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## Reining in Private Agents

Amitai Etzioni<sup>†</sup>

The Constitution and much of statutory law seek to protect individual rights from intrusions by the government. It is the government's coercive power that must be constrained. In contrast, private agents are assumed by most Americans to engage in voluntary transactions, transactions that are mutually beneficial as well as serve the common good.<sup>1</sup> Thus, major segments of Western political and social philosophy, public disclosure, and policymaking hold the private sector to be basically the realm of freedom—and the government as the power that needs to be checked and reined in. However, this Article presents evidence that at least in three major areas, the said restraints on governmental power are circumvented, on a very large scale, by private agents carrying out—for the government—activities that government is banned from undertaking. These areas concern surveillance, policing, and military interventions overseas. The question hence arises: what suggested remedies can correct this major challenge to the basic conception that underlies the Constitution and the rule of law? After reviewing several remedies, this Article asks whether a more profound reconceptualization is called for.

This Article begins with a discussion of Americans' privacy rights under the Constitution and current legislation before turning to a discussion of the private sector's largely unregulated collection of personal data and potential remedies to address related privacy concerns in Part I. Next, Part II covers the widespread use of private police and their lack of accountability, and then discusses the implications for public safety and the effectiveness of proposed reforms. Finally, Part III focuses on the U.S. government's reliance on private military contractors for overseas missions and the significant problems stemming from their lack of accountability, as well as the implica-

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1. Moreover, private agents can be limited through civil suits.

tions of their use for foreign policy. An overview and discussion of remedies follows.

### I. PRIVACY MERCHANTS

The right to privacy, like other rights, is first and foremost a right “against” the government. It protects Americans from undue intrusions by the state.<sup>2</sup> The first right to federal privacy was formulated in the mid-1960s. This right limited the power of the government to interfere in the reproductive choices of couples and women (i.e., decisional privacy).<sup>3</sup> Several laws have further limited the information the government may collect. Particularly important among these is the Privacy Act of 1974, which restricts government agencies, including the Internal Revenue Service (IRS), Social Security Administration, and Medicare, from sharing with third parties the personal information they collect on individuals without their consent.<sup>4</sup> The Video Privacy Protection Act of 1988 requires a warrant or court order for police to access a consumer’s video rental records, and the Driver’s Privacy Protection Act of 1994 limits disclosure of personal information obtained by the state in connection with motor vehicle records.<sup>5</sup> The Electronic Communications Privacy Act strictly limits phone wiretapping and electronic eavesdropping, except for law enforcement purposes, in which case a warrant or subpoena is required for government access to emails.<sup>6</sup> The National Security Act of 1947 and subsequent legislation following the intelligence scandals of the 1970s bans the National Security Agency (NSA) and

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2. True, an oft-cited article by Samuel Warren and Louis Brandeis conceived of privacy as a right to be let alone, mainly from the press; however, this was a law review article, not the law of the land. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

3. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

4. Privacy Act of 1974, 5 U.S.C. § 552 (1974).

5. Driver’s Privacy Protection Act of 1994, 18 U.S.C. § 2721 (1994); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (1988).

6. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in various sections of the United States Code, such as 18 U.S.C. § 2510 (1986)); see also *Electronic Communications Privacy Act (ECPA)*, ELEC. PRIVACY INFO. CTR., <https://epic.org/privacy/ecpa> (last visited Nov. 14, 2016) (“ECPA does include important provisions that protect a person’s wire and electronic communications from being intercepted by another private individual. In general, the statute bars wiretapping and electronic eavesdropping, possession of wiretapping or electronic eavesdropping equipment, and the use or disclosure of information unlawfully obtained through wiretapping or electronic eavesdropping.”).

Central Intelligence Agency (CIA) from spying on Americans in the United States; what information about them the NSA does hold in its computers, it may “read” only once it shows a court that it has reason to suspect that the person is the agent of a foreign power.<sup>7</sup> Finally, the Right to Financial Privacy Act requires a subpoena for the government to access financial records from a bank.<sup>8</sup>

True, some laws limit the personal information that select private parties can collect and share. For example, the Health Insurance Portability and Accountability Act (HIPAA) includes a Privacy Rule that limits access and sharing of personal medical information on the part of healthcare-related entities, both in the government and private sectors.<sup>9</sup> However, by and large, Americans have rather limited privacy protections against private parties. Corporations may read the emails of employees and listen to their phone calls, unless the terms of employment commit them to act otherwise. Grounds for libel and defamation are much narrower in the United States than in other nations.

The Fourth Amendment also provides a major source of privacy for individuals against government surveillance. This Amendment affirms “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” as well as the requirement of “probable cause” for a search warrant to be issued.<sup>10</sup> The Supreme Court’s Fourth Amendment jurisprudence limits how the government can collect information for law enforcement purposes, generally requiring a warrant for searches and seizures, but making exceptions for “exigent circumstances,” government “special needs” and administrative searches, consent by the person searched, “minimally intrusive” searches, and searches in the absence of a “reasonable expectation of privacy.”<sup>11</sup> These priva-

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7. *Two Sets of Rules for Surveillance, Within U.S. and on Foreign Soil*, N.Y. TIMES (Aug. 13, 2014), [http://www.nytimes.com/interactive/2014/08/13/us/two-sets-of-rules-for-surveillance.html?\\_r=0](http://www.nytimes.com/interactive/2014/08/13/us/two-sets-of-rules-for-surveillance.html?_r=0).

8. Christopher Slobogin, *Transaction Surveillance by the Government*, 75 MISS. L.J. 139, 162 (2005).

9. U.S. DEP’T. OF HEALTH & HUMAN SERVS., *Summary of the HIPAA Privacy Rule*, <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations> (last visited Nov. 15, 2016).

10. U.S. CONST. amend. IV.

11. See, e.g., *Maryland v. King*, 133 S. Ct. 1958 (2013) (on intrusiveness); *Brigham City v. Stuart*, 547 U.S. 398 (2006) (on exigent circumstances); *California v. Greenwood*, 486 U.S. 35 (1988) (on expectations of privacy); *New Jer-*

cy protections are enforced in part by the exclusionary rule, which limits the admissibility of evidence obtained in violation of the privacy doctrine, providing a disincentive for law enforcement to do so. After 9/11, the surveillance powers of the government were greatly increased; however, these powers became subject to much concern, criticism, and reform, especially after the Snowden revelations in 2013, and were amended with the 2015 USA Freedom Act.<sup>12</sup>

Less attention has been paid to the collection of personal information by the private sector. Such collection increased over the twenty-first century thanks to advances in information technology, and continues to grow rapidly in terms of the quantity, breadth, and dollar value of data collected.<sup>13</sup> Broadly speaking, there are two kinds of corporations that track the activities and backgrounds of Internet users. One category tracks user activity on its sites in support of its regular business, such as recording purchases and viewed products to help increase sales. Though these corporations may sell personal data to advertisers or others, it is not their primary line of business. A second category has as its primary business the collection of personal information, often in the form of detailed dossiers, and selling it in the marketplace to any and all comers. Such companies, termed “data brokers” or “privacy merchants,”<sup>14</sup> are the focus of this section.

#### A. PRIVACY MERCHANTS: A MAJOR INDUSTRY

Privacy merchants, or data brokers, are defined by the Federal Trade Commission as “companies that collect information, including personal information about consumers, from a wide variety of sources for the purpose of reselling such information to their customers for various purposes, including verifying an individual’s identity, differentiating records, mar-

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sey v. T.L.O., 469 U.S. 325 (1985) (on special needs); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1972) (on consent); *Katz v. United States*, 389 U.S. 347 (1967) (on expectations of privacy and attendant safeguards).

12. Sabrina Siddiqui, *Congress Passes NSA Surveillance Reform in Vindication for Snowden*, THE GUARDIAN (June 3, 2015), <https://www.theguardian.com/us-news/2015/jun/02/congress-surveillance-reform-edward-snowden>.

13. See, e.g., Gil Press, *6 Predictions For The \$125 Billion Big Data Analytics Market in 2015*, FORBES (Dec. 11, 2014), <http://www.forbes.com/sites/gilpress/2014/12/11/6-predictions-for-the-125-billion-big-data-analytics-market-in-2015/#1aafe71a2b20>.

14. Amitai Etzioni, *The Privacy Merchants: What Is To Be Done?*, 14 U. PA. J. CONST. L. 929, 930 (2012).

keting products, and preventing financial fraud.”<sup>15</sup> As of 2012, one leading privacy merchant alone, Acxiom, maintained a database of over “500 million active consumers worldwide, with about 1,500 data points per person,” including “a majority of adults in the United States.”<sup>16</sup> Though no comprehensive list of privacy merchants exists, estimates of the number of companies active in this sector ranges from the hundreds to the thousands.<sup>17</sup> The industry generated \$150 billion in revenue in 2012,<sup>18</sup> compared to \$75.4 billion for the U.S. Government’s FY2012 Intelligence Budget.<sup>19</sup>

Privacy merchants’ collection of consumer information is not limited to publicly available information, such as home addresses and phone numbers. Collection extends to such specific and private information as YouTube viewing habits, medical conditions, pet ownership, income, social media activity, financial vulnerabilities, and many other kinds of information.<sup>20</sup>

Although privacy merchants’ acts have not elicited the same kind of alarm that surveillance by the government has engendered, critics express concern about privacy violations and call for greater regulation and transparency of these private actors. Some note that data brokers create lists of people who are victims of sexual assault, or have specific health concerns. These critics argue that “many of the lists have no business being in the hands of retailers, bosses or banks” and that “[w]e need regulation to help consumers recognize the perils of the new information landscape . . . .”<sup>21</sup>

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15. FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE 1, 68 (2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

16. Natasha Singer, *Mapping, and Sharing, the Consumer Genome*, N.Y. TIMES, June 6, 2012, at BU1.

17. GOV’T. ACCT. OFF., *Information Resellers: Consumer Privacy Framework Needs To Reflect Changes in Technology and the Marketplace* 1, 5 (2013), <http://www.gao.gov/assets/660/658151.pdf>.

18. Press Release, Sen. Edward Markey, Markey, Rockefeller Introduce Data Broker Bill To Ensure Accuracy, Accountability for Consumers (Feb. 12, 2014), <http://www.markey.senate.gov/news/press-releases/markey-rockefeller-introduce-data-broker-bill-to-ensure-accuracy-accountability-for-consumers>.

19. *Intelligence Budget Data*, FED’N AM. SCIENTISTS, <http://fas.org/irp/budget> (last visited Nov. 14, 2016).

20. S. COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, 113TH CONG., A REVIEW OF THE DATA BROKER INDUSTRY: COLLECTION, USE, AND SALE OF CONSUMER DATA FOR MARKETING PURPOSES ii (Dec. 18, 2013).

21. Frank Pasquale, *The Dark Market for Personal Data*, N.Y. TIMES (Oct. 16, 2014), <http://www.nytimes.com/2014/10/17/opinion/the-dark-market-for>

The American normative assumptions are that if one is an innocent citizen, not suspected of anything, the government will know very little about that person. And whatever information the government gathers about such people will be locked into separate silos, not accessible to other government agencies. In contrast, private corporations know a great deal about people's preferences and behaviors, and may (and do) keep detailed dossiers on most Americans, although some areas are carved out as protected, especially medical information and, to a lesser extent, financial data.

#### B. PRIVACY MERCHANTS: WORKING FOR THE GOVERNMENT

Very little attention is paid to the fact that the distinction between the government and the private sector—which uses information for commercial purposes to improve customer service and make a profit—is increasingly meaningless. Privacy merchants sell the information they amass and process to the government. The difference between the Federal Bureau of Investigation (FBI) assembling detailed dossiers on most Americans (which would shock many) versus simply purchasing such a dossier from a company such as Acxiom and LexisNexis is increasingly trivial. The private data is but one check and one click away from the government.

The U.S. government in general, and law enforcement agencies in particular, have made substantial use of the services provided by data privacy merchants since the 1990s.<sup>22</sup> One leading company, ChoicePoint,<sup>23</sup> provided “services to 7000 federal, state, and local law enforcement agencies” as of 2006.<sup>24</sup> These include “multimillion dollar contracts with at least thirty-five federal agencies, including the Internal Revenue Service (IRS) and the FBI.”<sup>25</sup> Privacy merchants provide services specifically tailored to law enforcement needs, offering to “identify a subject's neighbors, relatives and business associates” and “discern geographic or pathological patterns in criminal behav-

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-personal-data.html.

22. See, e.g., Chris Jay Hoofnagle, *Big Brother's Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT'L L. & COM. REG. 595 (2004).

23. Choicepoint has since been rebranded “LexisNexis Risk Solutions” after its acquisition by Reed Elsevier.

24. Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357, 362 (2006).

25. *Id.* at 363.

ior.”<sup>26</sup> In 2012, the U.S. Treasury Department began using the Work Number database, which is owned by data broker Equifax and includes data on “54 million active salary and employment records, and more than 175 million historical records” from “more than 2,500 U.S. employers,” in order to determine eligibility for government benefits and reduce fraud.<sup>27</sup> Even before 9/11, “ChoicePoint and similar services ran between fourteen thousand and forty thousand searches per month for the United States Marshals Service alone.”<sup>28</sup>

“[C]ommercial data brokers have built massive data centers with personal information custom-tailored to law enforcement agents,”<sup>29</sup> and the FBI now holds “voluminous records from commercial data collectors like Acxiom, ChoicePoint,” and LexisNexis’s Accurint database.<sup>30</sup> Accurint alone claims to be used by “over 4,000 federal, state and local law enforcement agencies across the country” and to have access to “over 34 billion public and proprietary records.”<sup>31</sup> Likewise, findings indicate that “[f]ederal agencies have long evaded the privacy standards in the Privacy Act of 1974 by using information from commercial databases.”<sup>32</sup>

### C. PRIVACY MERCHANT ACTIVITIES ARE BASICALLY LEGAL

There are relatively few limits on personal information privacy merchants can collect or disclose compared to those on the government. One important limit on disclosure of private information is the Fair Credit Reporting Act (FCRA) which restricts Consumer Reporting Agencies (CRAs) from disclosing information except to third parties who have a “valid need.”

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26. Nicole Duarte, *Commercial Data Uses by Law Enforcement Raises Questions About Accuracy, Oversight*, NEWS21 (Aug. 16, 2006), [http://news21.com/story/2006/08/16/commercial\\_data\\_use\\_by\\_law](http://news21.com/story/2006/08/16/commercial_data_use_by_law).

27. Melanie Hicken, *What Information Is the Government Buying About You?*, CNN MONEY (Oct. 30, 2013), <http://money.cnn.com/2013/10/30/pf/government-data-broker>.

28. Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 320 (2008).

29. Hoofnagle, *supra* note 22, at 637.

30. Scott Shane, *Shifting Mood May End Blank Check for U.S. Security Effort*, N.Y. TIMES, Oct. 24, 2012, at A1.

31. *LexisNexis Accurint for Law Enforcement*, LEXIS NEXIS (2011), [http://www.lexisnexis.com/government/solutions/literature/accurintle\\_ss.pdf](http://www.lexisnexis.com/government/solutions/literature/accurintle_ss.pdf).

32. Robert Gellman & Pam Dixon, *Data Brokers and the Federal Government: A New Front in the Battle for Privacy Opens*, WORLD PRIVACY FORUM 1, 11 (2013), [http://www.worldprivacyforum.org/wp-content/uploads/2013/10/WPF\\_DataBrokersPart3\\_fs.pdf](http://www.worldprivacyforum.org/wp-content/uploads/2013/10/WPF_DataBrokersPart3_fs.pdf).



These third parties include creditors, landlords, and employers.<sup>33</sup> Employers are required to obtain specific, written consent from their employee or job candidate before requesting their credit information from a CRA.<sup>34</sup> While CRAs may be considered privacy merchants, they make up only a small fraction of that industry; however, other privacy merchants are subject to the provisions of the FCRA, to the extent that they provide personal information used in “making eligibility decisions affecting consumers.”<sup>35</sup> HIPAA limits direct access to a substantial part of health information, though privacy merchants still collect data on “over the counter drug purchases; whether the individual purchased disability insurance; purchase history or interest in various health topics like medicine preferences and diabetes care; ailment and prescription online searches.”<sup>36</sup> The Gramm-Leach-Bliley Act (GLBA) requires financial institutions to clearly display their privacy policies, and requires them to take appropriate measures to “safeguard” private financial information from unauthorized disclosure.<sup>37</sup> The Act also limits the extent to which these institutions can share select types of personal information with a list of third parties, and gives consumers the right to opt out of having their information shared in such cases.<sup>38</sup> However, privacy advocates describe GLBA’s protections as minimal and note that opt-out provisions put the burden of protecting privacy on the consumer.<sup>39</sup> No federal law gives individuals the right to learn what information privacy merchants collect on them. Individuals have no way to opt out of having their information collected or analyzed, or take action to remove their information from privacy merchants’ records, even if that information is inaccurate or outdated.<sup>40</sup> Outside of

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33. Fair Credit Reporting Act, 15 U.S.C. § 1681 (1968).

34. *Id.*

35. *Data Brokers and “People Search” Sites*, PRIVACY RIGHTS CLEARINGHOUSE, <https://www.privacyrights.org/consumer-guides/data-brokers-and-people-search-sites> (last visited Nov. 14, 2016).

36. Erin McCann, *FTC Calls Out Health Data Brokers*, HEALTHCARE IT NEWS (May 28, 2014), <http://www.healthcareitnews.com/news/ftc-calls-out-health-data-brokers>.

37. Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801–6809 (1999).

38. *In Brief: The Financial Privacy Requirements of the Gramm-Leach-Bliley Act*, FED. TRADE COMM’N (2002), <https://www.ftc.gov/tips-advice/business-center/guidance/brief-financial-privacy-requirements-gramm-leach-bliley-act>.

39. *Financial Privacy*, PRIVACY RIGHTS CLEARINGHOUSE (Oct. 5, 2016), <https://www.privacyrights.org/consumer-guides/financial-privacy#3>.

40. *Data Brokers and “People Search” Sites*, *supra* note 35.

the areas covered by statutes such as FCRA, privacy merchants are “largely unregulated for privacy” and “generally free to sell information as they please with little regard for accuracy, currency, completeness, or fairness.”<sup>41</sup>

Privacy merchants that supply information to the government benefit from the Third Party Doctrine. According to this doctrine, once a person voluntarily releases information to another party—say by purchasing a consumer good online, making a deposit in a bank, a phone call—this party can share this information with the government. It is no longer private.<sup>42</sup> Specifically, the Supreme Court has held that individuals have no reasonable expectation of privacy in their bank and telephone call records, respectively, setting the precedent that those who “voluntarily conveyed” records to third parties “assumed the risk” that their confidentiality would be violated.<sup>43</sup> Since the 1970s, developments in communications and information technology, including the rise of the Internet and the digitization of many goods and services, expanded the personal information individuals share with third parties. As such, these developments have increasingly rendered the Third Party Doctrine a major gap in Fourth Amendment privacy protections. Because “virtually all information obtained through data mining comes from third party record holders—either the government itself, commercial data brokers, or a commercial entity like a bank—its acquisition does not implicate the Fourth Amendment.”<sup>44</sup> Such a work-around using the Third Party Doctrine “allows the government to access information without any federal constitutional restraint.”<sup>45</sup> Moreover, “following the attacks of September 11 there has been a dramatic increase in government access to third-party information.”<sup>46</sup>

Not only does government business with data brokers not evoke the Fourth Amendment, but it is largely unregulated by statute. Christopher Slobogin, who has focused intensively on

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41. Gellman & Dixon, *supra* note 32, at 10.

42. Richard M. Thompson, *The Fourth Amendment Third-Party Doctrine*, CONG. RES. SERV. 1, 2 (June 5, 2014), <https://www.fas.org/sgp/crs/misc/R43586.pdf>.

43. *Smith v. Maryland*, 442 U.S. 735, 744 (1979); *United States v. Miller*, 425 U.S. 435 (1976).

44. Slobogin, *supra* note 28, at 330.

45. Stephen E. Henderson, *Beyond the (Current) Fourth Amendment: Protecting Third-Party Information, Third Parties, and the Rest of Us Too*, 34 PEPP. L. REV. 975, 982 (2007).

46. *Id.*

the Fourth Amendment, argues that unlike direct physical or electronic surveillance by law enforcement, there is far less regulation of what has been called “transaction surveillance,” the acquisition by the government of already existing records.<sup>47</sup> Even when the government seeks information directly from the original third party, federal law on transaction surveillance virtually never requires a warrant.<sup>48</sup> Rather, transaction surveillance at most requires a subpoena, typically based on the lax standard of “relevance” to an investigation, and in other cases a certification order or extrajudicial certification, which Slobogin argues are rubber stamps.<sup>49</sup> If instead the government obtains the same information from a privacy merchant rather than from the original third party source, such as a phone company, it does not need even a subpoena. As a result, the aforementioned privacy restrictions can easily be circumvented. For example, the Privacy Act has an exception for law enforcement (although a written request is still needed to obtain information from another government agency), and at any rate does not apply to records held by the private sector. Even beyond the Privacy Act’s explicit exceptions, if the government “obtains personal information from commercial data brokers but keeps the information outsourced and does not maintain that information in a government system of records,” the Privacy Act “imposes few or no privacy constraints on federal agencies, and no constraints at all on the commercial data brokers.”<sup>50</sup> Likewise, while a subpoena is needed for law enforcement to access medical or financial information covered by HIPAA or FCRA, respectively, the government does not need a subpoena to acquire that information from a privacy merchant.<sup>51</sup>

In short, the fact that the government can readily circumvent whatever limitations are in place on its surveillance of individuals by purchasing the information from privacy merchants raises the question: has the nation in effect sought to abolish privacy, or must the nation find new ways to limit the information privacy merchants can amass and above all, what they can share with the government?

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47. Slobogin, *supra* note 8, at 141.

48. One exception is the Electronic Communications Privacy Act’s treatment of communications records stored for fewer than 180 days. *Id.* at 141.

49. *Id.* at 153.

50. Gellman & Dixon, *supra* note 32, at 4–5.

51. Slobogin, *supra* note 8, at 161.

#### D. SUGGESTED REMEDIES

The following analysis examines four different types of possible regulations to remedy privacy concerns arising from the activities of privacy merchants. First, regulations requiring consent are discussed, followed by an examination of regulations aimed to specifically protect information classified as sensitive. The analysis then turns to regulations limiting what private parties may collect, regardless of the sensitivity of the data. Finally, regulations that limit the data the government can obtain from privacy merchants are discussed.

##### 1. Require Prior Consent

A major suggestion to deal with the issue at hand builds on the assumption that people own information about themselves and hence every secondary use should require the user to gain the consent of the “owner.” That is, in effect, the position the European Union takes with its Data Protection Directive (DPD). DPD asserts that any secondary use of personal information released by a person or collected about him or her requires the explicit a priori approval of the original individual “owner” of the information, and that granting this consent cannot be delegated to an agent or machine.<sup>52</sup> If such a rule were to be fully heeded, research would suffer greatly because of the great costs involved in seeking consent and the difficulties of securing a representative sample. Security would be hindered by having to ask for consent of those one needs to put under surveillance. And, given that such information is used many times a day, people would have to spend good part of their day reviewing requests for consent for such information use.

The European DPD hence provides a considerable number of exceptions to the consent, including for “journalistic purposes or for artistic or literary expression.” It also allows national laws to add additional exceptions for reasons of national security, law enforcement, or “protection of data subjects and the rights and freedom of others.”<sup>53</sup> Moreover, the DPD is not

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52. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.

53. EUR. COMM’N, *Exceptions to Data Protection Rules*, [http://ec.europa.eu/justice/data-protection/individuals/exceptions/index\\_en.htm](http://ec.europa.eu/justice/data-protection/individuals/exceptions/index_en.htm) (last visited Nov. 14, 2016).

strongly or consistently enforced in those areas that are not exempted.<sup>54</sup>

## 2. Protect Sensitive Information

Sensitive information is defined as personal information whose disclosure violates a significant prevailing societal norm.<sup>55</sup> Much personal information is in effect already ranked by law as if the level of sensitivity were being taken into account. Thus, collecting and reusing medical information in the U.S. is highly controlled, as it is considered particularly sensitive (and within that, information on HIV status is even more regulated); financial information is somewhat less sensitive—and less regulated; and non-sensitive information (such as purchases of most consumer goods) is much less regulated. To complete this approach, all remaining kinds of personal information would have to be regulated according to their level of sensitivity. For example, the American Bar Association's Standards Governing Government Access to Third Party Records argues that government access to third party information should depend on whether the information is "classified as *highly private, moderately private, minimally private, or not private.*"<sup>56</sup> Another approach would be to regulate government access to third party data according to the amount of information collected, such as imposing greater restrictions on obtaining data about activities over a period of time greater than 48 hours.<sup>57</sup>

Special restrictions have been imposed on secondary use and could be extended. For example, HIPAA designates as "Protected Health Information" any personally identifiable health information that relates to an individual's medical condition or to their purchase and receipt of healthcare services, and mandates that "covered entities" such as doctors, hospitals,

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54. EUR. COMM'N, *Comparative Study on Different Approaches to New Privacy Challenges, in Particular in the Light of Technological Developments* 1, 15 (2010), [http://ec.europa.eu/justice/policies/privacy/docs/studies/new\\_privacy\\_challenges/final\\_report\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/studies/new_privacy_challenges/final_report_en.pdf).

55. AMITAI ETZIONI, *PRIVACY IN A CYBER AGE: POLICY AND PRACTICE* 8 (2015).

56. AM. BAR ASS'N, *Law Enforcement Access to Third Party Records Standards* (2012), [http://www.americanbar.org/groups/criminal\\_justice/standards/law\\_enforcement\\_access.html](http://www.americanbar.org/groups/criminal_justice/standards/law_enforcement_access.html).

57. Christopher Slobogin, *Making the Most of United States v. Jones: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL. 1, 22 (2012).

and insurance companies do not use or disclose such information improperly (for example, by selling it to privacy merchants).<sup>58</sup> Likewise, the GLBA requires financial institutions to maintain the “security and confidentiality” of personal and financial information such as “names, addresses, and phone numbers; bank and credit card account numbers; income and credit histories; and Social Security numbers.”<sup>59</sup> However, this approach is limited in the era of “Big Data” by the fact that privacy merchants can often deduce such information through analysis of other publicly available information.<sup>60</sup> For example, retailer Target was able to use predictive analytics to determine whether its customers were pregnant by analyzing their purchases, assigning a “pregnancy prediction” score and accurately estimating the stage of a customer’s pregnancy.<sup>61</sup> These scores were used for marketing purposes, with those determined likely to be pregnant sent coupons. However, in at least one case, a customer’s privacy was violated when her pregnancy was revealed to her father without her consent through such marketing.<sup>62</sup> For this approach to work, Congress would have to ban using insensitive information to ferret out sensitive information.<sup>63</sup>

### 3. Limit the Information Private Parties Can Collect, Whether or Not It Is Sensitive

Several such restrictions are already in place, although critics argue that they have not kept pace with advances in technology. For example, the FCRA regulates CRAs, which sell information about people’s residential and tenant history, employment history, and insurance claims to entities such as a

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58. U.S. DEP’T. OF HEALTH & HUMAN SERVS., *supra* note 9.

59. *Financial Institutions and Customer Information: Complying with the Safeguards Rule*, FED. TRADE COMM’N (2006), <https://www.ftc.gov/tips-advice/business-center/guidance/financial-institutions-customer-information-complying>.

60. *Data Brokers: A Call for Transparency and Accountability*, FED. TRADE COMM’N 1, 14 (May 2014), <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.

61. Charles Duhigg, *How Companies Learn Your Secrets*, N. Y. TIMES MAG. (Feb. 16, 2012), <http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html>.

62. Dennis D. Hirsch, *That’s Unfair! Or Is It? Big Data, Discrimination and the FTC’s Unfairness Authority*, 103 KY. L.J. 345, 350–51 (2014–2015).

63. See ETZIONI, *supra* note 55, at 11–12, 32–34.

landlords and employees.<sup>64</sup> CRAs must provide an accessible means for consumers to find out what information the agencies have about them and if it has been used against them. Consumers may challenge the accuracy of that information and have inaccurate information deleted. Above all, CRAs may only sell such information to those with a “valid need.”<sup>65</sup> Although this rule may deter privacy merchants from selling consumer data too broadly, it has little relevance to government purchases of data, as law enforcement officials have long been exempt from these protections for counterintelligence and terrorism investigations, and law enforcement access to credit reports was broadened by the Patriot Act.<sup>66</sup>

#### 4. Limiting Government Purchasing Power

A broader shift in privacy law, either by the Supreme Court or Congress, should constrain government purchases of information from privacy merchants.<sup>67</sup> These might include requiring data brokers “to inform Congress whenever they disclose information to law enforcement . . . .”<sup>68</sup> Another proposed solution would be for the Supreme Court to overturn the *Katz* “expectations of privacy” doctrine, or reinterpret it to account for society’s “actual” expectations of privacy by removing the Third Party Doctrine.<sup>69</sup> Joshua L. Simmons argues that the “courts should refuse to treat disclosure” to data brokers that provide information to the government—which he terms “fourth parties”—as “corrosive to an individual’s expectation of privacy.” Instead, courts should “apply the same requirements to the government in accessing the information from a fourth-party as they would from a third party.”<sup>70</sup> Likewise, he argues that “courts must recognize that fourth-parties are agents of

64. 15 U.S.C. § 1681.

65. *A Summary of Your Rights Under the Fair Credit Reporting Act*, FED. TRADE COMM’N, <https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf> (last visited Nov. 14, 2016).

66. *Electronic Communications Privacy Act (ECPA)*, *supra* note 6.

67. Joshua L. Simmons, *Buying You: The Government’s Use of Fourth-Parties To Launder Data About “The People,”* 2009 COLUM. BUS. L. REV. 950, 982–95.

68. *Id.* at 1000 (citing Jon D. Michaels, *All the President’s Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CAL. L. REV. 901, 902 (2008)).

69. Sam Kamin, *The Private Is Public: The Relevance of Private Actors in Defining the Fourth Amendment*, 46 B.C. L. REV. 83, 89 (2004).

70. Simmons, *supra* note 67, at 1004.

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the government, and as such, their searches cannot be excused by the private party search doctrine.”<sup>71</sup>

Another means to accomplish this goal would be for government agencies to restrain themselves from using privacy merchants to bypass the constitutional restrictions on their information collection. For example, the Office of Management and Budget’s Do Not Pay Initiative relies on privacy merchants to verify eligibility for government benefits and payments. The Initiative requires the privacy merchants involved to uphold privacy standards including some normally applicable only to the government, notably the requirement that any database used may not include “records about the exercise of rights protected by the First Amendment.”<sup>72</sup> However, this very narrow example is not representative of government use of privacy merchants as a whole,<sup>73</sup> and as with “self-regulation” in the private sector, this approach has the advantage of being flexible and not requiring new legislation, but the disadvantage of lacking an mechanism for outside oversight and enforcement.

## 5. Final Thoughts

In short, there is no lack of suggestions of ways to prevent the government from drawing on privacy merchants to circumvent constitutional or legislative restrictions on its access to personal information. However, these suggestions have not been implemented and several of them would exact high costs and/or would not protect privacy well. It seems that a profound rethinking is called for of the public/private divide and the major legal assumptions that it entails. This Article returns to this subject after two more “case studies,” dealing with the same general subject, are introduced.

## II. PUBLIC SAFETY AND PRIVATE POLICE

The number of private police has surpassed that of public police, yet private police are not held to the same standards and, furthermore, they are accountable to their employers rather than to the public. The use of private police has dangerous implications for public safety and privacy. For example, there is often a lack of oversight with regard to the use of firearms by private police, a clear public safety concern. And the govern-

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71. *Id.*

72. Gellman & Dixon, *supra* note 32, at 5.

73. *Id.* at 11.



ment has used private police as a way to exploit loopholes in the constitutional protections afforded to citizens.

A. WHAT IS THE SCOPE OF THE PRIVATE POLICE SECTOR?

Citizens who are otherwise occupied may well assume that public safety, keeping people safe in their home and in public spaces, is the mission of the police. And one may note, that in some cases, they may be backed up by other state-level agencies, such as a State Bureau of Investigation, or—in extreme situations—the National Guard. In select cases, the FBI as a federal agency also can be activated. Actually, the role of the private sector in public safety has grown dramatically over the last few decades. The private police sector—those hired, trained, armed, and commanded by private parties ranging from corporations to neighborhood associations—has grown so much in the U.S. that it is now much larger than the public police.

Private police in the U.S. include security guards (whether employed by security companies or directly by the companies to which they provide security), private detectives, and bodyguards. Street policing and prison management,<sup>74</sup> while typically associated with the state, are also contracted out to or supplemented by the private sector.<sup>75</sup>

While in the 1970s there were 1.4 private police for every public police officer, by the 2000s there were three private police for every public police officer, and four private police for every public police officer in California.<sup>76</sup> As for security guards in particular, estimates range from 1.5 to 2 of them for every public police officer.<sup>77</sup> Given that there were “more than

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74. The U.S. Department of Justice recently announced that it will phase out the use of private prisons. See Charlie Savage, *U.S. To Phase Out Use of Private Prisons for Federal Inmates*, N.Y. TIMES (Aug. 18, 2016), [http://www.nytimes.com/2016/08/19/us/us-to-phase-out-use-of-private-prisons-for-federal-inmates.html?\\_r=0](http://www.nytimes.com/2016/08/19/us/us-to-phase-out-use-of-private-prisons-for-federal-inmates.html?_r=0).

75. This essay uses the definition put forward by Elizabeth Joh of this “private police” industry as “lawful forms of organized, for-profit personnel services whose primary objectives include the control of crime, the protection of property and life, and the maintenance of order.” See Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 577 (2005).

76. *Id.* at 586; see also JAMES F. PASTOR, *THE PRIVATIZATION OF POLICE IN AMERICA: AN ANALYSIS AND CASE STUDY* (2003) (chronicling the growth of the private police force in the U.S.).

77. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1174 (1999); Shoshana Walter & Ryan Gabrielson, *America’s Gun-Toting Guards Armed with Poor Training, Little Oversight*, REVEAL (Dec. 14, 2014), <https://>

900,000 sworn law enforcement officers” serving in the U.S. as of late 2014, the above ratios would put the number of private police in the U.S. at 2.7 million, and the number of security guards at 1.35 to 1.8 million (some sources count “1 million plus” security guards).<sup>78</sup>

In addition to employing more people, the domestic private security industry also spends more than public police agencies.<sup>79</sup> The most recent major study of the industry put the size of the private sector domestic security industry at \$282 billion (in addition to \$69 billion on federal spending, for a total of \$350 billion).<sup>80</sup> This report estimated that there were “between 1.9 and 2.1 million” full-time security workers in the United States as of 2013, and that industry spending is growing rapidly, at 5.5 percent per year in 2013.<sup>81</sup>

#### B. ACCOUNTABILITY

Private police provide a major way to circumvent the standards, oversight, and accountability to which public police are subjected. This is not to argue that all or even most private police are retained for this purpose. Nor does it mean that the public police are subject to sufficient accountability. Much national attention has recently been paid to abuses by the public police, particularly the number of people killed by police, and the fact that a highly disproportionate number of those killed have been unarmed African Americans.<sup>82</sup> However, while accountability measures to curb abuses by public police are heavi-

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[www.revealnews.org/article/americas-gun-toting-security-guards-may-not-be-fit-for-duty](http://www.revealnews.org/article/americas-gun-toting-security-guards-may-not-be-fit-for-duty).

78. JOHN S. DEMPSEY, INTRODUCTION TO PRIVATE SECURITY 66–67 (2010).

79. Joh, *supra* note 75, at 1283.

80. *Groundbreaking Study Finds U.S. Security Industry To Be \$350 Billion Market*, ASIS INT’L (Aug. 12, 2013), [https://www.asisonline.org/News/Press-Room/Press-Releases/2013/Pages/Groundbreaking-Study-Finds-U.S.-Security-Industry-to-be-\\$350-Billion-Market.aspx](https://www.asisonline.org/News/Press-Room/Press-Releases/2013/Pages/Groundbreaking-Study-Finds-U.S.-Security-Industry-to-be-$350-Billion-Market.aspx). However, that number included IT-related spending, which made up 40 percent of the total. *Id.*

81. *Id.*

82. See, e.g., Jon Swaine et al., *Black Americans Killed by Police Twice as Likely To Be Unarmed as White People*, THE GUARDIAN (June 1, 2015), <https://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis>.

ly criticized for being insufficient,<sup>83</sup> related institutions are at least in place and can usher in reforms.<sup>84</sup>

At the level of individual police departments, police chiefs have spearheaded major reforms of their departments, such as William J. Bratton's reforms of the Los Angeles Police Department during the 1990s.<sup>85</sup> In addition, public police departments have internal affairs units and are subject to civilian review boards such as the Chicago Police Board and the New York Police Department's Civilian Complaint Review Board.<sup>86</sup> Mayors and city councils have also launched police reform, sometimes at the urging of grassroots campaigns or NGOs. For example, the Community Safety Act in New York City, which curbed racial profiling, was passed by the New York City Council in 2014 with the support or endorsement of dozens of local organizations.<sup>87</sup> Independent commissions have also initiated police reform, for instance the Christopher Commission, which also established an Inspector General position in Los Angeles.<sup>88</sup> On the state level, state legislatures can promote reforms, as Connecticut did in June 2015.<sup>89</sup> The judiciary can also impose some

83. See, e.g., Chase Madar, *Why It's Impossible To Indict a Cop*, THE NATION (Nov. 25, 2014), <https://www.thenation.com/article/why-its-impossible-indict-cop>.

84. Robert C. Davis et al., *The Public Accountability of Private Police: Lessons from New York, Johannesburg, and Mexico City*, 13 POLICING & SOC'Y 197 (2003).

85. Jack Leonard & Richard Winton, *Will Bratton's Reforms Survive After His Departure?*, L.A. TIMES (Aug. 6, 2009), <http://articles.latimes.com/2009/aug/06/local/me-legacy6>.

86. Martin Kaste, *Police Are Learning To Accept Civilian Oversight, But Distrust Lingers*, NPR (Feb. 21, 2015), <http://www.npr.org/2015/02/21/387770044/police-are-learning-to-accept-civilian-oversight-but-distrust-lingers>.

87. See *The Community Safety Act*, COMMUNITIES UNITED FOR POLICE REFORM, <http://changethenypd.org/community-safety-act> (last visited Nov. 14, 2016).

88. *Office of the Inspector General*, L.A. POLICE DEPT, [http://www.lapdonline.org/police\\_commission/content\\_basic\\_view/1076](http://www.lapdonline.org/police_commission/content_basic_view/1076) (last visited Nov. 14, 2016); *Los Angeles: The Christopher Commission Report*, HUMAN RIGHTS WATCH, <https://www.hrw.org/legacy/reports98/police/usco73.htm> (last visited Nov. 14, 2016); see also U.S. DEPT OF JUSTICE, *The President's Task Force on 21st Century Policing Implementation Guide: Moving from Recommendations to Action* (2015), [http://cops.usdoj.gov/pdf/taskforce/Implementation\\_Guide.pdf](http://cops.usdoj.gov/pdf/taskforce/Implementation_Guide.pdf); U.S. DEPT OF JUSTICE, *Final Report of the President's Task Force on 21st Century Policing* (2015), [http://www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

89. Samantha Schoenfeld, *Legislature Passes Police Body Cam Law, Malloy's "Second Chance Society" Legislation*, FOX61 (June 29, 2015), <http://fox61.com/2015/06/29/legislature-passes-police-body-cam-law-malloys-second>

reforms, for example by ruling that select police policies are unconstitutional<sup>90</sup> or by ordering changes in police practice.<sup>91</sup> On the federal level, the Justice Department maintains a Civil Rights Division that investigates allegations of police civil rights abuses and demands reforms.<sup>92</sup> In the event that a police department displays a pattern of abusive behavior, the Violent Crime Control and Law Enforcement Act of 1994 allows the federal government to either formally pursue a federal civil rights lawsuit or to pressure the department in question to accept a “consent decree,” imposing reforms to be overseen by an independent monitor and with involvement from community stakeholders.<sup>93</sup>

Some of these institutions have much less legal authority and effective power over private police and others do not apply at all. There are no federal training standards for private police. No state even “comes close to meeting the training standards recommended by the country’s largest membership group for security guards.”<sup>94</sup> Many states allow armed private guards to carry guns without firearms training, do not require them to undergo mental health examinations, do not check if they are under court order not to carry weapons, and do not require them to report the use of their weapons.<sup>95</sup> The same is true for a majority of states with regard to “proprietary guards,” those employed by the guarded company rather than by a separate security company.<sup>96</sup>

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-chance-society-legislation.

90. Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, N.Y. TIMES, Aug. 12, 2013, at A1.

91. Jim Salter, *Ferguson Municipal Judge Announces Sweeping Changes*, HUFFINGTON POST (Aug. 24, 2015), <http://www.huffingtonpost.com/huff-wires/20150824/us--ferguson-municipal-court>.

92. *Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri*, U.S. DEP’T OF JUSTICE OFFICE OF PUB. AFFAIRS (Mar. 4, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri>.

93. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Joe Domanick, *Police Reform’s Best Tool: A Federal Consent Decree*, CRIME REP. (July 15, 2014), <http://thecrimereport.org/2014/07/15/2014-07-police-reforms-best-tool-a-federal-consent-decree>.

94. Walter & Gabrielson, *supra* note 77; see also Lauren Kirchner, *The Surprisingly Lax Oversight of the Security Guard Industry*, PAC. STANDARD (July 1, 2014), <https://psmag.com/the-surprisingly-lax-oversight-of-the-security-guard-industry-1b3e5f9a7d83#.mcfufvpom>.

95. Walter & Gabrielson, *supra* note 77.

96. *Id.*

A 2010 report warned that “leaders in the industry remain concerned about the nation’s ability to provide qualified, well-trained private security officers” and that “proprietary guards receive very little oversight and typically follow whatever standards are established by their employers.”<sup>97</sup> Shooting incidents involving private police are underreported and underinvestigated relative to those involving public police, often with no action being taken until an incident makes its way through the criminal justice system.<sup>98</sup>

Private police are accountable to their employer, not the public. Some have warned that “interests of private parties will rarely, if ever, be fully aligned with public interests,” and that in order to “safeguard justice, equity, and quality of service” and the “public interest” as the trend towards private security moves forward, “governments must develop the capacity to regulate, audit and facilitate the restructuring of policing.”<sup>99</sup> This is because “private police are not subject to the same formal and legal systems of accountability that govern public police agencies,” including the obligation to inform public authorities of crimes, yet “they may carry weapons, use force, detain suspects and intrude on the privacy and rights of individuals.” Such a situation of unaccountable policing may become “inherently dangerous to society.”<sup>100</sup> Private police are not accountable to criminal procedure law and are “disengaged from the moral underpinnings of the criminal law,” whereas public police typically swear to uphold the “public trust.” Furthermore, private police “stress preventive means over detection and apprehension,” and are linked to “private justice systems” that deter and punish wrongdoing by “banning, firing, and fining” property offenders such as shoplifters or trespassers.<sup>101</sup>

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97. Kevin Strom et al., *The Private Security Industry: A Review of the Definitions, Available Data Sources, and Paths Moving Forward* 8-1, RTI INT’L (Dec. 2010), <https://www.ncjrs.gov/pdffiles1/bjs/grants/232781.pdf>.

98. Shoshana Walter, *Shootings by Security Guards Rarely Reported, Let Alone Investigated*, REVEAL (Dec. 9, 2014), <https://www.revealnews.org/article/shootings-by-security-guards-rarely-reported-let-alone-investigated>.

99. Malcolm K. Sparrow, *Managing the Boundary Between Public and Private Policing*, NEW PERSPECTIVES IN POLICING 8 (2014), <https://www.hks.harvard.edu/content/download/67532/1242938/version/1/file/ManagingBoundariesPolicing.pdf>.

100. *Id.* at 9.

101. Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 62–63 (2004).

Private police are often used, especially in gated communities, to discriminate against minorities.<sup>102</sup> This point has also been made about public police and the criminal justice system more broadly, due to abuses such as discriminatory sentencing and racially-biased “stop-and-frisk” policing.<sup>103</sup> However, whereas public police are at least supposed to serve the whole public, and—to reiterate, the mechanism for accountability and reform are at least in place and sometimes used<sup>104</sup>—critics of private policing argue that the industry’s rise represents a more explicit move towards a two-tier justice system. At least one study, for example, has found that among developed countries, reliance on private security correlates with the Gini coefficient, a measure of inequality, with the U.S. high and increasing on both counts.<sup>105</sup> Likewise, other analyses of demographic and policing data show that “racial threat and economic inequality” better explain the prevalence of private police locally than the serious crime rate.<sup>106</sup>

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102. See, e.g., Angel M. Traub, *The Wall Is Down, Now We Build More: The Exclusionary Effects of Gated Communities Demand Stricter Burdens Under the FHA*, 34 J. MARSHALL L. REV. 379 (2000); Richard Damstra, *Don't Fence Us Out: The Municipal Power To Ban Gated Communities and the Federal Takings Clause*, 35 VAL. U. L. REV. 525 (2001); CLIFFORD D. SHEARING & PHILLIP C. STENNING, PRIVATE SECURITY AND PRIVATE JUSTICE: THE CHALLENGE OF THE 80S: A REVIEW OF THE POLICY ISSUES 9 (1982).

103. See, e.g., Editorial, *Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES, Aug. 13, 2013, at A22.

104. While the Supreme Court did rule in *DeShaney v. Winnebago County Department of Social Services* that the government, including public police, does not have a “constitutional duty” to protect private individuals from each other, this stems more from the understanding of Constitution as restricting rather than requiring government action: “the Due Process Clause . . . forbids the State itself to deprive individuals of life, liberty, and property without due process of law, its language cannot fairly be read to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.” 489 U.S. 189, 195 (1989). By contrast, public police do commit to actively protect the public. For example, the NYPD mission statement promises “to enhance the quality of life in New York City by working in partnership with the community to enforce the law, preserve peace, reduce fear, and maintain order.” *Mission*, N.Y.C. POLICE DEPT, <http://www.nyc.gov/html/nypd/html/administration/mission.shtml> (last visited Nov. 14, 2016).

105. Samuel Bowles & Arjun Jayadev, *One Nation Under Guard*, N.Y. TIMES: OPINIONATOR (Feb. 15, 2014), <http://opinionator.blogs.nytimes.com/2014/02/15/one-nation-under-guard>.

106. Stewart J. D'Alessio et al., *The Impact of Serious Crime, Racial Threat, and Economic Inequality on Private Police Size*, 34 SOC. SCI. RES. 2267, 2267–82 (2005); see also Rick Ruddell, Matthew O. Thomas, & Ryan Patten, *Examining the Roles of the Police and Private Security Officers in Urban Social Control*, 13 INT'L J. POLICE SCI. & MGMT. 54, 65 (2011) (“The idea

Another issue raised by private policing is the fact that it can be difficult for members of the public to distinguish private from public police. In some cases, off-duty police officers moonlighting as private police “wear[] their public uniforms and driv[e] their regular squad cars,”<sup>107</sup> wrongly giving the appearance that they are “on duty and available to assist the general public.”<sup>108</sup> At the same time, purely private police often “dress and act like public law enforcement” and thus wrongly “imply that they are acting with state authority” within the public monopoly on “state-sanctioned use of force and coercion.”<sup>109</sup> Police companies issue uniforms that are “often indistinguishable from public police uniforms,” with the result that “private security personnel are frequently mistaken for public police.”<sup>110</sup> For example, one prominent private police force in San Francisco, the patrol special police, “wear uniforms cut in a different shade of blue with seven-pointed stars instead of six.”<sup>111</sup> Special Conservators of the Peace, individually designated private police in Virginia, are permitted by law to refer to themselves as “police” and, “upon request and for good cause shown,” use flashing lights on their vehicles.<sup>112</sup> Statewide Patrol, a Texas-based private police firm, uses this ambiguity as a selling point for its services, boasting: “Statewide Patrol’s standing guards project authority, professionalism, and confidence. The look of our uniform closely resembles those of law enforcement[,] including a metal badge, brass nametag, shoulder patches, and appropriate rank.”<sup>113</sup>

Private police are usually not subject to constitutional limits. The criminal procedure law that restrains public police consists of a “vast set of interrelated constitutional doctrines,” including “the Fourth, Fifth, and Sixth Amendments, made

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of security as a general public good, and not simply an additional resource for those with economic advantage, should lead to a discussion about the roles of private security and the police.”).

107. Joh, *supra* note 101, at 64.

108. Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 185 (2005).

109. *Id.* at 186, 204.

110. *Id.* at 204.

111. Rachel Swan, *The Right To Remain Special: The City’s Other Police Force Struggles Against Extinction*, S.F. WEEKLY (Sept. 18, 2013), <http://archives.sfweekly.com/sanfrancisco/the-right-to-remain-special-the-citys-other-police-force-struggles-against-extinction/Content?oid=2827468>.

112. See Va. Code § 19.2-13 (2016).

113. *About Us*, STATEWIDE PATROL, INC., <http://www.statewidepatrol.com/about-us> (last visited Nov. 14, 2016).

applicable to the states through the Due Process Clause of the Fourteenth Amendment, along with the Supreme Court's elaborate efforts to implement those provisions through rules of evidentiary exclusion and the restrictions on interrogations imposed by *Miranda v. Arizona* and its progeny.<sup>114</sup> Private police, like other private citizens, are restrained merely by "tort and criminal doctrines of assault, trespass, and false imprisonment."<sup>115</sup> This means in practice that "confessions extracted by private police without Miranda warnings and evidence obtained through unlawful searches conducted by private agents are not subject to exclusionary rules."<sup>116</sup> Thus, a move towards greater reliance on private police threatens to undermine the civil liberties gained over the twentieth century with respect to public police—as limited as these gains may be.<sup>117</sup>

One explanation for the increasing prevalence of private police in the U.S. is the emergence of "mass private property," such as housing complexes, shopping malls, and university campuses, with the consequence that "more and more public life now takes place on property which is privately owned."<sup>118</sup> As agents of property owners, private police on private property may have authority that public police lack, such as the "powers of exclusion or ejection for those considered undesirable or unwelcome from the malls, corporate campuses, and other private spaces that are policed privately."<sup>119</sup> In other words, the enforcement power of private police in large part relates to exclusion of people from private property, which the Supreme Court views as "central to the private property right."<sup>120</sup> In this capacity, private police may "complete limited, investigative stops of individuals on private property" to the extent permitted by state law, and officers may conduct "routine searches" of any employee's "person or property" if required by that employee's

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114. Sklansky, *supra* note 77, at 1183.

115. *Id.*

116. Sparrow, *supra* note 99, at 9.

117. *See id.*

118. Clifford D. Shearing & Philip C. Stenning, *Private Security: Implications for Social Control*, 30 SOC. PROBS. 493, 496 (1983); *see also* Sklansky, *supra* note 77, at 1229 (discussing the difficulty courts find in treating private police as state actors); Joh, *supra* note 101 (documenting the difficulty of discerning the differences between public and private police, a legally critical distinction).

119. Joh, *supra* note 101, at 65.

120. *Id.* at 76–77.



contract.<sup>121</sup> At the same time, when investigating theft, employee wrongdoing, or other matters, private police “commonly question suspects, interview witnesses, and prepare reports for litigation,” without the obligation to issue *Miranda* warnings and, “regardless of the context of the private police interrogation,” with “any incriminating information obtained” being “normally admissible in future criminal prosecutions.”<sup>122</sup> At the same time, rather than opt to prosecute, private police may instead impose private sanctions such as firing an employee.<sup>123</sup>

There are some exceptions to the immunity of private police from constitutional limits. Section 1983 of the U.S. Code provides an “action at law” against “every person” who, acting “under color of” state law, violates a plaintiff’s federal constitutional or statutory rights.<sup>124</sup> Individuals claiming to have been “detained, harassed, physically abused, or otherwise injured by private police” may bring a § 1983 action “when the private police act under color of law, for example by acting jointly with local police, by exercising police powers granted by statute or by the local police, and when private security is provided by off-duty police in their official uniforms.”<sup>125</sup>

The Supreme Court has “shied away from addressing the constitutional status of private police” while developing “an elaborate, notoriously muddled doctrine of state action” with unclear relevance to private police,<sup>126</sup> and the Court has not provided meaningful guidance to lower courts on the constitutional status of private police.<sup>127</sup> Moreover, public police benefit from “having a private arm that reports crimes, that may detain and search citizens, and that may even testify in court, admitting evidence that might otherwise be excluded.”<sup>128</sup>

Since the 1970s, public police have increasingly relied on private security personnel “to obtain evidence that effectively circumvent[s] constitutional requirements under the Fourth, Fifth, and Sixth Amendments,” which is a legal loophole “so

121. Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 179 (2012).

122. *Id.* at 180–81.

123. Joh, *supra* note 75.

124. 42 U.S.C. § 1983 (1996).

125. Jack M. Beermann, *Why Do Plaintiffs Sue Private Parties Under Section 1983?*, 26 CARDOZO L. REV. 9, 21–22 (2005).

126. Sklansky, *supra* note 77, at 1229.

127. Joh, *supra* note 101, at 101.

128. Boghosian, *supra* note 108, at 186.

long as a court can find that there was a ‘legitimate private purpose behind the search.’”<sup>129</sup> This practice has been referred to as the “silver platter doctrine”; it suggests that current law and “new organizational forms of partnership create incentives that permit the circumvention of rules meant to constrain public police behavior.”<sup>130</sup> Finally, it may be that “the greater the legal constraints on the public police, the more private police will be turned to for ‘dirty work,’ sometimes by the public police themselves.”<sup>131</sup>

In short, public police conduct in a considerable number of cities is subject to criticism and concern. However, there are at least basic mechanisms in place for oversight, accountability, and reform. The private police, which often do not operate in high-crime areas and hence have less opportunity to commit abuse, are not subject to the same procedural checks as public police and may be available to carry out the public police’s “dirty businesses.”

### C. WHAT REMEDIES?

Various suggestions have been made as to how to remedy issues stemming from the extensive use of private police. The remedies next discussed include restricting the extent to which police privatization occurs, increasing control mechanisms over private police, and bringing private police under the umbrella of constitutional restrictions that currently are applied to public police.

#### 1. Privatization of the Police Could Be Stopped or Rolled Back

While it is worth analyzing how privatization can be better managed, the U.S. should “rethink how much policing we want to privatize at all.”<sup>132</sup> “[B]ringing public values to private policing” by holding private police to the same regulatory and constitutional standards as public police is possible but impractical, because private entities use private police largely because they are exempt from meeting the same standards as public po-

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129. Karena Rahall, *The Siren Is Calling: Economic and Ideological Trends Toward Privatization of Public Police Forces*, 68 U. MIAMI L. REV. 633, 647 (2014).

130. Joh, *supra* note 101, at 116 (emphasis omitted).

131. RICHARD ERICSON, *CRIME IN AN INSECURE WORLD* 179 (2007) (quoting Joh, *supra* note 101, at 115).

132. David Alan Sklansky, *Private Police and Democracy*, 45 AM. CRIM. L. REV. 89, 105 (2006).

lice.<sup>133</sup> Thus, little reform has taken place over the decades of police privatization, “meaningful constitutional protections against underpolicing do not exist,” and “there is virtually no political support” for stricter regulation or labor standards for private police.<sup>134</sup> There is likewise scant political support for ending private police work.

## 2. More Control of the Private Police

The shift towards private policing could make law enforcement “less egalitarian” but could be managed in part if “privatization chiefly took the form of government outsourcing, so that decisions about the allocation of law enforcement resources remained in the public sphere.”<sup>135</sup> Another solution would require developing constitutional protections against the unfair or unequal distribution of police resources, although to date the Supreme Court has explicitly rejected the idea of “minimally adequate protection” holding that “[d]ue process limits government’s ‘power to act’” rather than “guarantee[ing] minimal levels of safety and security.”<sup>136</sup> Along similar lines, some have advocated that public police should accept the need to work with private police, but must “do their utmost to make sure that overall provision of security squares with their public purpose,” and “tak[e] responsibility for the distribution of protection across society.”<sup>137</sup>

Moreover, “judicial attempts to control private police behavior through the expansion of the state action doctrine would be ineffective at deterring private police misconduct.”<sup>138</sup> Instead, some have called for a legislative, regulatory approach that would “mandate private police transparency, afford aggrieved parties with an efficient means of redress, and ensure public accountability.”<sup>139</sup> Likewise, “[t]he enormous and largely unregulated private police industry in this country has flourished” in part due to government “disengagement by failure to regulate,” and thus that private policing “deserves much more attention as an institution not wholly private, but public as

133. *Id.*

134. *Id.* at 104–05.

135. *Id.* at 104.

136. Sklansky, *supra* note 77, at 1281 (quoting *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989)).

137. Sparrow, *supra* note 99.

138. Rushin, *supra* note 121, at 159.

139. *Id.* at 162.

well.”<sup>140</sup> However, “imposition of increased control of private police behavior, if borrowing from criminal procedure law, must incorporate the understanding” of the significant differences between the two sectors.<sup>141</sup> In this sense, Elizabeth Joh and David Sklansky, two prominent scholars on criminal law, agree that the private and public police are fundamentally different, but Joh takes a more positive view of the opportunities this difference presents.

### 3. Constitutional Restrictions on the Public Police Could Be Expanded to Cover Private Police

This approach is favored by some, who argue that restrictions stemming from the Bill of Rights “should follow function over form: both official police and private police functioning as arms of the state should be held to constitutional standards because they have been legitimized, directly or indirectly, by the state, to fulfill a public demand for order and security.”<sup>142</sup> However, the same approach may not be appropriate for “private mercenaries who fulfill merely a private demand for force unrelated to communal order and security.”<sup>143</sup> Yet, attempts by courts to address the issues raised by private police are “vanishingly rare.”<sup>144</sup>

### 4. Final Thoughts

Scholars have suggested various ways to subject private police to the same oversight and accountability as public police, the lack of which is often used in effect to circumvent the constitutional restrictions imposed on the public police. However, these suggestions have not been implemented and several of them would exact high costs and/or would not protect the public well. It is hence necessary to profoundly rethink the public/private divide and the major legal assumptions that it en-

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140. Elizabeth E. Joh, *The Forgotten Threat: Private Policing and the State*, 13 *IND. J. GLOBAL LEGAL STUD.* 357, 389 (2006).

141. Joh, *supra* note 101, at 124.

142. M. Rhead Enion, *Constitutional Limits on Private Policing and the State's Allocation of Force*, 59 *DUKE L.J.* 519, 553 (2009).

143. *Cf. id.* at 552–53; *see also* John M. Burkoff, *Not So Private Searches and the Constitution*, 66 *CORNELL L. REV.* 627, 628 (1981) (“State involvement with nominally private law enforcers is often pervasive even when it appears to fall short of an actual agency relationship. This is particularly true when the unlawful private search and seizure activity results in criminal prosecution in state or federal criminal courts.”).

144. Sklansky, *supra* note 77, at 1235–36.

tails. The Article returns to this subject after one more “case study,” dealing with the same general subject, is introduced.

### III. PRIVATE MILITARY CONTRACTORS

Just as many expect “the police” (meaning the public police) to ensure public safety at home, many expect that the military to be responsible for defending the nation against external threats. Thus, the state is often defined in terms of its “monopoly of the legitimate use of physical force within a given territory.”<sup>145</sup> Many view this definition of the state as “common sense” and the “obvious starting point in most investigations” of security and violence.<sup>146</sup> Those who study globalization and non-state actors “generally assume that coercive power still resides with the state,”<sup>147</sup> and modern development theory views security as a “constitutive”<sup>148</sup> state function.

In reality, the private sector conducts much of the business of U.S. national defense, including the production of military assets and services and the training of personnel. Of \$519 billion in federal spending on contracts in 2012,<sup>149</sup> the Defense Department accounted for 70 percent, allocating 56 percent of its own budget on contracts. Both percentages increased over the last decade, although federal spending on contracts fell slightly to \$445 billion in 2014.<sup>150</sup> The top ten contractors working for the government in 2014 were defense contractors or sig-

145. Max Weber, *Politics as a Vocation*, Speech at Munich University (Jan. 28, 1919), <http://anthropos-lab.net/wp/wp-content/uploads/2011/12/Weber-Politics-as-a-Vocation.pdf>.

146. DEBORAH D. AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES FOR PRIVATIZING SECURITY* 1 (2005).

147. *Id.*

148. See Verena Fritz & Alina Rocha Menocal, *Understanding State-Building from a Political Economy Perspective: An Analytical and Conceptual Paper on Processes, Embedded Tensions and Lessons for International Engagement*, *OVERSEAS DEV. INST.* 7, 44 (Sept. 2007), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/1979.pdf>.

149. *Overview of Awards by Fiscal Year*, USASPENDING, <https://www.usaspending.gov/transparency/Pages/OverviewOfAwards.aspx> (last visited Nov. 14, 2016).

150. Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Chris Van Hollen, U.S. Senator, (Mar. 11, 2015), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49931-FederalContracts.pdf>; see also Danielle Ivory, *Federal Contracts Plunge, Squeezing Private Companies*, *N.Y. TIMES*, Jan. 16, 2014, at B1 (showing that the value of federal contracts awarded to private companies fell by \$58 billion in 2013).

nificantly involved in defense.<sup>151</sup> Private contractors provide vehicles, armor, weapons, transportation, logistical support, and many other goods and services; make up about a quarter of intelligence workers; and absorb “70 percent or more of the intelligence community’s secret budget.”<sup>152</sup> As with private police, defense contractors in addition often play a complementary role to the public military, with roles including protecting diplomats,<sup>153</sup> providing counterterrorism training, and supplementing U.S. military forces abroad.<sup>154</sup> This Part focuses on private actors that carry out military missions overseas, referred to from here on as “private military contractors” (PMCs).

#### A. THE RISE OF MILITARY CONTRACTING

The PMC sector is large and growing both in the U.S. and internationally. Since the 1990s, the PMC industry “has become global in both its scope and activity,” while at the same time it has showed “unprecedented” levels of outsourcing.<sup>155</sup> This outsourcing of U.S. military services is exemplified by the U.S. military’s increasing use of PMCs for “an array of services: security, military advice, training, logistics support, policing, technological expertise, and intelligence.”<sup>156</sup> While “true global statistics on private security contractor use do[] not currently exist,” a comparison of two U.S. military actions gives a sense of the expansion of PMC activity in recent decades.<sup>157</sup> Whereas in the first Gulf War, the U.S. military hired 9200 contractors, with a troop-to-contractor ratio of 55:1, the 2003 Iraq War wit-

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151. *Top 100 Contractors Report*, FED. PROCUREMENT DATA SYS., [https://www.fpds.gov/fpdsng\\_cms/index.php/en/reports/62-top-100-contractors-report3.html](https://www.fpds.gov/fpdsng_cms/index.php/en/reports/62-top-100-contractors-report3.html) (click the green icon next to “Fiscal Year 2014 v3” and a Microsoft Excel file will automatically download) (last visited Nov. 14, 2016).

152. Robert O’Harrow, Jr. et al., *NSA Leaks Put Focus on Intelligence Apparatus’s Reliance on Outside Contractors*, WASH. POST (June 10, 2013), [http://www.washingtonpost.com/business/nsa-leaks-put-focus-on-intelligence-apparatus-reliance-on-outside-contractors/2013/06/10/e940c4ba-d20e-11e2-9f1a-1a7cdee20287\\_story.html](http://www.washingtonpost.com/business/nsa-leaks-put-focus-on-intelligence-apparatus-reliance-on-outside-contractors/2013/06/10/e940c4ba-d20e-11e2-9f1a-1a7cdee20287_story.html).

153. *Case Against Contractors Resurfaces*, N.Y. TIMES, Oct. 17, 2013, at A17.

154. Jeremy Scahill, *Blackwater’s Black Ops*, NATION (Sept. 15, 2010), <http://www.thenation.com/article/154739/blackwaters-black-ops>.

155. PETER WARREN SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 9, 16 (2008).

156. *Id.* at 15.

157. *Statistics on the Private Security Industry*, PRIV. SECURITY MONITOR, [http://psm.du.edu/articles\\_reports\\_statistics/data\\_and\\_statistics.html](http://psm.du.edu/articles_reports_statistics/data_and_statistics.html) (last visited Nov. 14, 2016).

nessed U.S. employment of 190,000 contractors by 2011, with a troop-to-contractor ratio of less than 1:1.<sup>158</sup>

The military has increasingly depended on contractors and has relied on them to perform a wider array of functions.<sup>159</sup> Contracting is theoretically limited by the requirement that contractors not perform “inherently governmental functions,” but the Office of Management and Budget defines these in a circular fashion as “a function so intimately related to the public interest as to require performance by Federal Government employees,”<sup>160</sup> leaving much room for interpretation. The Federal Activities Inventory Reform Act expands this definition, including functions such as policy determination, “military or diplomatic action, civil or criminal judicial proceedings,” functions “significantly affecting the life, liberty, or property interests of private persons,” and the management of U.S. government employees, funds, or property.<sup>161</sup>

PMCs (also referred to as “PMFs”, or “Privatized Military Firms”) can be defined as “private business entities that deliver to consumers a wide spectrum of military and security services,” including “combat operations, strategic planning, intelligence, risk assessment, operational support, training, and technical skills” that were “once generally assumed” to be public in nature.<sup>162</sup>

The following discussion focuses on the ways PMCs are used to circumvent rules that limit the use of the military. Before proceeding two comments are called for. First, to suggest that PMCs need more controls is not to suggest that the military always conducts itself in an exemplary fashion. However, as shown in regard to public and private police, in the case of the military the mechanisms for accountability and reform are least in place, and often have worked. This is much less the case for PMCs. Second, the CIA and NSA, whose work as clandestine agencies does not adhere to the same code of conduct and accountability as the military, raise a whole slew of issues

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158. LAURA DICKINSON, *OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS* 4 (2011).

159. *Id.* at 37.

160. KATE M. MANUEL, CONG. RESEARCH SERV., R42325, *DEFINITIONS OF “INHERENTLY GOVERNMENTAL FUNCTION” IN FEDERAL PROCUREMENT LAW AND GUIDANCE* (2014).

161. *Id.* at 3.

162. SINGER, *supra* note 155, at 8.

similar to those raised by PMCs, but these lie outside the scope of the following examination.<sup>163</sup>

#### B. PROBLEMS WITH U.S. USE OF PRIVATE MILITARY CONTRACTORS

Concerns regarding the use of private military contractors by the United States fall into two categories. First, PMCs generally lack accountability. The contractors have more direct authority over their employees than the U.S. military does. Hence, the U.S. found itself in a situation where it lacked effective management practices. Second, the measures that do exist for holding PMCs accountable have lacked consistent and effective application. The result has been serious human rights abuses committed by PMCs that often go unpunished.

##### 1. Private Military Contractors Are Not Held Accountable for Abuses

The last decade's wars in Afghanistan and Iraq witnessed extensive corruption and serious human rights abuses by PMCs. While uniformed military personnel were sometimes held accountable by military courts, PMCs and other contractors were rarely held responsible for wrongdoing.<sup>164</sup> According to the bipartisan Congressional Commission on Wartime Contracting in Iraq and Afghanistan (CWC), which issued a series of detailed reports between 2008 and 2011, the "limited jurisdiction over criminal behavior and limited access to records" that characterized the PMC sector contributed "to an environment where contractors misbehave with limited accountability."<sup>165</sup> Of the more than \$206 billion spent by the U.S. on con-

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163. See, e.g., Simon Chesterman, "We Can't Spy . . . If We Can't Buy!": *The Privatization of Intelligence and the Limits of Outsourcing "Inherently Governmental Functions,"* 19 EUR. J. INT'L L. 1055, 1055-74 (2008); Mark Mazzetti, *Pakistan's Public Enemy*, N.Y. TIMES MAG., April 14, 2013, at MM30.

164. COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, 112TH CONG., AT WHAT RISK? CORRECTING OVER-RELIANCE ON CONTRACTORS IN CONTINGENCY OPERATIONS (Comm. Print Feb. 24, 2011), [http://www.wartimecontracting.gov/docs/CWC\\_InterimReport2-lowres.pdf](http://www.wartimecontracting.gov/docs/CWC_InterimReport2-lowres.pdf) ("Congress established the Commission on Wartime Contracting to reduce the extensive amount of waste, fraud, and abuse in Iraq and Afghanistan and in future contingency operations . . . Criminal behavior and blatant corruption sap dollars from what could otherwise be successful project outcomes and, more disturbingly, contribute to a climate in which huge amounts of waste are accepted as the norm.").

165. *Id.* at 4.



tracts and grants in Iraq and Afghanistan through 2011, between \$31 billion and \$60 billion was lost to waste and abuse.<sup>166</sup> Although some PMCs have been convicted of fraud or bribery,<sup>167</sup> accountability has been generally lacking.<sup>168</sup> While the details of this wartime fraud and abuse are covered extensively elsewhere,<sup>169</sup> it is worth briefly noting some of the abuses committed by PMCs in particular to demonstrate the relevance of their ambiguous legal status.

Perhaps the most notorious example of abuse of the 2003 Iraq War concerned the Abu Ghraib prison. Amnesty International and media organizations reported that U.S. personnel, including soldiers and PMCs, had engaged in “systematic abuse” of prisoners. This included torture, sexual abuse, and interrogation-related deaths.<sup>170</sup> These abuses were largely unpunished; eleven U.S. soldiers were convicted of crimes relating to the scandal, but these were “were mostly low-ranking soldiers and they generally received lenient sentences.”<sup>171</sup> The PMCs involved in the scandal have evaded even this limited level of accountability, in part because the Justice Department has abstained from prosecution.<sup>172</sup> A class-action suit by former Abu Ghraib prisoners against one of the contractors involved,

166. *Id.* at 1.

167. *See, e.g., Recent Criminal Cases*, SPECIAL INSPECTOR GEN. FOR AFGHANISTAN RECONSTRUCTION, <https://www.sigar.mil/investigations/criminalcases/index.aspx?SSR=3&SubSSR=20&WP=Criminal%20Cases>; Carlo Munoz, *2 Soldiers Convicted in Fuel-Selling Scam in Afghanistan*, STARS AND STRIPES (Feb. 18, 2015), <http://www.stripes.com/news/middle-east/afghanistan/2-soldiers-convicted-in-fuel-selling-scam-in-afghanistan-1.330236>; Press Release, U.S. Dep’t of Justice, Two Department of Defense Contractors Charged in Bribery Conspiracy Related to DOD Contracts in Afghanistan (Apr. 9, 2009), [http://www.justice.gov/atr/public/press\\_releases/2009/244643.htm](http://www.justice.gov/atr/public/press_releases/2009/244643.htm).

168. *See, e.g.,* Human Rights Council, Rep. of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, U.N. Doc A/HRC/15/25/Add.3 (2010).

169. *See, e.g.,* JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY* (2007); DAVID ISENBERG, *SHADOW FORCE: PRIVATE SECURITY CONTRACTORS IN IRAQ* (2008); ROBERT YOUNG PELTON, *LICENSED TO KILL: HIRED GUNS IN THE WAR ON TERROR* (2007).

170. *See, e.g., Iraq: A Decade of Abuses*, AMNESTY INT’L 13 (Mar. 11, 2013), <https://www.amnesty.org/en/documents/MDE14/001/2013/en>.

171. *Id.* at 65; *see also Iraq Prison Abuse Scandal Fast Facts*, CNN (Mar. 12, 2016), <http://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts>.

172. Editorial, *Abu Ghraib, 10 Years Later*, N.Y. TIMES, Apr. 23, 2015, at A22.

CACI International, is still ongoing as of 2016, after a series of contradictory court rulings over the justiciability of the case. In the most recent ruling, a district court again dismissed the detainees' claims, on the basis of the "political question" doctrine, which holds that "courts are not authorized or equipped to resolve certain matters—like some military decisions or aspects of foreign relations—and must leave them to the other branches of government."<sup>173</sup> In other words, PMCs working in Abu Ghraib, who "were involved in many of the very same incidents,"<sup>174</sup> were too close to the military to be prosecuted by U.S. courts, yet not close enough to be subject to the Uniform Code of Military Justice.<sup>175</sup>

A host of smaller incidents of abuse have gone unpunished. In 2006, for example, contractors working for Triple Canopy fired on Iraqi civilians "for sport" but were not prosecuted.<sup>176</sup> A 2010 study on the role of contractors in the Iraq war found noted that "[r]eports are plentiful of [PSCs] committing serious, sometimes fatal, abuses of power in Iraq," including "armed contractors taking offensive measures" or behaving "in an unnecessarily threatening, arrogant, or belligerent way," resulting in State Department personnel having to "manage the consequences."<sup>177</sup> Over one-fifth of State Department personnel reported "sometimes" or "often" having "•rsthand knowledge of armed contractors mistreating Iraqi civilians."<sup>178</sup> Local observers reported that aggression towards civilians was simply part of PMC's rules of engagement: "each time they went out they had to offend locals, forcing them to the side of the road, being overpowering and intimidating, at times running vehicles off

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173. Editorial, *Will Anyone Pay for Abu Ghraib?*, N.Y. TIMES, Feb. 5 2015, at A25.

174. Noah Bierman, *Few Have Faced Consequences for Abuses at Abu Ghraib Prison in Iraq*, L.A. TIMES, Mar. 17, 2005, <http://www.latimes.com/nation/la-na-abu-ghraib-lawsuit-20150317-story.html>.

175. Another PMC involved in the scandal, L-3 Services, a subsidiary of Engility Holdings, settled with the detainees. *Iraqis Awarded \$5m over Abu Ghraib Abuse*, AL-JAZEERA (Jan. 9, 2013), <http://www.aljazeera.com/news/middleeast/2013/01/2013193300675421.html>; *Iraq Prison Abuse Scandal Fast Facts*, *supra* note 171.

176. Sarah K. Cotton et al., *Hired Guns: Views About Armed Contractors in Operation Iraqi Freedom*, RAND CORP., NAT'L SECURITY RES. DIVISION 6 (2010), [http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND\\_MG987.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG987.pdf).

177. *Id.* at xiv, 29.

178. *Id.* at xv.

the road, making enemies each time.”<sup>179</sup> While the most egregious incident of abuse by PMCs, the 2007 Nisour Square killings of fourteen Iraqis, did result in a federal judge giving long jail sentences to four security contractors involved,<sup>180</sup> this was a rare exception to the prevailing lack of accountability.<sup>181</sup>

Incidents of this nature are not merely of great concern from an ethical viewpoint; they also undermine U.S. military operations. In Iraq, the public perception that contractors operated with impunity led to growing hostility not only towards contractors, but also towards the U.S. military.<sup>182</sup> Public opinion in Afghanistan and Iraq was especially inflamed when contractors were accused of serious crimes but escaped justice due to the fact that “jurisdiction over contractors is ambiguous, legal accountability is uncertain, and a clear command-and-control structure is absent,” leading to “intense enmity.”<sup>183</sup> Political scientists working for the National Bureau of Economic Research found “strong evidence that local exposure to civilian casualties caused by international forces” in Afghanistan led to “increased insurgent violence over the long-run,” while a separate study suggested that civilian casualties in Iraq made civilians less willing to share information with U.S. and allied forces.<sup>184</sup>

Although PMCs may be bound by contractual arrangements with a customer, such as the U.S. government, military officers have no direct control “over a private military contractor” and lack “even the legal authority to order a contractor to do those services he or she was hired to perform,” with the “duty of disciplining contractors” instead falling “squarely on the contractors’ corporate employer.”<sup>185</sup> In such a situation, military

179. Daniel Luban, *Blackwater Pays Price for Iraqi Firefight*, ASIA TIMES ONLINE (Sept. 19 2007), [http://www.atimes.com/atimes/Middle\\_East/II19Ak04.html](http://www.atimes.com/atimes/Middle_East/II19Ak04.html).

180. *Former Blackwater Guards Sentenced for Nisour Square Shooting*, ALJAZEERA (Apr. 13, 2015), <http://america.aljazeera.com/articles/2015/4/13/former-blackwater-guards-nisour-square-to-be-sentenced.html>.

181. See, e.g., Human Rights Council, *supra* note 168.

182. Cotton et al., *supra* note 176, at 27–28.

183. COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, 112TH CONG., TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 30 (Comm. Print Aug. 2011), [http://www.wartimecontracting.gov/docs/CWC\\_FinalReport-lowres.pdf](http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf).

184. Luke N. Condra, et al., *The Effect of Civilian Casualties in Afghanistan and Iraq 1* (Nat’l Bureau of Econ. Res., Working Paper No. 16152, 2010), <http://www.nber.org/papers/w16152.pdf>.

185. Mark W. Bina, *Private Military Contractor Liability and Accountabil-*

officers must rely on “soft control,” “persuasion and horse trading” to keep contractors in line.<sup>186</sup> According to the Congressional Budget Office, “[t]he military commander has less direct authority over the actions of contractor employees than over military or government civilian subordinates” and “limited authority for taking disciplinary action,” as “[t]he contractor, not the commander, is responsible for ensuring that employees comply with laws, regulations, and military orders.”<sup>187</sup>

Second, the government’s reliance on contractors in overseas military operations far exceeded its capacity to manage these contractors. The most detailed study on this issue, the final report of the CWC, points to numerous flaws in the contracting process, including the failure of the Defense and State Departments and USAID to reform their structures, practices, and cultures in preparation for a heavy reliance on contractors.<sup>188</sup> As a result, according to the CWC, the operations in Iraq and Afghanistan were characterized by an “unhealthy over-reliance” on contractors, including contracting of “functions that law or regulation require government employees to perform”; worsening of “risks to mission or other key U.S. objectives”; undermining of “federal agencies’ ability to self-perform core capabilities”; and a decline in the “government’s ability to effectively manage and oversee contractors.”<sup>189</sup>

Third, this heavy reliance on contractors has troubling implications for democratic and constitutional constraints on the conduct of foreign policy. Similar to comments made with respect to private police,<sup>190</sup> PMC’s lack of accountability provides a perverse incentive for future administrations to contract out “dirty work” such as torture. Use of PMCs can disrupt the balance of powers within the government. For example, “[b]ecause Congress has less information about and control over the use of contractors than the use of troops,” using PMCs can “speed policy making and limit the number and variety of inputs into the

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*ity After Abu Ghraib*, 38 J. MARSHALL L. REV. 1237, 1242 (2005).

186. Marc Lindemann, *Civilian Contractors Under Military Law*, 37 PARAMETERS 83, 89 (2007).

187. CONG. BUDGET OFFICE, CONTRACTORS’ SUPPORT OF U.S. OPERATIONS IN IRAQ 20 (2008).

188. See generally COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, *supra* note 183, at 2 (providing recommendations in an effort to rein in the excessive costs and abuses presented by private contractors in Iraq and Afghanistan).

189. *Id.* at 19.

190. ERICSON, *supra* note 131, at 179.

policy process” and so bypass “some of the constitutionalism said to be key to democratic policy making.”<sup>191</sup> Use of PMCs also “has the potential to reduce the political costs of using force—not because most people care less about private soldiers’ deaths, but because people know less about them.”<sup>192</sup> In other words, PMCs allow the government to “circumvent or evade public skepticism about the United States’ self-appointed role as global policeman.”<sup>193</sup>

For example, as the security situation in Iraq and Afghanistan has remained volatile following U.S. troop drawdowns in those countries, the U.S. has relied on contractors to bridge the gap between public statements about only limited troop increases and the actual needs for larger troop increases.<sup>194</sup> As of 2015, in Afghanistan, there were 39,600 contractors supporting the U.S. training and advising mission, including 14,200 U.S. citizen contractors, compared to 10,000 U.S. troops. While the number of U.S. contractors in Iraq fell dramatically after troop withdrawal from that country, the Defense Department began in March 2015 to seek additional PMCs to support the U.S. effort against ISIS.<sup>195</sup> Such deployments allow the U.S. to claim that it is adhering to a “no boots on the ground” policy despite placing a considerable number of boots on said ground. This is an instance of a broader phenomenon of “awarding contracts to provide services” that make the federal workforce “appear smaller,” which the Commission on Wartime Contracting refers to as the “shadow workforce.”<sup>196</sup>

191. Deborah Avant & Lee Sigelman, What Does Private Security in Iraq Mean for US Democracy at Home? 38 (Jan. 24, 2008) (presented at the Burkle Center, UCLA), [https://bc.sas.upenn.edu/system/files/Avant\\_08.pdf](https://bc.sas.upenn.edu/system/files/Avant_08.pdf).

192. *Id.*

193. David Isenberg, *Private Military Contractors and U.S. Grand Strategy*, INT’L PEACE RES. INST. 5 (Jan. 2009), <http://object.cato.org/sites/cato.org/files/articles/isenberg-private%2520military-contractors-2009.pdf>.

194. Seth Robson, *In Place of “Boots on the Ground,” US Seeks Contractors for Iraq*, STARS AND STRIPES (Sept. 7, 2014), <http://www.stripes.com/in-place-of-boots-on-the-ground-us-seeks-contractors-for-iraq-1.301798> (quoting Allison Stanger: “In the era of contractors wars, there are many ways to avoid putting boots on the ground, while committing significant U.S. resources and actually being very much militarily involved,” and Michael O’Hanlon: “As the political premium seems always to be placed on how many troops we have abroad, the pressure to have contractors do as much as possible only grows . . .”).

195. Paul McLeary, *US Looking for Contractors To Help in Iraq*, DEF. NEWS (Mar. 9, 2015), <http://www.defensenews.com/story/defense/2015/03/09/us-private-contractor-iraq-isis/24654439>.

196. COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, *supra*

## 2. Legal Accountability Is Fragmentary and Ineffective

While some accountability measures do exist for PMCs working overseas on behalf of the U.S. government, they have not been applied consistently or effectively. PMCs may be prosecuted under U.S. law, the domestic laws of another party to the conflict, or international law. U.S. civilian courts have been the most effective means of prosecuting abuses committed by security contractors abroad. For example, the Military Extraterritorial Jurisdiction Act (MEJA)<sup>197</sup> allows federal prosecution of contractors who are U.S. nationals who commit federal crimes abroad while working directly for the Department of Defense or an agency “supporting the mission of the Department of Defense.”<sup>198</sup> At least 12 contractors were charged under MEJA between its passage in 2000 and 2008, in addition to three contractors indicted for kidnapping in Iraq in 2008, and the six Blackwater contractors charged for the 2007 Nisour Square incident in Iraq.<sup>199</sup> U.S. “special maritime and territorial jurisdiction,” on the other hand, limits federal prosecution for crimes committed within “any facilities run by the U.S. overseas.”<sup>200</sup>

PMCs may also be prosecuted under military law. The Uniform Code of Military Justice (UCMJ) places security contractors “serving with or accompanying an armed force in the field” under the jurisdiction of military courts during a “time of declared war” or “contingency operations.”<sup>201</sup> Although at least one Canadian-Iraqi contractor has been prosecuted for assault under this provision, this amendment would likely face a serious constitutional challenge in the event of a court martial of a U.S. civilian.<sup>202</sup> The Supreme Court has historically prohibited military trials of civilians without a declaration of war.<sup>203</sup> The military currently views the UCMJ as an option of last resort for

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note 183, at 27.

197. Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 212 (2006).

198. 18 U.S.C. § 3267(1) (2006).

199. JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40991, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: LEGAL ISSUES 23 (2010).

200. DICKINSON, *supra* note 158, at 50.

201. *Id.* at 51; *see also* 10 U.S.C. § 802(a)(10) (2006) (“The following persons are subject to this chapter . . . In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.”).

202. ELSEA, *supra* note 199, 25–28.

203. DICKINSON, *supra* note 158, at 50.

prosecuting contractors, and prefers to defer to the Department of Justice.<sup>204</sup>

Prosecution by U.S. courts offers the best option to hold contractors accountable for abuses committed overseas. However, large gaps remain in the effectiveness of this option. For its part, MEJA does not apply to contractors whose work is unrelated to a Defense Department mission, a “significant loophole” according to an Assistant Attorney General,<sup>205</sup> and only applies to crimes for which the sentence is a year or more. Moreover, prosecution at a long distance from the site of the alleged abuses has severe disadvantages in and of itself. There is the expense and “difficulty in gathering evidence from distant locations days, or even weeks, after the event,” the even more difficult task of getting foreign witnesses to testify in the U.S., and the “language barriers and severe safety concerns” for civilian investigators.<sup>206</sup> Moreover, both these difficulties and the dependence on PMCs contribute to a “lack of prosecutorial motivation” to conduct MEJA-related investigations.<sup>207</sup> The Justice Department acknowledges that there are “significant limits to [their] ability to prosecute” because any case must focus not only “on the underlying criminal conduct, but also on the scope of the defendant’s employment, his or her specific work duties, and other jurisdiction-related facts.”<sup>208</sup> Thus, the “legal framework for domestic criminal prosecution” of PMC abuses exists but “does not work” because “neither civilian nor military prosecutors have thus far done much to enforce these statutes.”<sup>209</sup>

Given the limits of the above measures for ensuring accountability for PMCs, a Civilian Extraterritorial Jurisdiction

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204. ELSEA, *supra* note 199, at 28.

205. Peter T. Nguyen, *The Military Extraterritorial Jurisdiction Act: Past Legacy and Future Challenges*, LAW STUDENT CONNECTION (Aug. 14, 2013), [http://nysbar.com/blogs/lawstudentconnection/2013/08/the\\_military\\_extraterritorial\\_.html](http://nysbar.com/blogs/lawstudentconnection/2013/08/the_military_extraterritorial_.html).

206. Katherin J. Chapman, *The Untouchables: Private Military Contractors’ Criminal Accountability Under the UCMJ*, 63 VAND. L. REV. 1047, 1065–66 (2010); SCAHILL, *supra* note 169, at 27–29; *see also* Marc Lindemann, *Civilian Contractors Under Military Law*, 27 U.S. ARMY WAR C. Q. PARAMETERS 83, 87 (2007) (showing that there have been few prosecutions of private contractors, noting those who escaped justice after their abuses at Abu Ghraib).

207. *See* Chapman, *supra* note 206, at 1065.

208. *Statement by Assistant Attorney General Lanny A. Breuer of the Criminal Division Before the Senate Judiciary Committee*, U.S. DEP’T OF JUSTICE (May 25, 2011), <http://www.origin-www.justice.gov/criminal/pr/testimony/2011/crm-testimony-110525.html>.

209. DICKINSON, *supra* note 158, at 43–44.

Act (CEJA)<sup>210</sup> has been repeatedly put forward in Congress that would “extend U.S. criminal jurisdiction over federal government contractors and employees fielded abroad for serious crimes committed while employed by any U.S. department or agency other than the Department of Defense without impacting the conduct of U.S. intelligence agencies abroad.”<sup>211</sup> However, previous incarnations<sup>212</sup> of this bill have made little progress.<sup>213</sup> CEJA has been introduced to Congress seven times since 2010, but has yet to become law. Opponents have argued that CEJA would impair U.S. intelligence agencies, as it only exempts intelligence activity “consistent with applicable U.S. law,” a difficult requirement for intelligence agents to satisfy,<sup>214</sup> raising the prospect that intelligence and law enforcement agencies would have to “pay for defense attorneys and risk jail time at the political whim of the Justice Department.”<sup>215</sup> A second option for prosecuting abuses by PMC abroad is through the domestic criminal justice system of the countries in question. In the two major recent conflicts in which the U.S. relied heavily on PMC, Iraq and Afghanistan, many contractors obtained immunity from local law through treaty arrangements, largely negating this option.<sup>216</sup> Before and following those

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210. David L. Richards, *We Need the Civilian Extraterritorial Jurisdiction Act*, DAVID’S BLOG (Apr. 15, 2015), <http://davidrichards.com/blog/39-we-need-the-civilian-extraterritorial-jurisdiction-act>.

211. *The Case for the Civilian Extraterritorial Jurisdiction Act (CEJA): Why U.S. Needs To Clarify Criminal Jurisdiction over U.S. Contractors Fielded Abroad*, HUMAN RIGHTS FIRST, <https://www.humanrightsfirst.org/wp-content/uploads/pdf/CEJA-Fact-Sheet.pdf> (last visited Nov. 14, 2016).

212. CHARLES DOYLE, CONG. RESEARCH SERV, R42358, CIVILIAN EXTRATERRITORIAL JURISDICTION ACT: FEDERAL CONTRACTOR CRIMINAL LIABILITY OVERSEAS (2012), <http://www.fas.org/sgp/crs/misc/R42358.pdf>.

213. *Overview of S. 1145 (112th): CEJA*, GOVTRACK, <https://www.govtrack.us/congress/bills/112/s1145> (last visited Nov. 14, 2016).

214. *Grassley: Changes Need To Be Made to Judiciary Committee Passed Bill*, CHUCK GRASSLEY, U.S. SENATOR FOR IOWA (Jun. 23, 2011), <http://www.grassley.senate.gov/news/news-releases/grassley-changes-need-be-made-judiciary-committee-passed-bill>.

215. *DOJ Wants Congress To Resolve Legal Issue To Prosecute Civilians Who Kill, Rape in War Missions*, CBS LOCAL (Jan. 31, 2013), <http://washington.cbslocal.com/2013/01/31/doj-wants-congress-to-resolve-legal-issue-to-prosecute-civilian-contractors-who-kill-rape-in-war-missions>.

216. In Afghanistan, contractors as well as U.S. troops affiliated with the International Security Assistance Force (ISAF) gained immunity from Afghan law through the 2002 Military Technical Agreement. ELSEA, *supra* note 199. However, the status of forces agreements relating to Operation Enduring Freedom, while granting legal immunity to “U.S. military and DOD civilian personnel,” did not to provide immunity for contractors. *See id.* Following the



agreements, there were a few domestic Iraqi and Afghan prosecutions of contractors involved in abuse. For example, Afghan courts sentenced Bill Shaw, a British contractor who provided security to the UK embassy in Kabul, to jail for two years for bribery,<sup>217</sup> and Robert Langdon, an Australian contractor in Afghanistan, received a death sentence (later reduced to a twenty-year jail sentence) for murder.<sup>218</sup> An Iraqi court likewise sentenced a British contractor, Danny Fitzsimons, to a twenty-year prison sentence for murder.<sup>219</sup> However, this option is affected by the fact that many such cases take place in the context of an ongoing military occupation or other security relationships, as was illustrated by the case of the 2009 murder of contractor James Kitterman in Iraq. Five fellow contractors were arrested during a joint investigation of the murder by U.S. and Iraqi forces,<sup>220</sup> but were later released due to lack of evidence against them, after which legal analysts disagreed on whether the U.S. had violated their due process in cooperating with the Iraqi investigation.<sup>221</sup> During this period, two of the contractors were transferred to a U.S. base, but remained technically under Iraqi custody, while U.S. and Iraqi officials “offered a series of contradictory and inaccurate statements” as they tried to make sense of the jurisdictional issues following the end of contractor immunity under the previous status of forces agreement.<sup>222</sup> Another drawback of relying on host coun-

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official U.S. withdrawal in 2014, a Bilateral Security Agreement (BSA) mandated that contractors will be subject to Afghan criminal and civil jurisdiction. *Id.* In Iraq, Coalition Provisional Authority Order 17, which granted U.S. troops immunity from Iraqi law, also applied to contractors for acts related to their contracts. This immunity was removed by the 2009 Withdrawal Agreement negotiated between the US and Iraq. *See id.*

217. *Afghan Court Jails Briton on Bribery Charges*, OVERSEAS CIVILIAN CONTRACTORS (Apr. 27, 2010), <https://civiliancontractors.wordpress.com/tag/afghan-anti-corruption-court>.

218. Jon Boone, *Australian Escapes Afghan Death Sentence After Paying Afghan Family*, THE GUARDIAN (Jan. 5, 2011), <http://www.theguardian.com/world/2011/jan/05/australian-escapes-afghan-death-sentence>.

219. Sinan Salaheddin, *Iraqi Court Gives Briton 20 Years Over Slayings*, WASH. POST (Feb. 28, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/28/AR2011022800820.html>.

220. *U.S. Contractors Appear in Iraqi Court, Source Says*, CNN (June 8, 2009), <http://www.cnn.com/2009/WORLD/meast/06/08/iraq.contractors.held/index.html?iref=nextin>.

221. Bill Gertz, *Americans Held in Iraq: FBI Violated Rights*, WASH. TIMES (July 20, 2009), <http://www.washingtontimes.com/news/2009/jul/20/americans-freed-in-iraq-claim-fbi-violated-due-pro>.

222. Nada Bakri, *2 American Contractors Held in Iraqi Investigation Are*

try prosecution is that PMC firms often “operate in institutionally weak areas” such as failed states;<sup>223</sup> Iraq and Afghanistan, for example, are both notorious for flawed and abusive criminal justice systems.<sup>224</sup> Moreover, as international organizations, PMC firms can “move across borders or transform themselves,” unlike a national military.<sup>225</sup>

Gaps in U.S. and local law often allow PMCs to escape accountability for abuses they have committed. Few contractors have been prosecuted for abuses, despite “numerous incidents of reported abuse,”<sup>226</sup> and contractors are held accountable much less often than the uniformed military.<sup>227</sup> Peter Warren Singer, one of the nation’s leading scholars on defense, sees the possibility of legal recourse against security contractor firms as very slim, for while state militaries have all manner of traditional controls such as domestic and international laws, public opinion, and internal checks and balances, accountability for security contractors is diffused and difficult to track, making it difficult to determine who to hold responsible for illegal actions.<sup>228</sup>

Finally, PMCs may be prosecuted under international law, such as through an international war crimes tribunal, although this option has been basically theoretical to date. International humanitarian law focuses on conflicts between states, but does criminalize some human rights violations by non-state actors, including murder, torture, and degrading treatment.<sup>229</sup> Additional Protocol II, which strengthens civilian protections for non-international armed conflicts, also applies to “organized armed groups.” (The U.S. has not ratified this protocol.)<sup>230</sup> The

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*Transferred to U.S. Base*, WASH. POST (June 15, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/14/AR2009061402430.html>.

223. SINGER, *supra* note 155, at 239.

224. *Iraq: A Broken Justice System*, HUMAN RIGHTS WATCH (Jan. 31, 2013), <https://www.hrw.org/news/2013/01/31/iraq-broken-justice-system>; *see also Torture, Transfer, and Denials of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan*, OPEN SOCIETY FOUNDATIONS (Mar. 2012), <https://www.opensocietyfoundations.org/reports/torture-transfers-and-denial-due-process-treatment-conflict-related-detainees-afghanistan>.

225. SINGER, *supra* note 155, at 239.

226. DICKINSON, *supra* note 158, at 54–55.

227. *Id.* at 57.

228. SINGER, *supra* note 155, at 210–13.

229. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

230. Protocol Additional to the Geneva Conventions of 12 August 1949, and

Genocide Convention and the International Criminal Court's Rome Statute also apply to non-state actors, and although the U.S. has not signed this statute, a country that has could submit war crimes by PMCs for prosecution.<sup>231</sup> International humanitarian law applies to individuals, but whether it can be used to prosecute a corporation (such as a PMC firm) is a matter of debate.<sup>232</sup> International human rights law largely applies to PMC only to the extent they act as agents of a state. For example, the Convention Against Torture requires some involvement by "a public official or other person acting in an official capacity."<sup>233</sup> Likewise, the International Covenant on Civil and Political Rights is understood to protect against government abuses, although this may include non-state actors affiliated with a government.<sup>234</sup>

International law has struggled to gain traction in U.S. courts. The State Action Doctrine, according to which private actors "cannot be held to constitutional standards unless there is a sufficiently close nexus between the State and the challenged action,"<sup>235</sup> limits the obligation on contractors to abide by

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Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) June 8, 1977, 1125 U.N.T.S. 609.

231. Justin H. Whitten, Note, *They're Getting Away with Murder: How the International Criminal Court Can Prosecute U.S. Private Security Contractors for the Nisour Square Tragedy and Why It Should*, 11 WASH. U. GLOBAL STUD. L. REV. 503 (2012).

232. DICKINSON, *supra* note 158, at 46; *see also* William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 INT'L REV. RED CROSS 439, 453 (2001) ("Prosecutors will of course attempt to pierce the corporate shell and get at the individuals behind it, and where the evidence is clear this should pose no great problem. 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced,' wrote the Nuremberg Tribunal in 1946. But it may also be of interest to establish the liability of the corporation itself, particularly when it holds substantial assets that may be subject to seizure and forfeiture. International law in this area is relatively underdeveloped."); Benjamin Perrin, *Promoting Compliance of Private Security and Military Companies with International Humanitarian Law*, 88 INT'L REV. RED CROSS 613, 623 (2006) ("In many national jurisdictions, there are legal barriers to holding corporate clients criminally liable for the conduct of the private security and military companies they hire. . . . A provision at the international level that would have allowed the International Criminal Court to have jurisdiction over corporate entities was notably rejected during negotiations.")

233. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

234. DICKINSON, *supra* note 158, at 47; International Convention on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

235. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 42 (1999).

international law, although different cases have used more or less expansive interpretations of that doctrine. Court rulings have held that “private persons” and corporations may be held liable by U.S. or foreign citizens for war crimes according to the Alien Tort Statute (ATS),<sup>236</sup> but the Supreme Court narrowed the scope of the ATS in 2004.<sup>237</sup> District courts have dismissed torture claims against private contractors on the basis that the ATS applies to “official” torture—while noting that if the torture had been official, the case would have still been dismissed on grounds of sovereign immunity.<sup>238</sup>

In 2009, the U.S. and sixteen other states signed the Montreux Document on private and military security companies, agreeing not to “outsource certain functions assigned by treaty to states parties,” to ensure that “contractors are aware of their obligations and trained accordingly,” to prevent and facilitate the punishment of contractors’ violations of international law. The signatories also accepted state responsibility for reparations in the case of such violations.<sup>239</sup> Thus, while international humanitarian law and international human rights law “do provide mechanisms for potentially reigning in some of the worst abuses,”<sup>240</sup> these mechanisms have proven vague and ineffectual to date.

This legal ambiguity also has negative implications for contractors themselves. International law discourages “mercenaries” from involvement in conflict, though it defines this term so narrowly that it does not apply to many PMCs.<sup>241</sup> Moreover, international law does not clearly extend to PMCs the protections afforded to other participants in armed conflicts.<sup>242</sup> Internation-

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236. *Kadic vs. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *In re XE Servs. Alien Tort Litig.*, 665 F.Supp.2d 569 (E.D. Va. 2009).

237. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *see also Khulumani v. Barclay Nat’l Bank Ltd.*, 509 F.3d 148 (2d Cir. 2007) (limiting the application of the ATS to instances in which the actor was so closely associated with the country that the actor was acting under the color of authority or the actor aided and abetted in continuing the international legal violations).

238. DICKINSON, *supra* note 158, at 49.

239. Elsea, *supra* note 199, at 9.

240. DICKINSON, *supra* note 158, at 43–44.

241. SINGER, *supra* note 155, at 5, 238; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) June 8, 1977, 1125 U.N.T.S. 609; International Convention against the Recruitment, Use, Financing and Training of Mercenaries December 4, 1989, G.A. Res. 44/34, U.N. Doc. A/RES/44/34 (Dec. 4, 1989).

242. DICKINSON, *supra* note 158, at 41; Laura Dickinson, *Legal Regulation*

al law distinguishes between civilians and combatants, with combatants defined as “members of the armed forces of a party to the conflict,”<sup>243</sup> eligible to “participate directly in hostilities,” and lawful military targets,<sup>244</sup> and civilians defined as ineligible to take part in hostilities but protected from direct attack.<sup>245</sup> Whether PMCs are civilians or combatants is situational and open to interpretation.<sup>246</sup> This is important because, while combatants that obey the laws of war are entitled to prisoner-of-war status and the protections of the Third Geneva Convention if captured,<sup>247</sup> civilians who take part in hostilities may face criminal prosecution by the opposing side for violations of domestic law even if they do not violate international law.<sup>248</sup> In this sense, PMCs, like terrorists, may be considered “unlawful combatants” if they engage in combat (although this term is not used in international humanitarian law treaties).<sup>249</sup>

### C. REMEDIES TO PROMOTE CONTRACTOR ACCOUNTABILITY

There are various suggestions as to how to remedy this lack of accountability. The first remedy addressed in this section is legal reform; there is discussion of proposed legislation pertaining to PMCs considered by Congress. It then turns to strengthening the current enforcement regime and looks at suggestions on how to reform contracts between the government and PMCs. Finally, reducing government reliance on PMCs is discussed.

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*of Private Military Contractors*, in INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni, ed. 2008).

243. *Rule 106: Conditions for Prisoner-of-War Status*, INT’L COMM. OF THE RED CROSS, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter33\\_rule106](https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter33_rule106) (last visited Nov. 14, 2016).

244. Knut Dörmann, *The Legal Situation of “Unlawful / Unprivileged Combatants,”* 85 INT’L REV. OF THE RED CROSS, 45, 45 (2003).

245. *Rule 5: Definition of Civilians*, INT’L COMM. OF THE RED CROSS, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter1\\_rule5](https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5) (last visited Nov. 14, 2016); *Rule 6: Civilians’ Loss of Protection from Attack*, INT’L COMM. OF THE RED CROSS, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter1\\_rule6](https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule6) (last visited Nov. 14, 2016).

246. Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, INT’L COMM. OF THE RED CROSS (May 2009), <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

247. *Rule 106: Conditions for Prisoner-of-War Status*, *supra* note 243.

248. *Direct Participation in Hostilities: Questions & Answers*, INT’L COMM. OF THE RED CROSS (Feb. 6, 2009), <https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm>.

249. *See* Dörmann, *supra* note 244.

### 1. Reform the Legal Status of PMCs

In the U.S., several efforts have been made to close the legal loopholes affecting PMCs, including amending the UCMJ and MEJA. The aforementioned CEJA has also been introduced to complement MEJA, with the “strong support” of the DOJ.<sup>250</sup> This bill aims to clarify and expand federal criminal jurisdiction over federal contractors and employees outside the United States, “supplement rather than replace” existing “provisions of federal extraterritorial jurisdiction,” and deal with crimes including “federal violent, corruption, and trafficking offenses.”<sup>251</sup> Amending international law to reflect the increasing prevalence of PMCs, (e.g. by expanding or simplifying the definition of “mercenary”) might be another way to increase accountability.<sup>252</sup> However, “if there is to be law reform in this area, it is important to bear in mind the difficulties with the existing conventional law,” including lax enforcement and the emphasis in international law on the narrowly defined term “mercenary.”<sup>253</sup>

At the same time, most of the bills intended to deal with PMC abuse and fraud failed to make any headway in Congress.<sup>254</sup> The aforementioned MEJA bill was passed by the House in 2007, but not by the Senate, and made no subsequent progress.<sup>255</sup> Some provisions from the Comprehensive Contingency Contracting Reform Act of 2012, backed by Sen. Claire McCaskill and building on the recommendations of the CWC, were incorporated into the 2013 National Defense Authorization Act, but were “watered down over time or cut entirely.”<sup>256</sup>

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250. Letter from Ronald Weich, Assistant Att’y Gen., U.S. Dep’t of Justice, to Hon. Patrick J. Leahy & Hon. Dianne Feinstein, Chairmen, U.S. Senate, Comm. on the Judiciary (Oct. 7, 2011), <http://www.justice.gov/sites/default/files/ola/legacy/2011/11/08/100711-ltr-re-s1145-civilian-extraterritorial-jurisdiction-act.pdf>.

251. CHARLES DOYLE, CONG. RESEARCH SERV, R42358, CIVILIAN EXTRATERRITORIAL JURISDICTION ACT: FEDERAL CONTRACTOR CRIMINAL LIABILITY OVERSEAS (Feb. 15, 2012), <http://www.fas.org/sgp/crs/misc/R42358.pdf>; see also *Overview of S. 1145 (112th): CEJA*, *supra* note 213.

252. SINGER, *supra* note 155, at 238.

253. Katherine Fallah, *Corporate Actors: The Legal Status of Mercenaries in Armed Conflict*, 88 INT’L REV. RED CROSS 863 (2006).

254. See, e.g., *S. 674 (110th): Transparency and Accountability in Military and Security Contracting Act of 2007*, GOVTRACK, <https://www.govtrack.us/congress/bills/110/s674> (last visited Nov. 14, 2016).

255. *H.R. 2740 (110th): MEJA Expansion and Enforcement Act of 2007*, GOVTRACK, <https://www.govtrack.us/congress/bills/110/hr2740> (last visited Nov. 14, 2016).

256. Lindsay Wise, *Sen. Claire McCaskill Leaps Hurdles To Overhauling*

While the role of money in politics is difficult to prove, this legislative inertia likely results in part from the influence of military contractors in Washington. Recent consolidation in the defense contracting industry,<sup>257</sup> the government's reliance on military contractors, and the millions of dollars the industry spends on lobbying all combine to give military contractors substantial leverage to resist reforms.<sup>258</sup>

## 2. Strengthen the Existing Enforcement Regime

While many experts on PMCs are troubled by their legal unaccountability, Laura Dickinson, who focuses her studies on human rights and international security, argues that the legal jurisdiction for holding contractors accountable is adequate, and the real problem is the lack of an effective “enforcement regime” for these laws. She thus makes three broad recommendations for organizational reforms. First, she suggests reforming government contracts with PMCs to include “public law values” (including human rights norms, norms against corruption and waste, and democratic processes)<sup>259</sup> as well stronger oversight and enforcement requirements, and the requirement that contractors receive accreditation.<sup>260</sup> Second, she calls for greater public participation in the design and implementation of such contracts.<sup>261</sup> And third, she suggests “reforming the organizational structure and culture of private security firms,” which might include a greater supervisory role for judge advocates and military commanders, as well as the adoption of legal corps and stricter standards within private security contractors.<sup>262</sup>

While Singer is more skeptical of existing legal accountability, he also makes suggestions for reforming the relationship

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*Wartime Contracting*, MCCLATCHY DC (Jan. 19, 2013), <http://www.mcclatchydc.com/news/politics-government/congress/article24743218.html>; Press Release, Sen. Claire McCaskill, Fight Against ISIS Gets Independent Watchdog as McCaskill's Wartime Contracting Reforms Kick-in (Dec. 23, 2014), <https://www.mccaskill.senate.gov/media-center/news-releases/fight-against-isis-gets-independent-watchdog-as-mccaskills-wartime-contracting-reforms-kick-in>.

257. *Constellis Holdings, Inc. Acquires Constellis Group, Inc.*, ACADEMI (June 6, 2015), [https://www.academi.com/news\\_room/press\\_releases/95](https://www.academi.com/news_room/press_releases/95).

258. *Defense*, CTR FOR RESPONSIVE POLS., <https://www.opensecrets.org/industries/indus.php?Ind=D> (last visited Nov. 14, 2016).

259. Laura T. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383 (2006).

260. DICKINSON, *supra* note 158, at 71–73.

261. *Id.* at 143–45.

262. *Id.* at 194.

between government and PMCs. Acknowledging that PMCs have proposed various self-regulation schemes, he argues that the public interest in the nature of their activities necessitates greater public scrutiny and regulation. Much of his suggested reforms focus on transparency, including “full disclosure of equity partners and client lists,” “more transparent licensing processes, government oversight over local PMF contracts, and the establishment of financial and operational reporting requirements.”<sup>263</sup> On the international level, he calls for a U.N. task force and ultimately a permanent international office to monitor and regulate the industry.<sup>264</sup> At the same time, like Dickinson, he sees the need for greater enforcement of existing accountability measures, “a dedicated focus on managing the relationship to protect the public interest,” greater attention to the contract-making process, the establishment of “prior acceptable and sound business practices for the contract,” as well as effective supervision, administration, and enforcement of contracts with strict and immediate punishments for abuse.<sup>265</sup>

For its part, the CWC also puts forward a broad array of recommendations, including more careful risk assessment prior to using PMCs, improved resources, authority, and procedures for acquisition and contractor oversight, increased coordination among and guidance for government agencies relating to contractors, and more competitive bidding. To this end, the CWC has also called on Congress to legislate and provide funding for contracting reform.<sup>266</sup>

Scholars on governance and military affairs praise Dickinson’s proposed reforms as practical and realistic.<sup>267</sup> NGOs working on government accountability lauded the CWC for reaching bipartisan consensus on a “broader and compelling argument for systemic contracting reforms,” and the Commission has had some impact on government contracting practices.<sup>268</sup> For exam-

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263. SINGER, *supra* note 155, at 239–240.

264. *Id.* 238–41.

265. *Id.* at 235–37.

266. COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, *supra* note 183.

267. See, e.g., Kenneth Anderson, *Readings: Laura A. Dickinson, Outsourcing War & Peace*, LAWFARE (May 26, 2012), <http://www.lawfareblog.com/2012/05/readings-laura-a-dickinson-outsourcing-war-peace/>; An Hertogen, *Book Discussion: Laura Dickinson’s “Outsourcing War and Peace,”* OPINIO JURIS (May 14, 2012), <http://opiniojuris.org/2012/05/14/book-symposium-laura-dickinsons-outsourcing-war-and-peace>.

268. CWC’s *Final Report: Make Investments in Contracting Oversight*, CTR



ple, according to the Government Accountability Office, the Defense Department took or planned to take “actions that directly align with about half of the CWC recommendations” by August 2012, and State and USAID a third of the recommendations.<sup>269</sup> Even prior to the Commission’s final report, then-Senator Obama acknowledged that there were accountability issues in government contracting, broadly speaking, and pledged to support legislative reform.<sup>270</sup>

### 3. Reduce Government Reliance on PMCs

It may be wise to simply oppose privatization of security in general. Outsourcing of “essential or inherent functions” such as the armed forces and police both undermines the “capacity, effectiveness, and morale” of government and violates constitutional and democratic principles.<sup>271</sup> Another approach entails recognizing that PMCs do have some merits, but their use should be curtailed. This is the approach taken by the CWC, which argued the U.S. was “over-reliant” on contractors and should consider reducing their use or the “the number, nature, and scope of the overseas contingency operations” for which they are needed.<sup>272</sup>

One way to reduce reliance on contractors would be to do so in particular areas rather than simply call for an overall reduction. For example, Singer argues that due to the lack of full command authority of military officers over PMCs, “wherever possible private security contracting should be kept out of critical battlefield areas,” and that “when the military requires a

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FOR EFFECTIVE GOV'T (Sept. 13, 2011), <http://www.foreffectivegov.org/node/11850>; Jake Wiens, *Wartime Contracting Commission's Move To Seal Records for 20 Years: Just Plain Wrong*, PROJECT ON GOV'T OVERSIGHT (Nov. 1, 2011), <http://pogoblog.typepad.com/pogo/2011/11/wartime-contracting-commissions-move-to-seal-records-for-20-years-just-plain-wrong.html>.

269. *Contingency Contracting: Agency Actions To Address Recommendations by the Commission on Wartime Contracting in Iraq and Afghanistan*, GOV'T ACCOUNTABILITY OFF. (Aug. 1, 2012), <http://www.gao.gov/products/GAO-12-854R>.

270. Then-Senator Obama sponsored the Transparency and Accountability in Military and Security Contracting Act of 2007. See S. 674 (110th): *Transparency and Accountability in Military and Security Contracting Act of 2007*, *supra* note 254.

271. PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007).

272. COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, *supra* note 183, at 34.

service, it should be sure to examine first the possibilities offered within the force, across other service branches, and then to trusted allied forces.”<sup>273</sup> Likewise, the CWC recommended that the government “phase out use of private security contractors for certain functions,” particularly for guarding convoys or bases that are at risk of attack from enemy forces.<sup>274</sup>

### CONCLUSION

The preceding three case studies suggest that the public-private distinction, a major normative and legal meta-conception that has framed much of public discourse and policy making over the last two-hundred years, is obsolete. Many of the statements most commonly made in public discourse about the government and the market, or the state and individual rights, view one of these two realms as virtuous and the other as problematic. Many Americans see the government as coercive and the private sector as the realm of freedom, and hence hold that the government should be checked and curbed and the private sector be free to follow its own course. Libertarians and civil libertarians similarly hold that the government is oppressive and that individual rights must be protected. In contrast, the left sees the private sector—particularly Wall Street—as the source of major societal deformations and seeks to use the government to check the private elites and promote social justice. However, the preceding case studies show that in at least these three major areas, the two sectors increasingly act as one, with the private sector carrying out government missions, and the government using the private sector to circumvent the limits imposed on it. A more accurate conception would treat American society (polity and economy included) as one whole, influenced by a set of factors that affect both the private and the public sectors.

To provide but one more illustration of the extent to which the old but still-dominant framework is obsolete, take the following situation. In January 2009, the U.S. had about 34,400 troops in Afghanistan.<sup>275</sup> The U.S. military asked the White House to authorize a major increase in the level of troops com-

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273. SINGER, *supra* note 155, at 235.

274. COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, *supra* note 183, at 58–61.

275. Alan McLean & Archie Tse, *American Forces in Afghanistan and Iraq*, N.Y. TIMES, <http://www.nytimes.com/interactive/2011/06/22/world/asia/american-forces-in-afghanistan-and-iraq.html> (last visited Nov. 14, 2016).

mitted to this country (known as the Afghan surge). The request was followed by an intensive, months-long debate in the White House, Congress and the public over how many additional troops to commit. Some called for as many as 80,000, some for as few as zero.<sup>276</sup> The President settled for 30,000, and eventually the troop level peaked at 100,000 in August 2010.<sup>277</sup> During the debate, however, almost no one mentioned that at the same time, the U.S. had deployed 74,000 PMCs in Afghanistan, many more than the additional troops.<sup>278</sup> In reality, a larger “contractor surge” occurred over the same period: the number of contractors increased to 107,300 in December 2009. Moreover, as the U.S. drew down troop levels in Afghanistan beginning in 2011, it also undertook a *second* contractor surge with little fanfare: the number of contractors, which had fallen to 70,600 in September 2010, rose to 107,800 by March 2013.<sup>279</sup> This blind spot extends to casualty figures as well. When President Obama spoke in 2015 about the “more than 2,200 American patriots who made the ultimate sacrifice in Afghanistan,” for example, this did not include the 1,592 private contractors, thirty-two percent of whom were Americans, who were killed over the same period.<sup>280</sup> A reasonable debate should have encompassed the size of both public and private forces.

Any new approach need not hold that there are no differences between the private and public sector and hence treat privacy merchants as if they were agents of the NSA, members of the private police as public cops, and private military contractors as troops. One promising approach focuses on what might be called the “degrees of separation.” This approach suggests that private actors that are directly controlled by the government, have largely public missions, and are financed by the public (such as security guards hired to protect American dip-

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276. Mark Thompson, *Obama's Afghanistan Speech: What To Watch For*, TIME (Dec. 1, 2009), <http://content.time.com/time/nation/article/0,8599,1943707,00.html>.

277. McLean & Tse, *supra* note 275.

278. August Cole, *Afghanistan Contractors Outnumber Troops*, WALL ST. J. (Aug. 22, 2009), <http://www.wsj.com/articles/SB125089638739950599>.

279. MOSHE SCHWARTZ & JENNIFER CHURCH, CONG. RESEARCH SERV., R43074, DEPARTMENT OF DEFENSE'S USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS: BACKGROUND, ANALYSIS AND ISSUES FOR CONGRESS (May 17, 2013), <http://www.fas.org/sgp/crs/natsec/R43074.pdf>.

280. Micah Zenko, *The New Unknown Soldiers of Iraq and Afghanistan*, FOREIGN POL'Y (May 29, 2015), <http://foreignpolicy.com/2015/05/29/the-new-unknown-soldiers-of-afghanistan-and-iraq>.

lomats) should be treated much more like public sector agents. In contrast, those who are private actors that mainly serve the private sector, market their wares to one and all (the government included) and for whom the government is not a particularly large or influential client, should be granted much more leeway. Those in between these two extremes should be treated accordingly.

To avoid a misunderstanding: this Article suggests that all private agents who carry out a government function—directly or indirectly—should be subject to more accountability and oversight, of a kind similar to that which public agents are subjected. However, there should be a difference in degree according to the extent that the private actors are autonomous from the government.

One analogue for the needed approach is the normative and legal response to the rise of the “on-demand” or “gig” economy, in which companies such as Uber use part-time contracts for jobs previously performed by employees. Recent court and administrative rulings have looked at the extent to which the rules that apply to the traditional employee-employer relationship should also apply to the relationship between on-demand services and their contractors, based on several different criteria. For example, in June 2015, the California Labor Commissioner’s Office ruled that an Uber driver should be classified as an employee rather than an independent contractor, because Uber was “involved in every aspect of the operation” and played a controlling rather than merely facilitating role.<sup>281</sup> Likewise, in August 2015, the National Labor Relations Board ruled that companies such as McDonalds that used contractors and franchisees as intermediaries with their workers are still “joint employers” of those workers, which entitles unions representing these workers to bargain directly with the company as well as the contractor or franchisee.<sup>282</sup>

More broadly, the distinction between workers and contractors “has been the subject of intense legal battles for decades,” resulting in federal agencies designating the criteria that should be taken into account, with the extent of control usually

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281. *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, slip op. at 9 (Cal. Labor Comm’r June 3, 2015).

282. Noam Scheiber & Stephanie Strom, *Labor Board Ruling Eases Way for Fast-Food Unions’ Efforts*, N.Y. TIMES (Aug. 27, 2015), <http://www.nytimes.com/2015/08/28/business/labor-board-says-franchise-workers-can-bargain-with-parent-company.html>.

the most important.<sup>283</sup> Thus, the IRS lists three broad categories: “behavioral,” in the sense of whether the company controls the worker’s performance; “financial,” in terms of whether the “business aspects of the worker’s job” are controlled by the company; and “type of relationship,” such as whether there is a written contract or long-term association and whether the work performed is a “key aspect of the business.”<sup>284</sup> The difficulty of maintaining a sharp dichotomy between employees and contractors suggests that it would be productive to employ a nuanced approach that involves gradations in employee status and employer obligations. The same is true for privacy merchants, private police, private military contractors and all other private actors who carry out missions historically associated with the government.

When one takes this approach in the context of developing a new meta-doctrine to replace the private/public sharp distinction, several variables stand out as helpful in determining the degrees of separation between the government and its private agents. These include:

(a) Command and control. Does the government directly order the private agents about, daily and in a tight formation, just like its own troops, or does the government define a mission and contract it out, but let private supervisors control the actual agents?

(b) Accountability. Does misconduct by the private agents harm the public as much as would direct misconduct by the government (e.g. the way enhanced interrogations soiled American reputation in the Middle East and elsewhere), or is that harm largely absorbed by the private actor (e.g. cost overruns if charged to the company rather than the taxpayer)?

(c) Financing. Does the government finance the private actor completely or to a significant degree, and hence gain considerable influence over that actor? Or, is the government only one of the private actor’s many customers, limiting its influence?

Surely other criteria might be developed, but these suggested criteria illustrate the approach that would govern private agents as if they were public ones, with varying levels of

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283. James Surowiecki, *Gigs with Benefits*, NEW YORKER (Jul. 6, 2015), <http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits>.

284. *Independent Contractor (Self-Employed) or Employee?*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> (last visited Nov. 14, 2016).

strictness according to the extent they are separated from the public architecture.

The rise of private contractors in American government creates a need for new society-wide normative and legal doctrines<sup>285</sup> and a fundamental change in Western (and particularly American) thinking. This change is illustrated by the notion that the Fourth Amendment may apply to private actors and not just to government agencies. It makes little sense to lock the door (of the public sector) if one leaves the windows (of the private sector) wide open. For American society to uphold the values it seeks to implement, it requires normative positions, policies, laws and institutions that apply to both sectors. Many of the remedies listed above are partial. Most are of merit, but nevertheless do not offer the kind of comprehensive new framework that the evidence suggests is needed. It will take an almost revolutionary effort to develop the needed comprehensive meta-conception and integrate it into the policy and legal worlds.<sup>286</sup>

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285. For more discussion on this point, see Amitai Etzioni, *The Bankruptcy of Liberalism and Conservatism*, 128 POL. SCI. Q. 39 (2013).

286. *Id.*