully reduce the number of incarcerated

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219. BANSAL, *supra* note 203, at 7.

220. *Id.* at 5.

221. *Id.*

222. Editorial, *Mass Imprisonment and Public Health*, N.Y. TIMES (Nov. 26, 2014), http://www.nytimes.com/2014/11/27/opinion/mass-imprisonment-and-public-health.html [https://perma.cc/2BNB-VPH4].

223. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, NCJ 244205, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 1 (2014), https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf [https://perma.cc/RU9F-B789].

people without adequately supporting those who are being released. For too long, reentry services have consisted of a bus ticket and the name of a parole officer to report to, with no guarantee of a place to sleep that night. And current litigation and reforms surrounding housing discrimination, while promising in many ways, likely will not address the need for housing immediately upon release. Local, state, and federal governments must step up and fill this gap so that the ache for home will live in fewer of us.

—*Hensleigh Crowell*

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Damage Averaging—How the System Harms High-Value Claims*

The disappearance of the American civil trial has paved the way for a new order of dispute resolution—one marked by alternatives such as arbitration, mediation, and, above all, settlement. Nowhere has that shift been seen more than in tort cases.[1] In 1962, one in six tort cases went to trial; by 2002, only one in forty-six was tried.[2] In large part, this shift reflects the arrival of mass tort settlements, with headline-making examples such as Agent Orange, asbestos, tobacco, and Vioxx.[3] Whether it is the extreme cost, the uncertainty and unpredictability, or the potential for massive exposure (especially for the defendants), defendants and plaintiffs in mass tort cases avoid trials at all costs. Today, less than 1% of all mass tort cases proceed to trial.[4]

As a consequence of the vast majority of mass tort cases being settled by agreement between the parties, allocation of the settlement proceeds has become a massive undertaking, filled with ethical and practical difficulties for plaintiffs' attorneys entrusted with allocating aggregate settlement proceeds (as is the case in the majority of mass tort settlements).[5] When one or a small number of claimants settle with a defendant, it is relatively easy to determine how the proceeds of the settlement are to be split; it is far more difficult when a defendant establishes a $4.85 billion settlement fund for almost 50,000 claimants, as Merck & Co. did to settle nationwide multi-

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1. Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 133, 135 (2009) (noting that the settlement rate in tort cases is statistically significantly higher than the rate in other case categories such as contract and employment discrimination); *see also* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 466 (2004) (stating that in 1962, most federal civil trials involved torts: tort cases were 55% of all trials and 81% of all jury trials; by 2002, torts had dropped to under a quarter of all trials).

2. Galanter, *supra* note 1, at 466.

3. *Id.*

4. Pete Kaufman, *Ethics Challenges in Mass-Tort Litigation Settlements*, PLAINTIFF MAG. (Jan. 2014), http://www.plaintiffmagazine.com/recent-issues/item/ethics-challenges-in-mass-tort-litigation-settlements [https://perma.cc/K6SP-2VAH].

5. Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1465–67 (1998) (explaining that plaintiffs' attorneys dominate the allocation process in consensual group litigation).

district litigation (MDL) over the drug Vioxx.[6] As can be imagined, those claimants took Vioxx for various periods of time; had drastically diverse medical histories, employment opportunities, and family situations; and exhibited numerous other differences—no two claimants were identical in all regards. Had any of those claimants taken their case to trial, a jury would have been able to consider the facts and circumstances of each situation in determining an appropriate verdict. However, the individual settlement award for each Vioxx claimant was ultimately based on the calculation of 'points' pursuant to negotiated formulas, grids, and matrices; while some variances between claimants affected their settlement payout, the settlement-allocation plan minimized, or even ignored, other important differences between claims that could or would have affected their expected value at trial.

Such an allocation method—known as 'damage averaging, which occurs when a settlement-allocation plan does not adequately reflect unique differences 'between claims that could or would affect their expected value at trial"[7]—has become a valuable arrangement for distributing settlement proceeds in complex mass tort actions. Yet, while damage averaging provides an efficient, objective, and equitable (both horizontally and vertically) system for apportioning settlement proceeds among claimants, it may inadequately compensate those claims which our legal system should value most—the high-value claims of the most seriously injured claimants.[8] Thus, while I will argue that the benefits of the overall use of damage averaging in mass tort settlements significantly outweigh the negatives, the allocation method is limited by its undervaluation of high-value claims and could be significantly improved.

In Part I of this Note, I further define and explain damage averaging as well as investigate why high-value claims are likely undervalued under such a system, while, conversely, low-value claims are typically overvalued. In Part II, I explain why damage averaging use has greatly expanded in mass tort settlements and examine the benefits and negatives of a damage-averaging allocation method. Next, in Part III, I discuss alternatives to damage averaging and present an argument for why damage averaging is the best current arrangement for the distribution of settlement proceeds. Finally, in Part IV I recommend solutions to ensure that high-value claims are

6. Alex Berenson, *Merck Agrees to Settle Vioxx Suits for $4.85 Billion*, N.Y. TIMES (Nov. 9, 2007), http://www.nytimes.com/2007/11/09/business/09merck.html?_r=0 [https://perma.cc/JRG5-95FX].

7. Lynn A. Baker & Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227, 240 (1999).

8. While legally cognizable "high-value claims" are not necessarily identical to the claims of the most injured claimants, for simplicity I will use the two types of claims interchangeably. I admit that the two are not a perfect correlation, but since claimants with more serious injuries are far more likely to have high-value claims, my analysis will be unaffected by the decision.

accurately[9] valued—proposals that have the potential to reduce (or even eliminate) undervaluation of such claims and meaningfully improve the outcomes of damage-averaging apportionment.

I. Damage Averaging: Why High-Value Claims Are Undervalued (and Low-Value Claims Are Overvalued)

Given the massive scale, complexity, and size of mass tort settlements, damage averaging has become a highly used (and effective) device for apportioning settlement proceeds among claimants. Damage averaging occurs when 'a settlement allocation plan ignores or minimizes differences between claims that could or would affect their expected value at trial.'[10] At some level, the settlement of any group lawsuit involves some degree of damage averaging—there is simply no way to evaluate every aspect of each individual claim that might affect the claim's value if litigated individually.[11] To do so would require resources and efforts that our current system of adjudication does not allow for and, frankly, will never feasibly allow for. Furthermore, while the settlement of any group lawsuit inevitably involves some degree of damage averaging, damage averaging becomes increasingly beneficial as the complexity of an action increases. Thus, it is no surprise that damage averaging has become a common and accepted allocation tool to manage the complexity of large-scale mass tort settlements.

Yet for all the benefits of damage averaging,[12] the allocation method has its detractors.[13] And while many of the purported concerns with the use of damage averaging are adequately addressed by state rules of legal ethics and professional responsibility,[14] or are simply not significant enough to overcome the numerous benefits of such an allocation plan,[15] the effectiveness of damage averaging as a settlement-allocation method is

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9. In this Note, when I use the term "accurate" valuation, I do not mean it on an absolute basis, but rather as a proxy for comparing what a claim would be worth at trial, discounted for risk factors, time value of money, and other similar detractors from claim value. Thus, a claim that is "accurately" valued in my Note is one that matches the expected value at trial, discounted for the above factors.

10. Baker & Silver, *supra* note 7, at 240.

11. *Id.* at 241.

12. See *infra* Part II for a discussion of the benefits of damage averaging.

13. *E.g.*, Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 167–68 (1999); Steve Baughman Jensen, *Like Lemonade, Ethics Comes Best When It's Old-Fashioned: A Response to Professor Moore*, 41 S. TEX. L. REV. 215, 220–25 (1999).

14. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2015) (addressing conflict-of-interest dilemmas attorneys may face in group litigation).

15. *See, e.g.*, Jensen, *supra* note 13, at 216 (discussing the benefits of group litigation and damage averaging, including economies of scale, increased bargaining power, efficiency, and a significant reduction in the transaction costs of individualized treatment of claimants).

significantly limited by the undervaluation of high-value claims.[16] At this juncture, it is important to define what I mean by high-value claims being 'undervalued. There are two possible ways that undervaluation of high-value claims in damage-averaging group allocation occurs,[17] and while damage-averaging allocation in an individual mass tort settlement can suffer from either type of undervaluation, one can expect both categories to potentially be problematic in significant numbers of settlements.

First, high-value claims, on average, obtain lower settlements than the same claims would have received had they been handled individually, whether by being brought as a separate action or by individualized treatment of the claim when allocating group proceeds (type one undervaluation). To illustrate type one undervaluation, one can imagine that a certain claim would be awarded $10 million at trial, or similarly, if examined for all of its nuances in individualized settlement allocation, receive a value of the same $10 million. On the other hand, when such a claim is allocated in a damage-averaging apportionment process—that is, based on the calculation of 'points' pursuant to negotiated formulas, grids, and matrices that ignore unique differences between this claim and others—the valuation comes out to $5 million. In other words, such an example of type one undervaluation leads to a high-value claimant receiving a $5 million settlement value due to damage averaging, when the same claim would have netted $10 million in trial or in an individualized settlement-allocation process.

Second, the ratio between high-value claim payments and those awarded to lower value claimant groups is generally too small under a damage-averaging allocation (type two undervaluation).[18] For example, while high-value claims may receive ten times the amount of proceeds as low-value claims, they should be receiving twenty or thirty times the amount had all differences that could or would affect their expected value at trial been considered in evaluating both groups of claims.[19] Put another way, consider two claimants who both were harmed by taking a blood pressure medication. Claimant one is diagnosed with slight liver damage due to taking such medication—certainly not an optimal outcome, but treatable with a change in diet and lifestyle. Claimant two, however, suffers a heart attack based on

16. *See, e.g.*, Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 552 (explaining that damage averaging reduces the value of strong claims and raises the value of weak claims); Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 408 (2008) (describing damage averaging as an allocation method in which "those with more serious injuries receive less than they would have under an allocation that gives more weight to individualized factors").

17. I label these as "type one" and "type two" undervaluation, and discuss them in the next few paragraphs.

18. Baker & Silver, *supra* note 7, at 243.

19. *Id.*

taking the medication and is left paralyzed, requiring constant medical care for the rest of his life.

At trial or in an individualized settlement-allocation process, claimant one would receive $50,000, while claimant two would be awarded $1 million. Conversely, with damage-averaging settlement allocation, claimant one is awarded $75,000, while claimant two receives $750,000. While in both scenarios claimant two is compensated significantly more generously than claimant one (as one would no doubt expect given the severity of their injuries), there is significant type two undervaluation occurring here. At trial or in an individualized settlement-allocation situation, claimant two's award of $1 million is twenty times the value of claimant one's $50,000 payout. However, with a damage-averaging allocation system, claimant two's award of $750,000 is only ten times the value of claimant one's $75,000 payout. This difference between the proportion of each claim's value against the other demonstrates type two undervaluation.

As we have seen, undervaluation of high-value claims is a phenomenon that is widely accepted and present in damage-averaging allocation. Theoretically, one would expect that if any mass tort claims are to be overvalued, they would be the highest value claims, ones associated with claimants who have suffered the most serious injuries. Yet in practice, the exact opposite occurs—low- (and even negative-) value claims are overvalued, while high-value claims are undervalued. What explains this phenomenon, which seems logically backwards? And what incentive schemes and characteristics of our mass tort settlement regime lead to such a result?[20]

At the outset, it is important to realize that allocation occurs from one common pool of proceeds, so any additional dollar disbursed to one claim must be subtracted from another claim's amount. If allocations were accurately priced based on differences between claims that could or would affect their expected value at trial, there would be no under (or over) valuation of settlement proceeds. But, once any claim within the group settlement is inaccurately valued, at least one other claim must be adjusted in order to make up for the over (or under) valuation. In practice, low-value

20. For purposes of simplicity, I will assume that settlement allocation will be undertaken by plaintiffs' attorneys in my discussion of current incentive schemes. While it is true that on occasion third parties allocate settlement proceeds, the vast majority of mass tort proceeds are allocated by plaintiffs' attorneys. *See* Silver & Baker, *supra* note 5, at 1465–67 (emphasizing that plaintiffs' attorneys "dominate the settlement process," including determining each plaintiff's share of the settlement proceeds). Furthermore, many of the same pressures faced by plaintiffs' attorneys in allocating settlement proceeds are also felt by third-party allocators.

claims are systematically overvalued, which means that there is less in the pool for high-value claims, leading to undervaluation of high-value claims.[21]

Most importantly, almost all mass tort settlements are conditioned on a very high opt-in percentage of claimants.[22] In other words, unless a large percentage of eligible plaintiffs agree to participate in the settlement process, the defendant usually can abandon the settlement.[23] For example, the Vioxx Settlement Agreement and the Amended World Trade Center Settlement Agreement required at least 85% and 95% of eligible claimants to opt in, respectively.[24] Thus, an allocating plaintiffs' attorney knows that he must have most of the eligible claimants opt in or the settlement is off, and with it goes his contingency fee payment. Moreover, plaintiffs with low-value claims often greatly outnumber those with high-value claims, meaning that significantly more low-value claimants must opt in to meet the high opt-in threshold requirement.[25]

As such, plaintiffs' attorneys feel significant pressure to distribute settlement funds broadly within the claimant group in an attempt to maximize the number of claimants who accept a particular settlement, irrespective of the accurate value of each claim.[26] As can be expected, money often talks in encouraging (or persuading) clients to opt in to a settlement.[27] Again, because of the zero-sum situation that limited settlement funds present, each dollar that is allocated to low-value claimants in an effort to entice them to opt in (and thus meet the minimum opt-in threshold) comes out of the pocket of high-value claimants, leading to significant undervaluation of their claims. Furthermore, even when defendants condition settlement on high rates of participation by plaintiffs with high-value claims, plaintiffs' attorneys may still have little incentive to adequately pay that subgroup of claimants.[28]

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21. *See, e.g.*, Erichson, *supra* note 16, at 552 (explaining that damage averaging reduces the value of strong claims and raises the value of weak claims); Moore, *supra* note 16, at 408 (same).

22. *See* Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 157–58 (2012) (noting that almost all mass tort settlements are not effective unless a large percentage of eligible claimants opt in to the settlement).

23. *Id.* at 158 (explaining that a defendant may abandon a settlement through a walk-away provision if too few plaintiffs opt in).

24. *Id.* at 157–58.

25. Silver & Baker, *supra* note 5, at 1531.

26. *Id.*

27. For example, assume that low-value claimants make up two-thirds of the settlement claimants, and that the expected value of each of these claims at trial would be $100. If allocating attorneys were to offer $100 to each of these claimants, it is extremely unlikely many would accept; in other words, $100 is not enough of a financial incentive to persuade clients to opt in to a settlement. So, an allocating attorney may offer each of these claimants $1,000, $5,000, or whatever reasonable amount is necessary to entice enough low-value claimants to opt in and allow the settlement to continue.

28. *See* Silver & Baker, *supra* note 5, at 1532 (noting that high-value claimants tend to be the most risk averse, are uninformed about necessary information regarding their power within the group of claimants, and lack the power to unilaterally block a group-wide deal, all of which

Finally, attorneys eager to sell a settlement have valuable strategies to ensure high-value clients opt in, regardless of whether their settlement proceeds are accurately priced.[29]

Additionally, there are other factors that may explain the undervaluation of high-value claims in mass tort settlements.[30] First, undervaluation of high-value claims can occur when aggregate settlements are inadequate in their total amounts. While both low-value and high-value claims may experience type one undervaluation in such a case, it is far more likely that high-value claims will be reduced below adequate valuation. In order to meet the high opt-in threshold, allocating attorneys are unlikely to lower low-value claim payouts below a certain minimum. For example, assume that low-value claimants make up one-half of the settlement claimants, and that their claims are identical in every way. Further, assume that the expected value of each of these claims at trial would be $500, but no low-value claimant will settle for less than $1,000. If an attorney allocates settlement proceeds to all claimants based on expected value at trial, he may find that the total settlement amount is insufficient to pay out all claimants. Assuming that the defendant will not increase its offer,[31] the allocating attorney must determine whose settlement payout will be decreased. But, he will be constrained, knowing that low-value claimants will not opt in for lower than $1,000 and that a high opt-in threshold is necessary for the settlement to continue. Thus, he will likely not reduce the value of low-value claimants' payouts, but rather subtract from what a high-value claimant will receive. Furthermore, keeping allocations to low-value claims consistent while decreasing the settlement proceeds to high-value claims leads to type two undervaluation harm as well.

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significantly reduce any leverage high-value claimants have to insist on adequate settlement proceeds relative to the strength of their claim).

29. *See id.* at 1533–34 ("An attorney eager to sell a settlement that is inadequate in the aggregate or that shortchanges a particular subgroup of claimants may emphasize horizontal equity to distract attention from the proposed settlement's defects. For example, an attorney might tell a client, 'You're only getting $5,000 for your lung cancer claim, but you're getting the same as other lung cancer victims and more than victims with asbestosis or pleural disease.' By appealing to a client's sense of proportion, an attorney may persuade the client to accept an offer that should be rejected because it is less than the expected value of the client's claim in individual litigation.").

30. While there is extremely limited (or no) empirical support to confirm these factors lead to undervaluation of high-value claims, there is also no empirical support to suggest that these factors have no role to play in the damage-averaging phenomenon. Moreover, these factors have significant logical footing, and certainly could explain the phenomenon. Having said that, continued empirical evaluations are needed to evaluate the causes of undervaluation of high-value claims along with overvaluation of low-value claims.

31. This assumes that the plaintiffs' attorney will even take the time and effort to negotiate further, given that an attorney may accept "a relatively cheap settlement that would nonetheless pay the attorney a handsome premium on his or her hourly rate." Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 751 (1997); *see also* Moore, *supra* note 16, at 407–08 (noting that aggregate settlements may be inadequate in their total amount due to an attorney's financial incentive to settle quickly, even if that means the total settlement amount is inadequate or "cheap").

Similarly, negative-value claims within the group settlement subtract from the overall pool, potentially leading to undervaluation for high-value claimants in the same way as above. By definition, negative-value claims are ones that will never be brought on their own because the costs of litigation exceed the potential benefits of the suit.[32] Thus, their expected trial values are negative, and on their own, their claim arguably should be worth nothing in a settlement.[33] Obviously though, to entice these claimants to settle and encourage finality in the overall mass tort litigation, they are offered tangible settlement proceeds that well exceed their theoretical claim value.[34] Whatever amount is allocated to such claims reduces the settlement amounts of all other claims within the group settlement; yet as discussed above, while all claims within the group settlement may be affected, it is more likely that the highest value claims will be most affected since low-value claims will only be reduced so much to ensure adequate opt-in numbers.

Finally, it is useful to summarize why low- (or negative-) value claims are overvalued in damage-averaging allocation schemes. First, negative-value claims by definition are worthless since the cost of bringing one exceeds the potential benefit; thus, no fiscally prudent attorney would ever bring a negative-value claim on its own, unless nonfinancial reasons justified bringing the suit. So, if negative-value claims are not intrinsically worth anything, and therefore should have a settlement value (or more accurately payment to the defendant) of $0, why are negative-value claims provided positive compensation in mass tort settlements?

The reason is that negative- (and low-) value claims provide significant benefits to high-value claims in the context of the overall outcome of settlement for claimants. Even those individuals with high-value claims are unlikely to find an attorney "who is both able and willing to risk the enormous resources necessary to litigate a mass tort case for a contingent fee interest in a single client's claim."[35] Thus, high-value claimants may need aggregation just to secure legal representation.[36] And while aggregating only high-value claims would solve the representation issue, the addition of negative- (and low-) value claims also provides greater economies of scale and increased efficiency, both of which lead to a reduction in per-person cost.[37]

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32. *See* Benjamin P. Edwards, *Disaggregated Classes*, 9 VA. L. & BUS. REV. 305, 342 (2015) ("An individual claim has negative value when the litigation costs to bring it would exceed the possible benefit from suit.").

33. Yet as I will discuss over the next few pages, such claims are often not worthless and are in fact very valuable; that is, such claims may increase the total value of the overall settlement, among other benefits.

34. In theory, a settlement value of $0 would be worth more than these claims' value. Thus, any positive settlement amount is an allocation that significantly deviates from the underlying value of negative-value claims.

35. Jensen, *supra* note 13, at 216.

36. *Id.*

37. *Id.*

Furthermore, the aggregation of claims (including low- and negative-value ones) leads to bargaining leverage and representation by the most qualified attorneys in the country for the plaintiffs, and the potential for greater closure and finality for the defendant.[38] All three of these factors incentivize defendants to settle, and to settle for significant figures. Overall, negative- (and low-) value claims reduce costs for high-value claims, as well as increase the bottom-line payout.[39] In other words, even though high-value claims are undervalued in damage-averaging payouts, they may be even more undervalued in individual litigation.[40]

Thus, since negative-value claims do provide benefits to high-value claims and the overall settlement outcome, their inclusion in mass settlements makes financial sense. Yet, enticing negative-value claims requires overvaluing the claims; no claimant would ever join a mass tort litigation if his settlement amount was capped at $0 or if he was forced to pay the defendant. So, negative-value claims must be paid enough in settlement to incentivize the claimant to participate at all, which requires that the claim be overvalued. Similarly, low-value claims must be paid settlement proceeds that entice such claimants to opt in. Furthermore, given that plaintiffs with low-value claims usually greatly outnumber those with high-value claims,[41] such claimants are needed to satisfy the high opt-in threshold many settlements require. Because of this, low-value claims hold significant clout in ensuring the continuance of settlement, providing surprisingly substantial bargaining power for these claimants. Therefore, this bargaining power, along with the benefits that low-value claims provide to the overall settlement outcome and specifically to high-value claims, result in overvaluation of low-value claims in damage-averaging allocation methods.

II. Damage Averaging: Expansion in Tort Settlements; Benefits and Concerns

Before the explosion of mass torts in the late twentieth century, tort actions were generally brought by single, identified plaintiffs suing a specific defendant believed to have caused some injury to the plaintiff.[42] That is not to say that before the late twentieth century injuries that one thinks of as mass torts did not exist. On the contrary, industrial-worker harms, product

38. *Id.* at 216–17.

39. *See id.* (concluding that "most tort victims unquestionably benefit" from the structural features of aggregate litigation).

40. And, this is especially true when considering the *net* recovery of claims, given the spreading of expenses that occurs in group litigation.

41. Silver & Baker, *supra* note 5, at 1531.

42. RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT, at vii (2007); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1572, 1577–78 (2004).

liability, environmental harm, and similar injuries very much did exist.[43] Rather, changes in tort theory, economic theory, and civil procedure, as well as political developments, expanded the availability of remedies, consolidation, and group litigation, making mass tort actions feasible, efficient, and effective.[44]

Yet the defining features of mass torts—"numerosity, geographic dispersion, temporal dispersion, and factual patterns"—created significant challenges for the conventional tort system, requiring the formation of new and innovative mechanisms to deal with the complexity and sheer size of these new actions.[45] While class certification and multi-district litigation were created to manage claims all across the country, damage averaging began to be used as an alternative to individualizing damage determinations as a mechanism to reduce the extensive transaction costs of allocating damage awards in mass tort settlements.[46] And as the size, complexity, and costs of mass tort actions continued to multiply, the use of damage averaging increased alongside it. But, this is only the beginning. The increasingly interconnected world, globalized by the Internet and other modern technologies, suggests that mass tort actions are likely only to grow in magnitude, complexity, and cost. In such a world of global economies, product markets, and businesses, individual damage determinations may not be practical, leaving damage averaging as the vital core of the mass tort system.

A. Benefits of Damage Averaging

First and foremost, damage averaging provides an efficient method of allocating settlement proceeds to claimants. The significant reduction in the transaction costs of individualizing damage determinations is the single biggest benefit, and one that will only continue to be more beneficial as mass tort actions grow in complexity and scope. Second, damage averaging is an equitable and objective method of settlement distribution, providing both

43. NAGAREDA, *supra* note 42, at viii; *see also* Issacharoff & Witt, *supra* note 42, at 1579–81 (noting that "it is a standard observation among historians that tort law arose out of the mass harms thrown off by mid-nineteenth-century industrialization," and that in the late 1800s "common carrier accidents dominated the personal injury docket" in Oakland, California).

44. NAGAREDA, *supra* note 42, at 4–10. *See generally* Issacharoff & Witt, *supra* note 42 (discussing the evolution of mass tort aggregation and mass tort actions).

45. NAGAREDA, *supra* note 42, at xii; Issacharoff & Witt, *supra* note 42, at 1618.

46. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 919 n.104 (1987) ("Damage averaging is most likely to be accepted by courts and attorneys where the transaction costs of individualizing the damage determination are the highest."); *see also* Issacharoff & Witt, *supra* note 42, at 1625–26 (noting that among the most notable trends in the disposition of mature tort claims "is the rise of administrative grids similar to those used in workers' compensation and auto accidents to manage settlements").

vertical and horizontal equity,[47] while taking into account principles of rough justice. Vertical equity entails compensation for claimants according to the losses they may recover in civil litigation,[48] or put another way, vertical equity ensures that more deserving claimants receive more than less deserving claimants.[49] Conversely, horizontal equity in settlements occurs when similarly situated claimants are compensated equally.[50] Finally, rough justice means that settlement amounts may be adjusted or averaged 'in light of the practical limitations of compensating many people through a massive settlement scheme.'[51]

According to the American Law Institute's *Principles of the Law of Aggregate Litigation*, which reflect the combined work of scholars, litigants, and judges, allocations of awards should be distributed according to these principles of vertical equity, horizontal equity, and rough justice.[52] In other words, (1) more deserving claimants should receive larger payments than less deserving ones, based on the damages they may recover in civil litigation, (2) similarly situated parties should receive similar amounts, and (3) attorneys should be mindful of the practical limitations of administering a complex compensation scheme.[53] Damage-averaging allocation processes follow the suggestion of the Principles precisely, ensuring vertical and horizontal equity, while limiting the transactional costs of settlement-proceeds allocation. And such values are extremely important; it makes sense for higher value claims to receive larger settlement payments than lower value claims and for equally situated claimants to be treated similarly, all while attempting to reduce the significant costs incurred in directing a complex compensation system.

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47. While damage averaging results in horizontal equity, jury trials do not. *See* Alexandra D. Lahav, *The Case for 'Trial by Formula,'* 90 TEXAS L. REV. 571, 584 (2012) (explaining that "jurors exercise substantial leeway in determining damages, which in turn permits variation in outcomes of similar cases, and noting that empirical research confirms that there is variability in jury awards); *see also* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 162 (1986) (analyzing two categories of personal injury claims—"claims that involved wrongful death, medical malpractice, product liability, and street or sidewalk hazards' and 'claims involving automobile accidents or injuries on someone else's property"—and asserting that "[e]ven when the seriousness of the injury was similar, someone hurt in an automobile accident was likely to receive only one-third of the money that someone hurt in a workplace accident received"); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling 'Pain and Suffering,'* 83 NW. U. L. REV. 908, 924 (1989) (noting that "horizontal" equity is the extent of variation within a single category of cases with similar injury severity). This lack of horizontal equity is a significant downside to individually litigating mass tort claims.

48. Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385, 1453 (2011).

49. Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2061 (2012).

50. Zimmerman & Jaros, *supra* note 48, at 1453.

51. Sant'Ambrogio & Zimmerman, *supra* note 49, at 2061.

52. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04 cmt. f (AM. LAW INST. 2009).

53. *Id.* Sant'Ambrogio & Zimmerman, *supra* note 49, at 2061.

B. *Concerns with Damage Averaging*

Critics of damage averaging point to three main concerns with the allocation method: (1) conflicts of interest for attorneys representing multiple clients in a mass tort suit, (2) litigant autonomy concerns, such as the 'right of self-determination' of each mass tort plaintiff to claim and receive damages by the same individualization process that would have been available in a separate individual action,[54] and (3) undervalued recoveries for the highest value claims, and overvaluation of low- (or negative-) value claims.[55]

First, it is true that conflicts of interest exist when an attorney represents numerous clients in a mass tort litigation. Yet, the ABA Model Rules of Professional Conduct address such conflicts and require informed consent before damage averaging can occur.[56] ABA Model Rule 1.8(g) states that '[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients unless each client gives informed consent, in a writing signed by the client.'[57] Thus, the client has an opportunity to waive the conflict, if he so desires.[58] If not, he is free to hire another attorney and seek an individual action.[59] Such a consent requirement provides ample protection against any conflict of interest that the attorney may be limited by.[60]

Second, individualizing damage determinations is certainly beneficial in some situations. But in the context of expansive and complex mass tort settlements, such a system is inefficient, extremely time intensive, expensive, and may not even provide better results than damage averaging, given the infinite number of potential differences between claims. Even assuming that an individualization process of damage determination is financially beneficial for all mass tort plaintiffs (which is highly unlikely, given that many damage awards under such a method would be lower than settlement proceeds allocated under a damage-averaging system), claimants still have the power to accept or decline any proposed settlement allocation. If a claimant is unhappy with his allocated share of the total settlement proceeds, he can decline the settlement offer[61] or attempt to negotiate for a higher payment.

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54. David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 214 (1996).

55. Erichson, *supra* note 16, at 552.

56. MODEL RULES OF PROF'L CONDUCT r. 1.7(b), r. 1.8(g) (AM. BAR ASS'N 2015).

57. *Id.* r. 1.8(g).

58. Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291, 322 (2015).

59. *Id.*

60. *Id.* at 316, 322.

61. *Id.* at 322.

Finally, undervaluation of high-value claims is a significant concern in damage-averaging settlement allocation, and the most serious limitation of the method. Having said that, such concerns are not unique to damage-averaging schemes, as undercompensation of individuals with high-value claims is a serious problem throughout the tort system.[62] In fact, according to Professor Michael J. Saks, '[the] pattern of overcompensation at the lower end of the range and undercompensation at the higher end is so well replicated that it qualifies as one of the major empirical phenomena of [individual] tort litigation ready for theoretical attention.'[63] Part IV of this Note suggests solutions to ensure that high-value claims are more accurately valued, proposals which I hope will improve the general outcomes of damage-averaging apportionment and specifically the outcomes for the highest value claims.

III. Damage Averaging: Alternatives

There are two main alternatives to a damage-averaging allocation method: (1) individualized treatment of claims in group litigation and (2) opting out of aggregate litigation entirely and proceeding in an individual lawsuit. Evaluation of each alternative makes clear that damage averaging is the best current arrangement for the distribution of settlement proceeds. As discussed in Part II, while individualizing damage determinations can be beneficial in some situations, in the context of mass tort settlements, such a system is expensive and inefficient.[64] Furthermore, given the significant number of differences between claims, it may not even provide better results than damage averaging. Thus, individualizing treatment of claims in settlement allocation is an inferior compensation scheme to damage averaging.

Opting out of aggregate litigation entirely and proceeding in an individual lawsuit is also an alternative to group litigation and damage averaging. Yet for many of the reasons discussed throughout this Note, individual mass tort suits rarely are beneficial for plaintiffs. Even those individuals with high-value claims are unlikely to find an attorney 'who is both able and willing to risk the enormous resources necessary to litigate a mass tort case for a contingent fee interest in a single client's claim.'[65] Thus, high-value claimants often need aggregation just to secure legal representation.[66] Additionally, the aggregation of claims leads to bargaining

62. Baker & Silver, *supra* note 7, at 243.

63. *Id.* (quoting Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1218 (1992)).

64. See *supra* Part II for a discussion of the benefits of damage averaging.

65. Jensen, *supra* note 13, at 216.

66. *Id.*

leverage and representation by the most qualified attorneys,[67] and aggregate litigation provides greater economies of scale and increased efficiency, both of which lead to a reduction in litigation cost (and a potential increase in net settlement value) for each claimant.[68] Moreover, jury trials are unpredictable, presenting significant risk for a plaintiff who decides to take a tort case to trial,[69] and individuals who opt out of aggregate litigation are likely to find that individual actions are hard to undertake, expensive, risky, and unpredictable. Furthermore, a plaintiff who does not participate in group litigation loses all of the significant benefits such aggregation provides, such as substantial bargaining power, economies of scale, and increased efficiency.

Given the current alternatives to damage averaging, it is clear that such an allocation method is the most efficient, equitable, and objective scheme available today.

IV Damage Averaging: Solutions to Ensure High-Value Claims Are More Accurately Valued

As discussed in Part II, the use of damage averaging as a settlement-allocation method provides significant benefits.[70] Similarly, Part III posits that damage averaging is the best current arrangement for the distribution of settlement proceeds.[71] Yet two things remain true: (1) high-value claim undervaluation is a significant drawback to the use of a damage-averaging allocation process and (2) while the majority of mass tort settlements trust plaintiffs' attorneys to equitably distribute settlement proceeds,[72] current incentive structures may ensure that plaintiffs' counsel is the wrong group to ensure adequate compensation for high-value claims. Thus, I propose three potential solutions to reduce (or even eliminate) undervaluation of high-value claims in a damage-averaging allocation scheme: (1) a rule requiring defense counsel to allocate settlement proceeds; (2) the use of a tiered system of minimum-participation thresholds based on claim value levels, with the highest value claims having the highest opt-in threshold and the lowest value claims having a significantly lower opt-in threshold; and (3) a rule requiring all mass tort settlements to include significant extraordinary-injury buckets to compensate the highest value claims. I believe that the implementation of one, or some combination, of these proposed mechanisms will meaningfully improve the general outcomes of damage-averaging apportionment, specifically the outcomes for the highest value claims.

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67. *Id.* at 216–17.
68. *Id.* at 216.
69. Lahav, *supra* note 47, at 584.
70. *See supra* Part II.
71. *See supra* Part III.
72. Silver & Baker, *supra* note 5, at 1505.

A. Current Incentive Structures for Plaintiffs' Attorneys in Allocating Settlement Proceeds

The current mass tort settlement system does not appropriately incentivize plaintiffs' attorneys to protect against unfair allocations.[73] Currently, a plaintiffs' attorney charged with allocating proceeds has little financial incentive to ensure that high-value claims are adequately compensated.[74] Individualized allocation requires significant time, effort, and cost, and since the allocating plaintiffs' attorney will receive payment on a contingency basis, it generally makes no difference to him which claimants ultimately receive more of the proceeds—his portion will remain the same.[75] Accordingly, a plaintiffs' attorney's incentives are to minimize his investment of time and effort on allocation issues, and the easiest way to do so is to ignore or minimize differences between claimants, lumping claimants into classes and subclasses based on easily definable criteria.[76] Unfortunately, this damage averaging forces the holders of high-value claims to subsidize the holders of low-value claims, as we have seen before.[77]

Yet, even more worrisome are situations in which plaintiffs' attorneys may actively favor a biased allocation.[78] For example, 'if the attorney uses a sliding-scale contingent fee, as opposed to a fixed percentage, she will be motivated to distribute the amounts in such a way as to maximize the total fee by keeping the percentages higher for certain claimants.'[79] Similarly, since the attorney will generally 'earn more money from cases in which he is retained directly, as opposed to those in which the attorney receives the case from—and [thus] must share the contingent fee with—a referring attorney, he has an incentive to favor a biased allocation towards clients he

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73. *See, e.g.*, John C. Coffee, Jr., *Conflicts, Consent, and Allocation After* Amchem Products—*or, Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1549–50 (1998) (explaining that "plaintiffs' counsel has little incentive to expend the time or effort, or to incur the costs, necessary to effect a 'fair' allocation"); *see also* Moore, *supra* note 16, at 408 (noting that "a common attorney has little financial incentive to ensure horizontal equity among the various clients"). But see Silver & Baker, *supra* note 31, at 753, 773, for the proposition that the aggregate settlement rule, Model Rule 1.8(g), is a governance structure that "discourages attorney opportunism and helps manage allocation conflicts by constraining settlement-related activities.

74. *See* Coffee, *supra* note 73, at 1550 (explaining that "plaintiffs' counsel's incentive is to minimize its investment of time and effort on allocation issues, which 'forces holders of high-value claims to subsidize holders of low-value claims"). *But see* Silver & Baker, *supra* note 31, at 777–78 (discussing potential malpractice liability as a force that discourages attorneys from allocating settlement proceeds in a manner that significantly undervalues some plaintiffs' claims relative to others, though acknowledging that its strength as a deterrence may vary greatly from case to case).

75. Coffee, *supra* note 73, at 1550.

76. *Id.*

77. *Id.*

78. Moore, *supra* note 16, at 408.

79. *Id.* at 409.

retained directly.[80] Thus, if we are to improve settlement-fund distribution methods under damage-averaging schemes, it is vital to consider new and innovative methods of allocation. Otherwise, both biased allocations and the undervaluation of high-value claims will continue.

B. Requirement That Defense Counsel Allocate Settlement Proceeds

Unlike plaintiffs' counsel, defendants' attorneys have a significant incentive in ensuring that high-value claims are adequately compensated. For a defendant, high-value claims are precisely the claims that it fears and wants to reduce liability from. On the other hand, low- (or negative-) value claims are often relatively insignificant for defendants, especially in small quantities. This is why defendants generally require a certain subset of super-high-value claims to opt in as a condition of settlement, while at the same time are content with a small portion of low-value claims being left unresolved. Thus, if defendants' counsel were required to allocate settlement proceeds, it is likely that high-value claims would have significantly higher allocations than in the current system. Furthermore, since defendants' counsel typically works on an hourly basis, rather than a contingency basis, there would be an incentive to individualize allocation for claimants in order to increase billable hour fees. Overall, increased individualization, as well as incentives to compensate the highest value claimants adequately, could eliminate undervaluation of high-value claims and ensure a more accurate distribution scheme.

The downside to such a proposal would be cost and effort; individualized evaluation of claims takes time and has a serious financial cost. To ensure costs stay low, defendants' counsel could be provided by the defendant an upfront maximum budget for allocating proceeds, which would vary based on the size of the settlement. So, for example, large settlements could have allocation budgets capped at $5 million; defense counsel would submit hourly reports but know that they would only be reimbursed for work up to said $5 million. In this way, claimants would receive some level of individualized proceed evaluation, defendants' counsel would be incentivized to participate (given the extra income for the firm), and costs would continue to remain reasonable, with no opportunity to rise to unreasonable levels. And, most importantly, high-value claims would be more likely to be adequately valued.

80. *Id.* at 408–09.

C. *Tiered System of Minimum Opt-In Threshold Based on Claim Value Level*

Currently, the vast majority of mass tort settlements require a very high percentage of claimants to opt in.[81] In other words, the defendant is often protected by a walk-away provision which provides the defendant the right to abandon the settlement if an inadequate percentage of eligible plaintiffs agree to participate in the settlement process.[82] Yet, while some settlements have a tiered system of minimum-participation thresholds based on claim-value levels,[83] many do not. Thus, because plaintiffs with low-value claims usually greatly outnumber those with high-value claims—meaning that significantly more low-value claimants must opt in to meet the high opt-in threshold requirement[84]—plaintiffs' attorneys feel significant pressure to distribute settlement funds broadly within the claimant group in an attempt to maximize the number of claimants who accept a particular settlement, irrespective of the accurate value of each claim.[85]

Yet, in much the same way that defendants' attorneys have a significant incentive to ensure that high-value claims are adequately compensated, the use of a tiered system of minimum-participation thresholds based on claim-value levels incentivizes whoever is allocating settlement proceeds to accurately compensate high-value claims. Under such a tiered system, the highest value claims would have the highest opt-in threshold, and the lowest value claims would have a significantly lower opt-in threshold.[86] Thus, one would expect to see a shift in settlement-proceeds allocation in order to ensure that each value level opt-in threshold is met. In other words, as compared to a regime with a single opt-in threshold, one would expect more dollars to be allocated to high-value claims, to ensure that group's high opt-in threshold was met. Conversely, since lower percentages of low-value claim opt ins would be necessary, one would expect low-value claims to be offered lower awards than they currently are.[87] Overall, this shift in incentives would likely lead to more accurate valuations for high-value claims.

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81. Grabill, *supra* note 22, at 157–58 (noting that almost all mass tort settlements are not effective unless a large percentage of eligible claimants opt in to the settlement).

82. *Id.* at 158.

83. So, for example, the settlement agreement might require that 100% of high-value claims, 90% of medium-value claims, and 70% of low-value claims opt in, or the defendant can walk away from the deal.

84. Silver & Baker, *supra* note 5, at 1531.

85. *Id.*

86. *See supra* note 83.

87. Additionally, one would expect that the defendant would care less about the plaintiffs' lawyer falling short on the opt-in threshold for the low-value claims, since the likelihood that another attorney is willing to represent one (or a few) of such claimant(s) and take the case to trial is close to zero.

D. Requirement That All Settlements Include Extraordinary-Injury Buckets

Finally, I propose that all mass tort settlements be required to include significant amounts in extraordinary-injury buckets. While many settlements do have such pockets for high-value claims,[88] and other settlements designate a subset of super-high-value claims that will be paid significantly more than all other claims (to ensure they opt in to the settlement), a bright-line rule that requires extraordinary-injury buckets with substantial amounts set aside would increase total settlement proceeds to high-value claims. Defendants designating a subset of super-high-value claims could still occur, but significant extraordinary-injury buckets would allow high-value claimants the opportunity to receive more than originally allocated. Since this would reduce settlement proceeds for other claimants, there is a risk that fewer would opt in. But, given the miniscule number of claimants that currently do not opt in to settlements, it is extremely unlikely that opt-in thresholds would not be met solely because of this change. On the other hand, this would allocate more of the settlement proceeds to high-value claims, offsetting current undervaluation of such claims and helping move towards accurately valuing high-value claims. Even if this requirement does not eliminate undervaluation of high-value claims, it would be a shift in the right direction and be an easily implementable first step towards accurate allocation of such claims.

Conclusion

Mass tort litigation is complex, expensive, and time-consuming. And whether it is this extreme cost, the uncertainty and unpredictability. or the potential for massive exposure (especially for the defendants), parties in mass tort cases avoid trials at all costs. Thus, the vast majority of mass tort cases are settled by agreement between the parties. Yet, allocation of the settlement proceeds has become a massive undertaking, filled with ethical and practical difficulties for plaintiffs' attorneys who are increasingly entrusted with allocating aggregate-settlement proceeds. As a potential solution for many of these complications, damage averaging provides an efficient, objective, and equitable (both horizontally and vertically) system for apportioning settlement proceeds among claimants. Moving forward, mass tort actions are likely to only continue to grow in complexity. magnitude, and costs; the Internet and other modern technologies, as well as the entanglement of

88. *See, e.g.*, VIOXX MASTER SETTLEMENT AGREEMENT 19–20 (2007), http://www.beasleyallen.com/alerts/attachments/Vioxx%20Master%20Settlement%20Agreement.pdf [https://perma.cc/JY23-VCVE] (describing the requirements for claimants to be eligible for extraordinary-injury payments, and capping such payments at $195 million); *see also* 2015 DEPUY ASR SETTLEMENT AGREEMENT 45 (2015), https://www.usasrhipsettlement.com/Un-Secure/Docs/Final_2015_ASR_Settlement_Agreement.pdf [https://perma.cc/VKL2-G6NN] (explaining extraordinary-injury-fund award categories and benefits).

worldwide economies, product markets, and businesses ensure that. In such a world, it is likely that damage averaging will become increasingly more integral to the continued achievability and practicality of the mass tort system.

Yet, for all of its benefits, damage averaging may inadequately compensate those claims which our legal system should value most—that is, high-value claims, ones in which the claimant is most seriously injured. While undercompensation of individuals with high-value claims is not unique to damage averaging schemes—rather, it is a serious problem throughout the tort system—it nevertheless is a significant limitation on the effectiveness of damage averaging as a settlement-allocation method. Thus, this Note has presented three potential solutions to reduce (or even eliminate) undervaluation of high-value claims in a damage-averaging allocation process: (1) a rule requiring defense counsel to allocate settlement proceeds; (2) the use of a tiered system of minimum-participation thresholds based on claim-value levels, with the highest value claims having the highest opt-in threshold and the lowest value claims having a significantly lower opt-in threshold; and (3) a rule requiring all mass tort settlements to include significant extraordinary-injury buckets to compensate the highest value claims. The implementation of one, or some combination, of these proposed mechanisms has the potential to positively impact the compensation high-value claims receive, as well as improve the systematic outcomes of damage-averaging apportionment.

—Rony Kishinevsky

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Armed and Not Dangerous? A Mistaken Treatment of Firearms in *Terry* Analyses*

I. Introduction

During the Renaissance, a popular French song went as follows:

French	English
L'homme armé doibt on doubter.	The armed man must be feared.
On a fait partout crier	Everywhere it is proclaimed
Que chascun se viegne armer	That everyone should arm himself
D'un aubregon de fer.	With a coat of [iron] mail.
L'homme armé doibt on doubter.[1]	The armed man must be feared.[2]

While *L'homme armé* does not itself explain why the armed man should be feared, the reason is plain to any sensible person—the armed man is dangerous.

Unfortunately, this sensible proposition—that one who is armed is necessarily dangerous—is beginning to be questioned by courts and judges across the nation.[3] Beginning with the Supreme Court's decision in *District*

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1. *See* Alejandro Enrique Planchart, *The Origins and Early History of 'L'homme armé'* 20 J. MUSICOLOGY 305, 308 ex.1 (2003) (The text in this score contains many repetitions. I have taken the liberty of removing those repetitions for clarity's sake.).

2. Evan Eisenberg, *Arms and the Mass, or: Why Does this Liturgy Sound So Familiar?*. N.Y. TIMES (Feb. 26, 2006), http://www.nytimes.com/2006/02/26/arts/music/arms-and-the-mass-or-why-does-this-liturgy-sound-so-familiar.html?_r=0 [https://perma.cc/4TK4-X44M] (As before, I have taken the liberty of removing repetitions from the translation for clarity's sake.). For the curious, a recording of the song in the original French may be heard here: Ruey Yen, *L'homme Arme* [sic], YOUTUBE (Mar. 14, 2011), https://www.youtube.com/watch?v=t-E2_iNmYOE [https://perma.cc/C9T3-QP8H].

3. *See, e.g.*, United States v. Robinson (*Robinson I*), 814 F.3d 201, 208–09 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017) (providing an example of such questioning by judges, even though the particular case was later reversed, by deciding that, in states permitting both the open and concealed carrying of firearms, a gun carrier may not be presumed dangerous during a *Terry* stop); Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1132 (6th Cir. 2015) (holding that the *Terry* standard required the officer to have suspicion that the detainee "may have been [both] 'armed *and dangerous*. Yet all he ever saw was that [the detainee] was armed. ' (quoting Sibron v. N.Y., 392 U.S. 40, 64 (1968) (emphasis added))); State v. Serna, 331 P.3d 405, 410–11 (Ariz. 2014) (holding that in "a state such as Arizona that freely permits its citizens to carry weapons, both visible and concealed, the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous" for purposes of satisfying the second *Terry* prong).

of Columbia v. Heller[4] in 2008, federal constitutional law has expanded to recognize constitutional protections for the individual possession of firearms.[5] State law has followed suit, with many states deregulating firearm possession and the public carrying of firearms through both legislative and judicial measures.[6] These new Second Amendment protections have profoundly affected Fourth Amendment law as well, changing how courts treat the validity of searches for, and searches triggered by, the possession of firearms.[7]

Perhaps the most visible area of Fourth Amendment law in which the effects of expanded Second Amendment protections can be seen is in the two-pronged analysis for conducting an investigatory stop pursuant to *Terry v. Ohio*.[8] In the years immediately following the Supreme Court's decision in *Heller*, some commentators predicted that the 'resulting increase in law enforcement's exposure to firearms may compel the [Supreme] Court to grant broader stop and frisk rights in order to preserve the lives of officers.'[9] The opposite has been true. While the Supreme Court has not yet addressed the issue, lower courts have gone in the opposite direction, narrowing stop and frisk rights despite the risk that armed suspects present to officers' lives.

Police officers' ability to use the first *Terry* prong to stop a person on suspicion of carrying an illegal firearm has been greatly weakened. The first *Terry* prong allows an officer to seize a person for a brief investigatory stop if the officer has a reasonable suspicion that criminal activity is afoot.[10] As states have legalized the public possession of firearms, courts have consequently abandoned the 'assumption that the mere possession of a firearm constitutes a crime,'[11] reducing the ability of officers to stop and investigate publicly armed persons. Given those developments, Professor

4. 554 U.S. 570 (2008).

5. *See Robinson I*, 814 F.3d at 208 ("Within the last decade, federal constitutional law has recognized new Second Amendment protections for individual possession of firearms."); Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 3 (2015) (commenting that the Supreme Court "opened the judicial front" for this expansion of Second Amendment rights with its decision in *Heller*).

6. *See* Bellin, *supra* note 5, at 17–19 (listing states whose courts and legislatures have eased state and local gun restrictions). This consequence was foreseen by Justice Breyer in *Heller*. In his dissent, Justice Breyer observed that 'as many as 41 states' may preempt local gun control ordinances as a result of the majority's opinion. *Heller*, 554 U.S. at 713 (Breyer, J. dissenting).

7. Bellin, *supra* note 5, at 26 (noting that courts are now "hard-pressed to accept, as constituting 'reasonable suspicion' of a crime, an observation of an increasingly common activity that is not only lawful, but specifically protected by the Second Amendment").

8. 392 U.S. 1, 16–30 (1968).

9. George M. Dery III, *Unintended Consequences: The Supreme Court's Interpretation of the Second Amendment in* District of Columbia v. Heller *Could Water-Down Fourth Amendment Rights*, 13 J.L. & SOC. CHANGE 1, 24 (2010).

10. *Terry*, 392 U.S. at 30; *see also* Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (describing how, under *Terry*, an officer is authorized to "conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot").

11. Bellin, *supra* note 5, at 17–20, 25–26, 31.

Bellin observes that, going forward, '[p]olice authority to disarm persons [will] regularly depend on *Terry*'s second ('frisk') prong.'[12]

However, police officers' ability to protect themselves from armed, suspected criminals using the second *Terry* prong has also recently been weakened in several jurisdictions. The second *Terry* prong permits an officer to conduct a superficial search or 'frisk' of one detained under the first *Terry* prong if the officer has 'reason to believe that he is dealing with an armed and dangerous individual.'[13] In the past, there was a 'blanket assumption' that those who carried firearms were dangerous.[14] Thus, if an officer had reasonable suspicion that a person was both engaged in criminal activity and armed, the officer could frisk that person for weapons. This assumption is still strong, but the consensus around it has begun to crumble as state and federal courts across the nation have found that conducting a frisk under *Terry* requires that an officer have not only reasonable suspicion that the suspect is engaged in criminal activity and armed, but also additional indicia that the suspect is dangerous (i.e. likely to act violently),[15] creating both a circuit split[16] and a state–federal conflict.[17]

This Note analyzes the soundness of this trend towards treating 'armed and dangerous' as two separate requirements in a *Terry* analysis. My main thesis is simple—this trend is a horrible mistake. Treating 'armed and dangerous' as two separate requirements misinterprets the Supreme Court's treatment of firearms and the 'armed and dangerous' standard in *Terry* and other contexts, mistakenly uses state criminal law as a measure for

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12. *Id.* at 31.

13. *Terry*, 392 U.S. at 27.

14. Bellin, *supra* note 5, at 31–32.

15. *See, e.g.*, *Robinson I*, 814 F.3d 201, 208 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017) (holding that "reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that the person is dangerous for *Terry* purposes"); Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1132 (6th Cir. 2015) (holding that the *Terry* standard required the officer to have suspicion that the detainee "may have been both 'armed *and dangerous*. Yet all he ever saw was that [the detainee] was armed.' (quoting Sibron v. N.Y. 392 U.S. 40, 64 (1968))); State v. Serna, 331 P.3d 405, 410–11 (Ariz. 2014) (holding that "the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous").

16. *Compare* United States v. Robinson (*Robinson II*), 846 F.3d 694, 701 (4th Cir. 2017) (en banc), *and* United States v. Rodriguez, 739 F.3d 481, 491–92 (10th Cir. 2013) (holding that firearm possession is inherently dangerous for purposes of justifying a *Terry* frisk), *with Robinson I*, 814 F.3d at 208 (holding that firearm possession is not inherently dangerous for purposes of a *Terry* frisk), *and Northrup*, 785 F.3d at 1132 (same).

17. *Compare* United States v. Orman, 486 F.3d 1170, 1171, 1176 (9th Cir. 2007) (holding, in a case originating from Arizona, that a police officer's "reasonable suspicion that [the suspect] was carrying a gun [is] all that is required for a protective search under *Terry*"), *with Serna*, 331 P.3d at 410–11 (holding that in "a state such as Arizona that freely permits its citizens to carry weapons, both visible and concealed, the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous" for purposes of satisfying the second *Terry* prong).

dangerousness, and ignores the simple fact that guns are dangerous instruments used to kill people, including police officers.

II. The Legal Standard Under *Terry v. Ohio*

The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' and provides that 'no Warrants shall issue, but upon probable cause.'[18] In *Terry v. Ohio*, the Supreme Court weighed whether lawful police encounters exist 'which do[] not depend solely upon the voluntary cooperation of the citizen and yet which stop[] short of an arrest based upon probable cause.'[19] In *Terry*, the Court determined that a police officer could, on less than probable cause, briefly detain an individual to investigate potential wrongdoing and conduct a limited weapons search for the officer's and others' safety without violating the Fourth Amendment.[20] The stop and the search are analyzed as two separate events, with each requiring its own justification.[21] Thus, *Terry* created a two-pronged analysis, with the first prong governing the propriety of the initial investigatory seizure and the second prong governing the propriety of any subsequent frisk.[22]

A. The Legal Standard for Initiating an Investigatory Seizure

In order to initiate an investigatory seizure, a police officer must have reasonable suspicion that the person being stopped 'ha[s] engaged, or [is] about to engage, in criminal activity.'[23] Exactly what level of probability constitutes 'reasonable suspicion' is unknown, but the Supreme Court stated that the 'level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of evidence, and 'obviously less' than is necessary for probable cause.'[24] Despite the low requirements for meeting the reasonable suspicion standard, the test is an objective one.[25] These objective grounds need not be an officer's personal observations, but may be based on tips from an informant.[26] Officers may not involuntarily detain individuals 'even momentarily without reasonable, objective grounds

18. U.S. CONST. amend. IV.

19. Terry v. Ohio, 392 U.S. 1, 11 (1968).

20. *Id.* at 27.

21. Arizona v. Johnson, 555 U.S. 323, 326–27 (2009).

22. *Terry*, 392 U.S. at 27, 30.

23. *Johnson*, 555 U.S. at 332.

24. Navarette v. California, 134 S. Ct. 1683, 1687 (2014) (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)).

25. United States v. Cortez, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.").

26. Adams v. Williams, 407 U.S. 143, 147 (1972).

for doing so.'[27] In evaluating the reasonableness of the grounds on which an officer claims reasonable suspicion, a court takes into account 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'[28]

Before the Court's decision in *Heller*, there was a widely held 'assumption that a person carrying a concealed weapon was engaged in the crime of unlawful weapons possession.'[29] In the wake of *Heller*, however, as courts and state legislatures have deregulated the concealed and open possession of firearms, courts have been less willing to uphold *Terry* stops solely on the basis of possessing a weapon.[30] This is not true in all jurisdictions, as some courts have, post-*Heller*, continued to hold that the possession of a concealed firearm creates at least a reasonable suspicion that criminal activity is afoot.[31] However, the current role of firearms in establishing reasonable suspicion for a *Terry* stop, if one remains at all, is highly suspect.

B. The Legal Standard for Initiating a 'Frisk'

A police officer is permitted to frisk the person seized under the first *Terry* prong if the officer has 'reason to believe that he is dealing with an armed and dangerous individual.'[32] The level of certainty that an officer needs to possess that the detainee is armed and dangerous is the same as that for the initial stop—reasonable suspicion.[33] In practice, the reliability of the information on which a frisk is conducted may be lower than the necessary reliability of the information on which the initial stop is performed.[34] But the test is an objective one,[35] and 'the police officer must be able to point to

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27. Florida v. Royer, 460 U.S. 491, 498 (1983) (White, J., plurality).

28. Ornelas v. United States, 517 U.S. 690, 695 (1996) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)).

29. Bellin, *supra* note 5, at 31.

30. *Id.* at 26 (observing that courts are "hard-pressed to accept, as constituting 'reasonable suspicion' of a crime, an observation of an increasingly common activity that is not only lawful, but specifically protected by the Second Amendment").

31. *E.g.*, United States v. Rodriguez, 739 F.3d 481, 490–91 (10th Cir. 2013); Schubert v. City of Springfield, 589 F.3d 496, 502 (1st Cir. 2009).

32. Terry v. Ohio, 392 U.S. 1, 27 (1968); *see also* State v. Serna, 331 P.3d 405, 408–10 (Ariz. 2014) (holding that the first *Terry* prong must necessarily be satisfied before a frisk may occur (quoting *Terry*, 392 U.S. at 32–33 (Harlan, J. concurring) ("[I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. I would make it perfectly clear that the right to frisk depends upon the reasonableness of a forcible stop to investigate a suspected crime.")).

33. Arizona v. Johnson, 555 U.S. 323, 326–27 (2009).

34. 4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 9.6(a) (5th ed. 2016) (describing the basis for initiating a "frisk").

35. *Id.* United States v. Cortez, 449 U.S. 411, 417 (1981).

specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the frisk.[36]

Exactly what circumstances give rise to a reasonable suspicion that a detainee is armed and dangerous depend on the crime being investigated. Most courts tend to treat the right of the officer to frisk the detainee as automatic when the detainee 'has been stopped on the suspicion that he has committed, was committing, or was about to commit' a crime of violence 'for which the offender would likely be armed. '[37] When a suspect has been detained on suspicion of a less serious crime, however, there must be other circumstances arousing reasonable suspicion that the suspect is armed and dangerous before the officer may frisk the suspect.[38] These other circumstances could be, but are not limited to, 'a characteristic bulge in the suspect's clothing; awkward movements manifesting an apparent attempt to conceal something under [the suspect's] jacket; awareness that the suspect had previously been armed; [or] discovery of a weapon in the suspect's possession. '[39]

Reasonable suspicion that a detainee is armed and dangerous may also arise from an informant's tip.[40] Once the officer has reasonable suspicion that the detainee is armed and dangerous, the officer is entitled to frisk the detainee 'in an attempt to discover weapons which might be used to assault him. '[41] However, as the frisk is a 'serious intrusion upon the sanctity of the person, '[42] the frisk must be "a carefully limited search of the outer clothing. '[43]

Before *Heller*, there was nearly unanimous agreement that to be armed was to be dangerous. In the words of one commentator, there seemed to be a 'blanket assumption of dangerousness' when a police officer confronted

36. *Terry*, 392 U.S. at 21.

37. 4 LAFAVE, *supra* note 34, § 9.6(a) (citing lower court cases upholding an automatic right to frisk when the suspect has been detained on reasonable suspicion of "robbery, burglary, rape, assault with weapons, car theft, homicide, and dealing in large quantities of narcotics"). In his concurrence in *Terry*, Justice Harlan treated the fact that the suspects were detained on reasonable suspicion of planning a violent crime as sufficient to justify a frisk. Though the arresting officer "had no [other] reason whatever to suppose that [the suspect] might be armed, Justice Harlan said that the officer's actions were "illustrative of a proper stop and an incident frisk.' *Terry*, 392 U.S. at 33 (Harlan, J. concurring).

38. 4 LAFAVE, *supra* note 34, § 9.6(a).

39. *Id.* (citing cases for each "other circumstance' listed).

40. Adams v. Williams, 407 U.S. 143, 147 (1972).

41. *Terry*, 392 U.S. at 30.

42. *Id.* at 17.

43. *Id.* at 30.

an armed person.[44] This assumption has always had detractors.[45] These detractors were, however, a minority, and as recently as 2007[46] (pre-*Heller*) and 2017[47] (post-*Heller*) circuit courts across the nation have reaffirmed the blanket assumption of dangerousness that came with being armed during a *Terry* stop.

III. Courts Across the Nation Are Split on the Question of Whether Persons Carrying Firearms Are Inherently Dangerous for Purposes of a *Terry* Analysis

During the past decade, holes have begun to appear in the blanket assumption of dangerousness that courts used to apply to firearms and their carriers. As a result of these holes, a split has developed between the nation's courts regarding the inherent dangerousness of firearms for purposes of the second *Terry* prong. The Fourth,[48] Ninth,[49] and Tenth Circuits[50] have held that firearms are per se dangerous for purposes of the second *Terry* prong regardless of the permissiveness of a state's gun laws. The Sixth Circuit[51] and the Supreme Court of Arizona[52] have held that firearms cannot be considered per se dangerous for *Terry* purposes, at least in states that broadly permit the public possession of firearms. The split could not be more clear.

Out of all these cases, I shall only describe the Fourth Circuit's decision in *United States v. Robinson*[53] in depth. I do this for several reasons. First, in the course of coming to its final decision, the Fourth Circuit at various times considered and held for both sides of this debate. Initially, a panel of Fourth Circuit judges rendered a decision (which I shall call *Robinson I*[54])

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44. Bellin, *supra* note 5, at 34. It is also interesting to note that in LaFave's well-respected treatise on searches and seizures, updated as recently as October 2015, many of the additional indicia of dangerousness that LaFave cites as justifying a frisk during *Terry* stops on suspicion of lesser crimes are only indicia that the suspect is armed, not necessarily that he is dangerous. *See supra* note 37 and accompanying text.

45. *See, e.g.*, *Adams*, 407 U.S. at 159 (Marshall, J. dissenting) (arguing, unsuccessfully, that '*Terry* requires that the reliable information in the officer's possession demonstrate that the suspect is both armed and dangerous"(emphasis omitted)) David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 TEMP. L. REV. 1, 58 (1996) (arguing that police cannot "assume the existence of danger just because a person carries a gun").

46. *See, e.g.*, United States v. Orman, 486 F.3d 1170, 1176 (9th Cir. 2007) ("Officer Ferragamo's reasonable suspicion that Orman was carrying a gun [is] all that is required for a protective search under *Terry*.").

47. *See, e.g.*, *Robinson II*, 846 F.3d 694, 701 (4th Cir. 2017) (en banc).

48. *Id.*

49. *Orman*, 486 F.3d at 1176 (9th Cir. 2007).

50. United States v. Rodriguez, 739 F.3d 481, 491 (10th Cir. 2013).

51. Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1132 (6th Cir. 2015).

52. State v. Serna, 331 P.3d 405, 410–11 (Ariz. 2014).

53. 846 F.3d 694 (4th Cir. 2017) (en banc).

54. *Robinson I*, 814 F.3d 201, 208 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017).

holding that "reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that the person is dangerous for *Terry* purposes" in states that 'broadly allow public possession of firearms."[55] Later, the en banc Fourth Circuit (in a decision I shall call *Robinson II*[56]) reversed the panel's decision, holding as a matter of law that police officers may frisk a lawfully stopped suspect whom they reasonably suspect is armed because danger is inherent "in the presence of a weapon during a forced police encounter. '[57] Therefore, focusing on the *Robinson* case allows me to show both sides of this issue within the context of a single factual scenario.

Second, both *Robinson* decisions provide thorough overviews of their respective positions, treating the subject far more thoroughly than other cases on either side of the issue did. Third, proceedings in *Robinson* are ongoing—the Fourth Circuit entered its en banc judgment on January 23, 2017. so Robinson (the losing party) has until April 23, 2017. to petition the Supreme Court for a writ of certiorari.[58] As such, *Robinson II* is the most likely vehicle for any developments in the law that will occur in the immediate future and focusing on its particulars is currently relevant.

A. Robinson I: *Moving Away from the Blanket Assumption of Dangerousness*

Robinson I held that 'reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that the person is dangerous for *Terry* purposes' in states that 'broadly allow public possession of firearms. '[59] In *Robinson I*, West Virginia police received an anonymous tip (which was assumed to be credible for purposes of the appeal)[60] that a black male loaded a gun in a 7-Eleven parking lot before driving off as the passenger in a blue–green Toyota Camry.[61] The anonymous tip also indicated to police the direction in which the suspicious vehicle was travelling.[62] Based upon this information, police located the vehicle within three minutes.[63] The officers noticed that the vehicle's occupants were not wearing seatbelts (a violation of West Virginia traffic law) and pulled the car over.[64]

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55. *Id.* at 208.

56. 846 F.3d 694 (4th Cir. 2017).

57. *Id.* at 700–01.

58. *See* SUP. CT. R. 13(1) (providing that a petition for a writ of certiorari is timely if filed within ninety days after the entry of judgment in the court of appeals).

59. *Robinson I*, 814 F.3d at 208.

60. *Id.* at 203–04.

61. *Id.* at 204.

62. *Id.*

63. *Id.*

64. *Id.*

Once the car had pulled over, the officers asked the passenger (Robinson, the defendant) to step outside of the car.[65] Once Robinson exited the vehicle, the police investigated whether he had any weapons.[66] The officers first asked Robinson whether he had any weapons, in response to which Robinson said nothing, but instead 'gave a 'weird look. '[67] An officer then frisked Robinson and found a gun in his pocket, right where the tipster had said it would be.[68] After discovering the weapon, the officers confirmed that Robinson was a convicted felon and arrested him.[69] Robinson was cooperative, made no threatening gestures, and gave no indications of resistance throughout this process.[70]

Following his arrest, Robinson was indicted with violating 18 U.S.C. § 922(g)(1), which prohibits convicted felons from possessing firearms or ammunition.[71] Robinson filed a motion to suppress evidence of the gun, arguing that the police officer's frisk was unconstitutional.[72] The district court denied this motion.[73] Robinson then entered a conditional guilty plea and appealed the denial of his motion to suppress.[74] On appeal, Robinson conceded that the police had the right to stop the car he was in, that the police had the right to ask him to exit the vehicle, that the tip on which the police relied was reliable, and that the police had reasonable suspicion that he was armed.[75] Therefore the only issue on appeal was whether reasonable suspicion that Robinson was armed is enough to constitute reasonable suspicion that Robinson was dangerous.[76]

On appeal, a panel of Fourth Circuit judges, with one dissenting vote, reversed the district court's denial of Robinson's motion to suppress.[77] The court began its analysis by considering 'whether reasonable suspicion that Robinson was armed, in and of itself, generated reasonable suspicion of dangerousness. '[78] The answer to this question, the court decided, lay in the recent expansion of Second Amendment protections for individuals

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. 18 U.S.C. § 922(g)(1) (2012); *Robinson I*, 814 F.3d at 205.
72. *Robinson I*, 814 F.3d at 205.
73. *Id.*
74. *Id.*
75. *Robinson II*, 846 F.3d 694, 697–98 (4th Cir. 2017) (en banc).
76. *Id.* at 698–99.
77. *Robinson I*, 814 F.3d at 203.
78. *Id.* at 207.

possessing firearms provided by Supreme Court cases such as *Heller* and by West Virginia law.[79]

In the view of the court, these changes in the law required a "reevaluat[ion of] what counts as suspicious or dangerous under *Terry*."[80] In a different (pre-*Heller*) time and in a different legal regime where the carrying of weapons in public was tightly regulated and largely prohibited, "there [would be] precious little space between 'armed' and 'dangerous.'"[81] However, in jurisdictions like West Virginia, where the carrying of weapons is legal and widespread, courts cannot assume that 'firearms inherently pose a danger' to law enforcement or that those who publicly carry firearms are 'anything but law-abiding citizen[s] who pose[] no danger to the authorities.'"[82] Such an assumption, the court reasoned, would be inappropriate given the state legislature's decision that 'its citizens [could] safely arm themselves in public.'"[83] As such, mere possession of a firearm could not be enough to raise reasonable suspicion of dangerousness and justify a *Terry* stop and frisk[84]—additional objective indicia of dangerousness were required.[85]

After making these findings of law, the Fourth Circuit analyzed whether Robinson had presented any additional objective indicia that he was dangerous aside from his being armed.[86] It decided there were none, reversed the district court's denial of Robinson's motion to suppress, and vacated his conditional guilty plea.[87]

B. Robinson II: *The Fourth Circuit Decides Guns Are Dangerous*

Roughly two months after judgment was handed down in *Robinson I*, the Fourth Circuit vacated the opinion and 'granted the government's petition for rehearing *en banc*.'"[88] The en banc opinion reversed the panel's decision, holding instead that 'the reasonable suspicion that [Robinson] was armed justified the frisk' despite West Virginia's permissive concealed-carry laws.[89]

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79. *Id.* at 207–08; *see also* W. VA. CODE ANN. § 61-7-4 (West 2017) (describing the procedures for obtaining a license to carry a firearm).

80. *Robinson I*, 814 F.3d at 208.

81. *Id.* at 207.

82. *Id.* at 208.

83. *Id.* at 213.

84. *Id.*

85. *See id.* at 210 n.5 (stating that a *Terry* frisk may be justified where "there is not only reasonable suspicion that a person is armed, but also there are other objective indicia of danger" such as concurrent involvement in a serious crime).

86. *Id.* at 210–13.

87. *Id.* at 213.

88. *Robinson II*, 846 F.3d 694, 697 (4th Cir. 2017) (en banc).

89. *Id.* at 701.

In coming to its conclusion, the Fourth Circuit first observed that 'whenever police officers use their authority to effect a stop, be it a street stop or a motor-vehicle stop, 'they subject themselves to a risk of harm.'[90] On its own, the court reasoned, this risk is not enough to justify a frisk of the stopped person.[91] Relying on the language of *Terry* and subsequent cases, however, the court found that when the stopped person is armed the risk of harm rises to the level of dangerousness that justifies a frisk.[92] The court placed great weight on the fact that the Supreme Court twice used the phrase 'armed *and thus*' dangerous in upholding frisks as reasonable searches,[93] reasoning that this language 'recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed.'[94]

Having examined the text of the Supreme Court's precedents, the Fourth Circuit turned its attention to Robinson's argument that those precedents could be distinguished from his case because West Virginia—unlike Ohio at the time of *Terry* and Pennsylvania at the time of *Mimms*—"generally permits its citizens to carry firearms."[95] The court found Robinson's argument unconvincing[96] given what it deemed 'the Supreme Court's express recognition that the legality of the frisk does not depend on the illegality of the firearm's possession.'[97] Therefore, the court concluded that 'given Robinson's concession that he was lawfully stopped and that the police officers had reasonable suspicion to believe that he was armed, the officers were, as a matter of law, justified in frisking him' notwithstanding West Virginia's permissive concealed-carry laws.[98]

Strangely, the *Robinson II* majority opinion omits any discussion of the Supreme Court's decision in *Heller*. Considering that the panel's *Robinson I* decision leaned heavily on *Heller* and subsequent developments in the law, one would expect that the en banc Fourth Circuit would have taken time to address the implications—if any—of *Heller* in its opinion. However, it did not.

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90. *Id.* at 698–99.

91. *Id.* at 699.

92. *Id.* at 699–700.

93. *Id.* at 700 (quoting Terry v. Ohio, 392 U.S. 1, 28 (1968), and Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977)).

94. *Id.*

95. *Id.*

96. Unconvincing may be putting it lightly. The Fourth Circuit went so far as to say that Robinson was acting "illogically" in making this argument. *Id.* at 698.

97. *Id.* at 701 (citing Adams v. Williams, 407 U.S. 143, 146 (1972), and Michigan v. Long, 463 U.S. 1032, 1052 n.16 (1983)).

98. *Id.*

IV Firearms—and the Persons Who Possess Them—Are Inherently Dangerous for *Terry* Purposes

With the basic arguments on each side of this debate laid out (as illustrated by *Robinson I* and *Robinson II*), we can now ask which side is right. Does the second *Terry* prong require that a stopped person be 'armed and *also* dangerous' as the Sixth Circuit and the Supreme Court of Arizona would have us believe? Or does it require that the stopped person be 'armed, and *therefore* dangerous, as the Fourth, Ninth, and Tenth Circuits would have us believe?

The Sixth Circuit and the Supreme Court of Arizona are on the wrong side of this debate. I argue that these courts' decisions are incorrect for three reasons. First, these recent decisions run counter to consistent U.S. Supreme Court rulings, from *Terry* to the present day, that armed persons are inherently dangerous. Second, these decisions incorrectly use state criminal law to define what is dangerous for purposes of a *Terry* frisk rather than only what is illegal for purposes of a *Terry* stop. These decisions also misconstrue the policy decisions behind the state laws they use to support their conclusions. And third, these decisions divorce legal from real danger and ignore the simple fact that guns are dangerous and are increasingly being used to kill police officers. Thus, the law has always assumed, and should continue to assume, that armed persons are inherently dangerous for *Terry* purposes.

A. The Supreme Court Has, Since Deciding Terry, *Always Treated Firearms and the People Who Possess Them as Inherently Dangerous, and* Heller *Is No Exception*

Terry, correctly read, stands for the proposition that all armed persons are inherently dangerous for purposes of a stop and frisk. The Court stated in its majority opinion that the frisk in that case was warranted because the officer reasonably believed the detainee 'was armed *and thus* presented a threat to the officer's safety while he was investigating his suspicious behavior.'[99] This language, "armed and thus, on which the Fourth Circuit in *Robinson II* rightly placed great emphasis,[100] shows that the *Terry* court believed that danger flowed from the fact that the suspect was armed and did not exist as a separate factor.

Further evidence that the Court created no distinction between 'armed' and "dangerous' is found in the majority's reasoning that the frisk under consideration was justified by the 'immediate interest of the police officer in taking steps to assure himself that the person with whom he [was] dealing [was] not armed with a weapon that could unexpectedly and fatally be used

99. Terry v. Ohio, 392 U.S. 1, 28 (1968) (emphasis added).

100. *Robinson II*, 846 F.3d at 700.

against him.'[101] Creating an independent requirement that an officer have reasonable suspicion that the detainee be dangerous in addition to armed renders the 'unexpectedly' in the previous sentence meaningless. If an officer reasonably suspects that a suspect is dangerous—for reasons other than the fact that the person might be, or is, armed—then there is little risk that a weapon could be used 'unexpectedly' because the officer already suspects—even expects—foul play and violence. The 'unexpectedly' that the Court mentions seems designed to prevent the scenario in which an armed suspect uses the weapon on the officer having given no previous indication that he was independently 'dangerous' aside from being armed.[102]

Justice Harlan's concurrence also supports this interpretation. Justice Harlan, whose concurrence in *Terry* foreshadowed subsequent developments in stop-and-frisk law,[103] opined that any justified 'forced encounter' between an officer and a suspect creates an automatic dangerousness concern that justifies a frisk.[104] This premise, he stated, was implicit in the Court's reasoning.[105] Justice Harlan also categorically stated that "[c]oncealed weapons create an immediate and severe danger to the public.'[106]

If *Terry* left the question unclear, however, later Supreme Court cases clarified the matter. Four years after *Terry*, the Court decided *Adams v. Williams*,[107] in which it upheld the constitutionality of a frisk without a separate showing of dangerousness.[108] This would be unremarkable were it not for the fact that the frisk was held constitutional over the dissent of two Justices who argued that '*Terry* requires that the reliable information in the officer's possession demonstrate that the suspect is both armed and *dangerous*.'[109] That argument did not even persuade all of the dissenting

101. *Terry*, 392 U.S. at 23.

102. *Cf.* Arizona v. Johnson, 555 U.S. 323, 334 (2009) (remarking that the frisking officer "was not constitutionally required to give [the defendant] an opportunity to depart the scene without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her").

103. *See* 4 LAFAVE, *supra* note 34, § 9.6(a) & n.25 (providing several instances where Justice Harlan's concurrence later became the dominant view either as embraced by the Supreme Court itself or as practiced in lower courts).

104. *Terry*, 392 U.S. at 33–34 (Harlan, J. concurring) ("Once that forced encounter was justified, however, the officer's right to take suitable measures for his own safety followed automatically."); *see also* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment 'Reasonableness*, 98 COLUM. L. REV. 1642, 1692 (1998) (interpreting *Terry* to suggest that "the stop of a suspect is itself a critical event that almost automatically generates a dangerousness concern that authorizes a weapons frisk of the suspect").

105. *Terry*, 392 U.S. at 33–34 (Harlan, J. concurring).

106. *Id.* at 31–32. Some courts have, however, not given credence to this remark as Justice Harlan made it "at a time when handgun possession was illegal" in Ohio. *Robinson I*, 814 F.3d 201, 207 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017).

107. 407 U.S. 143 (1972).

108. *Id.* at 149.

109. *Id.* at 159 (Marshall, J. dissenting).

Justices.[110] The proposition that *Terry* might require a suspect to be both armed and dangerous before an officer may frisk him was clearly before the Court and rejected—indicating that, in the Court's view, being armed alone is equivalent to being dangerous.

That the Supreme Court views the possession of firearms as categorically dangerous is further reinforced by the Court's decision in *McLaughlin v. United States*.[111] *McLaughlin* was not a Fourth Amendment case, but a case that asked whether an unloaded handgun, for purposes of sentence enhancement under the federal bank robbery statute, is a deadly weapon.[112] Despite this difference, however, the case illustrates the Court's view of firearms as inherently dangerous objects. The Court answered the question quickly—the entire analysis is a single paragraph.[113] I quote the entire analysis that the Court saw fit to give this question:

> Three reasons, each independently sufficient, support the conclusion that an unloaded gun is a 'dangerous weapon.' First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.[114]

Not all of these circumstances will apply in every situation, and the second and third justifications would surely be deemed dangerous even by the courts that have recently held that firearms are not categorically dangerous for *Terry* purposes—displaying a firearm in a threatening manner

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110. Only Justices Marshall and Douglas argued that *Terry* requires reliable indicia that the suspect is *both* armed and dangerous. *Id.* at 153, 159 (Marshall, J. dissenting). Justice Brennan filed a separate dissent. *Id.* at 151 (Brennan, J. dissenting). Justice Douglas issued the only dissenting opinion in *Terry*, so his dissent in *Adams* flows naturally from that. *See Terry*, 392 U.S. at 35 (Douglas, J. dissenting). Interestingly, in the four years that passed between the Court's decisions in *Terry* and *Adams*, four Justices changed; Chief Justice Warren and Justices Black, Harlan, and Fortas in the *Terry* majority were replaced with Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist in *Adams*. *See Members of the Supreme Court of the United States*, SUP. CT. U.S., https://www.supremecourt.gov/about/members.pdf [https://perma.cc/B89X-DDNM] (showing a list of Supreme Court Justices and their dates of service). Thus, of the five remaining Justices from the *Terry* Court, more dissented than joined the majority by a margin of 3–2, while more implicitly rejected the proposition that *Terry* requires a showing that a suspect is *both* armed and dangerous by a margin of 3–2.

111. 476 U.S. 16 (1986).

112. *Id.*; *see* 18 U.S.C. § 2113(d) (1982) (providing for a potential fifteen-year increase of the maximum possible prison sentence and a potentially doubled fine for bank robberies in which a deadly weapon is used as opposed to bank robberies involving no deadly weapon or violence).

113. *McLaughlin*, 476 U.S. at 17–18.

114. *Id.* (footnote omitted).

or using it as a bludgeon would certainly seem to be additional indicia of dangerousness beyond merely being armed.

However, the Court noted that each of the three reasons was independently sufficient, and the first states that guns—and, by implication, the persons possessing them—are 'typically and characteristically dangerous.'[115] The Court does not derive the dangerousness of the firearm from the conduct of the person possessing the firearm (which, in this context, bank robbery, would have been easy to do), but instead focuses on the inherent potential for harm within the firearm itself.[116] This focus on potential is something that the modern courts deciding that firearms are not inherently dangerous for *Terry* purposes lack. And by shifting the focus of their inquiry from the inherent destructive potential in the firearm to the demeanor of the person and the external circumstances, these courts subtly change the question of the second *Terry* prong from 'is this person armed and dangerous (i.e. capable of harming the officer due to the dangerousness of that instrument)?' to 'is this person armed and violent?' Nothing in the Court's history of *Terry* decisions discussing dangerousness justifies this shift.

The Court's *Heller* decision did not change the Court's view of firearms as inherently dangerous for *Terry* purposes. To begin, the majority's opinion in *Heller* does not rest upon considerations of dangerousness, devoting only two paragraphs to a discussion of certain classes of weapons that may be banned because they are 'dangerous and unusual.'[117] Instead, the majority's decision rests on what it views as the original scope of the right protected by the Second Amendment as understood in the eighteenth century,[118] which cannot be curtailed by modern developments in firearms technology.[119] As the second *Terry* prong relies on considerations of dangerousness, it is inappropriate to argue that *Heller*, which relied on no such considerations, somehow changed what is and is not dangerous for purposes of *Terry*.

In fairness, however, the two paragraphs in the *Heller* majority opinion that discuss dangerousness could cause confusion regarding the constitutional status of firearms as inherently dangerous. The majority clearly states that certain firearms may be banned.[120] This class of firearms includes M-16 rifles, machineguns, tanks, and other 'weapons that are most useful in military service.'[121] The Government may ban the possession of these weapons, the Court says, because these are 'dangerous and unusual

115. *Id.* at 17.

116. *See id.* at 17–18 (uncoupling the dangerousness inherent in the firearm from the behavior of the possessor).

117. District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

118. *Id.* at 576, 581.

119. *Id.* at 627–28.

120. *Id.* at 626–27.

121. *Id.* at 624, 627.

weapons"[122] that are 'not typically possessed by law-abiding citizens for lawful purposes.'[123] If these weapons may be banned because they are dangerous, then one can argue that those weapons which may not be flatly banned must not be dangerous for constitutional purposes.

Such a reading, however, stretches the language of *Heller* too far. While *Heller* did say that certain classes of weapons could be flatly banned due to their extreme dangerousness,[124] it did not say that firearms not included in these classes are 'not dangerous' at all. While common sense is enough to conclude that a handgun of the sort at the heart of *Heller* is not as dangerous as a tank, it is also sufficient to recognize that said handgun is still dangerous and capable of taking a human life. Banning may be appropriate for the more dangerous class of firearms, but not for the less dangerous class.[125] Just because this less dangerous class is not dangerous *enough* to ban, however, does not mean that it is not sufficiently dangerous to merit less intrusive impositions—such as being a justification for a frisk and a temporary confiscation during a *Terry* stop based on reasonable suspicion of criminal activity.[126] Read this way, the language in *Heller* in no way reflects a determination that firearms are not inherently 'dangerous' for purposes of *Terry* and other constitutional analyses. Therefore, the recent trend of courts holding that firearms are not inherently dangerous for *Terry* purposes is inconsistent with the Supreme Court's view of firearms dating from *Terry* all the way to *Heller*.

B. *The Courts that Abandoned the Presumption of Inherent Dangerousness Improperly Relied on State Criminal Law to Decide What Is and Is Not Dangerous for* Terry *Purposes*

The Fourth Circuit panel, the Sixth Circuit, and the Supreme Court of Arizona all relied on underlying state firearm regulations as a central feature of their determinations that firearm possession is not per se dangerous for purposes of a *Terry* analysis.[127] I argue, however, that in doing so these courts made two interrelated errors. First, they assigned too much importance to state law for purposes of the second *Terry* prong. Second, the courts

122. *Id.* at 627.

123. *Id.* at 625.

124. *Id.* at 627. Note also that the Court discusses the dangerousness of the weapons as inherent in the weapons themselves, independent of their possessor. *Id.*

125. *See id.* at 627–28 (stating that the Second Amendment allows limitations on dangerous and military-style weapons).

126. *See* Bellin, *supra* note 5, at 30–31 ("Weapons seizures are not an explicit part of the *Terry* framework, but a necessary implication of the case is that guns can be seized, at least temporarily, as part of the frisk, if the firearm makes the person 'presently dangerous.'").

127. *Robinson I*, 814 F.3d 201, 208 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017); Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1131–33 (6th Cir. 2015); State v. Serna, 331 P.3d 405, 410–11 (Ariz. 2014).

misconstrued the policy choices underlying the permissive firearm possession laws in the states in question.

1. While State Law Is a Necessary Consideration in the First Terry *Prong, It Has No Place in the Second* Terry *Prong.*—State law should have no bearing on the second *Terry* prong; the proper place for state law is in the first *Terry* prong. The question asked in the first *Terry* prong is whether there is reasonable suspicion that one is engaging in criminal activity.[128] That courts should consider state law closely when evaluating an officer's actions under the first *Terry* prong is entirely logical. The only way to know whether an activity is criminal is by reference to the criminal law, which states have the power to create and change. By defining what actions are and are not criminal, the state decides the actions for which a police officer may stop a person. When a state makes the public possession of a firearm legal, it makes *Terry* stops, on the suspicion of carrying a firearm in public, unconstitutional.[129] As such, state criminal law must be of paramount importance when a court decides whether a police officer's actions in detaining a person are appropriate under the first *Terry* prong.

Such a connection does not exist between state criminal law and the second *Terry* prong. The question asked by the second *Terry* prong is whether the officer has reasonable suspicion that the suspect is armed and dangerous.[130] While a state clearly has the authority to legislate what is criminal, it hardly seems clear that a state may legislate what is armed and dangerous. That an activity such as skydiving, driving an automobile, working on an oil rig, or playing tackle football is legal does not mean the activity is not dangerous. A state may decide that a dangerous activity or thing is not worth the price (either in treasure or freedom) of making and enforcing a ban, but such legislative inaction does not thereby eliminate the inherent danger.

The Supreme Court recognized this in *Adams v. Williams*. The frisk in question in *Adams* occurred in Connecticut, which at the time had permissive firearm laws allowing 'its citizens to carry weapons, concealed or otherwise, at will, provided they have a permit. Connecticut law [gave] its police no authority to frisk a person for a permit.'[131] These permissive firearm laws had no bearing on the eventual outcome of the case, and the Court dismissed any consideration that they should.[132] The Court reasoned that because the purpose of a frisk is 'not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, [a] frisk for weapons might be equally necessary and reasonable, *whether or not carrying*

128. Terry v. Ohio, 392 U.S. 1, 30 (1968).
129. Bellin, *supra* note 5, at 30–31.
130. *Terry*, 392 U.S. at 27.
131. Adams v. Williams, 407 U.S. 143, 149 (1972) (Douglas, J. dissenting).
132. *Id.* at 146 (majority opinion).

a concealed weapon violated any applicable state law.'[133] The implication is clear—while state law defines what is evidence of a crime, it does not define the contours of what constitutes an armed-and-dangerous person.[134] This may be what the Fourth Circuit was referring to in *Robinson II*, when it opined that 'Robinson confuse[d] the standard for making stops with the standard for conducting a frisk.'[135]

Heller does not change this. *Heller* did not decide that firearms are not dangerous from a constitutional perspective. Because the *Heller* decision does not rest on considerations of dangerousness, which are the foundation of the second *Terry* prong, *Heller* does not provide any insight into what 'armed and dangerous' means for *Terry* purposes.[136] Thus, the shifts in state firearms laws that have occurred post-*Heller* should have no effect on what is considered dangerous under the second *Terry* prong, and courts ought to follow *Adams* in determining that the propriety of a weapons frisk should be evaluated without regard to state law.

2. State Decisions to Permit Public Possession of Firearms Do Not Reflect a Decision that Firearms and the Persons Carrying Them Are Not Dangerous.—State law has no place in the second *Terry* prong, but even if it did, it is incorrect to assume that a state legislature's decision to permit the public possession of firearms implies a legislative determination that firearms, and those carrying them, are not dangerous. Nonetheless, such an assumption guided many of the courts that have strayed from following the rule of per se firearm dangerousness during *Terry* stops—it is the intellectual link courts grasped at to move from the legislative decision permitting firearms in public to the conclusion that the legislative decision bears on the second *Terry* prong.[137] The political discussion surrounding the recently enacted 'constitutional carry' bill in West Virginia[138] demonstrates that this assumption is incorrect.

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133. *Id.* (emphasis added).

134. *See also* Michigan v. Long, 463 U.S. 1032, 1052 n.16 (1983) ("[W]e have expressly rejected the view that the validity of a *Terry* search depends on whether the weapon is possessed in accordance with state law." (citing *Adams*, 407 U.S. at 146)).

135. *Robinson II*, 846 F.3d 694, 698 (4th Cir. 2017) (en banc).

136. *See supra* subpart IV(A).

137. *See, e.g.*, *Robinson I*, 814 F.3d 201, 208–09 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017) ("Where the state legislature has decided that its citizens may be entrusted to carry firearms on public streets, we may not make the contrary assumption that those firearms inherently pose a danger justifying their seizure by law enforcement officers without consent."); Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1132 (6th Cir. 2015) (highlighting the difficulties of reconciling the "armed and dangerous" requirement with open-carry laws).

138. I could provide many other examples, but for the sake of brevity and because *Robinson I* and *II* revolved around West Virginian law, I will only write of West Virginia here.

In March of 2016, West Virginia passed HB 4145, which permits West Virginians to carry concealed weapons anywhere without a permit.[139] The bill was passed over the veto of West Virginia Governor Earl Tomblin.[140] The law-enforcement community in West Virginia staunchly opposed the bill.[141] Nonetheless, the bill passed both the West Virginia House and Senate with the necessary majority to override the Governor's veto.[142] Defending the bill, Senate Majority Leader Mitch Carmichael stated that he understood law enforcement's concerns, 'but the constitutional authority to carry a weapon is inherent in our Second Amendment.'[143] Another legislator, Senator Craig Blair, cited self-defense and crime deterrence as the motivations behind the bill, stating '[w]e're giving the people the ability to protect themselves without paying a fee.'[144] And while encouraging the legislature to override the Governor's veto, West Virginia Attorney General Patrick Morrisey stated, 'I know that this legislation will not impact public safety. If this bill is enacted, we will not only expand freedom, but we will keep our citizens protected.'[145]

These statements reveal that the legislative motivation behind HB 4145 in West Virginia was expanding Second Amendment rights and bolstering the ability of the law-abiding public to defend itself—by making the law-abiding public more dangerous. The only public official whose statement mentioned 'safety' was the Attorney General, and the safety of which he spoke plainly was not the lack of dangerous potential in armed persons, but the safety of the general public secured by an armed populace.[146] Senator Blair's statement likewise indicates the legislature's belief that armed persons are inherently dangerous, for the only crime deterrent in HB 4145 is the risk of danger associated with provoking an armed person.[147] And Senator Carmichael's statement shows that he was aware of law enforcement's opposition to the bill. But he did not respond to that opposition by saying that law enforcement officers' fears for their own and

139. W. VA. CODE ANN. §§ 61-7-3—4a (West 2017); *see also West Virginia Overrides a Governor's Veto to Pass Radical NRA-Backed Gun Law*, THINKPROGRESS (Mar. 6, 2016), https://thinkprogress.org/west-virginia-overrides-governors-veto-to-pass-radical-nra-backed-gun-law-86cd434ec9b0#.ybppzxeue [https://perma.cc/4RM4-83SE] (describing the bill and noting that West Virginians would no longer need a permit to carry a concealed weapon).

140. David Gutman, *Legislature Overrides Tomblin, Allows Permitless Hidden Guns*, CHARLESTON GAZETTE-MAIL (Mar. 5, 2016), http://www.wvgazettemail.com/news/20160305/legislature-overrides-tomblin-allows-permitless-hidden-guns [https://perma.cc/UTQ6-HKEX].

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *West Virginia Legislature Overrides Veto on HB 4145*, NRA-ILA (Mar. 5, 2016), https://www.nraila.org/articles/20160305/west-virginia-legislature-overrides-veto-on-hb-4145 [https://perma.cc/GK5R-YA6R].

146. *Id.*

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

others' safety were unfounded or overstated. Instead, he resorted immediately to the language of rights and the Second Amendment.[148]

This is not a criticism of Senator Carmichael or the Second Amendment (additional Second Amendment protections may well be worth the risks associated with having them),[149] but it does show that the police officers' safety was not at the forefront of the legislature's mind when it passed this bill and that the bill's passage in no way constitutes a decision that armed persons are not dangerous. If anything, it shows the opposite—the legislature passed HB 4145 precisely because armed persons are dangerous (hopefully to criminals), and the legislature wants a dangerous, law-abiding citizenry.

I could go through the political discussions in other states to demonstrate the same point, but for the sake of brevity I will not. As such, the Fourth Circuit panel, the Sixth Circuit, and the Supreme Court of all incorrectly concluded that state laws permitting the public possession of firearms made public possession of firearms 'not dangerous' for *Terry* purposes. A person who is armed, be it for purposes of assault or self-defense, has extreme, inherent, dangerous potential and poses an unacceptably high risk to police officers during a forced encounter on suspicion of criminal activity—no legislative decree can change that fact.

C. *Guns Are Dangerous and Pose a Threat to Police Officers*

If we briefly put aside the legal tests and precedents and look instead at statistics and newsreels, it is clear that guns are dangerous and that police officers have reason to fear an encounter with an armed citizen whether the citizen legally possesses his weapon or not. Hundreds of police have been feloniously killed with firearms over the past decade.[150] Between 2006 and 2015, more than 500 law enforcement officers were shot to death, which is more than the number of law enforcement deaths caused by automobile crashes, beatings, stabbings, strangling, and terrorist attacks combined over the same period.[151] The FBI's latest Uniform Crime Report reveals that, of the 505 law enforcement officers feloniously killed between 2005 and 2014, 128 (roughly 25%) were killed either investigating a suspicious person/ circumstance or during a routine, traffic-violation stop.[152] These are *Terry*-

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

149. As Thomas Jefferson wrote to James Madison, '*Malo periculosam, libertatem quam quietam servitutem*' (I prefer dangerous freedom over peaceful slavery). Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), *in* JEFFERSON'S LETTERS 61, 62 (Willson Whitman ed., 1940).

150. *Causes of Law Enforcement Deaths Over the Past Decade (2006–2015)*, NAT'L L. ENFORCEMENT OFFICERS MEMORIAL FUND (July 18, 2016), http://www.nleomf.org/facts/officer-fatalities-data/causes.html [https://perma.cc/2VSL-DH5N].

151. *Id.*

152. U.S. Dep't of Justice, Fed. Bureau of Investigation, *Table 21: Law Enforcement Officers Feloniously Killed, Circumstance at Scene of Incident, 2005–2014*, FBI: UCR, https://ucr.fbi.gov/leoka/2014/tables/table_21_leos_fk_circumstance_at_scene_of_incident_2005-

type situations. By comparing the FBI's Uniform Crime Report with the National Law Enforcement Officer's Memorial Fund (NLEOMF) statistics, it can be deduced that the vast majority of the officers killed in *Terry*-type situations were shot to death.[153]

These statistics do not include more recent cases from the past year. 'The number of law enforcement officers shot and killed in the line of duty increased sharply in 2016 relative to 2015 '[154] According to the NLEOMF. '64 officers were killed in firearm-related incidents in 2016. '[155] This is a dramatic 56% increase over the number of officers who were shot and killed in 2015.[156]

Even worse than the statistics, however, is the sheer sense of tragedy that has accompanied the horrific police shootings of this past summer. Two examples will suffice. On July 7, 2016, during a peaceful protest in downtown Dallas, Micah Johnson, an Afghanistan War veteran who had been honorably discharged from the U.S. Army. set out to kill police officers from a sniper's nest.[157] Before he was killed by police, Johnson succeeded in killing five law enforcement officers and wounding seven more.[158] Ten days later, on July 17. 2016, Gavin Long likewise targeted police officers on the streets of Baton Rouge, killing three and wounding three others before he was finally killed by police.[159]

Admittedly. nothing about the old, blanket assumption that an armed person is also dangerous for *Terry* purposes would have stopped Johnson or

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2014.xls [https://perma.cc/XS36-86RB]. The FBI separates felony vehicle stops from traffic-violation stops. *Id.* As such, we know that all 60 of the law enforcement officers listed as killed during traffic-violation stops (roughly two-thirds of the officers killed in vehicle pursuits and stops over the time span) were killed during routine stops of the sort that have been compared to *Terry* stops. *See* Berkemer v. McCarty, 468 U.S. 420, 439 n.29 (1984) ("[M]ost traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*.").

153. The years in the two data sets do not align perfectly. However, there is substantial overlap, and the NLEOMF data set reveals that, of all the causes of death that would likely be the result of felonious actions, shootings were by far the most common. *Causes of Law Enforcement Deaths, supra* note 150. This would certainly carry over to the 128 deaths reported as occurring during *Terry*-like circumstances in the FBI's report—deaths that occurred while investigating suspicious person/circumstance and during traffic-violation stops. U.S. Dep't of Justice, *supra* note 152.

154. Camila Domonoske, *Number of Police Officers Killed by Firearms Rose in 2016, Study Finds*, NPR (Dec. 30, 2016), http://www.npr.org/sections/thetwo-way/2016/12/30/507536360/number-of-police-officers-killed-by-firearms-rose-in-2016-study-finds [https://perma.cc/TS7C-ZLQ7]

155. *Id.*

156. *Id.*

157. Faith Karimi et al., *Dallas Sniper Attack: 5 Officers Killed, Suspect Identified*, CNN (July 9, 2016), http://www.cnn.com/2016/07/08/us/philando-castile-alton-sterling-protests/ [https://perma.cc/2QJD-KJB8].

158. *Id.*

159. Molly Hennessy-Fiske et al. *Marine Corps Veteran Identified as Gunman in Fatal Shooting of Three Police Officers in Baton Rouge*, L.A. TIMES (July 17, 2016), http://www.latimes.com/nation/nationnow/la-na-baton-rouge-police-shooting-20160717-snap-story.html [https://perma.cc/QC3C-WVVE].

Long from committing their atrocities.[160] The point is that these police-shooting statistics and the charged atmosphere provided by tragedies like these are among the 'factual and practical considerations of everyday life on which reasonable and prudent men' base their decisions.[161]

Also among those 'practical considerations' is the fact that the suspect, who is already under investigation for suspected involvement in criminal activity, is forcibly detained against his will by the police officer. To deny the inherent tension, even danger, of that situation is absurd.[162] Even if the suspect is polite or cooperative, the police officer ultimately does not know the propensity of the armed suspect,[163] or what else the suspect may want to conceal from the officer during the investigatory stop.[164] Thus, while a police officer cannot necessarily know whether an armed detainee will become violent at a moment's notice and use his weapon against the officer, the officer does necessarily know that an armed suspect possesses an inherently dangerous device capable of killing the officer. And with these facts in mind, and with the memories of recent tragedies still fresh, it is only reasonable that a police officer should expect that possessing a firearm, even legally[165] makes one dangerous. If courts do not recognize and respect the very real danger law enforcement officers face during *Terry* stops from any armed person, then officers' lives are put needlessly at risk and public safety is compromised on the basis of a baseless and incorrect interpretation of "armed and dangerous."[166]

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160. However, some commentators have observed that Louisiana's open-carry law likely resulted in police downplaying the threat Long presented as he legally walked down the street with his weapons. Maya Lau & Jim Mustian, *Baton Rouge Police Shooting Brings Renewed Attention to Louisiana's 'Open Carry' Rights*, ADVOCATE (Aug. 6, 2016), http://www.theadvocate.com/baton_rouge/news/baton_rouge_officer_shooting/article_83d7317a-5b60-11e6-84b4-13cf89c9f22f.html [https://perma.cc/4SA9-GJ29].

161. Ornelas v. United States, 517 U.S. 690, 695 (1996) (quoting Illinois v. Gates, 462 U.S. 213, 231 (1983)).

162. Colb, *supra* note 104, at 1692 ("[T]he stop of a suspect is itself a critical event that almost automatically generates a dangerousness concern that authorizes a weapons frisk of the suspect.").

163. *See* United States v. Rodriguez, 739 F.3d 481, 491 (10th Cir. 2013) (noting that an officer's observation that a suspect possessed a loaded firearm was enough to justify a stop under *Terry*).

164. *Cf.* Arizona v. Johnson, 555 U.S. 323, 331 (2009) (describing how the risk of a violent encounter during a traffic stop, which justifies a frisk of the vehicle's occupants, comes from "the fact that evidence of a more serious crime might be uncovered during the stop" even though the officer does not know of that evidence at the outset of the stop (quoting Maryland v. Wilson, 519 U.S. 408, 414 (1997))).

165. Johnson legally owned the weapons he used. Dan Frosch & Ben Kesling, *Dallas Shooter Purchased Guns Legally, Official Says*, WALL STREET J. (July 11, 2016), http://www.wsj.com/articles/dallas-shooter-purchased-guns-legally-official-says-1468269720 [https://perma.cc/5MBL-MQBV]. I can find no credible source stating whether Long legally owned the weapons he used.

166. *See Robinson I*, 814 F.3d 201, 208, 210 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017) (acknowledging that "recent legal developments regarding gun possession have made the work of the police more dangerous as well as more difficult," but then proceeding to make the work even more dangerous and difficult by holding that not all armed persons are dangerous for

V Conclusion

As states and courts across the nation have expanded the Second Amendment rights of those within their jurisdictions to carry firearms in public in the wake of *District of Columbia v. Heller*, decades-old assumptions concerning the interactions of firearms and the Fourth Amendment have come into question. In the past three years, courts around the country have called into question the assumption—as old as *Terry v. Ohio* itself—that armed persons are inherently dangerous for purposes of justifying a weapons frisk during a *Terry* stop. Multiple courts around the nation have rejected this assumption, reasoning that state legislative decisions to broadly permit the public possession of firearms somehow make the persons carrying those firearms not dangerous for constitutional purposes. Yet we have seen, for the reasons explained in Part IV of this Note, that these courts are mistaken. The Fourth, Ninth, and Tenth Circuits are correct in upholding the old assumption that 'armed means dangerous' during *Terry* stops. The path going forward is clear. *Robinson II* was decided very recently and may—until April 23, 2017—be appealed to the Supreme Court.[167] Although the en banc Fourth Circuit came to the correct decision, my hope is that Robinson will petition for a writ of certiorari with the Supreme Court. The Supreme Court should then grant certiorari, as *Robinson II* is an ideal vehicle with which to resolve the circuit split and to resolve the state–federal conflict between Arizona and the Ninth Circuit.[168] The Court should then hold, in line with its past

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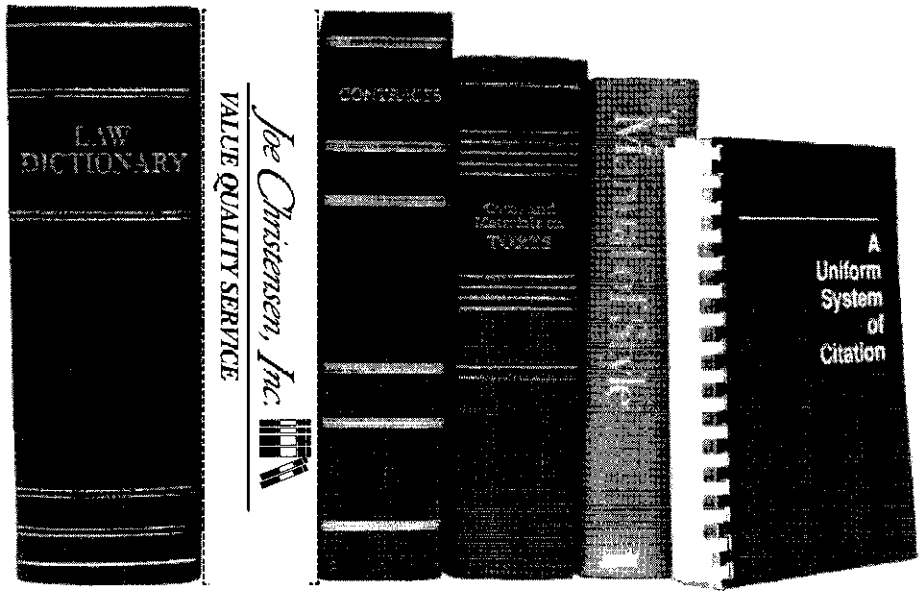
Terry purposes, thus depriving officers of the ability to disarm all persons with whom the police force an encounter on suspicion of criminal activity).

167. *See* SUP. CT. R. 13(1) (providing that a petition for a writ of certiorari is timely within 90 days after the entry of judgment in the court of appeals—April 23, 2017, is 90 days after January 23, 2017, the date on which judgment in *Robinson II* was entered).

168. *United States v. Robinson* is an ideal case for appeal to the Supreme Court. The case revolves around a single, isolated legal issue with stipulated facts, making it a proper vehicle. *See* RICHARD SEAMON ET AL., THE SUPREME COURT SOURCEBOOK 188–89 (2013) (discussing the Court's preference for hearing cases that revolve around legal, rather than factual, issues). There is a clear conflict between the Circuits regarding that legal issue. *See id.* at 185 (observing that the "presence of a 'conflict' " is one of "the two most important factors in determining whether the Court will grant certiorari"). Rule 10(b) of the United States Supreme Court provides that another compelling reason for granting certiorari exists when "a state court of last resort has decided an important federal question in a way that conflicts with the decision . . . of a United States court of appeals. SUP. CT. R. 10(b). Thus, the conflict between the Ninth Circuit and the Supreme Court of Arizona—a state within the jurisdiction of the Ninth Circuit—provides yet another compelling reason to grant certiorari. Finally, the issue at hand is extremely important—law enforcement officers' lives are clearly at stake, as are policing practices in cities across the country. *See* SEAMON ET AL., *supra*, at 185 (stating that "the importance of the issues presented' is the other of "the two most important factors in determining whether the Court will grant certiorari").

decisions, that the law presumes the armed man to be dangerous—especially for *Terry* purposes, where police officers face the constant threat of weapons unexpectedly being used against them. In this way, the Court can promote both police and public safety.

—*Matthew J. Wilkins*



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