

THE GEORGE WASHINGTON LAW REVIEW



ARTICLES

Coercive Settlements	733	<i>Gilat Juli Bachar</i>
Remedying Selective Enforcement	789	<i>Guy Rubinstein</i>
Criminal Investors	851	<i>Andrew K. Jennings</i>

NOTES

Solving a Patent Infringement Loophole for Objects in Outer Space: A Novel Interpretation of 35 U.S.C. § 105	910	<i>Brian Smallshaw</i>
“I Just Didn’t Want It to Be Me”: The Social Entrapment Framework in Self-Defense Claims of Criminalized Survivors	934	<i>Kelly Hennessy</i>



The George Washington Law Review, ISSN 0016-8076, is published in February, April, June, August, October, and December by students of The George Washington University Law School, 720 20th St., N.W., Washington, D.C. 20052. Email: gwlr@law.gwu.edu. Website: <http://www.gwlr.org>. Phone: (202) 994-4610. Fax: (202) 994-4609. Publication Office: Sheridan, PA, 450 Fame Avenue, Hanover, PA 17331. Please send address changes to the Editorial Office.

Subscriptions are \$50.00 per year; foreign, \$55.00 per year. District of Columbia residents please add 5.75% sales tax. Absent timely notice of termination, subscriptions are automatically renewed upon expiration. Periodicals postage is paid at Washington, D.C., and additional mailing offices.

Single issues of the current volume are available from the Editorial Office. Regular issues are \$10.00 each; symposia and *Annual Review of Administrative Law* issues, \$15.00 each; and double issues, \$20.00 each. To cover shipping charges, please add \$1.75 per issue to addresses in the United States, \$3.50 to Canada, \$3.75 to Mexico, and \$10.00 to elsewhere. For back issues of previous volumes, inquire of William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, New York 14068. Microfilms of all volumes are available through William S. Hein & Co., Inc., as well.

POSTMASTER: Please send change of address and new subscriptions to The George Washington Law Review, ISSN 0016-8076, 2028 G St. NW, Suite LLC-022, Washington, D.C. 20052, at least 45 days before the date of the issue with which it is to take effect. Duplicate issues will not be sent without charge.

The George Washington Law Review invites the submission of manuscripts for publication. We regret that manuscripts cannot be returned unless a self-addressed, postage-prepaid envelope is submitted with the manuscript. We also welcome electronic submissions. Please see our website for further details.

THE GEORGE WASHINGTON LAW REVIEW

BOARD OF EDITORS 2024–2025

STEPHANIE FAYE SAUER
Editor-in-Chief

GIULIANNA PENDLETON
Senior Managing Editor

ALLISON CHESKY
Senior Executive Editor

ABIGAIL STEIN
Senior Production Editor

SHLOKE SINGH NAIR
Senior Articles Editor

NATALIE REED
Senior Notes Editor

JOSEPH CAHILL
Senior Online Editor

AKSHARA ANIRJITA
*Senior Membership &
Development Editor*

CHRISTINA CASEY
Senior Projects Editor

JAKE BERNSTEIN
NARISA A. CHOWDHURY
LANDIS A. HAGERTY
LUIS SERGIO HERNANDEZ JR.
ZHEN LI
KATIE METZGER
LAURA ZECCA
Articles Editors

MISHAEL H. HIBSHOOSH
SEAN HULLIHAN
DANIEL O'SHEA
NICHOLAS J. PETRUZZIELLO
LUKE SCHLOBOHM
LORNA STRACHAN
XUEROU WANG
Managing Editors

JOSEPH LEO ARKFELD
LAUREN DAVIDSON
NOAH FISHER
DELANEY GATINE
JORDAN GUNNING
JAVERIA IJAZ
MARY ANN JOHANSEN
BRIAN SMALLSHAW
Notes Editors

MACKENZIE ELLIOTT
ARISTIDES N. HADJIPANTELI
Production Editors

REGINA POSTREKHINA
Online Editor

TARRA OLFAT
Membership & Projects Editor

ASSOCIATES

LILY BARRETT
THOMAS BERES
CAMERON BERNIER
ROBERT CASINO
JOE CIANCIOLA
NATALIE DE BENEDETTI
TRISH DREES
NICOLE ECONOMOU
SELENA EVERITT
EMILY FALLIN
CAROLINE FLOAM
ARIANA GILANI

KELLY HENNESSY
STEVEN HOLLINS
EMMA KEARNEY
CARTER KING
RYAN KOSCHES
FRANK KRATOVIL
RACHEL LAYNE
TÉA LORSCH
JEFFERY MA
ERIN MCGUIRE
KATIE MCKINNEY
KAITLYN MILINIC
JORDAN MORRIS

LEXI ORGILL
ROWAN PIERSON
JACK RAINERI
RIX RYSKAMP
ELANOR SANDS
NAWAL SEEDAT
BLAKE SLOANE
ALLY STOCKMAN
AUDREY STONE
LAUREN STURM
MADELEINE WINDEL
BEN WINNEG

CAROLYN JACOBS HARRIS, *Administrative Associate*

MEMBERS

EVAN ALLIS
CAROLINE BEREJKA
AARON BERNSTEIN
ANDREW BERNSTEIN
RHYIA BIBBY
EMMA BJELDANES
DARRELL BLACK
CHARLIE BORAH
MADELEINE BOUCHER
JADA BOURNE
READ BROWN
CAMILLE BURTON
ANNA CAPRIA
MATTHEW CHANG
ELIAS CHRISTENSEN
MITCHELL DAVENPORT
EMMA DONAHUE
HAILEY EASON
RACHEL EDWARDS
SARAH EKOLA
KRISTIN EWAN
DIANA Y. FENG
ERIC FRANK
KEVIN GARVEY
SAM GLENN
ELI GOLDFARB

JEANETTE GONG
DANIEL GULOTTA
MACKENZIE HARRIS
BENJAMIN J. HEIDLOFF
ALEX HINTON
JACOB HOECHSTER
DANIEL HOPKINS
RYAN HUDSON
SOPHIA JACKSON
MOLLY KALB
YAN KE
SAMANTHA KESSLER
ANGIE KESWANI
SARA KIM
CHRIS KING
GRAY KINNIER
CONNOR MAGNACCA
ANNA MARCUS
ALEXA MARSH
IAN MCCORMACK
COLTON MCRAE
DIANA METZ ARGÜELLO
ELYA NASSAJ
TAL NECHMAD
MATT O'CONNOR
TEGAN OLIVER

JACOB OUTWIN
RACHEL PEPPER
LEAH PORTER
BECCA RICHARDSON
BRITTANY ROCCO
STEPHEN RUTKOWSKI
JULIA SCOLAPIO
KHUSHAL SHAH
BENJAMIN SHAIMAN
GRANT SHENKMAN
ERIN SHYR HOLM
RACHEL SMITH
ANEESH SOOD
CALLIE STEVENS
SOPHIA TALESNIK
FRASER TROTTER
EBONY UPSHAW
ALEXIS VOCATURA
LEILA WARGOTZ
MATTHEW WEST
TANNER WHITESELL
ISABEL WILLIAMS
JIWON EMMA YANG
AMANDA YAP
SOPHIE YOUNG
BRIAN ZILBERBERG

The George Washington University Law School

2024–2025

Officers of Administration

Ellen W. Granberg, B.S., Ph.D., *President of the University*
Dayna Bowen Matthew, A.B., J.D., Ph.D., *Dean of the Law School; Harold H. Greene Professor of Law*
Michael Abramowicz, B.A., J.D., *Associate Dean for Strategy and Innovation; Oppenheim Professor of Law*
Randall S. Abate, B.A., M.S.L., J.D., *Assistant Dean for Environmental Law Studies*
Jason Belk, B.A., M.P.P., J.D., *Associate Dean of Students*
Carmia N. Caesar, B.A., J.D., *Associate Dean for Justice, Equity, Diversity, and Inclusion*
Rosa Celorio, B.S., J.D., *Associate Dean for International and Comparative Legal Studies; Burnett Family Distinguished Professorial Lecturer in International and Comparative Law and Policy*
Elizabeth L. Ewert, B.A., M.F.A., J.D., *Senior Associate Dean for Administrative Affairs; John S. Jenkins Family Professorial Lecturer in Law and Policy Chair*
Aram A. Gavoor, B.A., J.D., LL.M., *Associate Dean for Academic Affairs; Professorial Lecturer in Law; Professor (by courtesy), Trachtenberg School of Public Policy & Public Administration*
Suzanne Hard, B.A., J.D., *Associate Dean for Professional Development and Career Strategy*
Kathy Hessler, B.A., J.D., LL.M., *Assistant Dean for Animal Law*
David M. Johnson, B.A., J.D., *Assistant Dean for Advocacy Programs; Professorial Lecturer in Law*
Shehernaz D. Joshi, B.A., M.A., *Assistant Dean, Graduate and International Programs*
Laurie S. Kohn, B.A., J.D., LL.M., *Jacob Burns Foundation Associate Dean for Clinical Affairs; Associate Professor of Clinical Law; Director of the Family Justice Litigation Clinic; Director of the Access to Justice Clinic*
Keri A. McCoy, B.A., J.D., *Assistant Dean for Field Placement*
Alan B. Morrison, B.A., LL.B., *Lerner Family Associate Dean for Public Interest and Public Service Law; Professorial Lecturer in Law*
Scott B. Pagel, B.A., M.A.L.S., J.D., *Associate Dean for Information Services; Director of the Law Library; Professor of Law*
Michael Rand, B.S., B.S.B.A., M.A., Ph.D., *Assistant Dean for Business and Finance Law*
Alfreda Robinson, B.A., M.A., J.D., *Associate Dean for Trial Advocacy; Professorial Lecturer in Law; Co-Director of the Litigation and Dispute Resolution Program*
Lisa M. Schenck, B.A., M.P.A., J.D., LL.M., J.S.D., *Associate Dean for National Security, Cybersecurity, and Foreign Relations Law; Distinguished Professorial Lecturer in Law*
Steven L. Schooner, B.A., J.D., LL.M., *Jeffrey & Martha Kohn Senior Associate Dean for Academic Affairs; Nash & Cibinic Professor of Government Procurement Law*
Jonathan R. Siegel, B.A., J.D., *Associate Dean for Research and Faculty Development; F. Elwood and Eleanor Davis Research Professor of Law*
Sophia Sim, B.A., J.D., *Associate Dean for Admissions and Financial Aid*
Kristoffer Svendsen, LL.B., LL.M., Ph.D., *Assistant Dean for Energy Law*
Anthony D. Tiberio, B.A., M.A., J.D., *Assistant Dean of Students*
Jessica Tillipman, B.A., J.D., *Associate Dean for Government Procurement Law Studies; Government Contracts Advisory Council Distinguished Professorial Lecturer in Government Contracts Law, Practice & Policy*
John M. Whealan, B.S., M.S., J.D., *Associate Dean for Intellectual Property Law; Director, GW Center for Law and Technology*

Jacob Burns Law Library

Robert Bratton, B.A., M.L.S., *Head of Cataloging & Metadata Services*
Nate Delmar, B.A., J.D., M.L.I.S., *National Security Law Librarian*
Jennifer Fritz, B.M.M.E., M.L.I.S., *Systems Librarian*
Nicole Harris, B.A., J.D., M.L.I.S., *Assistant Director for Innovative Technology Services*
Mary Kate Hunter, A.B., J.D./B.C.L., M.S.L.I.S., *Head of Reference & Government Procurement Law Librarian*
Raphael D. Jackson-Ortiz, J.D., M.L.S., *Head of Legal Technology Services*
Germaine Leahy, B.A., M.L.S., *Energy & Environmental Law Librarian*
Iris Lee, B.A., M.L.S., J.D., *Head of Access Services*
Leslie A. Lee, B.A., J.D., M.L.S., *Assistant Director for Administrative Services*
Trina R. Robinson, B.A., J.D., M.L.I.S., *Assistant Director for Resource Management Services*
Traci Emerson Spackey, B.A., J.D., M.L.I.S., *Foreign & International Law Librarian*
Andrew M. Winston, B.A., J.D., M.S.L.I.S., *Assistant Director for Public Services*

Emeriti Faculty

Martin J. Adelman, B.A., M.S., J.D., *Theodore and James Pedas Family Professor Emeritus of Intellectual Property and Technology Law; Co-Director of the Intellectual Property Law Program; Co-Director of the Dean Dinwoodey Center for Intellectual Property Studies*

John F. Banzhaf, III, B.S.E.E., J.D., *Professor Emeritus of Law*

Jerome A. Barron, B.A., J.D., LL.M., *Harold H. Greene Professor of Law Emeritus*

W. Burlette Carter, B.A., J.D., *Professor Emerita of Law*

Donald C. Clarke, B.A., M.Sc., J.D., *David Weaver Research Professor Emeritus of Law*

Charles B. Craver, B.S., M.I.L.R., J.D., *Freda H. Alverson Professor Emeritus of Law*

Lynn E. Cunningham, B.A., B.D., J.D., *Professor Emeritus of Clinical Law*

Lawrence A. Cunningham, B.A., J.D., *Henry St. George Tucker III Research Professor of Law Emeritus*

Jack Harlan Friedenthal, B.A., J.D., *Howrey Professor Emeritus of Trial Advocacy, Litigation, and Professional Responsibility*

Miriam Galston, B.A., Ph.D., J.D., *Associate Professor Emeritus of Law*

Phyllis Goldfarb, B.A., Ed.M., J.D., LL.M., *Jacob Burns Foundation Professor of Clinical Law Emeritus*

Carol L. Izumi, B.A., J.D., *Professor Emeritus of Clinical Law*

Suzanne H. Jackson, B.A., J.D., *Professor Emerita of Clinical Law*

Laird Kirkpatrick, B.A., J.D., *Louis Harkey Mayo Research Professor Emeritus of Law*

Ira C. Lupu, B.A., J.D., *F. Elwood and Eleanor Davis Professor Emeritus of Law*

Peter H. Meyers, B.A., J.D., *Professor of Law Emeritus*

Thomas D. Morgan, B.A., J.D., *Oppenheim Professor Emeritus of Antitrust and Trade Regulation Law*

Ralph Clarke Nash, Jr., A.B., J.D., *Professor Emeritus of Law*

Anne K. Olesen, B.S., M.A., J.D., *Professor Emerita of Clinical Law*

Robert E. Park, B.S., B.A., J.D., LL.M., *Professor Emeritus of Law*

Peter Raven-Hansen, B.A., J.D., *Glen Earl Weston Research Professor of Law Emeritus*

Arnold W. Reitze, Jr., B.A., J.D., M.P.H., *J.B. and Maurice C. Shapiro Professor Emeritus of Environmental Law*

Catherine J. Ross, B.A., Ph.D., J.D., *Lyle T. Alverson Professor Emeritus of Law*

Roger E. Schechter, B.A., J.D., *Professor Emeritus of Law*

Lewis A. Schiller, B.A., J.D., *Professor Emeritus of Law*

Teresa Moran Schwartz, B.A., J.D., *J.B. and Maurice C. Shapiro Professor Emeritus of Public Interest Law*

David J. Sharpe, A.B., LL.B., S.J.D., *Professor Emeritus of Law*

Dinah L. Shelton, B.A., J.D., *Manatt/Ahn Professor of International Law Emeritus*

Eric Scott Sirulnik, B.A., J.D., LL.M., *Professor Emeritus of Law*

Lewis D. Solomon, B.A., J.D., *Van Vleck Research Professor of Law*

Ralph G. Steinhardt, B.A., J.D., *Lobingier Professor Emeritus of Comparative Law and Jurisprudence*

Joan H. Strand, B.A., J.D., *Professor Emeritus in Residence of Clinical Law*

Arthur E. Wilmarth, Jr., B.A., J.D., *Professor Emeritus of Law*

Luize E. Zubrow, B.A., J.D., *Professor Emeritus of Law*

Full-Time Faculty Members

Cori Alonso-Yoder, A.B., J.D., *Associate Professor of Fundamentals of Lawyering*

Jeremy Bearer-Friend, B.A., M.A., J.D., *Associate Professor of Law*

Emily Benfer, B.A., J.D., LL.M., *Associate Professor of Clinical Law; Director of the Health Equity Policy & Advocacy Clinic*

Alberto M. Benítez, B.A., J.D., *Professor of Clinical Law; Director, Immigration Clinic*

Paul Schiff Berman, A.B., J.D., *Walter S. Cox Professor of Law*

Francesca Bignami, A.B., M.Sc., J.D., *LeRoy Sorenson Merrifield Research Professor of Law*

Natalia Blinkova, B.A., M.A., J.D., *Acting Writing Center Coordinator; Associate Professor of Fundamentals of Lawyering*

Christopher A. Bracey, B.S., J.D., *Provost and Executive Vice President for Academic Affairs; Professor of Law*

Donald Braman, B.A., Ph.D., J.D., *Associate Professor of Law*

Robert Brauneis, B.A., J.D., *Michael J. McKeon Professor of Intellectual Property Law; Co-Director of the Intellectual Property Law Program; Co-Director of the Dean Dinwoodey Center for Intellectual Property Studies; Member, Managing Board, Munich Intellectual Property Law Center*

Karen B. Brown, B.A., J.D., LL.M., *Theodore Rinehart Professor of Business Law*

Leslie D. Callahan, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*

Arturo J. Carrillo, B.A., J.D., LL.M., *Professor of Clinical Law*

Steve Charnovitz, B.A., J.D., M.P.P., *Associate Professor of Law*

Mary M. Cheh, B.A., J.D., LL.M., *Elyce Zenoff Research Professor of Law*

Bradford R. Clark, B.A., J.D., *William Cranch Research Professor of Law*

Thomas Colby, B.A., J.D., *John Theodore Fey Research Professor of Law*
 John P. Collins, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 Robert J. Cottrol, B.A., Ph.D., J.D., *Harold Paul Green Research Professor of Law*
 Katya Cronin, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 Laura A. Dickinson, A.B., J.D., *Lyle T. Alverson Professor of Law*
 William S. Dodge, B.A., J.D., *Lobingier Professor of Comparative Law and Jurisprudence*
 David Fontana, B.A., J.D., *Samuel Tyler Research Professor*
 Mary Anne Franks, B.A., M.Phil., D.Phil., J.D., *Eugene L. and Barbara A. Bernard Professor in Intellectual Property, Technology, and Civil Rights Law*
 Theresa A. Gabaldon, B.S., J.D., *Lyle T. Alverson Professor of Law; Director of Academic Programs and Administration, C-LEAF*
 Iselin Gambert, B.A., J.D., *Director, Fundamentals of Lawyering Program; Professor, Fundamentals of Lawyering; Faculty Co-Director, Animal Legal Education Initiative*
 Robert L. Glicksman, B.A., M.A., J.D., *J.B. and Maurice C. Shapiro Professor of Environmental Law*
 Bethany Gullman, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 Jeffrey S. Gutman, B.A., J.D., *Professor of Clinical Law; Director, Public Justice Advocacy Clinic*
 Lula Hagos, B.A., J.D., LL.M., *Associate Professor of Clinical Law; Director, Criminal Defense and Justice Clinic*
 Emily Hammond, B.S., J.D., *Glen Earl Weston Research Professor of Law; Faculty Director of Academic Sustainability Programs, GW Alliance for a Sustainable Future*
 Robin L. Juni, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 Cheryl A. Kettler, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 F. Scott Kieff, B.S., J.D., *Stevenson Bernard Professor of Law; Faculty Director, C-LEAF*
 William E. Kovacic, B.A., J.D., *Global Competition Professor of Law and Policy; Professor of Law; Director, Competition Law Center*
 Cynthia Lee, B.A., J.D., *Edward F. Howrey Professor of Law*
 Renée Lettow Lerner, A.B., M.Litt., J.D., *Donald Phillip Rothschild Research Professor*
 Heidi H. Liu, A.B., J.D., Ph.D., *Associate Professor of Law*
 Jeffrey Manns, B.A., D.Phil., J.D., *Professor of Law*
 Maeva Marcus, B.A., M.A., Ph.D., *Research Professor of Law; Director of the Institute for Constitutional Studies*
 Brooke Ellinwood McDonough, B.A., J.D., *Acting Coordinator of Scholarly Writing; Associate Professor of Fundamentals of Lawyering*
 Caitlin Meade, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 Joan S. Meier, B.A., J.D., *National Family Violence Law Center Professor of Clinical Law; Director, National Family Violence Law Center at the George Washington University Law School*
 Dalia Tsuk Mitchell, LL.B., LL.M., S.J.D., Ph.D., *The John Marshall Harlan Dean's Research Professor of Law; Professor of Law and History*
 Blake D. Morant, B.A., J.D., *Robert Kramer Research Professor of Law*
 Sean D. Murphy, B.A., J.D., LL.M., S.J.D., *Manatt/Ahn Professor of International Law*
 Dawn C. Nunziato, B.A., M.A., J.D., *The Peadar Family Endowed Professorship; William Wallace Kirkpatrick Research Professor*
 Spencer Overton, B.A., J.D., *The Patricia Roberts Harris Research Professor of Law*
 Todd D. Peterson, A.B., J.D., *Carville Dickinson Benson Research Professor*
 Richard J. Pierce, Jr., B.S., J.D., *Lyle T. Alverson Professor of Law*
 Erika Nicole Pont, B.A., J.D., *Associate Director, Fundamentals of Lawyering Program; Coordinator of the Dean's Fellow Program; Associate Professor of Fundamentals of Lawyering*
 Jennifer Wimsatt Pusateri, B.A., J.D., LL.M., *Associate Professor of Fundamentals of Lawyering*
 Laura S. Richman, B.A., Ph.D., *Associate Professor of Social Science and Health Law*
 Barak D. Richman, A.B., J.D., Ph.D., *Alexander Hamilton Professor of Business Law*
 Jeffrey Rosen, A.B., B.A., J.D., *Professor of Law*
 Stephen A. Saltzburg, B.A., J.D., *Wallace and Beverley Woodbury University Professor of Law; Co-Director of the Litigation and Dispute Resolution Program*
 Joan E. Schaffner, B.S., M.S., J.D., *Associate Professor of Law; Faculty Co-Director of the Animal Legal Education Initiative*
 Naomi T. Schoenbaum, B.A., J.D., *William Wallace Kirkpatrick Dean's Research Professor of Law*
 Joshua I. Schwartz, B.A., J.D., M.R.P., *E.K. Gubin Professor of Government Contracts Law; Co-Director of the Government Procurement Law Program*
 Omari Scott Simmons, B.A., J.D., LL.M., *Lyle T. Alverson Professor of Law*
 Anita M. Singh, B.A., B.S., M.A., J.D., *Associate Director, Fundamentals of Lawyering Program; Associate Professor of Fundamentals of Lawyering*
 Peter J. Smith, B.A., J.D., *Arthur Selwyn Miller Research Professor*
 Daniel Justin Solove, B.A., J.D., *Eugene L. and Barbara A. Bernard Professor of Intellectual Property and Technology Law; Faculty Co-Director, GW Center for Law & Technology*
 Alicia Solow-Niederman, B.A., J.D., *Associate Professor of Law*
 Jessica K. Steinberg, B.A., J.D., *Professor of Law*
 Sonia M. Suter, B.A., M.S., J.D., *Henry St. George Tucker III Dean's Research Professor of Law; Kahan Family Research Professor of Law; Founding Director, Health Law Initiative*

Edward T. Swaine, A.B., J.D., *Charles Kennedy Poe Research Professor*
 Joel Teitelbaum, B.A., J.D., LL.M., *Associate Professor of Health Policy; Associate Professor of Law (courtesy appointment)*
 Roger H. Trangsrud, B.A., J.D., *James F. Humphreys Professor of Complex Litigation and Civil Procedure*
 Jonathan Turley, A.B., J.D., *J.B. and Maurice C. Shapiro Professor of Public Interest Law; Director of the Environmental Law Advocacy Center; Executive Director, Project for Older Prisoners*
 Robert W. Tuttle, B.A., M.A., J.D., Ph.D., *David R. and Sherry Kirschner Berz Research Professor of Law and Religion*
 Charles Tyler, B.A., B. Phil., J.D., *Associate Professor of Law*
 Tania N. Valdez, B.A., J.D., *Associate Professor of Law*
 Kayonia L. Whetstone, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 Kathryn Young, B.A., M.F.A., J.D., Ph.D., *Associate Professor of Law*
 Christopher R. Yukins, A.B., J.D., *Lynn David Research Professor in Government Procurement Law*

Fellows, Visitors, and Other Special Faculty Members

Mary Catherine Amerine, B.A., J.D., *Visiting Associate Professor of Law and Frank H. Marks Intellectual Property Law Fellow*
 Leah Calabro, B.A., B.F.A., J.D., *Visiting Associate Professor of Law and International and Comparative Law Fellow*
 Peter Calloway, B.A., J.D., *Visiting Associate Professor of Clinical Law and Friedman Fellow*
 Ashley Carter, B.A., J.D., *Visiting Associate Professor of Clinical Law*
 Caroline Cecot, A.B., J.D., Ph.D., *Visiting Associate Professor of Law*
 Roger Colinvau, B.A., M.Litt, J.D., *Visiting Professor of Law*
 Lolita Darden, B.E., J.D., M.F.E., *Visiting Associate Clinical Professor; Director of Intellectual Property and Technology Clinic*
 Holly R. Eaton, A.B., J.D., *Friedman Fellow and Visiting Associate Professor of Clinical Law for the Public Justice Advocacy Clinic*
 Jane Moretz Edmisten, B.A., M.A., J.D., *Visiting Associate Professor of Law*
 Giovanna E. Gismondi, LL.B., LL.M., S.J.D., *Visiting Professor of Law and Environmental Law Fellow*
 Drake Hagner, B.A., J.D., *Visiting Associate Professor of Clinical Law*
 Christina Lee, B.A., B.S., M.S., J.D., *Visiting Associate Professor of Law and Privacy and Technology Law Fellow*
 Robert Parrish, B.A., M.A., J.D., *Visiting Professor of Fundamentals of Lawyering*
 Sara Rosenbaum, B.A., J.D., *Harold and Jane Hirsh Professor of Health Law and Policy, School of Public Health and Health Services; Professor of Law (by Courtesy)*
 Melinda Roth, B.A., M.P.P., J.D., *Visiting Associate Professor of Law*
 Loren Voss, B.A., M.A., J.D., *National Security, Cybersecurity, and Foreign Relations Law Fellow; Visiting Professor of Law*

Professors of Practice

Jonathan G. Cedarbaum, A.B., M.A., M.Phil., J.D., *Professor of Practice for National Security, Cybersecurity, and Foreign Relations Law*
 Jeffrey I. Kohn, B.S., J.D., *Professor of Practice for Business and Finance Law*

Adjunct Faculty

Ernest B. Abbott, B.A., M.P.P., J.D., *Professional Lecturer in Law*
 Hdeel Abdelhady, B.A., J.D., *Professorial Lecturer in Law*
 Jason A. Abel, B.A., J.D., *Professorial Lecturer in Law*
 Victoria Ajayi, B.A., J.D., *Professorial Lecturer in Law*
 Brittany Aldredge, B.A., M.A., J.D., *Professorial Lecturer in Law*
 S. Craig Alexander, B.S., J.D., *Professorial Lecturer in Law*
 Stanimir A. Alexandrov, J.D., LL.M., S.J.D., *Professorial Lecturer in Law*
 Samiyyah R. Ali, B.A., M.A., J.D., *Professorial Lecturer in Law*
 John D. Altenburg, B.A., J.D., M.M.A.S., *Professorial Lecturer in Law*
 Eric Steven Angel, B.A., J.D., *Professorial Lecturer in Law*
 Hiba M. Anver, B.A., J.D., *Professorial Lecturer in Law*
 Jay Apperson, B.A., M.A., J.D., LL.M., *Professorial Lecturer in Law*
 William P. Atkins, B.S., J.D., M.B.A., LL.M., *Professorial Lecturer in Law*
 Michael K. Atkinson, B.A., J.D., *Professorial Lecturer in Law*
 Donna Attanasio, A.B., J.D., *Professorial Lecturer in Law*
 Benedetta Audia, J.D., LL.M., *Professorial Lecturer in Law*
 Marshall Babson, A.B., J.D., *Professorial Lecturer in Law*
 Hallie Tremaine Balkin, B.A., J.D., *Professorial Lecturer in Law*
 Charles K. Barber, B.A., J.D., *Professorial Lecturer in Law*

Jonathan A. Barnes, B.A., J.D., *Professorial Lecturer in Law*
 Craig D. Barrett, B.A., J.D., M.A., LL.M., *Professorial Lecturer in Law*
 Michael St. Patrick Baxter, LL.B., LL.M., *Professorial Lecturer in Law*
 Robert Baxter, B.A., M.A., J.D., *Professorial Lecturer in Law; Director, Schenck National Security Crisis Negotiations Competition*
 Philip Bayer, B.S.E., J.D., *Professorial Lecturer in Law*
 Sara J. Bayram, B.A., J.D., *Professorial Lecturer in Law*
 Michael Beder, B.S., J.D., *Professorial Lecturer in Law*
 Locke Bell, B.S., J.D., *Professorial Lecturer in Law*
 James P. Benoit, B.S., M.B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Robert R. Berger, B.A., J.D., *Professorial Lecturer in Law*
 Frank J. Bewkes, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Linda E. Blauhut, B.A., J.D., *Professorial Lecturer in Law*
 Steven N. Blivess, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Samantha Block, B.A., B.S., M.A., J.D., *Professorial Lecturer in Law*
 Matthew Blum, B.A., J.D., *Professorial Lecturer in Law*
 Jeff Blumberg, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Nathaniel Blaine Bolin, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Alex Bopp, B.A., J.D., *Professorial Lecturer in Law*
 Ronald Joseph Borro, B.S., J.D., *Professorial Lecturer in Law*
 Christina E. Bortz, B.A., J.D., *Professorial Lecturer in Law*
 Andrew Bowne, B.A., J.D., LL.M., Ph.D., *Professorial Lecturer in Law*
 Samuel B. Boxerman, B.A., J.D., *Professorial Lecturer in Law*
 Jeffrey Breinholt, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Patricia A. Broderick, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Thomas E. Brzozowski, B.A., J.D., LL.M., M.S.S., *Professorial Lecturer in Law*
 Trent Buatte, B.A., J.D., *Professorial Lecturer in Law*
 Michael F. Buchwald, B.A., J.D., *Professorial Lecturer in Law*
 Todd Buchwald, B.A., J.D., *Professorial Lecturer in Law*
 Bobby Burchfield, B.A., J.D., *Professorial Lecturer in Law*
 David Calabrese, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Charles Henry Camp, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Alexander O. Canizares, B.A., J.D., *Professorial Lecturer in Law*
 George Cannon, Jr., B.A., J.D., *Professorial Lecturer in Law*
 Marinn Carlson, B.A., M.P.A., J.D., *Professorial Lecturer in Law*
 Phillip Carter, B.A., J.D., *Professorial Lecturer in Law*
 Rebecca Cary, B.A., J.D., *Professorial Lecturer in Law*
 Mike Chajon, B.S., J.D., *Professorial Lecturer in Law*
 Joshua D. Champagne, B.A., J.D., *Professorial Lecturer in Law*
 Robin K. Chand, B.A., J.D., *Professorial Lecturer in Law*
 Jennifer A. Chang-Lo, B.A., M.S., *Professorial Lecturer in Law*
 Dana J. Chase, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Louis A. Chiarella, B.A., J.D., M.A., LL.M., *Distinguished Professorial Lecturer in Government Procurement Law*
 Jennifer S. Choi, B.S., J.D., *Professorial Lecturer in Law*
 Megan A. Christensen, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Victoria Christoff, B.A., J.D., *Professorial Lecturer in Law*
 Frances Chrzan, B.A., J.D., *Professorial Lecturer in Law*
 Jaimie Clark, A.A.S., B.A., M.S., J.D., *Professorial Lecturer in Law*
 Michael S. Coffee, B.S., J.D., *Professorial Lecturer in Law*
 David K. Cohen, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Melissa Colangelo, B.A., J.D., *Professorial Lecturer in Law*
 Amanda S. Conn, B.A., J.D., *Professorial Lecturer in Law*
 William E. Cooper, B.A., J.D., *Professorial Lecturer in Law*
 Liza Craig, B.A., J.D., *Professorial Lecturer in Law*
 Polly Craighill, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Paul Crane, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Graham R. Cronogue, B.A., J.D., *Professorial Lecturer in Law*
 John R. Crook, B.A., J.D., *Professorial Lecturer in Law*
 William Davis, B.A., J.D., *Professorial Lecturer in Law*
 Ryan K.J. Dickey, B.S., J.D., *Professorial Lecturer in Law*
 Anne P. Donohue, B.A., J.D., *Professorial Lecturer in Law*
 Patrick A. Doody, B.S., J.D., *Professorial Lecturer in Law*
 Matthew J. Dowd, B.S., J.D., *Professorial Lecturer in Law*
 Donna M. Downing, B.A., M.P.P., J.D., LL.M., *Professorial Lecturer in Law*
 Geoff Drucker, B.A., J.D., M.S., *Professorial Lecturer in Law*
 Alan Dubin, B.A., J.D., *Professorial Lecturer in Law*
 Alexandra D. Dunn, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Dale Durrer, B.A., J.D., *Professorial Lecturer in Law*

Randall D. Eliason, B.A., J.D., *Professorial Lecturer in Law*
 Andrew Eskin, B.A., M.B.A., J.D., *Professorial Lecturer in Law*
 Theodore R. Essex, B.A., J.D., *Professorial Lecturer in Law*
 Leslie Fair, A.B., J.D., *Professorial Lecturer in Law*
 Patrick Fang, B.B.A., J.D., *Professorial Lecturer in Law*
 William J. Farah, B.A., J.D., *Professorial Lecturer in Law*
 Stanley G. Fendley, B.A., M.B.A., J.D., *Professorial Lecturer in Law*
 Phil T. Feola, B.A., M.S., J.D., *Professorial Lecturer in Law*
 Scott Ferber, B.A., J.D., *Professorial Lecturer in Law*
 Stanley E. Fisher, B.S., J.D., *Professorial Lecturer in Law*
 Jared Fishman, B.A., J.D., *Professorial Lecturer in Law*
 Brandon Flick, B.A., J.D., *Professorial Lecturer in Law*
 Matthew Forst, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Cole R. Fox, B.A., J.D., *Professorial Lecturer in Law*
 Leon Fresco, B.A., J.D., *Professorial Lecturer in Law*
 Paul L. Frieden, B.A., J.D., *Professorial Lecturer in Law*
 Joshua Edward Gardner, B.A., J.D., *Professorial Lecturer in Law*
 Theresa Gee, B.A., J.D., *Professorial Lecturer in Law*
 Renée Gentry, B.A., J.D., *Distinguished Professorial Lecturer in Law; Director, Vaccine Injury Litigation Clinic*
 Jason Gerson, B.A., J.D., *Professorial Lecturer in Law*
 Francis A. Gilligan, B.A., J.D., LL.M., S.J.D., *Professorial Lecturer in Law*
 Kevin Gingras, B.A., J.D., *Professorial Lecturer in Law*
 Jonathan K. Gitlen, B.A., J.D., *Professorial Lecturer in Law*
 Kolya Glick, B.A., J.D., *Professorial Lecturer in Law*
 Kuyomars Golparvar, B.A., J.D., *Professorial Lecturer in Law*
 Timothy Goodman, B.S.F.S., J.D., *Professorial Lecturer in Law*
 Kiran N. Gore, B.A., J.D., *Professorial Lecturer in Law*
 John H. Gountanis, B.A., J.D., *Professorial Lecturer in Law*
 Nicole P. Grant, B.A., J.D., *Professorial Lecturer in Law*
 Jonathan J. Green, B.A., J.D., *Professorial Lecturer in Law*
 Allen Green, B.A., J.D., *Professorial Lecturer in Law*
 Jonathan L. Greenblatt, B.A., J.D., *Professorial Lecturer in Law*
 Erin J. Greden, B.A., J.D., *Professorial Lecturer in Law*
 Ben Grillot, B.A., M.S.L.S., J.D., *Professorial Lecturer in Law*
 J. Brett Grosko, B.A., M.A., J.D., *Professorial Lecturer in Law*
 R. Budd Haemer, B.S., Ch.E., J.D., *Professorial Lecturer in Law*
 Curt C. Haensel, B.A., J.D., *Professorial Lecturer in Law*
 Minsuk Han, B.A., J.D., *Professorial Lecturer in Law*
 Leila Hanafi, B.A., M.A., LL.M., Ph.D., *Professorial Lecturer in Law*
 Marc P. Hansen, B.A., M.A.T., J.D., *Professorial Lecturer in Law*
 Jonathan Haray, B.A., J.D., *Professorial Lecturer in Law*
 Calsy M. Hartman, B.S., J.D., *Professorial Lecturer in Law*
 Brian S. Harvey, B.A., J.D., *Professorial Lecturer in Law*
 Ann Woods Hawks, B.A., J.D., *Professorial Lecturer in Law*
 Hana Heineken, A.B., J.D., *Professorial Lecturer in Law*
 The Honorable Karen A. Henenberg, B.A., J.D., *Professorial Lecturer in Law*
 Henry Hertzfeld, B.A., M.A., Ph.D., J.D., *Research Professor of Space Policy and International Affairs*
 Kate E. Hill, B.A., J.D., *Professorial Lecturer in Law*
 Theodore Charles Hirt, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Adam S. Hoffinger, B.A., J.D., *Professorial Lecturer in Law*
 Eileen Barkas Hoffman, B.S., M.A., J.D., *Professorial Lecturer in Law*
 Jonathan Hooks, A.B., J.D., *Professorial Lecturer in Law*
 James E. Hopenfeld, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Marian Blank Horn, B.A., J.D., *Professorial Lecturer in Law*
 Meghan Hottel-Cox, B.A., J.D., *Professorial Lecturer in Law*
 Richard Hughes IV, B.A., M.P.H., J.D., *Professorial Lecturer in Law*
 The Honorable Craig S. Iscoe, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Brandon Jackson, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Fred B. Jacob, B.A., J.D., *Professorial Lecturer in Law*
 Lauren Johnson, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Alyssa M. Johnson, B.A., J.D., *Professorial Lecturer in Law*
 David S. Jonas, B.A., J.D., LL.M., LL.M., *Professorial Lecturer in Law*
 April Jones, B.A., J.D., *Professorial Lecturer in Law*
 David Brian Kacedon, B.S., J.D., *Professorial Lecturer in Law*
 Robert Kang, B.A., J.D., *Professorial Lecturer in Law*
 Debi R. Kant, J.D., *Professorial Lecturer in Law*
 Michael V. Kaplen, B.A., J.D., *Professorial Lecturer in Law*

Joshua M. Kaplowitz, B.A., J.D., *Professorial Lecturer in Law*
 Kristine Bridget Kassekert, J.D., LL.M., M.A., *Professorial Lecturer in Law*
 Robert S. Katz, B.S., J.D., *Professorial Lecturer in Law*
 Thomas Kearns, B.S., B.A., J.D., *Professorial Lecturer in Law*
 Kathleen M. Kedian, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Kim M. Keenan, B.S.F.S., J.D., *Professorial Lecturer in Law*
 Suedeene Kelly, B.A., J.D., *Professorial Lecturer in Law*
 Prashant K. Khetan, B.S., J.D., *Professorial Lecturer in Law*
 Minwoo Kim, B.A., J.D., *Professorial Lecturer in Law*
 Brian J. Kirkell, B.A., J.D., *Professorial Lecturer in Law*
 Peter Komorowski, B.A., A.A., M.A., J.D., *Professorial Lecturer in Law*
 Hean L. Koo, B.S., J.D., *Professorial Lecturer in Law*
 Carl Kravitz, A.B., J.D., *Professorial Lecturer in Law*
 John Kropf, B.A., M.P.I.A., J.D., *Professorial Lecturer in Law*
 Melissa A. Kucinski, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Jeffrey P. Kushan, B.S., M.A., J.D., *Professorial Lecturer in Law*
 Kamay Lafalsie, B.S., J.D., *Professorial Lecturer in Law*
 Jeffrey A. Lamken, B.A., J.D., *Professorial Lecturer in Law*
 Thomas D. Lasich, B.A., *Professorial Lecturer in Law*
 Kevin B. Laurence, B.A., J.D., *Professorial Lecturer in Law*
 Tawanna D. Lee, B.S., M.Ed., J.D., *Professorial Lecturer in Law*
 Craig E. Leen, A.B., J.D., *Professorial Lecturer in Law*
 Robert Leibenluft, B.A., J.D., *Professorial Lecturer in Law*
 David A. Levine, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Michael N. Levy, B.A., J.D., *Professorial Lecturer in Law*
 Nick Lewis, B.A., J.D., M.Sc., *Professorial Lecturer in Law*
 Josh Loigman, B.A., J.D., *Professorial Lecturer in Law*
 John Longwell, B.A., J.D., *Professorial Lecturer in Law*
 Alan J. LoRe, B.A., J.D., *Professorial Lecturer in Law*
 David Ludwig, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Cynthia C. Lynch, B.A., J.D., *Professorial Lecturer in Law*
 Susan Carney Lynch, B.A., J.D., LL.M., Dr.P.H., *Professorial Lecturer in Law*
 Eve Lyon, J.D., *Professorial Lecturer in Law*
 Daniel Mach, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Gregory E. Maggs, A.B., J.D., M.S.S., *Professorial Lecturer in Law*
 Peter B. Maggs, A.B., J.D., *Professorial Lecturer in Law*
 Robin M. Maher, B.A., J.D., *Professorial Lecturer in Law*
 John Mahon, B.S., B.A., J.D., *Professorial Lecturer in Law*
 Peter Malyshev, B.A., M.A., J.D., LL.M., *Professorial Lecturer in Law*
 Karen B. Marcou, B.A., J.D., *Professorial Lecturer in Law*
 John D. Mason, B.A., J.D., *Professorial Lecturer in Law*
 William L. Massey, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Tanner Mathison, B.A., M.S., J.D., *Professorial Lecturer in Law*
 Jason Matson, B.A., J.D., *Professorial Lecturer in Law*
 Darryl J. Maxwell, B.A., J.D., *Professorial Lecturer in Law*
 Marc S. Mayerson, B.A., J.D., *Professorial Lecturer in Law*
 Andrea McBarnette, B.A., J.D., *Professorial Lecturer in Law*
 Kel B. McClanahan, B.S., M.A., J.D., LL.M., *Professorial Lecturer in Law*
 Luke McCloud, B.S., J.D., *Professorial Lecturer in Law*
 James Peyton McCrary, B.A., M.A., Ph.D., *Professorial Lecturer in Law*
 Amanda H. McDowell, B.A., J.D., *Professorial Lecturer in Law*
 Courtland McEneny Ingraham, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Roderick R. McKelvie, B.A., J.D., *Professorial Lecturer in Law*
 Krissy McKenna, B.S., J.D., *Professorial Lecturer in Law*
 Michael J. McKeon, B.S., J.D., *Professorial Lecturer in Law*
 Scott McKeown, B.S., J.D., *Professorial Lecturer in Law*
 Chris McNett, B.S., M.S., J.D., *Professorial Lecturer in Law*
 Edward R. McNicholas, A.B., J.D., *Professorial Lecturer in Law*
 Deneen Melander, B.S., J.D., *Professorial Lecturer in Law*
 Anne-Valerie S. Mirko, B.A., J.D., *Professorial Lecturer in Law*
 David Mitchell, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Hank R. Molinengo, B.A., J.D., LL.M., *Professorial Lecturer in Law and Policy*
 William G.P. Monahan, B.S., M.P.A., J.D., *Professorial Lecturer in Law*
 Karen Morgan, B.A., J.D., *Professorial Lecturer in Law*
 Frank C. Morris, B.S., J.D., *Professorial Lecturer in Law*
 Sarah Morris, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Laura S. Morton, B.A., M.Sc., J.D., *Professorial Lecturer in Law*
 Benjamin Mark Moss, B.A., J.D., M.A., *Professorial Lecturer in Law*
 Darrell G. Mottley, B.S., M.B.A., J.D., *Professorial Lecturer in Law*

Danielle Muenzfeld, B.A., J.D., *Professorial Lecturer in Law*
 David S. Muraskin, B.A., M.Sc., J.D., *Professorial Lecturer in Law*
 Ari Nazarov, B.S., J.D., *Professorial Lecturer in Law*
 Katherine Nesbitt, A.B., J.D., LL.M., *Professorial Lecturer in Law*
 Barry M. Nudelman, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Krista A. Nunez, B.B.A., J.D., *Professorial Lecturer in Law*
 Benjamin Nussdorf, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Daniel Eric Ortiz, B.A., J.D., *Professorial Lecturer in Law*
 Richard J. Osterman, Jr., B.A., J.D., *Professorial Lecturer in Law*
 John S. Pachter, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Jeffrey A. Pade, B.S., J.D., *Professorial Lecturer in Law*
 Maria A. Pallante, B.A., J.D., *Professorial Lecturer in Law*
 S. Jennifer Panahi, B.A., J.D., *Professorial Lecturer in Law*
 Sean S. Park, B.A., J.D., M.S.S., *Professorial Lecturer in Law*
 Anand B. Patel, B.S., J.D., *Professorial Lecturer in Law*
 Amisha Rajni Patel, B.A., J.D., *Professorial Lecturer in Law*
 Charles N. Pede, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Douglas J. Pepe, B.A., J.D., *Professorial Lecturer in Law*
 Nancy Perry, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Stephen Pershing, B.A., J.D., *Professorial Lecturer in Law*
 James P. Petrila, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Sara Pikofsky, B.A., J.D., *Professorial Lecturer in Law*
 Robert B. Pincus, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Anna T. Pinedo, B.S., J.D., *Professorial Lecturer in Law*
 Steven A. Platt, B.A., J.D., *Professorial Lecturer in Law*
 Charles R. Pollack, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Daniel M. Portnov, B.A., J.D., *Professorial Lecturer in Law*
 Brian Michael Privor, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Randall R. Rader, B.A., J.D., *Professorial Lecturer in Law*
 Richard L. Rainey, B.S., J.D., *Professorial Lecturer in Law*
 Valencia R. Rainey, B.A., J.D., *Professorial Lecturer in Law*
 Zol Damon Rainey, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Larry E. Ray, B.A., J.D., *Professorial Lecturer in Law*
 Teresa Stanek Rea, B.S., J.D., *Professorial Lecturer in Law*
 Andrew D. Realon, B.A., J.D., Ed.D., *Associate Director for Student Academic Development;*
Professorial Lecturer in Law
 Harvey L. Reiter, B.A., J.D., *Professorial Lecturer in Law*
 Daniel L. Richard, B.A., M.A., J.D., *Professorial Lecturer in Law*
 James D. Ridgway, B.S., J.D., *Professorial Lecturer in Law*
 Roberta Oluwaseun Roberts, B.S., J.D., *Professorial Lecturer in Law*
 Lindsay Rodman, B.A., J.D., M.P.P., *Professorial Lecturer in Law*
 Dariely Rodriguez, B.A., J.D., *Professorial Lecturer in Law*
 Nury Gambarrotti Rodriguez, B.A., J.D., *Professorial Lecturer in Law*
 Caroline Rogus, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Peter F. Rose, B.A., J.D., *Professorial Lecturer in Law*
 Paul Rosenzweig, B.A., M.S., J.D., *Professorial Lecturer in Law*
 Eleanor Ross, B.A., J.D., *Professorial Lecturer in Law*
 Jane E. Rueger, B.A., J.D., M.B.A., *Professorial Lecturer in Law*
 Robin Rachel Runge, B.A., J.D., *Distinguished Professorial Lecturer in Law*
 Jayna Rust, B.J., M.A., J.D., *Professorial Lecturer in Law*
 Christopher Michael Ryan, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Peter O. Safir, B.A., J.D., *Professorial Lecturer in Law*
 Micah Salb, B.A., J.D., *Professorial Lecturer in Law*
 Michael I. Sanders, B.S., LL.B., LL.M., *Professorial Lecturer in Law*
 Chad T. Sarchio, B.A., J.D., *Professorial Lecturer in Law*
 Jessica Sarnowski, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Andrew Satten, A.B., J.D., *Professorial Lecturer in Law*
 Christopher W. Savage, B.A., J.D., *Professorial Lecturer in Law*
 Frank Scaduto, B.A., J.D., *Professorial Lecturer in Law*
 Mark E. Schamel, B.S., J.D., *Professorial Lecturer in Law*
 Andrew Schatz, B.S., J.D., *Professorial Lecturer in Law*
 Charles D. Schmitz, B.A., J.D., *Professorial Lecturer in Law*
 Daniel Schoeni, B.A., M.A., J.D., LL.M., Ph.D., *Professorial Lecturer in Law*
 Rebecca Schaeffer, B.A., J.D., *Professorial Lecturer in Law*
 David Shaw, B.A., M.S., J.D., *Professorial Lecturer in Law*
 Scott S. Sheffler, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Rami Sibay, B.A., J.D., *Professorial Lecturer in Law*
 Stacy Plotkin Silber, B.A., J.D., *Professorial Lecturer in Law*
 Soumya Silver, B.A., J.D., M.S.T., *Professorial Lecturer in Law*

Thomas J. Simeone, B.S., J.D., *Professorial Lecturer in Law*
 Kyle Singhal, B.S.S., J.D., *Professorial Lecturer in Law*
 Madeline Smedley, B.A., J.D., *Professorial Lecturer in Law*
 Brian D. Smith, B.A., J.D., *Professorial Lecturer in Law*
 Corey J. Smith, B.A., J.D., L.L.M., *Professorial Lecturer in Law*
 Jack D. Smith, B.A., J.D., *Professorial Lecturer in Law*
 Regan Smith, B.A., J.D., *Professorial Lecturer in Law*
 Robert H. Solomon, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Jeri Somers, B.A., J.D., *Professorial Lecturer in Law*
 Keith E. Sonderling, B.S., J.D., *Professorial Lecturer in Law*
 Regina Y. Speed-Bost, A.B., J.D., *Professorial Lecturer in Law*
 Leonard P. Stark, B.A., B.S., M.A., D.Phil., J.D., *Professorial Lecturer in Law*
 Andrew A. Steinberg, B.A., J.D., *Professorial Lecturer in Law*
 Dan E. Stigall, B.A., J.D., LL.M., *Distinguished Profesorial Lecturer in National Security Law*
 Sydney L. Stringer, B.A., J.D., *Professorial Lecturer in Law*
 Sandra Lee Strokoff, B.A., M.A., J.D., *Professorial Lecturer in Law*
 John H. Sturc, B.A., J.D., *Professional Lecturer in Law*
 Dwight H. Sullivan, B.A., M.A., J.D., LL.M., *Professorial Lecturer in Law*
 Maria Swaby, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Collin David Swan, B.A., J.D., *Professorial Lecturer in Law*
 Carolyn Sweeney, B.A., M.Ed., J.D., *Professorial Lecturer in Law*
 John L. Szabo, B.S., J.D., *Professorial Lecturer in Law*
 Mary Lynn Tate, B.A., J.D., *Professorial Lecturer in Law*
 Raffi Teperdijan, B.B.A., J.D., *Professorial Lecturer in Law*
 Steven M. Tepp, B.A., J.D., *Professorial Lecturer in Law*
 Michael A. Terry, B.A., J.D., *Professorial Lecturer in Law*
 Karen DaPonte Thornton, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Matthew Thrasher, B.A., J.D., *Professorial Lecturer in Law*
 Andrew S. H. Ting, A.B., J.D., *Professorial Lecturer in Law*
 Mike Torres, B.A., J.D., *Professorial Lecturer in Law*
 Ethan Torrey, A.B., M.A., J.D., *Professorial Lecturer in Law*
 Mark Traphagen, B.A., J.D., *Professorial Lecturer in Law*
 Michael R. Tregle, Jr., B.A., J.D., *Professorial Lecturer in Law*
 Thomas Tso, A.B., A.M., J.D., *Professorial Lecturer in Law*
 Raizza Ty, B.S., J.D., *Professorial Lecturer in Law*
 Emily A. Unnasch, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Melvin I. Urofsky, A.B., M.A., Ph.D., J.D., *Professorial Lecturer in Law*
 Paulina Vera, B.A., J.D., *Professorial Lecturer in Law*
 James Villa, B.A., J.D., *Professorial Lecturer in Law*
 Daniel Waldman, B.A., J.D., *Professorial Lecturer in Law*
 Johnny Hillary Walker, A.A., B.A., J.D., *Professorial Lecturer in Law*
 Lucas M. Walker, B.A., J.D., *Professorial Lecturer in Law*
 Hank B. Walther, B.A., J.D., *Professorial Lecturer in Law*
 Tara L. Ward, A.B., J.D., *Professorial Lecturer in Law*
 Marc Warren, B.A., J.D., LL.M., M.S., S.J.D., *Professorial Lecturer in Law*
 Edward Waters, B.A., J.D., *Professorial Lecturer in Law*
 Bradley Watts, B.A., J.D., *Professorial Lecturer in Law*
 Charles Wayne, B.A., J.D., *Professorial Lecturer in Law*
 Jason M. Weinstein, B.A., J.D., *Professorial Lecturer in Law*
 Larry Weinstock, B.S., J.D., *Professorial Lecturer in Law*
 Ann Weismann, B.A., J.D., *Professorial Lecturer in Law*
 William K. West, Jr., B.S.M.E., LL.B., *Professorial Lecturer in Law*
 Megan Murphy Wilcox, B.A., J.D., *Professorial Lecturer in Law*
 Beth A. Williams, A.B., J.D., *Professorial Lecturer in Law*
 Amanda Williams, B.A., J.D., *Professorial Lecturer in Law*
 Samuel J. Winer, B.A., J.D., *Professorial Lecturer in Law*
 Lance D. Wood, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 David W. Woodworth, B.A., M.A., J.D., LL.M., *Professorial Lecturer in Law*
 David Philip Yaffe, B.A., J.D., *Professorial Lecturer in Law*
 Esther You, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Lis Young, J.D., M.C.L., LL.M., *Professorial Lecturer in Law*
 John H. Zacharia, B.A., J.D., *Professorial Lecturer in Law*
 Imran Zaidi, B.A., J.D., *Professorial Lecturer in Law*
 Lisa M. Zarlenga, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Ellen M. Zavian, B.S., J.D., *Professorial Lecturer in Law*



Coercive Settlements

Gilat Juli Bachar*

ABSTRACT

Can civil settlements be coercive? Conventional wisdom suggests they generally cannot, as the inherent power dynamic of private law is accepted as inevitable. The media fuels this perception by publishing stories of lucrative bargained-for settlements and ignoring those offered on a take-it-or-leave-it basis by disproportionately powerful defendants. Courts have done the same. Despite the lack of judicial oversight of the settlement process and disadvantaged parties' limited access to legal representation, courts generally refuse to reopen settlement agreements except in cases of fraud or mutual mistake. And although scholars have extensively addressed coercion in plea bargains, they have not paid much attention to their civil, presumably choice-driven, counterparts.

This Article challenges these conventions, arguing that some private settlements—which it labels “high-risk civil settlements”—might be coercive. Using confidential settlements as an example, this Article contends that acquiescence to a defendant's demand for silence in exchange for forgoing a legal claim can reflect coercion when additional factors are present. These factors include position of authority or power, information asymmetry, the context of the dispute, and time pressure. The Article builds on psychological research to show how a plaintiff's voluntariness can be negated by using subtle methods of social influence. Further, this Article draws an analogy between the role of coercion in high-risk civil settlements and in criminal plea bargains. It then leverages this analogy to suggest recommendations for reform. Recognizing the coercive power that stronger parties wield in some private disputes, this Article urges the legal system to step up to assure that civil settlement agreements are in fact mutually desirable deals.

* Assistant Professor, Temple University Beasley School of Law. For helpful feedback and conversations, I wish to thank Alma Diamond, Erika Douglas, Melanie Fessinger, Craig Green, Chris Hampson, Dave Hoffman, Thea Johnson, Richard Jolly, Hila Keren, Jen Lee, J.J. Prescott, Dara Purvis, Itay Ravid, Stephen Ware, the participants of the Law and Society Association Annual Meeting in Denver, the Junior Faculty Colloquium at Temple Law, the SAFI Fifth Annual Conference at the University of Glasgow, the Law and Humanities Workshop at Temple University, the Michigan Junior Scholars Conference, and the faculty colloquium at Penn State Dickinson Law School. Brynn C. Chafin, Jasmine Hinkey, Aimely Michaud-Nolan, and Sarah R. Shaiman provided excellent research assistance. All mistakes are my own.

TABLE OF CONTENTS

INTRODUCTION	734
I. PHILOSOPHICAL FOUNDATIONS OF COERCION	740
II. COERCION IN PLEA BARGAINING	746
A. <i>Why Should Private Law Care About</i> <i>Plea Bargaining?</i>	746
B. <i>Plea Bargains and Voluntariness</i>	748
C. <i>The Scholarly Debate on Coercion in</i> <i>Plea Bargaining</i>	752
D. <i>Psychological Coercion</i>	758
E. <i>Takeaways from Plea Bargaining to Civil</i> <i>Settlement Coercion</i>	762
III. COERCIVE SETTLEMENTS	763
A. <i>Duress, Unconscionability, and Undue Influence</i> <i>in Civil Settlement: Existing Doctrine</i>	765
B. <i>Coercion in High-Risk Civil Settlements</i>	771
1. Procedural Context	772
2. Applying the Coercion Framework to Confidential Settlements	774
3. Structural Factors Contributing to Coercive Settlements	781
C. <i>A Path Forward: Settlement Intervention</i>	785
CONCLUSION	787

[A]ct that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.

—Immanuel Kant¹

INTRODUCTION

Sarah² was mistreated and eventually fired after sharing the news about her high-risk pregnancy with her bosses.³ Sensing that she was wronged, she hired a lawyer and filed a claim against her employer,

¹ IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 38 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785) (emphasis omitted).

² This is a pseudonym.

³ Anya Meyerowitz, *The Real Impact of NDA Abuse: 'I Struggled with Reading My Emails or Answering the Door. Being Silenced is Choking.'* GLAMOUR (Jan. 14, 2022), <https://www.glamourmagazine.co.uk/article/non-disclosure-agreement-abuse> [https://perma.cc/E57J-YGXH]. While Sarah's experience happened in the United Kingdom, similar incidents occur domestically. See *Statistics*, LIFT OUR VOICES, <https://liftourvoices.org/statistics> [https://perma.cc/5MQV-6REN].

starting a chain of legal letters and a cycle of endless stress.⁴ This emotional strain was piled on top of an already challenging pregnancy.⁵ Eventually, Sarah was offered a settlement conditioned on a nondisclosure agreement (“NDA”), which would prevent her from ever speaking about the underlying events.⁶ She took it.⁷ “After seven weeks of to’ing and fro’ing, I couldn’t do it anymore, my mental health was on the floor. . . . It was explained to me as a confidentiality agreement, meaning I couldn’t talk about it. I . . . wanted the whole ordeal to stop, so I signed it.”⁸ Discussing her decision, Sarah says she did not fully grasp the nature of the agreement: “I didn’t understand the repercussions of not speaking about it or how I’d feel being silenced. *Being silenced is choking.*”⁹

The news is replete with stories about money-for-silence exchanges. In particular, President Trump’s conviction involving his “hush money” deal with adult film star Stormy Daniels has kept NDAs in the public eye.¹⁰ Such high-profile cases create the misconception that NDAs typically represent bargained-for exchanges with lucrative payouts.¹¹ But, as Sarah’s story illustrates, reality is sometimes different. NDAs are often made following conduct like harassment, discrimination, or abuse, which disproportionately affect low income and other vulnerable individuals.¹²

⁴ Meyerowitz, *supra* note 3.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* (emphasis added). Sarah also noted, “I wish I’d been told about the ramifications of being silenced, it still feels unfair that I can’t tell people—openly—what happened. And that it would have absolutely no bearing on my former boss.” *Id.*

¹⁰ See Aaron Katersky & Peter Charalambous, *Timeline: Manhattan DA’s Stormy Daniels Hush Money Case Against Donald Trump*, ABC News (Mar. 4, 2025, 3:20 PM), <https://abcnews.go.com/Politics/timeline-manhattan-district-attorney-case-donald-trump/story?id=98389444> [<https://perma.cc/JX7Z-WU33>]. Importantly, the exchange itself was not the subject of the indictment, as NDAs are not generally illegal. Instead, Trump was found guilty of falsifying business records in connection with the exchange. *Id.*

¹¹ See HISCOX, *THE 2015 HISCOX GUIDE TO EMPLOYEE LAWSUITS 6* (2015), <https://www.hiscox.com/documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf> [<https://perma.cc/D83X-YBE2>]. Some scholars have also articulated this view. See Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 467, 477 (1991) (arguing against a legal system premised on public disclosure because only a miniscule portion of all litigation concerns the public interest and the vast majority generates no media attention, and instead arguing in favor of private settlement agreements).

¹² Low-income individuals—such as those working in the hospitality and accommodation sector and the retail sector—are more likely to experience sexual harassment and other forms of workplace mistreatment. See Anne Bolgert, *Lower-Wage Workers Disproportionately Face Sexual Harassment in the Workplace*, SCHAEFER HALLEEN LLC (Nov. 12, 2024), <https://www.schaeferhalleen.com/lower-wage-workers-disproportionately-face-sexual-harassment/> [<https://perma.cc/5WPA-96FF>]; Collier Meyerson, *Sexual Assault When You’re on the Margins: Can We All Say #MeToo?*, NATION (Oct. 19, 2017), <https://www.thenation.com/article/archive/sexual-assault-when-youre-on-the-margins-can-we-all-say-metoo/> [<https://perma.cc/X2XP-PD3Q>] (noting that

Moreover, it has been suggested that disadvantaged individuals with little to no bargaining power are prone to signing NDAs,¹³ especially those offered on a take-it-or-leave-it basis.¹⁴ Such settlements are anything but mutually desirable deals. This Article argues that some might even be coercive.

Courts and scholars have largely not taken note. Existing doctrine provides that settlement agreements can generally only be invalidated if fraud or a mutual mistake was involved.¹⁵ Likewise, the possible coercion of demanding silence in exchange for monetary compensation has not been addressed to date, notwithstanding the prevalence of nondisclosure clauses and their use by disproportionately powerful defendants.¹⁶ Although the philosophical concept of coercion has been explored in a variety of legal issues, including medical ethics,¹⁷ unconstitutional conditions,¹⁸ duress,¹⁹

“[p]eople on the margins—women of color, poor women, undocumented women, and trans men and women—are uniquely impacted by sexual assault and harassment” and subjected to sexual misconduct at disproportionately high rates).

¹³ Some have argued that historically disadvantaged parties are also more likely to sign NDAs. See CMTY. LEGAL ASSISTANCE SOC’Y & SHARP WORKPLACES, QUICK FACTS ON NON-DISCLOSURE AGREEMENTS (2022), <https://clasbc.net/wp-content/uploads/2022/11/2022-09-22-NDA-Quick-Facts-.pdf> [<https://perma.cc/7VPZ-9T2C>] (noting that seventy-five percent of Black women reported having signed an NDA compared to twenty-eight percent of their White counterparts).

¹⁴ As noted below, this Article’s analysis might apply to certain contracts of adhesion as well. See *infra* note 26.

¹⁵ “If the parties reached agreement on all material terms, then existing precedent ‘dictates that only the existence of fraud or mutual mistake can justify reopening an otherwise valid settlement agreement.’” *Henley v. Cuyahoga Cnty. Bd. of Mental Retardation & Developmental Disabilities*, 141 F. App’x 437, 443 (6th Cir. 2005) (quoting *Brown v. County of Genesee*, 872 F.2d 169, 174 (6th Cir. 1989)). For cases invalidating settlements on other grounds, see STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 3.39(b) (4th ed. 2023). Rare examples of cases invalidating settlements for duress include *Holler v. Holler*, 612 S.E.2d 469, 476 (S.C. Ct. App. 2005), *Duncan v. Hensley*, 455 S.W.2d 113, 117 (Ark. 1970), and *Service Fire Insurance Co. of New York v. Reed*, 72 So. 2d 197, 198 (Miss. 1954).

¹⁶ See, e.g., NDAs ‘Should Not Silence Sexual Harassment Claims,’ BBC (Feb. 10, 2020), <https://www.bbc.com/news/business-51438851> [<https://perma.cc/HKC5-4QA9>]; Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES (Oct. 23, 2017), <https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589> [<https://perma.cc/VM8F-RDYG>].

¹⁷ See, e.g., O. O’Neill, *Some Limits of Informed Consent*, 29 J. MED. ETHICS 4, 5 (2003); Joseph Millum, *Consent Under Pressure: The Puzzle of Third Party Coercion*, 17 ETHICAL THEORY & MORAL PRAC. 113, 116 (2014); Eric Chwang, *Against Risk-Benefit Review of Prisoner Research*, 24 BIOETHICS 14, 15–18 (2010) (addressing coercion in consent of prisoners).

¹⁸ See, e.g., Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 6 (2001) (suggesting “a new unified theory of unconstitutional conditions . . . that centers on coercion”); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1433 (1989) (mentioning the Supreme Court “has often invoked coercion as the reason to strike down conditions that affect rights to freedom of speech, religion, and association”).

¹⁹ See, e.g., Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1334 (1989) (discussing duress as an excuse from responsibility).

sexual consent,²⁰ interrogations,²¹ and plea bargains,²² it has been largely absent from the discussion of civil settlement agreements.²³

This Article addresses this crucial gap, labeling settlements prone to lack of voluntariness as “high-risk civil settlements” and drawing an analogy between such settlements and criminal plea bargains. Using confidential settlements in harassment, discrimination, or abuse cases as an example, the Article argues that under certain conditions, a settlement imposing silence and the forgoing of a legal claim in exchange for a monetary payout is coercive.²⁴ Such settlements can reflect coercion when the proposer-defendant is threatening punitive legal consequences—such as a prolonged legal battle or a defamation suit—and preventing the recipient-plaintiff from obtaining a better bargaining position. Defendants can achieve the latter, among other ways, by exploiting information asymmetry regarding the existence of similarly

²⁰ See, e.g., DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* 165 (2012) (“[C]onsent involves not the granting of a right but just the waiving of it.”); Peter Westen, Commentary, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 334 (2004) (remarking that “consent creates a Hohfeldian ‘privilege’” to allow otherwise wrongful action); Kimberly Kessler Ferzan & Peter Westen, *How to Think (Like a Lawyer) About Rape*, 11 CRIM. L. & PHIL. 759, 781 (2017) (“All Western jurisdictions have always made it a crime to induce sexual intercourse by threats of death or grievous bodily injury.”).

²¹ See *Miranda v. Arizona*, 384 U.S. 436, 448 (1966); *Illinois v. Perkins*, 496 U.S. 292, 296–97 (1990). See generally Frederick Schauer, *The Miranda Warning*, 88 WASH. L. REV. 155 (2013) (discussing the import of *Miranda*); Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968) (surveying social psychological research on coercion and arguing that such powerful psychological pressures are still at play despite the *Miranda* warning).

²² See *infra* Section II.B.

²³ Two noteworthy exceptions are in the context of divorce and custody agreements, see generally Hila Keren, *Consenting Under Stress*, 64 HASTINGS L.J. 679 (2013), and in the wage and hour context, see generally Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109 (2013). The latter refers specifically to confidentiality in Fair Labor Standards Act (“FLSA”) settlements, addressing the power imbalance between employers and employees in this context. *Id.* at 134; cf. Madison G. Conkel, Note, *The Lost Approach to FLSA Settlement Agreements: A Freedom-of-Contract Approach*, 55 GA. L. REV. 815, 819–20 (2021) (arguing confidentiality clauses should be permitted as a bargaining chip for employees). Arguments closely linked to coercion in settlements have also been made in the context of absent class members in class actions, see generally Maximilian A. Grant, Comment, *The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions*, 63 U. CHI. L. REV. 239 (1996) (arguing compelled class membership violates the First Amendment), and multidistrict litigation, Elizabeth Chamblee Burch & Abbe R. Gluck, *Plaintiffs’ Process: Civil Procedure, MDL, and a Day in Court*, 42 REV. LITIG. 225, 242 (2023) (“For the MDL’s cowboy on the frontier, plaintiffs can often be like proverbial cattle, herded into a forum they did not choose, wrangled by attorneys they did not hire who may assert claims telling only a part of their story, and corralled into a settlement and remedy they may not want.”).

²⁴ See generally David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFFS. 121 (1981) (offers can coerce); Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 L. & SOC’Y REV. 527 (1979) (same).

situated recipient-plaintiffs and by systematically settling individual claims with a nonnegotiable confidentiality clause.²⁵

Although acknowledging that other kinds of civil settlements might also coerce,²⁶ this Article focuses on the silencing effect of particular settlement agreements due to psychological pressures that may compel weaker parties to settle involuntarily and the emotional burden imposed by enforced silence. In this sense, the Article identifies faults both in the individual bargaining process of high-risk civil settlements and the broader social and economic conditions in which the bargaining occurs.

The Article points out the almost complete lack of judicial oversight over run-of-the-mill civil settlements—apart from limited exceptions²⁷—and shows how legal representation, even when it is offered, is scarcely a panacea to an environment ripe for involuntariness. It then suggests several structural factors that courts should consider when deciding whether a high-risk settlement agreement was entered voluntarily—namely, position of authority or power, the context of the dispute, information asymmetry, and time pressure. Importantly, rather than arguing that all settlements of a certain class are per se coercive, this framework intends to help courts identify coercion when it does

²⁵ Confidentiality of settlements seems to be the default for the defense bar, almost like release of claims. See Jennifer Snyder Heis, *Confidentiality of Settlement Agreements*, FOR DEF., Feb. 2007, at 35 (“Confidentiality provisions are routinely included in settlement agreements . . .”); Lizzie Barmes, *Silencing at Work: Sexual Harassment, Workplace Misconduct and NDAs*, 52 INDUS. L.J. 68, 80–82 (2023) (noting that her interviewees—lawyers and other individuals who are close to employment disputes—emphasized that NDAs are “commonplace”). As Barmes notes,

This comment from one of my interviews captured this: “I am trying to think of a settlement agreement that I’ve entered into which doesn’t have [an NDA] in the last 25 years, and I can’t actually think of any.” The assumption that an NDA would be included was described as so strong that some lawyers, although possibly junior, seemed to think this was a legal requirement and another interviewee observed that: “It is just seen as standard. It is not seen as something that individually is negotiated . . .”

Id. at 81 (alterations in original).

²⁶ This Article aims to provide examples of potentially coercive civil settlement scenarios. Other scenarios involving additional factors might arise, including, for example, certain contracts of adhesion.

²⁷ For example, a court must approve the settlement of class actions certified under Federal Rule of Civil Procedure 23. FED. R. CIV. P. 23(e). Similarly, actions “in which a receiver has been appointed may be dismissed only by court order.” FED. R. CIV. P. 66. Furthermore, settlements under the FLSA require court approval, and at least some courts have held that such settlements cannot be subject to a nondisclosure. See, e.g., *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982) (requiring that any settlement agreement reached in an FLSA claim be scrutinized by the court for fairness); *Brumley v. Camin Cargo Control, Inc.*, Nos. 08-1798, 10-2461, 09-6128, 2012 WL 1019337, at *7, *9 (D.N.J. Mar. 26, 2012) (rejecting as unfair the confidentiality provision of a settlement agreement). Another example is courts having to approve settlements in the child custody context. See *WARE*, *supra* note 15, § 3.39(b)(4). Of course, most federal cases are classified adjudication and thus in some way judicially monitored. Though the volume of such cases is significant, it is outside the scope of this Article.

occur. By so doing, it seeks to contest the default presumption of settlement voluntariness in high-risk settlements. Finally, the Article offers recommendations for reform, including a civil equivalent to the plea colloquy, albeit a research-informed version that goes beyond the boilerplate language currently used in the criminal context.²⁸

Attending to coercion-related challenges to confidential settlements is justified for two main reasons. First, lack of voluntariness of the bargaining process should independently invalidate even a seemingly fair settlement. This might be the case when one has given up a significant right such as their voice as part of the settlement.²⁹ Second, though not mutually exclusive, centering on coercion accounts for the many jurisdictions that have not otherwise addressed settlement confidentiality, either through the public policy defense or via legislative action.³⁰ In such jurisdictions, defenses like duress, unconscionability, and undue influence³¹ might be the primary grounds available to plaintiffs seeking to invalidate a confidential settlement.

This Article challenges the assumption that settlements of private disputes are necessarily voluntary exchanges, an assumption which has led courts to apply a more exacting standard than conventional contract law when plaintiffs attempt to invalidate settlement agreements.³² This view, the Article argues, overlooks the complex pressures that can compel settlement regardless of the offer's merits. By shining a light on the discrepancy between contract doctrine and the reality of particular civil settlements, the Article offers several contributions. Theoretically, it applies the concept of coercion to civil settlements that require confidentiality. It also organizes the rich body of literature on coercion in plea bargains, highlighting its key takeaways and using it as analytical leverage to address coercion in the private sphere. Pragmatically, it

²⁸ For a critique on the current structure of plea colloquies, see Melanie B. Fessinger & Margaret Bull Kovera, *An Offer You Cannot Refuse: Plea Offer Size Affects Innocent but Not Guilty Defendants' Perceptions of Voluntariness*, 47 LAW & HUM. BEHAV. 619, 631 (2023).

²⁹ In a sense, as noted, confidentiality is distinct from other contractual provisions. It thus merits special treatment in the context of assessing voluntariness. See generally NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS (2019) (arguing, among other things, that when agreements dramatically constrain our autonomy going forward, the requirements for finding consent and voluntariness should be more stringent).

³⁰ See generally David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165 (2019) (explaining that private settlements can be detrimental to public policy in certain contexts such as sexual assault); Gilat Juli Bachar, *A Duty to Disclose Social Injustice Torts*, 55 ARIZ. ST. L.J. 41, 48–50 (2023) (discussing statutory limits on confidential settlements in some jurisdictions).

³¹ See *infra* Section III.A.

³² “One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.” *Asberry v. U.S. Postal Serv.*, 692 F.2d 1378, 1380 (Fed. Cir. 1982) (quoting *Callen v. Pa. R.R. Co.*, 332 U.S. 625, 630 (1948)).

provides courts with a concrete list of factors to consider when weighing a coercion-based challenge to a settlement agreement, whether grounded in duress, unconscionability, or undue influence arguments. Prescriptively, it offers specific suggestions to address the problem of lack of settlement voluntariness.

The Article proceeds in three parts. Part I discusses the philosophical foundations of the concept of coercion, including its meaning and relationship to the idea of voluntariness. This Part argues that a nuanced understanding of coercion requires taking into account social norms about moral obligations and distributive justice considerations. Part II then surveys and organizes the scholarship regarding coercion in criminal plea bargains. It discusses both the legal doctrine and how psychology can help identify coercive situations, synthesizing key takeaways. Although undoubtedly different, as this Part concludes, criminal pleas and high-risk civil settlements share several characteristics. Thus, plea bargains are a fruitful analogy for unpacking coercion in civil settlements. Part III applies the philosophical, psychological, and legal discussion of coercion, including its bearing on plea bargains, to high-risk civil settlements. Using the example of confidentiality, this Part explains how and when such settlements might be coercive, refuting potential counterarguments. Table 1 then summarizes the coercive elements of plea bargains and high-risk civil settlements alongside suggestions for reform. Finally, the conclusion proposes thoughts for further exploration of this area.

The Article addresses a dimension yet to be considered in the discussion regarding litigation and settlement confidentiality: Silencing those who have been wronged can also evince their coercion into unwanted settlements. At the same time, the Article opens a broader conversation about the coercive power private parties can wield and its detrimental effects.

I. PHILOSOPHICAL FOUNDATIONS OF COERCION

Unlike “freedom,” a word which largely conveys positive normative judgment, “coercion” is widely considered in Western sociopolitical tradition to be a social evil, a word conveying negative meaning.³³ We strive to limit governmental coercion and ensure individual freedom through federal and state constitutional protections.³⁴ And we use criminal and civil laws to either prohibit coercion—for example, by

³³ See Peter Westen, “Freedom” and “Coercion”—*Virtue Words and Vice Words*, 1985 DUKE L.J. 541 *passim* (analyzing the rhetorical force and characteristics of the words “freedom” and “coercion”); see also ALAN WERTHEIMER, COERCION 173–74 (1987) (discussing the moralized approach to coercion in modern jurisprudence).

³⁴ See, e.g., WERTHEIMER, *supra* note 33, at 127–29 (considering how the Fifth Amendment protects against coerced guilty pleas).

criminalizing extortion—or institute excuses and defenses for those whose actions were coerced by others, such as the defense of duress.³⁵

But coercion can sometimes be challenging to identify. Although some scholars have argued that coercion renders an act involuntary,³⁶ coerced acts are typically viewed as voluntary in both the usual and legal sense.³⁷ How can a person voluntarily allow another to steal their freedom?³⁸ One way to settle this apparent paradox is to realize that the coerced person is taking a volitional action—giving a robber their wallet—to escape the threatened action: physical injury. Alan Wertheimer calls this “constrained volition.”³⁹ To better understand this proposition, the concept of coercion prompts a distinction between offers and threats.⁴⁰ Typically, threats—which promise to make one worse off than they otherwise would be compared to a baseline⁴¹—are distinguished from offers, which promise to make one better off in comparison to that baseline.⁴² Although most scholars of coercion, including Nozick

³⁵ Duress can be a defense to a criminal charge, in which an accused person, despite committing a criminal act, avoids punishment due to duress. See MODEL PENAL CODE § 2.09 (AM. L. INST. 1962) (duress constitutes an excuse when “a person of reasonable firmness in his situation would have been unable to resist”). It is also a defense in contract law, allowing a party to escape an obligation under a contract. See WERTHEIMER, *supra* note 33, at 152–54 (explaining the difference between the criminal and the contract defense of duress). See generally John Lawrence Hill, *A Utilitarian Theory of Duress*, 84 IOWA L. REV. 275 (1999) (evaluating several theoretical conceptions of duress).

³⁶ See, e.g., FELIX E. OPPENHEIM, DIMENSIONS OF FREEDOM 15–17 (1961); Michael D. Bayles, *A Concept of Coercion*, in COERCION 16, 17 (J. Roland Pennock & John W. Chapman eds., 1972) (comparing what the author calls “occurrent” coercion and “dispositional” coercion, or coercion by physical compulsion and coercion by threat, respectively).

³⁷ This has been the case in criminal law, in which the Model Penal Code excludes from the list of “voluntary acts” reflex movements, bodily movements during unconsciousness, acts performed under hypnosis, and other acts not the product of a conscious determination by the actor. MODEL PENAL CODE § 2.01(1)–(2) (AM. L. INST. 1962). It is also the case in the law of torts. For a discussion of what is considered a volitional act in torts, see W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 34–35 (5th ed. 1984).

³⁸ See Hill, *supra* note 35, at 286–87 (arguing that coerced acts are involuntary in that they are “characterized by volitional responses to impossible choices”); Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD 440, 440 (Sidney Morgenbesser et al. eds., 1969) (“If I lure you into an escape-proof room in New York and leave you imprisoned there, I do not coerce you into not going to Chicago though I make you unfree to do so.”).

³⁹ WERTHEIMER, *supra* note 33, at 30. Wertheimer also clarifies that “choice” can mean different things and explains what is meant by having “no choice” but to take certain action. *Id.* at 35, 192–201.

⁴⁰ But see Hill, *supra* note 35, at 292–96 (offering a critique on the distinction between threats and offers).

⁴¹ Many approaches to coercion use a baseline. Per Nozick, this baseline helps judge whether a coercive arrangement is acceptable. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 177 (1974). That said, there are also nonbaseline approaches to coercion. See, e.g., Grant Lamond, *The Coerciveness of Law*, 20 OXFORD J. LEGAL STUD. 39, 54–57 (2000) (justifying coercion by the undesirability of the options it eliminates).

⁴² See Westen, *supra* note 33, at 571–73; WERTHEIMER, *supra* note 33, at 136; Vinit Haksar, *Coercive Proposals [Rawls and Gandhi]*, 4 POL. THEORY 65, 66 (1976) (“Threats worsen your

and Wertheimer, argue that only threats can be coercive,⁴³ others contend that offers can coerce too.⁴⁴ The latter view suggests that when offers—ostensibly improving one’s current state—are combined with constraints, they can be coercive.⁴⁵ This Article will come back to this distinction in Parts II and III when applying the concept of coercion to both plea bargains and civil settlements.⁴⁶

Coercion also requires that the coercing party has the ability or apparent ability to carry out the proposed harmful action if the coerced party does not comply.⁴⁷ According to Westen, coercion is

a constraint or promise of constraint, Y , that X_i knowingly brings to bear on X in order that X choose to do something, Z_i , that X would not otherwise do and that X does not wish to be constrained to do, where X knows that X_i is bringing or promising to bring Y to bear on him for that purpose, and where the constraint renders X ’s doing Z_i more eligible to X than it would otherwise be.⁴⁸

Coercion claims build on two related moral duties: the duty not to use another as a means to one’s end⁴⁹ and the duty not to harm another.⁵⁰ But constraining others’ freedom can also be part of daily life in ways big and small.⁵¹ To help distinguish coercive from mundane freedom-constraining acts, Nozick—in his theory of voluntary exchange—makes a distinction between “facts of nature” and others’ willful acts.⁵² For Nozick, if one’s actions are limited due to facts of nature—for example, a decision to walk being constrained by the rules

position compared to what you can expect, whereas (non-coercive) offers do not.”).

⁴³ See WERTHEIMER, *supra* note 33, at 136; Nozick, *supra* note 38, at 447.

⁴⁴ See Scott Anderson, *Coercion*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2.4 (Edward N. Zalta & Uri Nodelman eds., 2023), <https://plato.stanford.edu/Entries/coercion/> [<https://perma.cc/4HZX-6VA9>] (“While the dominant strand in recent theory has associated coercion with threats, and denied that offers can be used to coerce, this sharp differentiation of these two sorts of proposals has come in for some criticism.”).

⁴⁵ See Brunk, *supra* note 24, at 527 (arguing that offers of leniency in the context of a negotiated guilty plea can also be coercive under certain conditions); Zimmerman, *supra* note 24, at 133–34 (arguing that a proposal can actively hinder a coercee’s ability to obtain a better situation than what the coercer proposes).

⁴⁶ See *infra* Parts II–III.

⁴⁷ See Nozick, *supra* note 38, at 441; Nozick, *supra* note 41, at 115.

⁴⁸ Westen, *supra* note 33, at 569.

⁴⁹ See KANT, *supra* note 1, at 38.

⁵⁰ Haksar, *supra* note 42, at 69 (“[F]or a proposal to be coercive, it is necessary that the proposal should involve a wrong to the recipient.”).

⁵¹ See Jeremy Waldron, *Kant’s Legal Positivism*, 109 HARV. L. REV. 1535, 1557 (1996) (“People are entitled to assume in the state of nature that their external freedom will be limited only to the extent necessary to harmonize their freedom with that of everyone else in accordance with a universal law . . .”).

⁵² Nozick, *supra* note 41, at 262.

of physics—these actions are still voluntary.⁵³ But if one's options are limited by another, voluntariness hinges on the extent to which that other had a right to act in such a way.⁵⁴ Given the relationship between voluntariness and rightful conduct, it is easier to identify coercion when it employs illegal conduct, particularly physical violence. It is harder when the coercion is context dependent, using means that might be considered legal in a different context. As Lindgren explains regarding blackmail, "In blackmail, the heart of the problem is that two separate acts, each of which is a moral and legal right, can combine to make a moral and legal wrong."⁵⁵ Although, independently, neither asking someone for money nor telling the police that a crime has been committed are wrong, asking someone for money while threatening to tell the police that a crime has been committed if they do not comply is a crime.⁵⁶ Nozick reconciles the paradox by focusing on what he calls "productive activities."⁵⁷ A productive activity is one in which the proposer makes the recipient better off by engaging in the activity.⁵⁸ Thus, blackmail is not a productive activity because it does not make the recipient better off than they would have been without the blackmail.⁵⁹

Importantly, an exchange can be voluntary per Nozick if the proposer compensates the recipient for declining a productive exchange with another.⁶⁰ This would be the case where a publisher offers an author payment for writing damaging secrets about a third party, and the third party then pays the author to avoid publishing those secrets.⁶¹ The author selling their silence may "legitimately charge only for what he forgoes by silence," which "does not include the payment he could have received to abstain from revealing his information, though it does include the payments others would make to him to reveal the information."⁶² The author therefore cannot demand more payment than necessary to account for the loss of publication.⁶³ In the negotiation context, Nozick can be read to suggest that "[a]s long as the negotiator proposes to pursue only alternatives that genuinely satisfy her interests,

⁵³ *Id.*

⁵⁴ *Id.*; see also WERTHEIMER, *supra* note 33, at 217–18 (describing a coercive proposal as one that rescinds or withholds an individual's rights or entitlements).

⁵⁵ James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 670 (1984).

⁵⁶ *Id.* at 670–71.

⁵⁷ NOZICK, *supra* note 41, at 84.

⁵⁸ *Id.*

⁵⁹ *Id.* at 85. But see Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935, 1962 (1993) (arguing that blackmail threatening to disclose criminal activity can provide society with economic benefits by deterring crime).

⁶⁰ NOZICK, *supra* note 41, at 85–86.

⁶¹ *Id.* at 85.

⁶² *Id.*

⁶³ *Id.*

then the most she can request . . . is to be compensated for forgoing those alternatives.”⁶⁴ If a party offers to waive something that does not entitle them to compensation, however, that party is not acting within their rights and the exchange is not voluntary, but coercive.⁶⁵

But Nozick’s approach to coercion raises questions: Are all proposals that result in a “productive activity” morally acceptable? And are all exchanges lacking alignment between costs and interests morally unacceptable? As Anthony Kronman notes, “defining voluntariness in [Nozick’s] way conflicts with deeply entrenched notions of moral responsibility.”⁶⁶ Extending Nozick’s theory to better address moral concerns, Peter Westen distinguishes “threats” that impose “burdens” from “offers” conferring “benefits” along two axes: parties’ expectations and society’s moral standards.⁶⁷ A proposal is coercive if it leaves the recipient “worse off *either* than he otherwise expects to be *or* than he ought to be for refusing to do the proponent’s bidding.”⁶⁸ Social norms regarding legal and moral obligations determine what “ought” to be refused.⁶⁹

Kronman and Westen capture an important aspect of coercion that escapes Nozick and other scholars who focus on liberty and strong notions of private property as defining features of voluntariness. Although common law rules often claim to promote wealth maximization by emphasizing individual liberty and property,⁷⁰ society should worry about the possibility of a stronger party exploiting “superior information, intellect, or judgment, in the monopoly he enjoys with regard to a particular resource, or in his possession of a powerful instrument of violence or a gift for deception.”⁷¹ As Kronman notes, society should avoid “grant[ing] the possessor of an advantage the exclusive right to exploit it for his own benefit unless those excluded from its ownership are thereby made better off than they would be if no one

⁶⁴ Paul F. Kirgis, *Bargaining with Consequences: Leverage and Coercion in Negotiation*, 19 HARV. NEGOT. L. REV. 69, 80 (2014). Kirgis suggests that Wertheimer has “a similar conception in mind with his focus on whether the offeror had a preexisting plan to engage in the conduct proposed; that would suggest that the proposal would satisfy the offeror’s interests.” *Id.* at 80 n.45 (citing WERTHEIMER, *supra* note 33, at 220).

⁶⁵ See Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 657–58 (1988) (suggesting that such an exchange is coercive blackmail).

⁶⁶ Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 478 (1980).

⁶⁷ Westen, *supra* note 33, at 586–87.

⁶⁸ *Id.* at 587.

⁶⁹ See *id.* at 586. It should be noted, however, that Westen’s work only partially defines the baseline determining a party’s expectations.

⁷⁰ See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 359 (1990) (“It probably is no accident . . . that many common law doctrines assumed their modern form in the nineteenth century, when laissez-faire ideology, which resembles wealth maximization, had a strong hold on the Anglo-American judicial imagination . . .”).

⁷¹ Kronman, *supra* note 66, at 480.

were given a greater right to the advantage than anyone else.”⁷² Seeking to promote overall welfare, Kronman would require that “the welfare of *most people* who are taken advantage of in a particular way be increased by the kind of advantage-taking in question.”⁷³

Thus, although Nozick and Wertheimer each serve as a crucial starting point for this Article’s analysis of coercion, their work is not the be-all and end-all. In this Article’s discussion of coercion, Westen contributes the importance of social norms regarding legal and moral obligations for understanding when a recipient is made worse off than they ought to be.⁷⁴ Kronman, in turn, contributes the importance of social norms regarding distributive justice in deciding whether certain activities are coercive.⁷⁵ Their analyses intimate a more nuanced understanding of coercion that goes beyond existing legal doctrine in the context of settlement.⁷⁶ In particular, they acknowledge that threats (or offers)—which are legal in the strict sense—can still exert improper emotional pressure on the recipient and make seemingly available alternatives considerably less attractive.⁷⁷ This Article thus adopts a broader definition of coercion: using power to constrain the recipient’s situation to impose the proposer’s will on the recipient by using either force or conditional proposals, including both threats and offers.⁷⁸ As detailed below, this definition differs from the current legal definition of coercion in the context of the defense of duress.⁷⁹ And yet, as the

⁷² *Id.* at 493.

⁷³ *Id.* at 487.

⁷⁴ *Supra* notes 67–69 and accompanying text.

⁷⁵ *Supra* notes 71–73 and accompanying text.

⁷⁶ *See infra* Section III.A.

⁷⁷ Kronman, *supra* note 66, at 476–82; Westen, *supra* note 33, at 584–89.

⁷⁸ This definition builds on Conrad Brunk’s work. *See* Brunk, *supra* note 24, at 539–41 (arguing that coercion occurs if the coercer makes a conditional proposal to an offeree that creates a situation that is less preferable than the situation that the offeree has the right to expect). In the plea-bargaining context, the coercer will make accepting a plea more desirable, either by making the alternative—going to trial—less desirable than what it would have been without the coercer’s intervention or by making it physically or psychologically impossible for the coercee to refuse the deal. *Id.* at 542–43. As discussed below, a prosecutor might threaten a defendant with seeking the maximum punishment at trial or with prompting other negative consequences for the defendant or others. But the prosecutor could also initially overcharge a defendant and then offer a significant “plea discount.” If the latter proposal is combined with other constraints, it might still be coercive. Although most scholars require that the coercer present the coercee with a conditional threat, *see* Nozick, *supra* note 38, at 440–41, some critics have contended that coercion can come from conditional offers that are so impactful that a reasonable person could not refuse them. *See* Brunk, *supra* note 24, at 541–42; *see also* Onora O’Neill, *Which Are the Offers You Can’t Refuse?*, in *VIOLENCE, TERRORISM, AND JUSTICE* 170, 170–71 (R.G. Frey & Christopher W. Morris eds., 1991) (pointing out the disagreement between scholars on how to classify coercion). As explained below, the Author joins this latter view.

⁷⁹ *Infra* Section III.A.

Article claims, the bar for finding duress in the formation of settlement agreements is set too high even by existing standards.⁸⁰

With these philosophical tools in hand, this Article turns to applying them, first to plea bargaining and next to what it calls high-risk civil settlements.

II. COERCION IN PLEA BARGAINING

A. *Why Should Private Law Care About Plea Bargaining?*

Although criminal and civil settlement dynamics differ considerably, similarities between the two justify extrapolating from plea bargains to certain forms of civil settlements.⁸¹ Indeed, some have argued more generally that plea bargains—as criminal settlements—are directly comparable to civil settlements.⁸² In the civil contexts discussed here, much like in plea bargains, less powerful parties might face a lack of alternatives because of the actions of a more powerful counterpart, rendering their acquiescence to the settlement terms involuntary. Although the less powerful party—criminal defendant or civil plaintiff—can ultimately decide whether to accept the settlement offer or proceed to trial, the voluntariness of their decision might be compromised nonetheless.

Furthermore, although the coercive mechanism is clearer in the criminal context, as the defendant cannot simply walk away from a plea negotiation without consequences, there is an element of coercion in enforcing private law too.⁸³ The state—which provides the institutional infrastructure to enforce private contracts⁸⁴—uses its instruments to allow the power wielded by private parties.

⁸⁰ See *infra* Section III.A.

⁸¹ In his seminal article, Owen Fiss describes settlements as the equivalent of plea bargains, hinting at the fact that some settlements might be coerced:

Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.

Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

⁸² See Richard Lorren Jolly & J.J. Prescott, *Beyond Plea Bargaining: A Theory of Criminal Settlement*, 62 B.C. L. REV. 1047, 1060 (2021) (“Criminal settlement is the product of optimizing agents engaged in utility-maximizing ‘trade.’ Each party possesses ‘assets’ that the other may value, so they bargain with the goal of achieving mutual gains. In the most familiar scenario, prosecutors ‘buy’ concessions from defendants by promising some benefit (e.g., a lesser charge or a shorter sentencing recommendation), and in turn defendants ‘sell’ some or all of their procedural rights.”).

⁸³ Arguably, the civil defendant cannot just walk away from a settlement negotiation without consequences either, as it is the plaintiff’s choice whether to pursue a suit. See WARE, *supra* note 15, § 3.5(c).

⁸⁴ As David Luban notes, “the appeal to a public institution such as the adversary system already bridges the gap between private and public responsibility.” DAVID LUBAN, *LAWYERS AND JUSTICE* 173 (1988).

Admittedly, criminal and civil settlement dynamics differ considerably. While a government agent, the prosecutor, initiates and controls the criminal proceeding against an individual defendant, the civil proceeding is started by a private plaintiff who theoretically is on equal footing with a private—individual or entity—defendant.⁸⁵ Moreover, in many civil actions, the roles are reversed as the more powerful party is the defendant.⁸⁶ The stakes can be much higher too in the criminal setting, in which the risk of incarceration and other criminal sanctions looms large. Relatedly, as Stephen Ware notes,

while high payments by civil defendants enrich plaintiffs (and typically their lawyers) more than low payments . . . high “payments” by criminal defendants often come in the form of more time behind bars, which does not enrich the prosecuting government and typically burdens [it].⁸⁷

Finally, the market for legal services differs considerably between the two settings. While some prosecutors’ offices might struggle with insufficient resources and more cases to pursue than personnel to prosecute them,⁸⁸ additional strong civil plaintiffs’ cases should attract more lawyers to maximize financial returns.⁸⁹

Despite these differences, in the context discussed here, the coercive dynamics of civil settlement are not unlike those in plea bargains. Importantly, plea bargains are also specifically relevant to settlements conditional upon confidentiality, as silencing can occur in the criminal setting too. As M. Eve Hanan and Alexandra Natapoff explain, defendants are often silenced in the criminal justice system.⁹⁰ Although plea bargains typically will not prevent defendants from telling their side of the story retrospectively, they contribute to a broader scheme that

⁸⁵ For a discussion of this democratic function of private ordering in the context of tort law, see generally Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 Nw. U.L. REV. 1765 (2009).

⁸⁶ See, e.g., Katersky & Charalambous, *supra* note 10.

⁸⁷ WARE, *supra* note 15, § 3.5(g).

⁸⁸ See William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2555 (2004); see also Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/W4P2-PLVL>] (noting that prosecutors are “often overworked and understaffed”).

⁸⁹ See Andrea Kupfer Schneider, *Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations?*, 91 MARQ. L. REV. 145, 158 (2007) (observing that, while civil litigators “work to maximize financial returns,” “[p]rosecutors have an incentive to maximize their conviction rate and, therefore, are more likely to only go to trial with sure winners”).

⁹⁰ See M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 495 (2021) (discussing how defendants rarely “talk back” in court in the sense of challenging authority); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1456 (2005) (arguing that defendant silencing has contributed to the declining adversarial nature of the criminal justice system).

permits defendants to be seen but not heard.⁹¹ This is another sense in which the comparison between plea bargains and confidential civil settlements is useful.

Thus, notwithstanding the qualifications, acknowledging the structural similarities between plea bargains and some civil settlements elucidates coercion in civil settlements.⁹² This Part of the Article discusses coercion in plea bargains. Next, in Part III, the Article uses this discussion as analytical leverage to highlight the coercive nature of some civil settlements.

B. *Plea Bargains and Voluntariness*

Guilty pleas lead to the vast majority of criminal convictions in the United States yearly.⁹³ For guilty pleas to be valid, however, courts must ensure that defendants entered them “knowingly, intelligently, and voluntarily.”⁹⁴ Rule 11 of the Federal Rules of Criminal Procedure states that pleas can only be accepted if they were made voluntarily and

⁹¹ Indeed, one of the big benefits of plea bargaining from the state’s perspective is that it prevents defendants from telling their side of the story. For instance, after Breonna Taylor was killed, the state offered her ex-boyfriend a favorable plea deal if he would (falsely) claim that she was involved in his drug conspiracy. See Vanessa Romo, *Prosecutors’ Plea Deal Required Drug Suspect to Name Breonna Taylor a ‘Co-Defendant,’* NPR (Sept. 2, 2020, 2:33 AM), <https://www.npr.org/2020/09/02/908625259/prosecutors-plea-offer-alleged-breonna-taylor-was-part-of-organized-crime-syndic> [<https://perma.cc/V579-V7FP>]. Further, there are many examples of *Alford* pleas being used to prevent defendants from suing the state in later civil litigation. See Thea Johnson, *Lying at Plea Bargaining*, 38 GA. ST. U. L. REV. 673, 698–99, 699 n.101 (2022) (discussing examples of such pleas, including the famous “West Memphis Three” case). Those *Alford* pleas are essentially good deals that force the defendant not to speak about their experience by preventing disclosures in civil litigation.

⁹² In fact, one of the most discussed psychological theories in criminal plea bargaining was borrowed from the literature on civil settlements. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464–65 (2004) (describing the prevalence of Mnookin and Kornhauser’s divorce-settlement model in criminal plea bargain literature). See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (considering the psychology of settlements in civil divorce proceedings).

⁹³ See Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Report Finds*, NPR (Feb. 22, 2023, 5:00 AM), <https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice> [<https://perma.cc/RC78-6WDZ>] (“98% of criminal cases in the federal courts end with a plea bargain . . .”). The National Registry of Exonerations reported that between 1989 and 2021, 2,970 innocent individuals had been exonerated of crimes they did not commit. THE NAT’L REGISTRY OF EXONERATIONS, 2021 ANNUAL REPORT 5 (2022). Of these exonerees, twenty-two percent entered a guilty plea. *Id.* at 9. False confessions and coerced plea bargains likely account for some of these wrongful convictions.

⁹⁴ *Stano v. Dugger*, 921 F.2d 1125, 1161 (11th Cir. 1991); see also *Brady v. United States*, 397 U.S. 742, 758 (1970) (endorsing the reliability of guilty pleas attained voluntarily, intelligently, and with advice of counsel). Courts have generally treated the terms understandingly, knowingly, and intelligently as “synonymous and interchangeable in the guilty-plea context, making no meaningful effort to attribute discrete and disparate meanings to them.” *United States v. Dominguez*, 998 F.3d 1094, 1102 n.5 (10th Cir. 2021).

“did not result from force, threats, or promises (other than promises in a plea agreement).”⁹⁵ But this standard fails to clarify the concept of voluntariness. Similarly, the Supreme Court’s definition of voluntariness has been dubbed “vague and imprecise,”⁹⁶ rendering the doctrine unclear.⁹⁷

Importantly, although there are competing views regarding the relationship between voluntariness and coercion,⁹⁸ the legal system has tended to treat them as each other’s antithesis. For example, regarding confessions, the Supreme Court in *Colorado v. Connelly*⁹⁹ held that “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’” and maintained that “the voluntariness

⁹⁵ FED. R. CRIM. P. 11(b)(2). The *Brady* standard requires that the plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g., bribes).

Brady, 397 U.S. at 755 (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957)).

⁹⁶ Hollida Wakefield & Ralph Underwager, *Coerced or Nonvoluntary Confessions*, 16 BEHAV. SCI. & L. 423, 436 (1998).

⁹⁷ It is important to distinguish between confessions and guilty pleas in this context. A confession can sometimes result in an acquittal at trial, as a suspect who confesses might still choose to exercise their right to a trial. See Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1425–26 (2016) (contrasting plea bargains and confessions). A defendant might even retract their confession prior to the beginning of trial. See Gisli H. Gudjonsson & James A.C. MacKeith, *Retracted Confessions: Legal, Psychological and Psychiatric Aspects*, 28 MED. SCI. & L. 187, 187 (1988). In contrast, when a guilty plea is accepted, it leads to a conviction. See Garrett, *supra*, at 1418. Furthermore, although prosecutors have specific authority to offer leniency in sentences and charges as part of a plea deal, police cannot legally promise leniency at trial. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 922 (2004) (explaining that when a defendant confesses, prosecutors tend to be less lenient); Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS 49, 52, 61 (G. Daniel Lassiter & Christian A. Meissner eds., 2010). However, confessions also share similarities with plea bargains: Primarily, state representatives exercise power and use other social influence factors to secure admissions from individuals. *Id.* at 59. Furthermore, both confessions and plea bargains present similar risk factors to certain suspects and defendants. Compare Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010) (describing demographic and social factors that make a defendant more likely to confess to a crime), with Allison D. Redlich, Stephanos Bibas, Vanessa A. Edkins & Stephanie Madon, *The Psychology of Defendant Plea Decision Making*, 72 AM. PSYCH. 339 (2017) (describing demographic and social factors that contribute to plea bargains).

⁹⁸ Compare Brunk, *supra* note 24, at 527 (arguing that coercion is essentially equivalent to involuntariness from a legal standpoint), with Michael Philips, *Are Coerced Agreements Involuntary?*, 3 LAW & PHIL. 133, 133 (1984) (arguing that the two concepts are distinct and that coercion is insufficient to make an act involuntary).

⁹⁹ 479 U.S. 157 (1986).

determination . . . is designed to determine the presence of police coercion.”¹⁰⁰ Similarly, with respect to plea bargains, the United States District Court for the Eastern District of New York took for granted that coercion rendered a plea agreement involuntary, asking instead what degree of coercion was needed to reject a plea as involuntary.¹⁰¹ To determine the voluntariness of pleas, courts evaluate the oral plea colloquy, which consists of judges asking defendants a series of questions to assess the extent to which they understand and desire the plea.¹⁰² Among other issues, the questions address whether any threats or promises were made in exchange for the plea.¹⁰³

Despite this procedural safeguard, research has found a high rate of exonerations involving false guilty pleas.¹⁰⁴ As a result, scholars have begun to identify factors that might negate voluntariness and contribute to false pleas, such as prosecutorial overcharging and deals constrained by time pressures.¹⁰⁵ What does overcharging mean in the context of plea bargaining? Prosecutors might take the term to mean falsely accusing the defendant of a crime they did not commit merely to induce the plea.¹⁰⁶ However, overcharging as used here refers

¹⁰⁰ *Id.* at 167–68.

¹⁰¹ *United States v. Speed Joyeros, S.A.*, 204 F. Supp. 2d 412, 424. (E.D.N.Y. 2002) (“‘[V]oluntary’ can not be defined by freedom from ‘coercion,’ rather than by acknowledging appropriate levels of coercion.”).

¹⁰² See *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969). Courts have said that the true inquiry in each plea colloquy is whether coercion has made the plea unconstitutional. See *Stano v. Dugger*, 921 F.2d 1125, 1142 (11th Cir. 1991); *United States v. Martinez*, 486 F.2d 15, 21 (5th Cir. 1973) (“[T]he question whether a guilty plea is voluntarily entered is determined, not by whether there are external forces inducing a defendant to plead guilty—for such forces will invariably exist—but instead by a determination as to whether these forces are constitutionally acceptable.”).

¹⁰³ *Boykin*, 395 U.S. at 242–43; *Stano*, 921 F.2d at 1162 n.6; see also Allison D. Redlich & Catherine L. Bonventre, *Content and Comprehensibility of Juvenile and Adult Tender-of-Plea Forms: Implications for Knowing, Intelligent, and Voluntary Guilty Pleas*, 39 LAW & HUM. BEHAV. 162, 164 (2015) (showing that jurisdictions significantly vary in the actual questions they ask as part of the oral plea colloquy).

¹⁰⁴ See Samantha Luna, *Defining Coercion: An Application in Interrogation and Plea Negotiation Contexts*, 28 PSYCH., PUB. POL’Y, & L. 240, 241 (2022) (“As of August 2021, . . . false guilty pleas were present in about 20% [of all known exonerations], with 2.7% of exonerations involving both a false confession and false guilty plea.”).

¹⁰⁵ See Redlich et al., *supra* note 97, at 339 (examining various factors affecting the extent to which pleas are made “knowingly, intelligently, voluntarily, and with a factual basis of guilt”); Tina M. Zottoli, Tarika Daftary-Kapur, Georgia M. Winters & Conor Hogan, *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCH., PUB. POL’Y, & L. 250, 250 (2016) (finding that “substantial discounts were offered to participants in exchange for their guilty pleas” and that participants were given “very short time periods in which to make their decisions”).

¹⁰⁶ See Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85 (1968). Interestingly, as Thea Johnson shows, the parties might at times mutually agree to a

to a much more common practice: “[w]hen the only reason for filing a charge is to induce a plea of guilty to some other charge”¹⁰⁷ The flip side of overcharging would be to apply exceeding leniency—or “plea discounts”—to those who agree to plead guilty.¹⁰⁸

Merely examining the plea colloquy could thus fail to identify involuntariness when such means of influence as overcharging and plea discounts were used in the plea-bargaining process.¹⁰⁹ Defendants might fail to acknowledge that their plea was entered involuntarily, and judges might do the same.¹¹⁰ As one district court has noted, many plea bargains would likely be invalidated if courts applied a strict voluntariness rule to assessing them.¹¹¹

fictional plea—that is, the defendant pleading guilty to a charge based on fabricated facts. *See* Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 858 (2019).

¹⁰⁷ Alschuler, *supra* note 106, at 86 (adding that “even when prosecutors have other, purely tactical reasons for multiplying the number of accusations[] defense attorneys view the practice as ‘overcharging’ despite the sufficiency of the prosecutor’s evidence” (citation omitted)). For a psychological perspective, see generally Stephanie A. Cardenas, *Charged Up and Anchored Down: A Test of Two Pathways to Judgmental and Decisional Anchoring Biases in Plea Negotiations*, 29 PSYCH., PUB. POL’Y, & L. 435 (2023).

¹⁰⁸ This is also referred to as “the trial penalty.” *See* Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT’G REP. 256, 256 (2019).

¹⁰⁹ *See* Samuel M. Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy*, 6 VAL. U. L. REV. 111, 119–20 (1972); *United States v. Speed Joyeros, S.A.*, 204 F. Supp. 2d 412, 417–18 (E.D.N.Y. 2002). Indeed, although judges have absolute discretion in rejecting or accepting a guilty plea, *see United States v. Bundy*, 392 F.3d 641, 647 (4th Cir. 2004) (providing that a district judge is free to withhold consent from a conditional plea “for any reason or no reason at all”); *United States v. Bell*, 966 F.2d 914, 916 (5th Cir. 1992) (providing that a court is “free to reject a conditional plea for any reason or no reason at all”); *In re Gallaher*, 548 F.3d 713, 716–17 (9th Cir. 2008) (“Rule 11(a)(2) does not place any per se restrictions on how a court may exercise its discretion.”); *United States v. Davis*, 900 F.2d 1524, 1527 (10th Cir. 1990) (stating that a district court “has absolute discretion with regard to accepting or rejecting the conditional plea” and “can refuse to accept a conditional plea for any reason or for no reason”), instances of coercion sufficient to invalidate a plea are rare, *see* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMPAR. L. 199, 212–13 (2006) (discussing general lack of involvement by judges in plea bargaining). Such rare instances of invalidated pleas due to coercion include threats to prosecute a baseless case against a defendant, *see Waley v. Johnston*, 316 U.S. 101, 101, 104 (1942) (stating that a plea induced by federal agents’ threats to turn over false information to state prosecutor would render the plea invalid), and occasionally threats against third parties, *see Martin v. Kemp*, 760 F.2d 1244, 1246–48 (11th Cir. 1985) (finding that a threat to prosecute defendant’s wife meant that the voluntariness of defendant’s guilty plea was not sufficiently developed in the state court hearings).

¹¹⁰ For a recent comprehensive review of the research on coercion in plea bargains, *see* generally Lucian E. Dervan, Vanessa A. Edkins & Thea Johnson, *Victims of Coercive Plea Bargaining: Defendants Who Give False Testimony for False Pleas*, 72 AM. U. L. REV. 1919 (2023).

¹¹¹ *Speed Joyeros*, 204 F. Supp. 2d at 423.

C. *The Scholarly Debate on Coercion in Plea Bargaining*

As scholars have observed, coercion has implications across various legal doctrines,¹¹² including contracts,¹¹³ negotiation,¹¹⁴ medical ethics,¹¹⁵ unconstitutional conditions,¹¹⁶ duress,¹¹⁷ and sexual consent.¹¹⁸ Specifically, coercion has been studied for years in plea bargains, with scholars debating the extent to which such exchanges are inherently coercive.¹¹⁹

Notably, scholars disagree on whether employing subtle influence tactics such as overcharging amounts to coercion.¹²⁰ Scholars who claim that overcharging can be coercive have argued that a fundamentally fair plea requires three factors: voluntariness,¹²¹ “informed choice and an

¹¹² See Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 720 (2005) (applying the concept of coercion across legal doctrines); Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45, 46 (2002) (arguing that legal doctrines require two distinct types of coercion); WERTHEIMER, *supra* note 33, at xi (offering a theory of coercion across legal doctrines).

¹¹³ See, e.g., WERTHEIMER, *supra* note 33, at 23–28 (surveying duress cases in contracts); Bar-Gill & Ben-Shahar, *supra* note 112, at 753 (“It is beyond dispute that an improper threat can create duress and justify the rescission of the contract . . .”); Stephen A. Smith, *Contracting Under Pressure: A Theory of Duress*, 56 CAMBRIDGE L.J. 343, 343 (1997) (observing that in contract law, “courts are regularly required to consider how far the scope of duress should extend”); Hamish Stewart, *A Formal Approach to Contractual Duress*, 47 U. TORONTO L.J. 175, 176 (1997) (“A bargain entered into under duress is not enforceable.”).

¹¹⁴ See, e.g., Kirgis, *supra* note 64, at 75 (relying on a theory of coercion to identify positive and negative negotiation leverage).

¹¹⁵ See *supra* note 17.

¹¹⁶ See *supra* note 18.

¹¹⁷ See, e.g., Dressler, *supra* note 19, at 1334.

¹¹⁸ See *supra* note 20.

¹¹⁹ See, e.g., Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1298 (1975) (“When our consciences cause us to deny the coercive character of the system that we have created, we magnify its injustice as we delude ourselves.”); Bar-Gill & Ben-Shahar, *supra* note 112, at 763 (“Plea bargains are a unique species of contract that raises frequent concerns of coercion.”); Josh Bowers, *Plea Bargaining’s Baselines*, 57 WM. & MARY L. REV. 1083, 1127 (2016) (arguing that whether a plea bargain is coercive should be determined based on a proportionality baseline); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 13 (1978) (“Plea bargaining, like torture, is coercive.”).

¹²⁰ Compare Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 704–07 (1980) (arguing that high sentencing can result in coercive plea agreements), with Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 311 (1983) (rejecting the argument that pleas can be coercive).

¹²¹ Included in the idea of voluntariness is how the outcome affects other people. See Jolly & Prescott, *supra* note 82, at 1092 (“[O]utcome-modification agreements can go beyond a defendant and directly affect third parties, which occurs only because the defendant has an interest in these parties. For instance, hardball prosecutors may threaten to investigate and indict a defendant’s friends, family members, or co-conspirators unless the defendant relinquishes some or all of their procedural rights. Under such circumstances, defendants might feel compelled to settle to protect their network from the costs of such attention or to save themselves from any reputational effects.” (footnote omitted)).

opportunity for reasoned deliberation,” and an absence of governmental misconduct.¹²² If any of these elements are missing, the plea should be considered wrongfully coercive and thus impermissible.¹²³

To assess the coercive nature of pleas, scholars tend to focus on what is known as a “sentencing differential” whereby the state imposes “one sentence if there is a plea, and a higher sentence if the defendant stands trial and is convicted.”¹²⁴ Arguments regarding coercive plea bargains can be divided into two broad views: “(1) differential sentences that ‘coerce’ confessions, and (2) differential sentences that ‘unduly burden’ constitutional rights.”¹²⁵

Starting with the first view, that differential sentences can coerce confessions, scholars like Steven Nemerson argue that ethical values should make enhancing “the maximum proportionate sentence to coerce cooperation . . . impermissible.”¹²⁶ In other words, “If a plea induced by fundamentally unfair or unethical conduct or promises is constitutionally infirm, then a plea resulting from threats of disproportionately severe punishment upon conviction after trial is also invalid.”¹²⁷ Nemerson thus believes it to be morally impermissible to use a “retributive principle” “to impose a greater sentence on a defendant than that justified by his individual culpability for the purpose of coercing cooperation by the defendant or others, except in the most compelling cases of social need.”¹²⁸ But how large should the differential be to render a plea coercive? According to Albert Alschuler, the size of the differential does not matter and any differential is problematic because “[i]f we are ‘lenient’ toward [defendants who plead guilty], we are by precisely the same token ‘more severe’ toward [those who

¹²² See Nemerson, *supra* note 120, at 704–07.

¹²³ *Id.*

¹²⁴ Easterbrook, *supra* note 120, at 311.

¹²⁵ Nemerson, *supra* note 120, at 701. The arguments based on morality alone are intertwined with these views, but as Nemerson points out, “it is generally inadequate in a legal brief to cite [morality texts] as controlling or even persuasive precedent on the validity of a judicially imposed sentence of incarceration.” *Id.*

¹²⁶ *Id.* at 707.

¹²⁷ *Id.* at 706–07.

¹²⁸ *Id.* at 698–99. But “the state may impose less than the proportional penalty on an offender if the overall consequences of such leniency . . . would be better than those that would likely result from imposition of the maximum deserved sentence.” *Id.* at 698–99. The caveat is that “any harmful consequences of such leniency (e.g., decreased general deterrence) do not outweigh the good gained.” *Id.* at 699. To determine an appropriate lower limit for a sentence, Nemerson suggests a “utilitarian principle,” which would support eliminating plea bargains based on the result. *Id.* But see Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 671–79 (1981) (taking issue with Nemerson’s position that the utilitarian “sacrifice of one governmental objective—that of insuring adequate punishment for offenders—can be justified to accomplish another—that of reducing government expenditures”).

plead not guilty].”¹²⁹ The state is thus punishing a person because, for the nonpleading defendant, “the act of putting the noose around their own necks is simply too difficult,”¹³⁰ and “[f]ar from promoting his sense of personal dignity, it may confirm his sense of bewilderment and unfair imposition.”¹³¹

Pivoting to the second argument, that “differential sentences . . . ‘unduly burden’ constitutional rights,”¹³² Alschuler asserts that “in the absence of a legitimate reason, the government may not burden the exercise of constitutional rights at all.”¹³³ Alschuler takes issue with the very balancing of the constitutional right to trial and counsels against economic pressures of government.¹³⁴ Taking this argument a step further, John H. Langbein compares a confession received after torturing a person to a negotiated plea for less prison time,¹³⁵ concluding that both prompt the victim “to bear false witness against himself in order to escape further [punishment].”¹³⁶ If “there is no way of knowing whether a particular guilty plea was given because the accused believed he was guilty, or because of the promised concession,” Langbein sees no moral difference other than degree of coercion between the two tactics for extracting confessions.¹³⁷

¹²⁹ Alschuler, *supra* note 128, at 659 (second and third alterations in original) (quoting *Scott v. United States*, 419 F.2d 264, 278 (D.C. Cir. 1969)). The very choice between a plea and a trial is thus unjust for Alschuler, as “[o]ne mark of a just legal system is that it minimizes the effect of tactical choices upon the outcome of its processes.” *Id.* at 657. In an unjust legal system, therefore, “one [of two virtually identical defendants will] receive a more severe sentence than the other only because he has exercised his right to trial.” *Id.* at 658.

¹³⁰ *Id.* at 666.

¹³¹ *Id.* at 668–69.

¹³² Nemerson, *supra* note 120, at 701.

¹³³ Alschuler, *supra* note 128, at 695. Thus, “[t]he legitimacy of the government’s purpose must always be evaluated in terms of the objectives of the Constitution itself.” *Id.* at 695 n.115. As a result, utilitarian arguments regarding government benefits or administrability cannot justify coercive pleas that involve “the sacrifice of penological purposes (or of important constitutional values).” *Id.* at 672; *see also* Lisa Kern Griffin, *State Incentives, Plea Bargaining Regulation, and the Failed Market for Indigent Defense*, 80 LAW & CONTEMP. PROBS. 83, 100–02 (2017) (discussing how plea bargaining relies on well-funded, accurate defense counsel, so the inadequate public defender system requires greater state funding).

¹³⁴ Alschuler, *supra* note 128, at 677 (“If the framers of the Constitution were not fools, they knew that trials would cost money. They apparently decided that the price was worth paying. Under our Constitution, it is simply impermissible to balance the virtues of trial against the economic costs . . . [because the framers] surely did not overlook the fact that the sixth amendment would have an impact on government treasuries.” (footnote omitted)).

¹³⁵ Langbein, *supra* note 119, at 12–13.

¹³⁶ *Id.* at 15.

¹³⁷ *Id.* at 16 (quoting *People v. Byrd*, 162 N.W.2d 777, 787 (Mich. Ct. App. 1968) (Levin, J., concurring)). Langbein adds an authority-usurping function to the analysis, noting that “plea bargaining . . . requires the prosecutor to usurp the determinative and sentencing functions, hence to make himself judge in his own cause.” *Id.* at 18. Unlike the constitutionally mandated fair trial, which requires “the prosecutor to make the charging decision, the judge and especially the jury to

Structural elements can also play a role in coercive plea bargains. A key example is information asymmetry.¹³⁸ To explain this asymmetry, Stephanos Bibas compares basic consumer protections to those offered to a defendant and shows that the market for bargaining is biased against “unsophisticated laymen facing repeat-player prosecutors.”¹³⁹ This asymmetry, combined with the pressure “to make hurried decisions based on advice by lawyers whom they may not yet have come to trust” and who are “often overburdened . . . and may have incentives to plead cases out quickly,” creates conditions ripe for coercion.¹⁴⁰ Similarly, Ion Meyn highlights structural elements used to limit formal discovery and overburdened public defenders ill-equipped to handle the discovery as crucial factors affecting the plea bargaining process.¹⁴¹

In contrast, some have argued that plea bargains are not inherently coercive unless accompanied by physical or extreme emotional threats, which are already prohibited.¹⁴² As for the sentencing differential, Frank Easterbrook argues that attempts to set a specific limit to the differential run counter to defendants’ and prosecutors’ autonomy and disincentivize the most efficient way of settling cases.¹⁴³ For Easterbrook, the mere act of buying and selling certain rights for certain results is not itself coercive:

adjudicate, and the judge to set the sentence[, p]lea bargaining merges these accusatory, determinative, and sanctional phases of the procedure in the hands of the prosecutor.” *Id.*; see also Griffin, *supra* note 133, at 100–02 (“Plea bargaining . . . compromis[es] the professional roles and norms of both prosecutors and judges.”). For Langbein, this is directly analogous to “the European inquisitorial procedure,” which “concentrated in the investigating magistrate the powers of accusation, investigation, torture, and condemnation.” Langbein, *supra* note 119, at 18.

¹³⁸ See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1153–59 (2011) (arguing that the current plea bargain system is unjust and in need of reform because it pits unsophisticated laymen against repeat-player prosecutors, leading to information imbalance); Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1091–92 (2014) (noting information asymmetry in criminal discovery).

¹³⁹ Bibas, *supra* note 138, at 1153.

¹⁴⁰ *Id.* at 1153–55. Bibas adds that for unsophisticated defendants, “[i]t is astonishing that a \$100 credit-card purchase of a microwave oven is regulated more carefully than a guilty plea that results in years of imprisonment.” *Id.* at 1153.

¹⁴¹ See Meyn, *supra* note 138, at 1129–33.

¹⁴² See Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133, 1147–48 (2013) (noting that plea bargains cannot be “cheekily equated” to torture, because “actual or threatened physical harm” and “mental coercion overbearing the will of the defendant” are already prohibited (quoting *Brady v. United States*, 397 U.S. 742, 750 (1970))); see also Easterbrook, *supra* note 120, at 311–12 (arguing that sentencing differentials that naturally result from the bargaining process are not coercive).

¹⁴³ Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1977–78 (1992) (“Formally, the [criminal sentencing] guidelines limit the discount for ‘acceptance of responsibility’ to two levels, or roughly fifteen percent of the sentence. This discount, significantly less than the historical reduction, could have discouraged pleas. . . . [This is] the opposite of the effect the guidelines’ authors sought to achieve.”).

If plea bargains are honest compromises among the parties, in which defendants who might be acquitted surrender that possibility in exchange for a lower sentence, then there will be a sentence differential that is indistinguishable from the coercive threat of which the critics complain.¹⁴⁴

Even if coercion were present, it would be difficult to identify, because in a world where plea bargains exist, it is impossible to know what a sentence would be in their absence.¹⁴⁵ Further, differences in posttrial and postplea sentences are expected, because “the right to take the case to trial is a valuable entitlement . . . [which the prosecutor] will pay handsomely for.”¹⁴⁶ Per Easterbrook, therefore, to base coerciveness only on differential size ignores other factors that create sentencing differentials, such as the likelihood of acquittal.¹⁴⁷ It also fails to account for inequalities rampant at trial, in which “[i]nformation and reputation effects create economies of scale in defense[,] . . . [e]yewitnesses are often unreliable (but believable) witnesses[, and e]vidence may not come to light.”¹⁴⁸

In contesting the claim that plea bargains are coercive, Robert E. Scott and William J. Stuntz use the framework of duress in contract law: “[C]ontract law has resolutely rejected the buyer’s duress argument [in cases where the standard going-rate and the actual price are drastically different] on the sensible ground that the seller’s actions did not produce the constraint on the buyer’s choices”¹⁴⁹ Thus, the fact that the defendant has “few and unpalatable choices” does not make the plea agreement involuntary as long as the prosecutor did not manipulate

¹⁴⁴ Easterbrook, *supra* note 120, at 311 (using an example in which a defendant facing twenty years believes he has a fifty percent chance of conviction and arguing that if his discount rate is ten percent, any offer of less than 5.82 years of incarceration would be an objectively attractive offer). Per Easterbrook, “only if circumstances cause him to accept a higher sentence or if the risk of the twenty-year sentence would not exist but for the existence of plea bargaining” then the plea bargains can be isolated as coercive itself. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1921 (1992). Easterbrook looks at the issues from a law and economics perspective, whereas Scott and Stuntz form a contract-based discussion, but their findings are similar. See Easterbrook, *supra* note 143, at 1969 (“Dean Scott and Professor Stuntz provide an impressive defense of plea bargaining based on autonomy and efficiency—the best defense in the literature. They add proposals for reform along contractual lines. The editors must have thought that Professor Schulhofer and I would supply contrasting points of view in reply, as if law reviews should aspire to the format of television commentary. Our reactions must be a disappointment, for we agree on everything that Scott and Stuntz themselves view as novel about their article.” (footnote omitted)).

¹⁴⁷ Easterbrook, *supra* note 120, at 312.

¹⁴⁸ *Id.* at 310, 316–17.

¹⁴⁹ Scott & Stuntz, *supra* note 146, at 1920.

posttrial sentences.¹⁵⁰ Scott and Stuntz also reject an unconscionability challenge to plea bargains, highlighting prosecutors' incentives to bargain with defendants and defendants' power to force prosecutors to try them.¹⁵¹ This incentive makes plea bargains different from most unconscionable contracts, as "it is in [the prosecutor's] interests to bargain for a deal with each defendant" and generally "the absence of such individualized bargaining in other settings . . . supports claims of unconscionability on the basis of unequal bargaining power."¹⁵²

A final strand of work assessing coercion in plea bargaining focuses on notice, which Josh Bowers claims is consistent with how courts interpret plea voluntariness.¹⁵³ Bowers notes that the Supreme Court has held that if the defendant is "fully aware of the likely consequences" when pleading guilty, it is "not unfair to expect him to live with those consequences."¹⁵⁴ This rationale fits with Bowers's claim that plea bargaining and guilty plea procedure care "comparatively more about autonomy and fairness, and comparatively less about the perceived settled question of technical guilt accuracy."¹⁵⁵ Thus, if a charge is supported by probable cause, "there is no impermissible coercion."¹⁵⁶

An important component largely missing from this theoretical and doctrinal discussion is the psychology of coercion. Understanding the psychological factors that contribute to an individual's experience of being pushed into acquiescence can narrow the divide between legal definitions and the coerced individual's reality. It can also aid in discerning subtler forms of coercion than those traditionally recognized by the legal system.

¹⁵⁰ See *id.* at 1920–21. For Scott and Stuntz, then, "An offer that exploits those circumstances [in which a defendant has few, bad options] is nevertheless value enhancing, and enforcement is appropriate. More choices are better, even—perhaps especially—if one has few to begin with." *Id.* at 1920.

¹⁵¹ *Id.* at 1921–24.

¹⁵² *Id.* at 1924.

¹⁵³ Bowers, *supra* note 142, at 1147–48 (noting that courts have not protected any other aspect of plea bargaining besides notice, as "actual or threatened physical harm" and "mental coercion overbearing the will of the defendant" are already prohibited (quoting *Brady v. United States*, 397 U.S. 742, 750 (1970))).

¹⁵⁴ *Id.* at 1148–49 (quoting *Mabry v. Johnson*, 467 U.S. 504, 511 (1984)).

¹⁵⁵ *Id.* at 1149–50.

¹⁵⁶ *Id.* at 1151 (noting that "[f]or the Court, it matters terrifically that prosecutors apply pressure with the law, not with their hands"). Bowers asserts that

[u]ltimately, then, there exists a complicated interplay between plea-bargaining and coercion—narrowly, between plea-bargaining and draconian substantive criminal codes. By compelling the defense attorney to bargain hard around unfair code law (and to exercise 'considerable persuasion' in her dealings with both the State and her client), the Court has facilitated the substantive circumvention of law in the name of procedural fairness.

Id. at 1166.

D. Psychological Coercion

Psychological coercion is often discussed in the context of plea bargaining and criminal confessions, but this literature is useful for understanding the psychological mechanisms contributing to coercion in other settings, including civil settlements. As reviewed in Part I, some philosophers have expanded their definitions of coercion over the last several decades to include subdued forms of coercion.¹⁵⁷ However, legal doctrine has yet to catch up¹⁵⁸ by addressing the subtle forms of coercion that psychological research shows can influence voluntary decision-making.¹⁵⁹

These subtle methods of coercion fall into two main categories. The first category is authority and power, and the second is social influences.¹⁶⁰

With regard to *authority*, psychological studies have shown that more often than not, people obey instructions from others who they view as authority figures.¹⁶¹ For example, in Stanley Milgram's famous experiment from 1963, more than half of the participants obeyed the experimenter's instructions and issued what they thought were potentially harmful shocks to a person in another room complaining of pain and pleading with them to stop.¹⁶² Later studies have produced similar results, showing that deference to perceived authority can have a significant impact on a person's decision-making process.¹⁶³

¹⁵⁷ See *supra* Part I.

¹⁵⁸ Indeed, cases discussing forced confessions only address situations in which coercion is obvious. See *Hopt v. Utah*, 110 U.S. 574, 585 (1884) ("[A] voluntary confession of guilt is among the most effectual proofs in the law, . . . [b]ut the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law."). These cases typically include explicit threats or promises. See, e.g., *id.*; *Brown v. Mississippi*, 297 U.S. 278, 281–82 (1936); cf. *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59, 364–65 (1978) (holding that a prosecutor did not violate the due process rights of a criminal defendant during plea bargaining by telling the defendant that the prosecutor would return to the grand jury and seek an indictment on a charge carrying a mandatory sentence of life imprisonment if the defendant pleaded not guilty).

¹⁵⁹ See Luna, *supra* note 104, at 242 (reviewing conceptions of coercion across law, philosophy, and psychology to propose an updated legal definition of coercion).

¹⁶⁰ *Id.* at 245, 250.

¹⁶¹ *Id.* at 245.

¹⁶² Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCH. 371, 374, 376 (1963).

¹⁶³ See, e.g., Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity, and Compliance*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 151, 170–71 (Daniel T. Gilbert et al. eds., 4th ed. 1998); Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1962, 2001–04

Another notable element of Milgram's study was how little pressure the experimenter put on the subjects to keep allegedly shocking the other individual.¹⁶⁴ In another study, researchers similarly found that very little pressure was needed before participants would confess to something that they did not do.¹⁶⁵ These researchers told participants to perform a computer task and instructed them not to press the "ALT" key, which would crash the computer.¹⁶⁶ The computer would then crash on its own, and the experimenter would ask the participant to sign a written confession that said "I hit the 'ALT' key and caused the program to crash. Data were lost."¹⁶⁷ A total of sixty-nine percent of participants signed the false confession despite being innocent, and the experimenter applied no pressure other than simply asking them to sign the confession.¹⁶⁸

Researchers have attempted to explain why people so often comply with authority even when they do not wish to do so.¹⁶⁹ One potential reason is that authority figures are perceived as people with high levels of knowledge and experience in a particular area.¹⁷⁰ Furthermore, people often comply with requests by authority figures because real-world decision-making has to be "fast, automatic, and unconscious."¹⁷¹ A related factor that contributes to psychological coercion is *power*.¹⁷² Similar to authority, power has to do with real or perceived control over rewards and punishments, which is the case for prosecutors and interrogators.¹⁷³ People in positions of power can exert similar influence on individuals who are subordinate to or otherwise weaker than them.

(2019) (reporting survey results and noting that "decision makers judging the voluntariness of consent consistently underestimate the pressure to comply with intrusive requests").

¹⁶⁴ See Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 175–77. According to the study, simply saying things like "you must go on" was enough for participants to continue their supposed torture of the person in the other room. *Id.* However, some have cast doubt on the study's method and findings. See Gina Perry, *Deception and Illusion in Milgram's Accounts of the Obedience Experiments*, THEORETICAL & APPLIED ETHICS, Winter 2013, at 79 (arguing that the experimenters in Milgram's study were far more involved in badgering participants than originally reported).

¹⁶⁵ Nadler, *supra* note 164, at 178–79. See generally Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCH. SCI. 125 (1996) (describing the method and results of the study).

¹⁶⁶ Kassin & Kiechel, *supra* note 165, at 126.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 126–27.

¹⁶⁹ See, e.g., Nadler, *supra* note 164, at 174–75.

¹⁷⁰ *Id.* at 173.

¹⁷¹ *Id.* at 174.

¹⁷² Luna, *supra* note 104, at 245.

¹⁷³ See *id.* There are five types of power: legitimate, reward, coercive, referent, and expert. *Id.* Legitimate power comes from one's perception of the person in power as having a right to influence. *Id.* Reward power comes from the perceived ability to control benefits, whereas coercive power is derived from the perceived ability to control punishments. *Id.* Referent power originates

Authority and power operate via perception, not necessarily objective reality.¹⁷⁴ An example of this comes from a psychological study in which experimenters showed participants a confession tape from different camera angles.¹⁷⁵ The participants who were shown the tape from the perspective of the interrogator were more likely to say that the confession was voluntary.¹⁷⁶ The participants who were shown the tape from the perspective of the accused, however, were more likely to say that the confession seemed coerced.¹⁷⁷ This suggests that coercion induced by authority and power is created by the subjective perception of the person being coerced, and people outside the situation may struggle to recognize this experience.¹⁷⁸ Further, when people perceive another as someone in an authority position or possessing power, it changes the way that their actions and language are perceived.¹⁷⁹ When someone with perceived authority and power gives a direction, people are more likely to understand the directive as an order, not a suggestion.¹⁸⁰

The second category of factors that contribute to psychological coercion is *social influences*.¹⁸¹ There are three main social theories that help explain coercive aspects of settlement agreements: reciprocity, scarcity, and social validation.¹⁸² First, reciprocity “involves the exchange of benefits for like benefits.”¹⁸³ A person acts reciprocally when they “reward kind actions and punish unkind ones.”¹⁸⁴ This behavioral phenomenon helps explain the desire to give a gift to a person after receiving a gift from that person.¹⁸⁵ Studies have shown that reciprocity

in someone identifying with the person in power. *Id.* Finally, expert power is attained from the perception that the person in power is knowledgeable. *Id.* Prosecutors and interrogators arguably hold all five of these types of power, which can have a significant impact on the decision-making process of the accused. *Id.* at 249.

¹⁷⁴ *Id.* at 245.

¹⁷⁵ Nadler, *supra* note 164, at 170; see also G. Daniel Lassiter, Andrew L. Geers, Patrick J. Munhall, Ian M. Handley & Melissa J. Beers, *Videotaped Confessions: Is Guilt in the Eye of the Camera?*, 33 ADVANCES EXPERIMENTAL SOC. PSYCH. 189, 241–46 (2001) (discussing and analyzing the results of the study).

¹⁷⁶ Nadler, *supra* note 164, at 170.

¹⁷⁷ *Id.*

¹⁷⁸ See *id.* at 169–72.

¹⁷⁹ See *id.* at 188–90.

¹⁸⁰ See *id.* Whereas if a friend were to give the same directive, it would more likely be perceived as a suggestion or request. See Jennifer L. Vollbrecht, Michael E. Roloff & Gaylen D. Paulson, *Coercive Potential and Face-Sensitivity: The Effects of Authority and Directives in Social Confrontation*, 8 INT'L J. CONFLICT MGMT. 235, 236 (1997).

¹⁸¹ See Luna, *supra* note 104, at 250–51.

¹⁸² See *id.*; Nadler, *supra* note 164, at 179–85.

¹⁸³ Luna, *supra* note 104, at 250.

¹⁸⁴ Armin Falk & Urs Fischbacher, *A Theory of Reciprocity*, 54 GAMES & ECON. BEHAV. 293, 293 (2006).

¹⁸⁵ See *id.*

theory “is a powerful determinant of human behavior.”¹⁸⁶ In plea deals, if a prosecutor originally overcharges a defendant and then offers concessions in exchange for a guilty plea, this could influence the defendant to reciprocate.¹⁸⁷

Second, scarcity explains that people tend to value things that are rare and likely to become unavailable if they wait.¹⁸⁸ Psychologists describe the state of scarcity as “having less than you feel you need.”¹⁸⁹ Researchers have found that scarcity causes a mental state that reduces cognitive and executive functioning and thus negatively impacts individuals’ decision-making skills.¹⁹⁰ In plea negotiations, if a prosecutor offers a defendant a plea deal with a time limit to accept—sometimes called “an exploding plea”¹⁹¹—the time limit increases the likelihood that the defendant will take the deal as compared to if the deal had no time limit.¹⁹² Additionally, the defendant may experience decreased complex decision-making abilities during this time due to pressure induced by scarcity.¹⁹³ Scholarly work studying how long it takes a defendant to plead guilty after being offered a deal has supported this theory.¹⁹⁴

Third, social validation elucidates how people tend to make decisions based on the actions of people around them.¹⁹⁵ When in a novel situation, a person may rely on the actions of those either currently or previously in similar situations to decide how to act.¹⁹⁶ Various psychological studies have shown that people are extremely influenced by the decisions and actions of those around them.¹⁹⁷ Although this phenomenon is less relevant to an individual settlement or plea, social cues might be gathered from how others have previously behaved in

¹⁸⁶ *Id.* at 294.

¹⁸⁷ See Luna, *supra* note 104, at 250. Reciprocity is also applicable to civil negotiations and transactions, as people more often agree to something when they feel compelled to participate in a quid pro quo. See Cialdini & Trost, *supra* note 163, at 175–76.

¹⁸⁸ See Luna, *supra* note 104, at 250; ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 203–04 (4th ed. 2001).

¹⁸⁹ SENDHIL MULLAINATHAN & ELДАР SHAFIR, *SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH* 4 (2013) (emphasis omitted).

¹⁹⁰ See Long Huang, Xiaojuan Li, Fuming Xu & Fuhong Li, *Consequences of Scarcity: The Impact of Perceived Scarcity on Executive Functioning and Its Neural Basis*, *FRONTIERS NEUROSCIENCE*, June 13, 2023, at 1, 1–2, <https://www.frontiersin.org/journals/neuroscience/articles/10.3389/fnins.2023.1158544> [<https://perma.cc/S8Q5-GLXN>].

¹⁹¹ See Jonathan A. Rapping, *Who’s Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 *WASHBURN L.J.* 513, 551 (2012).

¹⁹² See Luna, *supra* note 104, at 250.

¹⁹³ See Huang et al., *supra* note 190, at 2.

¹⁹⁴ See, e.g., Rapping, *supra* note 191, at 550–51.

¹⁹⁵ Nadler, *supra* note 164, at 179–81.

¹⁹⁶ See *id.*

¹⁹⁷ See, e.g., Solomon E. Asch, *Opinions and Social Pressure*, *SCI. AM.*, Nov. 1955, at 31, 32–33.

a similar situation. Conformity can thus be induced by pointing to the acts of similarly situated persons.

These factors combined can have a powerful impact on an individual's decision-making process.¹⁹⁸ Although the legal system has attempted to account for coercion in plea deals, it has done so only in a narrow subset of scenarios.¹⁹⁹ Further, subtle forms of psychological coercion are still present in a variety of situations, including civil settlements. Considering psychological factors that contribute to a sense of involuntariness can offer a more nuanced understanding of coercion in both criminal and civil settlements. The analysis in Part III integrates these notions into a legal account of coercive settlements. But before proceeding to Part III, it is useful to take stock of the main takeaways from the plea bargaining analysis.

E. Takeaways from Plea Bargaining to Civil Settlement Coercion

This analysis of coercion in plea bargaining helps gauge the extent to which some civil settlements—particularly those that silence the plaintiff—are coercive too. Several takeaways from this analysis are especially useful. *First*, sentencing differentials have the potential to be coercive. By creating a large disparity between the possibly devastating consequences of trial and the considerably more lenient treatment proposed in exchange for a guilty plea, prosecutors can generate conditions that hardly allow a defendant to decline the plea.²⁰⁰ Offers of leniency, in addition to threats of harsh treatment, can play a coercive role if the prosecutor imposes additional constraints on the defendant that lead them to take action.²⁰¹ As the next Part shows, civil defendants can similarly leverage a differential between trial and settlement. *Second*, structural and psychological elements are important. Factors such as lack of sufficient information, pressure to make decisions quickly, and overburdened

¹⁹⁸ Furthermore, in line with the theory on procedural justice, studies have found that when an individual has a voice during the decision-making process, their decisions are more often perceived as voluntary. See Melanie B. Fessinger & Margaret Bull Kovera, *From Whose Perspective? Differences Between Actors and Observers in Determining the Voluntariness of Guilty Pleas*, 46 LAW & HUM. BEHAV. 353, 353 (2022) (finding that “[d]efendants and judges both determine whether a guilty plea is made voluntarily” and “[t]hese decision-makers are likely to perceive the plea decision-making process differently given their differing perspectives”); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003) (arguing that a person's sense of procedural justice is important to whether they accept the results of the procedure).

¹⁹⁹ See *supra* Section II.B.

²⁰⁰ See *supra* notes 104–08, 126–31 and accompanying text.

²⁰¹ See generally Brunk, *supra* note 24 (arguing that many factors commonly present in the plea-bargaining process may make a negotiated guilty plea involuntary and that offers of leniency can also be coercive under certain conditions).

public defenders can further weaken defendants' voluntariness.²⁰² Part III elucidates that these elements are present in the civil context too. For example, information asymmetry favors civil defendants who know of the existence of other potential plaintiffs; plaintiffs face time constraints to settle; and even when plaintiffs are represented, their own lawyers might pressure them to settle as well. *Third*, context matters. Although plea deals are not inherently coercive,²⁰³ considerable institutional factors contribute to their coercive effect in many instances.²⁰⁴ A nuanced analysis of these factors is necessary to determine whether a settlement is truly voluntary. As explained in Part III, in the civil context, the conditions of the settlement process should be understood against the backdrop of the broader societal and economic structure to identify scenarios susceptible to coercion.²⁰⁵ But courts have been reluctant to take such a nuanced approach. As noted, although the Supreme Court invalidates plea bargains obtained through force, threats, or promises,²⁰⁶ many scholars argue that this approach is overly narrow.²⁰⁷ This Article contends that this is the case for civil settlements too.²⁰⁸

III. COERCIVE SETTLEMENTS

The foregoing discussion regarding coercion in plea bargaining raises the possibility that some civil settlements might be coercive too. This Part shows this is the case, dubbing civil settlements prone to coercion “high-risk civil settlements” and focusing on one class of

²⁰² See *supra* notes 138–41, 190–94 and accompanying text.

²⁰³ For a recent example of a plea bargain that the Author does not find coercive, see Eileen Sullivan & Danielle Kaye, *Boeing Agrees to Plead Guilty to Felony in Deal with Justice Department*, N.Y. TIMES (July 8, 2024), <https://www.nytimes.com/2024/07/08/business/boeing-justice-department-plea-deal.html> [<https://perma.cc/DQ8J-2QMM>].

²⁰⁴ See *supra* notes 138–41, 161–73 and accompanying text.

²⁰⁵ See *infra* Section III.B. This argument is aligned with a line of thinking in contract law arguing that in certain contexts, contracts are subject to the extracontractual norms formed by political and associative values: norms like due process and control over one's life and its prospects. See Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843, 845–46 (2012).

²⁰⁶ See FED. R. CRIM. P. 11(b)(2); *Waley v. Johnston*, 316 U.S. 101, 104 (1942); see also *Martin v. Kemp*, 760 F.2d 1244, 1246–48 (11th Cir. 1985) (providing that when the government induces a plea by threatening to prosecute a third party, such a plea is invalid only if the government lacked good faith of probable cause that the third party committed a crime).

²⁰⁷ See, e.g., Nemerson, *supra* note 120, at 701–13 (arguing that factors other than force, threats, or promises can coerce the defendant into confessing and pleading guilty).

²⁰⁸ That said, one might argue that the systemic value of plea bargains is more significant than civil settlements' systemic value. Pleas allow for maintaining the gap between the severe sentences on the books and the actual lower sentences in action. See Easterbrook, *supra* note 120, at 309, 311–12. Such systemic benefits are not as prominent in the civil context, except perhaps in eviction cases. See Nicole Summers, *Settlements of Adhesion*, 93 U. CHI. L. REV. (forthcoming 2026) (on file with author).

such settlements as an example. Specifically, this Part argues that when a defendant conditions a settlement on confidentiality, the resulting settlement might be coercive if additional factors are present, including power imbalance, lack of information, and time pressure.

Importantly, the argument advanced here pertains only to a specific subset of contracts rather than to the law of contract more generally. As explained in Section III.A, courts tend to shy away from intervening in settlements, effectively setting a higher bar for settlement invalidation compared to other contracts. This Part pushes back against this approach as applied to high-risk settlements. It argues that consideration should be given to the broader social and economic context of the settlement and to subtler forms of power and social influence—not unlike those commonly used in the plea-bargaining process—which might amount to coercion.

This Article focuses on certain confidential settlements as an example of high-risk settlements not only because of their contemporary importance but also because of the special nature of silence as a contractual term. As Nancy Kim has argued, for agreements that dramatically constrain one's autonomy going forward, the law should observe stricter requirements for consent and voluntariness.²⁰⁹ A settlement nondisclosure, this Part argues, merits special treatment given concerns about the psychological forces that could lead weaker parties to involuntarily enter such agreements and the emotional strain silence can impose.²¹⁰

The analysis below first discusses the doctrine on coercion in settlement agreements, showing that courts rarely invalidate settlements due to coercion. Then, this Part proposes a list of factors contributing to high-risk civil settlements, which warrant closer examination by courts for indications of coercion. It also addresses both the procedural context and the structural factors that can give rise to such coercive settlements and deals with potential counterarguments. Finally, it suggests a path forward.

²⁰⁹ KIM, *supra* note 29, at 218 (proposing that courts should examine “the context in which the manifestation of consent was made, rather than the mere fact that it was made” and arguing “that both the robustness of consent conditions *and* the consent-seeker’s responsibility for ensuring valid consent should increase commensurately with the threat to the consenter’s autonomy presented by the proposed activity”). In contrast, some have argued that relational contracts are inherently about constraining future states of action, particularly when one is concerned about counterparty risk. See Hanoch Dagan & Tamar Kricheli-Katz, *Long-Term Contractual Commitments and Our Future Selves*, 48 LAW & SOC. INQUIRY 517, 517 (2023) (finding that “people’s intuitive tendencies to make long-term commitments align with those that underlie liberal contract law, which is careful about enforcing contracts that constrain the self-determination of contractors’ future selves”).

²¹⁰ See *supra* Section II.D. Though for other reasons, the concern articulated in this Article is similar to concerns about a tendency to take fewer self-protective measures in ongoing contract relationships. See generally David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395 (2013) (finding evidence for this phenomenon by comparing precautions in ongoing contract relationships with those in initial negotiations).

A. *Duress, Unconscionability, and Undue Influence in Civil Settlement: Existing Doctrine*

This Section surveys standard doctrine and argues that although it is unlikely to find coercion in high-risk civil settlements, a more expansive look at typical coercion-based contract defenses allows for such a finding.

In contract law, coercion generally relates to two main doctrines: duress and unconscionability—each of which allows courts to ignore an agreement due, in part, to abusive bargaining methods.²¹¹ An additional relevant doctrine is undue influence, which protects weaker parties from overreaching and often involves a stronger party exploiting the other side's reduced capacity.²¹² Undue influence's boundaries, however, are currently even more limited than those of duress and unconscionability.²¹³ Indeed, generally speaking, "Courts rarely overturn contracts on the basis of these doctrines explicitly employing inequality of bargaining power as an element."²¹⁴

In the past, duress was a valid defense only when actual serious physical harm was used to coerce an agreement.²¹⁵ It was not until the late nineteenth century that economic duress was first acknowledged.²¹⁶ Per Justice Holmes,

If a party obtains a contract by creating a motive from which the other party ought to be free, and which, in fact, is, and is known to be, sufficient to produce the result, it does not matter that the motive would not have prevailed with a differently constituted person, whether the motive be a fraudulently created belief or an unlawfully created fear.²¹⁷

²¹¹ See RESTATEMENT (SECOND) OF CONTS. §§ 175, 208 (AM. L. INST. 1981). See generally John Dalzell, *Duress by Economic Pressure I*, 20 N.C. L. REV. 237, 240 (1942) (discussing duress); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (discussing unconscionability).

²¹² See RESTATEMENT (SECOND) OF CONTS. § 177 (AM. L. INST. 1981).

²¹³ See generally Hila Keren, *The Unbearable Narrowness of Undue Influence*, in RESEARCH HANDBOOK ON THE PHILOSOPHY OF CONTRACT LAW 415 (Mindy Chen-Wishart & Prince Saprai eds., 2025) (discussing how undue influence's narrowness renders it unable to protect vulnerable individuals from manipulative contracts). Because this Article focuses on standard arm's-length transactions in which undue influence is rarely applied, it dedicates more attention to duress and unconscionability. That said, it recognizes the potential to expand the use of undue influence in the context discussed here.

²¹⁴ Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 144 (2005). For empirical support of this assertion, see Danielle Kie Hart, *In and Out—Contract Doctrines in Action*, 66 HASTINGS L.J. 1661, 1672–73 (2015).

²¹⁵ JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.2 (6th ed. 2009).

²¹⁶ See *Silsbee v. Webber*, 50 N.E. 555, 556 (Mass. 1898).

²¹⁷ *Id.*

According to the Restatement (Second) of Contracts, outside of physical coercion, duress occurs when “a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative.”²¹⁸ When the standard for duress is met, an otherwise enforceable contract is voidable.²¹⁹ This standard typically requires that the party asserting the defense prove that, as a result of the other party’s improper threat, the “circumstances permitted no other alternative” but—seemingly—to assent to the contract.²²⁰

Wertheimer frames duress as generally requiring two independent and necessary elements: a “wrongful” proposal (the “proposal prong”) and an unreasonable constraining of a party’s choices (the “choice prong”).²²¹ Under the proposal prong, because legitimate actions by others can constrain a person’s choices, only wrongful proposals will allow a person to escape the consequences of volitional acts.²²² The choice prong demands that “[a recipient] has ‘no reasonable choice’ or ‘no acceptable alternative’ but to succumb to [the] proposal.”²²³ Likewise, Judge Posner reaches this conclusion through the causation element embedded in the duress framework. To Posner, causation does not exist unless the stronger party creates distress for the weaker party.²²⁴

As argued in the next Section, Wertheimer’s framework and Posner’s approach are overly narrow in the context of the agreements

²¹⁸ RESTATEMENT (SECOND) OF CONTS. § 175 (AM. L. INST. 1981). The exact way courts define duress varies from state to state. *Compare* *Brown v. Cain Chem., Inc.*, 837 S.W.2d 239, 244 (Tex. App. 1992) (explaining that in Texas, duress has an illegal act requirement that is not present in other states), *with* *Martinez-Gonzalez v. Elkhorn Packing Co.*, 25 F.4th 613, 620 (9th Cir. 2022) (explaining that in California, duress has no illegal act requirement).

²¹⁹ RESTATEMENT (SECOND) OF CONTS. § 175 (AM. L. INST. 1981).

²²⁰ *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1329 (Fed. Cir. 2003) (quoting *Dureiko v. United States*, 209 F.3d 1345, 1358 (Fed. Cir. 2000)).

²²¹ WERTHEIMER, *supra* note 33, at 30. Wertheimer analyzes parallel language from the Restatement (First) of Contracts. To him, duress involves a two-prong analysis that focuses on the voluntariness of the recipient’s choices and the moral legitimacy of the proposal. *Id.* As Hila Keren notes, Wertheimer can be read to emphasize “wrongness and unfairness” over “freedom and voluntariness” in the doctrine of duress. *See* Keren, *supra* note 23, at 721 n.254 (quoting WERTHEIMER, *supra* note 33, at 53).

²²² WERTHEIMER, *supra* note 33, at 30; *see also* Dalzell, *supra* note 211, at 240 (“[T]o constitute duress, the following elements are both essential and sufficient: (1) the transaction must be induced by a wrongful threat, (2) for which the law offers no adequate remedy, that is, no remedy which (by practical laymen’s standards, not those of the common-law nor even of equity) is really sufficient to compensate for the wrong suffered if the threat should be carried out.”).

²²³ WERTHEIMER, *supra* note 33, at 30. Wertheimer relies on a comparison to an old contract case in which a gunman demanded “[y]our money or your life” from a victim. *Id.* at 126–27. Per Wertheimer, “The gunman’s proposal is wrong (in part) because [the gunman] has created the victim’s coercive choice situation. We evaluate the victim’s choices by comparing them with his choices *prior* to the gunman’s proposal.” *Id.* at 135. The gunman is asking their victim to forgo a legal right: either a legal right to money or a legal right to life, which makes the proposal wrongful. *Id.* at 136.

²²⁴ *See* *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 928–29 (7th Cir. 1983).

discussed here. First, they fail to account for threats—or offers—that, although legal in the strict sense, still exert improper emotional pressure on the recipient. Second, they do not consider the possibility of making seemingly available alternatives like litigation considerably less attractive.

Turning specifically to settlements, courts rarely invalidate such agreements due to duress.²²⁵ Courts have held that “[a]n agreement is not void because a party settled for less than [the party] later believes the law provides.”²²⁶ Additionally, a plaintiff cannot prove a duress claim by simply stating that they were under economic duress to settle because they needed the money.²²⁷ In order to prevail on an economic duress argument, a plaintiff must prove that the duress was caused by the actions of the other party.²²⁸ Further, the plaintiff must prove that they had no other reasonable option,²²⁹ and litigation is usually considered an alternative option for disputants in such situations.²³⁰ Finally, an attorney’s presence at the signing of the settlement agreement generally creates a presumption that entering the agreement was voluntary.²³¹ Thus, the bar for proving an economic duress argument is high.²³²

²²⁵ See, e.g., *Ballard v. Phila. Sch. Dist.*, 273 F. App’x 184, 187 (3d Cir. 2008). One reason for this approach may be courts seeking to incentivize settlements to promote judicial economy.

²²⁶ *Id.* at 188. For the general jurisprudence on economic duress, see, for example, *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533, 535 (N.Y. 1971); *Alaska Packers’ Ass’n v. Domenico*, 117 F. 99, 102–03 (9th Cir. 1902).

²²⁷ See *Dobson v. Portrait Homes, Inc.*, 117 P.3d 1200, 1206 (Wyo. 2005). Economic difficulties can affect defendants in plea negotiations too, particularly if inability to post bail led to their pretrial detention. See Roxy W. Davis, *Homelessness and Pretrial Detention Predict Unfavorable Outcomes in the Plea Bargaining Process*, 46 LAW & HUM. BEHAV. 201, 209–10 (2022) (finding that homeless defendants were more likely to be held in pretrial detention, plead guilty, and serve longer sentences compared to housed defendants).

²²⁸ *Dobson*, 117 P.3d at 1206. See also Judge Posner’s approach in *Selmer*, 704 F.2d at 928–29, for an application of this principle.

²²⁹ *Dobson*, 117 P.3d at 1206. As further discussed below, cases often fail to consider that costs and other barriers can prevent litigation from serving as a reasonable alternative.

²³⁰ *Id.* There are exceptions, though. For example, in a case of spousal abuse, a court was willing to find duress during divorce negotiations because the abused spouse may have been in a fragile mental state. See *Lewis v. Lewis*, 234 A.3d 706, 718–19 (Pa. Super. Ct. 2020). There are also public policy exceptions, which can be used as an alternative to meeting the high standard of a duress argument in the settlement context. See generally Hoffman & Lampmann, *supra* note 30 (explaining that private settlements can be detrimental to public policy in certain contexts such as sexual assault).

²³¹ See, e.g., *Ortiz-Quinones v. Cook County*, 744 F. App’x 962, 964 (7th Cir. 2018).

²³² See *Alexander v. Standard Oil Co.*, 423 N.E.2d 578, 582 (Ill. App. Ct. 1981) (holding that there must be unlawful or morally wrongful pressure to show economic duress). That said, in many jurisdictions, the requirement that the pressure be “unlawful” no longer exists. As noted, according to the Restatement, the threat does not have to be illegal. RESTATEMENT (SECOND) OF CONTS. § 175 (AM. L. INST. 1981).

Although in the context of civil rights claims the standard is relaxed,²³³ it remains difficult to show that a settlement entered after the filing of a civil rights action was not entered voluntarily.²³⁴

This Article is aware of only two cases in which a party argued that a confidentiality provision of a settlement agreement should be invalidated due to duress. In *Igani v. Summit Physical Therapy*,²³⁵ the defendant filed a motion to enforce a settlement agreement reached during mediation for claims of harassment and retaliation.²³⁶ The plaintiff disputed the mutual confidentiality terms reflected in the settlement agreement,²³⁷ arguing that the mediation settlement was signed under duress because “his own attorney recommended settlement and the mediator ‘did not remain neutral’” during negotiations.²³⁸ The

²³³ Cases arising under civil rights statutes have their own voluntariness requirement for waiver or release of claims. Under this requirement, an employee’s consent to settle an action under Title VII must be knowing and voluntary or else any waiver of claims is ineffective. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974). To assess the validity of the settlement, courts must evaluate both state contract law and the “knowing and voluntary” nature of the employee’s entry into the settlement. *See, e.g., Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, 65 F.3d 562, 568, 570 (7th Cir. 1995) (analyzing the validity of a settlement on both state law contract grounds and “knowing and voluntary” grounds). One standard adopted by some of the circuits looks to the “totality of the circumstances” in evaluating whether a settlement was made voluntarily and knowingly. *See Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 523–24 (3d Cir. 1988). In evaluating the “totality of the circumstances,” the Third Circuit considered:

1) the plaintiff’s education and business experience, 2) the amount of the time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Id. at 523 (quoting *Equal Emp. Opportunity Comm’n v. Am. Express Publ’g Corp.*, 681 F. Supp. 216, 219 (S.D.N.Y. 1988)). Courts also consider whether the employer encourages or discourages the employee to consult an attorney and whether the attorney actually had the opportunity to do so. *See Cirillo v. Arco Chem. Co.*, 862 F.2d 448, 454 (3d Cir. 1988). New Jersey has also adopted this test in evaluating waivers of claims under the New Jersey Law Against Discrimination. *See Swarts v. Sherwin-Williams Co.*, 581 A.2d 1328, 1332 (N.J. Super. Ct. App. Div. 1990).

²³⁴ For a rare civil rights case in which a settlement was invalidated on appeal for lack of voluntariness, see *Taylor v. Krakora*, No. A-0294-20, 2022 WL 2760851, at *5–7, *9 (N.J. Super. Ct. App. Div. July 15, 2022) (invalidating a settlement because the plaintiff presented evidence of cruel, retaliatory acts by defendants). Although the issue of waiver voluntariness can come up both prior to and after the filing of a complaint or a civil action, it more commonly arises pre-filing. *See Daniel P. O’Gorman, A State of Disarray: The “Knowing and Voluntary” Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 74 n.4 (2005) (explaining differences between pre-filing and postfiling waivers). On the contrast between predispute and postdispute consent, see also Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711, 727–35 (2016).

²³⁵ No. 18-cv-155, 2019 WL 13299291 (E.D. Tenn. Dec. 20, 2019).

²³⁶ *Id.* at *1.

²³⁷ *Id.* at *4.

²³⁸ *Id.* at *6.

court found that even though the plaintiff's attorney may have urged settlement, this did not create coercion or duress, and a mediator's suggestions that the plaintiff was unlikely to win at trial did not "divest [plaintiff] of his own independent will."²³⁹ Additionally, in 2018 in the Middle District of Georgia,²⁴⁰ a plaintiff brought a breach of contract claim against the defendant for allegedly violating the confidentiality provision of their settlement agreement.²⁴¹ The defendant argued that the plaintiff's complaint must be dismissed because the confidentiality provision was induced through duress.²⁴² The court rejected the duress argument as premature, reasoning that it could not assess the merits of a duress argument without more facts.²⁴³ Courts thus have not yet fully considered the possibility that consent to settlement nondisclosure can, under certain circumstances, reflect duress.

Unlike duress, unconscionability emerged in equity as a catchall protection from oppressive bargaining or agreements.²⁴⁴ Later on, the doctrine was codified in the Uniform Commercial Code²⁴⁵ and in the law of contracts more generally.²⁴⁶ Although both duress and unconscionability protect weaker parties from stronger parties' overreaching, there are important differences between the doctrines. For example, duress is tested by the improper threat and the state of mind induced in the victim—one of a lack of choice²⁴⁷—while unconscionability addresses the parties' relationship and the extent to which the substance of the

²³⁹ *Id.* The court upheld the settlement agreement and enforced the confidentiality clause. *Id.* at *7.

²⁴⁰ [Redacted] v. [Redacted], 326 F. Supp. 3d 1349 (M.D. Ga. 2018).

²⁴¹ *Id.* at 1350–51.

²⁴² *Id.* at 1353.

²⁴³ *Id.* at 1355. The court ultimately held that the confidentiality provision was enforceable because it did not prohibit disclosure in civil discovery or ongoing criminal investigation, and thus it did not violate Georgia public policy. *Id.* at 1354–56.

²⁴⁴ See *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948) ("That equity does not enforce unconscionable bargains is too well established to require elaborate citation.").

²⁴⁵ Uniform Commercial Code ("UCC") section 2-302 provides,

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C. § 2-302(1) (AM. L. INST. & UNIF. L. COMM'N 1977). See generally Leff, *supra* note 211 (considering the history, implications, and criticisms of the unconscionability clause of the UCC). According to the comment to UCC section 2-302, "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." U.C.C. § 2-302(1) cmt. (AM. L. INST. & UNIF. L. COMM'N 1977). For a critique of this section, see Leff, *supra* note 211, at 487.

²⁴⁶ RESTATEMENT (SECOND) OF CONTS. § 208 (AM. L. INST. 1981).

²⁴⁷ See *id.* § 175.

bargain is reasonable.²⁴⁸ Of the two doctrines, Wertheimer contended that only duress requires coercion.²⁴⁹ Per Wertheimer, unlike duress, unconscionability includes situations in which neither party generated the lack of alternatives but one party exploited the lack of alternatives against the other.²⁵⁰

In contrast, Paul Kirgis suggests a different division of labor between duress and unconscionability in cases of coercion. Analyzing coercion in negotiation, Kirgis defines leverage as “power rooted in consequences”²⁵¹ and explains that “[w]hen a negotiator has sufficient power to compel a counterparty to accept a set of unfavorable terms, the use of leverage may cross a line into inappropriate or illegal coercion.”²⁵² Of course, power in negotiation is not in and of itself a negative thing.²⁵³ Negotiating parties regularly use advantages like information, charisma, and better alternatives to get their way—that is, as leverage.²⁵⁴ Drawing on Richard Shell’s distinction between “positive” and “negative” leverage,²⁵⁵ however, Kirgis distinguishes an offer to satisfy the other side’s interests from a threat to impose costs on them if they do not accept a term or set of terms.²⁵⁶ Only the latter carries coercive force.²⁵⁷

Abuses of negative leverage ought to be understood as grounds for contract unenforceability under the principle of duress, while abuses of positive leverage should be understood as grounds for contract unenforceability under the principle of unconscionability.²⁵⁸

²⁴⁸ See *Hume v. United States*, 132 U.S. 406, 411 (1889) (defining an unconscionable contract as one “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other” (quoting *Earl of Chesterfield v. Janssen* (1750) 28 Eng. Rep. 82, 100; 2 Ves. Sen. 125, 156)).

²⁴⁹ WERTHEIMER, *supra* note 33, at 40.

²⁵⁰ *Id.* at 39–40.

²⁵¹ Kirgis, *supra* note 64, at 73.

²⁵² *Id.* at 69.

²⁵³ Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAV. SCIENTIST 149, 150 (1983) (explaining that a party with negotiation power can obtain a more favorable outcome for themselves).

²⁵⁴ Kirgis explains that “a party has leverage when it has the ability to influence another party through the threat of or the imposition of consequences on that party.” Kirgis, *supra* note 64, at 73. This notion is closely tied to coercion, as a party’s power to impose consequences on a counterparty might allow the party to coerce the counterparty into an agreement. *Id.*

²⁵⁵ G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE* 101–02 (2d ed. 2006).

²⁵⁶ Kirgis, *supra* note 64, at 74.

²⁵⁷ *Id.* at 75. Kirgis argues that courts should more consistently apply the doctrines of duress and unconscionability when it comes to negotiation leverage. *Id.*

²⁵⁸ *Id.* Kirgis focuses specifically on arm’s-length transactions in which a weaker party wishes to invalidate a contract based on one of these doctrines. *Id.* at 75–76. As noted in *Viacom International Inc. v. Icahn*,

In a “hard-bargaining” scenario the alleged victim has no pre-existing right to pursue his business interests free of the fear he is quelling by receiving value in return for

Finally, the doctrine of undue influence is another important tool for addressing coercive settlements. In one famous case involving settlement, *Odorizzi v. Bloomfield School District*,²⁵⁹ the court, reciting California statutory law, stated that undue influence denotes “taking an unfair advantage of another’s weakness of mind; or . . . taking a grossly oppressive and unfair advantage of another’s necessities or distress.”²⁶⁰ Undue influence thus involves someone in a dominant position placing excessive pressure on and taking advantage of someone in a servient position when the latter is vulnerable and susceptible to such pressure.²⁶¹ Although courts tend to shy away from this doctrine, some scholars have pushed back against its narrowness, suggesting it should apply when people are manipulated into agreeing to a harmful contract.²⁶² This Article argues that the undue influence doctrine can also offer significant force in the context at hand.

As explained in the next Section, although courts rarely apply contract defenses such as duress, unconscionability, and undue influence to settlement agreements, the reality of settlement negotiations should encourage a more flexible approach.²⁶³ Courts should apply a broader understanding of these defenses, one that acknowledges subtler forms of coercion and considers the negotiation’s context, when a stronger party overpowers a weaker party through “power rooted in consequences.”²⁶⁴ As for the distinction among the three doctrines, a coercion-based challenge may be grounded in one or multiple doctrines depending on the circumstances.²⁶⁵

B. Coercion in High-Risk Civil Settlements

The settlement-related doctrine discussed in the preceding Section assumes that, barring extreme circumstances, civil settlement is by definition voluntary.²⁶⁶ Indeed, courts presume that civil litigants can always

transferring property to the defendant, but in an extortion scenario the alleged victim has a pre-existing entitlement to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant.

747 F. Supp. 205, 213 (S.D.N.Y. 1990). Even though the subject matters vary, the logic of this distinction and parts of Kirgis’s analysis apply to this Article’s discussion of settlement negotiations.

²⁵⁹ 54 Cal. Rptr. 533 (Cal. Ct. App. 1966).

²⁶⁰ *Id.* at 539 (alteration in original) (quoting CAL. CIV. CODE § 1575 (West 2025)).

²⁶¹ *Id.* at 540.

²⁶² See Keren, *supra* note 213, at 21.

²⁶³ See *infra* Section III.B.

²⁶⁴ Kirgis, *supra* note 64, at 73.

²⁶⁵ See generally Keren, *supra* note 213 (arguing for an expansion of the undue influence doctrine to include a wider variety of circumstances in which manipulation leads to accepting a harmful deal).

²⁶⁶ See, e.g., *Asberry v. U.S. Postal Serv.*, 692 F.2d 1378, 1380–81 (Fed. Cir. 1982) (“Those who employ the judicial appellate process to attack a settlement through which controversy has been sent to rest bear a properly heavy burden.”).

choose to litigate if they are unhappy with a settlement offer and—if they do not litigate—their decision to settle must be voluntary.²⁶⁷ This view overly simplifies settlements and ignores many factors that can make plaintiffs feel compelled to accept settlement deals whether deemed objectively good or bad.²⁶⁸ These situations are characterized, as detailed below, by unequal bargaining power, limited information, and the use of various social influence tactics.

This Section applies the coercion framework to civil settlement and shows how such settlements can become coercive in certain scenarios. Importantly, this Section does not claim that the scenarios discussed here are the *only* situations in which coercion in civil settlement can occur or that the list of factors is exhaustive. Rather, it points to common scenarios that tend to deny a civil party their voluntariness in entering a settlement. These scenarios are examples of what this Article calls “high-risk civil settlements.” Future work might help identify other scenarios that are similarly at risk of negating settlement voluntariness.

1. *Procedural Context*

Two preliminary notes about the infrastructure of civil settlement procedure are in order. First, run-of-the-mill civil settlements *lack judicial oversight*. Judges are typically not involved in approving or executing such settlements,²⁶⁹ which can allow coercion to go completely unobserved.²⁷⁰ Judges take part in executing a civil settlement only if the parties specifically invite them to do so.²⁷¹ Unlike their criminal

²⁶⁷ See *Dobson v. Portrait Homes, Inc.*, 117 P.3d 1200, 1205–06 (Wyo. 2005) (stating that a plaintiff “bears the burden of proving that . . . [he] perform[ed] some act under circumstances which deprive[d] him of the exercise of free will” (quoting *Kendrick v. Barker*, 15 P.3d 734, 741 (Wyo. 2001))).

²⁶⁸ In other words, a variety of reasons may cause plaintiffs to feel compelled to accept settlement deals that they otherwise do not want to accept, be it because the deal is bad, the plaintiff does not want to cooperate, or there exists some other interest.

²⁶⁹ See Dustin B. Benham, *Foundational and Contemporary Court Confidentiality*, 86 Mo. L. REV. 211, 229 (2021) (“In most circumstances, courts dismiss cases upon the agreed request of the parties. The agreement is not filed and only put before the court in the event of a breach as part of a contract action.” (footnote omitted)). As a result, settlement agreements are typically not public records. See, e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781 (3d Cir. 1994) (holding that a settlement agreement was not a public record because it was not filed with the court).

²⁷⁰ This is not the case in the context of multidistrict litigation, which is significant in rate but outside the scope of this Article. See Stephen R. Bough & Anne E. Case-Halferty, *A Judicial Perspective on Approaches to MDL Settlement*, 89 UMKC L. REV. 971, 972–73 (2021).

²⁷¹ Parties may ask the court to enter their settlement as a judgment, making it a court record. See, e.g., *Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344–45 (3d Cir. 1986). If the parties wish to keep the agreement from becoming public, they might seek a court order sealing their filed settlement. See Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 394 (1999) (“Litigants presumably do not file their agreement unless they want the court to take some action

counterparts, in which judges are at least formally required to assess the voluntariness of the plea through the plea colloquy,²⁷² civil settlements generally do not mandate judicial review for assuring the parties' voluntary assent.²⁷³ In fact, review of civil settlements is virtually nonexistent even when the law requires it, as judges have the incentive to dismiss settled cases quickly to trim their overloaded dockets.²⁷⁴ This incentive is also evident in the presettlement stage, in which judges often exert pressure on parties to settle.²⁷⁵

Second, *legal representation* is often unavailable or insufficient. Unlike defendants in the criminal context,²⁷⁶ plaintiffs may not have counsel in civil settlement negotiations and thus receive no legal advice about the negative implications of the settlement or their alternatives.²⁷⁷ But even when a plaintiff is represented, it does not guarantee that their settlement is voluntary. Although the presence of lawyers ameliorates the risk of undue pressure to settle,²⁷⁸ principal-agent problems loom

concerning it—either by issuing a confidentiality order incorporating its terms or, at the very least, a dismissal order retaining jurisdiction to enforce the accord.”).

²⁷² See *supra* notes 102–03 and accompanying text. This is not to say that the colloquy is a meaningful check on plea bargain voluntariness. Coercion can and does occur despite this procedural check. See *supra* notes 104–11 and accompanying text.

²⁷³ See Doré, *supra* note 271, at 297. There are some exceptions. See *supra* note 27.

²⁷⁴ See Ellen E. Deason, *Beyond “Managerial Judges”: Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 73, 85 (2017) (describing settlement as a mechanism for judges to control their dockets). This is the case even when it comes to sealing court records as part of a settlement. Research shows that when a joint protective order is sought by the parties, most federal judges never reject the request. See Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 DUKE L.J. 99, 100 (2024).

²⁷⁵ See Deason, *supra* note 274, at 109–13 (“The potential for coercion is elevated many fold when the arm twisting, or even less forceful encouragement, comes from a judge who will have decisional power over the case if it does not settle.”); AM. BAR ASS’N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 130 (2009), https://www.uscourts.gov/sites/default/files/aba_section_of_litigation_survey_on_civil_practice_0.pdf [<https://perma.cc/X4RT-2U3B>] (finding that twenty-three percent of plaintiffs’ lawyers and forty percent of defense lawyers surveyed agreed that judges inappropriately pressure parties to settle); Stephen G. Crane, *Judge Settlements Versus Mediated Settlements*, DISP. RESOL. MAG., Spring 2011, at 20, 22 (noting that “the environment is inherently coercive” when a settlement conference is conducted by the judge who will have power over the case at trial).

²⁷⁶ For criminal defendants, the right to counsel is constitutionally guaranteed, at least when it comes to serious crimes. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963); *Wheat v. United States*, 486 U.S. 153, 158 (1988) (citing *Gideon* to hold that “the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime”).

²⁷⁷ The U.S. Constitution grants no categorical right to counsel in civil cases, see *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31 (1981), and challenges faced by civil pro se litigants have been well-documented, see generally Donald H. Zeigler & Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157 (1972) (discussing issues pro se litigants encounter throughout the litigation process). This can affect settlement negotiation as well.

²⁷⁸ As noted, courts have held that the presence of an attorney at the signing of the settlement agreement generally creates a presumption that entering the agreement was voluntary. See *supra* note 231 and accompanying text. Courts have even held that an attorney pushing their

large in settlement negotiations.²⁷⁹ This is especially true in the personal injury context, in which contingency fees are often the norm.²⁸⁰ In such cases, a plaintiff's lawyer is incentivized to have the plaintiff settle quickly and cheaply²⁸¹ and might pressure their client to accept a suboptimal settlement offer. In this sense, civil settlements are similar to plea bargains, in which defense lawyers' incentive structure discourages them from taking cases to trial and encourages them to prefer quick pleas.²⁸² In both contexts, quick settlements or pleas are often better for all lawyers involved.²⁸³

Although these procedural characteristics of civil settlement do not directly lead to coercion, they contribute to a system in which it can easily occur without being detected or challenged. The absence of a judicial check coupled with the limitations of legal representation and perverse incentives of the lawyers involved give rise to an environment that can allow for coercive settlements. But what specific factors might lead to coercive civil settlements?

2. *Applying the Coercion Framework to Confidential Settlements*

The analysis of factors contributing to coercion in civil settlement starts with Wertheimer's two-prong test for coercion.²⁸⁴ Given the limitations of this test for identifying coercion in the scenarios in question,

client to settle does not constitute coercion or duress. *See Words v. United Parcel Serv.*, No. 92-3059, 1992 WL 25217, at *3 (10th Cir. Sept. 16, 1992); *see also id.* at *2 (collecting cases). In such cases, courts have found that the proper course of action is for the plaintiff to assert a claim against their attorney. *See id.*

²⁷⁹ *See Dalzell*, *supra* note 211, at 271.

²⁸⁰ *See* Eric Helland & Seth A. Seabury, *Contingent-Fee Contracts in Litigation: A Survey and Assessment*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS* 383, 387 (Jennifer Arlen ed., 2013). That said, litigation funding might change this calculus, given the rise in rapidly changing settlement dynamics in the context of personal injury law. *See generally* Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 *VAND. L. REV.* 563 (2021) (discussing litigation finance and its effects on parties to a dispute).

²⁸¹ For an extreme example of the effects contingency fees can generate, *see* Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 *N.Y.U. L. REV.* 805, 805 (2011) (arguing that high-volume personal injury firms produce large numbers of settlements, making them akin to a no-fault mechanism).

²⁸² *See* WARE, *supra* note 15, § 3.5(g) ("Relatedly, lawyers representing defendants in many criminal cases are paid in ways that discourage them from taking cases to trial.").

²⁸³ In the criminal context, prosecutors are incentivized to secure convictions using as few resources as possible. In this sense, their incentives can be aligned with those of some defense lawyers. *See* Josh Bowers, *Punishing the Innocent*, 156 *U. PA. L. REV.* 1117, 1122–23 (2008) ("For all involved, the best pleas are quick pleas. And quick pleas are most efficiently reached at low market prices, because—although prosecutors may abandon sentence maximization—defendants always remain sentence minimizers.").

²⁸⁴ *See supra* notes 221–23 and accompanying text.

this Section next builds on Zimmerman's account of coercive offers.²⁸⁵ Finally, it considers counterarguments and several structural elements that characterize the scenarios at issue and contribute to a coercive environment.

The scenarios this Section refers to involve a demand for confidentiality as a condition for settlement of a civil action for assault, harassment, or discrimination. The defendant might be an employer, a public or religious entity, or an educational institution, and the plaintiff might be an employee, a citizen, a congregant, or a student. In these scenarios, a significant power imbalance between the parties may allow the settlement to move forward despite one party's lack of free choice. And given the silencing effect of confidentiality agreements, these scenarios might involve multiple victims, with information asymmetry and lack of coordination between victims leading to claims settled on an individual basis.

Why confidential settlements? As noted, a settlement nondisclosure merits special treatment given concerns about the psychological forces that could lead weaker parties to concede valuable rights.²⁸⁶ Unlike courts' common tendency to set a high bar for disturbing settlement agreements,²⁸⁷ the settlement context should be carefully scrutinized for attempts to take advantage of a party's eagerness to move on from the stress of a legal dispute and give up a valuable right—their own voice—in the process. Importantly, the focus here is on the bargaining process rather than the fairness of the resulting settlement. Although, in some cases, the settlement reached between the parties might seem objectively fair, it can still be the result of a coercive process.

Sexual assault exemplifies the risks that such settlements entail. As Leah Lipton explains, settlement negotiations of sexual assault cases involve a complex history of trauma and abuse,²⁸⁸ as the wrongdoer has traumatized the victim.²⁸⁹ The parties might also go into the details surrounding the victim's trauma during negotiations, and the defendant might attack, belittle, and attempt to discredit the victim.²⁹⁰ Additionally, victims may lose the ability to work and have to pay for intensive therapy and treatment.²⁹¹ This puts victims in a financial situation that may pressure them into entering a settlement agreement containing an

²⁸⁵ See Zimmerman, *supra* note 24.

²⁸⁶ See *supra* Section II.D; *supra* note 210 and accompanying text.

²⁸⁷ See *supra* Section III.A.

²⁸⁸ See Leah Lipton, *Cutting Out Her Tongue: The Impact of Silencing Trauma Through a Nondisclosure Agreement*, 55 CONTEMP. PSYCHOANALYSIS 373, 376 (2019).

²⁸⁹ See *id.* at 376–79 (discussing an NDA between a victim of sexual assault and the assailant and arguing that, because of the parties' history, there cannot be a fair, rational agreement between the parties).

²⁹⁰ *Id.* at 377–78.

²⁹¹ *Id.* at 377.

NDA just so that they can pay their expenses.²⁹² Sarah's story²⁹³ demonstrates how such situations might lead to denying one's sense of free choice. But is this coercion in the legal sense?

Under the proposal prong of Wertheimer's framework, to be wrongful, the settlement proposal needs to deprive the other side of value without providing them with a benefit, thus making the recipient worse off than they ought to be.²⁹⁴ As for the choice prong, the question is whether the threatened party had a reasonable alternative to the settlement.²⁹⁵ If the threatened party agreed to a set of terms that is worse than the point at which they should have walked away from the settlement negotiation, their will was overborne—that is, they were coerced into the agreement.²⁹⁶ Applying the proposal prong of Wertheimer's framework to the context at hand, a demand for silence as a condition of settlement might make the recipient worse off than the recipient ought to be. As part of the settlement, the proposer seeks to have the recipient forgo a significant right: the ability to discuss their traumatic experience.²⁹⁷ This voice—when used, for example, to seek mental health assistance—might be vital for the recipient's healing from trauma.²⁹⁸ At the same time, because of the recipient's diminished bar-

²⁹² *Id.* For more on the importance of financial hardship when it comes to settlement of sexual misconduct claims, see Gilat Juli Bachar, *The Psychology of Secret Settlements*, 73 HASTINGS L.J. 1, 33 (2022).

²⁹³ See *supra* notes 2–9 and accompanying text.

²⁹⁴ Wertheimer describes a wrongful proposal as one that creates a dilemma for the recipient. See WERTHEIMER, *supra* note 33, at 40. This depiction suggests that the recipient must be worse off following the proposal than they were prior to the proposal or else it would not be a dilemma. As Kirgis notes, “to be deprived of ‘property’ by ‘wrongful means’ is to be pressured into an agreement that concedes value that the threatened party could not have been required to concede in the absence of the threatening proposal.” Kirgis, *supra* note 64, at 108.

²⁹⁵ See WERTHEIMER, *supra* note 33, at 36; P.S. Atiyah, *Economic Duress and the “Overborne Will,”* 98 LAW Q. REV. 197, 201 (1982).

²⁹⁶ See Joseph M. Livermore, *Lawyer Extortion*, 20 ARIZ. L. REV. 403, 407 (1978) (arguing that to assess extortion in litigation, courts should consider whether the settlement is worse than the expected value of litigation).

²⁹⁷ NDAs tend to be drafted very broadly to encompass any type of disclosure, including to mental health professionals. See William M. Sage, Joseph S. Jablonski & Eric J. Thomas, *Use of Nondisclosure Agreements in Medical Malpractice Settlements by a Large Academic Health Care System*, 175 JAMA INTERNAL MED. 1030, 1134 (2015).

²⁹⁸ Lipton, *supra* note 288, at 374; Leanh Nguyen, *The Ethics of Trauma: Re-Traumatization in Society's Approach to the Traumatized Subject*, 61 INT'L J. GRP. PSYCHOTHERAPY 26, 33 (2011) (explaining that failing to talk about trauma can keep a victim in the traumatic space and make it harder for them to heal). By the same token, disclosing trauma to others can have positive effects. See, e.g., Melanie A. Greenberg & Arthur A. Stone, *Emotional Disclosure About Traumas and Its Relation to Health: Effects of Previous Disclosure and Trauma Severity*, 63 J. PERSONALITY & SOC. PSYCH. 75 (1992) (showing that, beyond the positive psychological effects that trauma disclosure can have on victims, talking about trauma can improve physical health as well, and victims who disclosed serious traumas reported fewer physical symptoms in the months following the disclosure).

gaining power,²⁹⁹ the amount of money offered in exchange for silence and forgoing a legal claim might not adequately represent the value of the recipient's voice. The recipient may also forgo their right to an appropriate remedy for the wrong they suffered. They might do so to relieve themselves of the stress of legal battle, but they lose valuable rights in the process. Whether the resulting settlement is judged as good or bad from an objective perspective, the recipient simply might not want the settlement. The standard for settlement voluntariness should be strict here given the significant constraint imposed on the recipient's autonomy.³⁰⁰

In some scenarios, the choice prong of Wertheimer's coercion framework may be satisfied too. The defendant might turn the trial alternative—hailed by courts as always available to litigants³⁰¹—into something significantly less attractive for the plaintiff. As Kirgis notes, “The distinction between positive and negative leverage is the distinction between the ability to satisfy the other party's interests and the ability to impose costs on the other party in retaliation for the other party pursuing its [best alternative to a negotiated agreement].”³⁰² In this context, the proposer might threaten to “punish” the recipient by imposing significant costs should they choose trial over settlement. Similar to a prosecutor threatening to seek the maximum punishment at trial,³⁰³ a proposer-defendant might threaten to bury the recipient-plaintiff in motion practice and endless discovery that will prolong the litigation and impose both financial and emotional costs.³⁰⁴ Here too, a better bargaining position and more resources can allow the defendant to credibly make this threat. Furthermore, a proposer-defendant might threaten to disparage the plaintiff or even bring a defamation claim against them if they do not agree to an NDA.³⁰⁵

One might counter that because the proposer-defendant generally has a right to demand confidentiality as a condition for settlement³⁰⁶ as well as a right to threaten not to settle if the recipient-plaintiff does not accept the terms, such a settlement is not in fact coercive.³⁰⁷ The recipient

²⁹⁹ See *supra* notes 288–92 and accompanying text.

³⁰⁰ See KIM, *supra* note 29, at 218 (arguing that when the agreement significantly threatens the consenter's autonomy, the robustness of consent conditions must be greater).

³⁰¹ See, e.g., *Dobson v. Portrait Homes, Inc.*, 117 P.3d 1200, 1206 (Wyo. 2005).

³⁰² Kirgis, *supra* note 64, at 90.

³⁰³ See *supra* notes 105–08 and accompanying text.

³⁰⁴ See generally Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652 (2013) (discussing various measures aimed at addressing the costs and time involved in civil litigation on the federal level).

³⁰⁵ See, e.g., Lipton, *supra* note 288, at 378.

³⁰⁶ This assumes that NDAs have not been banned in the jurisdiction. See Bachar, *supra* note 30, at 48–50, for a review of statutes limiting or banning settlement confidentiality.

³⁰⁷ A version of this argument was made by Stephen Ware regarding employees' mandatory arbitration agreements. Ware discusses situations in which an “employer refuses to hire a job

might face an unpleasant situation, but the proposer should not be at fault for taking advantage of the recipient's unfavorable state. Both alternatives—either forgoing one's right to a legal remedy or pursuing the legal action at trial—might be bad for the recipient, and the proposer may well be exploiting the plaintiff's vulnerability.³⁰⁸ But this is still not coercion.³⁰⁹

In response to this counterargument, the Article takes the position that Wertheimer's two-prong test is too narrow. Instead, the Article proposes a broader understanding of coercion that highlights the fundamental rights at stake and considers the downstream effects of coercion. Arguing that offers can coerce, David Zimmerman contends that a proposer might actively hinder the recipient of the offer from obtaining a better situation for themselves than what the proposer puts forward.³¹⁰ For Zimmerman, the appropriate baseline to judge a settlement proposal should consider whether the proposal prevented the recipient from achieving a better state.³¹¹ Zimmerman uses an example of a person stranded on an island who receives an employment offer for a small amount that will allow them to survive.³¹² This proposal is an offer rather than a threat; it will improve on the recipient's state prior to the proposal. However, if the proposer prevents the recipient from leaving the island—for example, by not allowing them to build a boat—this

applicant unless that applicant signs an arbitration agreement,” as well as scenarios in which “an at-will employee who has been employed for some time but has not signed an arbitration agreement” and the employer threatens to fire them unless they sign it. *See* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 122 (1996) (footnote omitted) (“In neither of these cases is there ‘traditional’ duress because in both cases the employer has a right to take the threatened action. That is, the employer has a right to refrain from hiring and a right to fire an at-will employee. Or, to put it another way, in neither case does the employee have a right to be free of the threatened act.” (footnote omitted)).

³⁰⁸ Kirgis gives the following example: “[A] person in urgent need of medical care but with no insurance and very little cash appears at a private hospital. The hospital refuses to provide care unless the person can demonstrate an ability to pay a reasonable fee.” Kirgis, *supra* note 64, at 81. He argues that although many people would view a refusal to treat that person in need as morally problematic, Nozick would likely say this is a voluntary, noncoercive exchange, as “[t]he exchange the hospital proposes is productive in Nozick’s terms—it would leave the person better off than if the hospital had never existed.” *Id.*

³⁰⁹ *Id.* Kim Ferzan argues that this would be exploitation: taking advantage of someone who is already below the baseline rather than changing the baseline. *See* Kimberly Kessler Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L.J. 951, 961 (2018) (“Coercion is related to, but distinct from, exploitation. Whereas coercion is a threat to bring someone below a moralized baseline, exploitation is unfairly taking advantage of the fact that someone is already below a baseline.”); *see also* Berman, *supra* note 112, at 85 (“Exploitation . . . connotes taking unfair advantage of a person’s vulnerability.”).

³¹⁰ *See* Zimmerman, *supra* note 24, at 133. According to Zimmerman, the correct baseline to use to assess the proposal is what the recipient would encounter had it not been for the proposer intervening. *See id.*

³¹¹ *See id.*

³¹² *Id.*

offer is coercive.³¹³ The reason is that the correct baseline to assess the proposal would be the situation the person would encounter had it not been for the employer-proposer's interference. In Zimmerman's example, the recipient might have been able to build a boat and leave the island.³¹⁴ As such, the baseline offered by Zimmerman is normative rather than merely descriptive, baking in some assumptions about the impropriety of enhancing an already unequal bargaining dynamic.

A settlement process should be considered coercive if it prevented the recipient from achieving a better bargaining position that would have allowed them to "leav[e] the island"—that is, to achieve a satisfactory settlement for the wrong they suffered.³¹⁵ Put this way, the coercion can also be understood as causing the bargaining differential in the first place.³¹⁶ By systematically settling claims with a nonnegotiable confidentiality demand, defendants prevent plaintiffs from coordinating to obtain a better bargaining position.³¹⁷

Several potential counterarguments should be addressed. *First*, one might worry about the parties' freedom of contract in agreeing to the settlement³¹⁸ and, relatedly, the risk of paternalism arising from failing to uphold the autonomous choices of more vulnerable parties.³¹⁹ In response, this Article posits that a particularly large differential in bargaining power could prevent the weaker party from entering a

³¹³ See *id.* at 133–34.

³¹⁴ *Id.*

³¹⁵ Anderson, *supra* note 44, § 2.4. Some have suggested that Zimmerman's argument could be reconfigured to say "that offers made from a position of superior bargaining strength are very likely to be exploitative; and that sometimes coercion is used to create or maintain one's bargaining advantages." *Id.*

³¹⁶ *Id.*

³¹⁷ For an argument suggesting that victims should disclose their wrongdoing to advance solidarity and promote coordination, see generally Bachar, *supra* note 30. In Hohfeldian terms, this might be thought of as a change in legal relationship from power (held by the plaintiff) and liability (held by the defendant) to immunity (provided to the defendant via settlement) and disability (imposed on the plaintiff via settlement), except the disability is so much more crippling when the settlement was coerced. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710 (1917).

³¹⁸ Compare David Campbell, *Afterword: Feminism, Liberalism and Utopianism in the Analysis of Contracting*, in FEMINIST PERSPECTIVES ON CONTRACT LAW 161, 165, 172 (Linda Mulcahy & Sally Wheeler eds., 2005) (arguing that if authors "do not place a pre-eminent value on autonomy, feminists cannot really respect the law of contract, for a law of contract that does not turn on autonomy and choice becomes something like a law of planned, paternalistic exchanges, that is, not contract at all"), with Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on The Limits of Freedom of Contract*, 33 OSGOODE HALL L.J. 337, 341 (1995) (offering to cabin the scope of choice in contract law).

³¹⁹ For more on this concern, see generally Hadfield, *supra* note 318.

subjectively desirable settlement agreement.³²⁰ Respecting the parties' freedom of contract is unwarranted in such scenarios, as it serves to enforce a deal that the weaker party did not voluntarily enter. That said, coercion should not be so broad as to deny parties'—even vulnerable parties'—autonomy. This Article's framework seeks to identify coercion when it occurs; it is not meant to create an assumption that settlements are involuntary. As long as this framework is narrowly applied to adequate cases of "high-risk settlement," it should not reduce settlement finality nor the expected value of settlement.³²¹

Second, one could argue that confidentiality agreements are valuable to plaintiffs. Some plaintiffs value confidentiality themselves. Other plaintiffs can use confidentiality agreements to increase their bargaining power and extract large payouts from defendants.³²² Although this may hold true in certain cases, it does not apply to the scenarios examined here. Here, plaintiffs have limited if any bargaining power, and the settlement agreement including the confidentiality clause is offered on a take-it-or-leave-it basis. Thus, silence is a nonnegotiable term. Further, in these scenarios, plaintiffs' ability to have voice about the harm they suffered carries considerable value for them.³²³

Third, some might contend that the plaintiff could be falsely accusing the defendant of wrongdoing to gain settlement money for nuisance value. Such cases might exist.³²⁴ But here too, in the cases discussed in this Article, the plaintiff is truthful about the harm they suffered, and the defendant has at least preliminarily substantiated the allegations against it.

Finally, some of the scenarios discussed in this Article might also give rise to public policy or statutory challenges depending on

³²⁰ For a different version of this argument, see Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. 1131, 1131 (2016) (arguing that the unconscionability doctrine should be understood as "a party who engages in exploitative behavior may lose her moral standing to complain" when the other party violates a contractual obligation, thus avoiding paternalism-based critiques of the doctrine).

³²¹ Some might also argue that lowering the threshold for contract defenses would incentivize plaintiffs to attempt to invalidate settlement agreements. Although this remains an empirical question, it is unclear whether there will be an uptick in such attempts given the high costs of litigation.

³²² For discussion of this argument in the context of restricting NDAs, see Bachar, *supra* note 292, at 10–14; Hoffman & Lampmann, *supra* note 30, at 182–84.

³²³ See *supra* note 298.

³²⁴ However, concerns about false complaints might be overstated, at least in the context of sexual wrongdoing. See, e.g., Katie Heaney, *Almost No One Is Falsely Accused of Rape*, N.Y. MAG.: THE CUT (Oct. 5, 2018), <https://www.thecut.com/article/false-rape-accusations.html> [<https://perma.cc/3KF8-RYD8>] (explaining that, because only eight to ten percent of rapes are reported and about five percent of reports may be unsubstantiated, false accusations account for around one-half percent of reported and unreported rapes).

the jurisdiction.³²⁵ However, this Article focuses on coercion-related challenges to highlight the element of individual choice in settlement agreements and the extent to which a nondisclosure clause might in some instances reflect a lack of voluntariness.

Because structural elements are an inseparable part of the coercive environment discussed here, the next Section turns to unpacking these factors.

3. *Structural Factors Contributing to Coercive Settlements*

This Section identifies several structural and procedural factors that contribute to coercive settlements. It draws on the legal, philosophical, and psychological discussion regarding coercion in plea bargains to show how some of the characteristics of these exchanges are applicable to high-risk civil settlements as well.

Importantly, although courts might classify some of the structural elements discussed below as considerations for a procedural unconscionability challenge to a settlement agreement, courts should also consider these elements as potentially contributing to duress or undue influence. As discussed, courts rarely vacate settlements due to these defenses.³²⁶ For a successful unconscionability challenge, the court typically must find that the resulting deal is unfair.³²⁷ In instances in which courts do not view the settlement terms as unfair, considering the structural factors that negate one's voluntariness in entering a settlement can be vital to mounting a successful coercion-based challenge.³²⁸

First, a *position of power or authority* can influence whether a settlement is coercive. Somewhat like prosecutors as compared to defendants in the criminal context, defendants in civil litigation might hold positions of authority or disproportionate power compared to the plaintiff.³²⁹ This is the case, for example, in a civil action brought for police brutality or workplace sexual harassment. Such positionality is crucial for observing nuanced forms of coercion, particularly if the plaintiff is not represented by counsel.³³⁰ As discussed, psychological studies have shown that people are more likely to obey instructions from others who they perceive as authority figures partly because such figures have more knowledge and experience in a particular area, and most everyday decision-making

³²⁵ On the use of the public policy defense in the context of confidential settlements, see generally Hoffman & Lampmann, *supra* note 30. As for statutes barring sexual misconduct-related confidential settlements in some jurisdictions, see Bachar, *supra* note 30, at 48–50.

³²⁶ See *supra* notes 214, 225–34, 262 and accompanying text.

³²⁷ Kirgis, *supra* note 64, at 121–22. This is known as “substantive unconscionability.” *Id.*

³²⁸ See *supra* notes 214, 225–34, 262 and accompanying text (noting the difficulty caused by the individuality of contract defenses).

³²⁹ See *supra* Section II.A.

³³⁰ See *supra* note 277.

is done quickly.³³¹ Similarly, power plays a significant role in contributing to psychological coercion because of real or perceived control over rewards and punishments.³³² As Nadler observes, not only do people tend to comply with those in positions of authority,³³³ but they also tend to follow other people's actions.³³⁴ Furthermore, the language of the proposer and their perceived authority in the eyes of the recipient can significantly impact voluntariness or lack thereof.³³⁵

The proposer's power can result not only from their role or position but also from societal and financial inequities. As Anderson notes, "there are many offers that one cannot reasonably refuse, possibly reflecting great imbalances in power or prior historical injustices between the bargaining parties."³³⁶ In the context of confidential settlements of claims arising from sexual wrongdoing, data show that vulnerable groups are not only more likely to experience sexual harassment and other forms of mistreatment but are also more likely to sign NDAs concealing the mistreatment.³³⁷ This veil of silence in turn serves to sustain the societal power imbalance.

Such power imbalances affect settlement negotiation dynamics and the extent to which the resulting settlement is voluntary. When a plaintiff lacks bargaining power and an authority figure or disproportionately powerful counterpart offers settlement terms on a take-it-or-leave-it basis,³³⁸ the conditions are ripe for coercion. Furthermore, as noted, entrenched power dynamics can prevent weaker plaintiffs from gaining improved bargaining power and negotiating a better deal.

Second, and relatedly, the *context of the dispute* matters. The difficult, normative question of what parties are entitled to offer or withhold from one another as part of a settlement is best answered in a context-specific, fact-sensitive way. The cases discussed here—pertaining to discrimination, harassment, and assault—are merely examples. Such disputes are characterized not only by power imbalance but also by an emotional component that is generally absent from purely transactional

³³¹ See *supra* notes 161–71.

³³² See *supra* notes 172–73. Stephen Galoob and Erin Sheley have addressed how coercive power and control in an abusive relationship should affect the criminal law: "A defendant should be entitled to a coercion-based defense when the coercer has usurped the target's decisional authority—that is, when the coercer has usurped . . . control over the target's decision about what to do." Stephen R. Galoob & Erin Sheley, *Reconceiving Coercion-Based Criminal Defenses*, 112 J. CRIM. L. & CRIMINOLOGY 265, 314 (2022).

³³³ Nadler, *supra* note 164, at 173–79.

³³⁴ *Id.* at 179–85.

³³⁵ *Id.* at 187–90.

³³⁶ Anderson, *supra* note 44, § 2.4; see also Berman, *supra* note 18, at 1–4 (considering when conditional offers by the federal government coerce the states).

³³⁷ See *supra* note 13 and accompanying text.

³³⁸ Ware, *supra* note 307, at 118–19 (discussing this issue in the context of employment arbitration agreements).

contexts like business-to-business disputes. That said, coercive settlements can certainly occur elsewhere, including in the consumer and divorce contexts.³³⁹ When designating civil disputes as “high-risk” for the purposes of identifying coercion, courts should carefully consider the context of the dispute and the extent to which it might give rise to an environment in which one party coerces the other into settling.

The third factor is *information asymmetry*. As Bibas notes regarding plea bargains, the market for bargaining is biased against “unsophisticated laymen facing repeat-player prosecutors.”³⁴⁰ Similarly, information asymmetries abound in high-risk civil settlements, especially when the plaintiff is not represented. The plaintiff in a sexual harassment case may not know whether their experience is part of a larger pattern of sexual wrongdoing perpetrated by the wrongdoer.³⁴¹ In contrast, the wrongdoer and likely the employer have more information about the existence of other victims.³⁴² Defendants can exploit this information advantage, denying plaintiffs the possibility of sharing their experience with other victims to coordinate their legal strategy.³⁴³ As a result, defendants can pressure plaintiffs into individual settlements that inadequately compensate them while demanding their silence.³⁴⁴ In the context of a workplace sexual harassment claim, an employer might tell an individual employee that it will be the employee’s word against the employer’s, and a jury may well believe the employer. At the same time, the employer might be aware of several other victims whose words resemble the individual employee. Such information asymmetry can help employers pressure employees into unwanted settlements.

³³⁹ The latter example is interesting because of the lack of a clear alternative; if someone wants a divorce—or if their spouse is the one who filed for divorce—their options are limited.

³⁴⁰ Bibas, *supra* note 138, at 1153.

³⁴¹ See Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 322 (2018).

³⁴² *Id.* As Levmore and Fagan note, this can negatively affect the victim’s ability to “extract a high settlement” as well as lead to insufficient deterrence. *Id.*

³⁴³ *Id.* This information gap has mental health implications too. Research has found that when victims disclose their trauma to people who have experienced similar traumas themselves, the benefits of disclosure are even greater. See Kathleen de Boer, Chelsea Arnold, Jessica L. Mackelprang, Danielle Williamson, David Eckel & Maja Nedeljkovic, *Outcomes from a Pilot Study to Evaluate Phase 1 of a Two-Phase Approach to Treat Women with Complex Trauma Histories*, 58 AUSTRALIAN PSYCH. 346, 347 (2023). Researchers found that victims of trauma reported improved symptoms after undergoing group treatment in which they could share, validate, and normalize their experiences. See *id.* at 353–54. Victims of trauma tend to find comfort in speaking to others who had similar experiences. See Juan Forero, *From Shared Experience, an Offer of Comfort: A Support Group Helps to Repair Lives Shattered by Plane Crashes*, N.Y. TIMES (Nov. 13, 1999), <https://timesmachine.nytimes.com/timesmachine/1999/11/13/issue.html> [https://perma.cc/LW8N-DHGP].

³⁴⁴ Levmore & Fagan, *supra* note 341, at 322 (noting that “it is the pattern potential that makes the information valuable to others and costly to the settling party”).

A fourth factor concerns *time pressure*. As discussed, the psychological literature has found that the scarcity principle, which makes time-limited offers seem more valuable, plays a key role in coercion.³⁴⁵ In particular, time-limited plea bargains have been found to have a coercive effect on defendants who are rushed to make hurried decisions.³⁴⁶ By setting a short time limit on a settlement offer, the proposer can pressure the recipient to make a quick decision that does not adequately consider the long-term consequences. Thinking back to Sarah's story, her emotional turmoil after acquiescing to settle her claim confidentially might have resulted, at least in part, from pressure to make a decision in a hurried fashion.³⁴⁷

Importantly, these structural factors should be considered against the backdrop of the aforementioned procedural characteristics involving the limits of judicial review and legal representation.³⁴⁸ Many of these coercion-inducing conditions can be exacerbated by a lack of legal representation. In particular, without the advice of legal counsel, a recipient will struggle to assess their chances of success at trial or the credibility of a proposer's threat to drown them in legal motions or file a defamation suit.³⁴⁹ That said, even when a plaintiff *is* represented, lawyers are often incentivized to pressure plaintiffs into unwanted settlements.³⁵⁰ This issue ties into a recipient's lack of resources and the financial and emotional costs associated with going to trial. Although

³⁴⁵ See *supra* notes 187–94 and accompanying text; see also IRVING L. JANIS & LEON MANN, DECISION MAKING 59 (1977) (discussing the role played by imminence in decision-making processes and noting that the quality of the process depends on whether there was “sufficient time to make a careful search for and evaluation of information and advice” (emphasis omitted)); RICHARD S. LAZARUS & SUSAN FOLKMAN, STRESS, APPRAISAL, AND COPING 93 (1984) (discussing how the quality of decision-making largely depends on whether the decision-maker has enough time to consider the decision). As Keren notes, time pressure should be taken as a factor in understanding the victim's vulnerability and as enhancing the wrongfulness of the stronger party if that party imposed the time pressure. Keren, *supra* note 23, at 730–31.

³⁴⁶ See Luna, *supra* note 104, at 250 (“To some, having to make what is often a life-altering decision in such a brief amount of time is unduly coercive.”); Bibas, *supra* note 138, at 1153–54 (discussing how defense lawyers can pressure their clients into accepting a plea bargain); see also Zottoli et al., *supra* note 105, at 252, 255 (discussing a study of ninety-seven youths and adults in alternative-to-incarceration programs that found that most youths and a sizeable minority of adults had less than a day to decide whether to accept a plea bargain).

³⁴⁷ See *supra* notes 2–9 and accompanying text. Not only does time pressure affect voluntariness, but making such important decisions quickly may also increase the chances of experiencing regret and paying an emotional toll in the aftermath.

³⁴⁸ See *supra* Section II.B.

³⁴⁹ See generally Zeigler & Hermann, *supra* note 277 (describing the difficulties that unrepresented litigants face throughout the litigation process).

³⁵⁰ See Gilat Juli Bachar, *Money for Justice: Plaintiffs' Lawyers and Social Justice Tort Litigation*, 41 CARDOZO L. REV. 2617, 2654–55 (2020) (discussing plaintiffs' lawyers' practice of pushing for settlement even when it is inadequate); Engstrom, *supra* note 281, at 839–41.

financial hardship is not in and of itself grounds for duress,³⁵¹ it should be factored in as a constraint that might force unwanted settlements onto plaintiffs. Furthermore, because judges typically do not oversee civil settlements,³⁵² there is no check—not even a limited one—on the extent to which a settlement was entered voluntarily.³⁵³ This lack of oversight can allow coercion to occur and remain unnoticed.

Table 1 summarizes elements that can lead to coercion in high-risk civil settlements compared to plea bargains.

TABLE 1: COERCIVE ELEMENTS IN PLEA BARGAINS AND
HIGH-RISK CIVIL SETTLEMENTS

Element	Plea Bargains ³⁵⁴	High-Risk Civil Settlements (Confidential Settlements as an Example)
<i>Conditional Threats</i>	Seeking maximum punishment	Stating intention to prolong litigation proceedings or sue plaintiff, imposing financial and emotional costs
<i>Conditional Offers</i>	Overcharging / offering leniency in exchange for guilty plea	Offering money in exchange for silence and forgoing legal claim
<i>Authority / Power</i>	Authority	Authority / disproportionate power
<i>Structural Elements / Constraints</i>	Information asymmetry Time pressure Defense lawyers' and prosecutors' perverse incentives Costs associated with trial	Information asymmetry Time-pressure Lack of legal representation / plaintiff's lawyers' perverse incentives Costs associated with trial Lack of judicial oversight Context of dispute

C. A Path Forward: Settlement Intervention

The foregoing discussion has identified a gap between how courts treat settlement voluntariness and the reality that some settlements are reached in potentially coercive environments. The prior Sections suggested that existing doctrine fails to recognize moral considerations, distributive-justice issues, and psychological factors that can help to identify such environments. The remaining question is how the legal system can close this gap. This Article ends by putting forward two proposals aimed at reducing coercion in high-risk civil settlements.

³⁵¹ *Asberry v. U.S. Postal Serv.*, 692 F.2d 1378, 1381 (Fed. Cir. 1982) (noting that financial difficulties are insufficient to establish economic duress).

³⁵² *See supra* notes 269–71 and accompanying text. This is unlike the plea colloquy in the criminal context. *See supra* notes 102–03 and accompanying text.

³⁵³ *See Fiss, supra* note 81, at 1077–79.

³⁵⁴ This part of the table draws on Luna, *supra* note 104, at 249.

The first suggestion builds on existing contract defenses and is backward looking. Courts should be more open to considering coercion-based challenges to high-risk settlement agreements. These challenges should include duress, unconscionability, and undue influence, depending on the circumstances of the case. Duress should be used when a party can show that the settlement was entered involuntarily regardless of the extent to which the settlement is viewed as good or bad.³⁵⁵ For unconscionability, structural factors creating an unfair, one-sided process will typically need to be shown in addition to an unfair settlement.³⁵⁶ Undue influence should be applied when a party takes advantage of a counterparty's vulnerability and susceptibility to persuasion beyond the narrow context of special relationships.³⁵⁷

The laissez-faire approach courts have adopted with respect to civil settlement³⁵⁸ undoubtedly offers significant benefits to the legal system, such as helping judges quickly and efficiently dismiss attempts to invalidate settlement agreements and enhancing certainty.³⁵⁹ But the current approach lets cases that *do* require intervention slip through the cracks, inadequately protecting settlement voluntariness. Instead, courts should adopt an understanding of contract defenses such as duress, unconscionability, and undue influence that accounts for subtler forms of coercion, such as those discussed here, and the structural elements that can enhance it. Courts should also be cognizant of the context of the dispute to assess the extent to which the case before them is prone to allowing coercive power to be wielded by one party against another. Because settlements happen in the "shadow of the law,"³⁶⁰ courts producing contract doctrine that more rigorously defends voluntariness would in turn affect bargaining conditions in subsequent cases.³⁶¹

The second suggestion is forward looking, or preemptive, and will involve a more significant procedural change. This Article suggests adding a civil settlement colloquy in cases designated as high-risk. This process would intend for judges to inquire whether the settlement was reached "knowingly, intelligently, and voluntarily."³⁶² However, adopting

³⁵⁵ See *supra* Section III.A.

³⁵⁶ See *supra* Section III.A.

³⁵⁷ See Keren, *supra* note 213, at 11 (making the case for expanding the confines of the doctrine).

³⁵⁸ *Id.*

³⁵⁹ See *supra* note 274.

³⁶⁰ See Mnookin & Kornhauser, *supra* note 92, at 968.

³⁶¹ Once a court finds that a settlement was coercive, a separate question regards the appropriate remedy. Specifically, to what extent should the remedy be declaring the settlement void as opposed to allowing other remedies that will keep the settlement in place? Oren Bar-Gill and Omri Ben-Shahar argue that sometimes the coerced party is better off with an enforced than a nonenforced contract. See Bar-Gill & Ben-Shahar, *supra* note 112, at 718. Answering this question in the context of the scenarios discussed in this Article is best left for future work.

³⁶² *Stano v. Dugger*, 921 F.2d 1125, 1161 (11th Cir. 1991); see *supra* Section II.A.

critiques of the plea colloquy,³⁶³ its civil counterpart should go beyond using boilerplate language to ask whether the settlement is clear and voluntary. Instead, courts should pursue a more meaningful inquiry in cases designated as high-risk to assess settlement voluntariness. This inquiry could include, for example, the amount of time allowed to consider the settlement and the extent to which the plaintiff understands the settlement's implications.³⁶⁴ Further, a mechanism will need to be put in place to determine which cases are "high-risk." It also remains to be determined whether the mechanism may simply be subject-matter driven or may consider additional circumstances. Adding this stage to the case dismissal process might serve as a check on nefarious defendants—at least in cases in which the risk of coercion is greater.³⁶⁵ And a civil settlement colloquy can also caution courts against pressuring parties to settle in such cases.³⁶⁶ As shown by certain employment and collective settlements, courts can take a more active part in the settlement process.³⁶⁷ Although the colloquy is hardly a panacea,³⁶⁸ it steps in the right direction of acknowledging that the risk of coercion exists in some private law settings too.

CONCLUSION

Research shows that people tend to overestimate the voluntariness of other people's actions and underestimate the effect that situational factors had on their behavior and decisions.³⁶⁹ Courts are no exception to this tendency—as the doctrine on plea bargaining reflects—but this

³⁶³ See generally Fessinger & Kovera, *supra* note 28 (considering various factors, such as offer size, that pressure innocent defendants to plead guilty despite the plea colloquy).

³⁶⁴ As noted, such a standard has been adopted in the Title VII context as one indication of whether a waiver of claims was done knowingly and voluntarily. See *supra* note 233.

³⁶⁵ Although the colloquy will not be helpful in cases of prefiling settlement, the shadow of common law contract doctrine on coercion-based defenses will affect the bargaining process.

³⁶⁶ See *supra* note 275 and accompanying text.

³⁶⁷ See *supra* note 27.

³⁶⁸ See David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1233 (critiquing courts' failure to combat secrecy and practice restrictions in class actions).

³⁶⁹ Nadler, *supra* note 164, at 169 ("As a general matter, people are strongly inclined toward explaining another person's behavior in terms of internal causes (their intentions and dispositions), while ignoring aspects of the situation that could account for the person's actions. For this reason, behavior that looks voluntary from the outside can feel constrained by the situation from the perspective of the actor." (footnote omitted)). This human tendency is sometimes referred to as the "fundamental attribution error." See Lee D. Ross, Teresa M. Amabile & Julia L. Steinmetz, *Social Roles, Social Control, and Biases in Social-Perception Processes*, 35 J. PERSONALITY & SOC. PSYCH. 485, 491 (1977) (finding that in a study involving subjects randomly assigned as either a contestant with a challenging task or a quizmaster with an easy task, observers rated the quizmasters as smarter than the contestants despite the obvious differential in task difficulty); Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCH. BULL. 21, 25 (1995) (observing that situational factors affecting the actor's behavior can be "invisible" from the perspective of the observer).

bias has been largely overlooked with respect to civil settlement. Not only does the legal system often take a laissez-faire approach when it comes to settlement approval and case dismissal, but courts are also reluctant to invalidate settlement agreements, generally assuming they represent a mutually desirable deal. Although this approach may serve judicial economy³⁷⁰ and is generally appropriate when parties are on equal footing, the scenarios discussed here caution against applying this approach without exception.

This Article argued that subtle forms of coercion apply to certain civil settlements and focused on one particular kind: those in which recipients are offered money in exchange for their silence and forgoing their legal claims. To support this argument, the Article adopted a broader definition of coercion that considers methods of social pressure and structural factors that can lead recipients to involuntarily accept a settlement offer. It also suggested small and big ways in which the legal system can better address these situations.

Although this Article focused on a particular kind of settlement, it hopes to begin a larger conversation about civil settlements more generally. For example, in some civil settlements, the roles are reversed and the poor, marginalized, or otherwise disproportionately weak are the defendants. This is the case in debt collection and eviction cases, in which coercion might occur when defendants agree to economic terms they cannot comply with. Further research could help identify coercive settlements in such settings. Finally, alongside contemplating ways to expand existing contract doctrines where appropriate, scholars should also continue to develop strategies that address collective concerns.³⁷¹ The first step is to acknowledge that private action is vital in the fight to achieve social change—in the fight to ensure that no individual is ever merely a means.

³⁷⁰ Arthur Miller famously made this point in support of confidential settlements. See Miller, *supra* note 11, at 441.

³⁷¹ See generally Bachar, *supra* note 30 (arguing that it is in victims' interest—and the public interest—to create a culture of solidarity and disclosure); Benjamin C. Zipursky & Zahra Takhshid, *Consumer Protection and the Illusory Promise of the Unconscionability Defense*, 103 TEX. L. REV. 847, 865 (2025) (noting that “when one just focuses on each individual consumer and their bargain with AT&T Mobile (as opposed to the collective question of all similarly situated consumers), the contract was arguably quite favorable to the individual plaintiff”). Another example in which a collective strategy matters relates to class action waivers. In this context, Keren argues that courts' blind enforcement of such waivers should be replaced with treating them as coerced, unconscionable, and in violation of public policy. See Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 583 (2020).

Remedying Selective Enforcement

Guy Rubinstein*

ABSTRACT

Scholars have long regarded the prohibition against racially selective enforcement by the police as a dead letter. Formally, the Supreme Court forbids police officers from stopping or searching individuals based on race. In practice, the traditional evidentiary standard for proving selective enforcement is nearly insurmountable, and successful claims are rare. Remarkably, the Court has never specified the remedy judges should grant in criminal cases to victims of selective enforcement. Nevertheless, recent years have seen a revitalization of the doctrine of selective enforcement. An increasing number of state and federal courts have made proving selective enforcement much easier by relaxing the evidentiary standard claimants must satisfy. Additionally, lower courts have adopted suppression of incriminating evidence or dismissal of criminal charges as the remedy for successful claims. This Article explores these recent developments in selective enforcement remediation, which have largely escaped academic attention. Although celebrating the adoption of powerful remedies for selective enforcement, this Article critiques the justifications courts have provided for them. Despite the promises made by courts, suppression and dismissal are unlikely to serve as effective deterrents to selective enforcement. Nor will they necessarily help courts maintain their judicial integrity. Rather than relying on these two justifications, selective enforcement remedies should be grounded in the same goal that equal protection remedies have traditionally sought to promote—namely, corrective justice for victims of unconstitutional discrimination. Courts, therefore, should grant remedies aimed at eliminating the harmful effects suffered by victims of selective enforcement due to the police’s discriminatory conduct, to the greatest extent possible.

* Assistant Professor of Law, University of Hawai‘i at Mānoa, William S. Richardson School of Law; S.J.D., Harvard Law School, expected 2025; Edmond J. Safra Graduate Fellow in Ethics, Edmond & Lily Safra Center for Ethics, Harvard University, 2024–25. For helpful comments and discussions, I am grateful to David Ball, Zamir Ben-Dan, Kelsey Berry, Andrew Crespo, Donald Dripps, Thomas Frampton, Andrew Hessick, Aliza Hochman Bloom, Babe Howell, Amy Johnson, Rachel Kincaid, Matt Macdonald, Gilad Mills, Haggai Porat, Inbal Rubinstein, Rachel Rubinstein, Yoav Sapir, Carol Steiker, Susannah Tobin, Quinn White, and participants of the 2024 CrimFest Conference at Cardozo School of Law, the S.J.D. Colloquium at Harvard Law School, and the Graduate Fellows Seminar at the Safra Center for Ethics at Harvard University. Finally, I am grateful to Read Brown, Shloke Nair, and the editors of *The George Washington Law Review* for their dedicated and highly professional editing work.

TABLE OF CONTENTS

INTRODUCTION	791
I. SELECTIVE ENFORCEMENT:	
DOCTRINE AND REMEDIES	796
A. <i>Proving Selective Enforcement</i>	797
1. The Traditional Demanding Evidentiary Standard	797
a. <i>The Selective Prosecution Standard</i>	798
b. <i>The Selective Prosecution Standard Applied to Selective Enforcement</i>	799
2. Lower Courts' Recent Doctrinal Changes	802
a. <i>Lower Discovery Threshold</i>	804
b. <i>Lenient Evidentiary Standard</i>	805
c. <i>Substantive Doctrinal Change</i>	808
B. <i>Remedying Selective Enforcement</i>	809
1. The Supreme Court's Failure to Specify a Remedy	809
2. Lower Courts' Remedial Responses	813
a. <i>No Proper Remedy Within the Criminal Process</i>	814
b. <i>Suppression of Evidence as the Proper Remedy</i>	815
c. <i>Dismissal of Charges as the Proper Remedy</i>	818
II. DETERRENCE AND JUDICIAL INTEGRITY AS INADEQUATE JUSTIFICATIONS	821
A. <i>Deterring Discriminatory Policing</i>	823
1. Negligible Deterrent Benefits	825
2. Less Harmful Alternatives	831
3. The Risk of Legitimation Effect	833
B. <i>Preserving Judicial Integrity</i>	835
III. GROUNDING REMEDIES FOR SELECTIVE ENFORCEMENT IN CORRECTIVE JUSTICE	838
A. <i>Equal Protection's Corrective Justice Framework</i>	838
B. <i>Judges' Duty to Eliminate the Effects of Selective Enforcement</i>	842
C. <i>Corrective Remedies in Action</i>	845
D. <i>Expanding the Toolbox of Judicial Remedies</i>	847
CONCLUSION	849

INTRODUCTION

Legal scholars have long regarded the prohibition against racially selective enforcement by the police as a dead letter.¹ Formally, the Supreme Court has held that police officers may not engage in “selective enforcement of the law based on considerations such as race” and that such conduct could amount to an equal protection violation.² For example, officers are forbidden from stopping or searching an individual because they think people of the individual’s race are more likely to break the law.³ In practice, however, courts almost always reject selective enforcement claims raised by defendants in criminal proceedings.⁴ Indeed, the traditional evidentiary standard for proving selective enforcement in court is considered “insurmountable” or “nearly

¹ See, e.g., Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 650–51 (2021) (describing the practical ineffectiveness of the prohibition against selective enforcement); Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 991–92 (2021) (arguing that it has traditionally been “virtually impossible” for selective enforcement claimants to win); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 137 (10th anniversary ed. 2020) (explaining that “the Supreme Court has made it virtually impossible to challenge racial bias in the criminal justice system under the Fourteenth Amendment”); see also William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 818–19, 819 n.211 (2006) (describing the failure of the Supreme Court “to guarantee ‘the equal protection of the laws’” in the context of law enforcement).

² *Whren v. United States*, 517 U.S. 806, 813 (1996); see also *Reichle v. Howards*, 566 U.S. 658, 665 n.5 (2012) (“[T]he Equal Protection Clause would prohibit an officer from selectively enforcing the traffic laws based on race.”); *Nieves v. Bartlett*, 587 U.S. 391, 414 (2019) (Gorsuch, J., concurring in part and dissenting in part) (“[A] detention based on race, even one otherwise authorized by law, violates the Fourteenth Amendment’s Equal Protection Clause.” (emphasis omitted)). The right to equal protection is guaranteed by the Fourteenth Amendment’s Equal Protection Clause and the Fifth Amendment’s equal protection component. See U.S. CONST. amend. XIV, § 1; *id.* amend. V; see also *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (“Although the Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, it does contain an equal protection component.”).

³ See, e.g., R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1203–04 (2004); Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1342–43 (2004).

⁴ See, e.g., Guy Rubinstein, *Selective Prosecution, Selective Enforcement, and Remedial Vagueness*, 2022 WIS. L. REV. 825, 829 (“[D]efendants who raise selective prosecution or selective enforcement claims in court virtually always lose.”); Siegler & Admussen, *supra* note 1, at 1002 (arguing that from 1996 to 2021, “there has not been a single successful [racially] selective prosecution or [racially] selective law enforcement claim on the merits”); Alison Siegler, Judith P. Miller & Erica K. Zunkel, *Reforming the Federal Criminal System: Lessons from Litigation*, 25 J. GENDER, RACE & JUST. 99, 113 (2022) (“To our knowledge, there has never been a successful racial discrimination claim against a law enforcement agency in a state or federal criminal case.”).

insurmountable.”⁵ The Supreme Court has thus managed to refrain from determining the appropriate judicial remedy for successful claims.⁶

Nevertheless, recent years have seen a growing number of state and federal courts breathing new life into the doctrine of selective enforcement. First, some courts have made proving selective enforcement claims much easier by relaxing the evidentiary requirements claimants must meet to win.⁷ Under the traditional evidentiary standard, claimants have to identify specific individuals of a different race whom the police treated differently under similar circumstances.⁸ They also need to demonstrate that their own differential treatment—or the policy underlying it—“was motivated by a discriminatory purpose.”⁹ These evidentiary requirements are almost impossible to satisfy.¹⁰ Nowadays, however, some courts are more open to accepting selective enforcement claims based on statistical evidence concerning officers’ or departments’ enforcement patterns, even when claimants fail to offer direct evidence that they were targeted due to their race.¹¹ Some courts have also expanded claimants’ access to police or prosecutorial materials that may contain relevant data helpful for proving selective enforcement.¹² In two states—Massachusetts and New Jersey—courts have even revised the selective enforcement doctrine substantively. These courts now recognize not only purposefully discriminatory enforcement as unconstitutional, but also differential treatment resulting from implicit bias.¹³

Second, and more pertinent to this Article, an increasing number of state and federal courts have established judicial remedies for successful selective enforcement claims raised in criminal cases.¹⁴ As mentioned,

⁵ See, e.g., Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIA. L. REV. 425, 427 (1997); AZIZ Z. HUQ, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* 122 (2021).

⁶ See, e.g., Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2009–14 (1998) (discussing the Court’s ambiguity on the issue of remedies for selective enforcement); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 338 n.22 (1998) (same); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 741 (2002) (arguing that “[t]he Supreme Court has explicitly left [open] the question” of the appropriate remedy for selective enforcement); Rubinstein, *supra* note 4, at 833–40 (discussing the Supreme Court’s choice not to specify the appropriate remedy for successful selective enforcement claims).

⁷ See *infra* Section I.A.

⁸ See, e.g., *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006); *United States v. Washington*, 869 F.3d 193, 214 (3d Cir. 2017).

⁹ E.g., *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996) (citing *United States v. Armstrong*, 517 U.S. 456, 465 (1996)); *United States v. Sellers*, 906 F.3d 848, 850 (9th Cir. 2018).

¹⁰ See *supra* note 5 and accompanying text; see also *infra* Section I.A.1.

¹¹ See *infra* Section I.A.2.

¹² See *infra* Section I.A.2.

¹³ See *infra* Section I.A.2.

¹⁴ See *infra* Section I.B.

the Supreme Court has never determined the appropriate remedy for selective enforcement, or whether defendants who have proven selective enforcement are even entitled to any remedy at all.¹⁵ In recent years, however, lower courts have resolved the remedy question by adopting suppression of incriminating evidence or dismissal of criminal charges as the proper remedy.¹⁶ Judges have offered two primary justifications for their remedial choices: deterrence of future selective enforcement and maintenance of judicial integrity.¹⁷ Notably, these two justifications have historically supported suppressing evidence obtained through unreasonable searches or seizures under the Fourth Amendment exclusionary rule.¹⁸ According to the deterrence rationale, police officers will be less likely to engage in selective enforcement if they know it could jeopardize the ultimate conviction of the suspects they stop, search, or arrest.¹⁹ The judicial integrity rationale suggests that by responding to selective enforcement with suppression or dismissal, judges send the message that they do not turn a blind eye to police wrongdoing, thereby maintaining public confidence in both the judiciary and the criminal process.²⁰ Scholars writing on the subject generally agree these rationales support the adoption of suppression or dismissal as the response to successful selective enforcement claims.²¹

This Article argues against invoking deterrence and judicial integrity to justify suppressing evidence or dismissing charges as a remedy for selective enforcement. Although these justifications have supported the Fourth Amendment exclusionary rule,²² importing them directly into the discussion around remedies for discriminatory policing may prove both erroneous and counterproductive.²³

First, there is no basis for assuming suppression and dismissal effectively deter police officers from enforcing the law in a discriminatory

¹⁵ See *supra* note 6 and accompanying text; see also *infra* Section I.B.1.

¹⁶ See, e.g., *Commonwealth v. Robinson-Van Rader*, 208 N.E.3d 693, 706 (Mass. 2023) (stating that “[t]he remedy for a selective enforcement violation is suppression of the evidence that was obtained in violation of the defendant’s constitutional right to equal protection” (citing *Commonwealth v. Lora*, 886 N.E.2d 688, 699–700 (Mass. 2008))); *People v. Jones*, 177 N.Y.S.3d 174, 178–79 (App. Div. 2022) (holding that suppression is the proper judicial response to racially selective traffic stops); *United States v. Lewis*, No. 22-14246, 2023 WL 6620313, at *2 (11th Cir. Oct. 11, 2023) (*per curiam*) (suggesting that suppression may be a remedy for selective enforcement); *United States v. Mumphrey*, 193 F. Supp. 3d 1040, 1055–59 (N.D. Cal. 2016) (adopting dismissal of charges as the remedy for selective enforcement); *Ex parte Aparicio*, 707 S.W.3d 189, 199, 202–03 (Tex. Crim. App. 2024) (same); see also *infra* Section I.B.2.

¹⁷ See *infra* Section I.B.2.

¹⁸ See *infra* notes 307–11 and accompanying text.

¹⁹ See *infra* notes 313–15 and accompanying text.

²⁰ See *infra* notes 411–13 and accompanying text.

²¹ See *infra* notes 313, 411 and accompanying text.

²² See *supra* note 18 and accompanying text.

²³ See *infra* Sections II.A–.B.

manner.²⁴ Selective enforcement claims usually arise in the context of discretionary police stops, such as investigative traffic stops by officers patrolling the road or pedestrian stop-and-frisks by officers patrolling the street.²⁵ Officers who conduct such stops rarely seek to secure convictions, as their professional performance is not assessed by conviction rates.²⁶ Instead, they are systematically encouraged by their departments to arrest individuals and seize illegal drugs and firearms to get them “off the streets.”²⁷ Due to these professional incentives, officers who believe that targeting individuals based on race helps them arrest suspects or seize contraband are unlikely to be deterred by the threat of suppressing evidence or dismissing charges.²⁸ This is especially true given the very low probability that a judge would accept a selective enforcement claim and subsequently suppress evidence or dismiss charges.²⁹

The negligible deterrent benefits of suppression and dismissal explain why some lower courts reject these remedies and instead hold that the only available option for selective enforcement claimants is to file civil suits against police officers.³⁰ Although civil remedies such as monetary damages are also unlikely to serve as effective deterrents, the fact that they do not lead to the release of factually guilty defendants makes them attractive in the eyes of many judges.³¹

The biggest concern is that courts that nonetheless insist that suppression and dismissal effectively deter selective enforcement are not only wrong, but also inadvertently mislead the public about the judiciary’s ability to combat discriminatory policing.³² This, in turn, could impede the exploration of other potentially more effective deterrent devices and strategies, thereby undermining long-term efforts to reduce racially biased enforcement.³³

Second, it is incorrect to assume that suppressing evidence or dismissing charges in response to selective enforcement necessarily helps preserve judicial integrity.³⁴ There is little doubt that discrimination within the criminal process compromises the integrity of and undermines public trust in the legal system, and that judges are expected to combat selective enforcement.³⁵ However, it does not necessarily follow

²⁴ See *infra* Section II.A.1.

²⁵ See *infra* notes 328–33 and accompanying text.

²⁶ See *infra* notes 334–50 and accompanying text.

²⁷ See *infra* notes 334–50 and accompanying text.

²⁸ See *infra* notes 334–76 and accompanying text.

²⁹ See *infra* notes 351–76 and accompanying text.

³⁰ See *infra* Section II.A.2.

³¹ See *infra* Section II.A.2.

³² See *infra* Section II.A.3.

³³ See *infra* Section II.A.3.

³⁴ See *infra* Section II.B.

³⁵ See *infra* notes 411–22 and accompanying text.

that the best way to maintain the integrity of courts is through suppressing evidence or dismissing charges.³⁶ Some may take issue with judges allowing prosecutions resulting from selective enforcement to continue uninterrupted.³⁷ Others, however, may argue that judges who suppress reliable incriminating evidence or dismiss well-founded charges undermine the integrity of the judiciary and the criminal process.³⁸

This Article proposes that rather than relying on the historical justifications for the Fourth Amendment exclusionary rule, courts should ground remedies for selective enforcement in the same goal traditionally sought by *equal protection remedies*—namely, corrective justice for victims of unconstitutional discrimination.³⁹ Remedies, therefore, should not focus on deterring police wrongdoing or maintaining judicial integrity but on correcting the harms suffered by victims of discriminatory policing.⁴⁰

The Supreme Court has established a relatively coherent set of principles that will guide the development of judicial remedies for equal protection violations.⁴¹ The Court has held that the judicial response to successful equal protection claims must prioritize corrective justice for the victims of unconstitutional discrimination.⁴² According to the Court, proper remedies must “be designed as nearly as possible ‘to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.’”⁴³ As Justice Marshall explained, remedies should make victims of discrimination “whole” again by ensuring “any injurious condition flowing from the constitutional violation [is] remedied to the maximum extent practicable.”⁴⁴ To achieve these aims, judges have been afforded broad discretion in shaping suitable corrective measures.⁴⁵ Nevertheless, the Court has clarified that the corrective objective of remedies for equal protection violations is not unqualified.⁴⁶ Rather, this objective must be weighed against—and sometimes yield to—other, often competing social interests, such as public health and state budgets.⁴⁷

The same general corrective purpose that guides judicial remedies for equal protection violations should also shape the remedies that

³⁶ See *infra* notes 423–28 and accompanying text.

³⁷ See *infra* note 424 and accompanying text.

³⁸ See *infra* notes 425–28 and accompanying text.

³⁹ See *infra* Sections III.A–.D.

⁴⁰ See *infra* Sections III.A–.D.

⁴¹ See *infra* Section III.A.

⁴² See *infra* notes 434–46 and accompanying text.

⁴³ *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)).

⁴⁴ *Bd. of Educ. v. Dowell*, 498 U.S. 237, 264 n.8 (1991) (Marshall, J., dissenting).

⁴⁵ See *infra* notes 448–50 and accompanying text.

⁴⁶ See *infra* notes 451–64 and accompanying text.

⁴⁷ See *infra* notes 459–64 and accompanying text.

courts grant for successful selective enforcement claims.⁴⁸ Thus, when a defendant successfully proves selective enforcement, judges must grant a remedy aimed at eliminating the negative consequences resulting from the defendant's discriminatory stop, search, or arrest.⁴⁹ Consequently, if selective enforcement leads to obtaining incriminating evidence or filing criminal charges against the defendant, a proper judicial response should include the suppression of evidence or the dismissal of charges, respectively.⁵⁰ The purpose of the remedy, however, would be corrective justice, not deterring wrongdoing or maintaining judicial integrity.⁵¹ In some cases, judges may conclude that suppressing evidence or dismissing charges would result in a particularly excessive threat to public safety and consequently refrain from granting these remedies.⁵² Therefore, to ensure victims of selective enforcement are not left without any redress, the toolbox of remedies available for judges in criminal adjudication should be expanded to include additional remedies beyond suppression or dismissal.⁵³ For example, judges could also be empowered to reduce sentences for defendants who have been victims of selective enforcement.⁵⁴

This Article proceeds in three parts. Part I introduces the doctrine of selective enforcement and describes how lower courts across the country have shaped the evidentiary standard for proving selective enforcement, as well as the judicial remedies for its violation. Part II critiques courts' reliance on the justifications of deterring selective enforcement and preserving judicial integrity to suppress evidence or dismiss charges. Part III proposes grounding remedies for selective enforcement in corrective justice for victims of discriminatory policing.

I. SELECTIVE ENFORCEMENT: DOCTRINE AND REMEDIES

The Supreme Court considers race-based discrimination in the criminal process among the most severe of constitutional violations, referring to it as “especially pernicious,”⁵⁵ “particularly abhorrent,”⁵⁶ and “a familiar and recurring evil.”⁵⁷ According to the Court, such discrimination not only harms the individual whose right to equal protection was violated, but also compromises public trust in the criminal process⁵⁸ and reinforces

⁴⁸ See *infra* Section III.B.

⁴⁹ See *infra* Section III.B.

⁵⁰ See *infra* Section III.C.

⁵¹ See *infra* Section III.B.

⁵² See *infra* Section III.C.

⁵³ See *infra* Section III.D.

⁵⁴ See *infra* Section III.D.

⁵⁵ *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).

⁵⁶ *McCleskey v. Kemp*, 481 U.S. 279, 346 (1987) (Blackmun, J., dissenting).

⁵⁷ *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 224 (2017).

⁵⁸ See *Johnson v. California*, 543 U.S. 499, 510–11 (2005).

“state-sponsored group stereotypes.”⁵⁹ Nevertheless, as scholars have long identified, the Court has been reluctant to take an active role in addressing, let alone reducing, racial discrimination in policing.⁶⁰ The explanations scholars have provided for this phenomenon vary, ranging from ill intentions or carelessness on the part of the Court⁶¹ to the paucity of race-based discrimination claims by litigants.⁶² While the Court has provided limited guidance on the doctrine of selective enforcement,⁶³ lower state and federal courts have been left to articulate the requirements for proving selective enforcement and to develop the judicial remedies for it.⁶⁴

This Part discusses how lower courts across the country have shaped the doctrine of selective enforcement. Section A describes the demanding standard that lower courts have traditionally applied to proving claims of selective enforcement. It then discusses the recent trend among some courts to relax this standard, making proving selective enforcement much easier. Section B addresses the Supreme Court’s silence regarding the appropriate judicial remedy for successful selective enforcement claims as well as the attempts of lower courts to fill this gap.

A. *Proving Selective Enforcement*

1. *The Traditional Demanding Evidentiary Standard*

Although the Supreme Court has never articulated the evidentiary standard for proving selective enforcement by the police,⁶⁵ the Court has established the requirements that defendants claiming selective

⁵⁹ *Miller-El v. Dretke*, 545 U.S. 231, 237–38 (2005) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994)).

⁶⁰ *See, e.g.*, Stuntz, *supra* note 1, at 818–19, 819 n.211 (discussing the Supreme Court’s failure to reduce discriminatory law enforcement); GUY PADULA, *COLORBLIND RACIAL PROFILING: A HISTORY, 1974 TO THE PRESENT* 194 (2018) (discussing the Court’s “silence” on discriminatory policing); *see also* Paul Butler, *Race and Adjudication*, in 3 *REFORMING CRIMINAL JUSTICE* 211, 217 (Erik Luna ed., 2017) (“There is surprisingly little case law on racial bias in the criminal process.”).

⁶¹ *See, e.g.*, I. Bennett Capers, *On Justitia, Race, Gender, and Blindness*, 12 *MICH. J. RACE & L.* 203, 222 (2006) (claiming that “[t]he Court today acts blindly by pretending [racial] dynamics do not exist” in the context of law enforcement); ALEXANDER, *supra* note 1, at 136 (suggesting that the Court intentionally “adopted rules that would *maximize*—not minimize—the amount of racial discrimination” in law enforcement, and “then closed the courthouse doors to claims of racial bias”).

⁶² *See, e.g.*, Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 *GEO. L.J.* 923, 927 (2023) (explaining that “in many of the Fourth Amendment cases that scholars have most heavily critiqued for ignoring race, *none* of the parties focused on race at the [Supreme] Court or in the lower court proceedings”).

⁶³ *See, e.g.*, Gross & Barnes, *supra* note 6, at 741 (suggesting that the Supreme Court’s case law on selective enforcement is “undeveloped”).

⁶⁴ *See id.*; *see also infra* Sections I.A–B.

⁶⁵ *See Nieves v. Bartlett*, 587 U.S. 391, 418–19 (2019) (Gorsuch, J., concurring in part and dissenting in part) (suggesting that the standard for proving selective enforcement has been developed by lower courts, not the Supreme Court).

prosecution must meet.⁶⁶ In practice, satisfying the requirements for proving selective prosecution is almost impossible.⁶⁷ Yet state and federal courts have traditionally imported the same evidentiary standard for demonstrating selective prosecution into the selective enforcement doctrine.⁶⁸

a. The Selective Prosecution Standard

According to the Supreme Court, defendants who argue that their race influenced a prosecutor's charging decision must provide "clear evidence"⁶⁹ that this decision—or the policy underlying it—"had a discriminatory effect" and "was motivated by a discriminatory purpose."⁷⁰ In other words, defendants must identify "similarly situated individuals of a different race [who] were not prosecuted" and demonstrate that the decision to prosecute the defendants was at least partly motivated by their race.⁷¹ As the Court explained, these requirements resemble the standard that claimants alleging equal protection violations usually must satisfy in contexts beyond criminal law.⁷²

The Court has acknowledged that the requirements for proving selective prosecution are difficult to meet.⁷³ To learn about individuals whom prosecutors did *not* charge, claimants typically need access to prosecutorial documents that mention them.⁷⁴ The Court, however, has severely restricted this access by requiring claimants seeking discovery to provide "some evidence of both discriminatory effect and discriminatory intent,"⁷⁵ including "a credible showing of different treatment of similarly situated persons."⁷⁶ As scholars have noted, the Court has effectively created a "Catch-22" situation in which claimants seeking

⁶⁶ See, e.g., *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Wayte v. United States*, 470 U.S. 598, 608–09 (1985); *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

⁶⁷ See *infra* notes 73–82 and accompanying text.

⁶⁸ See *infra* note 83 and accompanying text.

⁶⁹ *Armstrong*, 517 U.S. at 465 (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

⁷⁰ *Id.* (quoting *Wayte*, 470 U.S. at 608).

⁷¹ *Id.*

⁷² See *id.* ("The requirements for a selective-prosecution claim draw on 'ordinary equal protection standards.'" (quoting *Wayte*, 470 U.S. at 608)).

⁷³ See, e.g., *id.* at 463 ("Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one."); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (stating that "a [successful] selective prosecution claim is a *rara avis*").

⁷⁴ See, e.g., Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 616–18 (1998) (explaining why the success of selective prosecution claims is largely dependent on access to relevant prosecutorial documents, which do not always exist).

⁷⁵ *United States v. Bass*, 536 U.S. 862, 863 (2002) (per curiam).

⁷⁶ *Armstrong*, 517 U.S. at 470.

discovery must present the same type of information that they originally sought to access.⁷⁷ Proving discriminatory purpose may pose even greater challenges for selective prosecution claimants. Prosecutors, after all, are unlikely to admit to improper motives or produce the type of “smoking gun” evidence that demonstrates they prosecuted an individual based on race.⁷⁸

Due to these strict requirements, selective prosecution claims almost invariably fail.⁷⁹ Nevertheless, the Court has consistently defended the strict evidentiary standard by pointing to the “broad discretion” prosecutors possess in their charging decisions⁸⁰—discretion that is considered “a special province of the Executive”⁸¹ and that, therefore, entitles these charging decisions to a “presumption of regularity.”⁸²

b. The Selective Prosecution Standard Applied to Selective Enforcement

Although the Supreme Court itself has not applied the demanding requirements for proving selective prosecution to allegations of selective enforcement, lower state and federal courts have traditionally employed the same evidentiary standard for both types of claims.⁸³

⁷⁷ See, e.g., DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 159 (1999).

⁷⁸ See, e.g., ALEXANDER, *supra* note 1, at 130 (arguing that “evidence [of discriminatory purpose] will almost never be available in the era of colorblindness”); McAdams, *supra* note 74, at 605 (claiming that “[t]oday, most discriminators strive to conceal their intent in order to avoid legal, social, and economic sanctions”).

⁷⁹ See, e.g., Yoav Sapir & Guy Rubinstein, *Minimalist Criminal Courts*, 101 WASH. U. L. REV. 1955, 1986 (2024) (“Studies have confirmed the existence of racial biases in law enforcement and prosecution, but the requirements for proving . . . selective prosecution are so demanding that such claims are consistently rejected.” (footnote omitted)); Siegler & Admussen, *supra* note 1, at 1002–03 (arguing in 2021 that “the last successful [racially] selective prosecution claim at either the state or federal level was the very first one that reached the Court back in 1886—*Yick Wo* [v. *Hopkins*, 118 U.S. 356 (1886)]”). Some scholars argue that the Court’s decision in *Yick Wo* had nothing to do with selective prosecution. See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 354–55 (1997) (“In *Yick Wo* . . . the officials who were shown to have engaged in wrongful discrimination were not the prosecutors but rather the officers in charge of awarding exemptions.”).

⁸⁰ *Armstrong*, 517 U.S. at 464 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

⁸¹ *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999).

⁸² *Armstrong*, 517 U.S. at 464 (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

⁸³ See, e.g., *Nieves v. Bartlett*, 587 U.S. 391, 418 (2019) (Gorsuch, J., concurring in part and dissenting in part) (“Some courts of appeals . . . have already applied [the Supreme Court’s selective prosecution standard in] *Armstrong* to claims alleging selective arrest under the Fourteenth Amendment.” (first citing *United States v. Mason*, 774 F.3d 824, 829–30 (4th Cir. 2014); then citing *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006); and then citing *Johnson v. Crooks*, 326 F.3d 995, 1000 (8th Cir. 2003))); see also Maclin, *supra* note 6, at 337 n.22 (“[L]ower court decisions . . . have applied [selective prosecution’s] strict evidentiary burden to claims of selective enforcement by the police.”); Siegler & Admussen, *supra* note 1, at 1005 (“Every circuit to address

Typically, therefore, claimants alleging selective enforcement have to prove discriminatory effect by identifying “similarly situated individuals of a differen[t] race” whom the police treated differently.⁸⁴ For instance, a defendant who argues they have been discriminatorily stopped by a police officer has to point to people of a different race whom the police did not stop under similar circumstances.⁸⁵ However, the chances of an individual learning about similarly situated others who were not stopped are incredibly small, as it is unlikely that the police have documented this type of information.⁸⁶ The records that do exist are usually those stemming from stops that resulted in an official enforcement measure, such as an arrest or a ticket, or stops that led to the discovery of contraband or other incriminating evidence.⁸⁷ Unless instructed otherwise,⁸⁸ officers are unlikely to document unfruitful stops that ended with no official measures.⁸⁹ They will almost certainly not document stops they chose to forgo despite the fact that they could have made them.⁹⁰ Even when police have recorded useful data, the demanding discovery standard, which courts have traditionally imported from the selective prosecution context into the selective enforcement doctrine,⁹¹ usually bars claimants from gaining access to it.⁹²

the issue continues to use the same merits standard for both selective prosecution and selective law enforcement claims.”). *But see* Conley v. United States, 5 F.4th 781, 789 (7th Cir. 2021) (holding that “racially selective-enforcement claims must be proven by a preponderance of the evidence”).

⁸⁴ United States v. Washington, 869 F.3d 193, 214 (3d Cir. 2017); *see also* Alcaraz-Arellano, 441 F.3d at 1264 (“To satisfy the discriminatory-effect element, one who claims selective enforcement ‘must . . . make a credible showing that a similarly-situated individual of another race could have been, but was not, [stopped or] arrested . . . for the offense for which the defendant was [stopped or] arrested . . .’” (alterations in original) (quoting United States v. James, 257 F.3d 1173, 1179 (10th Cir. 2001))).

⁸⁵ *See, e.g.,* Alcaraz-Arellano, 441 F.3d at 1264.

⁸⁶ *See, e.g.,* Siegler & Admussen, *supra* note 1, at 992; Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 206.

⁸⁷ *See* David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 560 (1997).

⁸⁸ *See, e.g.,* Thomas Tracy, *NYPD to Document All Vehicle Stops to Accommodate NYC Law Aimed at Curbing Racial Profiling*, N.Y. DAILY NEWS (Dec. 29, 2021, 2:56 AM), <https://www.nydailynews.com/2021/12/28/nypd-to-document-all-vehicle-stops-to-accommodate-nyc-law-aimed-at-curbing-racial-profiling/> [https://perma.cc/5SCL-G95N] (reporting that “NYPD officers will have to document every traffic stop—whether or not they result in tickets or other legal action—to accommodate a new city law meant to ensure vehicles aren’t pulled over because of their occupants’ race”).

⁸⁹ *See* Harris, *supra* note 87, at 560.

⁹⁰ *See, e.g.,* Sharad Goel, Maya Perelman, Ravi Shroff & David Alan Sklansky, *Combating Police Discrimination in the Age of Big Data*, 20 NEW CRIM. L. REV. 181, 198 (2017); McAdams, *supra* note 74, at 617–18; Siegler & Admussen, *supra* note 1, at 992; Davis, *supra* note 5, at 438.

⁹¹ *See, e.g.,* Siegler & Admussen, *supra* note 1, at 1005–06.

⁹² *See, e.g.,* PADULA, *supra* note 60, at 200 (arguing that the demanding discovery standard “made it practically impossible for criminal defendants to obtain relevant data from law enforcement agencies even in the rare instances in which such data exists”).

Like selective prosecution claimants, defendants alleging selective enforcement must typically also present clear evidence that the choice to stop, search, or arrest them—or the policy on which the choice was based—was motivated by their race.⁹³ And like prosecutors, police officers too will rarely admit to discriminatory enforcement of the law.⁹⁴ In 2013, in *Floyd v. City of New York*,⁹⁵ a federal district court in New York ruled that the New York Police Department engaged in a years-long practice of racially discriminatory stop-and-frisks.⁹⁶ The court largely relied on the testimonies of officers, who explained that the Department had an “unwritten policy” of “targeting ‘the right people,’” which the court concluded was in fact a euphemism for racial profiling.⁹⁷ Yet direct evidence of selective enforcement is very uncommon, as officers are aware of what to say—and what not to say—to avoid a judicial finding of misconduct on their part.⁹⁸

Selective enforcement claimants sometimes attempt to prove either discriminatory effect or discriminatory purpose by presenting various types of statistical evidence.⁹⁹ In some cases, for instance, claimants have presented evidence of racial disparities in enforcement by either an individual police officer¹⁰⁰ or an entire unit.¹⁰¹ Such statistics, if they exist at all, are generally obtainable only through the discovery of police or prosecutorial materials—a task that most courts have made difficult to accomplish.¹⁰² Claimants who have nonetheless managed to present relevant statistical evidence usually find that judges do not consider it convincing enough to support a selective enforcement claim.¹⁰³ In 1987, in *McCleskey v. Kemp*,¹⁰⁴ the Supreme Court held that defendants raising an equal protection claim “must prove that the decisionmakers in [their specific] case acted with discriminatory purpose”¹⁰⁵ and suggested

⁹³ See, e.g., *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006); *United States v. Washington*, 869 F.3d 193, 214 (3d Cir. 2017).

⁹⁴ See *supra* note 78 and accompanying text.

⁹⁵ 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

⁹⁶ *Id.* at 658, 660.

⁹⁷ *Id.* at 603.

⁹⁸ See generally Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 54–55 (2015) (describing how “officers have developed recurring narratives or scripts of suspicion to satisfy administrative review of their actions and the rare instances of constitutional challenges to contemporary practices”).

⁹⁹ See generally Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1281–82 (2018) (mentioning various types of statistical evidence litigants can present to prove discrimination).

¹⁰⁰ See *United States v. Mesa-Roche*, 288 F. Supp. 2d 1172, 1188 (D. Kan. 2003).

¹⁰¹ See *United States v. Avery*, 137 F.3d 343, 348, 356 (6th Cir. 1997).

¹⁰² See *supra* notes 91–92 and accompanying text.

¹⁰³ See Goel et al., *supra* note 90, at 199–202.

¹⁰⁴ 481 U.S. 279 (1987).

¹⁰⁵ *Id.* at 292.

that only statistical evidence showing “a ‘stark’ pattern” of racial disparities in enforcement could serve as an appropriate alternative to direct evidence of such purpose.¹⁰⁶ Lower courts have seldom found the statistical evidence of racial disparities that defendants have presented strong enough to meet *McCleskey*’s “stark pattern” requirement.¹⁰⁷ Instead, even when statistical evidence was reliable and disparities were significant, courts have typically insisted that defendants must also provide strong direct evidence that the decision to stop or arrest them specifically resulted from intentional discrimination.¹⁰⁸

2. Lower Courts’ Recent Doctrinal Changes

Scholars agree that proving selective enforcement under the demanding evidentiary standard borrowed from the selective prosecution doctrine is almost “impossible.”¹⁰⁹ Scholars also argue that using the same evidentiary standard for both types of claims is both illogical and unjustified.¹¹⁰ As mentioned previously, the Supreme Court has defended the demanding selective prosecution standard by pointing to the presumption of regularity that benefits prosecutorial decisions.¹¹¹ The Court has clarified that this presumption rests on prosecutors’ extensive discretion in charging,¹¹² which is considered “a special province of the Executive.”¹¹³ As scholars note, however, “there is no ‘special province’ of law enforcement.”¹¹⁴ Although judges afford strong deference to prosecutors, they routinely review and question police officers’ decisions in both criminal and civil proceedings.¹¹⁵ Officers’ enforcement decisions, in other words, do not benefit from the same presumption of regularity that prosecutors’ charging decisions enjoy, and the high

¹⁰⁶ *Id.* at 293–94 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

¹⁰⁷ *See, e.g.*, Goel et al., *supra* note 90, at 199–204.

¹⁰⁸ *See id.*; *see also* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2097 n.210 (2016) (“There is a debate among scholars as to whether *McCleskey* actually bars courts from using statistical analysis to satisfy the ‘intent’ prong of the equal protection analysis.”).

¹⁰⁹ *See, e.g.*, ALEXANDER, *supra* note 1, at 137; Alschuler, *supra* note 86, at 206; Siegler & Admussen, *supra* note 1, at 991–92; Rushin & Edwards, *supra* note 1, at 650–51; Gross & Barnes, *supra* note 6, at 741; Rubinstein, *supra* note 4, at 832.

¹¹⁰ *See, e.g.*, PADULA, *supra* note 60, at 198; Siegler & Admussen, *supra* note 1, at 1019–26.

¹¹¹ *See supra* notes 80–82 and accompanying text.

¹¹² *See United States v. Armstrong*, 517 U.S. 456, 464 (1996).

¹¹³ *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999).

¹¹⁴ Siegler & Admussen, *supra* note 1, at 1020.

¹¹⁵ *See id.* at 1019–23.

barriers to proving that officers have enforced the law discriminatorily are therefore unjustified.¹¹⁶

In recent years, an increasing number of state and federal courts have been responsive to this line of critique.¹¹⁷ Consequently, some of them have applied various changes to the selective enforcement doctrine, making it easier for claimants to prevail. Some courts handling selective enforcement claims have thus relaxed the requirements for obtaining discovery,¹¹⁸ adopted a more lenient evidentiary standard for proving claims on the merits,¹¹⁹ and even begun to consider implicit bias—not just purposeful discrimination—unconstitutional.¹²⁰

These doctrinal changes have not resulted in a surge of successful selective enforcement claims. However, thanks to these changes, at least some defendants managed to prove that they were the victims of selective enforcement¹²¹—a task that for decades had been considered almost impossible.¹²² The higher probability that a court will accept a selective enforcement claim or grant a discovery motion has also potentially discouraged some prosecutors from taking cases tainted with discrimination to trial or encouraged them to extend very generous plea offers to defendants.¹²³ Nevertheless, further research is necessary to learn about the influence that these doctrinal changes have had on the litigation of selective enforcement claims in jurisdictions that have implemented them.

¹¹⁶ *See id.*

¹¹⁷ *See, e.g.,* *Nieves v. Bartlett*, 587 U.S. 391, 418–19 (2019) (Gorsuch, J., concurring in part and dissenting in part) (describing how a few circuit courts have recognized the special evidentiary difficulties faced by selective enforcement claimants, as well as the fact that police officers’ enforcement decisions should not be afforded the same “presumptions of regularity and immunity” that benefit prosecutors’ charging decisions (first citing *United States v. Sellers*, 906 F.3d 848, 856 (9th Cir. 2018); then citing *United States v. Washington*, 869 F.3d 193, 219 (3d Cir. 2017); then citing *United States v. Davis*, 793 F.3d 712, 720–21 (7th Cir. 2015) (en banc); and then citing *Marshall v. Columbia Lea Reg’l Hosp.*, 345 F.3d 1157, 1168 (10th Cir. 2003))); *Conley v. United States*, 5 F.4th 781, 790–96 (7th Cir. 2021) (discussing the same line of critique); *Commonwealth v. Robinson-Van Rader*, 208 N.E.3d 693, 707–08 (Mass. 2023) (same); *People v. Sims*, 207 N.E.3d 238, 265–68 (Ill. App. Ct. 2022) (same).

¹¹⁸ *See infra* notes 124–43 and accompanying text.

¹¹⁹ *See infra* notes 144–68 and accompanying text.

¹²⁰ *See infra* notes 169–81 and accompanying text.

¹²¹ *See, e.g.,* *Commonwealth v. Long*, 152 N.E.3d 725, 731, 747 (Mass. 2020); *State v. Scott*, 288 A.3d 842, 849 (N.J. Super. Ct. App. Div. 2023); *United States v. Moore*, 716 F. Supp. 3d 415, 419 (E.D. Va. 2024).

¹²² *See supra* notes 5, 109 and accompanying text.

¹²³ *See, e.g.,* Rubinstein, *supra* note 4, at 881 (explaining why “there is reason to believe that some cases with potentially strong equal protection claims never even reach trial,” as they are “dismissed by the prosecution” or “resolved in a plea bargain that is favorable to the defendant”).

a. Lower Discovery Threshold

Some courts have relaxed the requirements that selective enforcement claimants must satisfy to obtain discovery.¹²⁴ Traditionally, courts set a high bar for selective prosecution claimants and selective enforcement claimants seeking discovery.¹²⁵ They ask claimants to provide “some evidence of both discriminatory effect and discriminatory intent,”¹²⁶ including “a credible showing of different treatment of similarly situated persons.”¹²⁷ As explained earlier, this has resulted in an absurd “Catch-22” situation in which claimants are required to provide data similar to what they are trying to discover.¹²⁸ However, a few federal courts—including at least three federal courts of appeals (the Third, Seventh, and Ninth Circuits)—have recently begun to turn away from this nearly impossible discovery standard in selective enforcement cases.¹²⁹

For example, in 2017, in *United States v. Washington*,¹³⁰ the Third Circuit authorized judges to grant “limited discovery” even when selective enforcement claimants do not present evidence of discriminatory purpose or cannot point to specific individuals whom the police treated differently.¹³¹ Instead, claimants are only required to present “‘some evidence’ of discriminatory effect”—including “reliable statistical evidence[] or its equivalent”—which could “support a reasonable inference of discriminatory intent.”¹³² As scholars suggest, this lower standard may lead to discovery even if claimants can only show that the officers in their case disproportionately enforced the law against people of color.¹³³ For instance, in 2019, in *United States v. Brooks*,¹³⁴ a federal district court in New Jersey applied the *Washington* standard and granted limited discovery.¹³⁵ The defendant was arrested by the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) following a

¹²⁴ See Siegler & Admussen, *supra* note 1, at 1008–19 (describing circuit courts that have “craft[ed] new, lower discovery standards for selective law enforcement claims”).

¹²⁵ See *supra* notes 74–77, 91–92 and accompanying text.

¹²⁶ *United States v. Bass*, 536 U.S. 862, 863 (2002) (per curiam).

¹²⁷ *United States v. Armstrong*, 517 U.S. 456, 470 (1996).

¹²⁸ See *supra* note 77 and accompanying text.

¹²⁹ See, e.g., *United States v. Washington*, 869 F.3d 193, 213–22 (3d Cir. 2017); *United States v. Davis*, 793 F.3d 712, 719–21 (7th Cir. 2015) (en banc); *Conley v. United States*, 5 F.4th 781, 791–92 (7th Cir. 2021); *United States v. Sellers*, 906 F.3d 848, 854–56 (9th Cir. 2018); *United States v. Mumphrey*, 193 F. Supp. 3d 1040, 1059–60 (N.D. Cal. 2016); *United States v. Lopez*, 415 F. Supp. 3d 422, 425–27 (S.D.N.Y. 2019).

¹³⁰ 869 F.3d 193 (3d Cir. 2017).

¹³¹ *Id.* at 220–21.

¹³² *Id.*

¹³³ See Siegler & Admussen, *supra* note 1, at 1016.

¹³⁴ No. 14-cv-382, 2019 WL 258694 (D.N.J. Jan. 18, 2019).

¹³⁵ *Id.* at *4.

“stash-house sting operation”¹³⁶ in which undercover ATF agents convinced the defendant to rob a “stash house” containing cocaine, which in fact never existed.¹³⁷ The defendant demonstrated that at least five of the latest federal criminal cases in New Jersey that resulted from such ATF sting operations were brought against “defendants and respective co-defendants [who] were either African-American or minority.”¹³⁸ He also pointed to “several” white people whom he argued were similarly situated to him and whom ATF agents allegedly could have targeted but did not.¹³⁹ The government maintained that “[r]eference to the races of defendants charged in other cases and a ‘laundry list of white males from [the defendant’s county]’” did not satisfy the *Washington* standard.¹⁴⁰ The court, however, found that this information was sufficient for granting limited discovery of data about these operations—data that could potentially help the defendant prove that he was the victim of racially selective enforcement.¹⁴¹

To date, state courts, on the other hand, have been reluctant to apply a more lenient discovery standard¹⁴² unless such a relaxed standard was required by statute.¹⁴³

b. Lenient Evidentiary Standard

A few state and federal courts have gone further than relaxing the discovery standard in cases involving selective enforcement claims. Instead, these courts have lowered the evidentiary standard for proving selective enforcement *on the merits* and no longer require claimants to present clear evidence of both discriminatory effect and discriminatory purpose.¹⁴⁴ For instance, in 2021, in *Conley v. United States*¹⁴⁵—another case involving a stash house sting operation—the Seventh Circuit held that “racially selective-enforcement claims must be proven by a

¹³⁶ *Id.* at *1.

¹³⁷ See generally *United States v. Washington*, 869 F.3d 193, 196 (3d Cir. 2017) (explaining stash house sting operations).

¹³⁸ *Brooks*, 2019 WL 258694, at *1–2.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at *4.

¹⁴¹ See *id.*

¹⁴² But see *State v. Johnson*, 890 S.E.2d 891, 895 (N.C. 2023) (Earls, J., dissenting) (stating that “[t]he differences between enforcement and prosecution make a compelling case for lowering *Armstrong*’s pre-discovery standard in the context of selective enforcement”).

¹⁴³ See, e.g., *Commonwealth v. Long*, 152 N.E.3d 725, 740 (Mass. 2020) (discussing defendants’ statutory “right to reasonable discovery of evidence concerning the totality of the circumstances of the traffic stop”).

¹⁴⁴ See, e.g., *Conley v. United States*, 5 F.4th 781, 789–96 (7th Cir. 2021); *United States v. Moore*, 716 F. Supp. 3d 415, 420–21, 429–30 (E.D. Va. 2024); *Long*, 152 N.E.3d at 733–41.

¹⁴⁵ 5 F.4th 781 (7th Cir. 2021).

preponderance of the evidence,” not clear evidence.¹⁴⁶ In other words, selective enforcement claimants need only demonstrate that “it is more likely than not” that they were victims of intentionally discriminatory enforcement.¹⁴⁷ The court also emphasized that statistical evidence can serve as “a useful tool” for proving selective enforcement on the merits.¹⁴⁸ Ultimately, however, it found that the defendant’s statistical evidence, which aimed to show that the ATF disproportionately employed stash house sting operations against Black people like the defendant, did not meet even the lower standard.¹⁴⁹

Another court that applied the preponderance of the evidence standard, however, reached a different result. In 2024, in *United States v. Moore*,¹⁵⁰ a federal district court in Virginia ruled that the defendant—a Black person whom the police stopped for driving with “suspicious temporary tags”¹⁵¹—successfully proved by a preponderance of the evidence that the decision to stop him amounted to selective enforcement.¹⁵² Notably, the defendant did not identify any similarly situated individuals whom the police did not stop.¹⁵³ Additionally, he did not provide any direct evidence that the specific officers who stopped him were acting with “invidious or bad faith.”¹⁵⁴ Instead, the court found both discriminatory effect and discriminatory purpose based solely on statistical evidence demonstrating that the Richmond Police Department, as a whole, “stop[ped] Black drivers five times as often as it stop[ped] white drivers,” in addition to “evidence of Richmond’s history of discrimination” in policing, housing, and other spheres of life.¹⁵⁵

Some state courts have adopted even more lenient evidentiary standards for proving selective enforcement under their respective state

¹⁴⁶ *Id.* at 789.

¹⁴⁷ *Id.* at 798.

¹⁴⁸ *Id.* at 796–97 (quoting *United States v. Barlow*, 310 F.3d 1007, 1011 (7th Cir. 2002)).

¹⁴⁹ *See id.* at 797–98. According to the court, in the defendant’s specific case, it was the Federal Bureau of Investigation (“FBI”)—not the ATF—that brought about the sting operation. *See id.* Additionally, the target of the operation was not the defendant but another individual. *Id.* The court found that the defendant was “selected by co-conspirators” to participate in the (staged) robbery. *Id.* The FBI, meanwhile, was not involved in the recruitment of the defendant, and agents were not aware of the defendant’s race “until his arrest.” *Id.* The court concluded, therefore, that the statistical evidence the defendant provided was insufficient to demonstrate either discriminatory effect or discriminatory purpose on the part of the FBI or the ATF and rejected the defendant’s selective enforcement claim. *See id.*

¹⁵⁰ 716 F. Supp. 3d 415 (E.D. Va. 2024).

¹⁵¹ *Id.* at 430 n.19.

¹⁵² *Id.* at 428–32.

¹⁵³ *See id.* at 428–29.

¹⁵⁴ *Id.* at 430.

¹⁵⁵ *Id.* at 425–26, 432.

constitutions.¹⁵⁶ For example, in a series of three decisions published between 2008 and 2023, the Supreme Judicial Court of Massachusetts incrementally eased the requirements that selective enforcement claimants must satisfy to prevail under the Massachusetts Constitution's equal protection guarantee.¹⁵⁷ Nowadays, Massachusetts claimants are no longer required to prove discriminatory effect.¹⁵⁸ Instead, they need only “establish[] a reasonable inference that the investigation was motivated by race or membership in another constitutionally protected class.”¹⁵⁹ The court has demonstrated a liberal approach as to the type of facts that claimants may cite to sustain a reasonable inference of such motivation.¹⁶⁰ According to the court, these facts could be predicated on either “personal knowledge, the [claimant]’s own investigation, evidence obtained during discovery, [or] other relevant sources.”¹⁶¹ If a judge is convinced that the facts the claimant cited indeed establish such a reasonable inference, the prosecution will have the opportunity to rebut it¹⁶² by demonstrating that the police did *not* enforce the law against the claimant because of race and by “establishing a race-neutral reason” for their action.¹⁶³ If the prosecution fails to do so, the claimant will prevail. For example, in 2020, in *Commonwealth v. Long*,¹⁶⁴ the court found that the statistical evidence presented by the defendant—a Black person who was stopped by the Boston Police Department for a “missing inspection sticker”¹⁶⁵—supported a reasonable inference of discriminatory motivation.¹⁶⁶ The evidence, derived from data gathered by the police department, revealed significant racial disparities in traffic enforcement by the officers involved in the defendant’s stop.¹⁶⁷ After the prosecution failed to refute this inference, the court held that the defendant successfully proved his selective enforcement claim.¹⁶⁸

¹⁵⁶ See, e.g., *State v. Segars*, 799 A.2d 541, 549–52 (N.J. 2002) (describing the lenient evidentiary standard for proving selective enforcement under the New Jersey Constitution).

¹⁵⁷ See *Commonwealth v. Lora*, 886 N.E.2d 688, 697–701 (Mass. 2008); *Commonwealth v. Long*, 152 N.E.3d 725, 733–41 (Mass. 2020); *Commonwealth v. Robinson-Van Rader*, 208 N.E.3d 693, 706–09 (Mass. 2023).

¹⁵⁸ See *Robinson-Van Rader*, 208 N.E.3d at 706–07.

¹⁵⁹ *Id.* at 708 (citing *Long*, 152 N.E.3d at 739).

¹⁶⁰ See *id.* at 706.

¹⁶¹ *Id.* (quoting *Long*, 152 N.E.3d at 739).

¹⁶² See *id.*

¹⁶³ *Id.* at 706, 711.

¹⁶⁴ 152 N.E.3d 725 (Mass. 2020).

¹⁶⁵ *Id.* at 732.

¹⁶⁶ See *id.* at 745–47.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 747.

c. Substantive Doctrinal Change

In recent years, appellate courts in at least two states—Massachusetts and New Jersey—have applied a major substantive change to the doctrine of selective enforcement under their respective state constitutions.¹⁶⁹ The U.S. Supreme Court has only regarded “*intentionally* discriminatory” law enforcement as unconstitutional,¹⁷⁰ therefore suggesting that “unconsciously” biased enforcement decisions would not constitute an equal protection violation.¹⁷¹ But in 2020, in *Long*, discussed above, the Supreme Judicial Court of Massachusetts held that discriminatory enforcement of the law by police officers could be considered unconstitutional under the Massachusetts Constitution even if it resulted from implicit bias—namely, even when the officers involved had no “awareness” of their biases and did not engage in intentionally discriminatory policing.¹⁷²

In 2023, in *State v. Scott*,¹⁷³ the Appellate Division of the Superior Court of New Jersey issued a similar holding under the New Jersey Constitution’s equal protection guarantee.¹⁷⁴ In this unusual case, a woman who called the police to report that she fell victim to robbery provided some details about the robber, including his clothes, the direction that he headed, and the fact that he took her phone.¹⁷⁵ However, she explicitly refrained from identifying his race, explaining that she “didn’t see.”¹⁷⁶ Nevertheless, when the police dispatcher reported about the incident to officers in the field, she “improperly added to the victim’s description that the robber was a Black male.”¹⁷⁷ Based on these details, the officers observed and stopped the defendant on the street, frisked him, and discovered he was carrying the victim’s phone.¹⁷⁸ The court held that even if the dispatcher mentioned the robber was Black unintentionally, because of unconscious biases she had, her biased description of the defendant could still be considered unconstitutional selective enforcement under the New Jersey Constitution.¹⁷⁹ As the court suggested, this holding was motivated by the view that “[t]he problem of implicit bias

¹⁶⁹ See *id.* at 736–37; *State v. Scott*, 288 A.3d 842, 854–55 (N.J. Super. Ct. App. Div. 2023).

¹⁷⁰ *Whren v. United States*, 517 U.S. 806, 813 (1996) (emphasis added).

¹⁷¹ See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (describing how the Supreme Court has usually “requir[ed] proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent”).

¹⁷² See *Commonwealth v. Long*, 152 N.E.3d 725, 736–37, 739 (Mass. 2020).

¹⁷³ 288 A.3d 842 (N.J. Super. Ct. App. Div. 2023).

¹⁷⁴ See *id.* at 848.

¹⁷⁵ See *id.* at 849.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* at 854–55.

in the context of policing is both real and intolerable.”¹⁸⁰ Ultimately, the court concluded that the defendant successfully proved selective enforcement, regardless of the exact reasons that had led the dispatcher to add race to the description of the robber.¹⁸¹

B. Remedying Selective Enforcement

1. The Supreme Court’s Failure to Specify a Remedy

The Supreme Court has never decided the appropriate remedy within the criminal process for successful selective enforcement claims.¹⁸² Even if a defendant gets over the evidentiary hurdles to proving selective enforcement, the Court’s case law does not specify the remedy that a judge should grant, if any.¹⁸³

The vagueness surrounding the proper remedy for selective enforcement is quite unusual in the field of constitutional criminal procedure. Other types of constitutional violations by the police generally result in the suppression—namely, inadmissibility—of the incriminating evidence obtained.¹⁸⁴ For example, searches and seizures that violate the Fourth Amendment may trigger the suppression of evidence seized by the police,¹⁸⁵ and the omission of warnings required by *Miranda v. Arizona*¹⁸⁶ for custodial interrogations may lead to the inadmissibility of

¹⁸⁰ *Id.* at 848.

¹⁸¹ *See id.* at 855; *see also* Aliza Hochman Bloom, *Policing Bias Without Intent*, 2025 U. ILL. L. REV. (forthcoming 2025) (discussing *State v. Scott* case critically).

¹⁸² *See, e.g.,* Rubinstein, *supra* note 4, at 833–40; Karlan, *supra* note 6, at 2009–14; Gross & Barnes, *supra* note 6, at 741; Ric Simmons, *Race and Reasonable Suspicion*, 73 FLA. L. REV. 413, 469 n.273 (2021); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 349 (2001); Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 571 (1998); Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1109–11 (2000).

¹⁸³ The Supreme Court has also expressly refrained from specifying the judicial remedy for successful selective prosecution claims. *See* *United States v. Armstrong*, 517 U.S. 456, 461 n.2 (1996) (“We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race.”); *see also* Rubinstein, *supra* note 4, at 833–40 (describing this remedial choice of the Court and providing possible explanations for it).

¹⁸⁴ *See, e.g.,* ERWIN CHERMERINSKY, *PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS* 73 (2021) (considering suppression of unconstitutionally obtained evidence “the primary remed[y]” within the criminal process for constitutional violations by the police); Alice Ristorph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1594 (2015) (arguing that “[t]he individual defendant who raises a Fourth, Fifth, or Sixth Amendment complaint about the police is nearly always seeking to suppress evidence”).

¹⁸⁵ *See* *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

¹⁸⁶ 384 U.S. 436 (1966).

the confession obtained.¹⁸⁷ Yet the Court has never explained whether there are similar consequences for racially selective enforcement.

The Court's failure to specify the judicial remedy for successful selective enforcement claims can be attributed to the fact that it has never found any such claim to be successful,¹⁸⁸ and it aligns with the Court's broader reluctance to discuss discriminatory policing or develop the selective enforcement doctrine.¹⁸⁹ Nevertheless, this remedial uncertainty may also be a conscious choice, reflecting the Court's general disapproval of using suppression of evidence or dismissal of charges as a remedy for police misconduct.¹⁹⁰ Concerning the Fourth Amendment, for example, the Court has long limited and narrowed the application of the exclusionary rule,¹⁹¹ citing concerns over the rule's negative consequences for society, primarily the potential impunity for factually guilty defendants.¹⁹² Due to similar concerns, the Court might hesitate to apply the suppression or dismissal remedies to other types of police wrongdoing, including selective enforcement.¹⁹³

Some judges and scholars suggest the Court may have already ruled out suppressing evidence as an appropriate remedy for selective enforcement.¹⁹⁴ They base this claim on the Court's 1996 decision

¹⁸⁷ See *id.* at 444.

¹⁸⁸ See, e.g., PADULA, *supra* note 60, at 22 n.72; Gross & Barnes, *supra* note 6, at 741.

¹⁸⁹ See *supra* notes 60–62 and accompanying text.

¹⁹⁰ See, e.g., Rubinstein, *supra* note 4, at 839 (arguing that the Court's "distaste for, even aversion to, dismissal, suppression, and other strong remedies for procedural violations in the criminal process" may have influenced the Court's reluctance to specify the appropriate remedy for selective enforcement).

¹⁹¹ See, e.g., Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2505–21 (1996) (describing how the Court has gradually limited and narrowed the application of the Fourth Amendment exclusionary rule); CHEMERINSKY, *supra* note 184, at 184–90, 243–48 (same).

¹⁹² See, e.g., *Herring v. United States*, 555 U.S. 135, 141 (2009) ("The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free . . ."); *Davis v. United States*, 564 U.S. 229, 237 (2011) (stating that the rule "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence" and that "its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment").

¹⁹³ See, e.g., Lewis R. Katz, "Lonesome Road": *Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413, 1426 (2013) (arguing that due to the Court's negative attitudes toward the Fourth Amendment exclusionary rule, "it is very unlikely to adopt the remedy in criminal cases for equal protection violations").

¹⁹⁴ See, e.g., *United States v. Weaver*, 9 F.4th 129, 159 (2d Cir. 2021) (en banc) (Lohier, Jr., J., concurring) (stating that due to the Supreme Court's Fourth Amendment and equal protection case law, "any evidence obtained as a result of [a] racially biased stop could still be used against [the defendant] in [a] criminal proceeding" (first citing *Whren v. United States*, 517 U.S. 806, 813 (1996); then citing Karlan, *supra* note 6, at 2010–14; and then citing Gabriel J. Chin & Charles J.

in *Whren v. United States*,¹⁹⁵ in which the Court held that the fact that a search or seizure was racially discriminatory does not constitute, by itself, a Fourth Amendment violation.¹⁹⁶ The Fourth Amendment prohibits “unreasonable searches and seizures,”¹⁹⁷ and the remedy for its violation is the possible suppression of any evidence that the police obtained through such unlawful searches and seizures.¹⁹⁸ In *Whren*, the two defendants, who were charged with federal drug offenses, moved to suppress the primary evidence against them: drugs that a police officer seized after stopping the defendants’ car for a number of traffic violations and noticing bags containing crack cocaine within the vehicle.¹⁹⁹ The defendants argued that the circumstances surrounding the traffic stop suggested that the stop was “pretextual”—namely, that the officer conducted the stop not to enforce traffic regulations (as the officer maintained), but rather to “investigat[e] other law violations,” such as drug crimes, “as to which no probable cause or even articulable suspicion exist[ed].”²⁰⁰ The defendants also hinted that the stop may have been motivated by the fact that they were Black.²⁰¹ Therefore, the defendants argued, the traffic stop was unreasonable in a way that violated the Fourth Amendment, and the incriminating evidence obtained must be suppressed.²⁰²

The Court unanimously rejected the defendants’ claims. It clarified that judges should not assess the reasonableness of traffic stops based on the “actual motivations” of the police officers who conducted them.²⁰³ Instead, the Court held that traffic stops were reasonable whenever officers had “probable cause to believe that a traffic violation ha[d] occurred,”²⁰⁴ regardless of any other motivations that they may have

Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 918 (2015)); Karlan, *supra* note 6, at 2004 (arguing that the Court’s equal protection case law “raise[s] the possibility that . . . exclusion and dismissal[] will be unavailable for claims of racial discrimination” by the police); Renée McDonald Hutchins, *Racial Profiling: The Law, the Policy, and the Practice*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 95, 119 (Angela J. Davis ed., 2017) (“If the police violate your equal protection rights and discover drugs and a gun . . . you cannot ask for those drugs and gun to be kept out of a future prosecution.”).

¹⁹⁵ 517 U.S. 806 (1996).

¹⁹⁶ *See id.* at 813.

¹⁹⁷ U.S. CONST. amend. IV.

¹⁹⁸ *See supra* note 185 and accompanying text.

¹⁹⁹ *Whren*, 517 U.S. at 808–09.

²⁰⁰ *Id.* at 809–10.

²⁰¹ *See id.*

²⁰² *See id.*

²⁰³ *Id.* at 813.

²⁰⁴ *Id.* at 810.

had—including intentional racial bias.²⁰⁵ In short, as the Court stated, “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”²⁰⁶ The Court moved on to mention that racially selective enforcement by the police was indeed unconstitutional.²⁰⁷ It emphasized, however, that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”²⁰⁸ The defendants in *Whren* focused their suppression motion on the Fourth Amendment and did not raise any equal protection claim under the Fourteenth Amendment.²⁰⁹ For this reason, enforcement against the defendants merely had to comply with the Fourth Amendment to be constitutional.²¹⁰ Ultimately, the Court affirmed the lower courts’ decision to deny the defendants’ suppression motion.²¹¹

By holding that officers’ subjective intentions are irrelevant to Fourth Amendment analysis, *Whren* effectively barred judges from suppressing, under the Fourth Amendment, evidence obtained through racially discriminatory searches or seizures.²¹² Scholars have long criticized this decision,²¹³ arguing that the Court has encouraged police officers to engage in racial profiling,²¹⁴ especially given the difficulties of proving that a traffic stop was a result of intentional racial bias for purposes of the Equal Protection Clause.²¹⁵ This criticism is justified. Yet, contrary to suggestions made by some judges and scholars,²¹⁶ *Whren* has not prevented judges from granting suppression of evidence as a

²⁰⁵ See *id.* at 813; see also *Ashcroft v. al-Kidd*, 563 U.S. 731, 739 (2011) (“Our unanimous opinion [in *Whren*] held that we would not look behind an objectively reasonable traffic stop to determine whether racial profiling or a desire to investigate other potential crimes was the real motive.”).

²⁰⁶ *Whren*, 517 U.S. at 813.

²⁰⁷ See *id.*

²⁰⁸ *Id.*

²⁰⁹ See PADULA, *supra* note 60, at 195.

²¹⁰ See *Whren*, 517 U.S. at 819.

²¹¹ See *id.*

²¹² See *supra* note 206 and accompanying text.

²¹³ See, e.g., Tracey Maclin & Maria Savarese, *Martin Luther King, Jr. and Pretext Stops (and Arrests): Reflections on How Far We Have Not Come Fifty Years Later*, 49 U. MEM. L. REV. 43, 57 (2018) (“*Whren* ranks as one of the Court’s worst opinions in the last thirty years and is deserving of the vast criticism it has received.”).

²¹⁴ See, e.g., Justin Driver, *The Supreme Court as Bad Teacher*, 169 U. PA. L. REV. 1365, 1410 (2021) (arguing that the Court’s case law on traffic stops, including its decision in *Whren*, may have granted law enforcement officers “licenses to conduct racially-motivated exploratory searches”); Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 908 (2015) (arguing that the *Whren* Court “rebuffed an opportunity to squarely confront racialized vehicle stops”).

²¹⁵ See, e.g., Leipold, *supra* note 182, at 571–72 (explaining that it is much more difficult to prove an equal protection violation than a Fourth Amendment violation).

²¹⁶ See *supra* note 194 and accompanying text.

remedy for selective enforcement under the Equal Protection Clause.²¹⁷ Instead, as other judges and scholars have concluded, the Court has simply left the proper remedy question unresolved, leaving it to lower courts to answer it.²¹⁸ As the next Section shows, this is indeed what courts across the country have done.

2. Lower Courts' Remedial Responses

Although the Supreme Court has left the remedy question unanswered, defendants alleging selective enforcement constantly file motions to suppress evidence or to dismiss charges against them.²¹⁹ Virtually all of these motions are denied, primarily due to defendants' failure to meet the high evidentiary threshold.²²⁰ When judges deny such motions, they often feel comfortable refraining from deciding whether the defendant's proposed remedy—suppression or dismissal—is proper, reasoning that such determination is unnecessary. The Fifth and Tenth Circuits, for example, have consistently declined to comment on the propriety of suppressing evidence as a remedy for selective enforcement in cases in which defendants have failed to prove their claim.²²¹

Nevertheless, an increasing number of state and federal courts across the country have not hesitated to express their position on the appropriate remedial response to selective enforcement. Courts have generally taken one of three approaches, none of which seems to be dominant. First, some courts—including the Sixth Circuit, the Supreme Court of Maryland, and some appellate courts in Ohio—hold that successful selective enforcement claims should warrant no judicial remedy within the criminal process.²²² Second, other courts—including the highest courts of New Jersey and Massachusetts—maintain that successful selective enforcement claims should lead to the suppression of evidence against the defendant.²²³ Lastly, yet other courts—including the Third Circuit and the Court of Criminal Appeals of Texas—consider the proper remedy for selective enforcement to be dismissal of charges.²²⁴

²¹⁷ See Rubinstein, *supra* note 4, at 839–40.

²¹⁸ See *supra* note 182 and accompanying text; see also, e.g., *United States v. Chavez*, 281 F.3d 479, 486–87 (5th Cir. 2002); *United States v. Lopez-Moreno*, 420 F.3d 420, 434 (5th Cir. 2005).

²¹⁹ See, e.g., Rubinstein, *supra* note 4, at 844.

²²⁰ See *supra* notes 4–6, 109 and accompanying text.

²²¹ See, e.g., *United States v. Torrellas*, 197 F. App'x 318, 319 (5th Cir. 2006) (per curiam); *United States v. Alabi*, 597 F. App'x 991, 997 (10th Cir. 2015).

²²² See *infra* notes 225–42 and accompanying text.

²²³ See *infra* notes 243–78 and accompanying text.

²²⁴ See *infra* notes 279–04 and accompanying text.

a. No Proper Remedy Within the Criminal Process

A few state and federal courts hold that there is no appropriate remedy for selective enforcement within the criminal process and that the only type of remedy that claimants can seek is a civil one, such as under 42 U.S.C. § 1983.²²⁵ According to these courts, selective enforcement claimants can sue the police officers who allegedly discriminated against them for damages or injunctive relief, but they cannot move to suppress evidence or dismiss charges in a criminal proceeding.²²⁶

For example, in 2008, in *United States v. Nichols*,²²⁷ the Sixth Circuit held that suppressing evidence was an inappropriate remedy for selective enforcement.²²⁸ The defendant had moved to suppress incriminating evidence against him, arguing that the police obtained it during a racially motivated traffic stop.²²⁹ The court denied the suppression motion, holding that the only way that the defendant could obtain a remedy was by suing the police officer who allegedly discriminated against him.²³⁰ The court acknowledged that the Supreme Court has never positively declared suppressing evidence inappropriate for successful selective enforcement claims.²³¹ The court implied, however, that it would not adopt such a remedy without affirmative approval by the Supreme Court.²³² Additionally, the court highlighted suppression's "costly toll upon truth-seeking and law enforcement objectives"²³³ and suggested that less harmful civil remedies, like monetary damages, could be as effective as suppression in deterring selective enforcement.²³⁴ In 2012, in *United States v. Cousin*,²³⁵ the Sixth Circuit reaffirmed *Nichols*, holding that suppression will continue to be an improper remedy for selective enforcement "in the absence of an intervening change in law or en banc review."²³⁶

²²⁵ According to 42 U.S.C. § 1983,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983.

²²⁶ See *infra* notes 227–42 and accompanying text.

²²⁷ 512 F.3d 789 (6th Cir. 2008), *abrogated on other grounds* by *Arizona v. Gant*, 556 U.S. 332 (2009), *as recognized in* *United States v. Buford*, 632 F.3d 264 (6th Cir. 2011).

²²⁸ *Id.* at 794–95.

²²⁹ See *id.* at 793.

²³⁰ See *id.* at 794.

²³¹ See *id.*

²³² See *id.*

²³³ *Id.* at 794–95 (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

²³⁴ See *id.*

²³⁵ 448 F. App'x 593 (6th Cir. 2012) (per curiam).

²³⁶ *Id.* at 594.

Several federal district courts have followed suit.²³⁷ For instance, in 2011, in *United States v. Harmon*,²³⁸ a district court in New Mexico agreed that the proper judicial remedy for selective enforcement should be civil, under 42 U.S.C. § 1983, and not suppression of evidence.²³⁹ The court reasoned that it was “not aware of [any] court that has applied the exclusionary rule for a violation of the Equal Protection Clause.”²⁴⁰ It also mentioned the high social costs stemming from suppression of evidence—especially compared with damages—and raised doubts about suppression’s capacity to deter police wrongdoing effectively.²⁴¹

In addition to federal courts, some state courts have also declined to adopt suppressing evidence as a remedy for selective enforcement. For example, the Supreme Court of Maryland and at least two courts of appeals in Ohio held suppression inadequate in such situations, citing the absence of supportive precedent.²⁴²

b. Suppression of Evidence as the Proper Remedy

In contrast to courts that deny selective enforcement claimants any recourse within the criminal process, some state and federal courts have declared that defendants can move to suppress incriminating evidence against them. The justifications that courts most commonly invoke for adopting this remedy are to deter police officers from engaging in selective enforcement and to preserve judicial integrity.²⁴³

In at least two states—New Jersey and Massachusetts—the highest state courts have adopted suppression of evidence as a remedy for selective enforcement under their respective state constitutions’ equal protection guarantees.²⁴⁴ As early as 2001, the Supreme Court of New Jersey held, in *State v. Maryland*,²⁴⁵ that suppression was the proper remedy for selective enforcement.²⁴⁶ The court went on to accept the

²³⁷ See, e.g., *United States v. Foster*, No. 07-cr-254, 2008 WL 1927392, at *5 (M.D. Ala. Apr. 28, 2008); *United States v. Crawford*, No. 20-cr-84, 2022 WL 2603558, at *2–3 (N.D. Ind. July 8, 2022); *United States v. Christie*, No. 21-cr-156, 2023 WL 4760709, at *7 (E.D. Tenn. July 26, 2023).

²³⁸ 785 F. Supp. 2d 1146 (D.N.M. 2011), *aff’d*, 742 F.3d 451 (10th Cir. 2014).

²³⁹ See *id.* at 1170.

²⁴⁰ *Id.*

²⁴¹ See *id.* at 1170 n.4.

²⁴² See, e.g., *Portillo Funes v. State*, 230 A.3d 121, 146 (Md. 2020); *State v. Chambers*, 2011-Ohio-1305, at ¶ 22; *State v. Hansard*, 2020-Ohio-5528, at ¶ 29. *But see* *State v. Bello-Mancilla*, 2017-Ohio-8003, at ¶ 29 (Horton, J., dissenting) (supporting the adoption of suppression of evidence as a remedy for selective enforcement).

²⁴³ See *infra* notes 244–78 and accompanying text.

²⁴⁴ The Supreme Court of Kansas has also recognized suppression as the proper remedy for racial profiling, albeit under a state statute and not under the Kansas Constitution. See *State v. Gray*, 403 P.3d 1220, 1226–27 (Kan. 2017).

²⁴⁵ 771 A.2d 1220 (N.J. 2001).

²⁴⁶ See *id.* at 1228–31.

defendant's claim that the police officers who searched him in a train station initially approached him because he was Black, and therefore the court ordered the suppression of the drugs obtained in this unconstitutional search.²⁴⁷ In 2002, in *State v. Segars*,²⁴⁸ the court emphasized that the basis for adopting the suppression remedy was the need to deter the police from selectively enforcing the law and to preserve the integrity of the court.²⁴⁹

The Supreme Judicial Court of Massachusetts declared that suppression of evidence was the proper remedy for racially selective enforcement in 2008, in *Commonwealth v. Lora*,²⁵⁰ explaining that the central reason for adopting it was to “deter intentional unconstitutional behavior.”²⁵¹ The court first ordered the suppression of incriminating evidence obtained through a racially selective traffic stop in 2020, in *Commonwealth v. Long*.²⁵²

Trial and intermediate appellate courts in other states have also declared suppression the appropriate judicial response to selective enforcement. For example, in 2022, in *People v. Jones*,²⁵³ the Third Department of the Appellate Division of the Supreme Court of the State of New York held that suppressing evidence was the proper remedy for a racially selective traffic stop under the New York State Constitution.²⁵⁴ This decision adopted a different approach than the Appellate Division's First Department's position, under which selective enforcement claimants could only civilly sue the officers who allegedly discriminated against them but could not seek any remedies within the criminal process.²⁵⁵ The Third Department explained that this different approach was necessary because suppression was the only remedy that could make defendants' rights “meaningful.”²⁵⁶ Notably, the court cited a portion of a 2004 decision from the Court of Appeals of New York, the state's highest court,²⁵⁷ in which it highlighted the deterrent rationale underlying the remedy of suppression, albeit in a case that did not discuss the issue of selective enforcement.²⁵⁸

Federal courts that view suppression as an appropriate remedy for selective enforcement also often cite its potential to deter

²⁴⁷ *See id.*

²⁴⁸ 799 A.2d 541 (N.J. 2002).

²⁴⁹ *See id.* at 548–49.

²⁵⁰ 886 N.E.2d 688, 698–700 (Mass. 2008).

²⁵¹ *Id.* at 699.

²⁵² 152 N.E.3d 725, 747–48 (Mass. 2020).

²⁵³ 177 N.Y.S.3d 174 (App. Div. 2022).

²⁵⁴ *See id.* at 178–79.

²⁵⁵ *See People v. Fredericks*, 829 N.Y.S.2d 78, 79 (App. Div. 2007).

²⁵⁶ *Jones*, 177 N.Y.S.3d at 179.

²⁵⁷ *Id.* (citing *People v. Jones*, 810 N.E.2d 415, 419–20 (N.Y. 2004)).

²⁵⁸ *See Jones*, 810 N.E.2d at 419–20.

discriminatory policing or preserve judicial integrity. For instance, in 2009, in *United States v. Benitez*,²⁵⁹ a district court in Iowa rejected the defendant's claim that the police stopped his car because of his race.²⁶⁰ The court, therefore, refrained from determining the proper remedy for a successful claim.²⁶¹ However, the court commented that due to the low chances of proving selective enforcement in court, police officers would be properly discouraged from acting in a discriminatory manner only if the sanction for such conduct was as drastic as suppressing evidence.²⁶² The court noted that "it is highly doubtful that civil remedies would adequately deter police agencies from engaging in this unconstitutional and blatantly reprehensible behavior."²⁶³ The court also suggested that suppression would be necessary to maintain judicial integrity, as admitting evidence obtained through discriminatory policing would "implicitly condone th[is] improper behavior by allowing the Government to utilize the evidence it garnered."²⁶⁴

In 2011, in *United States v. Bernard*,²⁶⁵ a district court in New Mexico became the first federal court to suppress incriminating evidence obtained through racially selective enforcement.²⁶⁶ The court found that the law enforcement officer in this case, employed by the New Mexico Motor Transportation Division, conducted an exceptionally thorough inspection of the defendants' vehicle at the state's port of entry due to their race.²⁶⁷ The court then ordered the exclusion of drugs and other incriminating evidence obtained through the search of the defendants' vehicle.²⁶⁸ The court emphasized that suppressing evidence was the sole remedy capable of effectively deterring police officers from engaging in selective enforcement, while civil remedies alone would be insufficient.²⁶⁹ The court also suggested that suppression would help preserve the integrity of the court and the criminal process, while avoiding it "would condone discriminatory enforcement of the law, eviscerate the substance of the Fourteenth Amendment, and render hollow the promise of equal protection."²⁷⁰ The court's

²⁵⁹ 613 F. Supp. 2d 1099 (S.D. Iowa 2009).

²⁶⁰ *See id.* at 1101–03.

²⁶¹ *See id.*

²⁶² *See id.* at 1101 n.3.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ No. 09-cr-2474, 2011 WL 13277499 (D.N.M. Dec. 9, 2011), *vacated*, No. 09-cr-2474 (D.N.M. Apr. 16, 2012), *as recognized in* *United States v. Alabi*, No. 11-cr-2292, 2013 WL 2284956 (D.N.M. May 15, 2013).

²⁶⁶ *See id.* at *6.

²⁶⁷ *See id.* at *3–5.

²⁶⁸ *See id.* at *5–6.

²⁶⁹ *See id.* (citing *United States v. Benitez*, 613 F. Supp. 2d 1099, 1102 n.3 (S.D. Iowa 2009)).

²⁷⁰ *Id.*

decision in *Bernard* was historic but also short-lived, as the court subsequently vacated it following a request made by the parties due to a procedural error in the decision.²⁷¹

Unlike federal district courts, federal courts of appeals have rarely supported the adoption of suppressing evidence as a remedy for selective enforcement. In 1993, in *United States v. Jennings*,²⁷² the Sixth Circuit noted in dicta that such a step would be suitable, explaining that suppression would help deter future selective enforcement and preserve the integrity of the court.²⁷³ However, as explained above, the Sixth Circuit reversed course in 2008, in *Nichols*, ruling that there was no remedy for selective enforcement within the criminal process.²⁷⁴ Nevertheless, in 2023, in *United States v. Lewis*,²⁷⁵ the Eleventh Circuit vaguely suggested that suppressing evidence was an available judicial response to selective enforcement.²⁷⁶ The court found that the defendant abandoned the (unsupported) selective enforcement claim that he raised in the district court.²⁷⁷ Yet the court obliquely suggested that selective enforcement claimants may move to suppress incriminating evidence against them and that the justification for this remedy was its deterrent potential.²⁷⁸

c. Dismissal of Charges as the Proper Remedy

Some state and federal courts specify dismissing charges—not suppressing evidence—as the appropriate remedy for selective enforcement. Oftentimes, they do so while refraining from providing detailed justifications for their remedial choice. For example, the Third Circuit, along with several lower courts, has suggested in passing that proving selective enforcement in court can lead to the dismissal of charges

²⁷¹ See *United States v. Alabi*, No. 11-cr-2292, 2013 WL 2284956, at *13–15, *52 (D.N.M. May 15, 2013) (discussing the vacatur of *Bernard* by the court), *aff'd*, 597 F. App'x 991 (10th Cir. 2015). The government's argument leading to the vacatur of *Bernard* was that “the Court had adopted findings from litigation to which the United States had not been a party, without giving the government an opportunity to controvert them.” *Id.* at *14.

²⁷² 985 F.2d 562, 1993 WL 5927 (6th Cir. 1993) (unpublished table decision).

²⁷³ See *id.* at *4 & n.2.

²⁷⁴ See *supra* notes 227–34 and accompanying text.

²⁷⁵ No. 22-14246, 2023 WL 6620313 (11th Cir. Oct. 11, 2023) (per curiam).

²⁷⁶ See *id.* at *2.

²⁷⁷ See *id.* at *2–3.

²⁷⁸ See *id.* (“The proper remedy for selective-enforcement is a claim under the Equal Protection Clause rather than the Fourth Amendment. The exclusionary rule is a judicial remedy created to deter constitutional violations, not a ‘personal constitutional right.’” (first citing *Whren v. United States*, 517 U.S. 806, 813 (1996); and then quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974))).

against the defendant.²⁷⁹ In 2024, in *United States v. Moore*,²⁸⁰ a federal district court in Virginia accepted the defendant's selective enforcement claim²⁸¹ and dismissed the charges against him without explaining why this remedy was the most suitable judicial response.²⁸² Similarly, in 2025, in *United States v. Morgan*,²⁸³ the Superior Court of the District of Columbia also accepted a selective enforcement claim and ordered the dismissal of the charges against the defendant without explaining its choice of remedy.²⁸⁴

A growing number of lower courts indicate that dismissal of charges is the proper, or likely proper, judicial response to selective enforcement, based on their interpretation of the Supreme Court's 1886 landmark decision in *Yick Wo v. Hopkins*.²⁸⁵ These include several federal district courts,²⁸⁶ the Supreme Court of Arizona,²⁸⁷ and the Court of Criminal Appeals of Texas.²⁸⁸ In *Yick Wo*, the Supreme Court ordered the "discharge [of] the petitioners from custody and imprisonment" upon finding that the petitioners—"aliens and subjects of the Emperor

²⁷⁹ See, e.g., *United States v. Washington*, 869 F.3d 193, 223 (3d Cir. 2017) ("If discovery is granted, and if it leads to a successful selective enforcement claim, then [the defendant's] constitutional rights can be vindicated at that time by striking the indictment in whole or in part."); *United States v. Randall*, No. 21-cr-28, 2022 WL 3334602, at *5 (W.D. Wis. May 23, 2022) (stating that "the selective enforcement doctrine . . . applies to dismissal motions, not suppression motions"), *report and recommendation adopted*, No. 21-cr-28, 2022 WL 2681295 (W.D. Wis. July 12, 2022); cf. *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1265 (10th Cir. 2006) (ruling that the defendant failed to prove selective enforcement and therefore should not be granted "dismissal on the basis of selective enforcement").

²⁸⁰ 716 F. Supp. 3d 415 (E.D. Va. 2024).

²⁸¹ See *supra* notes 150–55 and accompanying text (discussing the court's ruling).

²⁸² See *Moore*, 716 F. Supp. 3d at 432.

²⁸³ No. 2024-CMD-008567 (D.C. Super. Ct. Feb. 10, 2025). Thank you to Professor Andrew Crespo for bringing this opinion to the Author's attention.

²⁸⁴ See *id.* at 3–4, 31–32.

²⁸⁵ 118 U.S. 356 (1886).

²⁸⁶ See, e.g., *United States v. Mackey*, No. 16-cr-772, 2016 WL 9280003, at *3 (S.D. Tex. Oct. 24, 2016) ("Consistent with *Yick Wo*, the Court concludes that dismissal of an indictment is an available remedy for a criminal defendant's selective-enforcement claim."), *aff'd*, 734 F. App'x 227 (5th Cir. 2018); *United States v. Mumphrey*, 193 F. Supp. 3d 1040, 1055–59 (N.D. Cal. 2016) ("[A]lthough the discrimination at issue in *Yick Wo* was a form of selective enforcement rather than selective prosecution, the Supreme Court ordered that the petitioners be discharged as a remedy for the equal protection violation—a remedy that is akin to a dismissal.").

²⁸⁷ See *Jones v. Sterling*, 110 P.3d 1271, 1275–76, 1276 n.3 (Ariz. 2005) (stating that *Yick Wo* "squarely stands for the proposition that violation of the Equal Protection Clause by authorities enforcing a facially neutral law can result in dismissal of resulting criminal charges" but commenting that the court here "express[es] no opinion as to the proper remedy if the superior court determines that petitioners have been the victims of selective enforcement").

²⁸⁸ See *Ex parte Aparicio*, 707 S.W.3d 189, 199 (Tex. Crim. App. 2024) (stating that "the strong weight of authority suggests that a successful selective enforcement [claim] also requires dismissal" and citing *Yick Wo* as an example (quoting *T.J. ex rel. Johnson v. Rose*, 635 F. Supp. 3d 65, 70–71 (D.R.I. 2022))).

of China” who operated laundry businesses in wooden buildings—were victims of unconstitutional discrimination.²⁸⁹ As operators of such businesses, the petitioners were required by a local ordinance to seek the consent of the San Francisco County Board of Supervisors to continue operating them in wooden buildings—consent that they indeed sought.²⁹⁰ However, like “two hundred others who . . . also petitioned, all of whom happen[ed] to be Chinese subjects,” the petitioners did not receive the consent of the Board of Supervisors, while “eighty others, not Chinese subjects, [were] permitted to carry on the same business under similar conditions.”²⁹¹ The petitioners continued to operate their businesses nonetheless—an act that led to their conviction and imprisonment.²⁹² Based on the statistics concerning the Board of Supervisors’ authorization of laundry businesses in wooden buildings, the Court easily concluded that the petitioners were unconstitutionally discriminated against on the basis of their race and nationality and ordered their discharge.²⁹³

Generations of judges and scholars have regarded *Yick Wo* as a case involving a very rare successful selective prosecution claim.²⁹⁴ As legal scholar Gabriel Chin once observed, it is “simultaneously celebrated as a classic equal protection case, establishing the rule against discriminatory prosecution, and lamented as the first and last case in which the Supreme Court invalidated a prosecution as racially motivated.”²⁹⁵ Others, as mentioned above, have regarded *Yick Wo* not as a case involving selective prosecution, but as a case involving selective enforcement,²⁹⁶ in which “the Supreme Court ordered that the petitioners be discharged as a remedy for the equal protection violation—a remedy that is akin to a dismissal.”²⁹⁷ Nevertheless, as some judges and scholars, including Chin, have persuasively argued, *Yick Wo* had nothing to do with discriminatory prosecution or policing and everything to do with the San Francisco County Board of Supervisors’ discriminatory treatment of Chinese people who sought their consent to operate laundry businesses in wooden buildings.²⁹⁸ Indeed, “[f]or all that appears, the

²⁸⁹ *Yick Wo*, 118 U.S. at 368–74.

²⁹⁰ *See id.* at 368, 374.

²⁹¹ *Id.* at 374.

²⁹² *See id.* at 369, 374.

²⁹³ *See id.* at 373–74.

²⁹⁴ *See, e.g.*, Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV. 1359, 1359.

²⁹⁵ *Id.*

²⁹⁶ *See supra* notes 285–88 and accompanying text.

²⁹⁷ *United States v. Mumphrey*, 193 F. Supp. 3d 1040, 1056 (N.D. Cal. 2016).

²⁹⁸ *See, e.g.*, *United States v. Falk*, 479 F.2d 616, 618 (7th Cir. 1973); *Ex parte Aparicio*, 707 S.W.3d 189, 212 (Tex. Crim. App. 2024) (Keller, P.J., dissenting); Chin, *supra* note 294, at 1365; KENNEDY, *supra* note 79, at 354–55.

police and prosecutors impartially charged all who violated a law that was discriminatorily administered by someone else.”²⁹⁹

A small number of courts that have relied on *Yick Wo* to support dismissal of charges as a remedy for selective enforcement have offered detailed normative justifications for their remedial choice.³⁰⁰ Most significantly, in 2016, in *United States v. Mumphrey*,³⁰¹ a federal district court in California explained that dismissal could help deter police officers from engaging in discriminatory behavior and suggested it would be valuable in preserving “the integrity of the criminal justice system” and “public confidence therein.”³⁰² Beyond these rationales—that are also commonly invoked by courts that embrace suppression of evidence as the remedy for selective enforcement—the court also offered another justification: corrective justice for victims of unconstitutional discrimination.³⁰³ Dismissing charges, according to the court, would “redress” the harms resulting from the equal protection violation against the victim by “put[ting] the victim where he or she could have been but for racially selective conduct of law enforcement.”³⁰⁴

II. DETERRENCE AND JUDICIAL INTEGRITY AS INADEQUATE JUSTIFICATIONS

Courts have provided various rationales for adopting suppression of evidence or dismissal of charges as the judicial remedy for selective enforcement. Among them, however, two justifications appear to be prominent: deterring discriminatory policing and preserving judicial integrity. According to courts, suppression and dismissal discourage police officers from engaging in selective enforcement and send the message that judges and the criminal justice system as a whole do not overlook officers’ discriminatory behavior.³⁰⁵ Scholars who advocate for suppression or dismissal as a remedy for selective enforcement also invoke these two justifications.³⁰⁶

That judges and scholars focus on these two specific rationales is unsurprising given their significance to the Fourth Amendment exclusionary rule. The Supreme Court has long regarded deterrence of police wrongdoing as the primary justification for the existence of the Fourth

²⁹⁹ Chin, *supra* note 294, at 1365.

³⁰⁰ See, e.g., T.J. *ex rel.* Johnson v. Rose, 635 F. Supp. 3d 65, 70–71 (D.R.I. 2022) (suggesting that preserving “the integrity of the criminal justice system” supports the adoption of dismissal of charges as a remedy for selective enforcement (quoting *Mumphrey*, 193 F. Supp. 3d at 1055)).

³⁰¹ 193 F. Supp. 3d 1040 (N.D. Cal. 2016).

³⁰² *Id.* at 1055–59.

³⁰³ See *id.* at 1058–59.

³⁰⁴ *Id.*

³⁰⁵ See *supra* notes 243–304 and accompanying text.

³⁰⁶ See *infra* notes 313, 411 and accompanying text.

Amendment exclusionary rule.³⁰⁷ Since 2011, the Court has viewed deterrence as the rule's "sole purpose."³⁰⁸ Historically, the need to preserve the integrity of the judiciary had also served as an important basis for the Fourth Amendment exclusionary rule.³⁰⁹ For many years, the Supreme Court had explained that suppressing evidence seized unlawfully by the police was necessary to prevent judges from being "accomplices in the willful disobedience of a Constitution they are sworn to uphold."³¹⁰ Nowadays, the Court considers the Fourth Amendment exclusionary rule to be serving no goal beyond deterrence.³¹¹

Intuitively, relying on these rationales seems logical. If they were sufficient to justify suppressing evidence in response to unlawful searches and seizures, they should also justify suppression or dismissal in response to the more morally reprehensible act of discriminatory policing.³¹² This Part argues, however, that upon close examination, these justifications turn out to be unpersuasive. Section A introduces serious doubts regarding the potential of these remedies to serve as effective deterrents to discriminatory enforcement. Section B questions the claim that suppressing evidence or dismissing charges will necessarily help maintain the integrity of courts.

³⁰⁷ See, e.g., *Elkins v. United States*, 364 U.S. 206, 217 (1960) (stating that the exclusionary rule's "purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it"); *United States v. Calandra*, 414 U.S. 338, 347 (1974) ("[T]he rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . ."); *Arizona v. Evans*, 514 U.S. 1, 10–11 (1995) ("The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect."); *Herring v. United States*, 555 U.S. 135, 141 (2009) ("[W]e have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.").

³⁰⁸ *Davis v. United States*, 564 U.S. 229, 236–37 (2011); see also *Lange v. California*, 594 U.S. 295, 317 (2021) (Thomas, J., concurring in part and concurring in the judgment) ("'[W]e have said time and again that the sole factor courts can consider is 'deter[ring] misconduct by law enforcement.'" (second alteration in original) (quoting *Davis*, 564 U.S. at 246)).

³⁰⁹ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (discussing "the imperative of judicial integrity" as an important basis for the exclusionary rule (quoting *Elkins*, 364 U.S. at 222)); *Terry v. Ohio*, 392 U.S. 1, 13 (1968) ("Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.").

³¹⁰ *Elkins*, 364 U.S. at 223.

³¹¹ See *supra* note 308 and accompanying text.

³¹² See, e.g., *State v. Segars*, 799 A.2d 541, 549 (N.J. 2002) (stating that "[t]he rationales that support the suppression of evidence [as a remedy for unreasonable searches and seizures], namely, deterrence of impermissible investigatory behavior and maintenance of the integrity of the judicial system, apply equally, if not more so, to cases of racial targeting"); *Holland*, *supra* note 182, at 1119–26 (making a similar argument).

A. *Deterring Discriminatory Policing*

The most common justification for adopting suppression of evidence or dismissal of charges as a remedy for selective enforcement is to deter discriminatory policing.³¹³ Judges and scholars observe that, currently, the remedies that exist in the civil process—namely, monetary damages and injunctive relief—do not effectively discourage police officers from engaging in selective enforcement.³¹⁴ However, if suppression or dismissal is available as a remedy and officers know that selective enforcement on their part could lead to impunity for suspects, officers will be motivated to avoid discriminatory practices.³¹⁵

³¹³ See *supra* notes 243–304 and accompanying text (discussing judges’ reliance on the deterrence rationale to justify suppressing evidence or dismissing charges due to selective enforcement); Jerome H. Skolnick & Abigail Caplovitz, *Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 43 ARIZ. L. REV. 413, 435–36 (2001) (arguing that “[j]udicial oversight, through voiding cases, excluding evidence, and ordering discovery, can provide a significant positive incentive to change [discriminatory] police behavior” (footnotes omitted)); Karlan, *supra* note 6, at 2013 (arguing that suppression of evidence will help deter selective enforcement); Holland, *supra* note 182, at 1123–24 (contending that “[t]he deterrence rationale . . . amply supports application of the exclusionary rule to equal protection violations to safeguard equal protection rights”); Brooks Holland, *Racial Profiling and a Punitive Exclusionary Rule*, 20 TEMP. POL. & C.R. L. REV. 29, 59 (2010) (claiming that “an equal protection violation presents a paradigmatic case for exclusionary rule deterrence efficacy”); Rudovsky, *supra* note 182, at 321 n.146 (arguing that the deterrence rationale justifies the adoption of suppression as a remedy for selective enforcement); Abby M. Fink, *The Long Road to Justice: Why State Courts Should Lower the Evidentiary Burden for Proving Racialized Traffic Stops and Adopt the Exclusionary Rule as a Remedy for Equal Protection Violations*, 13 WASH. J. SOC. & ENV’T JUST. 1, 13 (2023) (arguing that “applying the [suppression] remedy to equal protection violations at the state level is a valid avenue to combat racist policing”); Christopher Hall, Note, *Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence: Whren v. United States, United States v. Armstrong, and the Evolution of Police Discretion*, 76 TEX. L. REV. 1083, 1116 (1998) (claiming that deterrence can be “best furthered by applying the exclusionary rule to evidence obtained from a race-motivated traffic stop”); Lisa Walter, Comment, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 258 (2000) (claiming that a suppression remedy will help “prohibit and deter impermissible law enforcement practices”); Lawrence W. Williamson, Jr., Note, *Profiling, Pretext, and Equal Protection: Protecting Citizens from Pretextual Stops Through the Fourteenth Amendment*, 42 WASHBURN L.J. 657, 662 (2003) (considering suppression of evidence “the only remedy that serves to deter racially motivated police behavior”). The Author once commented that the suppression and dismissal remedies may create an “incentive for . . . police officers to comply with the [Fourteenth Amendment].” Rubinstein, *supra* note 4, at 876. Nevertheless, the Author also noted that these “remedies would not help deter a police officer from discriminatorily enforcing the law if by this behavior they are not hoping to secure convictions” and listed additional factors that would likely “further dilute the deterrent value of dismissal [and] suppression.” *Id.* at 866–67.

³¹⁴ See, e.g., *United States v. Bernard*, No. 09-cr-2474, 2011 WL 13277499, at *5 (D.N.M. Dec. 9, 2011), *vacated*, No. 09-cr-2474 (D.N.M. Apr. 16, 2012), as recognized in *United States v. Alabi*, No. 11-cr-2292, 2013 WL 2284956 (D.N.M. May 15, 2013); Rushin & Edwards, *supra* note 1, at 700–02; Holland, *supra* note 313, at 63.

³¹⁵ See, e.g., Karlan, *supra* note 6, at 2013 (arguing that the suppression remedy “alters the incentives of the police to engage in [selective enforcement] in the first place”); Holland, *supra* note

Basing suppression and dismissal on the theory of deterrence is intuitively appealing. As mentioned earlier, the deterrence rationale can be traced back to the Supreme Court's case law on the Fourth Amendment exclusionary rule.³¹⁶ According to the Court, the only justification for suppressing evidence obtained in unlawful searches or seizures is to deter officers from committing similar violations.³¹⁷ As the Court explained in 2006, in *Sanchez-Llamas v. Oregon*,³¹⁸ "[w]e exclude the fruits of unreasonable searches on the theory that without a strong deterrent, the constraints of the Fourth Amendment might be too easily disregarded by law enforcement."³¹⁹ Indeed, many of the judges and scholars who invoke deterrence in support of adopting suppression or dismissal as a remedy for selective enforcement cite the Court's reliance on this rationale in the context of the Fourth Amendment.³²⁰

This Section argues that resting the suppression and dismissal remedies on the theory of deterrence may prove both erroneous and counterproductive. First, concerning selective enforcement, the deterrent benefits of suppression and dismissal can often be expected to be particularly insignificant.³²¹ Second, courts that view deterrence as the primary rationale for suppression and dismissal may conclude that these remedies are unnecessary given the availability of other "less harmful" remedies outside the criminal process, such as monetary damages.³²² Third, centering suppression and dismissal around deterrence could inadvertently convey that discriminatory policing can be sufficiently deterred through these remedies, thereby possibly discouraging the exploration of more effective tools and strategies.³²³

313, at 62–63 (claiming that suppression will be an effective deterrent because it "[d]eni[es] . . . the law enforcement objective itself"); Walter, *supra* note 313, at 291–92 ("In theory, the knowledge the police will not be able to . . . convict the defendant[] will deter police from racial targeting in general.").

³¹⁶ See *supra* note 307 and accompanying text.

³¹⁷ See *supra* note 308 and accompanying text.

³¹⁸ 548 U.S. 331 (2006).

³¹⁹ *Id.* at 349.

³²⁰ See, e.g., *Commonwealth v. Lora*, 886 N.E.2d 688, 698–99 (Mass. 2008) (discussing the deterrent benefits of the suppression remedy while citing the Supreme Court's case law on the Fourth Amendment exclusionary rule (first citing *United States v. Calandra*, 414 U.S. 338, 347–48 (1974); and then citing *Stone v. Powell*, 428 U.S. 465, 486 (1976))); *United States v. Jennings*, 985 F.2d 562, 1993 WL 5927, at *4 n.2 (6th Cir. 1993) (unpublished table decision) (same); Rudovsky, *supra* note 182, at 321 n.146 (arguing that selective enforcement is "at least as serious as the violation of Fourth Amendment rights and the need for deterrence would appear to be as strong").

³²¹ See *infra* Section II.A.1.

³²² See *infra* Section II.A.2.

³²³ See *infra* Section II.A.3.

1. Negligible Deterrent Benefits

The fundamental premise of the deterrence justification is that police officers are less likely to engage in selective enforcement if they know it could jeopardize the ultimate conviction of the suspects they stop, search, or arrest.³²⁴ In some cases, this assumption is valid.³²⁵ For officers who prioritize convictions, the threat of suppressing evidence or dismissing charges creates an incentive to avoid enforcing the law in a discriminatory manner.³²⁶

More often, however, suppression and dismissal will be particularly ineffective in deterring discriminatory behavior, as officers who engage in racially selective enforcement typically do so with motives aside from securing convictions.³²⁷ Selective enforcement claims usually arise in the context of discretionary police stops, such as investigative traffic stops by officers patrolling the road or pedestrian stop-and-frisks by officers patrolling the street.³²⁸ Police officers who engage in such activities do not merely wait for a dispatcher to report to them about crimes that have already occurred or about a particular suspect that needs to be apprehended. Instead, they go out into the field to scan highways, train stations, or neighborhoods for individuals who are breaking the law or are (speculatively) about to do so.³²⁹ By their nature, discretionary stops are especially susceptible to discrimination. Because police officers retain broad discretion in determining whom to stop and whom not to stop—discretion that is barely limited or guided by the law—there is a constant concern that arbitrary or impermissible considerations, including race, could influence their decisions.³³⁰ Empirical studies repeatedly validate that this concern is grounded in facts.³³¹ Indeed, as

³²⁴ See *supra* notes 313–15 and accompanying text.

³²⁵ See generally Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 878–79 (2014) (arguing that unlike most patrol officers, who care little about the ultimate result of the cases against the suspects they arrest, “investigators and detectives, particularly those in high-profile units like homicide or sex crimes,” do care about case outcomes).

³²⁶ See Rubinstein, *supra* note 4, at 866 (“[T]he risk that discriminatory conduct would result in dismissal or suppression may at least be considered by . . . police officers for whom convictions are important as one reason not to engage in . . . selective enforcement.”).

³²⁷ See *infra* notes 335–50 and accompanying text.

³²⁸ For example, in all but one of the cases discussed above in which courts supported the adoption of suppressing evidence in response to selective enforcement, the defendants’ selective enforcement claim arose from discretionary police stops. See *supra* notes 243–73 and accompanying text.

³²⁹ See, e.g., Rachel A. Harmon & Andrew Manns, *Proactive Policing and the Legacy of Terry*, 15 OHIO ST. J. CRIM. L. 49, 55–57 (2017); Jeffrey Fagan, *No Runs, Few Hits, and Many Errors: Street Stops, Bias, and Proactive Policing*, 68 UCLA L. REV. 1584, 1587–88 (2022).

³³⁰ See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 26–27 (1998); Davis, *supra* note 5, at 427–28; Harris, *supra* note 87, at 560.

³³¹ See, e.g., Farhang Heydari, *The Invisible Driver of Policing*, 76 STAN. L. REV. 1, 14–15 (2024) (“Study after study confirms that Black, Hispanic, Native American, and other people belonging to already-over-policed communities are disproportionately stopped by police.”).

Justice Sotomayor noted in 2016 in her dissent in *Utah v. Strieff*,³³² “it is no secret that people of color are disproportionate victims of this type of scrutiny.”³³³

The fact that most selective enforcement claims arise from discretionary stops presents a significant challenge to the deterrence justification. As mentioned, suppression and dismissal can serve as potent deterrents to selective enforcement if officers prioritize convictions and are afraid to jeopardize them.³³⁴ For patrol officers who conduct discretionary stops, however, securing convictions will very often be secondary, if not completely insignificant, in relation to other goals.³³⁵

As a general matter, police departments demonstrate little interest in the ultimate outcomes of cases resulting from their officers’ enforcement work.³³⁶ As legal scholar Jonathan Abel noted, “departments track the number of stops, tickets, arrests, and closed cases their officers produce, but they do not track information about the court outcomes of these cases.”³³⁷ The numbers that departments track—and particularly the number of arrests—reflect the fact that “departments almost invariably measure their own efficiency in terms of ‘clearances by arrest,’ not by conviction.”³³⁸ Because of these institutional priorities, police superiors also assess the professional performance of the officers working under them based on their success in arresting suspects rather than their ability to secure convictions.³³⁹ In the case of discretionary stops specifically, there is reason to believe that police departments care even less about the convictions that their officers manage, or fail, to secure. Patrol officers often carry out discretionary stops under proactive policing

³³² 579 U.S. 232 (2016).

³³³ *Id.* at 254 (Sotomayor, J., dissenting).

³³⁴ See *supra* notes 324–26 and accompanying text.

³³⁵ See generally Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 600–07 (2011) (describing the various goals police officers often prioritize over securing convictions); Jonathan Abel, *Cops and Pleas: Police Officers’ Influence on Plea Bargaining*, 126 YALE L.J. 1730, 1779 (2017) (arguing that police officers “lack [any] interest in case outcomes” and, therefore, “act on the street without considering what those actions will do to their cases in court”); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 377 (claiming that “the objective of police who conduct searches is, first and foremost, evidence to support an arrest, not a conviction”); Guy Rubinstein, *The Prosecutor-Oriented Exclusionary Rule*, 65 B.C. L. REV. 1755, 1767–68 (2024) (describing the trifling importance of convictions in the eyes of many police officers).

³³⁶ See, e.g., Abel, *supra* note 335, at 1781; Jacobi, *supra* note 335, at 602–03.

³³⁷ Abel, *supra* note 335, at 1781.

³³⁸ Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 793 (1970).

³³⁹ See Stoughton, *supra* note 325, at 877 (“Officer evaluation forms used by both large and small police departments do not mention, let alone put weight on, convictions, though most include some evaluation of arrests.”).

programs.³⁴⁰ These programs are geared toward promoting public safety by “preventing would be criminals from seeking to violate the law in the first place,”³⁴¹ especially by reducing illegal firearm possession.³⁴² The most infamous program was the New York Police Department’s stop-and-frisk program, which included “a concerted effort to rid the streets of handguns, employing specialized units tasked with seizing firearms, mass stop-and-frisk, pretextual arrests, and other measures.”³⁴³ For officers in such programs, arrests and impounding contraband often become official top priorities.³⁴⁴

Given their incentives, police officers are *systematically* motivated to stop individuals whom they think carry contraband and could therefore be arrested, even if their arrest will not ultimately translate into a conviction.³⁴⁵ Officers who base their enforcement decisions on race—and especially those who associate race with crime³⁴⁶—are therefore unlikely to be deterred by the consequences that their choice can have for future prosecutions against suspects.³⁴⁷ In other words, if officers believe that targeting individuals based on race helps them arrest suspects or seize contraband—or more broadly, enhance public safety—the threat of suppressing evidence or dismissing charges is unlikely to deter

³⁴⁰ See, e.g., Harmon & Manns, *supra* note 329, at 49.

³⁴¹ *Id.*

³⁴² See, e.g., Bernard E. Harcourt, *Introduction: Guns, Crime and Punishment in America*, 43 ARIZ. L. REV. 261, 262 (2001) (“Urban police departments are pursuing gun-oriented policing strategies focused on increased stop-and-frisk encounters and misdemeanor arrests as a way to get guns off the streets.”).

³⁴³ Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 8 (2015); see also Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 159–60, 165–69 (2015) (describing the preventive goals of such programs).

³⁴⁴ See, e.g., Stoughton, *supra* note 325, at 878 (“[T]he success of a particular police program is not measured by reference to the number of convictions generated. Instead, law enforcement operations are evaluated by referring to the number of arrests that they generate, the reduction in crime generally or in particular types of crime, or less quantifiable quality-of-life factors.”).

³⁴⁵ See, e.g., Rubinstein, *supra* note 335, at 1767–68 (discussing the goals police officers usually prioritize); Jacobi, *supra* note 335, at 600–05 (same); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 721–22 (1970) (same); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1625 (2012) (discussing the focus of police officers on crime rates and arrests).

³⁴⁶ See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 236 (1983) (describing the tendency of “many police officers” to associate people of color with “a general propensity to commit crime”).

³⁴⁷ See, e.g., Jacobi, *supra* note 335, at 602–03 (arguing that “police [have] an incentive to arrest suspects using a potentially illegal search, if following the [law] would prevent them from making an arrest”); Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209, 223 (2010) (“Exclusion reduces but does not eliminate the value of borderline actions, as police administrators probably derive considerable utility from seizing drugs and weapons even if these may not be used in court.”).

them from selective enforcement. And even worse, these remedies may be completely ineffective in discouraging officers from discriminatory enforcement done purely for the sake of harassment and not for legitimate policing purposes.³⁴⁸ Indeed, as the Supreme Court suggested as early as 1968 in *Terry v. Ohio*,³⁴⁹ the risk that defendants will ultimately go free is “powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.”³⁵⁰

Suppressing evidence and dismissing charges will likely not effectively deter even officers who *do* care about case outcomes from engaging in selective enforcement, because the probability of a court accepting a selective enforcement claim and subsequently suppressing evidence or dismissing charges is low.³⁵¹ Most defendants plead guilty to the charges against them,³⁵² and many of them never get the opportunity to raise a selective enforcement claim in court.³⁵³ Even when defendants do raise such a claim, they virtually never succeed³⁵⁴ due to both the demanding evidentiary standard and the high discovery threshold.³⁵⁵ Lower courts that have adopted a more lenient evidentiary standard or more liberal discovery rules have undoubtedly helped defendants prevail.³⁵⁶ Yet the number of successful selective enforcement claims is still very small, and without more substantial doctrinal changes, it is likely to remain so. Additionally, some judges who are reluctant to release factually guilty defendants may manipulatively attempt to evade doing so, such as by finding that selective enforcement has not been proven, even when they believe it has.³⁵⁷ Officers who know that successful selective

³⁴⁸ See Jacobi, *supra* note 335, at 605 (“If . . . police—or at least some police—enjoy harassing innocent citizens, then they will continue to do so regardless of whether evidence found on guilty citizens through similar methods would be suppressed.”).

³⁴⁹ 392 U.S. 1 (1968).

³⁵⁰ *Id.* at 14.

³⁵¹ See, e.g., Rubinstein, *supra* note 4, at 867.

³⁵² See generally William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1437 (2020) (“[A]round 95% of criminal convictions are based on guilty pleas, most of which are the result of plea bargains.”).

³⁵³ See, e.g., Rubinstein, *supra* note 4, at 867.

³⁵⁴ See *supra* note 4 and accompanying text.

³⁵⁵ See *supra* Section I.A.1.

³⁵⁶ See *supra* Section I.A.2.

³⁵⁷ Scholars have discussed this phenomenon primarily in the context of the Fourth Amendment exclusionary rule. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994) (“Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated.”); Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1794 (2007) (“Judges often pretend to believe police officer testimony about how evidence was obtained if the cost of not believing the police is exclusion of important evidence.”); Donald A. Dripps, *The “New” Exclusionary Rule Debate: From “Still Pre-occupied with 1985” to “Virtual Deterrence,”* 37 FORDHAM URB. L.J. 743, 784 (2010) (“No one can

enforcement claims are a rare event may not worry much that discriminatory behavior on their part will lead to suppression or dismissal.³⁵⁸

A recent empirical study supports the argument that adopting suppression or dismissal as a remedy for selective enforcement will likely have negligible deterrent benefits.³⁵⁹ As explained earlier, in *Whren*, the Supreme Court held that the Fourth Amendment authorizes a traffic stop whenever officers “have probable cause to believe that a traffic violation has occurred,”³⁶⁰ even if the stop is pretextual—namely, conducted to investigate another suspected offense—or motivated by intentional racial bias.³⁶¹ In 1999, however, the Supreme Court of Washington held that pretextual traffic stops in the state were unconstitutional under the Washington State Constitution.³⁶² Consequently, police officers who conducted pretextual stops in Washington knew, or at least should have known, that any incriminating evidence they seized during such stops could later be suppressed in court.³⁶³ In 2012, however, the Washington Supreme Court completely revised its approach, holding that traffic stops were constitutional whenever officers “actually and consciously” conducted them—even in part—to enforce traffic laws.³⁶⁴ This holding essentially “instated a standard functionally equivalent to *Whren*,” permitting the same pretextual stops that the U.S. Supreme Court authorized in 1996 and that the Washington Supreme Court itself forbade in 1999.³⁶⁵ Since 2012, therefore, officers in Washington have had much less reason to worry about the admissibility of evidence they seize during pretextual traffic stops.³⁶⁶

quantify it, but there is widespread belief that police not infrequently testify untruthfully at suppression hearings and that judges not infrequently credit (I do not say ‘believe’) their testimony.”).

³⁵⁸ See, e.g., Rubinstein, *supra* note 4, at 867. As opposed to many law enforcement officers, “prosecutors do fear for the fate of their criminal cases and are therefore motivated to prevent police wrongdoing that could jeopardize the admissibility of incriminating evidence.” Rubinstein, *supra* note 335, at 1759. However, because of the very low probability of successful selective enforcement claims, it is possible that prosecutors are not highly motivated to discourage police officers from discriminatory enforcement.

³⁵⁹ See Rohit Asirvatham & Michael D. Frakes, *Are Constitutional Rights Enough? An Empirical Assessment of Racial Bias in Police Stops*, 116 NW. U. L. REV. 1481 (2022); see also *infra* notes 367–76 and accompanying text (explaining how this study supports the argument that suppression and dismissal are unlikely to serve as effective deterrents to selective enforcement).

³⁶⁰ *Whren v. United States*, 517 U.S. 806, 810 (1996).

³⁶¹ See *id.* at 813.

³⁶² See *State v. Ladson*, 979 P.2d 833, 842–43 (Wash. 1999) (en banc).

³⁶³ See *id.*

³⁶⁴ *State v. Arreola*, 290 P.3d 983, 991 (Wash. 2012).

³⁶⁵ Asirvatham & Frakes, *supra* note 359, at 1502.

³⁶⁶ Technically speaking, the Washington Supreme Court no longer regards traffic stops conducted even in part to enforce traffic laws as “pretextual.” See *Arreola*, 290 P.3d at 991. For purposes of consistency, this Article refers to traffic stops as “pretextual” if they are conducted to investigate a nontraffic offense, regardless of whether such investigation is the sole motivation behind them.

Legal scholars Rohit Asirvatham and Michael Frakes analyzed more than seven million stops that took place in Washington between 2010 and 2015.³⁶⁷ The goal of their analysis was to study the effects that the 2012 renewed permission to conduct pretextual stops had on “racial disparities in traffic stops” within the state.³⁶⁸ The analysis, however, found “no robust evidence that the legal change in Washington had an effect on racial disparities in traffic stops.”³⁶⁹ In other words, there was no evidence that withdrawing the threat to suppress evidence seized during pretextual traffic stops “contributed to an increase in the rate of stops of non-white drivers (or Black drivers specifically).”³⁷⁰ As Asirvatham and Frakes explained, these findings suggest that suppressing evidence had served as a weak deterrent to pretextual traffic stops, either because officers did not conduct such stops to obtain incriminating evidence or because they did not think defendants would successfully prove they were stopped pretextually.³⁷¹ Therefore, it made little difference for officers whether evidence obtained in pretextual traffic stops could be suppressed as a matter of law.³⁷²

Asirvatham and Frakes’s study did not explicitly address the doctrine of selective enforcement. However, its findings support the argument made in this Section, according to which suppressing evidence and dismissing charges will not effectively discourage police officers from engaging in selective enforcement. The Washington Supreme Court’s 1999 prohibition against pretextual traffic stops implicitly included a prohibition against racially motivated traffic stops, at least when the latter were conducted to investigate drivers for non-traffic offenses.³⁷³ Because the judicial remedy for pretextual traffic stops was suppression of evidence, the same remedy also applied to racially discriminatory traffic stops.³⁷⁴ In practice, therefore, Washington had embraced suppression of evidence as the judicial response to proven discriminatory traffic stops between 1999 and 2012—until the Washington Supreme Court reversed course.³⁷⁵ As mentioned, however, there is no evidence that revoking this remedy encouraged officers to stop

³⁶⁷ Asirvatham & Frakes, *supra* note 359, at 1487–88, 1505.

³⁶⁸ *Id.* at 1487–88.

³⁶⁹ *Id.* at 1488.

³⁷⁰ *Id.* at 1507. In an earlier study, published in 2021, legal scholar Stephen Rushin and economist Griffin Edwards found that the Washington Supreme Court’s 2012 renewed authorization to conduct pretextual traffic stops did “contribute[] to racial profiling” in the state. Rushin & Edwards, *supra* note 1, at 644. In their 2022 article, Asirvatham and Frakes addressed and explained the different results and conclusions of Rushin and Edwards. See Asirvatham & Frakes, *supra* note 359, at 1488–90.

³⁷¹ See Asirvatham & Frakes, *supra* note 359, at 1542.

³⁷² See *id.*

³⁷³ See *supra* notes 362–63.

³⁷⁴ See *supra* notes 362–63.

³⁷⁵ See *supra* notes 362–66.

nonwhite drivers at higher rates.³⁷⁶ Therefore, Asirvatham and Frakes's findings suggest not only that suppression was ineffective as a deterrent to pretextual traffic stops, but also specifically as a deterrent to discriminatory stops.

2. *Less Harmful Alternatives*

Although the deterrent benefits of suppressing evidence and dismissing charges are likely insignificant, they may still cause *some* police officers to think twice before stopping, searching, or arresting an individual based on race.³⁷⁷ Should these limited deterrent benefits justify adopting suppression and dismissal as remedies for selective enforcement, despite their high social costs (particularly the possible impunity for factually guilty defendants)?³⁷⁸ The answer that the Supreme Court has provided to a similar question concerning the Fourth Amendment exclusionary rule seems to be “no.” According to the Court, when suppressing evidence is not expected to effectively deter police wrongdoing, it should generally not be available as a remedy.³⁷⁹ Instead, victims of police misconduct should seek alternative remedies that are less harmful to society.³⁸⁰

The Court has long held that evidence seized in unreasonable searches or seizures may be suppressed only when the resulting deterrent benefits “outweigh [the] heavy costs” of suppression.³⁸¹ And indeed, the Court has consistently curtailed the application of the Fourth Amendment exclusionary rule whenever it found its deterrent benefits to be insignificant in relation to its costs.³⁸² One such example is the “knock-and-announce” exception that the Court created in 2006 in *Hudson v. Michigan*.³⁸³ The Fourth Amendment requires that prior to entering and searching a home, “law enforcement officers must announce their presence and provide residents an opportunity to open the door.”³⁸⁴ An exception is made if officers have reasonable suspicion that their announcement “would be dangerous or futile” or “would inhibit the effective investigation of the crime.”³⁸⁵ In *Hudson*, however, the Court held that despite infringing upon the Fourth Amendment,

³⁷⁶ See *supra* notes 369–70 and accompanying text.

³⁷⁷ See *supra* notes 325–26 and accompanying text.

³⁷⁸ See *supra* note 192 and accompanying text.

³⁷⁹ See *infra* notes 381–91 and accompanying text.

³⁸⁰ See *infra* note 391 and accompanying text.

³⁸¹ *Davis v. United States*, 564 U.S. 229, 237 (2011) (first citing *Herring v. United States*, 555 U.S. 135, 141 (2009); and then citing *United States v. Leon*, 468 U.S. 897, 910 (1984)).

³⁸² See, e.g., *Steiker*, *supra* note 191, at 2505–21; *CHEMERINSKY*, *supra* note 184, at 184–90, 243–48.

³⁸³ 547 U.S. 586 (2006).

³⁸⁴ *Id.* at 589.

³⁸⁵ *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

knock-and-announce violations should not lead to the suppression of evidence that the police obtained during a subsequent search.³⁸⁶ The Court reasoned that suppressing evidence in response to such violations would entail “substantial social costs” without effectively discouraging officers from engaging in wrongdoing.³⁸⁷ The Court assumed that officers would only avoid announcing their presence in order to prevent occupants of the house from tampering with evidence or harming officers.³⁸⁸ These two risks, however, “suspend the knock-and-announce requirement anyway,” and officers that avoid announcing their presence in these circumstances are not in violation of the Fourth Amendment.³⁸⁹ The Court concluded, therefore, that officers lack strong motivation to violate the knock-and-announce rule to begin with and that suppressing evidence in response to violations that do occur would yield no appreciable deterrent benefits.³⁹⁰ Rather than seeking suppression, the Court invited victims of knock-and-announce violations to sue offending officers for monetary damages—a remedy that will purportedly deter police wrongdoing more effectively and will not lead to the release of factually guilty defendants.³⁹¹

Inspired by the Court’s guidance on the Fourth Amendment exclusionary rule, some lower courts have rejected suppressing evidence as a proper remedy for selective enforcement, finding that “exclusion of probative, reliable evidence of a defendant’s guilt is too high a price to pay for the unknown degree of deterrence that exclusion [would] achieve[.]”³⁹² Instead, like the Supreme Court in *Hudson*, these courts have held that victims of selective enforcement should file civil suits for monetary damages against the officers who allegedly discriminated against them.³⁹³

To be sure, monetary damages may be an even less effective deterrent to selective enforcement than suppressing evidence or dismissing charges.³⁹⁴ Although officers are unlikely to enjoy qualified immunity when sued for intentionally discriminatory law enforcement,³⁹⁵ the low chance of proving selective enforcement may dissuade lawyers from

³⁸⁶ See *Hudson*, 547 U.S. at 599.

³⁸⁷ *Id.* at 594–96 (quoting *Penn. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998)).

³⁸⁸ See *id.* at 596.

³⁸⁹ *Id.* (emphasis omitted).

³⁹⁰ See *id.* at 594–96.

³⁹¹ See *id.* at 596–98.

³⁹² *United States v. Alabi*, No. 11-cr-2292, 2013 WL 2284956, at *55 (D.N.M. May 15, 2013) (quoting *United States v. Harmon*, 785 F. Supp. 2d 1146, 1170 n.4 (D.N.M. 2011)), *aff’d*, 597 F.App’x 991 (10th Cir. 2015).

³⁹³ See, e.g., *Harmon*, 785 F. Supp. 2d at 1170; *Alabi*, 2013 WL 2284956, at *54–55; *United States v. Nichols*, 512 F.3d 789, 794–95 (6th Cir. 2008), *abrogated on other grounds by Arizona v. Gant*, 556 U.S. 332 (2009), *as recognized in United States v. Buford*, 632 F.3d 264 (6th Cir. 2011).

³⁹⁴ See Rubinstein, *supra* note 4, at 843–44.

³⁹⁵ See, e.g., *Conley v. United States*, 5 F.4th 781, 794 (7th Cir. 2021).

taking such cases.³⁹⁶ Additionally, in rare instances in which plaintiffs sue and win, the damages awarded for humiliation and disrespect suffered are usually small, unless the discriminatory police conduct also resulted in physical harm.³⁹⁷ If the discriminatory stop or search results in the discovery of incriminating evidence against the plaintiff, the plaintiff could be made “unsympathetic” in the eyes of juries and judges, potentially leading to even lower damages.³⁹⁸ The combination of a low probability of civil liability and low expected damages renders civil suits inadequate as a deterrent to selective enforcement.³⁹⁹

Nevertheless, for courts facing a choice among ineffective deterrents, it is reasonable to adopt the alternative that is more likely to result in lower social costs. Thus, the fact that monetary damages cannot lead to the release of defendants can — and does — make them more desirable in the eyes of some judges who consider damages superior to suppressing evidence or dismissing charges.⁴⁰⁰ As a federal district court in New Mexico explained in 2013 in *United States v. Alabi*,⁴⁰¹ the reason that monetary damages are the proper remedy for selective enforcement is not that damages necessarily deter discriminatory behavior more effectively than suppressing evidence.⁴⁰² Rather, damages “provide[] *some* remedy to the affected individual and deterrence to law enforcement” without triggering the same adverse consequences as suppression.⁴⁰³

3. *The Risk of Legitimation Effect*

Courts’ endorsement of suppressing evidence and dismissing charges as effective deterrents to selective enforcement is not only theoretically flawed but also has the potential to inadvertently undermine long term efforts to reduce discriminatory policing.

Legal scholars Carol Steiker and Jordan Steiker employed the term “legitimation effect” to describe the risk posed by legal reforms

³⁹⁶ See generally Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 750–53 (2004) (describing the challenges faced by selective enforcement victims suing police officers for damages).

³⁹⁷ See, e.g., *COLE*, *supra* note 77, at 167 (“An illegal search motivated by race . . . may be extremely intrusive and humiliating, but as long as the police do no physical damage, it will be difficult to point to harm for which one should be compensated.”).

³⁹⁸ Karlan, *supra* note 6, at 2011–12.

³⁹⁹ See generally A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 (1998) (“If injurers pay less than for the harm they cause, underdeterrence may result . . .”).

⁴⁰⁰ See *supra* notes 392–93 and accompanying text.

⁴⁰¹ No. 11-cr-2292, 2013 WL 2284956 (D.N.M. May 15, 2013), *aff’d*, 597 F. App’x 991 (10th Cir. 2015).

⁴⁰² See *id.* at *55.

⁴⁰³ *Id.*

that yield minimal practical benefits for the system they aim to change but manage to “promote an exaggerated or false confidence” in it.⁴⁰⁴ An example of such a reform is a line of proposals to change the burden of proof in death penalty cases—“from ‘beyond a reasonable doubt’ to ‘beyond any doubt.’”⁴⁰⁵ According to Steiker and Steiker, these proposals would likely yield no real benefit for the struggle against wrongful executions, yet they may provide a false and misleading “insurance against error.”⁴⁰⁶

Similarly, courts that (mistakenly) claim that suppressing evidence or dismissing charges discourages police officers from behaving in a discriminatory manner may inadvertently mislead the public and policymakers about the judiciary’s ability to combat selective enforcement. This, in turn, could impede the exploration of other potentially more effective deterrent devices and strategies. For instance, some scholars argue that disciplinary sanctions internally imposed on police officers by their departments could be effective deterrents to police wrongdoing.⁴⁰⁷ Indeed, it is possible that officers would be less likely to engage in selective enforcement if being caught could jeopardize their “vacation days, promotions, choice assignments, scheduling, [or] other aspects of job quality and compensation.”⁴⁰⁸ However, policymakers might not prioritize experimenting with such internal disciplinary measures if they believe that existing judicial remedies effectively discourage officers from discriminatory conduct. And even if policymakers decide to try out such measures, police officers—who presumably disfavor the establishment of additional sanctions against them—could argue that the existence of judicial deterrents obviates the need to adopt more deterrent mechanisms.

History suggests that these concerns are well-founded. Scholars have long noted that the Supreme Court’s dependence on the Fourth Amendment exclusionary rule to deter unreasonable searches and seizures may have impeded the exploration of alternative deterrent devices.⁴⁰⁹ For instance, legal scholar Dallin Oaks argued as early as 1970 that, by requiring states to suppress evidence obtained in an unlawful

⁴⁰⁴ Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 749 (2014).

⁴⁰⁵ Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417, 423 (2002).

⁴⁰⁶ *Id.*

⁴⁰⁷ See, e.g., ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 259 (2018).

⁴⁰⁸ *Id.* at 259.

⁴⁰⁹ See, e.g., Tonja Jacobi & Ross Berlin, *Supreme Irrelevance: The Court’s Abdication in Criminal Procedure Jurisprudence*, 51 U.C. DAVIS L. REV. 2033, 2059–60 (2018); William Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U. L.Q. 621, 682.

search or seizure, the Court may have unintentionally “sap[ped] state officials’ energy and determination to control law enforcement officials in alternative ways that might prove just as effective and even more comprehensive than the exclusionary rule.”⁴¹⁰ The genuine risk that relying on suppression or dismissal as a deterrent to selective enforcement will lead to similar outcomes makes such a move both unjustified and dangerous.

B. Preserving Judicial Integrity

Many judges and scholars who advocate for suppressing evidence or dismissing charges due to selective enforcement state that these remedies are not merely deterrents to discriminatory policing; rather, they are also measures to preserve the integrity of the judiciary and the criminal justice system by protecting judges “from becoming ‘accomplices in the willful disobedience of a Constitution they are sworn to uphold.’”⁴¹¹ For example, in 2021, in his concurring opinion in *United States v. Weaver*,⁴¹² Judge Lohier of the Second Circuit called to adopt suppression as a remedy for discriminatory policing, warning that “[a]llowing the fruit of a stop tainted by racial bias to be admitted at a trial or hearing undermines the integrity of judicial proceedings” and “imperils trust in the justice system.”⁴¹³

Like deterrence, the rationale of preserving judicial integrity is also derived from the traditional justifications for the Fourth Amendment exclusionary rule. From the dawn of the twentieth century—the early days of the rule—to the mid-1970s, the Supreme Court emphasized that suppressing unlawfully obtained evidence was necessary to shield judges from accusations of tolerating unconstitutional searches

⁴¹⁰ Oaks, *supra* note 345, at 753.

⁴¹¹ *United States v. Jennings*, 985 F.2d 562, 1993 WL 5927, at *4 n.2 (6th Cir. 1993) (unpublished table decision) (quoting *Elkins v. United States*, 364 U.S. 206, 222–23 (1960)); *see also* *United States v. Benitez*, 613 F. Supp. 2d 1099, 1102 n.3 (S.D. Iowa 2009) (noting that “the Court would be loathe [sic] to implicitly condone [selective enforcement] by allowing the Government to utilize the evidence it garnered”); *United States v. Bernard*, No. 09-cr-2474, 2011 WL 13277499, at *6 (D.N.M. Dec. 9, 2011) (stating that “[a]dmission of . . . evidence [obtained through selective enforcement] would condone discriminatory enforcement of the law”), *vacated*, No. 09-cr-2474 (D.N.M. Apr. 16, 2012), *as recognized in* *United States v. Alabi*, No. 11-cr-2292, 2013 WL 2284956 (D.N.M. May 15, 2013); *State v. Segars*, 799 A.2d 541, 549 (N.J. 2002) (stating that as a remedy for selective enforcement, suppression will help “maint[ain] the integrity of the judicial system”); Holland, *supra* note 182, at 1125–26 (arguing that the goal of preserving judicial integrity justifies suppressing evidence obtained through selective enforcement); Williamson, *supra* note 313, at 681, 684 (same).

⁴¹² 9 F.4th 129 (2d Cir. 2021) (en banc).

⁴¹³ *Id.* at 160 (Lohier, Jr., J., concurring). It is important to note that Judge Lohier seemed to support the suppression of evidence obtained through discriminatory policing under the Fourth Amendment (by “reconsidering” *Whren*) and not under the Fourteenth Amendment’s Equal Protection Clause. *Id.* at 158–60.

and seizures—accusations that could compromise their integrity.⁴¹⁴ For instance, in 1968, the *Terry* Court stated that, in the interest of maintaining judicial integrity, “[c]ourts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.”⁴¹⁵ With time, however, the Court has gradually shifted away from this justification, insisting instead that the lone basis for the Fourth Amendment exclusionary rule is its ability to deter police wrongdoing.⁴¹⁶

The concept of “judicial integrity” is vague, and it is not always clear what judges and scholars mean when they write about the need to protect it.⁴¹⁷ This vagueness, in turn, may lead different judges and scholars to reach very different conclusions about the expected effects that various judicial decisions may have on judicial integrity.⁴¹⁸ Nevertheless, regardless of the precise definition of the concept, there seems to be little doubt that a judicial or criminal justice system that treats individuals differently based on their race (or other impermissible factors) cannot be said to have integrity. Such a system is also unlikely to inspire public confidence. Analyzing a series of survey studies conducted over fifteen years, political scientist Austin Sarat concluded that individuals’ “perception of unequal treatment” was “the single most important source of popular dissatisfaction with the American legal system.”⁴¹⁹ Similarly, the Supreme Court has consistently emphasized the disastrous ramifications that racial discrimination can have for public confidence in the criminal justice system.⁴²⁰ The Court has also acknowledged its

⁴¹⁴ See, e.g., Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1382–83, 1391 (1983) (describing the rise and the demise of the judicial integrity rationale).

⁴¹⁵ *Terry v. Ohio*, 392 U.S. 1, 12–13 (1968).

⁴¹⁶ See, e.g., Rubinstein, *supra* note 335, at 1763–66 (describing the Court’s gradual focus on deterrence as the exclusionary rule’s sole basis).

⁴¹⁷ See Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 419, 421–22 (2013) (discussing the vagueness of the concept of judicial integrity in case law and scholarship).

⁴¹⁸ In a 2015 dissent in a context different from remedies for police misconduct, Justice Scalia accused the majority of treating the “concept of judicial integrity” as “a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please.” *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 465 (2015) (Scalia, J., dissenting) (quoting Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 12 THE WORKS OF THOMAS JEFFERSON 135, 137 (Paul Leicester Ford ed., 1905)).

⁴¹⁹ Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC’Y REV. 427, 434 (1977).

⁴²⁰ See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (“Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”); *Johnson v. California*, 543 U.S. 499, 511 (2005) (“[P]ublic respect for our system of justice is undermined when the system discriminates based on race.”); *Peña-Rodriguez v. Colorado*,

own “duty to confront racial animus” among criminal justice officials,⁴²¹ highlighting the positive impact such efforts would have on public trust in the system.⁴²²

Although judicial integrity—again, regardless of its exact meaning—may rely on judges’ efforts to reduce discrimination, it does not necessarily follow that such integrity will be preserved by suppressing evidence or dismissing charges. Indeed, “appeals to judicial integrity cut in divergent directions.”⁴²³ For many of those who prioritize equal protection values or individual rights, the idea of judges allowing prosecutions resulting from selective enforcement to continue uninterrupted may be intolerable.⁴²⁴ However, for others—particularly law and order proponents, but not exclusively—judges who choose to suppress reliable incriminating evidence or dismiss well-founded criminal charges are those who compromise the integrity of the judiciary and the criminal process.⁴²⁵ From the latter perspective, this is especially true given that courts do not have an independent constitutional obligation to respond to selective enforcement with suppression or dismissal and that courts’ decision to do so arises from utilitarian concerns over their own reputation.⁴²⁶ As legal scholar Richard Re noted, “A court’s integrity—actual and perceived—must grievously suffer when known criminals stride proudly out of court, unpunished.”⁴²⁷ To be sure, people with opposing views and values may agree that judges should actively combat discrimination in the criminal justice system. However, for many,

580 U.S. 206, 237 (2017) (Alito, J., dissenting) (“[E]ven a tincture of racial bias can inflict great damage on [the criminal justice] system, which is dependent on the public’s trust.”).

⁴²¹ *Peña-Rodriguez*, 580 U.S. at 222.

⁴²² *See, e.g., Batson*, 476 U.S. at 99 (“[P]ublic respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.”).

⁴²³ Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1904 (2014) (discussing the rationale of judicial integrity in the context of the Fourth Amendment exclusionary rule).

⁴²⁴ *See, e.g., Holland*, *supra* note 182, at 1126 (arguing that “our courts cannot maintain their institutional integrity while accepting the proceeds of racially discriminatory investigations by law enforcement”); *cf. Re*, *supra* note 423, at 1904 (“Perhaps judicial integrity is somewhat compromised when judges hold their nose while admitting unlawfully obtained evidence.”).

⁴²⁵ *See, e.g., Re*, *supra* note 423, at 1904 (“[J]udicial integrity is . . . at stake when courts keep relevant evidence away from juries and thereby oversee demonstrably false verdicts.”); Amar, *supra* note 357, at 792–93 (“[I]ntegrity and fairness are . . . threatened by excluding evidence that will help the justice system to reach a true verdict.”).

⁴²⁶ *See, e.g., Stewart*, *supra* note 414, at 1383 (“Describing the judiciary as a ‘party’ to the constitutional violation begs the question: what provision of the Constitution forbids the judiciary to admit illegally obtained evidence?”); *Re*, *supra* note 423, at 1904 (“[I]nvocations of integrity cannot answer why courts should have legal authority to suppress evidence that, under the law of evidence, should be admitted.”).

⁴²⁷ *Re*, *supra* note 423, at 1904.

an ideal judicial response—one that best upholds judicial integrity—would involve making offending police officers pay damages rather than granting impunity to defendants.⁴²⁸

III. GROUNDING REMEDIES FOR SELECTIVE ENFORCEMENT IN CORRECTIVE JUSTICE

Judges and scholars who advocate for adopting suppression of evidence or dismissal of charges as a remedy for selective enforcement usually rely on the two traditional justifications for the Fourth Amendment exclusionary rule: deterring police wrongdoing and preserving judicial integrity.⁴²⁹ As just discussed, however, these justifications turn out to be unpersuasive in the context of selective enforcement upon close examination.⁴³⁰

This Part argues that judges and scholars should not have resorted to these rationales to begin with. Instead of relying on the justifications for the Fourth Amendment exclusionary rule, courts should ground remedies for selective enforcement in the same goal traditionally sought by equal protection remedies—namely, corrective justice for victims of unconstitutional discrimination. Section A introduces the corrective framework that the Supreme Court has applied to equal protection remediation in various contexts. Section B discusses courts' duty to eliminate the negative consequences stemming from selective enforcement. Section C describes how the concept of corrective justice both empowers and constrains judges' remedial authority. Section D explains the expected benefits of expanding the toolbox of remedies available to courts handling selective enforcement claims.

A. *Equal Protection's Corrective Justice Framework*

Claims of equal protection violations are not exclusively made by defendants in criminal proceedings arguing that they were victims of selective enforcement by the police. Rather, courts hear allegations of racial discrimination in various contexts both within the criminal process and outside of it, such as employment, education, housing, jury selection, and sentencing. With few exceptions, the Supreme Court has applied the same demanding evidentiary standard in these different

⁴²⁸ See, e.g., Amar, *supra* note 357, at 792–93 (arguing that “courts best affirm their integrity and fairness” by making offending police officers pay, not by suppressing incriminating evidence); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 70 (suggesting that courts could preserve their integrity by remedying police misconduct through the civil process).

⁴²⁹ See *supra* Section I.B.2.

⁴³⁰ See *supra* Sections II.A–B.

contexts, requiring claimants of equal protection violations to prove both discriminatory effect and discriminatory purpose.⁴³¹

As mentioned earlier, most state and federal courts were quick to apply the same evidentiary standard to selective enforcement claims.⁴³² Therefore, like other individuals alleging equal protection violations, selective enforcement claimants must typically demonstrate both discriminatory effect and discriminatory purpose.⁴³³ Nevertheless, lower courts have largely overlooked the fact that, in addition to a uniform evidentiary standard, the Supreme Court has also emphasized a primary goal that judicially ordered remedies for equal protection violations should promote—namely, corrective justice for victims of purposeful discrimination.⁴³⁴

Tracing back to the Greek philosopher Aristotle,⁴³⁵ the corrective justice concept has taken on multiple different meanings and interpretations in legal academic scholarship.⁴³⁶ In essence, however, corrective justice holds that “when one person has been wrongfully injured by another, the injurer must make the injured party whole.”⁴³⁷ Applying this concept to equal protection violations—most commonly in school desegregation cases⁴³⁸—the Supreme Court has held that proper remedies “must be designed as nearly as possible ‘to restore the victims of discriminatory conduct to the position they would have occupied in the

⁴³¹ See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1311–15 (1995) (discussing the Supreme Court’s “universalist approach” to proving equal protection violations); Michael Coenen, *Spillover Across Remedies*, 98 MINN. L. REV. 1211, 1228–33 (2014) (same).

⁴³² See *supra* Section I.A.1.

⁴³³ See *supra* Section I.A.1.

⁴³⁴ See, e.g., Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 729–35 (1986) (discussing the centrality of corrective justice to the Supreme Court’s approach to remedies for equal protection violations); Stephen Barrett Kanner, *From Denver to Dayton: The Development of a Theory of Equal Protection Remedies*, 72 NW. U. L. REV. 382, 382–85 (1977) (same); Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 77 (2008) (same).

⁴³⁵ See ARISTOTLE, NICOMACHEAN ETHICS 72–74 (Terence Irwin trans., Hackett Publ’g Co. 2d ed. 1999) (n.d.) (describing the principle of corrective justice).

⁴³⁶ See Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 191–201 (1981) (describing legal scholars’ different interpretations of corrective justice).

⁴³⁷ Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 695 (2003); see also, e.g., Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 423 (1982); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 403 (1992); George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658, 1667–68 (1993) (reviewing JULES L. COLEMAN, *RISKS AND WRONGS* (1992)); Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 906 (2001).

⁴³⁸ See Gewirtz, *supra* note 434, at 729 (arguing that “corrective ideas probably have received their fullest elaboration” in the context of “remedies for unlawful school segregation”).

absence of such conduct.”⁴³⁹ As Justice Marshall once explained, the goal is that such remedies will make victims of discrimination “whole” again, by ensuring “any injurious condition flowing from the constitutional violation [is] remedied to the maximum extent practicable.”⁴⁴⁰ Of course, the aspiration to promote corrective justice is not restricted to equal protection remedies and is also shared by other types of constitutional remedies, as well as private law remedies.⁴⁴¹ Additionally, the Supreme Court has not considered corrective justice to be the sole aspiration—or even an aspiration at all—of equal protection remedies in each and every context. In some cases, it has regarded other goals, such as deterrence of unlawful conduct or maintenance of public trust in the criminal justice system as important.⁴⁴² Yet, as an “aspiration” and “commitment[] expressed again and again in the [Court’s] case law” on equal protection remedies,⁴⁴³ corrective justice seems to enjoy a uniquely prominent status that other goals do not usually have. In his classic essay on the Court’s corrective justice approach to equal protection remedies, legal scholar Paul Gewirtz emphasized this approach’s “distinctive moral force.”⁴⁴⁴ According to Gewirtz, because racial inequality in the United States is, to a great degree, the result of “the effects of purposeful discrimination extending throughout American society over many years,” remedies for unconstitutional discrimination must focus

⁴³⁹ *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 269 (1995) (Souter, J., dissenting) (“The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination.”).

⁴⁴⁰ *Bd. of Educ. v. Dowell*, 498 U.S. 237, 264 n.8 (1991) (Marshall, J., dissenting).

⁴⁴¹ See, e.g., Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1532–33 (2009) (discussing the importance of corrective justice as a goal of both constitutional and private law remedies).

⁴⁴² See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (O’Connor, J., concurring in the judgment) (“This Court has long held that upon proof of systematic exclusion of [Black people] from a grand jury issuing an indictment, the admittedly costly remedy of reversal of a conviction thereafter obtained through a fair trial is necessary in order to eradicate and deter such discrimination.”); *id.* at 273 (Powell, J., dissenting) (stating that the “‘appropriate remedy’ for the exclusion of [Black people] from grand juries in Kings County, California, in 1962 . . . depends on (i) the utility of the remedy in either correcting any injustice to respondent or deterring unconstitutional conduct by state officials, and (ii) the remedy’s costs to society” (quoting *Hobby v. United States*, 468 U.S. 339, 342 (1984))); *Flowers v. Mississippi*, 588 U.S. 284, 301 (2019) (“By taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system.”). But see *Gray v. Mississippi*, 481 U.S. 648, 672 (1987) (Powell, J., concurring in part and concurring in the judgment) (“Our decision in *Batson* . . . was justified by the compelling need to remove all vestiges of invidious racial discrimination in the selection of jurors . . .”).

⁴⁴³ Gewirtz, *supra* note 434, at 729.

⁴⁴⁴ *Id.*

on eliminating these negative effects.⁴⁴⁵ Otherwise, if left unaddressed, “[t]hese effects will continue to work their harms even if new violations end.”⁴⁴⁶

Gewirtz noted that adherence to corrective justice both “empower[s]” and “constrain[s]” judges’ remedial authority.⁴⁴⁷ On the one hand, judges are not only required to demand that the offending parties discontinue their ongoing discriminatory actions, but also to eliminate the negative effects stemming from specific instances of unconstitutional discrimination.⁴⁴⁸ To achieve these aims, judges are afforded broad discretion in shaping suitable corrective measures.⁴⁴⁹ For example, as Gewirtz pointed out, when a court finds racially discriminatory hiring practices at a school, the remedy should “include corrective steps such as paying damages to the excluded teachers and eliminating lingering consequences that the violation has had on the composition of the teaching staff.”⁴⁵⁰

On the other hand, the corrective justice framework adopted by the Court also limits judges’ remedial authority because it requires judges to refrain from attempting to eliminate any negative consequences that do *not* stem from proven unconstitutional discrimination.⁴⁵¹ In other words, as the Court stated in 1974 in *Milliken v. Bradley*,⁴⁵² “the scope of the remedy is determined by the nature and extent of the constitutional violation.”⁴⁵³ In *Milliken*, for instance, the Court held that the remedy for the intentionally segregated public school system in one school district may not include the integration of students from districts that did not have a similar segregated system.⁴⁵⁴ Such a remedy, the Court stated, “would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in . . . any holding of this Court.”⁴⁵⁵

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 739; *see also* Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 862 (1983) (“The constitutional requirement that courts ‘eliminate the discriminatory effects of the past’ is simply the obligation to prevent the perpetuation of past discrimination viewed from a different point in time.” (footnote omitted) (quoting *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438 n.4 (1968))).

⁴⁴⁷ Gewirtz, *supra* note 434, at 732–34.

⁴⁴⁸ *See id.*

⁴⁴⁹ *See, e.g., id.*; *Missouri v. Jenkins*, 515 U.S. 70, 124–25 (1995) (Thomas, J., concurring) (“Motivated by our worthy desire to eradicate segregation . . . we indicated that trial judges had virtually boundless discretion in crafting remedies once they had identified a constitutional violation.”).

⁴⁵⁰ Gewirtz, *supra* note 434, at 732.

⁴⁵¹ *See id.* at 733; Kanner, *supra* note 434, at 382–83.

⁴⁵² 418 U.S. 717 (1974).

⁴⁵³ *Id.* at 744; *see also* *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (“[T]he nature of the violation determines the scope of the remedy.”).

⁴⁵⁴ *See Milliken*, 418 U.S. at 744–46.

⁴⁵⁵ *Id.* at 745.

To be sure, although striving for corrective justice “as nearly as possible,”⁴⁵⁶ remedies for equal protection violations do not always fully achieve it. For example, plaintiffs who are victims of school or housing segregation often seek—and are consequently granted—only desegregation, but not monetary damages for the harm they suffered.⁴⁵⁷ Courts, therefore, succeed in eliminating some of the negative consequences of segregation but often struggle to make victims whole.⁴⁵⁸ Additionally, the Supreme Court has repeatedly emphasized that the corrective purpose of remedies for equal protection violations is not unqualified.⁴⁵⁹ Rather, it must be weighed against other often competing social interests,⁴⁶⁰ such as local governance,⁴⁶¹ public health,⁴⁶² and state budgets.⁴⁶³ In some cases, therefore, the elimination of the negative effects of discrimination may need to yield to more pressing considerations.⁴⁶⁴ Nevertheless, the remedial aspiration remains the same—namely, “to remove all vestiges of invidious racial discrimination” to the greatest extent possible.⁴⁶⁵

B. Judges’ Duty to Eliminate the Effects of Selective Enforcement

Corrective justice should guide judicial remedies for successful selective enforcement claims, just as it informs the judicial response to equal protection violations in various other contexts. Rather than

⁴⁵⁶ *Milliken v. Bradley*, 433 U.S. 267, 280 (1977).

⁴⁵⁷ See, e.g., James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1508–09 (1990) (discussing the common absence of monetary damages from the package of remedies granted for school segregation); Olatunde C.A. Johnson, *The Missing Half: Revisiting Monetary Remedies to Redress Racial Segregation*, 59 HARV. C.R.-C.L. L. REV. 277, 278–79, 295 (2024) (discussing the focus of victims of school and housing segregation on injunctive relief instead of monetary damages).

⁴⁵⁸ See, e.g., Liebman, *supra* note 457, at 1508 (arguing that monetary damages are necessary “to restore the distributive balance that the defendant threw out of kilter by injuring the plaintiff”); Johnson, *supra* note 457, at 335 (claiming that “[m]aking humans and communities whole for past harm requires both monetary compensation and forward-looking action”); Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education Is More Than Just a Tort*, 96 NW. U. L. REV. 99, 153 (2001) (“[F]rom a corrective perspective money damages more efficiently compensate plaintiffs for their injuries than do the over- and under-corrective injunctive remedies that the courts have implemented in [school] desegregation cases.”).

⁴⁵⁹ See, e.g., Gewirtz, *supra* note 434, at 734; Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 589–90 (1983) [hereinafter Gewirtz, *Remedies and Resistance*].

⁴⁶⁰ See, e.g., Gewirtz, *supra* note 434, at 734; Gewirtz, *Remedies and Resistance*, *supra* note 459, at 589–90.

⁴⁶¹ See *Milliken*, 433 U.S. at 280–81.

⁴⁶² See *id.* at 280 n.15.

⁴⁶³ See *Crawford v. Bd. of Educ.*, 458 U.S. 527, 542 (1982).

⁴⁶⁴ See, e.g., Morgan, *supra* note 458, at 119–20.

⁴⁶⁵ *Gray v. Mississippi*, 481 U.S. 648, 672 (1987) (Powell, J., concurring in part and concurring in the judgment).

relying on the justifications of deterrence or judicial integrity, courts that find a defendant has successfully proven selective enforcement should grant a remedy aimed at eliminating the negative consequences resulting from the defendant's discriminatory stop, search, or arrest as much as possible.

In practice, the types of negative effects that courts can eliminate are constrained by the set of "tools" available to them.⁴⁶⁶ Within the criminal process, courts have a very limited range of available remedies for violations committed by criminal justice officials.⁴⁶⁷ These remedies include suppressing evidence, dismissing charges, and—for appellate courts—reversing convictions.⁴⁶⁸ Judges in criminal proceedings lack the authority to order the offending officer to pay the defendant monetary damages, nor can they grant equitable relief, such as a judicial decree compelling the officer's department to implement certain preventive measures. Instead, damages and equitable relief can only be pursued through a civil suit filed separately by the victim of misconduct against the relevant police officer or department.⁴⁶⁹

Due to these remedial constraints, courts in criminal proceedings would struggle to eliminate all types of negative effects stemming from selective enforcement. Suppressing evidence or dismissing charges, for instance, would not compensate for the humiliation experienced by targets of discriminatory policing⁴⁷⁰ or for any physical harm they might have suffered,⁴⁷¹ nor would they "restore the public trust that a criminal defendant once enjoyed."⁴⁷² Suppression and dismissal, however, can fully eliminate the two most significant consequences faced by defendants due to discriminatory law enforcement: the incriminating

⁴⁶⁶ See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 558 (2001) (explaining that courts' actions and powers are "limited by the range of tools [they] have").

⁴⁶⁷ See, e.g., John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 239 (2015) ("[T]he universe of available sanctions in criminal adjudication [for constitutional violations] is limited . . .").

⁴⁶⁸ See David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1244 ("[T]he forms of [criminal procedural] remedies—exclusion of evidence, dismissal of criminal charges, and the reversal of convictions—are quite distinct in form and application from their civil counterparts."); Karlan, *supra* note 6, at 2004 (listing these three remedies as the "conventional remedies for violations of criminal procedure protections" that can be granted in criminal adjudication).

⁴⁶⁹ See generally Rudovsky, *supra* note 468, at 1213–41 (discussing the availability of monetary damages and equitable relief as remedies for constitutional violations within the civil process).

⁴⁷⁰ See generally Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1048 (2010) (describing the humiliation caused by racial profiling).

⁴⁷¹ See, e.g., Rudovsky, *supra* note 468, at 1245 (explaining that "instances of excessive or unreasonable force" by the police "cannot be remedied in the criminal process").

⁴⁷² Re, *supra* note 423, at 1903.

evidence against them and their subsequent criminal prosecution. For most defendants, doing away with these two negative effects of selective enforcement would be sufficient, as their top priority is “to avoid conviction and imprisonment, not to recover damages.”⁴⁷³ By suppressing incriminating evidence or dismissing charges resulting from proven selective enforcement, courts can fulfill their commitment to strive “to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.”⁴⁷⁴ As one federal court explained in 2016,⁴⁷⁵ dismissal can “put[] the victim where he or she could have been but for racially selective conduct of law enforcement.”⁴⁷⁶ Importantly, because courts derive their power to suppress evidence or dismiss charges from their mandate to eliminate the effects of selective enforcement, they need not rely on the inadequate justifications of deterrence or judicial integrity from the Fourth Amendment context. Although these goals are important as a general matter, courts’ authority to eliminate the harms of selective enforcement is independent of their success in promoting deterrence or maintaining their integrity.

Interestingly, the Supreme Court has rejected corrective justice as a justification for the Fourth Amendment exclusionary rule,⁴⁷⁷ holding that the rule was not meant “to redress the injury to the privacy of the search victim.”⁴⁷⁸ According to the Court, the rule would simply not be able to serve as an effective corrective mechanism, as “the ruptured privacy of the victims’ homes and effects cannot be restored.”⁴⁷⁹ That is, any piece of information that was exposed or revealed as a result of an unconstitutional search or seizure cannot be made private again.⁴⁸⁰ The Equal Protection Clause, however, is not meant to protect people’s right to privacy, but to guarantee them “the equal protection of the laws.”⁴⁸¹ The Supreme Court has implicitly admitted it is often impossible to correct all of the harms that stem from unconstitutional discrimination but has insisted courts should attempt to do so “as nearly as possible”⁴⁸²

⁴⁷³ Johnson, *supra* note 470, at 1064; *see also* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1353 (2017) (arguing that civil remedies “would be of little use to a defendant who primarily seeks to avoid conviction based on” selective enforcement).

⁴⁷⁴ *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).

⁴⁷⁵ *See supra* notes 301–04 and accompanying text.

⁴⁷⁶ *United States v. Mumphrey*, 193 F. Supp. 3d 1040, 1059 (N.D. Cal. 2016).

⁴⁷⁷ *See Elkins v. United States*, 364 U.S. 206, 217 (1960) (“The [exclusionary] rule is calculated to prevent, not to repair.”).

⁴⁷⁸ *United States v. Calandra*, 414 U.S. 338, 347 (1974).

⁴⁷⁹ *Linkletter v. Walker*, 381 U.S. 618, 637 (1965).

⁴⁸⁰ *See, e.g., Re, supra* note 423, at 1903 (explaining that “[l]awless searches can . . . uncover once-private information that slips into the public domain” in a way that suppressing evidence would not be able to correct).

⁴⁸¹ U.S. CONST. amend. XIV, § 1.

⁴⁸² *Milliken v. Bradley*, 433 U.S. 267, 280 (1977).

and “to the maximum extent practicable.”⁴⁸³ The judicial commitment to equal protection means courts should do their best to eliminate the negative effects of selective enforcement, even if full restoration of defendants to their former situation—before the discriminatory conduct took place—is impossible.

C. *Corrective Remedies in Action*

Similar to other areas of equal protection, the judicial duty to pursue corrective justice should simultaneously empower and constrain judges’ authority to grant remedies for selective enforcement.⁴⁸⁴ Thus, on the one hand, judges handling selective enforcement claims in criminal proceedings should be empowered with broad discretion when choosing remedies that could achieve corrective justice.⁴⁸⁵ Rather than mandating a uniform remedy for all successful selective enforcement claims, judges should be authorized to determine the most effective solution to correct the harm suffered by the specific defendant in the case before them. For example, if a defendant charged with a minor traffic offense successfully proves the police conducted the traffic stop based on the defendant’s race, the appropriate remedy would be to dismiss the traffic charge. But if the discriminatory stop additionally led to a search of the defendant’s car and illegal drugs were discovered, excluding those drugs as incriminating evidence against the defendant would also be necessary.⁴⁸⁶

On the other hand, judges should refrain from eliminating negative effects that are not the result of unconstitutional discrimination.⁴⁸⁷ For instance, a court should, of course, suppress evidence obtained through a discriminatory stop. However, the court should not dismiss the entire criminal charge against the defendant if it is based on additional incriminating evidence seized independently and lawfully. Furthermore, a court should generally refrain from granting a remedy in a case in which it cannot be demonstrated that the police officer who enforced the law against the defendant was motivated by purposeful discrimination, as opposed—for example—to implicit bias (unless required otherwise by the court’s respective state law, such as in Massachusetts and New Jersey).⁴⁸⁸

⁴⁸³ *Bd. of Educ. v. Dowell*, 498 U.S. 237, 264 n.8 (1991) (Marshall, J., dissenting).

⁴⁸⁴ *See supra* note 447 and accompanying text.

⁴⁸⁵ *See supra* notes 448–50 and accompanying text.

⁴⁸⁶ *See* Karlan, *supra* note 6, at 2009–10 (arguing that dismissal alone would not be an appropriate judicial response to racially selective traffic stops, because it might only apply to the traffic charge against the defendant, but not necessarily to additional charges resulting from incriminating evidence obtained during the stop).

⁴⁸⁷ *See supra* notes 451–55 and accompanying text.

⁴⁸⁸ *See supra* notes 169–81 and accompanying text.

Finally, as in other areas of equal protection, judges contemplating the proper corrective remedies for selective enforcement in the cases before them must also consider competing social interests, particularly public safety.⁴⁸⁹ Of course, suppressing evidence and dismissing charges often result in some risk to public safety, because they frequently lead to the release of factually guilty defendants.⁴⁹⁰ Because of that, public safety should not be a decisive consideration against granting suppression or dismissal; otherwise, those remedies would almost never be granted. Given the special severity of racial discrimination within the criminal process and the pressing need to eliminate its negative effects, judges should avoid suppressing evidence or dismissing charges only when doing so would prevent a particularly excessive threat to community well-being.

Some may argue that giving judges the option not to grant suppression or dismissal under special circumstances may sometimes lead them to refrain from granting them even when they are appropriate. Although this scenario is possible, the alternative of not having the option to refrain from suppression and dismissal might be even more concerning. Scholars have long argued that judges employ various methods to skirt their duty to grant remedies for rights violations when they consider the outcomes objectionable.⁴⁹¹ For example, to avoid suppressing evidence obtained in unconstitutional searches, judges have allegedly “pretend[ed] to believe police officer[s]” who testify that the search they conducted was flawless.⁴⁹² Similarly, if judges were obligated to suppress evidence or dismiss charges whenever they accepted a selective enforcement claim, they might also sometimes attempt to avoid doing so by pretending that no selective enforcement was proven.⁴⁹³ By allowing judges to refrain from granting suppression or dismissal in exceptional circumstances, judges would be able to prevent undesirable outcomes while still recognizing that the police officers involved in the case before them engaged in unconstitutional selective enforcement. As the next Section explains, a judicial determination that suppression

⁴⁸⁹ See *supra* notes 459–64 and accompanying text.

⁴⁹⁰ See *supra* note 192 and accompanying text.

⁴⁹¹ See, e.g., Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006) (arguing that “[w]hen facing an outcome or pattern of outcomes that it regards as practically intolerable or disturbingly sub-optimal, the [Supreme] Court will adjust or manipulate the applicable law”); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 885 (1999) (claiming that “the threat of undesirable remedial consequences motivat[es] courts to construct the right in such a way as to avoid those consequences”); Starr, *supra* note 441, at 1515 (arguing that “if the remedy for a rights violation is undesirable, courts will find ways to avoid granting it, such as narrowing the underlying right”).

⁴⁹² Butler, *supra* note 357, at 1794; see also *supra* note 357.

⁴⁹³ See, e.g., Rubinstein, *supra* note 4, at 867 (raising a similar concern).

or dismissal would lead to intolerable results should not necessarily preclude granting some other form of relief to the defendant.

D. Expanding the Toolbox of Judicial Remedies

Under the corrective justice framework, courts that determine a defendant has successfully proven selective enforcement would typically grant suppression of evidence or dismissal of charges to eliminate the negative effects of discrimination, unless competing social interests dictate otherwise.⁴⁹⁴ The problem, however, is that both suppression and dismissal are binary in nature—namely, they can either be granted to the full extent or not be granted at all.⁴⁹⁵ As opposed to monetary damages, for instance, which are “infinitely divisible,”⁴⁹⁶ suppression and dismissal are “all or nothing”: “[C]harges are either thrown out or let stand; evidence is either excluded or admitted.”⁴⁹⁷ There is no in-between, and judges in criminal proceedings generally have no other remedies at their disposal.⁴⁹⁸ This might mean that in cases in which judges determine that suppression and dismissal should not be granted due to serious public safety concerns, they will not be able to “grant any remedy at all.”⁴⁹⁹

To prevent defendants who are victims of selective enforcement from being left without relief when suppressing evidence and dismissing charges are improper, the toolbox of judicial remedies in criminal cases must be expanded to include other remedies beyond suppression and dismissal. At a minimum, these additional remedies should have the capacity to advance corrective justice by mitigating the negative consequences resulting from discriminatory policing, even if not to the same extent that suppression or dismissal would achieve.

One example of such a potential additional remedy is sentence reduction.⁵⁰⁰ To date, at least one federal court has adopted sentence reduction as a possible remedy for procedural violations in the criminal process,⁵⁰¹ and some leading scholars and jurists have advocated

⁴⁹⁴ See *supra* Sections III.B–.C.

⁴⁹⁵ See, e.g., Starr, *supra* note 441, at 1510–11.

⁴⁹⁶ Amar, *supra* note 357, at 798.

⁴⁹⁷ Starr, *supra* note 441, at 1510–11.

⁴⁹⁸ See *supra* notes 467–69 and accompanying text.

⁴⁹⁹ Starr, *supra* note 441, at 1511.

⁵⁰⁰ Another possibility is to introduce monetary damages and injunctive relief—two remedies currently available only in civil proceedings—into the criminal process. Implementing such a massive reform in the law of remedies would likely necessitate legislative authorization and raise additional practical and procedural concerns.

⁵⁰¹ See *United States v. Dicus*, 579 F. Supp. 2d 1142, 1158–61 (N.D. Iowa 2008) (adopting sentence reduction as a remedy for prosecutorial wrongdoing).

for it as well.⁵⁰² Granting sentence reduction as a remedy for selective enforcement when suppression and dismissal are improper would help promote corrective justice by “restor[ing] some of th[e] liberty” defendants are expected to lose due to discriminatory policing, even if it cannot restore it altogether.⁵⁰³ Scholars have proposed various models of sentence reduction courts could potentially follow.⁵⁰⁴ According to legal scholar Sonja Starr, for instance, “The reduction could be a fixed amount, percentage of the sentence, or number of levels in a sentencing guidelines scheme, or the court could be permitted to tailor it to the violation.”⁵⁰⁵ Regardless of the specific model courts choose to implement, any reduction in a sentence that would not have been imposed on a defendant if not for the police’s discriminatory conduct would be desirable under the framework of corrective justice.

Beyond its potential to promote corrective justice, the availability of sentence reduction could create an incentive for defendants to raise selective enforcement claims even when they know courts will likely avoid granting suppression or dismissal due to pressing competing social interests (for instance, because the defendant was charged with a particularly severe offense).⁵⁰⁶ Moreover, sentence reduction could be granted even when a police officer’s discriminatory conduct has not led to the discovery of incriminating evidence or to criminal charges against the defendant. As corrective remedies, suppressing evidence and dismissing charges would be appropriate only if a discriminatory stop, search, or arrest was the “but-for cause” of seizing incriminating evidence or bringing criminal charges against the defendant.⁵⁰⁷ Sometimes, however, discriminatory conduct by the police does not lead directly to the discovery of evidence or the initiation of a criminal case. For instance, in a case in which there is no basis for concluding that a police

⁵⁰² See Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun’s Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 70–75 (1994) (advocating for the adoption of sentence reduction as a remedy for police wrongdoing); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 115–17 (2003) (same); Starr, *supra* note 441, at 1519–20 (advocating for the adoption of sentence reduction as a remedy for prosecutorial wrongdoing).

⁵⁰³ Starr, *supra* note 441, at 1540.

⁵⁰⁴ See, e.g., Caldwell & Chase, *supra* note 502, at 73 (proposing that a “judge should reduce a defendant’s sentence by a certain percentage based on the gravity of the [constitutional] violation”); Calabresi, *supra* note 502, at 116 (proposing that “a judge would come down [a certain number of] points on the sentencing guidelines” based on the circumstances surrounding the constitutional violation).

⁵⁰⁵ Starr, *supra* note 441, at 1519.

⁵⁰⁶ See, e.g., Calabresi, *supra* note 502, at 115 (discussing defendants’ interest in having their sentence reduced); Caldwell & Chase, *supra* note 502, at 70–71 (arguing that a “reduction in the prison sentence [that is] significant enough [can] provide an incentive to a criminal defendant to challenge a search or seizure”).

⁵⁰⁷ See *supra* notes 487–88 and accompanying text.

officer stopped the defendant based on race but it has been demonstrated that the defendant's race was the cause for the use of excessive force by the officer during the arrest, suppression and dismissal would be improper as corrective remedies.⁵⁰⁸ With sentence reduction as an available remedy, criminal courts would not need to have the excessive force claim "relegated to the civil law for remedies."⁵⁰⁹ Rather, they would be able to grant sentence reduction to "compensate the defendant for any non-conviction-related harm . . . suffered."⁵¹⁰ In that sense, sentence reduction would serve the same role that monetary damages serve when awarded for "non-monetary injuries."⁵¹¹

To be sure, the claim here is not that when suppression and dismissal are improper, sentence reduction would be an ideal corrective measure—far from it.⁵¹² Rather, the main takeaway from this discussion is that the toolbox of judicial remedies should be expanded to ensure the goal of corrective justice for victims of selective enforcement is served even when courts decide to refrain from granting suppression and dismissal.

CONCLUSION

We are currently experiencing one of the most interesting and important periods in the history of the doctrine of selective enforcement. Thanks to judges who have reconsidered the traditional demanding requirements for proving selective enforcement, successful

⁵⁰⁸ Cf. Rudovsky, *supra* note 468, at 1245 ("Fourth Amendment violations that do not result in the seizure of evidence [and] instances of excessive or unreasonable force . . . cannot be remedied in the criminal process.").

⁵⁰⁹ *Id.*

⁵¹⁰ Starr, *supra* note 441, at 1519; see also Mark D. Duda, *Remedying Police Brutality Through Sentence Reduction*, 107 VA. L. REV. ONLINE 99, 109–12 (2021) (arguing that "[s]entence reduction has unique corrective power to remedy the particular harms done by police brutality").

⁵¹¹ Starr, *supra* note 441, at 1539–40.

⁵¹² For example, different judges are likely to quantify the harms of selective enforcement differently, inevitably resulting in some arbitrariness in the number of "years of reduction" that victims of selective enforcement are awarded. *Id.* at 1539–43; see also Guy Rubinstein, *The Influence of Proportionality in Private Law on Remedies in American Constitutional Criminal Procedure*, in *PROPORTIONALITY IN PRIVATE LAW* 201, 213–14 (Franz Bauer & Ben Köhler eds., 2023) (discussing "the problem of valuation and quantification" of harms in the context of sentence reduction as a remedy for police wrongdoing). There is also a risk that judges may sometimes "impos[e] a harsher penalty on conviction" to neutralize the corrective effects of the sentence reduction they intend—or pretend—to grant. Caldwell & Chase, *supra* note 502, at 72; see also Starr, *supra* note 441, at 1562–63 (discussing "the possibility that courts would just raise the base sentence to cancel out the reduction"). Some scholars argue that prosecutors may also "attempt to offset the impact of sentence reduction by exercising their discretion in ways that increase base sentences." *Id.* at 1563. Additionally, introducing the remedy of sentence reduction might lead judges to settle for this "milder" remedy instead of granting the more "drastic" remedies of suppression or dismissal. See *id.* at 1564–65.

claims are no longer impossible in a growing number of jurisdictions. No less importantly, although the Supreme Court has refrained from specifying the proper remedy for selective enforcement, an increasing number of state and federal courts have responded to successful claims by suppressing incriminating evidence or dismissing criminal charges.

Although celebrating the adoption of powerful remedies that scholars and advocates of racial justice have long called for, this Article has highlighted the flaws in the justifications courts have offered for them. Despite the promises made by courts, suppressing evidence and dismissing charges are unlikely to effectively deter police officers from engaging in selective enforcement. Nor will these remedies necessarily help courts maintain their judicial integrity. Rather than relying on these two unconvincing justifications, remedies for selective enforcement should be grounded in corrective justice—the same goal that various equal protection remedies have traditionally sought to promote. Appropriate remedies, therefore, will be those “designed as nearly as possible ‘to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.’”⁵¹³

⁵¹³ *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)).

Criminal Investors

Andrew K. Jennings*

ABSTRACT

This Article reassesses the culpability of those who invest in law-breaking firms. Prosecutors currently treat investors as victims of corporate wrongdoing rather than as actors who might bear responsibility for it. This Article observes, though, that investment can facilitate, and even cause, illicit corporate activity. When investors intentionally contribute to those effects, substantive criminal law imposes liability on them just the same as it does on accomplices, conspirators, or principals in other contexts. Despite this formal parity, however, investor criminal liability is more a theoretical proposition than a practical reality.

This Article questions that status quo by asking whether and when culpable investors should be held criminally accountable for corporate wrongdoing. The answer, it explains, must balance the public's interests in law compliance and capital formation. It finds individual investors in private law-breaking firms, who have at least a knowing intent, to be plausible enforcement targets. For other investors, the status quo merits keeping. Yet, if culpable investors are at realistic risk of prosecution, law-abiding investors might, even if erroneously, perceive themselves as exposed. If so, they might make fewer and less efficient investments. To address this danger, this Article calls for safe harbors to protect investors who rely on firms' representations of having adequate corporate compliance programs or who rely on their own pre-investment investigations. These safe harbors would incent proactive compliance by firms and due diligence by investors while also distinguishing law-abiding from criminal investors.

TABLE OF CONTENTS

INTRODUCTION	853
I. INVESTORS IN CORPORATE LAW AND CRIMINAL LAW . . .	859
A. <i>Limited Liability and Its Limits</i>	861
1. Limited Liability's Limit to Vicarious Liability	862
2. Limited Liability's Limit to Corporate Law	865

* Associate Professor of Law, Emory University. I thank Bennett Capers, Adam Davidson, Andrea Dennis, Tonja Jacobi, Eisha Jain, Ben Johnson, Benjamin Levin, Kay Levine, John Meixner, Jessica Roberts, Matthew Sag, Jocelyn Simonson, and Quinn Yeargain, as well as participants in the 2024 CrimFest Conference, the 2024 Emory University and University of Georgia Workshop, the University of Alabama School of Law Southeastern Junior-Senior Workshop, the George Washington University Law School Faculty Workshop, and the 2025 BYU Law Winter Deals Conference for their helpful questions and suggestions. I also thank Hope Kagan and Feimei Zhang for research assistance. All errors are my own.

B. <i>The Rhetoric of the “Innocent” Investor</i>	867
C. <i>Prosecuting Criminal Investors</i>	871
1. Investment as Criminal Act, Investment with Criminal Intent	871
2. Potential Approaches to Prosecuting Investors . . .	874
II. THE STRUCTURE OF CRIMINAL INVESTMENT	877
A. <i>Investment in Illicit and Licit Firms</i>	877
B. <i>Capital Structure and Criminal Investment</i>	881
C. <i>Firm Structure and Criminal Investment</i>	884
1. Public Firms	885
2. Private Firms	887
III. PROSECUTORIAL DISCRETION AND INVESTOR CRIMINAL LIABILITY	889
A. <i>The Social Cost of Investor Criminal Liability</i>	889
1. The Social Cost of Prosecuting Criminal Investors	890
2. The Social Cost of Not Prosecuting Criminal Investors	892
B. <i>When Should Culpable Investors Be Prosecuted?</i>	892
1. A Five-Factor Investor-Prosecution Test	893
a. <i>Prosecute Individual, Not Institutional, Investors</i>	894
b. <i>Prosecute Private, Not Public, Investors</i>	895
c. <i>Prosecute Only Investors with Knowing or Purposeful Mens Rea</i>	896
d. <i>Prosecute Only Investors Who Substantially Contribute to Corporate Crime</i>	896
e. <i>Prosecute Only Investors in Firms That Engage in Significant Criminal Activity</i>	897
2. Applying the Five-Factor Test to DGI’s Investors	898
C. <i>Safe Harbors for Nonculpable Investors</i>	901
1. Safe Harbor 1: Reliance on Corporate Compliance Programs	902
2. Safe Harbor 2: Reliance on Pre-Investment Investigations	905
CONCLUSION	908

INTRODUCTION

Federal prosecutors have accused Ruthia He (“RH”), a former Facebook product designer, of running a massive illegal drug operation.¹ They allege that between 2020 and 2024, RH illicitly distributed forty million pills of Adderall and other stimulants.² From these forty million pills, RH is said to have generated about \$100 million in revenue.³ She is alleged to have achieved these staggering sums not as the leader of a drug-trafficking network or as a prolific street dealer but rather as the founder and chief executive officer of telemedicine startup Done Global, Inc. (“DGI”).⁴ RH’s startup employed licensed clinicians to remotely examine patients and write prescriptions for controlled substances that pharmacies filled and insurers paid for.⁵ Prosecutors allege, however, that despite possessing the trappings of a legitimate medical provider, DGI was, in fact, an illegal pill mill.⁶ Publicly, RH said that her company’s mission was “to empower everyone living with [attention deficit hyperactivity disorder (“ADHD”)] to reach their fullest potential.”⁷ But her true business model, prosecutors say, was giving drug-seeking customers false ADHD diagnoses and medically unnecessary prescriptions in violation of the Controlled Substances Act⁸ and healthcare fraud statutes.⁹

This case serves as a productive example for thinking about criminal activity and liability in the corporate context. It raises questions, however, that look beyond the culpability of either the founder or DGI itself. After all, RH is not the first founder to be accused of criminal wrongdoing,¹⁰ and DGI is not the first company to be implicated in

¹ Indictment at 1, 11, United States v. He, No. 24-cr-00329 (N.D. Cal. June 12, 2024) (indicting RH and an employee for conspiracy to distribute controlled substances, commit healthcare fraud, and obstruct justice); Ruthia He, LINKEDIN, <https://www.linkedin.com/in/rujia/> [https://perma.cc/EEX3-QA89] (disclosing that He worked at Facebook as a product designer from 2014 to 2018).

² Indictment, *supra* note 1, at 11, 13. These drugs are used to treat conditions like attention deficit hyperactivity disorder; they are also commonly misused to “improve performance” and “induce euphoria.” Shaheen E. Lakhan & Annette Kirchgessner, *Prescription Stimulants in Individuals with and Without Attention Deficit Hyperactivity Disorder: Misuse, Cognitive Impact, and Adverse Effects*, 2 *BRAIN & BEHAV.* 661, 662 (2012).

³ Indictment, *supra* note 1, at 11.

⁴ *Id.* at 11, 13.

⁵ *Id.* at 2, 12, 14, 16.

⁶ *See id.* at 16–17.

⁷ Done. *Announces Appointment of World-Renowned Psychiatrist and Psychopharmacologist as Newest Company Advisor*, DONE. (Aug. 1, 2022), <https://www.donefirst.com/company-news/dr-stahl-psychiatrist-adhd-done> [https://perma.cc/7AZ8-ESL7].

⁸ 21 U.S.C. §§ 801–904.

⁹ Indictment, *supra* note 1, at 13, 15, 18.

¹⁰ *See, e.g., infra* notes 310–16 and accompanying text.

executive misdeeds.¹¹ This Article looks beyond the executive and the corporation and refocuses on actors who, to date, are largely missing from corporate enforcement policy and practice.¹² It asks, What about law-breaking firms' investors?¹³ What blame do *they* bear, if any?

It was not cheap, after all, for DGI to grow large enough to distribute forty million pills or generate \$100 million in revenue.¹⁴ Finding customers is a challenge for any startup.¹⁵ In DGI's case, it required "spending tens of millions of dollars on deceptive social media advertisements, intentionally targeting drug-seeking patients, and advertising that members could obtain easy access to prescriptions for Adderall and other stimulants in exchange for payment of a monthly subscription fee."¹⁶ Those fees presumably supported some of DGI's marketing and other expenses. But, as is typical of technology startups, DGI also sought investment from venture capital ("VC") firms.¹⁷ VC firms pool cash from institutions and wealthy individuals to be invested by professional managers in private startups that have the potential to grow into

¹¹ Although DGI has not been charged, it is vicariously liable for any criminal acts of its chief executive officer given that the alleged acts were within RH's scope of employment and meant to benefit DGI. *See* *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 493 (1909).

¹² That is, unless the policy or practice regards those actors as blameless or victims of corporate crime. *See infra* notes 114–18 and accompanying text.

¹³ With exceptions noted in Section I.C.2, substantive criminal law usually does not *directly* prohibit investment in or financing of illicit activity. Rather, substantive law criminalizes a wide range of conduct—including investment—under accomplice and conspiracy liability theories. *See infra* notes 160, 167 and accompanying text. Still, an application of these theories to investors requires defining "investor" or "investment," a task that substantive criminal law does not seriously attempt. Because "investment" covers innumerable forms of transactions and economic interests, a generic definition meets the needs of this Article's analysis. *See* Barton Legum, *Defining Investment and Investor: Who Is Entitled to Claim?*, 22 *ARB. INT'L* 521, 522 (2006) ("[C]apital is fungible and investment of capital takes a multitude of forms in the world today."). For this Article, investors are those who provide financial support, broadly considered, to business enterprises through primary or secondary purchases of equity or debt interests or through other arrangements or transactions that have the effect of providing an enterprise with financial resources or improving its financial condition. *See* *United States v. Schullo*, 363 F. Supp. 246, 250–51 (D. Minn. 1973) (suggesting that providing insurance to illegal bookmakers is a form of financing because it reduces the bookmaker's financial risk), *aff'd sub nom.* *United States v. Thomas*, 508 F.2d 1200 (8th Cir. 1975); *see also* *Investor*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "investor" as a "buyer of a security or other property who seeks to profit from it without exhausting the principal" or "[b]roadly, a person who spends money with an expectation of earning a profit"). Importantly, these definitions remove from the Article's scope those who finance illicit activity *without* profit motive, such as those who finance crime out of some ideological, social, or familial motive.

¹⁴ *See* Indictment, *supra* note 1, at 14.

¹⁵ *See* Shaun Buck, *Getting New Customers Is Hard!*, ENTREPRENEUR (Oct. 12, 2017), <https://www.entrepreneur.com/growing-a-business/getting-new-customers-is-hard/297518> [<https://perma.cc/36N5-YZKA>].

¹⁶ Indictment, *supra* note 1, at 14.

¹⁷ *See infra* note 20 and accompanying text.

large, profitable businesses.¹⁸ In return for this cash, VC firms receive equity in the startup, as well as governance rights designed to protect their financial interests.¹⁹ In DGI's case, it raised capital from three San Francisco Bay Area-based VC firms with over \$3.5 billion in collective assets under management.²⁰

There is no public reporting on how much cash DGI received from its three VC investors. But the venture capitalists' presence in its capital structure suggests three illuminating counterfactuals of what could have happened at DGI, in both commercial and compliance terms, *without* their investments. First, without VC backing—especially in its early days—DGI likely would not have had the financial resources necessary to grow its customer base as quickly or to the same scale as it had achieved at the time of its founder's indictment.²¹ That is, without VC, DGI likely would have distributed far fewer pills by now. Second, without the pressure to grow quickly that startups face after they accept VC, DGI might have kept pace with federal and state regulations on the practice of telemedicine and the prescription of controlled substances.²² That is, without VC, the startup might have remained a smaller and slower-growing, but law-abiding, concern that served ADHD patients and not those who sought to misuse Adderall or other stimulants. Third, without VC backing, DGI might have lacked the resources necessary to run a telemedicine startup, including hiring clinical staff, finding patients, and so on.²³ In that case, it might have failed to launch or gone

¹⁸ See Paul A. Gompers, Will Gornall, Steven N. Kaplan & Ilya A. Strebulaev, *How Do Venture Capitalists Make Decisions?*, 135 J. FIN. ECON. 169, 169, 173 n.4 (2020).

¹⁹ See *id.* at 183 (“The least negotiable provisions for VC firms in descending order are pro-rata rights, liquidation preference, anti-dilution protection, valuation, board control, and vesting. The provisions on which VCs are most flexible (again, in descending order, the first being most flexible) are dividends, redemption rights, option pool, investment amount, and participation.”).

²⁰ PITCHBOOK, CRAFT VENTURES, Pitchbook 225318-25 (database updated June 19, 2025) (reporting assets under management and listing DGI among the firm's investments); PITCHBOOK, F7 VENTURES, Pitchbook 327215-89 (database updated June 18, 2025) (same); PITCHBOOK, OFFLINE VENTURES, Pitchbook 437109-76 (database updated June 19, 2025) (same). On June 16, 2024, the Author sent an email to each of the foregoing VC firms inviting them to make a comment about the DGI case or to speak with the Author. Letter from author to Craft Ventures (June 16, 2024) (on file with author); Letter from author to F7 Ventures (June 16, 2024) (on file with author); Letter from author to Offline Ventures (June 16, 2024) (on file with author). The Author received no replies.

²¹ See Jeremy Greenwood, Pengfei Han & Juan M. Sánchez, *Venture Capital: A Catalyst for Innovation and Growth*, 104 FED. RES. BANK ST. LOUIS REV. 120, 126 (2022) (“VC-backed companies are more R&D intensive and grow faster than their non-VC-backed counterparts.”).

²² See Manju Puri & Rebecca Zarutskie, *On the Life Cycle Dynamics of Venture-Capital- and Non-Venture-Capital-Financed Firms*, 67 J. FIN. 2247, 2249 (2012) (“Venture capitalists might push their companies hard to grow quickly . . .”).

²³ See generally Guoqian Xi, Jörn Block, Frank Lasch, Frank Robert & Roy Thurik, *The Survival of Business Takeovers and New Venture Start-Ups*, 29 INDUS. & CORP. CHANGE 797 (2020) (reviewing the literature on how VC funding impacts a startup's viability).

out of business early, serving neither those who truly needed ADHD treatment nor those merely seeking drugs.

Whether DGI's investors might themselves be exposed to criminal liability depends on several unknowns, particularly what they knew about illicit drug distribution at the startup and when they knew it.²⁴ But, as the counterfactuals suggest, providing DGI with capital bore on the occurrence and scale of its alleged criminal activity. Financial investment in an illicit business, in other words, can enable and increase returns to crime.²⁵ This effect appears in three forms. First, investment can satisfy upfront costs needed to commence illicit activity.²⁶ Second, it can fund the growth of preexisting illicit activity.²⁷ Third, and most troublingly, it can shape the incentives of a firm's personnel to engage in or foster illicit activity that otherwise would not have occurred.²⁸ Given this potential for investment's criminogenic influence on corporate activity, the role of investors in corporate crime requires reconsideration along doctrinal, structural, and policy lines. This Article's three Parts begin that reconsideration.

Part I revisits corporate law's doctrine of shareholder limited liability. It observes that although under most circumstances shareholders—in their capacities as such—are shielded from corporate liabilities, corporate law does not protect them against liability for their own acts.²⁹ Thus, to the extent that investment-related conduct can satisfy a theory of criminal liability, corporate law leaves shareholders exposed.³⁰ This doctrinal point yields in practice, however, to a rhetoric of investor “innocence” that more readily treats investors as victims of corporate wrongdoing rather than as persons who might bear responsibility

²⁴ Section III.B.2 presents twelve hypotheticals regarding the conduct and intent of DGI's VC investors.

²⁵ See Mirko Draca, Theodore Koutmeridis & Stephen Machin, *The Changing Returns to Crime: Do Criminals Respond to Prices?*, 86 REV. ECON. STUD. 1228, 1255 (2019) (presenting results “suggest[ing] that the returns to illegal activity are an important input into criminal decision-making”).

²⁶ Cf. William R. Kerr & Ramana Nanda, *Financing Constraints and Entrepreneurship* 1 (Harvard Bus. Sch., Working Paper No. 10-013, 2009) (“Surveys of current and potential entrepreneurs suggest that obtaining adequate access to capital is one of the biggest hurdles to starting and growing a new business.”).

²⁷ See Greenwood et al., *supra* note 21, at 126.

²⁸ See Brian J. Broughman & Matthew T. Wansley, *Risk-Seeking Governance*, 76 VAND. L. REV. 1299, 1306 (2023) (“Many startups accelerate growth through ‘blitzscaling’—taking shortcuts like hiring candidates without vetting them, bringing unfinished products to market, and neglecting compliance and other long-term risks.”).

²⁹ See *infra* Section I.A.

³⁰ This Article uses the term “criminal” or its equivalent in the sense of a person having done an act that could be objectively said to have violated substantive criminal law. It does not mean that the act has been identified by law enforcement or prosecuted, nor that it has led to conviction. See Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 990–94 (2019) (observing the distinction between arrests or indictments and legal guilt).

for it.³¹ Part I explains that although this solicitous rhetoric toward investors has superficial appeal, it relies on erroneous assumptions about investors' roles within business enterprises. In truth, investors sometimes bear responsibility for corporate crime. Beyond the financial responsibility for corporate wrongs that investors bear, they might also be responsible in a moral or legal sense, or both.³² Yet, despite their potential culpability, the rhetoric of investor innocence removes those influential actors from decision-making about the appropriate targets of corporate enforcement.

Although investors' moral responsibility for corporate wrongdoing is worthy of inquiry,³³ Part I focuses on their criminal-legal liability and its consequences.³⁴ In doing so, Part I outlines three theories under which prosecutors could charge investors for investment-related conduct. The first is that an investor acts as an accomplice to corporate crime.³⁵ The second is that an investor joins a conspiracy by agreeing to finance some corporate criminal objective.³⁶ And the third is that the act of investment itself is sometimes a principal offense.³⁷ For each theory, the underlying act and its causal effect—making an investment that advances some illicit corporate activity—are indistinguishable between culpable and nonculpable investors. For example, whether DGI's VC investors knew that RH would use their cash to violate federal law or not, the act (investment in DGI) and its alleged effect (enabling illegal distribution of controlled substances) were the same. The distinguishing mark of a culpable investor, then, is the presence of criminal intent.³⁸

The doctrinal analysis in Part I informs Part II's structural analysis of criminal investment. That analysis considers three aspects of illicit corporate activity: organizational legitimacy, capital structure, and ownership structure.³⁹ It addresses three questions. First, how does an

³¹ See *infra* Section I.B.

³² Martin E. Sandbu, *Stakeholder Duties: On the Moral Responsibility of Corporate Investors*, 109 J. BUS. ETHICS 97, 100 (2012) ("Most will think that by investing in my shadowy money-making activity, you carry some moral responsibility for my wrongful conduct.").

³³ See *id.*

³⁴ Civil and regulatory liability are alternatives or complements to criminal enforcement against investors. A comparative treatment of private, regulatory, and criminal enforcement against culpable investors would be a valuable contribution to the literature and policy intervention. This Article's scope, however, is limited to investigating the criminal dimensions of investor culpability.

³⁵ In that case, a person aids and abets illicit activity through the act of investment or investor participation in governance. See *infra* Section I.C.2.

³⁶ See *infra* Section I.C.2.

³⁷ Some laws—such as the federal statute against illegal gambling operations—directly prohibit investment in specific types of criminal enterprises. See 18 U.S.C. § 1955. More general laws—including state and federal anti-money-laundering and anti-racketeering statutes—also proscribe the act of investment in illicit activity. See *infra* Section I.C.2.

³⁸ See *infra* Section I.C.1.

³⁹ See *infra* Part II.

enterprise's apparent legitimacy—for example, a telemedicine startup that illicitly offers controlled substances as opposed to a street gang that illicitly offers those same substances—affect investor culpability?⁴⁰ Second, how does capital structure—whether an investment is made in the form of debt or equity—affect investor culpability?⁴¹ And last, how does ownership structure—whether the enterprise is publicly or privately held—affect investor culpability?⁴²

Part III answers the question at the Article's heart: When investors *can* be prosecuted for illicit activity that happens within a firm, when, if ever, *should* they be? The answer requires appreciating the social cost of prosecuting culpable investors, as well as that of their *nonprosecution*. The chief social cost of prosecuting is that culpable investors' realistic risk of prosecution is apt to increase *ex ante* risk perception among even investors who lack the criminal intent that demarks their culpable peers.⁴³ If so, the consequence would be less and less-efficient capital formation.⁴⁴ But *not* prosecuting culpable investors tends to impose parallel social costs in the form of diminished law compliance.⁴⁵ If investors know that they will not be held accountable for culpable investment-related conduct, then they will be more likely to engage in that conduct and hence to foster illicit corporate activity.⁴⁶

Part III explains, then, that the decision whether to prosecute culpable investors requires careful balancing of both costs. The composition of the investor class matters to that calculus. Culpable investors are likely a small minority of all investors.⁴⁷ Given the substantial cost of chilling good-faith investors, proper balancing of the social costs of investor prosecution and nonprosecution would lead to charging only egregious cases in which pursuing investors would contribute meaningfully to general deterrence.⁴⁸ Prime cases will be those in which an individual investor has made a substantial investment in a private law-breaking firm with a knowing or purposeful intent and with a significant law violation resulting from the firm's activities.⁴⁹

After outlining that standard, Part III calls for prosecutorial agencies that do pursue culpable investors to adopt two safe harbors. These safe harbors are designed to reduce criminogenic investment, motivate corporate compliance, and protect good-faith investors. Each turns on

⁴⁰ See *infra* Section II.A.

⁴¹ See *infra* Section II.B.

⁴² See *infra* Section II.C.

⁴³ See *infra* Section III.A.1.

⁴⁴ See *infra* Section III.A.1.

⁴⁵ See *infra* Section III.A.2.

⁴⁶ See *infra* Section III.A.2.

⁴⁷ See *infra* note 265 and accompanying text.

⁴⁸ See *infra* Section III.B.1.

⁴⁹ See *infra* Section III.B.1.

the negation of criminal intent as establishing that law-abiding investors are not to blame should their investments go on to facilitate corporate wrongdoing. Neither alters the scope of investor criminal liability; rather, the safe harbors clarify conditions under which investors lack criminal intent. The first would allow investors to rely in good faith on firms' representations that they have appropriate compliance programs or are undertaking appropriate remedial efforts, if and after violations occur.⁵⁰ This safe harbor would be particularly protective of investors in public companies.⁵¹ The second would provide that investors who conduct good-faith due diligence into a firm's compliance before investing in it will be presumed to lack criminal intent regarding any wrongdoing that should happen later.⁵² This safe harbor would be particularly protective of investors in private companies, including startups.⁵³ Part III's discussion of each safe harbor closes with model policy text and commentary.

I. INVESTORS IN CORPORATE LAW AND CRIMINAL LAW

This Part tackles a puzzle: Those who help facilitate criminal activity in all kinds of ways—from supplying weapons,⁵⁴ to selling drug precursors,⁵⁵ to driving getaway cars⁵⁶—are routinely prosecuted. But those who invest in businesses that engage in criminal activity rarely, if ever, face charges.⁵⁷ Why do those who help facilitate crime via finan-

⁵⁰ See *infra* Section III.C.1.

⁵¹ See *infra* note 335 and accompanying text.

⁵² See *infra* Section III.C.2.

⁵³ See *infra* notes 249–50 and accompanying text.

⁵⁴ See, e.g., CAL. PENAL CODE § 12022.4(a) (West 2022) (imposing additional punishment on those who furnish firearms to another “for the purpose of aiding, abetting, or enabling that person or any other person to commit a felony”).

⁵⁵ See, e.g., *United States v. Karawi*, 213 F. App'x 570 (9th Cir. 2006) (affirming the conviction of a convenience-store owner who sold pseudoephedrine that he knew would be used to manufacture methamphetamine); *People v. Lauria*, 59 Cal. Rptr. 628, 634 (Ct. App. 1967) (“It seems apparent . . . that a supplier who furnishes equipment which he *Knows* will be used to commit a serious crime may be deemed from that knowledge alone to have intended to produce the result.” (emphasis added)).

⁵⁶ *People v. Bartlett*, 414 N.E.2d 253, 256 (Ill. App. Ct. 1980) (“Where a defendant knowingly drives a getaway car, he is legally accountable for the crime committed.”).

⁵⁷ As part of the research for this Article, the Author searched extensively for cases in which a mere investor was charged in connection with some corporate crime. Although the Author expected to find few such cases, *none* were identified. One case came close to dealing with a mere investor, though. In *United States v. Bell*, a participant in a retail investment scam appealed his conviction by arguing in part that he was merely a “big-picture investor with no involvement in day-to-day operations.” 112 F.4th 1318, 1335 (11th Cir. 2024). The Eleventh Circuit held, however, that a reasonable jury could convict him as a conspirator for “bankroll[ing]” the scam and *actively* participating in maintaining the scam’s website. *Id.*

cial investment avoid prosecution when those who do so through other means do not?

Two explanations for the nonprosecution of investors hold particular promise and are consistent with one another.⁵⁸ First, those who invest in businesses that engage in illicit activity rarely do so with criminal intent.⁵⁹ Even when they do, prosecutors might struggle to obtain evidence sufficient to prove that intent.⁶⁰ That is, there is a limited supply of investors to prosecute. The second explanation is that law enforcement looks past investors, even the culpable ones, because it privileges the investor class. That is, there is limited demand for investor prosecution. Under this explanation, a foundational principle of modern corporate law—that a company’s shareholders generally enjoy a privilege against vicarious liability for its debts or obligations⁶¹—constrains prosecutors’ conception of investors as actors who might contribute to corporate crime.

The second explanation is the more interesting one because it calls into question the decisions prosecutors make today and asks what effects would follow if they were to choose a different path. This explanation embraces the modal corporation as having “powerless” shareholders.⁶² Such shareholders do not know what managers are doing and cannot reasonably hope to influence their actions, whether for right or wrong.⁶³

As part of this separation of investors from management, prosecutors might view shareholders sympathetically as ordinary people saving for retirement and life’s other financial needs.⁶⁴ If they act based on this conception, prosecutors would hold investors blameless and instead

⁵⁸ They are not the only explanations, however. For example, investigating or prosecuting investors is costly. Given that cost, enforcers might find that focusing on the organization and culpable insiders is the most efficient use of limited public enforcement resources. That could be especially so if opening the door to investor prosecution would massively expand the universe of defendants—not just legal investors, like VC funds, but also the individuals who made decisions for those investors, like VC professionals.

⁵⁹ See *infra* Sections I.C, II.C.

⁶⁰ See MIRIAM H. BAER, MYTHS AND MISUNDERSTANDINGS IN WHITE-COLLAR CRIME 121 (2023) (“[U]nderenforcement arises when liability thresholds are met and exceeded well in advance of viability thresholds. Under this scenario, numerous individuals violate the law, but they nevertheless evade detection, prosecution or punishment.”).

⁶¹ See *supra* note 68 and accompanying text.

⁶² See Jennifer G. Hill, *Images of the Shareholder – Shareholder Power and Shareholder Powerlessness*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 53, 54 (Jennifer G. Hill & Randall S. Thomas eds., 2015) (attributing the popular image of the “powerless” shareholder to the depiction of shareholders in ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932)).

⁶³ See *id.* at 54.

⁶⁴ See, e.g., Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 TEX. L. REV. 285, 350 (2021) (“Put simply, corporate crime affects all of us—as consumers, employees, and investors who increasingly save for retirement by investing in the stock market.”).

turn their focus to other actors, including firms themselves, but especially culpable insiders.⁶⁵ Indeed, prosecutors might view investors as victims of corporate wrongdoing along with other sympathetic stakeholders like nonculpable employees and customers.⁶⁶ This Part explains, however, that limited-liability doctrine has little bearing on *criminal* liability. It further explains that a rhetoric treating investors as generally blameless misapprehends their liability-bearing role and their potential as a lever over corporate compliance.⁶⁷ After offering these points, Section I.C outlines culpable accomplice, conspiracy, and principal liability theories under which motivated prosecutors could charge investment-related conduct.

A. *Limited Liability and Its Limits*

A core feature of corporate law is that shareholders avoid personal liability for a corporation's debts or other obligations.⁶⁸ Some scholars, especially in the tort context, have questioned this doctrine on risk-allocation and equity grounds.⁶⁹ Around the globe, some jurisdictions have crafted exceptions to the doctrine, particularly concerning labor and environmental claims.⁷⁰ Still, the doctrine prevails in the United States and other jurisdictions, and scholars and market participants celebrate it as essential for promoting efficient capital formation.⁷¹ This Section contributes to the doctrine's literature by observing that

⁶⁵ See *infra* note 94 and accompanying text.

⁶⁶ See *infra* notes 114, 118 and accompanying text.

⁶⁷ See *infra* Sections I.A.2, I.B.

⁶⁸ FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 40 (paperback ed. 1996) ("Limited liability is a distinguishing feature of corporate law—perhaps *the* distinguishing feature."); 18 AM. JUR. 2D *Corporations* § 46 (2025) ("The corporate form normally insulates shareholders . . ."). This doctrine extends to other forms of business organizations—including limited liability companies and limited partnerships—but for simplicity, this Article generally maintains the corporation and shareholder frame throughout, or else refers more generally to "firms," "entities," "enterprises," or the like.

⁶⁹ For the most famous contribution to that literature, see generally Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991) (challenging the doctrine of shareholder limited liability, especially in the context of corporate torts).

⁷⁰ See Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism*, 47 SEATTLE U. L. REV. 535, 543–51 (2024) (observing that some jurisdictions in the Global South have narrowed limited-liability doctrine, especially in the environmental and labor cases).

⁷¹ See, e.g., David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1566 (1991) ("[F]ew topics are liable to strike the reader as less likely to produce changes in the law than an analysis of limited liability. No principle seems more established in capitalist law or more essential to the functioning of the modern corporate economy." (footnotes omitted)).

criminal liability is beyond its limits.⁷² Several points support this conclusion. First, investor criminal liability arises directly from an investor's own acts or conduct.⁷³ Limited-liability doctrine, in contrast, protects against *vicarious*, rather than *direct*, liability.⁷⁴ That is, a shareholder is not responsible for corporate liabilities solely by virtue of being a shareholder.⁷⁵ The shareholder *is* responsible, however, for acts taken personally. Further, the doctrine allocates *private* liabilities, leaving exposure under regulatory or criminal law unaltered. Relatedly, the doctrine does not disturb a sovereign's power to enforce its penal laws against foreign business entities or their affiliates.

1. *Limited Liability's Limit to Vicarious Liability*

Limited-liability doctrine offers investors a narrow protection against vicarious liability: It protects shareholders from personal responsibility for corporate liabilities derived merely from their status as shareholders.⁷⁶ This rule is underscored by the veil-piercing exception to limited liability, under which abuses of the corporate form justify the imposition of vicarious liability on a corporation's shareholders.⁷⁷

If the modal shareholder is understood to be an investor in a public corporation, then it is sensible enough to conceive of limited liability, in practical terms, as immunity.⁷⁸ For those passive investors, corporate law's narrow protection against vicarious liability is realistically total: Given their remoteness from the firm, that liability theory would be

⁷² *United States v. Sain*, 141 F.3d 463, 474 (3d Cir. 1998) (“[A corporation] has the capacity of being aided and abetted. To hold otherwise would allow the controlling stockholder of a corporation to enjoy the benefits of the corporate form . . . without accepting the burden of assuming criminal responsibility when the individual causes the corporation to commit a crime.”); *United States v. Lovett*, No. 11-cr-00165, 2013 WL 1405421, at *10 (D. Nev. Apr. 5, 2013) (“Defendant insinuates that this Court impermissibly allowed the Government to ‘reach beyond the wall of protection that divides a corporation from the people or entities that exist behind it.’ However, Defendant incorrectly applies a *civil* liability limitation to a *criminal* case.”).

⁷³ *See, e.g., Sain*, 141 F.3d at 468 (imposing criminal liability on a defendant for fraudulently submitting invoices on behalf of a company); *Lovett*, 2013 WL 1405421, at *1 (imposing criminal liability on a defendant for falsifying records to induce a loan to the defendant's company).

⁷⁴ *See* STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL*, at v (2024–2025 ed. 2024) (clarifying that the veil-piercing exception to limited liability relates to *vicarious* liability, whereas the alter-ego theory relates to *direct* liability).

⁷⁵ *Id.*

⁷⁶ Andrew K. Jennings, *Criminal Subsidiaries*, 92 FORDHAM L. REV. 2013, 2030 (2024).

⁷⁷ *Cf.* Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 2 (1994) (“The corporate form limits the liability of shareholders and other participants arising from the enterprise[, including] . . . vicarious liability for the acts of others . . .” (footnote omitted)).

⁷⁸ *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1047 (1991) (noting that in a large dataset of veil-piercing cases, the veil was never pierced against shareholders of a publicly traded corporation).

the only one under which they plausibly could be held responsible.⁷⁹ That practical immunity is consistent with an understanding of shareholders as passive participants in a public firm's capital structure and governance.⁸⁰

But investors who actively engage in a firm's affairs remain *directly* liable for their own personal conduct—the Delaware General Corporation Law,⁸¹ for instance, announces a rule that “stockholders of a corporation shall not be personally liable for the payment of the corporation's debts.”⁸² It excludes, however, shareholders' liabilities that arise “by reason of their own conduct or acts.”⁸³ Similarly, under the Model Business Corporation Act—which over thirty states have adopted⁸⁴—a “shareholder of a corporation is not personally liable for any liabilities of the corporation (including liabilities arising from acts of the corporation)” but remains subject to liability “by reason of the shareholder's own acts or conduct.”⁸⁵

Although scant case law discusses what acts or conduct fall within those statutory exclusions,⁸⁶ personally committed criminal or tortious acts would fit easily.⁸⁷ Imagine, for example, a public corporation that manufactures a product that injures consumers. A stranger to the company who purchases a few of its shares would bear no legal responsibility for the decisions its personnel made in selling the dangerous product. The stranger's nonliability for those injuries would rest in the heartland of limited-liability doctrine.⁸⁸ But a shareholding executive

⁷⁹ Cf. PRESSER, *supra* note 74 (“[T]here is a continuing awareness that controlling individuals and entities who *directly participate* in causing harm ought consequently to have liability imposed on them.”).

⁸⁰ See *infra* notes 219–20 and accompanying text.

⁸¹ DEL. CODE ANN. tit. 8, §§ 101–398 (2025).

⁸² *Id.* § 102(b)(6).

⁸³ *Id.*

⁸⁴ See *Model Business Corporation Act Resource Center*, AM. BAR ASS'N (Jan. 1, 2023), https://www.americanbar.org/groups/business_law/resources/model-business-corporation-act/ [<https://perma.cc/8GYF-97WD>].

⁸⁵ MODEL BUS. CORP. ACT § 6.22(b) (AM. BAR ASS'N 2024).

⁸⁶ See *Cigna Health & Life Ins. Co. v. Audax Health Sols., Inc.*, 107 A.3d 1082, 1096 (Del. Ch. 2014) (“[T]here is virtually no case law on 8 Del. C. § 102(b)(6).”).

⁸⁷ Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1, 11 (1997) (“The second major exception to the use of a business form to insulate participants from liability is based on the participants' direct liability for their own acts. Individuals who act for the corporations are held personally liable . . . if their action on behalf of the entity is tortious, criminal, or otherwise wrongful.”); see also *Miller v. Am. Tel. & Tel. Co.*, 507 F.2d 759, 763 (3d Cir. 1974) (holding that the business-judgment rule does not protect corporate directors against allegations of intentional violations of law); *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) (“[O]ne cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey.”).

⁸⁸ See Jennings, *supra* note 76, at 2030 (offering the hypothetical of a retired teacher who holds shares in a corporate offender whose conduct the teacher has no influence over).

who knew that a product was dangerous and nevertheless directed its sale would enjoy no real protection—to be sure, the executive’s status as a shareholder would not create vicarious liability for the injuries, but the executive could be liable as a direct participant in the acts that gave rise to the product liability.⁸⁹ Similarly, imagine an influential shareholder who was not employed by the firm and who, despite knowing of the product’s dangers, pressured management to market it anyway. That shareholder might be protected qua shareholder from liability for the resulting injuries, but tort law might nevertheless hold the shareholder responsible as an aider and abettor for the act of encouraging the harm-causing decision.⁹⁰

This distinction between vicarious and direct liability matters because the concepts manifest differently between the firm and other corporate actors. Substantive criminal law imposes vicarious liability on corporations under a respondeat superior theory for on-the-job offenses committed by their employees and agents.⁹¹ Other actors—including officers, directors, and employees—are usually not liable for corporate offenses due solely to their association with the firm.⁹² This is also the case for shareholders.⁹³ Nevertheless, insider shareholders routinely face liability, in both the civil and criminal contexts, for acts they personally take within their employing firms.⁹⁴ This point is unremarkable given that it is the corporation’s insiders who most prominently do, or encourage, the unlawful acts it might become liable for.⁹⁵ But outsider shareholders and insiders are not always dissimilarly situated.

⁸⁹ See, e.g., *Leon v. Shmukler*, 992 F. Supp. 2d 179, 194 (E.D.N.Y. 2014) (“[T]he general principle is that a corporate officer who commits or participates in a tort, even if it is in the course of the officer’s duties on behalf of the corporation, may be held individually liable.”).

⁹⁰ See RESTATEMENT (SECOND) OF TORTS § 876 (AM. L. INST. 1979) (“For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or *encouragement* to the other so to conduct himself . . .” (emphasis added)).

⁹¹ See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493 (1909).

⁹² But see V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1492–96 (1996) (considering alternative approaches, including imposing vicarious civil or criminal liability on managers).

⁹³ See Jennings, *supra* note 76, at 2030–31.

⁹⁴ See U.S. Dep’t of Just., Justice Manual § 9-28.010 (2023) (“[Individual] accountability deters future illegal activity, incentivizes changes in corporate behavior, ensures that the proper parties are held responsible for their actions, and promotes the public’s confidence in our justice system. Prosecutors should focus on wrongdoing by individuals from the very beginning of any investigation of corporate misconduct.”); see also, e.g., *Indictment*, *supra* note 1, at 13–17 (describing the personal actions taken by RH to illegally distribute controlled substances through DGI); Press Release, U.S. Dep’t of Just., Backpage Principals Convicted of \$500M Prostitution Promotion Scheme (Nov. 17, 2023), <https://www.justice.gov/opa/pr/backpage-principals-convicted-500m-prostitution-promotion-scheme> [<https://perma.cc/JS43-4NS4>] (announcing the convictions of several defendants who used their corporate entities to promote prostitution).

⁹⁵ See *supra* note 94.

Although mere investors might spend less time around the crime scene than active participants do, that absence does not mean that the two groups are not working together.⁹⁶ This possibility requires reassessment of outsider investors' roles in, and culpability for, the illegal conduct within law-breaking firms.

2. *Limited Liability's Limit to Corporate Law*

Limited-liability doctrine only protects corporate actors from the liabilities allocable by corporate law, which chiefly includes contract, tort, and other private liabilities—that is to say, limited-liability doctrine does not limit the application of regulatory or criminal law to corporate actors, including investors.⁹⁷ For example, when courts enforce regulatory law in the context of corporate groups—in which multiple entities hold interests in each other as a single firm—they sometimes impose common-enterprise liability on the group rather than respect the legal separation of its constituents.⁹⁸ Doing so satisfies the regulatory objectives of noncorporate substantive law—such as environmental or employee benefits law—that diverge from the liability-allocation principles of corporate law.⁹⁹ These non-corporate-law interventions in corporate-related liability are further justified by a need to harmonize conflicting areas of law.¹⁰⁰

Earlier work has noted that corporate borders become “porous” when exposed to criminal liability.¹⁰¹ This work has focused on the porousness between entities within corporate groups rather than between entities and outside investors.¹⁰² But a corporate group's constituents and outside investors are not dissimilarly situated in the criminal context. The entity-to-entity relationships within a corporate group are fundamentally shareholding relationships in that one entity is

⁹⁶ See *infra* Section I.C.2.

⁹⁷ See Jennings, *supra* note 76, at 2030–31.

⁹⁸ *FTC v. AMG Servs., Inc.*, 558 F. Supp. 3d 946, 963 (D. Nev. 2021) (“Under the theory of common enterprise, each entity in a group of interrelated companies can be held jointly and severally liable for the actions of other entities in that group.”).

⁹⁹ See Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 115–23 (2014).

¹⁰⁰ Cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“A court must therefore interpret the statute ‘as a symmetrical and coherent regulatory scheme,’ and ‘fit, if possible, all parts into an [sic] harmonious whole.’” (citation omitted) (first quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995); and then quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1995))); *Davis v. Mich. Dep’t of the Treasury*, 489 U.S. 803, 809 (1989) (recognizing the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme”).

¹⁰¹ See Jennings, *supra* note 76, at 2030.

¹⁰² See *id.*

the shareholder of another.¹⁰³ The shared criminal liability in corporate groups generally arises not from shareholding relationships, however, but rather from the actions of shared employees and agents—that is to say, the shared liability centers on criminal *acts* fairly attributable to each entity and is undisturbed by their legal separateness.¹⁰⁴ Similarly, prosecution of an outside investor might center on the investor's own actions in contributing to wrongdoing at a corporation. That focus on the investor's own acts would look past the legal separation between investor and corporation.¹⁰⁵

This limitation appears even more clearly in cross-jurisdictional enforcement, such as when sovereign *A* enforces its regulatory and penal laws against actors associated with a firm formed under the laws of sovereign *B*. Although state corporate law's limited-liability protections cross jurisdictional borders, that extension is limited to the doctrine's narrow, private-liability-allocating scope.¹⁰⁶ That is, the law of a corporation's incorporating jurisdiction governs its shareholders' vicarious liability for corporate debts, but it does not constrain other sovereigns' enforcement of their own public laws.¹⁰⁷ This point explains why federal courts have “consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies.”¹⁰⁸ Because federal courts, in deciding whether to respect the corporate form “must consider the importance of [its] use . . . in the federal statutory scheme,” they are apt to be less deferential to the legal separation of corporate actors than is state corporate law.¹⁰⁹ This cross-jurisdictional point is important given that corporate wrongdoing often transgresses sovereigns other

¹⁰³ See *id.*; Henry W. Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 CALIF. L. REV. 12, 19 (1926) (noting that “in the ordinary case” the corporate entity relationship “is that of shareholder to corporation and does not constitute the subsidiary an agent”).

¹⁰⁴ See Jennings, *supra* note 76, at 2031 (“Although courts often look to corporate law’s veil-piercing doctrine in deciding whether to disregard entity borders, they must also consider the commands of other areas of common and statutory law. . . . [Q]uestions of corporate crime may require applying more criminal law than corporate.”).

¹⁰⁵ See *id.* (“[M]ere observance of separate corporate formalities would tend to receive less weight from a criminal judge than from a civil one.”).

¹⁰⁶ See *supra* note 72 and accompanying text.

¹⁰⁷ Compare RESTATEMENT (SECOND) OF CONFLICT OF L. § 307 cmt. a (AM. L. INST. 1971) (“The local law of the state of incorporation will be applied to determine the liability to which a person subjects himself by purchasing, or subscribing to, shares of a corporation.”), with *id.* § 89 cmt. e (“A state will only entertain a criminal prosecution brought under its own local law.”).

¹⁰⁸ *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983); accord *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co.*, 417 U.S. 703, 713 (1974) (“[T]he corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. In such cases, [federal courts] . . . will deal with the substance of the action and not blindly adhere to the corporate form.” (citations omitted)).

¹⁰⁹ *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987).

than firms' incorporating states.¹¹⁰ In those cases, especially, there is no reason to expect sovereign *B*'s corporate law to constrain sovereign *A*'s penal law.

B. *The Rhetoric of the "Innocent" Investor*

Modern finance theory teaches investors "to be more or less indifferent to the fate of any given corporation" and to diversify their holdings across firms whose governance they might rationally ignore.¹¹¹ The contemporary investor, particularly the shareholder in a public company, can thus be regarded as something of an absentee owner. An attenuated relationship to the firm implies that the investor has no, or at least cannot be expected to exercise any, influence over its conduct. The investor, then, as so many other counterparties that interact with a law-breaking firm,¹¹² is not responsible for its wrongdoing.

Consistent with that learning, prosecutors have embraced a well-established rhetoric of investor innocence.¹¹³ As a matter of policy, the U.S. Department of Justice ("DOJ") instructs corporate prosecutors to consider the interests of "blameless investors," in addition to "blameless" employees and other stakeholders.¹¹⁴ It even approves of mitigating penalties against corporate offenders to avoid indirectly punishing their investors.¹¹⁵ DOJ justifies this policy because investors "may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, have been unable to prevent it, or have been victimized

¹¹⁰ The small state of Delaware, for example, is "the state of incorporation for nearly 68.2 percent of the Fortune 500, 65 percent of the S&P 500, and approximately 79 percent of all U.S. initial public offerings in calendar-year 2022." Amy L. Simmerman et al., *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, WILSON SONSINI, GOODRICH & ROSATI (Apr. 23, 2024) (footnote omitted), <https://www.wsgr.com/en/insights/delawares-status-as-the-favored-corporate-home-reflections-and-considerations.html> [<https://perma.cc/N3FV-6TLE>]. Most operate primarily outside the state, however, and so their law violations would be expected to occur primarily in other states.

¹¹¹ Lawrence E. Mitchell, *The Morals of the Marketplace: A Cautionary Essay for Our Time*, 20 STAN. L. & POL'Y REV. 171, 174 (2009).

¹¹² See, e.g., *Sanabria v. United States*, 437 U.S. 54, 70 n.26 (1978) ("Numerous cases have recognized that [the federal illegal-gambling statute] proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor.").

¹¹³ Lawrence E. Mitchell, *The "Innocent Shareholder": An Essay on Compensation and Deterrence in Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 243, 288 (observing that the rhetoric of investor innocence is a longstanding trope).

¹¹⁴ See U.S. Dep't of Just., Justice Manual § 9-28.010 (2023) ("Thus, the manner in which prosecutors perform their jobs—including the professionalism and civility demonstrated, willingness to secure the facts in a manner that encourages corporate compliance and self-regulation, and appreciation that corporate prosecutions can cause harm to *blameless investors*, employees, and others—affects public perception of the Department's mission." (emphasis added)).

¹¹⁵ *Id.* § 9-28.1100.

by it.”¹¹⁶ This rhetoric features in DOJ officials’ public articulations of corporate enforcement policy.¹¹⁷ In discrete corporate criminal resolutions, prosecutors regularly invoke the interests of innocent investors in justifying their settlement decisions.¹¹⁸

The rhetorical appeal of shareholder innocence grows stronger if investors are not merely remote from the firm and passive in its affairs, but also sympathetic in their investment purposes. Surely, the rhetoric would suggest, workers investing for their retirement or parents investing

¹¹⁶ *Id.*

¹¹⁷ See, e.g., *Cleaning Up the C-Suite: Ensuring Accountability for Corporate Criminals: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. 9 (2023) (statement of Nicole Argentieri, Acting Assistant Att’y Gen. of the United States, Criminal Division & Matthew Olsen, Assistant Att’y Gen. of the United States, National Security Division) (“We also want to encourage companies to claw back or withhold compensation from culpable executives, which will shift the burden of financial penalties resulting from criminal conduct onto individual wrongdoers and away from often innocent shareholders.”); Press Release, U.S. Dep’t of Just., Deputy Assistant Attorney General Matthew S. Miner Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets (July 25, 2018), <https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th> [<https://perma.cc/UY5Z-Z68N>] (“[W]e are working to avoid imposing excessive corporate penalties that harm innocent shareholders, employees, and other stakeholders.”); Eric H. Holder, Jr., Att’y Gen. of the U.S., Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), <https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law> [<https://perma.cc/W3P8-CECA>] (“[I]t’s not right for punishment to be borne *exclusively* by the company, its employees, and its innocent shareholders.”).

¹¹⁸ See, e.g., Deferred Prosecution Agreement at 6, *United States v. Genzyme Corp.*, No. 15-cr-00352 (M.D. Fla. Sept. 3, 2015), ECF No. 2-1 (listing “potential collateral consequences of proceeding with a prosecution, which may cause undue harm to innocent individuals including . . . shareholders” as a settlement consideration); Deferred Prosecution Agreement at 2, *United States v. Unico, Inc.*, No. 13-cr-00355 (S.D. Cal. Jan. 30, 2013), ECF No. 5 (recognizing that “a guilty plea and criminal conviction of Unico [for filing false information with the SEC] would have caused negative collateral consequences to Unico’s . . . shareholders . . . incommensurate with their roles in the offense”); Letter from Seth R. Aframe & Arnold H. Huftalen, Assistant U.S. Att’ys, Dist. of New Hampshire, to Maria A. Barton, Benton J. Campbell & Barry M. Sabin, Att’ys for Imperial Holdings, Inc. 1 (Apr. 30, 2012), <https://www.sec.gov/Archives/edgar/data/1494448/000119312512193743/d344352dex101.htm> [<https://perma.cc/5DNR-9M5U>] (resolving a corporate enforcement in light of “the negative impact and collateral consequences that charging the Company would have on the Company’s . . . shareholders”); Deferred Prosecution Agreement at 2–3, *United States v. CommunityOne Bank*, No. 11-cr-122 (W.D.N.C. Apr. 28, 2011), ECF No. 2 (citing the “negative collateral consequences to hundreds of employees not involved in the [defendant’s] BSA/AML program, its shareholders and the communities it serves” as justifying a bank’s deferred prosecution); Letter from Michael J. Sullivan, U.S. Att’y, Dist. of Massachusetts, to Joseph F. Savage, Jr., Couns. to NeuroMetrix, Inc. 2 (Jan. 26, 2009) (on file with author) (declining to indict a corporation due to potential collateral harm to shareholders); Letter from Michael J. Sullivan, U.S. Att’y, Dist. of Massachusetts, to Brien T. O’Connor, Couns. to Express Scripts, Inc. 2 (Sept. 11, 2007) (on file with author) (declining to indict a corporation due to potential collateral harm to “current employees, ESI clients and their members, and shareholders”); Press Release, U.S. Dep’t of Just., Prudential Financial Subsidiary Agrees to Pay \$600 Million to Settle Securities Fraud Allegations (Aug. 28, 2006), https://www.justice.gov/archive/opa/pr/2006/August/06_odag_574.html [<https://perma.cc/8JKK-KXML>].

for their children's education are *victims* of value-destroying corporate crime.¹¹⁹ That solicitude for the small investor might persist even in capital markets in which most shares are held by large, sophisticated, and powerful money managers.¹²⁰ Many of the ultimate beneficiaries of those managers' holdings are, after all, retirement or college savers.¹²¹ Sympathy for small investors, in other words, might be conveyed to those who indirectly invest on their behalf.¹²² But this rhetoric obscures three points about the proper understanding of investors and corporate wrongdoing. In consequence, it risks distorting enforcement decisions in corporate cases.

This distortion first follows from an underappreciation that investors accept a trade-off between bearing a corporation's business and legal risks and receiving a share of its profits and residual value.¹²³ Although that balance varies depending on the nature of an investment—for instance, the inverse relationships between risk and reward among common equity, preferred equity, and debt—risk bearing is an essential function of the investor.¹²⁴ A failure by prosecutors to impose realized risk on investors—that is, bearing collective losses in consequence of corporate offending—distorts the risk-reward bargain that investors accept.¹²⁵ It does so by securing the profits of corporate activity to shareholders while inequitably sharing the costs of corporate wrongdoing with the public.¹²⁶

¹¹⁹ Of course, prosecutors as a group likely overlap, and so identify, with those who save for retirement, college costs, or other financial needs. See Lund & Sarin, *supra* note 64, at 350.

¹²⁰ See generally Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17 (2019), for a comprehensive explanation of the nature of these intermediary investors and their role in corporate governance.

¹²¹ *Id.* at 34 (“[A] substantial percentage of all mutual fund investing occurs within the framework of employer-sponsored 401(k) retirement plans.”).

¹²² See Leo E. Strine, Jr., *Stewardship 2021: The Centrality of Institutional Investor Regulation to Restoring a Fair and Sustainable American Economy*, 24 U. PA. J. BUS. L. 1, 17 (2021) (“[I]nstitutional investors who take human investors’ money . . . should be required to consider the investment objectives and horizons of their ultimate beneficiaries, such as saving for retirement, saving for their children’s education, or investing in a socially responsible manner, when making voting and other stewardship decisions.”).

¹²³ See Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 290 (1980) (“We . . . commonly observe that the joint functions of risk bearing and ownership of capital are repackaged and sold in different proportions to different groups of investors.”); see also Mitchell, *supra* note 113, at 288 (observing that it is appropriate to penalize “innocent shareholders” for corporate wrongs against third parties so that the shareholders internalize those harms).

¹²⁴ See Fama, *supra* note 123, at 290.

¹²⁵ See Thompson, *supra* note 78, at 1070 (“The value of shareholders’ investments in public corporations declines when civil or criminal liability is assessed against the enterprise . . .”).

¹²⁶ See Andrew K. Jennings, *The Market for Corporate Criminals*, 40 YALE J. ON REGUL. 520, 555–56 (2023) (criticizing resolutions of enforcement actions in which the public bears some of an offender corporation’s sanction).

Second, investors as a collective are not powerless over corporate conduct. Money managers that hold large blocks of securities for the ultimate benefit of small investors have the ability to influence the election of corporate directors and the adoption of compliance-enhancing corporate policies.¹²⁷ Investors' collective power over corporate governance marks them as a potential lever over corporate compliance.¹²⁸ Holding investors blameless writ large, or permitting law-breaking firms to claim their innocence as a shield, tends to demotivate them from pressing corporate management to maintain and improve law compliance.¹²⁹

The prior two points raise descriptive and pragmatic cautions against a rhetoric of investor innocence. But such a rhetoric also overlooks a third point, as a moral and legal matter, that some investors might be individually responsible for corporate wrongdoing. For example, in a public company, a large or controlling shareholder might knowingly encourage management to take actions that would be profitable but lead to law violations.¹³⁰ Or, in a private company, an investor might know that a firm has an illegal business model, yet still agree to finance it.¹³¹ As the next Section explains, either scenario just described could embrace an investor's prosecution.¹³² A firm could thus have culpable investors in its capital structure, a possibility that must be reckoned with if the rhetoric touting the interests of truly innocent investors is to be coherent.

The rhetoric of investor innocence has superficial appeal, no doubt. Although this Article questions a presumption of investor blamelessness, it does not dispute that most of the time, investors are blameless or,

¹²⁷ Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2046 (2019) (“[T]he large and growing stakes held by [the three largest index fund managers] give them significant influence over the outcomes of corporate votes. This influence leads, in turn, to their substantial influence over the decisions of corporate managers, even before matters come to a vote.” (emphasis omitted)).

¹²⁸ See Asaf Eckstein, *The Virtue of Common Ownership in an Era of Corporate Compliance*, 105 IOWA L. REV. 507, 538–46 (2020) (theorizing that institutional investors have incentive and power to mitigate macro legal risks).

¹²⁹ See Jennings, *supra* note 126, at 557 (calling for enforcement practices that motivate investors to value corporate compliance).

¹³⁰ See Kevin E. Davis & Mariana Pargendler, *Corruption and Controlling Shareholders*, 25 THEORETICAL INQUIRIES L. 107, 109 (2024) (“[C]ontrolling shareholders of family-controlled companies often have both opportunities and incentives to become personally involved in corrupt activity.”). The same avenues for direct involvement in illicit acts, primarily board seats and management roles, might naturally enable majority shareholders, the direct and indirect electors of these positions, to pressure or encourage management to undertake them without the shareholders' direct involvement.

¹³¹ See *infra* Section III.B.2.

¹³² See *infra* Section I.C.

as a matter of prosecutorial discretion, should be held so.¹³³ But it urges that corporate enforcement policy and practice ought also to account for investor culpability. That accounting would include a rhetorical shift that concedes the social cost of holding investors uniformly blameless, acknowledges their collective power to influence corporate compliance, and admits that some investors are not so innocent.

C. *Prosecuting Criminal Investors*

The last two Sections dismiss the idea that corporate law protects investors from prosecution in connection with corporate wrongdoing.¹³⁴ This Section offers a positive account of how investment-related conduct could satisfy one or more theories of criminal liability. Although not an exhaustive treatment—facts are variable and prosecutors are creative, after all—it outlines potential scenarios under which investors' conduct might satisfy accomplice, conspiracy, or principal theories of liability.¹³⁵

1. *Investment as Criminal Act, Investment with Criminal Intent*

This Section looks beyond the actors traditionally scrutinized for responsibility in corporate offending, such as a firm's managers, rank-and-file employees, and agents. It considers, rather, investors in their capacities as such. That is, it focuses on the "mere investor," one whose sole relationship with an enterprise is as investor, rather than as investor *plus* controller, officer, director, employee, contractor, commercial counterparty, or so on. Three kinds of acts by the mere investor could constitute the actus reus required for a violation of substantive criminal law: the act of investment itself, formal participation in corporate governance, or informal participation in corporate governance. Throughout the rest of the Article, these three kinds of acts will be referred to collectively as "investment-related conduct."

The act of investment, the actual transfer of value in exchange for an interest in an enterprise, is the essence of investor status. When a person transfers value to a firm that is engaged, or will engage, in illicit activity, that person provides the enterprise with resources it needs to carry out illicit activity. For preexisting activity, those financial resources can permit its scaling up or maintenance.¹³⁶ The act of investment thus results in more law violation than would occur in its absence.¹³⁷

¹³³ See *infra* Section III.B.

¹³⁴ See *supra* Sections I.A–B.

¹³⁵ It is not inconceivable that investment-related conduct could satisfy an accessory-after-the-fact theory, but it is a less likely case.

¹³⁶ See *supra* note 28 and accompanying text.

¹³⁷ See Greenwood et al., *supra* note 21, at 122, 124.

Investors, particularly equity investors, also enjoy rights to participate in corporate governance. These rights follow from the act of investment, but they are not always exercised by the actor who transferred value to the firm.¹³⁸ Because investment interests are typically transferrable—such as by sale or bequest—multiple persons could become investors following a single act of investment, including the original purchaser and those who later succeed to that person’s interests.¹³⁹ This point distinguishes how one can engage in culpable conduct as an investor. Most obviously, investment-related conduct includes making an investment, but it can also include participating in governance. These two types of conduct do not necessarily coincide in the same person.

The following illustration helps outline the distinctions. Imagine, for example, that *A* receives shares in a primary offering by company *X* in exchange for cash.¹⁴⁰ Disappointed in company *X*’s business results, *A* agrees to sell those shares to *B*. *B*, having bought the shares in a secondary transaction, has succeeded to investor status by virtue of purchasing the shares.¹⁴¹ What *B* does with that purchased status could fit within this Article’s definition of criminal investment-related conduct. Imagine further, for example, that *B* uses this new status to encourage company *X*’s management to improve the business’s results by undertaking new efforts that are profitable but illegal. This wrongful investment-related conduct would follow from *B*’s purchased right to participate in company *X*’s governance but not the act of purchasing the shares itself.

Investors participate in governance both formally and informally. As a formal matter, corporate law or a firm’s governing documents give shareholders rights meant to enable monitoring and to mitigate agency costs.¹⁴² These rights include electing the company’s board of directors,¹⁴³ approving extraordinary transactions,¹⁴⁴ obtaining information about

¹³⁸ See Henry Hansmann & Reinier Kraakman, *What Is Corporate Law?*, in *THE ANATOMY OF CORPORATE LAW* 1, 1 (2004) (listing share transferability among the five basic legal features of a corporation, along with legal personality, limited liability, delegated management, and investor ownership).

¹³⁹ See *id.*

¹⁴⁰ *Offering*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining “primary offering” as “[a]n offering of newly issued securities”).

¹⁴¹ *Id.* (defining “secondary offering” as “[a]n offering of previously issued securities by persons other than the issuer”).

¹⁴² See Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 800 (2017) (“[D]iscretionary control rights[] are rights that principals may exercise without first having to prove that the agent violated an established restriction.”).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

the company's affairs,¹⁴⁵ and suing for breaches of fiduciary duty by directors or officers.¹⁴⁶ In some cases, those formal governance rights are contractually augmented.¹⁴⁷ Informally, investors—especially large investors in public companies or VC investors in startup companies—might solicit information from management or offer advice or encouragement to management.¹⁴⁸ Management responds to this informal engagement for several reasons. In public companies, engagement between management and an important investor happens under the implicit threat that the investor could exercise formal governance powers in ways undesirable to management¹⁴⁹ or put downward pressure on the price of the company's securities by selling.¹⁵⁰ In private firms, management might heed investors' informal input out of genuine regard for their advice¹⁵¹ or, less volitionally, by understanding the implicit threat that failure to heed current investors could undermine future access to capital.¹⁵²

Those are the acts that could give rise to criminal liability. Setting aside the rare strict liability offense, criminal liability requires coupling such an act with illicit intent.¹⁵³ Every day, countless investors engage in the investment-related conduct just described. Some invest in companies that use the capital they receive to break the law—even if breaking the law is not those firms' entire purpose. Presumably, most

¹⁴⁵ See, e.g., DEL. CODE ANN. tit. 8, § 220 (2025) (granting inspection rights to shareholders); MODEL BUS. CORP. ACT § 16.02 (AM. BAR ASS'N 2024) (same).

¹⁴⁶ Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 421–22 (2006) (outlining shareholder derivative suits).

¹⁴⁷ See Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 YALE J. ON REGUL. 1124, 1148–54 (2021) (documenting the practice in public companies); Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913, 930–33, 946–53 (2021) (documenting the practice in private companies).

¹⁴⁸ See Lucian Bebchuk & Scott Hirst, *Big Three Power, and Why It Matters*, 102 B.U. L. REV. 1547, 1571–82 (2022); Stefano Bonini, Senem Alkan & Antonio Salvi, *The Effect of Venture Capitalists on the Governance of Firms*, 20 CORP. GOVERNANCE: INT'L REV. 21, 23–24, 30 (2012).

¹⁴⁹ Caleb N. Griffin, *Humanizing Corporate Governance*, 75 FLA. L. REV. 689, 736 (2023).

¹⁵⁰ See generally Anat R. Admati & Paul Pfleiderer, *The “Wall Street Walk” and Shareholder Activism: Exit as a Form of Voice*, 22 REV. FIN. STUD. 2645 (2009) (discussing how large shareholders can discipline management through the credible threat of exit, which can depress stock prices and influence managerial behavior).

¹⁵¹ See generally Harry J. Sapienza, *When Do Venture Capitalists Add Value?*, 7 J. BUS. VENTURING 9 (1992) (examining how venture capitalists can influence firm performance through advisory roles and management support beyond formal control mechanisms).

¹⁵² See Anat R. Admati & Paul Pfleiderer, *Robust Financial Contracting and the Role of Venture Capitalists*, 49 J. FIN. 371, 374 (1994).

¹⁵³ See WAYNE R. LAFAYE, SUBSTANTIVE CRIMINAL LAW § 5.1 (3d ed. 2024) (describing the general requirement for both actus reus and mens rea before criminal liability can attach). *But see* People v. Lauria, 59 Cal. Rptr. 628, 633 (Ct. App. 1967) (holding that intent may be inferred from the acquisition of a “special interest in the operation of [an] illegal enterprise”).

of those investors did not know about, and would not have condoned, the violations.

Imagine, for example, one who buys shares in an offering by a global construction company, which then secretly pays bribes to obtain business. Because money is fungible, part of the investor's cash contributed to the bribe payments, even if the shareholder expected the company to obtain business through lawful means only. The lack of a culpable mental state, however, separates this unwitting investor from those who could plausibly be enforcement targets.¹⁵⁴ Although an investor's actions might indirectly facilitate corporate offending, the investor is not personally blameworthy without some intent that the offenses be carried out.¹⁵⁵ From least to most culpable, that intent can be satisfied by a negligent, reckless, knowing, or purposeful state of mind.¹⁵⁶ Because many, although perhaps not all, offenses likely to be committed in the corporate context require at least a knowing intent, this Article's analysis will generally treat knowledge as the threshold mens rea at which investment-related conduct gives rise to criminal liability.¹⁵⁷

2. *Potential Approaches to Prosecuting Investors*

When firms break the law, federal and state prosecutors rarely, if ever, prosecute their mere investors.¹⁵⁸ But what if that were to change? What approaches might prosecutors take to charge investment-related conduct? Federal and state criminal codes are capacious and malleable, and so an accounting of potential theories is not feasible. This subsection, however, provides a high-level view of how prosecutors could pursue culpable investors under accomplice, conspiracy, or principal theories.

The likeliest sources of investor criminal liability are accomplice—that is, aider and abettor—and conspiracy liability. In those cases,

¹⁵⁴ See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (“[T]he presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.”).

¹⁵⁵ See *Rehaif v. United States*, 588 U.S. 225, 231 (2019) (citing to the “legion” of “cases in which [the Supreme Court has] emphasized scienter’s importance in separating wrongful from innocent acts”).

¹⁵⁶ See *United States v. Bailey*, 444 U.S. 394, 404 (1980) (setting forth “a hierarchy of culpable states of mind . . . in descending order of culpability, as purpose, knowledge, recklessness, and negligence”).

¹⁵⁷ See *Rosemond v. United States*, 572 U.S. 65, 79–80 (2014) (“The law does not, nor should it, care whether [an accomplice] participates with a happy heart or a sense of foreboding. Either way he has the same culpability, because either way he has knowingly elected to aid in the commission of a peculiarly risky form of offense.”). But see Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 236 (2000) (“For decades, the American courts and legislatures have debated whether knowledge or ‘true purpose’ should be the required mens rea for accomplice liability.”).

¹⁵⁸ See *supra* notes 117–20 and accompanying text.

investment-related conduct is not itself a criminal act, but rather gives rise to responsibility derivative of another's conduct. Accomplice liability most directly challenges the rhetoric of the innocent investor.¹⁵⁹ An indictment as an aider and abettor should not surprise a knowing investor who funds a clearly illegal business,¹⁶⁰ as such an investor "associated with a criminal venture, purposefully participated in the criminal activity, and sought by [their] actions to make the venture successful."¹⁶¹ Although the investor might have tried to avoid liability by merely cutting a check and not participating in the firm's governance,¹⁶² that check alone represented an "affirmative" act "designed to aid the venture."¹⁶³ Indeed, even an "act of relatively slight moment may warrant a jury's finding participation" in corporate offenses.¹⁶⁴ Further, so long as prosecutors can prove the investor's knowing intent, "it does not take much to satisfy [accomplice liability's] facilitation element,"¹⁶⁵ although admittedly the patina of legitimacy examined in Section II.A could complicate efforts to prove intent.¹⁶⁶

Alternatively, a prosecutor could proceed on a conspiracy theory. It could be alleged that there was "an agreement between two or more persons to break the law"¹⁶⁷—that is, an agreement to pool resources and talents to conduct illicit corporate activity. The investor's investment-related conduct would be "an overt act in furtherance of the conspiracy[]"¹⁶⁸—that is, providing the company with funds to carry out illicit acts. An investor who knows of present or planned illicit activity

¹⁵⁹ *United States v. Baca-Valenzuela*, 118 F.3d 1223, 1232 (8th Cir. 1997) ("A fundamental theory of American criminal law is that there is no offense of aiding and abetting or accomplice liability as such. Instead, accomplice liability is merely a means of determining which persons were closely enough related to the underlying offense to be prosecuted and convicted of that offense.").

¹⁶⁰ See Luke Scheuer, *The "Legal" Marijuana Industry's Challenge for Business Entity Law*, 6 WM. & MARY BUS. L. REV. 511, 518 (2015) ("In the case of the marijuana industry, law breaking permeates the entire business, from the investors who provide funding, to the managers and the employees who are engaging in an enterprise that is criminal under federal law.").

¹⁶¹ See *United States v. Landerman*, 109 F.3d 1053, 1068 n.22 (5th Cir. 1997); accord, e.g., JUD. COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS § 401 (2024) ("Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." (emphasis omitted)).

¹⁶² See Andrew K. Jennings & Kimberly D. Krawiec, *Vice Capital*, 15 U.C. IRVINE L. REV. (forthcoming 2025) (reporting that VC investors in cannabis startups sometimes attempt to limit their exposure to criminal enforcement by not participating in governance).

¹⁶³ See *Landerman*, 109 F.3d at 1068 n.22. Investors who purchase securities second hand would appear to have plausible defenses against an aider-and-abettor liability theory in that they do not directly fund the firm. See *infra* Section II.B.

¹⁶⁴ *United States v. Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962).

¹⁶⁵ *United States v. Bennett*, 75 F.3d 40, 45 (1st Cir. 1996).

¹⁶⁶ See *infra* Section II.A.

¹⁶⁷ *United States v. Summers*, 414 F.3d 1287, 1295 (10th Cir. 2005).

¹⁶⁸ *Id.*

and nevertheless decides to engage in investment-related conduct could be said to have joined the conspiracy willfully,¹⁶⁹ and the investor would be vicariously liable for that activity even after simply cutting a check and participating no further.¹⁷⁰

Perhaps less likely, there are several principal-liability theories under which investment-related conduct is itself criminal. A number of industry-specific and generic federal and state criminal statutes impose such liability. Federal law, for instance, directly criminalizes “financ[ing] . . . or own[ing] . . . an illegal gambling business.”¹⁷¹ In one example, clients of Vanguard, a major investment manager, sued the firm following a DOJ crackdown on illegal gambling businesses that Vanguard had invested in.¹⁷² Although prosecutors did not charge Vanguard along with the gambling operators under the statute, they *could* have.¹⁷³ In another setting, the Controlled Substances Act criminalizes “profit[ing] from” a “place for the purpose of unlawfully manufacturing, storing, *distributing*, or using a controlled substance.”¹⁷⁴ Recalling the motivating example, if DGI’s office space was a place for “distributing” controlled substances, then, read strictly, the statute could criminalize venture capitalists’ knowing investments in it.¹⁷⁵

More generic statutes could also be used by prosecutors to pursue investors as principals. Some states’ money-laundering laws, for example, broadly criminalize a person who knowingly “finances or invests or intends to finance or invest funds that the person believes are intended to further the commission of criminal activity.”¹⁷⁶ Further, federal and state racketeering influenced and corrupt organizations (“RICO”)

¹⁶⁹ *United States v. Johnson*, 42 F.3d 1312, 1319 (10th Cir. 1994). Although the viability of accomplice theories to charge secondary purchasers is questionable, *see supra* note 163, it could be more plausibly said that a knowing secondary purchaser has “joined” a conspiracy.

¹⁷⁰ The case supplying this principle of vicarious liability for conspirators involved, suitably enough, an illegal liquor business. *Pinkerton v. United States*, 328 U.S. 640, 646 (1946).

¹⁷¹ 18 U.S.C. § 1955(a). Courts give the word “finance” under the statute broad interpretation in line with its “ordinary sense.” *See United States v. Greco*, 619 F.2d 635, 638 (7th Cir. 1980).

¹⁷² Grant McCool, *Vanguard Sued for “Illegal Gambling” Investments*, REUTERS (Aug. 29, 2008, 6:49 PM), <https://www.reuters.com/article/markets/us/vanguard-sued-for-illegal-gambling-investments-idUSN29472821/> [<https://perma.cc/5KZR-ADW4>]; *see also, e.g.*, Memorandum from Fox Rothschild, LLP to AdvisorShares Investments, LLC 9 (Apr. 15, 2019), https://www.sec.gov/Archives/edgar/data/1408970/000161577419005745/s117396_ex99-q2.htm [<https://perma.cc/G89K-BS37>] (listing several cannabis-related businesses that Vanguard had also invested in).

¹⁷³ *See supra* note 171 and accompanying text.

¹⁷⁴ 21 U.S.C. § 856(a)(2) (emphasis added).

¹⁷⁵ *See supra* note 1 and accompanying text.

¹⁷⁶ TEX. PENAL CODE ANN. § 34.02 (West 2025); *accord* DEL. CODE ANN. tit. 11, § 951 (2025); N.C. GEN. STAT. § 14-118.8 (2025).

statutes could be used against those who knowingly take an interest in an enumerated racket.¹⁷⁷

II. THE STRUCTURE OF CRIMINAL INVESTMENT

Naturally, any type of organization can commit crimes, and organizations vary structurally, including in terms of their apparent legitimacy, their capital structure, and their firm structure. Culpable investment-related conduct inherently occurs in the context of those structures and is thus shaped by them. This Part analyzes the complications that these variations pose for assessing whether an investor is criminally liable and, if so, whether prosecution is warranted.

A. *Investment in Illicit and Licit Firms*

Whether a firm is generally of an illicit or licit nature shades analysis of its investors' culpability. As a practical matter, those who knowingly finance illicit activity *are* prosecuted in the United States,¹⁷⁸ but those who finance seemingly licit enterprises that engage in illicit activity are not.¹⁷⁹ Without expressing a normative view on what activities are or ought to be unlawful, licit enterprises can be defined as those engaged in activities that are at least superficially lawful, whereas illicit enterprises

¹⁷⁷ See 18 U.S.C. § 1961(1) (defining “racketeering activity” to include violations of the Controlled Substances Act); *id.* § 1962(b) (prohibiting “any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce”). Most RICO statutes have a limited set of predicate acts, at least one of which must be satisfied to give rise to liability. *See, e.g.*, N.Y. PENAL LAW §§ 460.10–20 (McKinney 2025). Many of those acts align most directly with noncorporate illicit activity. *See, e.g., id.* § 460.10. The federal RICO statute, however, includes wire fraud as a predicate act, which covers a wide range of white-collar or corporate offending. *See* 18 U.S.C. § 1961(1) (defining “racketeering activity” to include “wire fraud”).

¹⁷⁸ In *Ex parte Couch*, for example, a mother was charged with financing her son's flight from probation. 629 S.W.3d 509, 511 (Tex. App. 2021), *vacated*, 629 S.W.3d 217 (Tex. Crim. App. 2021). In a similar case, a wealthy businessman was charged with financing his father's flight from a murder prosecution. David Ovalle, *Pincho Part-Owner Accused of Funding Fugitive Dad Won't Get Jail Time*, MIA. HERALD (Apr. 4, 2019, 4:37 PM), <https://www.miamiherald.com/news/local/crime/article228822169.html> [<https://perma.cc/76J6-BQQH>]. Outside of fugitive financing, a former Florida state legislator was charged with multiple campaign-finance violations for illicitly funding a fraudulent election campaign. Scott Glover, Curt Devine & Audrey Ash, *Former Florida State Senator Charged in Spoiler Candidate Scheme*, CNN (Mar. 18, 2021, 6:42 PM), <https://www.cnn.com/2021/03/18/politics/frank-artiles-arrested-sham-candidate-invs/index.html> [<https://perma.cc/744W-JV4N>]. In the national-security space, 18 U.S.C. § 2339A prohibits providing “material support” to terrorist organizations, and the government has used this statute heavily since the September 11 attacks. *See* Maryam Jamshidi, *The Private Enforcement of National Security*, 108 CORNELL L. REV. 739, 743–44 (2023) (“Since 9/11, the government has relied heavily on the concept of material support to prosecute and otherwise address the terrorist threat.”).

¹⁷⁹ *See supra* note 57 (discussing the paucity of cases in which mere investment in a licit enterprise is charged).

engage in activities that are plainly illegal. A licensed pharmacy and a drug-selling gang readily illustrate the distinction.

Although illicit and licit activity are objective and dichotomous states, the neat binary suggested by the two labels might often fail to capture the reality of organizational malfeasance. To be sure, although some firms' purposes are entirely licit or illicit, others might engage in a mix of lawful and unlawful activities, or they might engage in some lawful activities in an unlawful way.¹⁸⁰ A street gang that sells controlled substances, for example, is entirely unlawful.¹⁸¹ But pills that would be unlawful for the gang to sell may be lawfully provided by licensed clinics or pharmacies—that is, the business of providing controlled substances is licit when done by certain actors but illicit when done by others.¹⁸² Yet, those permitted actors must also sell controlled substances only in a certain way. They act illicitly when they provide controlled substances but fail to comply with a host of regulations meant to restrict access to patients with true medical need.¹⁸³

This dichotomy is complicated by the idea of legitimacy, a normative overlay on what is and is not illicit. Legitimacy, for this Article's purposes, refers to the quality by which third parties perceive an enterprise as being lawful and otherwise within socially acceptable bounds.¹⁸⁴ Imagine, for example, that both a drug-selling gang and a VC-backed startup each exist for the true purpose of selling controlled substances to anyone who wants them. All things being equal, the former will sooner come under law enforcement's gaze, even if the latter illegally distributes drugs at a greater scale. That differential response can be attributed to several factors, including, potentially, differences in the

¹⁸⁰ See Andrew K. Jennings, *Criminal Recordkeeping*, 102 WASH. U. L. REV. 223, 254–61 (2024) (typologizing illicit business activity as illicit activity in illicit organizations, illicit activity in licit organizations, and licit activity in licit organizations done illicitly).

¹⁸¹ See generally Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 Q.J. ECON. 755 (2000) (analyzing a drug-selling gang as a business organization).

¹⁸² 21 U.S.C. § 841(a) (criminalizing possession, dispensation, manufacture, and possession of controlled substances); *id.* § 822(b) (allowing those properly registered to engage in the same).

¹⁸³ See generally 21 U.S.C. §§ 801–904 (establishing a regulatory framework to control the manufacture, distribution, and dispensation of controlled substances to prevent abuse and ensure use only for legitimate medical purposes); see also Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 IOWA L. REV. 1885, 1893 (2021) (observing that “the first principle of corporate law” is that “corporations may only conduct lawful business by lawful means”).

¹⁸⁴ See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOCIO. REV. 147, 155 (1983) (“[O]rganizations with ambiguous or disputed goals are likely to be highly dependent upon appearances for legitimacy. Such organizations may find it to their advantage to meet the expectations of important constituencies about how they should be designed and run.”).

socioeconomic backgrounds of the businesses' principals and related law enforcement bias.¹⁸⁵ But the expected differential is also directly attributable to the patina of legitimacy that the latter drug seller enjoys. After all, controlled substances may only be sold by certain people in certain settings under certain conditions. Those people, settings, and conditions are bound up in the professional and social authority signified by white lab coats.¹⁸⁶ By contrast, if law enforcement notices that those who are categorically prohibited from selling controlled substances are doing so, it might move quickly to investigate and arrest them.¹⁸⁷ Those investigations and arrests might include the use of physical, even deadly, force.¹⁸⁸

The same conduct committed by a startup cloaked in white-lab-coat authority, however, might prompt a more cautious and methodical approach by law enforcement.¹⁸⁹ Even if it appears that the startup is illegally distributing drugs, can investigators be *sure* that it is violating the law to a degree that warrants criminal enforcement? The startup has the trappings, after all, of being a legitimate business in the health-care industry that provides drugs in line with professional standards of care. Superficial similarities between law-abiding and law-breaking enterprises, then, mean that an investigation of a putatively legitimate enterprise more likely proceeds via subpoenas and grand-jury testimony rather than by search warrants and station-house interrogations.¹⁹⁰

¹⁸⁵ See JEFFREY REIMAN & PAUL LEIGHTON, *THE RICH GET RICHER AND THE POOR GET PRISON* 64 (9th ed. 2010); MICHELLE ALEXANDER, *THE NEW JIM CROW* 62 (10th anniversary ed. 2010) (noting, for example, that DOJ under President Ronald Reagan announced a shift in federal prosecutorial focus away from white-collar and toward street crime); KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE* 179 (2d ed. 2004) (“Surveillance practices long associated with prison have spilled into communities, as law enforcers and security guards increasingly monitor public places—a trend captured in the phrase ‘the prisonization of society.’”).

¹⁸⁶ See generally Dan W. Blumhagen, *The Doctor's White Coat: The Image of the Physician in Modern America*, 91 *ANNALS INTERNAL MED.* 111 (1979) (providing a historical and symbolic analysis of the white lab coat).

¹⁸⁷ See Julie R. O'Sullivan, *Is the Corporate Criminal Enforcement Ecosystem Defensible?*, 47 *J. CORP. L.* 1047, 1047 (2022) (“It has been widely acknowledged that, compared to many drug, immigration, or simple fraud cases, investigating corporate crime is difficult. That said, with sufficient effort and resources, it is possible to bring corporations and their executives to account.”).

¹⁸⁸ See Rachel A. Harmon, *When Is Police Violence Justified?*, 102 *NW. U. L. REV.* 1119, 1121 (2008) (“Police officers use force as an authorized form of state coercion, but they do so in tense and often emotionally charged interpersonal encounters.”).

¹⁸⁹ See O'Sullivan, *supra* note 187, at 1058–62.

¹⁹⁰ The federal investigation into DGI, for example, began at least eighteen months before the company's founder was indicted. Rolfe Winkler, *DEA Investigating ADHD Telehealth Provider Done*, *WALL ST. J.* (Sept. 16, 2022, 8:04 PM), <https://www.wsj.com/articles/dea-investigating-adhd-telehealth-provider-done-11663239601> [<https://perma.cc/RVU7-KFJV>]; see also Miriam H. Baer, *Law Enforcement's Lochner*, 105 *MINN. L. REV.* 1667, 1668–71 (2021) (characterizing the government's current use of subpoenas and internal investigations as an “ease-of-access era” for investigating corporate crime).

This patina of legitimacy can even shield illicit enterprises when they simply adopt generic signifiers of being proper businesses.¹⁹¹ Would a truly illicit business, an enforcer might wonder, rent office space, enroll employees in a health plan, purchase advertising, and do other things typical of licit enterprises?

Whether a given firm projects legitimacy complicates a culpability analysis. Investors, knowingly or not, sometimes contribute to the impression that a firm is legitimate. Their presence in a firm's capital structure suggests to outsiders that the firm operates in rough accord with law.¹⁹² Surely sophisticated venture capitalists, outside observers might assume, would be faithful fiduciaries to their limited partners and actively avoid investing in illegal businesses.¹⁹³ In that light, culpable investing could undermine enforcement against law-breaking firms by creating uncertainty around their illicitness. But, on the other hand, the patina of legitimacy might also fool investors into believing an enterprise is law-abiding, removing any criminal intent from the equation, or, at least, confounding efforts to prove its presence.¹⁹⁴

Complicating this analysis further is that both illicit and licit activity can occur within a single firm. A global construction company that bribes foreign officials to obtain contracts engages in both licit acts (building things) and illicit acts (paying bribes). That mix of licit and illicit conduct could permit an investor to convincingly assert—whether truthfully or not—a lack of knowledge about the firm's illicit acts.

Illicitness also sometimes adopts a transitory quality. A firm's unlawful business model might become lawful in the future, perhaps because its entry into the market forced changes to existing law.¹⁹⁵ Ride-hailing company Uber and short-term-rental company Airbnb, for instance, allegedly facilitated illegal taxi and hotel operations until local officials acquiesced to their business models.¹⁹⁶ In another example, at the time of their foundings, real-money fantasy-sports companies

¹⁹¹ Donald E. deKieffer, *Trade Diversion as a Fund Raising and Money Laundering Technique of Terrorist Organizations*, in COUNTERING THE FINANCING OF TERRORISM 150, 151 (Thomas J. Biersteker & Sue E. Eckert eds., 2008) (noting that front businesses created to finance terrorist organizations must create “trappings of legitimacy”).

¹⁹² Greg Fisher, Suresh Kotha & Amrita Lahiri, *Changing with the Times: An Integrated View of Identity, Legitimacy, and New Venture Life Cycles*, 41 ACAD. MGMT. REV. 383 (2016) (identifying channels by which new ventures obtain legitimacy, including from the signal provided by outside investment).

¹⁹³ *But cf.* Hartsel v. Vanguard Grp., Inc., No. 5394, 2011 WL 2421003 (Del. Ch. June 15, 2011) (addressing allegations that an investment manager knowingly invested client funds in illegal offshore gambling operations), *aff'd*, 38 A.3d 1254 (Del. 2012).

¹⁹⁴ See *supra* Section I.C.

¹⁹⁵ See Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 398–403 (2017), for the leading account of how entrepreneurs enter markets illegally and later achieve market and legal acceptance.

¹⁹⁶ See *id.* at 399–403.

DraftKings and FanDuel allegedly offered illegal gambling services.¹⁹⁷ Later, a U.S. Supreme Court decision and changes in state law legalized online sports betting in many jurisdictions.¹⁹⁸ In these transitory cases, attempts to prove investors' mental states could be confounded by the effects of changing regulatory environments. Alternatively, prosecutors might elect not to pursue subsequently legalized conduct.¹⁹⁹ Thus, perniciously, investors could escape accountability for culpable investment-related conduct if law-breaking firms use their cash to secure favorable regulatory developments.²⁰⁰

The transitory quality also appears when corporate practices mature from violating to complying with law. Software company Zenefits, for example, started life as an unlicensed insurance broker.²⁰¹ As it raised capital and engaged more experienced management, it obtained required broker licenses and became compliant.²⁰² In cases of similar shifts in internal practices, investors could credibly claim that their investment-related conduct was compliance enhancing. That is, they used their influence as potential or actual investors to force reforms at a law-breaking firm. If such a claim were true, it would tend to undermine that an investment happened with criminal intent. Indeed, it would be consistent with an optimistic thesis that investors have latent power to promote corporate compliance.²⁰³

B. Capital Structure and Criminal Investment

The form that an investment in a law-breaking firm takes also informs its culpability analysis. Consider two investors: one who

¹⁹⁷ See *id.* at 402–03; Walt Bogdanich, Joe Drape & Jacqueline Williams, *Attorney General Tells DraftKings and FanDuel to Stop Taking Entries in New York*, N.Y. TIMES (Nov. 10, 2015), <https://www.nytimes.com/2015/11/11/sports/football/draftkings-fanduel-new-york-attorney-general-tells-fantasy-sites-to-stop-taking-bets-in-new-york.html> [https://perma.cc/4QNT-FJXE].

¹⁹⁸ See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 454 (2018); Brian Pempus, *States Where Sports Betting Is Legal – January 2025*, FORBES (Jan. 1, 2025, 9:00 AM), <https://www.forbes.com/betting/legal/states-where-sports-betting-is-legal/> [https://perma.cc/Y95A-TEGY].

¹⁹⁹ See, e.g., Kurtis Lee & Yesenia Robles, *Denver Joins Boulder in Dropping Prosecution of Limited Pot Possession*, DENVER POST (Apr. 30, 2016, 4:10 PM), <https://www.denverpost.com/2012/11/15/denver-joins-boulder-in-dropping-prosecution-of-limited-pot-possession/> [https://perma.cc/5RBQ-YVQX].

²⁰⁰ Cf. Pollman & Barry, *supra* note 195, at 392 (presenting political activity as a major component of law-breaking firms' business models).

²⁰¹ YourPeople, Inc., Securities Act Release No. 10,429, 117 SEC Docket 3715 (Oct. 26, 2017).

²⁰² Heather Clancy, *Zenefits CEO David Sacks Talks Compliance, Mobile Aspirations*, FORTUNE (June 2, 2016, 11:36 AM), <https://fortune.com/2016/06/02/zenefits-david-sacks-compliance-mobile/> [https://perma.cc/R2D4-CB2G] (quoting the company's replacement chief executive officer as saying “[w]here I feel good is where we have brought our licensing into compliance [b]ut the thing I said when I took over is that we couldn't just see the licensing problem as a failure of technology”).

²⁰³ Cf. *supra* note 128 and accompanying text.

specializes in equity and the other in debt.²⁰⁴ The equity investor purchases a share of the firm's profits and residual value and, along with it, governance rights.²⁰⁵ This investor enjoys an interest in the firm's upside. Yet because equity holders have the lowest priority if the firm becomes insolvent, the investor also risks losing the entire value of the investment.²⁰⁶ The debt investor, on the other hand, purchases the right to receive a return of principal and a payment of interest, along with negative control rights designed to minimize the chances that the debt goes unpaid.²⁰⁷ This investor does not share in the firm's upside but does face comparatively less downside because it has a higher-priority claim on the firm's assets.

All things being equal, culpable investors will tend to be equity investors. Equity signals a stronger commitment to the success of a firm. That commitment follows because equity shares in the upside enterprise value created by profitable illicit activity. Debt investors, in contrast, have weaker commitments to the success of a firm beyond its ability to repay.²⁰⁸ Indeed, their limited upside makes them rationally risk averse, and knowingly lending funds to support illegal activity is exceptionally risky. First, there is the typical credit risk associated with debt investment—that the financed activity might not generate enough cash to repay the financing. *Culpable* lending carries additional risks, however. In addition to everyday credit risk, the borrower's prosecution might drive it into insolvency or its assets might be forfeited to the government.²⁰⁹ Further, a culpable debt investor would itself be exposed to prosecution.²¹⁰ These added risks—potential total loss of investment for reasons unrelated to commercial credit risk plus the

²⁰⁴ Other forms of investment, including preferred equity and convertible debt, blur these equity and debt lines. In the interests of analytical clarity, though, this Section adheres to the dichotomy just described.

²⁰⁵ See *supra* notes 142–46 and accompanying text.

²⁰⁶ See Douglas G. Baird, *Chapter 11's Expanding Universe*, 87 TEMP. L. REV. 975, 979 (2015) (“By the early 2000s, equity commonly received nothing in the vast majority of [corporate bankruptcy] cases.”).

²⁰⁷ See Douglas G. Baird, *Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy*, 165 U. PA. L. REV. 785, 794 (2017) (“Creditors also enjoy control rights. By virtue of their ability to waive defaults instead of accelerating their loans, creditors can also influence the behavior of their debtor.” (footnote omitted)).

²⁰⁸ Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 CALIF. L. REV. 745, 760–61 (2020) (“[T]he directors of an insolvent firm may consider the interests of creditors when assessing their fiduciary duty to the corporation, which in some cases might justify taking a ‘less risky’ course of action . . .”).

²⁰⁹ See 21 U.S.C. § 853(a)(2) (subjecting to criminal forfeiture any of a firm's “property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of” a crime); see also *id.* § 853(b) (permitting third parties with security interests to retain property that would be otherwise forfeited, provided that they were unaware of the property's criminal use).

²¹⁰ See *supra* Section I.C.

potential for criminal enforcement—would require equity-like returns to compensate for them.²¹¹ They thus would tend to be accepted only by risk-preferring equity investors.²¹²

Beyond that structural theory, there are other reasons why equity investors are more likely to culpably invest than debt investors. These reasons point toward the policy interventions called for in Part III. Equity investors—such as general partners of VC funds—might be contractually bound not to invest in illegal businesses, but they are subject to practically no compliance-forcing public regulation.²¹³ Conducting pre-investment due diligence could alert equity investors to compliance risk at a prospective investee, thus allowing them to avoid financing illicit corporate activity or to insist on remediation in return for investment.²¹⁴ But equity investors might forgo diligence if they perceive it as inefficient in light of their overall investment expectations.²¹⁵ As a result, considerable ex ante opportunity for those equity investors to use diligence to improve compliance would be lost if there are insufficient consequences for dispensing with diligence.

Lenders, on the other hand, are more likely to be subject to compliance-forcing regulations, as they often operate in highly regulated industries.²¹⁶ Banks, for example, must engage in appropriate risk assessment before lending, and outside regulators scrutinize their compliance.²¹⁷ These two regulatory settings—one in which compliance-promoting due diligence is not mandatory and the other in which it is both mandatory and policed—suggest that equity investors are comparatively freer in their actions and thus even more likely to culpably invest.

²¹¹ See generally WILLIAM N. GOETZMANN & ROGER G. IBBOTSON, *THE EQUITY RISK PREMIUM* (2006) (exploring the risk-return tradeoff that underlies equity investment and the premium required to compensate for heightened uncertainty and potential loss).

²¹² *Id.*

²¹³ See Jennings & Krawiec, *supra* note 162, at 37, 45–46 (noting that some VC funds’ limited-partnership agreements contain “vice clauses,” which prohibit the funds’ managers from investing in illegal businesses or in specific normatively objectionable industries).

²¹⁴ See Gompers et al., *supra* note 18, at 187.

²¹⁵ Marina Temkin, *OpenAI Tumult, FTX Blowup Help Bring VC Governance Back in Vogue*, PITCHBOOK (Nov. 30, 2023), <https://pitchbook.com/news/articles/VC-investors-start-up-board-seats-FTX-OpenAI-governance> [<https://perma.cc/M3X4-PN2F>] (“[In the late 2010s and early 2020s, m]any investors, driven by fear of missing out during the last boom cycle, relaxed various aspects of investment criteria, from the thoroughness of their due diligence to governance, even relinquishing certain information rights, including access to detailed financials and business plans.”).

²¹⁶ *Laws & Regulations*, OFF. OF THE COMPTROLLER OF THE CURRENCY, <https://www OCC.treas.gov/topics/laws-and-regulations/index-laws-and-regulations.html> [<https://perma.cc/WBL7-B6EY>] (“National banks and federal savings associations are among the most highly regulated institutions in the country, with many laws and regulations that govern their activities.”).

²¹⁷ Karen Schnatterly, Brent B. Clark, John Howe & Michael L. DeVaughn, *Regulatory and Governance Impacts on Bank Risk-Taking*, 21 RISK MGMT. 99, 100 (2019).

C. *Firm Structure and Criminal Investment*

Firms vary in size and in the composition of their equity holders, again complicating culpability assessment. On one extreme, consider a small business that is wholly owned by its manager. On the other, consider a publicly traded company with shareholders numbering in the thousands,²¹⁸ many of whom do not vote in corporate elections²¹⁹ or who unsentimentally buy and sell shares based on the ebbs and flows of quarterly earnings.²²⁰ In the middle of that spectrum fall countless other ownership configurations, including closely held firms whose shareholders are members of the same family or founder group; VC-backed startups owned by their founders, outside investors, and employees;²²¹ portfolio companies owned by one or more private-equity sponsors; and so on.

This variation contains baroque layered ownership structures. A shareholder in a public company, for instance, might be an investment fund that invests on behalf of individual and institutional investors; those institutional investors might, in turn, invest on behalf of hundreds of thousands of individual beneficiaries.²²² A VC-backed startup might be owned in part by funds that invest on behalf of dozens of institutional limited partners, which in turn invest on behalf of still more beneficiaries.²²³ Even the ownership of a family business might be split among a handful of individuals, intermediary companies, and trusts.

For analytical clarity, this Section collapses all that variation into two ownership structures: public and private. The divide between the public and private firm is long-standing, evolving, and contested.²²⁴ A workable definition, however, is as follows: The equity interests of public companies are freely tradeable and available to anyone to purchase, often via a centralized exchange, whereas the equity interests of

²¹⁸ See 15 U.S.C. § 78l(g)(1)(A)(i) (providing that companies with 2,000 shareholders or more are public companies).

²¹⁹ See generally Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227 (2008) (analyzing widespread issues with shareholder voting in public companies, including low participation rates and systemic obstacles to effective shareholder influence).

²²⁰ But see George W. Dent, Jr., *The Essential Unity of Shareholders and the Myth of Investor Short-Termism*, 35 DEL. J. CORP. L. 97, 105 (2010) (acknowledging that “many investors hold stocks briefly” but refuting that they are short-termists).

²²¹ See *infra* Section II.C.2.

²²² *Facts and Figures*, VANGUARD, <https://corporate.vanguard.com/content/corporatesite/us/en/corp/who-we-are/sets-us-apart/facts-and-figures.html> [<https://perma.cc/VQ49-HNAT>].

²²³ *The Ideal Number of Limited Partners in a VC Fund*, VCLAB, <https://govclab.com/2023/12/04/the-ideal-number-of-lps-in-a-vc-fund> [<https://perma.cc/5C87-72Y3>] (recommending that VC managers should “have 20 – 30 LPs in their funds”).

²²⁴ See generally George S. Georgiev, *The Breakdown of the Public–Private Divide in Securities Law: Causes, Consequences, and Reforms*, 18 N.Y.U. J.L. & Bus. 221 (2021), for a comprehensive review of this divide.

private firms are not available to everyone, and their transfers are often restricted.²²⁵

1. Public Firms

In the public company, many, if not most, investors have an attenuated, financialized, and transitory connection to the firm. Their identities are often unknown to the firm's management,²²⁶ they often do not exercise their governance rights,²²⁷ and they buy and sell shares without particular attachment to the issuers of those shares.²²⁸ Because public-company investors are remote from the firms they hold shares in and because such firms are often quite complex, they cannot directly monitor the actions of management and other employees and whether those actions are lawful. True, they receive some disclosure about corporate activities,²²⁹ but casual and fleeting investors can be expected to rationally ignore such disclosure other than the aggregate effect it has on the prices of the company's securities.²³⁰

"Investment" is perhaps a misnomer in this setting because, over time, most shareholders will have obtained their shares through secondary transactions rather than primary offerings.²³¹ Instead of giving the firm cash in return for shares—cash that the firm could then use for illicit purposes—most public-company shareholders have purchased their shares from someone else. That person, in turn, likely purchased the shares from someone else, and so on, in a series of anonymous market transactions.²³² How public-company shareholders acquire their

²²⁵ See, e.g., DEL. CODE ANN. tit. 8, § 202 (2025) (permitting restrictions on stock transfers).

²²⁶ See Kahan & Rock, *supra* note 219, at 1237–40 (explaining the "street name" system of managing stock ownership and transfers).

²²⁷ See generally Kahan & Rock, *supra* note 219.

²²⁸ In an era in which some investors are motivated by environmental, social, and governance factors, however, investors might evaluate firms on more than financial considerations. See, e.g., Jessica Ground, *ESG Global Study 2022*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 17, 2022), <https://corpgov.law.harvard.edu/2022/06/17/esg-global-study-2022/> [<https://perma.cc/W9YU-YTJG>] (reporting on investors' positive and negative screening strategies for environmental, social, and governance factors).

²²⁹ See generally Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984) (arguing that mandatory disclosure requirements improve market efficiency and protect investors by ensuring access to material corporate information).

²³⁰ Jill E. Fisch & Hillary A. Sale, *The Securities Analyst as Agent: Rethinking the Regulation of Analysts*, 88 IOWA L. REV. 1035, 1040–42 (2003) ("[C]hanges in analyst recommendations typically trigger substantial price movements. . . . Analysts read and digest company reports and other secondary sources . . .").

²³¹ See *supra* notes 140–41 and accompanying text.

²³² See Merritt B. Fox, Lawrence R. Gosten & Gabriel V. Rauterberg, *Informed Trading and Its Regulation*, 43 J. CORP. L. 817, 829 (2018) (noting that transactions on the stock market are anonymous).

shares matters for assessing their responsibility for corporate wrongdoing: Only investors in primary offerings directly fund the firm and its activities.²³³

Directly funding a law-breaking public company, however, does not necessarily signal investor culpability. Public-company status is a powerful signal of commercial legitimacy,²³⁴ and even law-breaking public companies usually engage in some business activities that are perfectly lawful.²³⁵ Primary purchasers thus likely do not know if they are funding criminal activity, meaning that they lack criminal intent—after all, a company would have no incentive to disclose such funding.²³⁶

Even for companies with a known history of offending and a propensity to recidivate, investors in primary offerings cannot know for certain whether the company has turned the compliance corner.²³⁷ New investors in prior-offender companies thus face the risk that the prior-offender companies will use the new investor cash to engage in further wrongdoing. But in light of that uncertainty, and barring some disclosure about illicit corporate plans, those investors at most could be said to have a negligent or reckless mental state.²³⁸ Even if those mental states were sufficient to obtain conviction, when facts involve complex business scenarios, juries might be reluctant to convict without convincing evidence of culpable knowledge or purpose.²³⁹ Further, prosecutors must ques-

²³³ See Sandbu, *supra* note 32, at 101 (“Buyers of equity or debt securities in secondary markets are incontrovertibly ‘investors in’ corporations . . . but they have in no way financed the corporation in the sense of providing it with funds.” (emphasis omitted)).

²³⁴ See Ailsa Röell, *The Decision to Go Public: An Overview*, 40 EUR. ECON. REV. 1071, 1075–76 (1996) (reporting perceptions that going public enhances a company’s reputation).

²³⁵ See, e.g., Joseph Kahn & Jonathan D. Glater, *Enron Auditor Raises Specter of Crime*, N.Y. TIMES, Dec. 13, 2001, at C1.

²³⁶ One counterexample, though, is that several cannabis-related companies—whose businesses are illegal under the federal Controlled Substances Act despite being permitted under some state and local laws—are publicly traded. These companies warn investors that they could be personally subject to prosecution under aiding-and-abetting theories were the federal government to fully enforce the Controlled Substances Act. See, e.g., Innovative Indus. Props., Inc., Annual Report (Form 10-K) 39–40 (Feb. 27, 2024) (“[F]ollowing [a] change in the federal government’s enforcement position [on those who provide services to federally illegal cannabis businesses], we could be subject to criminal prosecution, which could lead to imprisonment and/or the imposition of penalties, fines, or forfeiture.”); Green Thumb Indus. Inc., Annual Report (Form 10-K) 24 (Feb. 29, 2024) (“It is further possible that Department of Justice or an aggressive federal prosecutor could allege that Green Thumb Industries Inc., and our Board, our executive officers and, potentially, our shareholders, ‘aided and abetted’ violations of federal law by providing finances and services to our portfolio cannabis companies.”); Lowell Farms Inc., Annual Report (Form 10-K) 21 (Mar. 28, 2024) (same); Goodness Growth Holdings, Inc., Annual Report (Form 10-K) 23 (Apr. 1, 2024) (same).

²³⁷ See Andrew K. Jennings, *Follow-Up Enforcement*, 70 DUKE L.J. 1569, 1593 (2021) (“After a company breaks the law, uncertainty abounds whether it will do so again.”).

²³⁸ See MODEL PENAL CODE § 2.02 (AM. L. INST. 1962).

²³⁹ See Stephanie Holmes Didwania, *Regressive White-Collar Crime*, 97 S. CAL. L. REV. 299, 348 (2024) (arguing that “complicated financial crimes are . . . burdensome to prove”).

tion whether acts committed with lesser intent would merit prosecution given the high social cost associated with prosecuting investors.²⁴⁰ This high cost coupled with a low probability of success creates a doubtful case for the prosecution of primary purchasers. That case is even more doubtful for secondary purchasers, who do not fund the firm directly.²⁴¹

2. *Private Firms*

Public companies in the United States have meaningfully converged in their governance structures, practices, and policies.²⁴² The structures among privately held companies, in contrast, vary greatly.²⁴³ For the sake of brevity, this discussion on private-firm structures will focus on VC-backed startups, which effectively illustrate the culpability considerations arising in the private-firm setting. That is, the points raised here about information asymmetries and investor governance can be extended to other private structures.

Investors take on qualitatively distinct roles in the VC-backed startup. Consider three investor personas: entrepreneurs, outside investors, and employees. Entrepreneurs, either alone or as small teams, conceive a startup's business and direct its earliest stages, including the development of products, commercial strategies, and fundraising.²⁴⁴ Their investments take the form of labor, intellectual property, cash, or, most often, a combination thereof.²⁴⁵ They might also take below-market salaries, especially in the early days.²⁴⁶ Instead, they expect ultimately to be compensated for their entrepreneurial efforts via their equity in the business: When the company is acquired or goes public, its founders' stakes could bring them fabulous wealth.²⁴⁷ Entrepreneurs, almost

²⁴⁰ See *infra* Sections III.A–B.

²⁴¹ Under a capacious view of some criminal statutes, an aggressive theory would be that secondary purchasers support the firm's securities prices, thereby incenting management to engage in unlawful but profitable activity to meet investors' expectations. Another aggressive theory would assert that the presence of a secondary market motivates investment *ex ante* in primary markets. These theories would test the frontiers of criminal intent and prosecutorial discretion, however. If a secondary purchaser *is* to be seen as culpable for corporate wrongdoing, it would be more plausible that the culpable investment-related conduct relates to using a meaningful stake to encourage management to violate the law.

²⁴² See Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2565–66 (2021) (attributing this convergence to a “vast array of institutional players,” including “proxy advisors, stock exchanges, ratings agencies, institutional investors, and associations”). *But see* Geeyoung Min, *Strategic Compliance*, 57 U.C. DAVIS L. REV. 415 (2023) (documenting divergence in the adoption of compliance policies by large public companies).

²⁴³ See Lund & Pollman, *supra* note 242, at 2626.

²⁴⁴ DANIEL F. SPULBER, *THE INNOVATIVE ENTREPRENEUR* 2 (2014).

²⁴⁵ See *id.* at 61.

²⁴⁶ See *id.* at 68.

²⁴⁷ Steven N. Kaplan & Per Strömberg, *Financial Contracting Theory Meets the Real World: An Empirical Analysis of Venture Capital Contracts*, 70 REV. ECON. STUD. 281, 296 (2003) (explaining

definitionally, are risk-preferring investors with regard to their own firms. And as managers, they have superior information about their firms' affairs, including compliance with law.²⁴⁸

Outside investors enter a startup's capital structure in early stages as angel investors investing relatively small amounts of cash and in later stages as venture capitalists investing successively larger rounds.²⁴⁹ These investors have opportunities to conduct due diligence into the firm and to receive disclosure from the firm's entrepreneurs, thereby reducing the information asymmetry that typifies the investor-manager relationship.²⁵⁰ Less formally, they may exert control via their ability to provide more capital as needed and to provide nonfinancial support, such as by using their business networks to advance the firm's interests.²⁵¹ Outside investors are risk-preferring in that they choose to invest in speculative private companies.²⁵² Unlike entrepreneurs—who make highly specific investments in their own firms—outside investors expect many of their investments to end in loss and so reduce their aggregate risk by diversifying into a portfolio of startups.²⁵³

Lastly, startup employees are comparatively the least risk-preferring of the three personas. They receive a roughly market salary, although they might choose or be forced to trade some present salary for equity.²⁵⁴ They are disempowered, however, from fully participating in the firm's governance. Further, they face the greatest formal information asymmetry vis-à-vis management in that they cannot conduct due diligence before making an investment²⁵⁵ and are not entitled to useful

that “[i]nvestors can screen out entrepreneurs by offering high-powered [meaning heavily equity-weighted] compensation contracts because only high-ability entrepreneurs will accept such contracts” given that failure will cause equity compensation to be worthless).

²⁴⁸ George G. Triantis, *Financial Contract Design in the World of Venture Capital*, 68 U. CHI. L. REV. 305, 307 (2001) (“First, some information is observable by only one party (the entrepreneur) who cannot credibly communicate it to others (information asymmetry).”).

²⁴⁹ Off. of the Advoc. for Small Bus. Cap. Formation, *Early-Stage Investors*, U.S. SEC. & EXCH. COMM’N (Dec. 23, 2024), <https://www.sec.gov/education/capitalraising/building-blocks/investor-types> [<https://perma.cc/A2EN-JMYS>].

²⁵⁰ See Gompers et al., *supra* note 18, at 176.

²⁵¹ See Admati & Pfleiderer, *supra* note 152.

²⁵² See PAUL GOMPERS & JOSH LERNER, *THE VENTURE CAPITAL CYCLE* 183–87 (2d ed. 2004).

²⁵³ See Chris Dixon, *Performance Data and the ‘Babe Ruth’ Effect in Venture Capital*, ANDREESSEN HOROWITZ (June 8, 2015), <https://a16z.com/2015/06/08/performance-data-and-the-babe-ruth-effect-in-venture-capital> [<https://perma.cc/S2YY-CC55>] (explaining the many failures are made up for by the explosive growth of their home-run investments).

²⁵⁴ See Saul Levmore, *Puzzling Stock Options and Compensation Norms*, 149 U. PA. L. REV. 1901, 1924 (2001).

²⁵⁵ See Anat Alon-Beck, *Bargaining Inequality: Employee Golden Handcuffs and Asymmetric Information*, 81 MD. L. REV. 1165, 1206–07 (2022) (reporting that startups force employees to waive inspection rights in connection with equity awards).

pre-investment disclosures.²⁵⁶ This effect is mitigated, however, to the extent that employee-investors obtain private information in the course of their employment.

Entrepreneurs and employees, as day-to-day insiders, are already exposed to prosecution for their personal contributions to corporate crime.²⁵⁷ Setting that insider exposure aside, two factors—knowledge and influence—appear central to assessing the culpability of these three personas when their firms violate the law. Knowledge is a relevant factor because investors who know of the company’s wrongful conduct have a culpable mental state when they engage in the act of investment—that is, they are aware that their investment will facilitate illicit activity.²⁵⁸ Influence—the ability to encourage or force action or inaction by management—is a relevant factor because those investors who exercise formal or informal governance rights to promote illicit corporate activity meet both the *actus reus* and *mens rea* for liability.²⁵⁹ Influence, in turn, implies a capacity for steering the company toward greater or lesser law compliance.²⁶⁰ That capacity, as the next Part explains, can be exploited to promote compliance-enhancing outcomes.

III. PROSECUTORIAL DISCRETION AND INVESTOR CRIMINAL LIABILITY

This final Part turns to the question at the Article’s heart: When investors are criminally responsible for corporate wrongdoing, when, if ever, should they be charged with a crime? It answers this question first by identifying the social cost of prosecuting investors and the social cost of *not* doing so. It then draws on the Article’s earlier doctrinal and theoretical contributions to recommend a five-factor test to guide the exercise of positive prosecutorial discretion. It closes by calling for the adoption of safe harbors for good-faith investors’ benefit.

A. *The Social Cost of Investor Criminal Liability*

Substantive criminal law permits the prosecution of those who engage in culpable investment-related conduct.²⁶¹ Despite that doctrinal

²⁵⁶ Yifat Aran, *Making Disclosure Work for Start-Up Employees*, 2019 COLUM. BUS. L. REV. 867, 871 (criticizing the lack of useful disclosure given to startup employees in connection with their equity awards).

²⁵⁷ See *supra* note 94 and accompanying text.

²⁵⁸ See *supra* Section I.C.

²⁵⁹ See *supra* Section I.C.

²⁶⁰ See Broughman & Wansley, *supra* note 28, at 1307 (positing a model in which venture capitalists “behave more subversively” by “skip[ing] monitoring, indulg[ing in] self-dealing, and push[ing] managers to take risks”).

²⁶¹ See *supra* Section I.C.

possibility, it has not been the practice of prosecutors in the United States to pursue those whose sole connection to a criminal offense is as an investor.²⁶² This Article urges a more nuanced approach in which any prosecutorial policy around culpable investors accounts for two competing public interests: the interest in promoting welfare-enhancing capital formation and the interest in preventing welfare-destroying law violation. The question of whether to prosecute criminal investors sits in tension between these interests. That is, prosecuting criminal investors is apt to impose social cost in the form of less and less-efficient capital formation, whereas *not* prosecuting them is apt to impose social cost in the form of greater law violation.²⁶³

1. *The Social Cost of Prosecuting Criminal Investors*

This Article challenges a status quo in which investors are understood by all concerned—prosecutors, corporate insiders, the public, and investors themselves—to be outside enforcement’s scope.²⁶⁴ That understanding might be doctrinally and pragmatically sound as applied to a considerable majority of investors. Most investors are, after all, too remote from the uses of their invested capital to form criminal intentions toward its illicit use.²⁶⁵ But there likely are some investors whose investment-related conduct facilitates corporate violations and who *do* act with culpable mental states. In those latter cases, if prosecutorial practice shifts away from uniform nonprosecution, then culpable investing becomes riskier.²⁶⁶

If this prosecutorial shift were to occur, then the increased risk, or at least the perception of it, could be shared by law-abiding investors as well. Whereas all investors—the law-abiding and the criminal—currently enjoy an implicit policy of nonprosecution, culpable investors do not deserve that peace. Yet, perversely, if culpable investors face realistic enforcement risk, then even law-abiding investors might find their peace disturbed. Substantive criminal law is, after all, expansive and enforced by overlapping jurisdictions that might have divergent laws, policies, and interests.²⁶⁷ Given that reality, even good-faith investors would not be unjustified in worrying about exposure to some

²⁶² See U.S. Dep’t of Just., Justice Manual § 9-28.100 (2023).

²⁶³ See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 198 (1968).

²⁶⁴ See *supra* Section I.B.

²⁶⁵ See *supra* Sections I.B, II.C; see also U.S. Dep’t of Just., Justice Manual § 9-28.1100 (2023) (providing that when charging corporations with crimes, prosecutors should consider that many investors are the victims of corporate crime and bear no responsibility).

²⁶⁶ See Becker, *supra* note 263, at 178.

²⁶⁷ See Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 461–63 (2009).

unexpected law enforcement agency or novel criminal theory.²⁶⁸ That worry can only grow when considering the incentives of an entrepreneurial prosecutor to engage in publicly salient enforcement²⁶⁹ or of a partisan prosecutor to target political enemies. These concerns enter the picture if there is new receptivity to pursuing criminal cases against investors.²⁷⁰ Treating investors as blameless undoubtedly shields some who ought not to be shielded. Yet today it also properly protects many more who deserve such protection. If investors join the usual suspects in corporate investigations, then that sweep of suspicion might well put them *all* at ill ease.

To be sure, law-abiding investors definitionally lack criminal intent regarding the commission of corporate wrongdoing. That absence of intent alone should foreclose their liability. But this point cannot grant full comfort given that the threat faced by law-abiding investors would be litigation risk rather than epistemic uncertainty over their culpability.²⁷¹ Juries can, and do, erroneously convict despite a defendant's literal innocence.²⁷² Moreover, for offenses that can be proved by reckless or negligent intent, investors must worry that they have innocently missed red flags but that with the bias of hindsight, prosecutors or juries might unjustly hold those failures against them.²⁷³

Even setting litigation risk aside, the sweep of suspicion could impose serious costs on investors. Imagine if, for example, each time a VC-backed startup engages in criminal behavior its investors expect to bear a long and costly investigation into whether they might share in the company's guilt.²⁷⁴ This not unreasonable risk perception could produce a chilling effect among good-faith investors. In turn, this effect would be expected to undermine capital formation and increase costs of capital, especially for those businesses perceived as riskier from a

²⁶⁸ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 588–94 (2001).

²⁶⁹ Beth A. Wilkinson & Steven H. Schulman, *When Talk Is Not Cheap: Communications with the Media, the Government and Other Parties in High Profile White Collar Criminal Cases*, 39 AM. CRIM. L. REV. 203, 223 (2002) (recognizing an “increasing prosecutorial appetite for high profile white collar defendants”).

²⁷⁰ See Miriam H. Baer, *Corporate Compliance's Achilles Heel*, 78 BUS. LAW. 791, 812 (2023) (warning of the ill effects for corporate compliance if federal prosecutors succumb, or are perceived as succumbing, to increased political polarization in American society).

²⁷¹ See CARISSA BYRNE HESSICK, *PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL* (2021) (criticizing a plea-bargaining system that imposes litigation risks high enough to make innocent defendants plead guilty).

²⁷² See NAT'L INST. OF JUST., U.S. DEP'T OF JUST., *WRONGFUL CONVICTIONS: THE LITERATURE, THE ISSUES, AND THE UNHEARD VOICES* 12 (2023).

²⁷³ See Maggie Wittlin, *Hindsight Evidence*, 116 COLUM. L. REV. 1323, 1359–62 (2016).

²⁷⁴ See Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 306 (2020) (noting the high costs associated with corporate investigations).

compliance perspective.²⁷⁵ This effect could also lead riskier businesses to attract more investors who do not value compliance, which could exacerbate illicit activity at those firms.²⁷⁶

The social cost of prosecuting criminal investors follows chiefly, as just mentioned, from the indirect effects such a practice would have on capital markets. There would be direct costs, too. Prosecuting investors could increase the difficulty and expense of corporate enforcement.²⁷⁷ More targets would significantly increase the complexity and expense of corporate criminal investigations.²⁷⁸ Beyond investigative costs, outside investors faced with criminal liability might also have less incentive to settle and thus would be more likely to go to trial, creating additional expense and generating litigation risk for the government.²⁷⁹

2. *The Social Cost of Not Prosecuting Criminal Investors*

Not prosecuting criminal investors also imposes social costs. Insulating a class of actors who intentionally or knowingly contribute to organizational wrongdoing could undermine corporate deterrence and postenforcement reform by neglecting investment's criminogenic influence on corporate behavior.²⁸⁰ Nonprosecution also produces a moral hazard. When culpable investors perceive themselves as having low or no risk of prosecution, they would be expected to invest marginally more in enterprises that break, or are at risk of breaking, the law.²⁸¹ The result would be marginally lower costs of capital for—and thus more attractive returns to—corporate crime.²⁸²

B. *When Should Culpable Investors Be Prosecuted?*

In most cases, the social cost of prosecuting investors, chiefly the chilling effect on nonculpable investors,²⁸³ will outweigh the social cost

²⁷⁵ Cf. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 98–99 (1985) (theorizing that a corporation's cost of capital would be higher if its shareholders were exposed to its liabilities).

²⁷⁶ Cf. Jennings, *supra* note 126, at 564 (warning that acquisition of a firm with criminal liability by a low-compliance buyer could exacerbate compliance problems in the acquired firm).

²⁷⁷ *Supra* note 94 and accompanying text.

²⁷⁸ See *supra* note 274 and accompanying text.

²⁷⁹ Cf. Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1824 (2015) (questioning whether individual defendants are more likely to go to trial than corporate defendants).

²⁸⁰ See *supra* notes 25–27 and accompanying text.

²⁸¹ Cf. Daniel Henninger, *Welcome to 'Moral Hazard,'* WALL ST. J. (Oct. 2, 2008, 12:01 AM), <https://www.wsj.com/articles/SB122290454416296295> [<https://perma.cc/6RY8-B6ZH>] (“[E]very corner bar and hair salon is filled with experts on the perils of moral hazard. Everyone gets it: Cut risk down to next to nothing and some people do crazy things.”).

²⁸² See Draca et al., *supra* note 25, at 1255.

²⁸³ See *supra* Section III.A.1.

of holding investors blameless. In those cases, law enforcement should not pursue investors even if substantive criminal law prohibited their investment-related conduct. However, in narrow circumstances, the cost of *not* prosecuting culpable investors²⁸⁴ exceeds the cost of doing so, implying that they could be efficiently charged. Drawing on the doctrinal, structural, and policy considerations above, this Section recommends five factors for identifying cases that fall in the latter category. It closes by applying those factors to hypothetical scenarios rooted in the Article's opening example of DGI, the VC-backed pill mill.

1. *A Five-Factor Investor-Prosecution Test*

Only the most egregious cases of criminal investment-related conduct, if any, should warrant prosecution. For all other chargeable cases, the status quo of investor nonprosecution will best satisfy the prior Section's social-cost considerations. This Section sets out a five-factor test for identifying egregious cases. Specifically, this test counsels prosecutors to limit enforcement to investment-related conduct by (1) individuals (2) in private firms (3) who act with knowing or purposeful intent and (4) who make substantial contributions (5) to significant corporate wrongdoing.

Beyond the social-cost justifications for a test applying these five factors, their adoption by prosecutorial agencies would produce rule-of-law benefits. In questioning the status quo of investor blamelessness, this Article opens the door to new and expanded criminal accountability. Deciding whom to hold criminally accountable is generally committed to prosecutorial discretion.²⁸⁵ Although this approach allows for flexibility, it risks biased application, especially along racial, ethnic, gender, and other demographic lines.²⁸⁶ If prosecutorial agencies consider charging culpable investors, adoption of this five-factor test—or some similar policy—would not only provide clear guidance to the capital markets, but it could also limit arbitrary or biased decision-making by line prosecutors.²⁸⁷

²⁸⁴ See *supra* Section III.A.2.

²⁸⁵ See *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973).

²⁸⁶ See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 313–14 (2013); Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R.L. REV. 369, 371 (2010) (“We rightly fear that justice will vary from prosecutor to prosecutor, with each one a law unto himself and his own whims, biases, and shirking.”).

²⁸⁷ See Bibas, *supra* note 286, at 371 (“The solution, then, is to create a culture, structures, and incentives within prosecutors’ offices so that prosecutors use their discretion consistently and in accord with the public’s sense of justice.”).

a. Prosecute Individual, Not Institutional, Investors

In the corporate context, human volition produces crime.²⁸⁸ For instance, if a VC fund chooses to knowingly invest in an illegal business, that choice and that knowledge ultimately belong to the investment professionals who manage the fund.²⁸⁹ Although the fund is vicariously liable for its managers' actions, the pragmatic focus on culpable individuals in contemporary corporate enforcement policy follows a normative and pragmatic logic that individual investors—whether they invest on their own or others' behalf—are the most appropriate targets for enforcement.²⁹⁰ After all, investment professionals, unlike the institutions they represent, exercise their own agency and are likely more susceptible to deterrence given the availability of carceral sanctions.²⁹¹ Moreover, pursuing culpable outsider individuals promotes parity with prosecutors' contemporary focus on identifying and charging culpable insider individuals.²⁹² It also places culpable individual investors on more equal footing with noninvestors who are routinely charged as accomplices or coconspirators to noncorporate offenses.²⁹³

Further, prosecuting only individual investors achieves economy. Most culpable investment decisions are made by a small number of people. A person investing for a personal account or for a small fund might be a sole decision-maker.²⁹⁴ Even in larger funds that require more thorough internal vetting and approvals before an investment is made, one or two professionals will shepherd an investment and be the people with access to information sufficient to form criminal intent.²⁹⁵ Limiting the prospect of enforcement to those key players avoids recursive liability in which the managers of limited partners are potentially

²⁸⁸ Samuel W. Buell, *The Responsibility Gap in Corporate Crime*, 12 CRIM. L. & PHIL. 471, 488 (2018).

²⁸⁹ See GOMPERS & LERNER, *supra* note 252, at 65.

²⁹⁰ E.g., Indictment, *supra* note 1, at 13–17.

²⁹¹ John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 409 (1981) (theorizing that individuals are more deterrable by criminal law than are corporations because, in part, they can be imprisoned).

²⁹² See RESTATEMENT (SECOND) OF TORTS § 876(b) (AM. L. INST. 1979).

²⁹³ See *supra* note 178 and accompanying text.

²⁹⁴ See Ilya A. Strebulaev & Alex Dang, *Make Decisions with a VC Mindset*, HARV. BUS. REV. (May 2024), <https://hbr.org/2024/05/make-decisions-with-a-vc-mindset> [<https://perma.cc/4Z9P-3H4C>] (“In VC firms, once a partner decides to invest in a start-up, the deal can quickly be finalized.”).

²⁹⁵ See generally Jennings & Krawiec, *supra* note 162 (describing internal decision-making processes of VC firms and how those processes affect investment or noninvestment in morally or legally objectionable startups).

exposed and so on.²⁹⁶ Instead, the line stops at those most closely linked to wrongdoing at a firm.

Still, this factor is not an essential one. The earlier logic of shareholders bearing risk for corporate wrongdoing, and thus having an incentive to police corporate compliance, applies with some strength to those who invest in collective funds managed by third parties.²⁹⁷ Thus, prosecutors should not categorically decline cases against limited partners or their managers. Unusual circumstances might warrant pursuing such cases. A limited partner that invests in a VC fund that it knows specializes in funding illegal businesses, for example, is similarly situated to a VC fund that invests in a portfolio company that it knows operates an illegal business.²⁹⁸

b. Prosecute Private, Not Public, Investors

Part II suggests that private-company investors are best positioned to directly influence corporate compliance, whereas at best, public investors influence compliance indirectly and in ways generally insufficient to establish criminal intent.²⁹⁹ Beyond that doctrinal point, pragmatism also counsels against prosecuting even culpable public-company investors.³⁰⁰ A policy that expresses openness to holding culpable private-company investors criminally accountable but presumes against the same for public-company investors could mitigate risk perception and its attendant drag on capital formation among good-faith public investors.³⁰¹ It would also avoid the obvious enforcement costs around attempting investigations of a public firm's investors when they number in the thousands, are largely anonymous, and have transitory relationships with the firm.³⁰²

²⁹⁶ Given that each step of financial intermediation between the ultimate sources and recipients of capital reduces the likelihood that an investor acts with a culpable mental state, the problem of recursion should not be overstated. But it is nevertheless one to be avoided by all involved, including investors and prosecutors.

²⁹⁷ See *supra* Section I.B.

²⁹⁸ See Jennings & Krawiec, *supra* note 162, at 66 (theorizing that VC funds that specialize in stigmatized—and even illegal—industries can reduce search costs by marketing themselves as vice specialists).

²⁹⁹ See *supra* Sections II.B–C.

³⁰⁰ This factor is not essential, however. Public-company controllers, major shareholders, or investors in private-investment-in-public-equity deals are qualitatively analogous to private-company investors, and so it would not be sensible to treat them as such for enforcement purposes.

³⁰¹ Cf. Thompson, *supra* note 78, at 1070–71 (“The willingness to sometimes hold shareholders of close corporations liable, but never shareholders of public corporations, suggests that limited liability’s positive role in facilitating the public market for shares is strong enough to overcome any justification for piercing.”).

³⁰² See *supra* notes 218–20 and accompanying text.

c. Prosecute Only Investors with Knowing or Purposeful Mens Rea

When substantive law supports investor liability for negligent or reckless conduct, charging investors based on those mental states is apt to create higher risk perception among even good-faith investors. That is, the chilling effect Section III.A warns of could be particularly acute if prosecutors treat these less culpable mental states as meriting enforcement.³⁰³ This heightened risk perception might prevent socially desirable projects from obtaining funding or force them to bear higher costs for any capital they do obtain. Additionally, investors might conduct excessive, value-destroying levels of due diligence to protect themselves from future accusations that they negligently or recklessly invested in an illicit business.³⁰⁴ Although the prosecution of negligent or reckless investment-related conduct could perhaps achieve some incremental deterrence, the tradeoff is unlikely to be profitable in social-cost terms. Instead, bringing only those cases with more culpable—knowing or purposeful—mens rea strikes an appropriate balance between the public's interests in capital formation and law compliance.

d. Prosecute Only Investors Who Substantially Contribute to Corporate Crime

Substantial investments—with substantiality varying in the context of a given firm—correlate with the ability to directly influence corporate compliance.³⁰⁵ As said in the prior discussion on the public and private divide, there is pragmatism and economy in focusing on the most important investors.³⁰⁶ After all, culpable investment-related conduct can be an essential input of corporate offending. If the most important investors are deterred, there is a lower likelihood that corporate offending will occur or, if it does, that it does so at a large scale. Insubstantial investments, in contrast, are on their own unlikely to contribute meaningfully to a firm's ability to engage in illicit activity, and thus their deterrence will be less likely to affect the course of the firm's compliance.

The substantiality of investment-related conduct is not necessarily a quantitative factor. It might be so if the only potentially culpable act is *investment*—that is, if the scale of investment-related conduct's criminogenic effect was driven solely by the cash sum invested. Assessing

³⁰³ See *supra* Section III.A.1 (discussing the hierarchy of culpability).

³⁰⁴ See *supra* Section III.A.2. This excessive due diligence could be value destroying in the sense that it is costly to perform. More troubling, it could destroy value by creating frictions that prevent value-creating deals from closing.

³⁰⁵ The Restatement (Second) of Torts defines “substantial” as “denot[ing] the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense” RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (AM. L. INST. 1965).

³⁰⁶ See *supra* Sections II.B–C.

this factor might require more qualitative analysis, however, when the conduct in question is governance participation, such as appointing board members or informally communicating with management.

e. Prosecute Only Investors in Firms That Engage in Significant Criminal Activity

Total enforcement of criminal law in the corporate context is not practicable, nor would it be efficient.³⁰⁷ Enforcers must choose what conduct is quantitatively or qualitatively significant enough to expend limited resources pursuing.³⁰⁸ The same is doubly true for corporate crime, which is often more complex and costly to investigate compared to nonorganizational offenses.³⁰⁹ It follows that if corporate offending is not significant enough to merit criminal enforcement at the entity level, then neither would it be at the investor level.

Applying this factor requires making value judgments around what kind of corporate offending—and consequently, culpable investment-related conduct—merits law enforcement’s attention. A VC firm might, for example, invest in a startup knowing that it sells insurance without required licenses;³¹⁰ facilitates financial transactions that violate anti-money-laundering laws or economic sanctions;³¹¹ offers taxicab services that violate municipal law;³¹² lies to patients about the efficacy of its medical tests;³¹³ facilitates prostitution;³¹⁴ distributes child-exploitation

³⁰⁷ See George J. Stigler, *The Optimum Enforcement of Laws*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 55, 56 (Gary S. Becker & William M. Landes eds., 1974) (“There is one decisive reason why the society must forego ‘complete’ enforcement of the rule: enforcement is costly.”).

³⁰⁸ See Andrew K. Jennings, *State Securities Enforcement*, 47 *BYU L. REV.* 67, 78–79, 91 (2021) (observing that enforcers of securities law pursue some cases because they represent significant offending in monetary terms and others because they involve conduct prioritized by an enforcement regardless of their monetary impact).

³⁰⁹ See Martinez, *supra* note 274, at 266, 306.

³¹⁰ Chris Rauber, *Zenefits Executives and Employees Could Face Criminal Charges*, *S.F. BUS. TIMES* (Feb. 17, 2016), <https://www.bizjournals.com/sanfrancisco/blog/techflash/2016/02/zenefits-insurance-licensing-conrad-david-sacks.html> [<https://perma.cc/DQ8P-UBSA>] (“Regulatory agencies in California and Washington caution that Zenefits . . . could face criminal charges related to the alleged sale of health insurance without proper brokers’ licenses.”).

³¹¹ Press Release, U.S. Dep’t of Just., Binance and CEO Plead Guilty to Federal Charges in \$4B Resolution (Nov. 21, 2023), <https://www.justice.gov/opa/pr/binance-and-ceo-plead-guilty-federal-charges-4b-resolution> [<https://perma.cc/6425-9T3J>] (reporting on cryptocurrency exchange Binance’s guilty plea to money-laundering and sanctions-violations charges).

³¹² Gregory Wallace, *Uber CEO Charged with Operating Illegal Taxi Service in South Korea*, *CNN* (Dec. 24, 2014, 5:17 PM), <https://money.cnn.com/2014/12/24/technology/uber-south-korea/> [<https://perma.cc/X47Y-HMXS>].

³¹³ *Theranos Founder Elizabeth Holmes Jailed for Fraud*, *BBC* (Nov. 18, 2022), <https://www.bbc.com/news/world-us-canada-63685131> [<https://perma.cc/9D76-M8NU>].

³¹⁴ Press Release, U.S. Dep’t of Just., Justice Department Leads Effort to Seize Backpage.Com, the Internet’s Leading Forum for Prostitution Ads, and Obtains 93-Count Federal

or nonconsensual sexual content;³¹⁵ or markets nicotine products to minors.³¹⁶ Prosecutors might uniformly agree that some of those examples—like distributing child-exploitation content or facilitating sanctions violations—are significant corporate offenses. They might disagree, however, on some of the others, like running illegal taxi cabs.

2. *Applying the Five-Factor Test to DGI's Investors*

Recall the Introduction's motivating example: DOJ has accused telemedicine startup DGI of illegally distributing tens of millions of stimulant pills and defrauding insurers of tens of millions of dollars.³¹⁷ DGI raised capital from at least three VC funds, although the indictment charging its founder omits any mention of them or their involvement in the company.³¹⁸ Because it is not known what, if anything, the funds knew, this omission presents an opportunity to consider hypothetical applications of this Section's proposed five-factor test, unburdened by what has been already reported.

In these hypotheticals, several factors are fairly assumed to be satisfied. Under the first and second factors, individual venture capitalists chose to invest in DGI, a private company.³¹⁹ Under the fourth factor, their investment-related conduct was presumably *quantitatively* substantial given the company's marketing expenditures and the commercial scale it achieved.³²⁰ And under the fifth factor, the scale of the company's alleged drug distribution and fraud would fit any prosecutor's idea of significant criminal activity.³²¹ That leaves the third factor and the *qualitative* aspect of the fourth factor for consideration: Did the hypothetical venture capitalists engage in investment-related conduct with knowing or purposeful intent, and did that conduct make a qualitatively substantial contribution to illicit activity at DGI?

To consider the fourth factor, each of the following three hypotheticals presents different investment-related conduct that the investors

Indictment (Apr. 9, 2018), <https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forum-prostitution-ads> [<https://perma.cc/UL3Y-PS3W>].

³¹⁵ Press Release, U.S. Att'y's Off., E.D.N.Y., Pornhub Parent Company Admits to Receiving Proceeds of Sex Trafficking and Agrees to Three-Year Monitor (Dec. 21, 2023), <https://www.justice.gov/usao-edny/pr/pornhub-parent-company-admits-receiving-proceeds-sex-trafficking-and-agrees-three-year> [<https://perma.cc/3FLL-SQ3H>].

³¹⁶ Jennifer Maloney, *Federal Prosecutors Conducting Criminal Probe of Juul*, WALL ST. J. (Sept. 23, 2019, 5:49 PM), <https://www.wsj.com/articles/federal-prosecutors-conducting-criminal-probe-of-juul-11569268759> [<https://perma.cc/UH6M-RG2G>].

³¹⁷ See Indictment, *supra* note 1, at 11, 13.

³¹⁸ See *id.*; *supra* note 20 (identifying the VC firms with known investments in DGI).

³¹⁹ See *supra* note 20.

³²⁰ Indictment, *supra* note 1, at 14.

³²¹ *Id.* at 11 (alleging that DGI distributed forty million pills and generated around \$100 million in revenue).

could have engaged in. To consider the third factor, each hypothetical applies four different levels of intent. These four intents are the hypothetical investors (1) knew DGI was illicitly distributing controlled substances or planned to do so, (2) did not know, but should have known based on available information, (3) did not know and would not have been expected to know based on available information, and (4) did not know and were actively deceived as to DGI's actions or planned actions. These three hypotheticals are respectively presented in Tables 1, 2, and 3.

TABLE 1: HYPOTHETICAL 1

Act	Intent
Provided investment only.	A. Knew DGI was illicitly distributing controlled substances or planned to do so.
	B. Did not know, but should have known based on available information.
	C. Did not know and would not have been expected to know based on available information.
	D. Did not know and was actively deceived as to DGI's actions or planned actions.

In Hypothetical 1, the substantiality of the venture capitalists' investment-related conduct would be assessed quantitatively: All they did was provide cash. Given the assumptions stated above, the only outstanding factor is criminal intent. Hypotheticals 1C and 1D suggest that the venture capitalists invested in, but had no intent to enable illicit activity at, DGI. Hypothetical 1B suggests that the investors were negligent or reckless about the risk that they were funding illicit activity. But it also makes clear that they lacked actual knowledge of that fact; the five-factor test thus counsels against charging them. Under the test, only Hypothetical 1A presents sufficiently high culpability—knowledge—to warrant enforcement.

TABLE 2: HYPOTHETICAL 2

Act	Intent
Provided investment funds and participated in VC-typical governance.	A. Knew DGI was illicitly distributing controlled substances or planned to do so.
	B. Did not know, but should have known based on available information.
	C. Did not know and would not have been expected to know based on available information.
	D. Did not know and was actively deceived as to DGI's actions or planned actions.

Hypothetical 2 adds an additional fact to Hypothetical 1: that the investors participated in corporate governance in a fashion typical of

venture capitalists, such as by designating directors to board seats or informally communicating with or advising management. This participation would not alter their mental states at the time of investment or afterward, and thus the same results would follow from Hypotheticals 1B, 1C, and 1D to Hypotheticals 2B, 2C, and 2D.

But Hypothetical 2A requires further analysis. If, for example, the venture capitalists invested in DGI knowing that it engaged in illicit activity or planned to do so *and* they exerted pressure through governance participation not to make changes—including compliance with the law—that might harm revenue growth, then their conduct would be more egregious than the investment-only facts of Hypothetical 1A. On the other hand, if they invested and then used their participation in DGI’s governance to insist that it cease illicit activity or cancel plans to pursue such activity, then their actions were compliance-enhancing. The investors would have prevented law violations while promoting the success of a business that honestly provided medical care to those who need it, and so no enforcement would be warranted.³²²

TABLE 3: HYPOTHETICAL 3

Act	Intent
Provided investment and encouraged DGI management to engage in more aggressive practices to increase sales.	A. Knew DGI was illicitly distributing controlled substances or planned to do so.
	B. Did not know, but should have known based on available information.
	C. Did not know and would not have been expected to know based on available information.
	D. Did not know and was actively deceived as to DGI’s actions or planned actions.

Hypothetical 3 offers more information about how the venture capitalists participated in DGI’s governance: They urged management to improve revenues, market share, or some other relevant metric by engaging in more aggressive sales practices.³²³ They encouraged management, in other words, to take steps necessary to distribute more pills.³²⁴

³²² This conclusion follows because the investors in that scenario have not acted “to aid” the criminal aspect of the firm or to join the criminal conspiracy embedded within it. Rather they have acted to defeat it. *Cf.* *United States v. Landerman*, 109 F.3d 1053, 1068 n.22 (5th Cir. 1997); *United States v. Summers*, 414 F.3d 1287, 1295 (10th Cir. 2005).

³²³ *Cf.* Settlement Agreement Between the United States et al. and Richard Sackler et al. add. A, paras. 3–4 (Oct. 21, 2020), <https://www.justice.gov/archives/opa/press-release/file/1329736/dl> [<https://perma.cc/ZQ5D-FNXA>] (stipulating that Purdue Pharma investors knew that the “legitimate market for Purdue’s opioids had contracted” but nevertheless pressured management to adopt an “aggressive marketing program” to increase opioid sales despite those sales lacking a legitimate medical purpose).

³²⁴ *Cf. id.*

Notably, aggressive sales practices are not per se *unlawful*, although they do abut that line and risk that salesforces cross it.³²⁵

The analyses for Hypotheticals 3B, 3C, and 3D follow their analogs in the prior hypotheticals. Yet for Hypothetical 3A, culpable knowledge at the time of making an investment suggests that subsequent encouragement in favor of “more aggressive” sales practices was *purposeful* conduct to increase the scale of the company’s illicit activity.³²⁶ Given this most-culpable mens rea, Hypothetical 3A would be an even more appropriate case for enforcement than would be Hypotheticals 1A or 2A.

This hypothetical also suggests that investor liability can arise after an initial act of investment. The “aggressive practices” that the venture capitalists urged could have been actions that those investors knew to be illegal. Imagine, for example, that in a meeting with DGI’s founder, the investors said “sales are not where they need to be; we suggest you make the customer experience more efficient by ending examinations by clinicians and instead prescribe Adderall based on customers’ self-diagnoses of having ADHD.”³²⁷ Under this extension, even if the venture capitalists’ initial act of investment would fail to satisfy the five-factor test’s required level of criminal intent, the subsequent governance engagement would substantially contribute to more illicit activity *and* would be done with a knowing or purposeful intent. In those cases, under Hypotheticals 3B, 3C, and 3D, the venture capitalists would not be appropriate targets for prosecution based on their time-of-investment conduct, yet their postinvestment conduct would satisfy the test.

C. *Safe Harbors for Nonculpable Investors*

Section III.A recognizes that if prosecutors begin to hold culpable investors accountable for corporate crime, then even nonculpable investment could be chilled.³²⁸ To avoid this social cost, this last Section calls on prosecutorial agencies—including DOJ and federal civil and quasi-criminal enforcers,³²⁹ as well as state and local agencies—to

³²⁵ See, e.g., INDEP. DIRS. OF THE BD. OF WELLS FARGO & CO., SALES PRACTICES INVESTIGATION REPORT overview (2017) (“The root cause of sales practice failures was the distortion of the Community Bank’s sales culture and performance management system, which, when combined with aggressive sales management, created pressure on employees to sell unwanted or unneeded products to customers and, in some cases, to open unauthorized accounts.”).

³²⁶ See LAFAYE, *supra* note 153, § 13.2 (“It may generally be said that one is liable as an accomplice to the crime of another if he (a) gave assistance or *encouragement* . . . (b) with the intent thereby to promote or facilitate commission of the crime.” (emphasis added)).

³²⁷ Cf. Broughman & Wansley, *supra* note 28, at 1307 (positing a model in which venture capitalists “push managers to take risks”).

³²⁸ See *supra* Section III.A.1.

³²⁹ See Jennings, *supra* note 76, at 2018 n.30, for a discussion of why corporate criminal enforcement by DOJ and civil enforcement by regulatory agencies are analogous.

adopt guidelines recognizing two safe harbors around investor criminal intent should they start bringing mere investor cases. If lack of criminal intent demarks law-abiding and criminal investors, then safe harbors that establish the lack of intent would counter the risk perception this Article's move might otherwise prompt. The discussion in this Section around each safe harbor includes model policy text that can be adopted by agencies.³³⁰

Before introducing these safe harbors, however, a note of caution about their use is in order. Both offer not only private protections to investors but also nudge them to undertake steps—pushing for more effective corporate compliance programs and better policing in the private capital market—that would serve a public interest in law compliance. If implemented, these safe harbors should not, however, be viewed as mandates or minimum efforts that must be undertaken if investors hope to avoid criminal exposure. As Section III.B makes clear, investor culpability is—and even more so investor *prosecution* ought to be—exceptional.³³¹ Given that, prosecutors should not view investors' nonobservance of these safe harbors as signaling wrongdoing.³³²

1. *Safe Harbor 1: Reliance on Corporate Compliance Programs*

Safe Harbor 1 provides that when an investor relies in good faith on an enterprise's representation that it has an effective compliance program in place, but a violation of law nevertheless happens, prosecutors will treat the investor as lacking criminal intent. "Good faith" is an important qualifier, as the model policy text explains, and would not include those investors who are in a position to know that such a representation is false.³³³ This safe harbor aims at protecting the passive investor,

³³⁰ This exemplar text tracks the format of DOJ's existing corporate enforcement policies. See U.S. Dep't of Just., Justice Manual § 9-28.000 (2024).

³³¹ See *supra* Section II.B.

³³² See Susan C. Morse, *The Truth About Safe Harbors*, 92 TENN. L. REV. 743, 771 (2025) ("Because a safe harbor is an objective *nonexclusive* test, it does not penalize behavior outside safe harbor boundaries. Nevertheless, a safe harbor can have the silent-implication effect of discouraging that behavior.").

³³³ In a parallel context, civil liability under section 11 of the Securities Act of 1933 is subject to due-diligence defenses, but those defenses are qualified by the reasonable and actual belief of those who assert them. 15 U.S.C. § 77k(b)(3) (qualifying due-diligence defenses to those with exculpatory information developed via "reasonable investigation" for which there is "reasonable ground to believe" and who actually "did believe" such information).

particularly one in a public company,³³⁴ whose knowledge about the firm and its conduct is in large part controlled by management.³³⁵

Although at first glance this safe harbor might imply a significant undertaking by a firm, it merely offers an incremental incentive. Criminal and civil enforcement policies already strongly encourage firms to implement compliance programs, and Safe Harbor 1 calls for nothing more than what those policies already incent.³³⁶ Instead, it offers a novel benefit. Existing policies encourage corporate compliance programs by promising mitigation for firms that happen to incur vicarious liability despite their efforts to the contrary.³³⁷ As a result, most large firms have embraced that some form of corporate compliance program is in the corporate interest.³³⁸ This safe harbor would differ, however, from existing incentives around corporate compliance programs; those incentives offer benefits at the organizational level. Safe Harbor 1, however, would inure to the benefit of investors directly.

If prosecutors were to view investors as not categorically blameless, then under this safe harbor, the presence of a corporate compliance program would become personally valuable to investors. In such an environment, investors would be expected to exercise what influence they have over firm governance—not just to mitigate the collective costs, such as fines, that follow corporate criminal violations, but also to protect against personal exposure.³³⁹ Substantial investors, who have the most leverage over corporate management and would be the most at risk in an age of investor culpability, would have the greatest interest in motivating law compliance.³⁴⁰ This safe harbor would thus offer a positive social policy in addition to providing private benefits. To the extent that compliance programs, combined with incremental support from shareholders, better prevent offending in the corporate context,

³³⁴ Section III.B.1.b concludes that public investors usually should not be targets. But there could be marginal cases, such as when a corporation appears to be at high risk of recidivism or there is derogatory information about its compliance practices in the public domain.

³³⁵ See Merritt B. Fox, *Required Disclosure and Corporate Governance*, 62 LAW & CONTEMP. PROBS. 113, 118 (1999) (observing that management is unlikely to disclose evidence of fiduciary violations absent a mandate to do so).

³³⁶ But see Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIA. L. REV. 321, 361–62 (2012) (questioning whether incentives for implementing corporate compliance programs adequately compensate for their costs).

³³⁷ See Donald C. Langevoort, *Compliance as Liability Risk Management*, in THE CAMBRIDGE HANDBOOK OF COMPLIANCE 123 (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

³³⁸ For public firms, they also do so because the Securities and Exchange Commission mandates disclosure of the firm's code of ethics or an explanation why the firm has not adopted such a code. 17 C.F.R. § 229.406(a) (2024).

³³⁹ See generally Jennings, *supra* note 126 (theorizing how aggregate corporate sanctions are imposed, or could be imposed, on shareholders).

³⁴⁰ See *supra* Sections II.B–C, III.B.1.d.

this safe harbor would protect investors while avoiding the social costs that Section III.A outlines.

The remainder of this Section comprises the Article's proposed text for Safe Harbor 1, which reads as follows:

Investor Reliance on Corporate Compliance Programs

General Principle: In circumstances in which a business enterprise represents to investors that it has established and maintains a compliance program that it believes to be adequate for the prevention and detection of misconduct within the enterprise, an investor may rely in good faith on such representation.

Comment: Investors provide financial support, broadly considered, to business enterprises through primary or secondary purchases of equity or debt interests or through other arrangements or transactions that have the effect of providing an enterprise with financial resources or improving its financial condition.³⁴¹ Under some circumstances, investors as a matter of law are subject to personal liability for investment-related conduct in the context of such enterprises.³⁴² For example, if *X* invests in *Y* corporation after learning that the investment will be used by *Y* corporation to fund illicit acts, then *X* is generally liable for the commission of those acts or a conspiracy to commit them.³⁴³ Typically, however, investors will lack the sort of information necessary to intend that an investment facilitate such wrongdoing. In those circumstances, investors would lack a culpable mental state and thus would not be liable for an enterprise's illicit acts. The latter case is most likely to occur in the context of publicly traded enterprises.³⁴⁴

Investor liability as just described arises by operation of law.³⁴⁵ This safe harbor does not expand or reduce the scope of such liability. Rather it resolves potential factual ambiguities by clarifying that investors who rely in good faith on an enterprise's compliance program lack the requisite mental state to intend that the enterprise engage in misconduct. In that light, the safe harbor promotes capital formation by providing good-faith investors additional assurance that they are not subject to individual liability for corporate misconduct.³⁴⁶ Further, the safe harbor enhances the total incentives enterprises have to adopt effective compliance programs. Under this safe harbor, such programs provide a protective benefit directly to the enterprise's investors. As a result, investors' interests align with the public interest in compliance through

³⁴¹ See *supra* note 13.

³⁴² See *supra* Section I.C.

³⁴³ See *supra* Section I.C.2.

³⁴⁴ See *supra* Sections II.C, III.B.1.b.

³⁴⁵ See *supra* Section I.C.

³⁴⁶ See *supra* Section III.A.1.

the establishment and maintenance of effective corporate compliance programs.

When misconduct does occur within an enterprise and prosecutors consider appropriate enforcement resolutions, remediation is often of paramount importance to the public interest in preventing future violations.³⁴⁷ Given this interest, the safe harbor applies with equal force to both pre-enforcement compliance programs and postenforcement remediation programs.

The safe harbor is qualified, however, by an investor's good faith. It would not apply, for example, when an investor knows or should know an enterprise's activities or proposed activities are unlawful because that knowledge would render representations about the effectiveness of a corporate-compliance program nonreliable as to that investor.³⁴⁸ It would also not apply when an investor knows or should know that the enterprise has materially misrepresented the establishment, maintenance, or adequacy of its compliance program.³⁴⁹ Further, the safe harbor is limited to liability arising from a person's capacity as investor. To the extent that a person has engaged in other acts—including, but not limited to, as a director, officer, employee, agent, advisor, contractor, counterparty, or otherwise—that advances misconduct in the enterprise, such acts would be outside the scope of this safe harbor.³⁵⁰

2. *Safe Harbor 2: Reliance on Pre-Investment Investigations*

Safe Harbor 2 establishes a policy that investors lack criminal intent when they rely in good faith on appropriate investigations of the firms they intend to invest in and from those investigations conclude that the company is not engaged in illicit activity or that the investor's capital will not be used for it.³⁵¹ This safe harbor accounts for the fact that primary investment can be criminogenic but that purchasing securities in secondary transactions has a more attenuated, and thus less

³⁴⁷ See Jennings, *supra* note 237, at 1610 (theorizing the “public interest in deterring violations by means of ex ante compliance or ex post remediation”).

³⁴⁸ Cf. *supra* note 333.

³⁴⁹ Cf. *supra* note 333.

³⁵⁰ See *supra* note 87 and accompanying text.

³⁵¹ There are some scenarios in which an investor knowingly invests in a firm that engages in illicit activity but can credibly ensure that its investment will not facilitate that activity. Imagine, for example, that a real estate company owns and leases commercial buildings via limited partnerships formed with outside investors. Imagine that as part of its business, it leases retail properties to cannabis dispensaries, a violation of the Controlled Substances Act, 21 U.S.C. § 856(a)(2) (prohibiting allowing any place under one's “manage[ment] or control” to be used for certain drug related activities, including their distribution). An outside investor who purchases interests in that partnership would be potentially liable. But if the investor participates in a separate partnership that deals only in apartment buildings, presumably there would be no liability for that investor related to the manager's cannabis-related properties.

plausibly culpable, connection to corporate crime.³⁵² Thus, the safe harbor incrementally incents those who directly fund firms to be reasonably sure that their capital will not be used to fund illicit activity. Just as the compliance programs embraced by Safe Harbor 1 need not always prevent law violations, the pre-investment investigations called for by Safe Harbor 2 need not be entirely certain.³⁵³ Even a thorough investigation can miss derogatory information. That possibility increases when entrepreneurs mislead prospective investors.³⁵⁴ Requiring perfection would undermine the procompliance incentive the safe harbor intends to offer. Rather, the investigation need only be designed and conducted in a way that gives the investor reasonable certainty, an open-ended and flexible standard.

Safe Harbor 1 is especially valuable for passive investors in public companies, whereas Safe Harbor 2 is particularly useful for investors in private firms in which investment-related conduct tends to be more active.³⁵⁵ That greater activity includes personally engaging with the firm's management and serving in formal and informal governance roles, such as designating seats on a board or providing advice.³⁵⁶ This safe harbor is especially valuable from a deterrence perspective because private companies, especially newer ones, often lack compliance programs,³⁵⁷ but they increasingly have the capacity to raise large sums and potentially to cause large-scale violations of law.³⁵⁸ Safe Harbor 2 would incent due diligence that leads investors either to avoid investing in law-breaking firms or to insist that those firms reform themselves as a condition of investment.

³⁵² See *supra* Section II.C.1.

³⁵³ See Jennings, *supra* note 237, at 1603 (“[A]n enforcer can look to a firm’s misconduct and compliance program to make a judgment whether the program was adequate to prevent the kind of misconduct that occurred, notwithstanding that it did.”).

³⁵⁴ In one particularly flagrant case, for example, a startup’s founder faked contracts and impersonated a customer to deceive investors during the diligence process. Press Release, U.S. Att’y’s Off., E.D.N.Y., Carlos Watson, Founder and Former CEO of Ozy Media Inc., Convicted of Multi-Million Dollar Fraud Scheme (July 16, 2024), <https://www.justice.gov/usao-edny/pr/carlos-watson-founder-and-former-ceo-ozy-media-inc-convicted-multi-million-dollar> [<https://perma.cc/WV7J-TR44>].

³⁵⁵ See *supra* Section II.C.

³⁵⁶ See *supra* Section I.C.1.

³⁵⁷ See Jeff J. Marwil & Jerry J. Burgdoerfer, *Private Companies Can Benefit from Compliance Programs Too*, LAW.COM (Aug. 2, 2006), <https://www.law.com/corpocounsel/almID/900005459335/> [<https://perma.cc/Y94H-CM2L>] (“[T]he public company has come to serve as a mentor of sorts to the private company in the arena of corporate compliance programs, offering certain ‘best practices’ that may also be useful to the privately held company, its management and its shareholders or owners.”).

³⁵⁸ See Allison Herren Lee, Comm’r, Sec. & Exch. Comm’n, Remarks at The SEC Speaks in 2021: Going Dark: The Growth of Private Markets and the Impact on Investors and the Economy (Oct. 12, 2021), <https://www.sec.gov/newsroom/speeches-statements/lee-sec-speaks-2021-10-12> [<https://perma.cc/K8U5-33UR>].

Unlike Safe Harbor 1, Safe Harbor 2 does not merely add incremental benefits to an already ubiquitous practice. Although due diligence is a best practice among private-company investors, deals sometimes come together with only modest, or even no, diligence.³⁵⁹ Due diligence is, across many business dimensions, a risk-mitigation tool for the benefit of investors.³⁶⁰ For especially enthusiastic private-company investors, however, the expected value of buying into the next big thing can outweigh the expected value of risk mitigation via due diligence.³⁶¹ Such enthusiastic investors might rationally forgo due diligence that is meant for their, or their limited partners', downside protection.³⁶² But as Part II explains, private-company investment is risky in law-compliance terms.³⁶³ Moreover, the deals that investors are most willing to forgo due diligence on are perhaps the riskiest of all in terms of compliance—given their potential scale—and thus are among the more appropriate sites of law enforcement scrutiny. In an environment with such scrutiny and given the unique risks of criminal prosecution compared to other investment risks—that is, imprisonment versus loss of capital—due diligence would be a compelling undertaking even for those investors who would otherwise be willing to forgo it.

The remainder of this Section comprises the Article's proposed text for Safe Harbor 2, which reads as follows:

Investor Reliance on Pre-Investment Investigation

General Principle: In circumstances in which an investor has, after reasonable investigation, reasonable ground to believe and does believe, at the time of an investment in a business enterprise that the investment would not facilitate or further misconduct within the enterprise, the investor may rely on such pre-investment investigation.³⁶⁴

Comment: Refer to the commentary for the “Investor Reliance on Corporate Compliance Programs” safe harbor for a general discussion regarding the nature of investors and their potential liability with respect to misconduct within business enterprises.³⁶⁵

Many private enterprises, especially those that have yet to be formed or that are in early stages of operation, lack corporate compliance programs.³⁶⁶ In those early-stage settings, investor decision-making

³⁵⁹ See *supra* note 215 and accompanying text.

³⁶⁰ Cf. Jeffrey J. Reuer, *Avoiding Lemons in M&A Deals*, MIT SLOAN MGMT. REV., Spring 2005, at 15, 15 (“The process of due diligence provides a useful starting point for obtaining detailed and reliable information about the quality of the resources to be acquired . . .”).

³⁶¹ See *supra* note 215 and accompanying text.

³⁶² See *supra* note 215 and accompanying text.

³⁶³ Cf. *supra* Sections II.B–C, III.B.1.b.

³⁶⁴ Cf. *supra* note 333 and accompanying text.

³⁶⁵ See *supra* Section III.C.1.

³⁶⁶ See *supra* note 357 and accompanying text.

can meaningfully influence whether an enterprise remains, or becomes, compliant with applicable law.³⁶⁷ Further, in these settings, investors could face heightened exposure to liability relative to passive investors in public firms.³⁶⁸ This safe harbor permits investors to negate a culpable mental state through the conduct of pre-investment due diligence. Further, it promotes the public interest in compliance by incenting investors to provide capital only to enterprises that will refrain from using such capital to engage in unlawful conduct.

Although it is likely to be particularly valuable to investors in private enterprises, the safe harbor also applies to investors in public companies, including those purchasing securities in primary offerings or in private-investment-in-public-equity transactions.³⁶⁹ The safe harbor is modeled in part on the affirmative due-diligence defenses available under section 11 of the Securities Act of 1933³⁷⁰ and should be construed in line with those defenses.³⁷¹

A “reasonable investigation” is one that provides reasonable assurance that a business enterprise is not engaging, and will not engage, in unlawful conduct or otherwise that a proposed investment will not advance such conduct. “Reasonable assurance” does not, however, require perfect or complete assurance.³⁷² Such investigations might be carried out by the investor or the investor’s personnel, or by appropriate third parties, including, but not limited to, legal counsel, financial advisors, accountants, subject-matter experts, or consultants.

CONCLUSION

In the United States, federal and state criminal codes prohibit an expansive array of conduct. Capacious accomplice and conspiracy theories of liability give prosecutors considerable room to charge those they allege to have helped principal offenders.³⁷³ Prosecutors routinely use this power.³⁷⁴ That is, unless, the potential accomplice or conspirator is merely an investor in a law-breaking firm.³⁷⁵

This Article has questioned a status quo in which law enforcement more readily views investors as victims of corporate crime than as actors who might bear some responsibility for it. Because investment-related conduct can contribute to the initiation, maintenance, or expansion of

³⁶⁷ See *supra* Sections II.B, II.C.2, III.B.1.b.

³⁶⁸ See *supra* Sections II.B, II.C.2, III.B.1.b.

³⁶⁹ See *supra* note 300 and accompanying text.

³⁷⁰ 15 U.S.C. § 77k.

³⁷¹ See *supra* note 333.

³⁷² See *supra* note 353 and accompanying text.

³⁷³ See *supra* Section I.C.2.

³⁷⁴ See *supra* notes 54–56 and accompanying text.

³⁷⁵ See *supra* note 57 and accompanying text.

illicit corporate activity, it is a worthy site of law enforcement attention. Although the vast majority of investors likely lack the minimal intent necessary to be criminally responsible for corporate wrongdoing,³⁷⁶ those who knowingly facilitate such wrongdoing through their actions as investors are appropriate subjects for deterrence.³⁷⁷ Under some circumstances, they might also be appropriate targets for enforcement.³⁷⁸

Still, upsetting the status quo would not be without expected cost, which would manifest in greater risk perception among good-faith investors that they too could be exposed to criminal liability or, at least, to costly investigations.³⁷⁹ To mitigate that risk, this Article recommends guidelines for the positive exercise of prosecutorial discretion in charging culpable investors. Moreover, should prosecutors break through to investor prosecution, it calls for the adoption of two safe harbors—one aimed at investors in public companies and the other at investors in private companies—to distinguish good-faith investors from their criminal peers.

³⁷⁶ See *supra* Sections I.C, II.C.

³⁷⁷ See *supra* Section III.B.1.

³⁷⁸ See *supra* Section III.B.1.

³⁷⁹ See *supra* Section III.A.1.

NOTE

Solving a Patent Infringement Loophole for Objects in Outer Space: A Novel Interpretation of 35 U.S.C. § 105

*Brian Smallshaw**

ABSTRACT

Amid a developing space technology industry, Congress passed 35 U.S.C. § 105 in 1990 to protect inventions in outer space from patent infringement. The Act clarified when an object in space should be considered made, used, or sold within the United States, but provided an exception for when another country registers the object under the Convention on Registration of Objects Launched into Outer Space. Traditionally, this exception has been read to create a flags-of-convenience loophole. A potential infringer could register their space object in another country and benefit from the U.S. market without fear of infringement liability under U.S. case law addressing extraterritorial infringement. As the space technology industry continues to grow rapidly each year, protecting patent rights for inventors is a necessary step to ensure the United States does not fall behind competing countries technologically or economically. This Note explores why the traditional interpretation of 35 U.S.C. § 105 is not in agreement with the goals of the patent system or the intention of Congress and offers a novel interpretation that avoids the loophole and brings the statute in line with patent policy and Congress's intent. Further, this Note discusses why interpreting the exception as a limitation on the scope of the statute is a particularly effective solution to eliminate the loophole and addresses two possible counterarguments against the solution.

* J.D. 2025, The George Washington University Law School; B.A. 2019, Columbia University. I thank the editors of *The George Washington Law Review* for their diligent work in preparing this piece for publication, as well as my peers, Immanuel Elijah and Jaemin Sung, for the numerous discussions they had with me to provide their thoughts and feedback on my Note. Lastly, I thank my family and friends for their support throughout my entire education.

TABLE OF CONTENTS

INTRODUCTION	911
I. THE CONFLICT BETWEEN SPACE LAW AND PATENT LAW	914
A. <i>Goals of the Patent System</i>	914
B. <i>Development of Jurisdictional Reach in Outer Space</i>	916
C. <i>Development of Extraterritorial Reach of Patent Enforcement</i>	917
D. <i>Convergence of Space Law and Patent Law</i>	918
II. AVOIDING A LOOPHOLE	921
A. <i>Proposed Solution: Read the Exception in 35 U.S.C. § 105 as a Limit on Its Scope</i>	921
B. <i>Comparing This Solution to Other Common Proposals</i>	923
1. Patenting in as Many Countries as Possible Is Too Costly	924
2. Challenges of International Treaties	925
3. Low Likelihood of a Statutory Amendment.	927
C. <i>Potential Objections to the Proposed Solution</i>	928
1. Reading Against the Plain Meaning	928
a. <i>Doctrine of Equivalents</i>	929
b. <i>Public Use Doctrine</i>	929
c. <i>Attributed Infringement</i>	931
2. Recent Instances of Limiting Patentees' Rights	932
CONCLUSION	933

INTRODUCTION

As technology advances in the modern age, the scientific arts continuously introduce new issues that must be legislated and adjudicated. One such rapidly advancing area is the space technology industry: From 2021 to 2022, successful rocket launches increased by approximately twenty-eight percent globally, setting a record for the number of successful launches in a year.¹ The industry saw continued growth in 2023

¹ John Coykendall, Kate Hardin, Alan Brady & Aijaz Hussain, *Riding the Exponential Growth in Space*, DELOITTE INSIGHTS (Mar. 22, 2023), <https://www2.deloitte.com/us/en/insights/industry/aerospace-defense/future-of-space-economy.html> [<https://perma.cc/E6F3-7JVB>] (“2022 was a record year for the space sector, with 186 successful rocket launches (41 more than in 2021)—the most ever, signaling a rapid transformation of the space sector.”).

with 223 launches,² and it grew again in 2024, bringing the new record of orbital launches in a year up to 259—over double the number of launches just four years prior.³ Public support for space exploration is strong,⁴ and advancements in rocket and satellite technology have encouraged the industry's recent growth.⁵ As the industry expands, countries and private companies are racing to develop even more sophisticated technology to corner the burgeoning market.⁶ The increase in competition and innovation has naturally led to an increase in the number of patents protecting space technology as companies move to monetize the inventions in which they have heavily invested.⁷

Amid the explosion of space activity, several patent experts have questioned whether the United States adequately protects space technology patents from infringement.⁸ Specifically, 35 U.S.C. § 105,⁹ which affects the circumstances in which an object in outer space is said to infringe a U.S. patent,¹⁰ is commonly interpreted to mean that space objects registered by foreign countries cannot be found to have

² *Recap of All Global Launches for 2023*, SPACEWORKS (Jan. 10, 2024), <https://www.space-works.aero/recap-of-all-global-launches-for-2023/> [<https://perma.cc/2FU6-J2VQ>].

³ Press Release, Ed. Team, Space Found., *The Space Report 2024 Q4 Shows Record Annual Launches, Strong H2 Market Performance, and Growing Demand for Tracking and Removal of Orbital Debris* (Jan. 21, 2025), <https://www.spacefoundation.org/2025/01/21/the-space-report-2024-q4/> [<https://perma.cc/BV3X-CAPL>].

⁴ See CARY FUNK & MARK STRAUSS, PEW RSCH. CTR., *MAJORITY OF AMERICANS BELIEVE IT IS ESSENTIAL THAT THE U.S. REMAIN A GLOBAL LEADER IN SPACE* 7 (June 6, 2018), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2018/06/PS_2018.06.06_science-and-space_FINAL.pdf [<https://perma.cc/XC44-57LF>] (“Although most Americans believe that NASA still has an essential role to play in the exploration of space, they also express confidence that private companies can make meaningful contributions in such areas as developing safe spacecraft and conducting research to expand scientific knowledge.”).

⁵ Coykendall et al., *supra* note 1 (“A major driver of growth in the space sector has been the development of new technologies, such as reusable launch vehicles, SmallSats (satellites of low mass and size, usually under 2,600 lbs.), and CubeSats (square shaped miniaturized satellites).”).

⁶ See Sarah Kreps, Avishai Melamed & Ray Jayawardhana, *The Promise and Perils of the New Space Boom*, BROOKINGS INST. (Nov. 2, 2022), <https://www.brookings.edu/articles/the-promise-and-peril-of-the-new-space-boom-us-china-competition-spacex-international-law/> [<https://perma.cc/U6X7-MVNE>] (“Undeniably, the U.S. has a distinct first-mover advantage, having captured a large share of the market and demonstrated the affordability of space launches.”).

⁷ Stephen A. Brookman, *Patents in the Emerging World of NewSpace*, PERKINS COIE (July 3, 2023), <https://www.perkinscoie.com/en/news-insights/patents-in-the-emerging-world-of-newspace.html> [<https://perma.cc/9ZGK-4ZV8>] (“Space-related filings increased significantly in the early 2000s and have continued a steady upward trend since 2012. While the overall filings dipped before and during the COVID-19 pandemic, space-related filings numbers continued to rise through mid-2021.”).

⁸ See, e.g., Theodore U. Ro, Matthew J. Kleiman & Kurt G. Hammerle, *Patent Infringement in Outer Space in Light of 35 U.S.C. § 105: Following the White Rabbit Down the Rabbit Loophole*, 17 B.U. J. SCI. & TECH. L. 202, 206 (2011).

⁹ 35 U.S.C. § 105.

¹⁰ See *id.* §§ 105, 271.

infringed a U.S. patent.¹¹ An infringer could exploit the U.S. market and undercut the patent owner merely by registering the patent in another country.¹² This potential loophole has been deemed a “Flag of Convenience,” akin to highly criticized maritime laws that enable ship owners to register their ships in foreign nations to take advantage of more lenient regulations offered by another jurisdiction.¹³ The common interpretation of 35 U.S.C. § 105 leads to a similar result for patents, which directly opposes the goals of the patent system.¹⁴

Consider, for example, a satellite that infringes a U.S. patent and services companies or individuals within the United States. Ignoring the registration exception, such a satellite would likely be liable for infringement of the U.S. patent under the current extraterritorial principles established by relevant cases.¹⁵ This protects the interests of the patent owner and enables the patent owner to benefit as the sole provider of the technology within the United States, exactly as the patent system intends.¹⁶ However, if such a satellite was merely registered in another country—all else being equal—then the patent owner would not be able to establish infringement within the United States and would need to compete with the infringer in the U.S. market.¹⁷ At least one foreign scholar has already identified this loophole and advised that foreign nations should capitalize on it at the detriment of inventors within the United States.¹⁸

The Note argues that the correct reading of the registration exception is that objects that are registered in another country are excepted from the scope of 35 U.S.C. § 105, which prevents this loophole. This proposal would avoid the need to amend the statute while eliminating the harmful loophole and bringing the statute in greater accord with the intention and vision of Congress when the statute was written. This Note first explains the general goals of the patent system, the jurisdictional

¹¹ See Kevin Davidson & Keri Sicard, *Extraterrestrial Law: Protecting Patents in Outer Space and on Celestial Bodies*, IPWATCHDOG (Aug. 20, 2023, 12:15 PM), <https://ipwatchdog.com/2023/08/20/extraterrestrial-law-protecting-patents-outer-space-celestial-bodies/id=164862/> [<https://perma.cc/7RQP-M7V7>].

¹² See *id.* (“The Flags of Convenience Loophole allows infringement with impunity. The U.S. patent owner has no protection in this scenario.”).

¹³ *Id.*; see Walton J. McLeod, Note, *The Flags-of-Convenience Problem*, 16 S.C. L. REV. 409, 410 (1964).

¹⁴ See *infra* Section I.A.

¹⁵ See Ro et al., *supra* note 8, at 219–20.

¹⁶ See *infra* Section I.A.

¹⁷ See *infra* Section I.A.

¹⁸ See Dov Greenbaum, Opinion, *Israel’s Space Race Has an IP Issue That Needs Its Own Exploration*, CTECH (Sept. 2, 2022, 10:46 AM), <https://www.calcalistech.com/ctechnews/article/bj9uyg01o> [<https://perma.cc/4ARC-XEBW>] (“[I]f you want to develop AI-mediated space technologies and you want to be safe from the nuisance of IP infringement lawsuits, maybe consider developing and launching it from Israel.”).

scope of U.S. space law and patent law, the history of 35 U.S.C. § 105, and the Act's adverse effects under its popular interpretation. Then, this Note proposes its novel interpretation of 35 U.S.C. § 105 derived from legislative history and an alternative textual reading of the law. Finally, this Note compares the proposed interpretation to solutions that have been suggested by other sources and addresses possible objections to the proposed solution.

I. THE CONFLICT BETWEEN SPACE LAW AND PATENT LAW

A. *Goals of the Patent System*

To understand patent law's shortcomings with respect to space objects, one should first briefly explore the original goal of the patent system. At the dawn of the United States as an independent nation, one of the most widely recognized challenges for the country in maintaining its early success was establishing a sustainable economy.¹⁹ Recognizing the need for domestic scientific innovation if the United States was to keep pace with foreign nations, George Washington encouraged "the exertions of skill and genius in producing [new and useful inventions] at home" during his first State of the Union address to Congress in 1790.²⁰ Soon after, Congress passed the Patent Act of 1790,²¹ creating a legal framework for the United States to derive economic strength from transformative inventions like the steamboat, which was patented only a year later,²² and the cotton gin, patented in 1794.²³

Today, the American economy continues to rely on science, technology, and innovation,²⁴ and history has shown the importance of protecting an inventor's intellectual property. Countries that have not provided such rights have suffered economically; for example, the inability to adequately protect patents contributed to Russia's struggles in rebuilding its economy after the Soviet Union collapsed.²⁵

¹⁹ See Janet A. Riesman, *Money, Credit, and Federalist Political Economy*, in *BEYOND CONFEDERATION* 128, 128–29 (Richard Beeman et al. eds., 1987).

²⁰ George Washington, President of the U.S., State of the Union Address (Jan. 8, 1790), <https://founders.archives.gov/documents/Washington/05-04-02-0361> [<https://perma.cc/Q8QK-XBJC>].

²¹ Patent Act of 1790, ch. 7, 1 Stat. 109.

²² *Today in History - August 26: Steaming Along*, LIBR. OF CONG., <https://www.loc.gov/item/today-in-history/august-26/> [<https://perma.cc/ZJ29-X8BC>]; see also *Patents Signed by George Washington*, MOUNT VERNON, <https://www.mountvernon.org/george-washington/the-first-president/patents/patents-signed-by-george-washington> [<https://perma.cc/7WCD-FG5E>].

²³ MARTIN J. ADELMAN, RANDALL R. RADER & JOHN R. THOMAS, *CASES AND MATERIALS ON PATENT LAW* § 1.3[b][2] (5th ed. 2018); see also MOUNT VERNON, *supra* note 22.

²⁴ *Science, Technology, and Innovation*, U.S. DEP'T OF STATE, <https://www.state.gov/policy-issues/science-technology-and-innovation/> [<https://perma.cc/5P8Q-SBWA>].

²⁵ Marina Portnova, Comment, *Ownership and Enforcement of Patent Rights in Russia: Protecting an Invention in the Existing Environment*, 8 *IND. INT'L & COMP. L. REV.* 505, 505 (1998).

According to former U.S. Trade Representative Jeffrey Lang, companies were unwilling to engage in trade with Russia without sufficient intellectual property protection.²⁶ Within the United States, there is a strong correlation between the number of patents granted and capital investment.²⁷ Data connecting economic growth and patents shows that “[l]ong-term economic growth is primarily the result of the growth of technological knowledge” as measured by the number of patents filed in a given period.²⁸ From the outset, these historical realities and data support the claim that the patent system has played an important role in the United States’s global scientific and economic dominance through *domestic* protection of innovation.

In conjunction with economic growth, the disclosure of how inventions work is “[a] principal purpose of the patent law.”²⁹ When inventors feel that a patent will not successfully protect their intellectual property, however, they will often resort to trade secrets, whereby detailed information about the invention is not disclosed to the public and even receives discovery protections in litigation.³⁰ For example, after the Supreme Court’s decision in *Alice Corp. v. CLS Bank International*,³¹ which generally limited the patent protection afforded to computer programs,³² software companies shifted their focus away from patents and toward trade secrets.³³ Although this can be a suitable short-term alternative for inventors, the public suffers because an industry that resorts to trade secrets sees less innovation, meaning new and useful technologies—ranging from everyday gadgets to medical treatments—may never reach the market.³⁴

²⁶ See *id.*

²⁷ See JACOB SCHMOOKLER, INVENTION AND ECONOMIC GROWTH 196–98 (1966).

²⁸ See *id.*

²⁹ ADELMAN ET AL., *supra* note 23, § 1.6, at 68.

³⁰ See *id.*; FED. R. CIV. P. 26(c)(1)(G).

³¹ 573 U.S. 208 (2014).

³² See Joseph Allen Craig, Note, *Deconstructing Wonderland: Making Sense of Software Patents in a Post-Alice World*, 32 BERKELEY TECH. L.J. 359, 360 (2017) (“Although *Alice* did not announce a per se rule against software patents, it created a patent-eligibility test that made it difficult for software to be patented, and it called many software patents into question, prompting many decisions invalidating software patents.”).

³³ Samuel J. LaRoque, Comment, *Reverse Engineering and Trade Secrets in the Post-Alice World*, 66 U. KAN. L. REV. 427, 427–28 (2017); see also Robins Kaplan LLP, *Software and Trade Secrets: Rethinking IP Strategies After CLS v. Alice*, JD SUPRA (June 30, 2014), <https://www.jdsupra.com/legalnews/software-and-trade-secrets-rethinking-i-15738/> [<https://perma.cc/NF4V-Z6H2>] (“As a result [of *Alice*], software innovators may find that, in some cases, trade secret law now offers the best method for protecting proprietary software advancements.”).

³⁴ See Andrea Contigiani, David H. Hsu & Iwan Barankay, *Trade Secrets and Innovation: Evidence from the “Inevitable Disclosure” Doctrine*, 39 STRATEGIC MGMT. J. 2921, 2938 (2018) (analyzing how protecting intellectual property through trade secrets rather than patents reduces innovation output).

B. Development of Jurisdictional Reach in Outer Space

At the height of the space race, the international community recognized the role outer space would play in future scientific and political endeavors. Accordingly, dozens of nations signed the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies ("Outer Space Treaty") to govern human activity in space.³⁵ The treaty declared that outer space belongs to no nation and lies outside the jurisdiction of any one country.³⁶ It also provided a jurisdictional framework governing liability in outer space both for governments and private entities.³⁷

Enforcing responsibility is obviously challenging if the international community is unable to determine from which country a space object originated, so the Convention on Registration of Objects Launched into Outer Space ("Registration Convention") followed the Outer Space Treaty in 1976.³⁸ The Registration Convention mandates all parties to retain a registry of any space objects for which they are responsible and submit the registry to the United Nations; responsibility is carried by the "launching State" of the object, and the launching state "shall register the space object by means of an entry in an appropriate registry which it shall maintain."³⁹ The launching state is responsible for any object launched into space from its territory, so it must register both private and public objects.⁴⁰ Additionally, the Outer Space Treaty states that "[a] State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object," creating a jurisdictional basis in the launching state.⁴¹ By maintaining a registry that is submitted to the United Nations, a spacefaring nation cannot evade liability by claiming that it does not own a tortious space object that it does actually own. In total, seventy-seven nations are party to the convention, including several major spacefaring nations.⁴²

³⁵ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

³⁶ *Id.* art. I.

³⁷ *Id.* art. VI.

³⁸ Convention on Registration of Objects Launched into Outer Space, *opened for signature* Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15 (entered into force Sept. 15, 1976) [hereinafter Registration Convention].

³⁹ *Id.* art. II.

⁴⁰ *See id.*

⁴¹ Outer Space Treaty, *supra* note 35, art. VIII.

⁴² *See generally* Registration Convention, *supra* note 38 (listing China, Russia, India, and New Zealand, the four most active launching states after the United States, as parties to the convention).

C. Development of Extraterritorial Reach of Patent Enforcement

Traditionally, U.S. patents are only infringed if the underlying invention is made, used, imported, sold, or offered for sale within the United States.⁴³ Essentially, the protection a U.S. patent offers ends at the physical boundaries of the United States; someone who sells an infringing device would not be liable if their sale was done outside the country.⁴⁴ During the mid-twentieth century, the development of remote technology required the U.S. Court of Claims⁴⁵ to reconsider whether the availability of patent enforcement needed to be extended beyond the country's borders in *Decca Ltd. v. United States*.⁴⁶ The court established a balancing test that included three considerations for determining whether an extraterritorial object was used within the United States in an infringement suit: (1) "ownership of the equipment by the United States," (2) "control of the equipment from the United States," and (3) "actual beneficial use of the system within the United States."⁴⁷

In 2005, the judiciary once again heard a case involving extraterritorial land-based technology in *NTP, Inc. v. Research In Motion, Ltd.*⁴⁸ The patentee, NTP, owned a patent claiming a device that allows a user to remotely receive emails.⁴⁹ When Research In Motion developed the popular BlackBerry telephone, which also allowed users to remotely receive emails, NTP sued for patent infringement under 35 U.S.C. § 271.⁵⁰ Research In Motion argued that because one of its data towers was located in Canada, the entire invention was not being practiced within the United States and was therefore not infringing within the United States.⁵¹ In its decision, the Federal Circuit narrowed the *Decca* test by forgoing the ownership prong and found that Research In Motion's actions occurred within the United States; Research In Motion was therefore liable for violating 35 U.S.C. § 271.⁵² The court reasoned that "use" of the patented invention occurred within the United States because BlackBerry users in the United States "controlled" the cellular tower by prompting it to transfer data every time they accessed email

⁴³ 35 U.S.C. § 271(a).

⁴⁴ See SUSY FRANKEL & DANIEL J. GERVAIS, *ADVANCED INTRODUCTION TO INTERNATIONAL INTELLECTUAL PROPERTY* 42 (2016).

⁴⁵ Congress replaced the Court of Claims in 1982 with the Court of Federal Claims for trials and the Court of Appeals for the Federal Circuit for appellate cases. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.).

⁴⁶ 544 F.2d 1070 (Ct. Cl. 1976).

⁴⁷ *Id.* at 1083.

⁴⁸ 418 F.3d 1282 (Fed. Cir. 2005), *abrogated on other grounds by* *Zoltek Corp. v. United States*, 672 F.3d 1309, 1322–23 (Fed. Cir. 2012).

⁴⁹ See *id.* at 1287.

⁵⁰ 35 U.S.C. § 271; see *NTP*, 418 F.3d at 1289–90.

⁵¹ See *NTP*, 418 F.3d at 1311.

⁵² See *id.* at 1315–17.

from their phones.⁵³ The users also benefited from this remote access, thereby satisfying the extraterritorial test.⁵⁴ Notably, however, *NTP* did not involve any space objects.⁵⁵ So 35 U.S.C. § 105, which had been in effect for fifteen years but only pertains to space objects,⁵⁶ was not relevant.⁵⁷

Ignoring 35 U.S.C. § 105, an analogous situation to *NTP* in which a space satellite is used to transfer data for U.S. residents would likely be found to infringe any pertinent U.S. patents. Such a satellite would be prompted to send data, either upon instantaneous demand or through a prior agreement, satisfying the “control” prong in *NTP*, and the data would inherently be used for some benefit, likewise satisfying the “beneficial use” prong.⁵⁸

D. Convergence of Space Law and Patent Law

Although the courts have provided some guidance on extraterritorial infringement,⁵⁹ the inherent unpredictability of technological innovation and the uniqueness of each scientific field create challenges to developing patent law.⁶⁰ Over the past century, an evolving understanding of chemistry, for example, has forced a reexamination of what is considered a nonobvious invention worthy of a patent.⁶¹ Likewise, the modern ability to isolate gene sequences and perform highly advanced algorithms that were once impossible without computers has prompted the question of what it means for something to be an invention in the first place.⁶² Continuing this trend, as space technology has advanced, the necessarily remote nature of the inventions and the lack of sovereign

⁵³ See *id.* at 1316–17.

⁵⁴ See *id.* at 1317.

⁵⁵ See *id.* at 1287–90 (discussing the facts at issue, none of which pertained to space objects).

⁵⁶ See 35 U.S.C. § 105.

⁵⁷ See *NTP*, 418 F.3d at 1311–25 (analyzing the patent infringement claim without any reference to 35 U.S.C. § 105).

⁵⁸ See *id.* at 1316–17.

⁵⁹ See *supra* Section I.C.

⁶⁰ See, e.g., *Bilski v. Kappos*, 561 U.S. 593, 605–06 (2010) (plurality opinion) (altering the test for what qualifies as patentable under 35 U.S.C. § 101 because “times change,” “[t]echnology and other innovations progress in unexpected ways,” and “[the Information] Age puts the possibility of innovation in the hands of more people and raises new difficulties for the patent law”).

⁶¹ See, e.g., *In re Papesch*, 315 F.2d 381, 391–92 (C.C.P.A. 1963) (holding that chemicals with unexpected properties can be considered nonobvious despite the traditional view that the physical structure of the invention is the determining factor); 35 U.S.C. § 103.

⁶² *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 591 (2013) (reasoning that the discovery of the location of particular genes was not patentable); *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 223 (2014) (“[T]he mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.”).

territory in space have caused similar confusion about how to enforce the field's patents.⁶³

To address this issue, 35 U.S.C. § 105 extends territorial reach to patented inventions in outer space if they are under the jurisdiction or control of the United States.⁶⁴ The statute, however, contains an exception that arguably creates a loophole for infringers to avoid liability. The statute reads,

Any invention made, used or sold in outer space on a space object or component thereof under the jurisdiction or control of the United States shall be considered to be made, used or sold within the United States for the purposes of this title, except with respect to any space object or component thereof that is specifically identified and otherwise provided for by an international agreement to which the United States is a party, or with respect to any space object or component thereof that is carried on the registry of a foreign state in accordance with the Convention on Registration of Objects Launched into Outer Space.⁶⁵

Commentators have interpreted this statute and exception to mean that registration in a foreign country serves as a categorical bar to winning an infringement lawsuit stemming from a U.S. patent; in other words, if the object is registered by another country, then the object shall *not* be considered to be made, used, or sold within the United States.⁶⁶ Under this interpretation, a company that wants to use another patentee's technology to exploit the U.S. market could launch their object—such as a satellite—from another country, have it registered there, and sell its service to entities within the United States.⁶⁷ If sued for infringement, the company could entirely avoid the object being considered used within the United States.⁶⁸ By enabling the exploitation of patented technology, the law would disincentivize U.S. companies from investing in the rapidly growing space technology industry, as a company cannot realize a return on investment if another company can undermine the market by copying the technology.⁶⁹ Even if companies continue to invest in the industry, their only effective protection would be through trade secrets.⁷⁰ This would slow down advancement of the

⁶³ See Brookman, *supra* note 7 (“A U.S. patent is generally only effective within the jurisdiction of the United States. So, what happens when someone practices a U.S. patent in space?”).

⁶⁴ 35 U.S.C. § 105.

⁶⁵ *Id.* § 105(a).

⁶⁶ See, e.g., Ro et al., *supra* note 8, at 213.

⁶⁷ See *id.* at 214–15.

⁶⁸ See *id.* at 221.

⁶⁹ See *supra* Section I.A.

⁷⁰ See *supra* note 33 and accompanying text.

industry, hurting both the U.S. economy, which relies on technological innovation, and the public at large, which would be denied useful services.⁷¹

Such an interpretation runs contrary to Congress's intent. When drafting the bill in 1988, the House Committee on Science, Space, and Technology wrote that the overall goals of 35 U.S.C. § 105 were to "focus on commercial development of space" and provide "clarity to the question of application of U.S. patent law in space."⁷² By including exceptions in the statute, Congress did not intend to restrict commercial developments in space, but instead sought to maintain flexibility in how intergovernmental space objects—specifically international space station operations—are treated.⁷³ The attention to intergovernmental objects such as the space station was pertinent at the time, as the commercial space technology industry was still miniscule compared with government projects, and objects like the space station had a greater comparative role in the overall space technology sector.⁷⁴ Congress added the exception to the statute to create flexibility and highlight that the exception "is an important aspect of current negotiations on U.S. Space Station operations with its international partners."⁷⁵ The committee continued, "This flexibility is particularly important in multinational cooperative agreements relating to space stations"⁷⁶ Congress was focused entirely on a scenario involving governmental projects when writing the exception, and it evidently did not have in mind the collateral possibility of protecting private actors seeking to avoid liability by launching their infringing object from a foreign country.⁷⁷ Not only does the common interpretation of the statute oppose Congress's interest in promoting the commercial space technology industry,⁷⁸ but it has become increasingly inapposite in recent decades as the growth of commercial investment has far outpaced that of government investment.⁷⁹ The shift toward commercial interests leads objects like the

⁷¹ See *supra* Section I.A.

⁷² H.R. REP. NO. 100-51, pt. 2, at 2–3 (1988).

⁷³ See *id.* For instance, the International Space Station is exempted from 35 U.S.C. § 105 because its jurisdiction is instead governed by an international agreement. See Agreement Concerning Cooperation on the Civil International Space Station, Jan. 29, 1998, T.I.A.S. No. 12,927.

⁷⁴ See NANCY GALLAGHER & JOHN D. STEINBRUNER, RECONSIDERING THE RULES FOR SPACE SECURITY 16–17 (2008).

⁷⁵ H.R. REP. NO. 100-51, pt. 2, at 3.

⁷⁶ See *id.*

⁷⁷ See *id.* at 1–3 (making no reference to private actors).

⁷⁸ See *id.* at 3.

⁷⁹ See SPACE F., ORG. FOR ECON. COOP. & DEV., SPACE ECONOMY INVESTMENT TRENDS 15, 18 (2024), https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/04/space-economy-investment-trends_7eafcb97/9ae9a28d-en.pdf [https://perma.cc/ZC25-WTZS].

International Space Station, which itself may be deorbited by 2030,⁸⁰ to have decreasing comparative importance to the industry.⁸¹ The accelerating development of the commercial space technology industry requires proper patent protection to avoid industry reliance on trade secrets or outright abandonment of investment in the field. Because Congress intended to provide that protection through 35 U.S.C. § 105, practitioners should seek an interpretation that is more congruous with the purpose of the statute and the policy goals of patent law.

II. AVOIDING A LOOPHOLE

A. *Proposed Solution: Read the Exception in 35 U.S.C. § 105 as a Limit on Its Scope*

To avoid reading a loophole into 35 U.S.C. § 105, the statute should be read such that objects registered in another country that is party to the Registration Convention are excepted from the statute's scope. Otherwise, by reading the registration exception⁸² to apply only to the part of the statute that reads "shall be considered to be made, used or sold within the United States for the purposes of this title,"⁸³ the exception prevents a finding that an object on a foreign registry infringed a U.S. patent.⁸⁴ Essentially, when an object has been registered outside the United States by a party to the Registration Convention, practitioners currently interpret the rule to mean that any invention made, used, or sold in outer space on a space object or component thereof under the jurisdiction or control of the United States shall *not* be considered to be made, used, or sold within the United States for the purposes of this title.⁸⁵

However, in order to bring the interpretation of the statute into greater accordance with Congress's intent and avoid abuse of this loophole, the exception should instead be read to apply to the entire preceding independent clause of the statute.⁸⁶ Moreover, by reading 35

⁸⁰ NAT'L AERONAUTICS & SPACE ADMIN., INTERNATIONAL SPACE STATION DEORBIT ANALYSIS SUMMARY 1 (2024), <https://www.nasa.gov/wp-content/uploads/2024/06/iss-deorbit-analysis-summary.pdf> [<https://perma.cc/KD37-8SWM>].

⁸¹ *See id.* at 3, 6.

⁸² *See* 35 U.S.C. § 105(a) (excepting from the statute "any space object or component thereof that is carried on the registry of a foreign state in accordance with the Convention on Registration of Objects Launched into Outer Space").

⁸³ *Id.*

⁸⁴ *See, e.g.,* Ro et al., *supra* note 8, at 214–15.

⁸⁵ *See id.*

⁸⁶ The entire preceding independent clause reads, "Any invention made, used or sold in outer space on a space object or component thereof under the jurisdiction or control of the United States shall be considered to be made, used or sold within the United States for the purposes of this title" 35 U.S.C. § 105(a).

U.S.C. § 105 such that objects that are registered in another country are excepted from its scope, the statute satisfies the functional role of an exception in the first place.⁸⁷ The recommended interpretation would thus suggest that 35 U.S.C. § 105(a) *as a whole* is inapplicable if the object is registered by another country, rather than meaning that an object is categorically not made, used, or sold within the United States.

There are three possible scenarios that this interpretation of the statute would touch: (1) the object has been registered by the United States, (2) the object has been left unregistered, or (3) the object has been registered by a foreign country that is party to the Registration Convention.

In the first scenario, the exception would not be triggered, and U.S. jurisdiction or control would be evident by the U.S. registration. The use of the space object would therefore be considered within the United States, and a patentee would have a cause of action for infringement.⁸⁸

In the second scenario, it is possible the object has not been registered either because the launching state is not party to the Registration Convention or due to administrative oversight on behalf of the launching state.⁸⁹ Although the exception would not be triggered, if the object is under the jurisdiction or control of the United States, the use of the object would automatically be considered within the United States per 35 U.S.C. § 105.⁹⁰ This is particularly important because even if the object is not benefiting entities within the United States, merely showing U.S. jurisdiction or control will be enough for a U.S. patentee to have a cause of action for infringement.⁹¹

In the third scenario, the exception would be triggered, and the preceding clause of the statute would therefore not apply, so there would be no *statutory* extension of territoriality. Applying prior case law, namely *NTP*, a court would be able to rely on extraterritorial principles for patent enforcement.⁹² Specifically, a court would inquire whether the infringement factually occurred within the United States, which would be the basis for U.S. jurisdiction and create a cause of action under 35 U.S.C. § 271(a).⁹³ Consider again the example involving

⁸⁷ See Charles J. Zinn, *Provisos and Exceptions in Statutory Composition*, 44 A.B.A. J. 269, 269 (1958) (“[An exception’s] purpose is to take out of the purview of the statute something that would otherwise be a part of it.”).

⁸⁸ See *supra* Sections I.B–C.

⁸⁹ See *supra* Section I.B.

⁹⁰ See 35 U.S.C. § 105 (“Any invention made, used, or sold in outer space . . . under the jurisdiction or control of the United States shall be considered to be made, used or sold within the United States for the purposes of this title . . .”).

⁹¹ See *supra* Section I.C.

⁹² See *supra* Section I.C.

⁹³ See *NTP, Inc. v. Rsch. In Motion, Ltd.*, 418 F.3d 1282, 1317 (Fed. Cir. 2005); 35 U.S.C. § 271(a).

a foreign-registered satellite that uses technology patented within the United States and supplies services to people within the United States.⁹⁴ Without an interfering statute, a court could analogize those facts to the facts of *NTP*: A cellular tower located in another country that is prompted to send data by and benefits people within the United States—as was the case in *NTP*—is a nearly identical situation to a satellite located in outer space that is prompted to send data by and benefits people within the United States.⁹⁵ Because the court found this constituted an infringing use within the United States in *NTP*, the loophole would be closed in an equivalent case involving a space satellite or any similar type of space object.⁹⁶

Notably, the third scenario requires showing both control and beneficial use to establish that the infringement occurred within the United States.⁹⁷ This combination is a higher standard than in the second scenario, in which merely showing jurisdiction or control of the object creates a cause of action.⁹⁸ This strict standard would fulfill Congress's desired flexibility to protect intergovernmental objects like the space station from infringement suits while simultaneously promoting protection for commercial patentees.⁹⁹

Supported by the courts' precedent of interpreting statutes and rules with the goals of the patent system in mind,¹⁰⁰ this Note's novel interpretation closes the supposed loophole in 35 U.S.C. § 105.

B. Comparing This Solution to Other Common Proposals

Over the past decade, a variety of other solutions have been proposed. Practitioners and scholars have recommended filing international patents in specific countries,¹⁰¹ encouraging new treaties between the United States and other nations,¹⁰² and passing legislation that would allow extraterritorial reach for an infringement cause of action.¹⁰³ Each of these, however, presents obstacles not faced by an interpretive solution.

⁹⁴ See *supra* Section I.C.

⁹⁵ See *NTP*, 418 F.3d at 1317.

⁹⁶ See *id.*

⁹⁷ See *supra* Section I.C.

⁹⁸ See *supra* Section I.C.

⁹⁹ See *supra* Section I.D.

¹⁰⁰ See *infra* Section II.C.

¹⁰¹ See Davidson & Sicard, *supra* note 11.

¹⁰² See Andrew Stevens & Todd M. Hopfinger, *Obtaining and Enforcing Patents for Outer Space*, STERNE KESSLER (July 31, 2020), <https://www.sternekessler.com/news-insights/publications/obtaining-and-enforcing-patents-outer-space> [<https://perma.cc/M3Y3-WQ8P>].

¹⁰³ See Ro et al., *supra* note 8, at 231.

1. *Patenting in as Many Countries as Possible Is Too Costly*

Filing patents in multiple countries may seem like a good option for inventors, especially because the solution is entirely within the patentee's control. Whereas interpretative solutions, international treaties, and statutory amendments all require some action by a third party,¹⁰⁴ a patentee could theoretically ensure protection of their invention by filing a patent in every member state of the Registration Convention. However, there are seventy-seven parties to the convention,¹⁰⁵ which makes covering the map more daunting, both because of the cost of obtaining a patent and the difficulty in enforcing patents in many foreign nations.

Analysts have calculated that the cumulative filing, issuance, and maintenance fees for a patent in all 195 countries would cost approximately \$2 million.¹⁰⁶ Assuming, as a rough calculation, that the cost to file for and maintain a patent in all 195 countries would remain proportional to the cost to file for and maintain a patent in seventy-seven specific countries, a patentee would be expected to pay over \$750 thousand in administrative fees alone over the lifetime of the patent.¹⁰⁷ This does not account for traditional fees associated with patent prosecution, such as attorney's fees, translation fees, prior art searches, and other costs that rise with the increased time and labor of filing in so many countries.¹⁰⁸ Although this estimate is for just one patent, many major companies file hundreds of patent applications each year, multiplying the costs by factors of tens to thousands and making this solution even more impractical.¹⁰⁹ The patentee could, however, target only countries in which infringers are likely to exploit this loophole, thereby filing in fewer locations and reducing costs.¹¹⁰ But a potential infringer with a large incentive to exploit the loophole could still choose from the remaining countries where no patent is filed. Even for important inventions, tech companies will typically apply for a patent in fewer than ten

¹⁰⁴ See *infra* Sections II.B.2–.3.

¹⁰⁵ *Convention on Registration of Objects Launched into Outer Space*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtsg_no=XXIV-1&chapter=24&Temp=mtdsg3&clang=_en [https://perma.cc/2DLN-6SHK].

¹⁰⁶ See *Cost of a Worldwide Patent: Everything You Need to Know*, UPCOUNSEL (Nov. 16, 2020), <https://www.upcounsel.com/cost-of-a-worldwide-patent> [https://perma.cc/532V-WS4L].

¹⁰⁷ See *id.*

¹⁰⁸ See JEFFREY G. SHELDON, *HOW TO WRITE A PATENT APPLICATION* § 18:1.2 (3d ed. 2015).

¹⁰⁹ See Thomas Alsop, *Companies with the Most United States Patents Granted to Them in 2023*, STATISTA (May 22, 2024), <https://www.statista.com/statistics/274825/companies-with-the-most-assigned-patents/> [https://perma.cc/XRG8-M2Y6].

¹¹⁰ See Davidson & Sicard, *supra* note 11 (“China is a major spacefaring nation. By obtaining a China patent, the inventor is afforded protection from infringement that would not otherwise be available.”).

countries,¹¹¹ far short of the seventy-seven that are party to the Registration Convention.

Moreover, even if the patentee does commit to filing in all member states, enforcing international patents has proven difficult in many countries, including several prominent spacefaring nations.¹¹² In particular, Russia and India both score below average for patent enforcement according to an annual Chamber of Commerce study comparing the intellectual property frameworks of fifty-three global economies.¹¹³ At the same time, these two nations have launched a significant number of objects into outer space.¹¹⁴ With the infrastructure in place for launches, these countries are attractive locations for an infringer to carry out such activity, and a patentee would have a limited guarantee that their patent rights would be enforced there due to the countries' weak patent systems. Overall, the solution of patenting in multiple countries, despite being entirely within the inventor's control, is impractical due to the cost of patenting in dozens of countries and the unreliable patent programs of pertinent nations.

The statutory interpretation this Note proposes would eliminate the need for broadly filing international applications. Even if the inventor does not own a patent in the registering state, they can still show that there is beneficial use and control within the United States, and thus infringement.¹¹⁵ Although that would not guarantee as much protection as a patent owned in the registering state, the interpretive solution does not preclude an inventor from utilizing both options simultaneously. Overall, compared with applying in numerous countries, the proposed interpretation would reduce prosecution time and costs for the inventor while also providing more flexible coverage.

2. *Challenges of International Treaties*

Because 35 U.S.C. § 105 has extraterritorial scope and is therefore an international issue, treaties that provide more guidance on intellectual property rights in outer space are a natural suggestion for closing

¹¹¹ Michael K. Henry, *Where Should We File in 2020? Recent Trends in Foreign Patent Filings*, HENRY (Nov. 22, 2019), <https://henry.law/blog/trends-in-foreign-patent-filings/> [<https://perma.cc/D79C-S2BZ>] ("For important patent applications, most tech companies will choose anywhere from two to six jurisdictions for foreign filing (and sometimes more).").

¹¹² UP-COUNSEL, *supra* note 106.

¹¹³ See MEIR PUGATCH & DAVID TORSTENSSON, U.S. CHAMBER OF COM., INTERNATIONAL IP INDEX 6–7 (11th ed. 2023).

¹¹⁴ See Avery Koop, *Visualized: Which Countries Are Dominating Space?*, VISUAL CAPITALIST (July 8, 2022), <https://www.visualcapitalist.com/visualized-which-countries-are-dominating-space/> [<https://perma.cc/TQ95-TU44>] (showing that as of July 2022, Russia had launched 3,611 objects, India had launched 127, and the United States had launched 5,534).

¹¹⁵ See *supra* Section II.A.

the potential loophole.¹¹⁶ Often, the goal of such proposed treaties would be to create a unified international patent system in which filing in one nation would provide protection worldwide, or at least in the countries that are party to the Registration Convention.¹¹⁷ This suggestion does seemingly have legitimate support behind it; the World Intellectual Property Organization (“WIPO”), which oversees international intellectual property standards and cooperation, has recognized the issue of extraterritoriality of space inventions for several decades.¹¹⁸ In 1997, WIPO published a series of questions concerning the territoriality of intellectual property made or used in space.¹¹⁹ And in 2004, WIPO recognized the possibility of treating outer space and its objects under a universal, uniform legal code as a solution to “many of the practical difficulties that arise from the commercial application of space technologies.”¹²⁰

Although scholars and WIPO agree that this solution would theoretically prevent infringers from escaping liability, issues involving enacting and enforcing international agreements make it impracticable. Countries may be disincentivized from entering effective agreements, as the repercussions of failing to uphold their end of the bargain often outweigh the benefits gained from the other side of the bargain.¹²¹ Historically, the major spacefaring nations have displayed an unwillingness to relinquish autonomy to global organizations that would be able to establish and govern outer space as a unified, international territory.¹²² And to complicate the issue further, developing countries may be

¹¹⁶ See, e.g., Davidson & Sicard, *supra* note 11 (“Without an international agreement, complete patent protection remains elusive. . . . Commentators and scholars have suggested the United Nations close this loophole by developing an international agreement on intellectual property protection in Outer Space.”).

¹¹⁷ See Matthew J. Kleiman, *Patent Rights and Flags of Convenience in Outer Space*, 23 AIR & SPACE LAW., no. 3, 2011, at 4, 6 (“The ideal solution to the flag-of-convenience problem, at least as it relates to effective patent protection, is to create a new multinational patent jurisdiction for filing and enforcing patents in outer space.”); Stevens & Hopfinger, *supra* note 102 (“[A] cooperation treaty mirroring the Patent Cooperation Treaty could include all countries that are party to the Registration Convention, allowing for a more efficient patent application process.”).

¹¹⁸ INT’L BUREAU, WIPO, MEETING OF CONSULTANTS ON INVENTIONS MADE OR USED IN OUTER SPACE annex I, at 1 (1997), https://www.wipo.int/documents/d/patents/docs-en-topics-outer-space-meeting-of-consultants_inventions_space_1997.pdf [<https://perma.cc/Q87M-7E2X>].

¹¹⁹ *Id.* annex 1, at 2–3.

¹²⁰ INT’L BUREAU, WIPO, INTELLECTUAL PROPERTY AND SPACE ACTIVITIES 22 (2004), https://www.wipo.int/documents/d/patents/docs-en-topics-outer-space-ip_space_wipo-contribution_oecd_2004.pdf [<https://perma.cc/9BN2-D2N5>].

¹²¹ See Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT’L L. 579, 581–82 (2005); Katerina Linos & Tom Pegram, *The Language of Compromise in International Agreements*, 70 INT’L ORG. 587, 592 (2016) (“In the absence of a global police force, states comply with international agreements only when they expect concessions to be reciprocated and rewarded with future cooperation.”).

¹²² FRANCIS LYALL & PAUL B. LARSEN, *SPACE LAW* 560–61 (2009).

unlikely to join intellectual property agreements because developing countries are typically unwilling to negotiate away access to technology that the developed world already has.¹²³ Although developed countries, such as the United States, would want to protect their own industries' patents, a developing country without a significant space technology industry may lack incentive to sign a treaty because it would oversee very few patents, if any, that would gain from the treaty. Rather, because an attempt to exploit 35 U.S.C. § 105 would require a foreign nation's government to register the space object, a country that sees value in allowing and investing in infringing space technology may be unlikely to agree simultaneously to limit its own advancement by signing a treaty that closes that opportunity.

Even if all relevant countries agree to a treaty that closes the alleged loophole, enforcing it poses further challenges. Enforcement measures such as sanctions are often inconsistently applied and only lead to meaningful change slowly, if at all.¹²⁴ Statistically, the more members a treaty has, the more difficult it is to enforce.¹²⁵ A treaty composed of at least the countries that are party to the Registration Convention, therefore, would pose significant enforcement problems.

This Note's proposed interpretation of 35 U.S.C. § 105 circumvents the issues associated with treaties. First, it does not require the cooperation of other countries, including developing countries that are seeking to expand their own technology industries. And second, patentees would be able to successfully sue for infringement on their own, a better alternative than having to rely on the threat of sanctions, which may not accomplish their goals and leaves them with no personal cause of action if the treaty is nonetheless violated.

3. *Low Likelihood of a Statutory Amendment*

A final solution that has been proposed by scholars is to rewrite 35 U.S.C. § 105 entirely to guarantee that there is no loophole.¹²⁶ The

¹²³ See Robert C. Bird & Subhash C. Jain, *The Continuing Challenge of Global Intellectual Property Rights*, in *THE GLOBAL CHALLENGE OF INTELLECTUAL PROPERTY RIGHTS* 3, 11 (Robert C. Bird & Subhash C. Jain eds., 2008) ("Developing countries may argue that intellectual property rights raise prices and profits for one country or company at the expense of the well-being of a developing nation.").

¹²⁴ Frederic L. Kirgis, *Enforcing International Law*, ASIL INSIGHTS (Jan. 22, 1996), <https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law> [<https://perma.cc/ECG7-VDRC>].

¹²⁵ Steven J. Hoffman et al., *International Treaties Have Mostly Failed to Produce Their Intended Effects*, 119 PROC. NAT'L ACAD. SCI., Aug. 1, 2022, at 3–4, <https://www.pnas.org/doi/epdf/10.1073/pnas.2122854119> [<https://perma.cc/5W95-NYZH>].

¹²⁶ See Ro et al., *supra* note 8, at 231 ("Congress should consider amending 35 U.S.C. § 105 by modifying Exception 2 to require U.S. courts to follow extraterritorial principles when evaluating whether the United States has jurisdiction for a claim of patent infringement occurring on a 'foreign-flagged' spacecraft.").

Supreme Court's increasing use of textualism and adherence to ordinary meaning in interpreting statutes suggest that encoding any change in the statute is a more guaranteed solution than convincing the courts to adopt an interpretation that might run contrary to the plain meaning.¹²⁷ However, the well-recorded rise in congressional stalemate and decrease in legislative activity make this option less reliable, as solving legislative problems is pushed off to the indeterminate future.¹²⁸ Moreover, because the statute can already be read in a manner that is in accordance with the stated goals of Congress and the patent system, there is no explicit need to pass new legislation.

C. *Potential Objections to the Proposed Solution*

1. *Reading Against the Plain Meaning*

One concern with the proposed solution is that courts might not be willing to interpret the statute against its commonly understood meaning.¹²⁹ Indeed, the Supreme Court commonly directs that the ordinary meaning of the text is the first step in statutory interpretation.¹³⁰ Moreover, the modern trend of interpretation heavily relies on the plain meaning of the statute.¹³¹

Although convincing the courts to read against the plain meaning of the statute is a considerable hurdle to the proposed solution, there is reason to believe courts would do so. Historically, in cases involving patent law, courts have determined that the appropriate reading of the law—and what Congress intended in multiple statutes—is the reading that retains the values of the patent system.¹³² The doctrine of equiv-

¹²⁷ See James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 486 (2013). This Note assumes that the plain meaning of the statute is the commonly proposed interpretation that creates the loophole—which is supported by the various articles explaining the statute. See, e.g., Ro et al., *supra* note 8, at 206; Davidson & Sicard, *supra* note 11.

¹²⁸ See generally Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85 (2015) (analyzing the cause, trend, and effects of modern congressional gridlock); Joseph Ax & Jason Lange, *Insight: Moderates Fleeing U.S. House, Setting Stage for More Washington Gridlock*, REUTERS (Sept. 14, 2022, 5:13 PM), <https://www.reuters.com/world/us/moderates-fleeing-us-house-setting-stage-more-washington-gridlock-2022-09-14/> [<https://perma.cc/NY3H-8637>] (suggesting that gridlock will continue to worsen in the coming years).

¹²⁹ See *supra* note 127 and accompanying text.

¹³⁰ See, e.g., *Moskal v. United States*, 498 U.S. 103, 108 (1990) (“‘In determining the scope of a statute, [courts] look first to its language,’ giving the ‘words used’ their ‘ordinary meaning.’” (citations omitted) (first quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981); and then quoting *Richards v. United States*, 369 U.S. 1, 9 (1962))).

¹³¹ See Brudney & Baum, *supra* note 127, at 486.

¹³² See *infra* Sections II.C.1.a–c.

alents, public use doctrine, and rule of attributed infringement each exemplify this principle.¹³³

a. Doctrine of Equivalents

In *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*,¹³⁴ the Supreme Court officially adopted the “doctrine of equivalents” to guarantee that a strict interpretation of the patent laws would not limit acts of infringement to literal infringement.¹³⁵ Describing the purpose of the patent system, the Court commented,

to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. . . . It would deprive him of the benefit of his invention and would foster concealment rather than disclosure of inventions, which is one of the primary purposes of the patent system.¹³⁶

The dissenting justices, on the other hand, explained that the plain meaning of the statute defining infringement¹³⁷ prevented any expansion of claim language to include equivalents, stating that “petitioners had a right to act on the belief that this Court would follow the plain mandates of Congress that a patent’s precise claims mark its monopoly boundaries.”¹³⁸ Despite the Court’s awareness of the plain meaning of the infringement statute, it interpreted the statute in line with “the primary purposes of the patent system,” demonstrating the Court’s willingness to go beyond the text of patent statutes.¹³⁹

b. Public Use Doctrine

Similarly, to encourage early disclosure of inventions, the judiciary has provided a pragmatic interpretation of what constitutes a “public use” of an invention sufficient to bar its patentability. Traditionally, if an invention has been used in public, it can serve as a bar to patenting the invention,¹⁴⁰ even if the public was never aware of the invention.¹⁴¹ This rule, simply put, prevents someone from attempting to patent an invention and remove it from the public sphere after society at large

¹³³ See *infra* Sections II.C.1.a–c.

¹³⁴ 339 U.S. 605 (1950).

¹³⁵ *Id.* at 612.

¹³⁶ *Id.* at 607.

¹³⁷ 35 U.S.C. § 271.

¹³⁸ *Graver Tank*, 339 U.S. at 617 (Black, J., dissenting).

¹³⁹ *Id.* at 607.

¹⁴⁰ See 35 U.S.C. § 102(a)(1).

¹⁴¹ See, e.g., *Egbert v. Lippmann*, 104 U.S. 333, 338 (1881).

has already grown accustomed to its availability.¹⁴² The judiciary's focus on the values of the patent system over a strict definition of what constitutes a "public use" is on display with a juxtaposition of two cases: *Metallizing Engineering Co. v. Kenyon Bearing & Auto Parts Co.*¹⁴³ and *W.L. Gore & Associates v. Garlock, Inc.*¹⁴⁴

In *Metallizing*, the Second Circuit dealt with a suit in which an inventor patented a process for conditioning a metal surface, which eventually resulted in a product that was sold to the public while the process itself remained secret to the public.¹⁴⁵ The inventor began selling the product over a year before filing their patented method, which would trigger a public use bar to patentability if the court found that the inventor's actions qualified as a public use.¹⁴⁶ The court ruled that this was, in fact, a public use because the effects of the process were sold in the market.¹⁴⁷ The patent was thus found invalid.¹⁴⁸

Thirty-seven years later, the Federal Circuit presided over a nearly identical fact pattern in *Gore*: Once again, the inventor manufactured their product with a secret process and sold the product publicly with much success.¹⁴⁹ After several years, a competitor independently invented the method of making the product and filed a patent for the method.¹⁵⁰ The original inventor was sued for infringing the new patent and, in response, argued that *Metallizing* established the rule that the product being in public meant that the process of making it was in public as well, barring a later patent.¹⁵¹ The only difference in *Gore* was a matter of *who* filed the patent; in *Metallizing*, the patentee was the party who had kept the invention a secret,¹⁵² whereas in *Gore*, the patentee was not the party who had kept the invention a secret.¹⁵³ Functionally, the inventions in both cases had been in the public to the exact same degrees as each other.¹⁵⁴ The Federal Circuit, however, held that the patent in *Gore* was valid.¹⁵⁵ The court reasoned that the party who filed the

¹⁴² See *Cont'l Plastic Containers v. Owens Brockway Plastic Prods., Inc.*, 141 F.3d 1073, 1079 (Fed. Cir. 1998).

¹⁴³ 153 F.2d 516 (2d Cir. 1946).

¹⁴⁴ 721 F.2d 1540 (Fed. Cir. 1983).

¹⁴⁵ See *Metallizing Eng'g Co.*, 153 F.2d at 517.

¹⁴⁶ See *id.* at 517–18.

¹⁴⁷ See *id.* at 520.

¹⁴⁸ See *id.*

¹⁴⁹ See *W.L. Gore & Assocs.*, 721 F.2d at 1544–46.

¹⁵⁰ See *id.*

¹⁵¹ See *id.* at 1550.

¹⁵² See *Metallizing Eng'g Co.*, 153 F.2d at 517.

¹⁵³ See *W.L. Gore & Assocs.*, 721 F.2d at 1544–46.

¹⁵⁴ See *Metallizing Eng'g Co.*, 153 F.2d at 518 (“[T]he use [of the invention] was not public, but secret . . .”); *W.L. Gore & Assocs.*, 721 F.2d at 1550 (describing “the processes claimed in [the patent]” as “having been secret, not public”).

¹⁵⁵ See *W.L. Gore & Assocs.*, 721 F.2d at 1550.

patent was a material fact that distinguished *Gore* from *Metallizing*.¹⁵⁶ The court clarified its rationale, stating,

Early public disclosure is a linchpin of the patent system. As between a prior inventor who benefits from a process by selling its product but suppresses, conceals, or otherwise keeps the process from the public, and a later inventor who promptly files a patent application from which the public will gain a disclosure of the process, the law favors the latter. The district court therefore erred as a matter of law in applying the statute ¹⁵⁷

The Federal Circuit's reasoning here suggests that upholding the goals of the patent system is a valuable consideration in interpreting patent statutes and can support overturning the district court's statutory interpretation of what constitutes a "public use,"¹⁵⁸ even though doing so creates a secondary and opposite meaning for the term with respect to an identical use in *Metallizing*.¹⁵⁹

c. Attributed Infringement

More recently, in *Akamai Technologies, Inc. v. Limelight Networks, Inc.*,¹⁶⁰ the Federal Circuit expanded on the Supreme Court's holding that "a method patent is not directly infringed . . . unless a single actor can be held responsible for the performance of all steps of the patent."¹⁶¹ In the Federal Circuit's en banc opinion, the court recognized that it would harm patentees if an infringer could carry out all but a few steps of a patented method and require their customers to finish the method.¹⁶² The patentee would be left with no singular party that technically infringed their patent as defined by 35 U.S.C. § 271(a).¹⁶³ As a solution, the court eventually ruled that "liability under § 271(a) can also be found when an alleged infringer conditions participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method."¹⁶⁴ In doing so, the Federal Circuit directly expanded the scope of the patentee's rights to avoid a loophole.¹⁶⁵ Like *Graver Tank* and *Gore*, *Akamai* represents a case in which the judiciary interpreted the patent statutes broadly to maintain the efficacy of the system

¹⁵⁶ *See id.*

¹⁵⁷ *Id.* (citation omitted).

¹⁵⁸ *See id.*

¹⁵⁹ *See Metallizing Eng'g Co.*, 153 F.2d at 517–18.

¹⁶⁰ 797 F.3d 1020 (Fed. Cir. 2015) (en banc).

¹⁶¹ *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915, 924 (2014).

¹⁶² *See Akamai Techs., Inc.*, 797 F.3d at 1023.

¹⁶³ *See id.*

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

and close loopholes that negatively affect inventors.¹⁶⁶ An interpretation of 35 U.S.C. § 105 that does not necessarily follow the plain language of the statute but better aligns with the goals of the patent system would be consistent with this approach taken by the courts and could therefore be adopted.

2. *Recent Instances of Limiting Patentees' Rights*

Because the suggested interpretation of 35 U.S.C. § 105 would expand the rights of patentees, it is important to note that the Supreme Court has a recent trend of ruling in favor of defendants in patent cases.¹⁶⁷ In the past two decades, the Court has twice interpreted patent-related statutes in favor of accused infringers, limiting the rights of patentees,¹⁶⁸ which some scholars believe is a trend that is likely to continue.¹⁶⁹ These decisions, however, do not appear to be because of the position of the parties, but rather have explicitly been in line with the overall goals of the patent system.

In the first case, *eBay Inc. v. MercExchange, L.L.C.*,¹⁷⁰ the Court's decision in favor of the alleged infringer was in line with the social and economic goals of the patent system because it prevented the plaintiff, a nonpracticing entity, from entirely removing a technological advancement from the public market.¹⁷¹ Justice Kennedy stated this rationale clearly in his concurrence, writing, "An industry has developed in which firms use patents not as a basis for producing and selling goods . . . [In these cases,] an injunction may not serve the public interest."¹⁷² Similarly, in *Alice Corp. v. CLS Bank International*, the Court expanded the limitations on patent eligibility, seeking to fulfill the goal of allowing new technology to develop and reach the public market.¹⁷³ The Court explained, "we must distinguish between patents that claim the 'buildin[g] block[s]' of human ingenuity and those that integrate

¹⁶⁶ See *id.*; *W.L. Gore & Assocs. v. Garlock, Inc.*, 721 F.2d 1540, 1550 (Fed. Cir. 1983); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 605 (1950).

¹⁶⁷ See Peter O. Huang, *Recent Supreme Court Patent Decisions: The Trend to Limit the Power of Patent Holders*, 10 J. APP. PRAC. & PROCESS 393, 393 (2009) (describing a series of Supreme Court decisions between 2006 and 2008 that each limited the power of patent holders and discussing the high probability of the trend continuing).

¹⁶⁸ See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (holding that a permanent injunction is not an automatic remedy for infringement despite a patent representing the right to exclude others from practicing the patented invention); *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 216–18 (2014) (explaining the judicially created exceptions to what types of inventions are patent eligible under 35 U.S.C. § 101).

¹⁶⁹ See Huang, *supra* note 167, at 400.

¹⁷⁰ 547 U.S. 388 (2006).

¹⁷¹ *Id.* at 394.

¹⁷² See *id.* at 396–97 (Kennedy, J., concurring).

¹⁷³ See *Alice*, 573 U.S. at 217.

the building blocks into something more The former ‘would risk disproportionately tying up the use of the underlying’ ideas’¹⁷⁴ *Alice* particularly exemplifies the Court’s effort to maintain the overarching goals of the patent system amidst a rapidly evolving technological field—in this case, computer programs.¹⁷⁵

Despite the recent trend to rule against patentees, the driving factor behind the Supreme Court’s decisions has been to achieve the goals of the patent system. Thus, the argument that the courts would continue a trend not in favor of patentees and choose not to expand patent rights in this instance is not a major concern.

CONCLUSION

As the space technology industry continues to rapidly progress, the application of patent law must keep pace to ensure that innovation within the industry does not stall. The modern-day space race to corner the market is already in progress, with significant investment from private companies.¹⁷⁶ If courts recognize the possible loophole arising from 35 U.S.C. § 105, the industry will likely see either a shift toward trade secrets, which will slow innovation, or a significant abandonment of the industry altogether.¹⁷⁷ The common interpretation that causes the loophole, however, violates the intent of Congress, and an alternative reading of the statute is not only valid but also congruous with Congress’s stated goals.¹⁷⁸ Although practitioners and scholars have recommended other solutions such as expanded patent prosecution, treaties, and legislation, each of these solutions faces barriers that the alternative interpretation does not.¹⁷⁹ Moreover, the judiciary’s precedent interpreting the patent laws such that they conform to the overarching goals of the patent system supports the likelihood of the adoption of this Note’s proposed interpretation.¹⁸⁰

¹⁷⁴ See *id.* (first and second alterations in original) (citation omitted) (quoting *Mayo Collaborative Servs. v. Prometheus Lab’ys, Inc.*, 566 U.S. 66, 72, 89 (2012)).

¹⁷⁵ See *generally id.* (addressing patent claims regarding a computer system and program code).

¹⁷⁶ See Kreps et al., *supra* note 6.

¹⁷⁷ See *supra* Section I.A.

¹⁷⁸ See *supra* Section II.A.

¹⁷⁹ See *supra* Section II.B.

¹⁸⁰ See *supra* Section II.C.

NOTE

“I Just Didn’t Want It to Be Me”: The Social Entrapment Framework in Self-Defense Claims of Criminalized Survivors

*Kelly Hennessy**

ABSTRACT

Intimate partner violence affects over ten million people across the United States each year. The primary societal response to this violence has been the criminal legal system, which has had the unintended consequence of creating a subset of accused persons, referred to in this Note as criminalized survivors, who are incarcerated for crimes committed against their abusive partners in response to their abuse. The criminal legal system’s conception intimate partner violence, consisting of discrete violent incidents, creates issues for criminalized survivors trying to explain the reasonableness of their responsive force when claiming self-defense. “Battered woman syndrome” and its progeny, “battering-and-its-effects” evidence, which purportedly describe psychological and behavioral symptoms of someone who has suffered persistent intimate partner violence, are the chief adaptations to address these challenges. But they have numerous limitations that make them ill-suited to assessing criminalized survivors’ self-defense claims.

This Note argues that practitioners defending criminalized survivors charged with murder should adopt an expansive “social entrapment” framework, which considers the coercive control exercised by the abusive partner and

* J.D. 2025, The George Washington University Law School; B.A. 2016, Middlebury College. Thank you to Jackie Hennessy and Darrel Harris for lending the expertise you’ve developed over years advocating for domestic violence survivors to this Note and to Erin Hennessy and the rest of the Advocates for fighting for survivors every day. Thank you to Rachel Lynch for being my perpetual sounding board and gut check and to the rest of my friends and family for listening to me wax on about the criminal legal system and its many injustices daily. Here’s to the fights worth having and the people you fight alongside.

the ways in which institutional indifference and structural inequalities support that control when arguing criminalized survivor’s self-defense claims. Such a framework will enable factfinders to better assess the circumstances as the criminalized survivor believed them to be when they engaged in defensive force, allowing factfinders to more accurately assess the reasonableness of the criminalized survivor’s actions.

TABLE OF CONTENTS

INTRODUCTION	935
I. THE CRIMINAL LEGAL RESPONSE TO INTIMATE PARTNER VIOLENCE AND ITS CONSEQUENCES	940
A. <i>Increasing Criminalization of Intimate Partner Violence</i>	940
B. <i>Impact of Mandatory Arrest and Prosecution Policies on Intimate Partner Violence</i>	943
C. <i>Increased Arrests of Intimate Partner Violence Victims</i>	945
II. SELF-DEFENSE AND ITS LIMITATIONS	945
A. <i>Traditional Self-Defense</i>	946
1. Reasonableness	948
B. <i>Battered Woman’s Syndrome Evidence</i>	950
III. IMPLEMENTING A SOCIAL ENTRAPMENT MODEL IN THE UNITED STATES	952
A. <i>The Case of Deven Grey</i>	954
B. <i>The Social Entrapment Model</i>	955
1. Coercive Control	957
2. Institutional Issues	960
3. The Exacerbating Effect of Structural Inequalities	963
C. <i>Admissibility of Social Entrapment Model Evidence</i>	965
1. Admissibility of Fact Witness Testimony	966
2. Admissibility of Expert Testimony	967
CONCLUSION	969

INTRODUCTION

Around midnight on December 12, 2017, Deven Grey was “slapped awake” by her boyfriend, John Vance.¹ He was mad because

¹ Blind Plea, *Someone Is Lying*, LEMONADA MEDIA, at 18:36 (May 17, 2023), <https://lemonadamedia.com/podcast/someone-is-lying/> [https://perma.cc/9755-3SJY] [hereinafter *Someone Is Lying*]. Deven recounted the story detailed above throughout *Blind Plea: Someone is Lying*. See *id.* The eleven-episode podcast provides an in-depth look at Deven and John’s relationship and

he could not find his phone, because he thought Deven was too flirty with his friend who was over earlier that day, or perhaps because of nothing at all.² According to Deven, things always seemed to spiral like this when John was upset, and he could be set off by “anything at any time.”³ For hours, John hit Deven, punching her to reawaken her when she lost consciousness.⁴ He grabbed his gun, firing shots indiscriminately around the trailer with their daughter sleeping nearby and pistol whipping Deven with the barrel.⁵ He choked Deven both with his hands and with a hose from outside.⁶ This type of abuse was not new to Deven—much of her six-year relationship with John was punctuated with physical, psychological, and emotional abuse—but Deven says this night was different.⁷ That night, she was sure he was going to kill her—that either he or she would die that night—and, she said, “I just didn’t want it to be me.”⁸

And so, a few minutes after John laid down on their pullout couch with his gun beside him, Deven picked it up and shot him in the back of the head.⁹ Deven immediately called 911 to tell them she had gotten into an argument with her boyfriend and that she shot him and thought he was dead.¹⁰ When police arrived, Deven was bleeding from her ear from a “busted . . . eardrum,” covered in cuts and bruises, and suffering from facial fractures.¹¹ But police quickly decided Deven killed John “in cold blood,” and she was charged with murder.¹² One year later, a judge denied Deven’s self-defense immunity claim in a Stand Your Ground hearing.¹³ Feeling she had no good options left, Deven agreed

Deven’s interaction with the criminal legal system after she kills him. *See generally* Blind Plea, *All Episodes*, LEMONADA MEDIA (2023), https://lemonadamedia.com/podcast/?_episode_cat=blind-plea [<https://perma.cc/87VR-58VZ>]. This Note discusses Deven’s story as she tells it and treats her recounting as true. For more information about the State’s case against Deven and Deven and John’s relationship, see generally *id.* This Note uses first names when referencing the people involved in these events as that is how the *Blind Plea* podcast refers to them.

² See *Someone Is Lying*, *supra* note 1, at 19:24.

³ *Id.* at 20:22.

⁴ See *id.* at 36:10.

⁵ See *id.* at 32:46.

⁶ See *id.* at 36:35.

⁷ See Blind Plea, *Haunted Land*, LEMONADA MEDIA (May 17, 2023), <https://lemonadamedia.com/podcast/haunted-land/> [<https://perma.cc/6G3R-TNCV>]; *Someone Is Lying*, *supra* note 1, at 43:19.

⁸ Blind Plea, *Deven’s Defense*, LEMONADA MEDIA, at 36:56 (June 14, 2023), <https://lemonadamedia.com/podcast/devens-defense/> [<https://perma.cc/QC83-PEE7>]; see also *Someone Is Lying*, *supra* note 1, at 44:04.

⁹ See *Someone Is Lying*, *supra* note 1, at 42:55.

¹⁰ See *id.* at 00:35.

¹¹ *Id.* at 34:03.

¹² *Id.* at 06:45.

¹³ See Blind Plea, *supra* note 8, at 39:35.

to a “blind plea” in which she pled guilty to manslaughter with no agreement on sentencing.¹⁴ In 2020, she was sentenced to fifteen years.¹⁵

Much of Deven’s story is not unusual. Roughly one quarter of women have been a victim of severe physical violence at the hands of an intimate partner,¹⁶ and nearly one half, approximately fifty-nine million women, report experiencing some type of intimate partner violence (“IPV”) in their lives.¹⁷ Domestic violence composes twenty-one percent of all violent crime, with IPV composing fifteen percent.¹⁸ Women in the United States are “more likely to be attacked, injured, raped, or killed by a current or former male partner than by all other types of assailants combined.”¹⁹

¹⁴ See Blind Plea, *The Blind Plea*, LEMONADA Media, at 28:49 (June 21, 2023), <https://lemonadamedia.com/podcast/the-blind-plea/> [<https://perma.cc/LR9Q-GXXH>].

¹⁵ *Id.* at 45:02. Deven’s release date was moved up to April 2024 because of good behavior. See Blind Plea, *The Parole Hearing*, LEMONADA MEDIA, at 13:45 (June 28, 2023), <https://lemonadamedia.com/podcast/the-parole-hearing/> [<https://perma.cc/3THG-GRFJ>]. She was ultimately released from prison on May 23, 2023. Blind Plea, *Life on the Outside*, LEMONADA MEDIA, at 1:45 (July 19, 2023), <https://lemonadamedia.com/podcast/life-on-the-outside/> [<https://perma.cc/QH2J-26JA>].

¹⁶ MICHELE C. BLACK, KATHLEEN C. BASILE, MATTHEW J. BREIDING, SHARON G. SMITH, MIKEL L. WALTERS, MELISSA T. MERRICK, JIERU CHEN & MARK R. STEVENS, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 44 (2011). The survey considers being “hit with a fist or something hard, beaten, slammed against something” as examples of severe violence. *Id.* at 2.

¹⁷ RUTH W. LEEMIS, NORAH FRIAR, SRIJANA KHATIWADA, MAY S. CHEN, MARCIE-JO KRESNOW, SHARON G. SMITH, SHARON CASLIN & KATHLEEN C. BASILE, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON INTIMATE PARTNER VIOLENCE 4 (2022). This report considers “sexual violence, physical violence, and/or stalking” victimization by an intimate partner. *Id.*

¹⁸ JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP’T OF JUST., SPECIAL REPORT: NONFATAL DOMESTIC VIOLENCE, 2003–2012, at 1, 3 (2014). Domestic violence is defined as victimizations committed by intimate partners, immediate family members, or other relatives. See *id.* at 14. Intimate partner violence is defined as victimizations committed by current or former spouses, boyfriends, or girlfriends, though there is variance in how state law defines “intimate partners.” See *id.*; Avanti Adhia, Jaron Goddard, Mary A. Kernic, Mary D. Fan, Monica S. Vavilala & Frederick P. Rivara, *Variation in State Laws on Access to Civil Protection Orders for Adolescents Experiencing Intimate Partner Violence*, 66 J. ADOLESCENT HEALTH 610, 613 (2020). Although IPV can impact people of all genders, the vast majority—eighty-two percent—is committed against female victims. TRUMAN & MORGAN, *supra*, at 6.

IPV also exists in relationships of all orientations, and LGBTQ+ persons experience intimate partner and gender-based violence at high rates. See Sarah M. Peitzmeier, Mannat Malik, Shanna K. Kattari, Elliot Marrow, Rob Stephenson, Madina Agénor & Sari L. Reisner, *Intimate Partner Violence in Transgender Populations: Systematic Review and Meta-analysis of Prevalence and Correlates*, 110 AM. J. PUB. HEALTH e1, e1 (2020); Autumn M. Bermea, Danielle C. Slakoff & Abbie E. Goldberg, *Intimate Partner Violence in the LGBTQ+ Community: Experiences, Outcomes, and Implications for Primary Care*, 48 PRIMARY CARE 329, 329–30 (2021). Most of the available data on criminalized survivors focuses on female victims of male abusers in heteronormative relationships, so that is the primary focus of this Note. However, it is important to note that IPV impacts everyone, and marginalized genders and sexualities are also at risk.

¹⁹ ELIZABETH DERMODY LEONARD, CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL 3 (2002).

Prior to the 1970s, IPV was considered a private matter that police departments and the criminal legal system at large were uninterested in addressing.²⁰ In the early 1970s, the feminist-led anti-domestic-violence movement began to challenge societal and legal attitudes toward IPV.²¹ Law enforcement's failure to intervene in IPV situations was a focal point of the movement, and activists lobbied for legal reform "to make prosecution more frequent and more successful and to signal the state's condemnation of gender-based violence," as they believed "state intervention via the criminal legal system was essential if gender-based violence was to be taken seriously."²² As a result of this advocacy, states began to adopt mandatory arrest laws, which require officers to make an arrest if they "find[] probable cause to believe that an offense has been committed."²³ The federal government further incentivized a criminal legal response to IPV with the Violence Against Women Act ("VAWA") of 1994,²⁴ which provided funding for preferred policy initiatives, including "mandatory arrest or proarrest programs."²⁵

As IPV was increasingly handled within the criminal legal system, there were unintended consequences, including a concurrent increase in the criminalization and incarceration of women.²⁶ States that enacted mandatory arrest laws saw a sharp increase in female arrests for domestic violence²⁷ with scant evidence to indicate that girls and women had become more violent.²⁸ Prosecutors charged with acting upon these arrests acknowledge that "[a]s mandatory-, pro-, and preferred-arrest policies have been instituted, an increasing number of victims of battering have been arrested."²⁹ Although some states have made efforts to rectify these issues, primarily through the adoption of "primary

²⁰ See Susan L. Miller, *Unintended Side Effects of Pro-Arrest Policies and Their Race and Class Implications for Battered Women: A Cautionary Note*, 3 CRIM. JUST. POL'Y REV. 299, 301 (1989).

²¹ See *id.*

²² LEIGH GOODMARK, *IMPERFECT VICTIMS* 7 (Claire M. Renzetti ed., 2023).

²³ David Hirschel, Eve Buzawa, April Pattavina & Don Faggiani, *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 255–56, 265 (2007).

²⁴ Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902.

²⁵ *Id.* sec. 40231, § 2101, 108 Stat. at 1932.

²⁶ See Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 831 (2001).

²⁷ See *id.*

²⁸ Meda Chesney-Lind, *Criminalizing Victimization: The Unintended Consequences of Pro-Arrest Policies for Girls and Women*, 2 CRIMINOLOGY & PUB. POL'Y 81, 85 (2002).

²⁹ JEFFREY P. GREIPP, TOOLSI GOWIN MEISNER & DOUGLAS J. MILES, *AEQUITAS*, INTIMATE PARTNER VIOLENCE VICTIMS CHARGED WITH CRIMES: JUSTICE AND ACCOUNTABILITY FOR VICTIMS OF BATTERING WHO USE VIOLENCE AGAINST THEIR BATTERERS 2 (2010); see also, e.g., Deborah Epstein, *Redefining the State's Response to Domestic Violence: Past Victories and Future Challenges*, 1 GEO. J. GENDER & L. 127, 134–35 (1999) (discussing "no-drop" policies).

aggressor” statutes, this criminalization persists.³⁰ Antiviolence activists and legal scholars have labeled the “women, trans people, and gender-nonconforming people whose punitive encounters with the criminal legal system are directly linked to their own gender-based victimization” as “criminalized survivors.”³¹ The existence of criminalized survivors demonstrates that, although “[v]ictim and offender are binary categories used within law, social science, and public discourse to describe social experiences with a moral dimension,”³² when it comes to how people are treated by and interact with the criminal legal system, these categories are not mutually exclusive.³³

The histories of women incarcerated for killing their abusive partners indicate the existence of “an ‘abuse to prison pipeline’ where survivors are criminalized for using self-defense against abusers.”³⁴ Available data, although limited on a nationwide scale, suggests that criminalized survivors “may account for a large percentage of women serving sentences for murder or manslaughter.”³⁵ A 2024 study of people incarcerated for murder or manslaughter at two correctional facilities in California found that 110 of the 134 women convicted for the deaths of their intimate partners experienced abuse in the year leading up to the offense. Eighty of those 110 women were considered to be in “extreme” or “severe” danger of being killed by their partners according to their Danger Assessments, a survey used by police, health care workers, and domestic violence advocates to predict which victims are at imminent risk of death.³⁶ Another study conducted in New York found that two-thirds of women convicted of killing a person with whom they had a close relationship had been abused by the decedent.³⁷ One 2004 study of women imprisoned for violent crimes found that nearly half stated that they “acted in response to being pushed, slapped, punched, beaten, choked, raped, or threatened

³⁰ See Chesney-Lind, *supra* note 28, at 82–83; Susan L. Miller & Michelle L. Meloy, *Women’s Use of Force: Voices of Women Arrested for Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 89, 92 (2006). Miller and Meloy note that, as of 2006, twenty-four states have primary or predominant aggressor assessments that instruct officers to consider the history of violence between parties. Miller & Meloy, *supra*. Jurisdictions have shown contradictory results concerning decreases in arrests of women or dual arrests. *Id.*

³¹ GOODMARK, *supra* note 22, at 12.

³² KATHLEEN J. FERRARO, *NEITHER ANGELS NOR DEMONS* 1 (Claire Renzetti ed., 2006).

³³ See *id.* at 1–3.

³⁴ LAUREN COURTNEY, JAMIE HALPER, HAYDEN HENDERSON, KARA SALOVAARA & EMILY VAUGHAN, STANFORD CRIM. JUST. CTR., GREAT WEIGHT: A REVIEW OF CALIFORNIA BOARD OF PAROLE HEARINGS TRANSCRIPTS TO ASSESS FREQUENCY AND CONSIDERATION OF INTIMATE PARTNER VIOLENCE AMONG WOMEN CONVICTED OF HOMICIDE OFFENSES 7 (2023).

³⁵ *Id.* at 9.

³⁶ DEBBIE MUKAMAL, ANDREA N. CIMINO, BLYSS CLEVELAND, EMMA DOUGHERTY, JACQUELINE LEWITES & BECCA ZIMMERMAN, STANFORD CRIM. JUST. CTR., FATAL PERIL: UNHEARD STORIES FROM THE IPV-TO-PRISON PIPELINE AND OTHER VOICES TOUCHED BY VIOLENCE 13, 93 (rev. ed. 2024).

³⁷ COURTNEY ET AL., *supra* note 34, at 9.

with a weapon” prior to their crime.³⁸ The available data show a clear pattern of women who commit violent crimes most commonly committing them against individuals who were previously violent toward them—usually current or former intimate partners.

Although the right to use force to protect oneself from harm is a long and widely recognized principle of criminal law,³⁹ self-defense doctrine’s origin and development make the defense inaccessible for many criminalized survivors in practice. The right to self-defense was originally reserved for “white, property-owning men.”⁴⁰ Traditionally, one can defend themselves with deadly force only when they reasonably believe it necessary to defend against an imminent, unlawful threat of death or serious bodily harm.⁴¹ Although there have been modifications to self-defense doctrine meant to account for criminalized survivors—most notably the introduction of “Battered Woman’s Syndrome” (“BWS”) testimony, which theorizes that prolonged abuse can cause a specific type of post-traumatic stress disorder⁴²—self-defense doctrine still fails to serve criminalized survivors. To begin to fill this gap, practitioners should build a defense using a “social entrapment” paradigm, which focuses on (1) the coercive control exercised by the abusive partner as well as the (2) institutional issues and (3) social inequalities that compound the abuse. Courts should admit evidence speaking to these three different dimensions to best equip the factfinder to assess the reasonableness of the criminalized survivor’s actions.

Part I of this Note examines the criminalization of IPV, the increased incarceration of women generally, and the criminalized survivors that sit at the intersection of these two issues. Part II considers the limitations of traditional self-defense doctrine and the introduction and limitations of BWS evidence in cases of criminalized survivors. Part III explains what a defense modeled after the social entrapment framework could look like and argues courts can and should admit evidence necessary for this framework as relevant and probative of reasonableness.

I. THE CRIMINAL LEGAL RESPONSE TO INTIMATE PARTNER VIOLENCE AND ITS CONSEQUENCES

A. *Increasing Criminalization of Intimate Partner Violence*

By the end of the 1970s, anti-violence-against-women movements that targeted “rape and incest, wife beating, workplace sexual harassment,

³⁸ DANA D. DEHART, CTR. FOR CHILD & FAM. STUD., PATHWAYS TO PRISON: IMPACT OF VICTIMIZATION IN THE LIVES OF INCARCERATED WOMEN 18 (2004).

³⁹ See CAROLINE E. LIGHT, STAND YOUR GROUND 1 (2017).

⁴⁰ *Id.*

⁴¹ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.01 (7th ed. 2015).

⁴² See LENORE E.A. WALKER, THE BATTERED WOMAN SYNDROME 44–45 (3d ed. 2009).

and sex trafficking” surfaced as part of the larger civil rights movement and second-wave feminism.⁴³ Given the legal system’s history of “approval of and complicity in violence against women,” the battered women’s movement originally viewed the state with skepticism, but their strategy eventually advocated for greater “legislative and executive involvement at first through civil protection order legislation and later through mandatory arrest laws and no-drop prosecution policies.”⁴⁴

Prior to the passage of these policies, law enforcement regarded domestic violence as “a private matter,” and as a result, mostly did not intervene.⁴⁵ Social scientists and psychologists began advocating for more intervention, such as “mediation and advising” approaches, in the 1960s, but law enforcement and even some women’s groups dismissed these efforts.⁴⁶ Police believed they were inadequately prepared to act as mediators, and many women’s groups argued that this was a fundamentally flawed approach that “assumed equal bargaining power and equal culpability between the parties” that would not adequately impact recidivism in the long term.⁴⁷

The anti-violence-against-women movement advocated for “a number of far-reaching changes in criminal law,”⁴⁸ bolstered by several studies that examined the need and impact of mandatory arrest laws. One of the most notable studies was the 1984 Minneapolis Domestic Violence Experiment (“MDVE”), which posited that arrest reduced the risk of future assaults against the same victim by more than fifty percent during a six-month follow-up period.⁴⁹ Despite the fact that all six National Institute of Justice-sponsored studies to replicate these findings failed to do so, the MDVE was championed by the movement to promote the enactment of mandatory and preferred arrest policies nationwide.⁵⁰ Women

⁴³ Jami Ake & Gretchen Arnold, *A Brief History of Anti-Violence-Against-Women Movements in the United States*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 3, 3 (Claire M. Renzetti et al. eds., 3d ed. 2017). There were earlier efforts to address domestic violence throughout the late nineteenth century, up until the 1960s, but “[w]hat was new in the era of civil rights and feminism was a perspective that defined *domestic violence* as a distinct form of violence” that was intrinsically linked to patriarchal oppression generally. *Id.* at 5.

⁴⁴ Epstein, *supra* note 29, at 128, 130. Much of both the anti-rape and anti-domestic violence movements’ early years were spent organizing around community support for shelters that acted as organizing hubs and resource centers. *Id.* at 128. For more information about the evolution of the anti-violence-against-women movements, see generally Ake & Arnold, *supra* note 43.

⁴⁵ See Alexandra Pavlidakis, Note, *Mandatory Arrest: Past Its Prime*, 49 SANTA CLARA L. REV. 1201, 1206 (2009).

⁴⁶ See *id.* at 1207–08.

⁴⁷ *Id.* at 1208. Recidivism refers to the likelihood that a person will repeat the battering conduct.

⁴⁸ Coker, *supra* note 26, at 802.

⁴⁹ Pavlidakis, *supra* note 45, at 1209; LAWRENCE W. SHERMAN & RICHARD A. BERK, THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT 6–7 (1984).

⁵⁰ See Christopher D. Maxwell, Joel H. Garner & Jeffrey A. Fagan, *The Effects of Arrest on Intimate Partner Violence: New Evidence from the Spouse Assault Replication Program*, NAT’L INST.

also brought class action suits against police departments for their failure to protect them from abuse.⁵¹ This combination of lawsuits, advocacy by antiviolenace activists, and findings in studies forced substantive change in law enforcement responses to IPV.⁵²

The first mandatory arrest statute was enacted in Oregon in 1977.⁵³ Twelve years later, more than three-quarters of jurisdictions allowed law enforcement to make misdemeanor arrests without warrants in response to suspected IPV calls.⁵⁴ As of 2022, twenty-two states and the District of Columbia have mandatory arrest policies, and seven additional states have preferred arrest policies, which direct officers to make an arrest while also permitting some discretion for special circumstances.⁵⁵

The passage of VAWA in 1994 further demonstrated the anti-violence-against-women movement's focus on the criminal legal system. VAWA views IPV primarily through the lens of criminal law, as illustrated by its definition of domestic violence, which remains largely the same today as it was in 1994:

[F]elony or misdemeanor crimes of violence committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, [or] by a person similarly situated to a spouse of the victim.⁵⁶

VAWA's passage was "part of a larger cultural shift in the 1980s and early '90s toward law enforcement approaches to solving social problems through criminalization."⁵⁷ Although VAWA made some changes to the substantive law governing IPV, its most significant impact was through its grant programs.⁵⁸ Since 1995, the Department of Justice's Office of

JUST. RSCH. BRIEF, July 2001, at 1, 4. None of the replication studies demonstrated the clear deterrent effect of the MDVE, with three studies instead showing higher levels of recidivism and three showing a modest reduction in recidivism. *Id.* at 1.

⁵¹ See Miller, *supra* note 20, at 301–02.

⁵² See *id.* at 302.

⁵³ Leigh Goodmark, *Assessing the Impact of the Violence Against Women Act*, 5 ANN. REV. CRIMINOLOGY 115, 117 (2022).

⁵⁴ Pavlidakis, *supra* note 45, at 1211.

⁵⁵ D.C. JUST. LAB, 50 STATE SURVEY: MANDATORY ARRESTS FOR DOMESTIC VIOLENCE CASES 1 (2022), <https://dcjusticelab.org/wp-content/uploads/2024/07/Mandatory-Arrests-50-State-Survey-April-19-2022.pdf> [<https://perma.cc/V4C4-QSUA>]. Some states have both preferred and mandatory arrest policies, where the amount of officer discretion is dictated by factors such as what type of violence is alleged and whether a protective or restraining order is in place. See, e.g., BATTERED WOMEN'S JUST. PROJECT, DOMESTIC VIOLENCE ARREST POLICIES 5, 7 (2023) (describing Arizona's and California's domestic violence arrest laws).

⁵⁶ Violence Against Women Act of 1994, Pub. L. No. 103-322, sec. 40231, § 2105(1), 108 Stat. 1902, 1933 (current version at 34 U.S.C. § 12291(a)(12)).

⁵⁷ Ake & Arnold, *supra* note 43, at 4.

⁵⁸ See Goodmark, *supra* note 53, at 118, 120.

Violence Against Women, which is responsible for administering most of the grant programs authorized in VAWA, has issued more than eight billion dollars in grants toward objectives like “encouraging states, tribes, and local governments to treat domestic violence as a serious crime and implement arrest policies” and “investigating and prosecuting domestic violence and related crimes.”⁵⁹ VAWA incentivized the adoption of mandatory arrest and more aggressive prosecution policies, making jurisdictions that enacted such policies eligible for federal grants.⁶⁰ Subsequent renewals of VAWA have continued to encourage arrest policies.⁶¹ This focus on the criminal legal system has led to unintended consequences for victims of IPV.

B. Impact of Mandatory Arrest and Prosecution Policies on Intimate Partner Violence

A stronger criminal legal response to IPV was considered by many a “corrective for the history of profoundly inadequate and sometimes hostile response of the criminal justice system to domestic violence cases.”⁶² However, some activists were wary that a focus on criminal intervention would come at the expense of other anti-domestic-violence strategies as well as poor and minority women.⁶³ Although subsequent reauthorizations of VAWA have created and supported noncriminal programs—such as “civil legal assistance, direct support for victims of violence, transitional housing, community education and prevention,”—the bulk of VAWA’s funding continues to go to the criminal legal system.⁶⁴

By some measures, the enactment of mandatory arrest and prosecution policies and VAWA have led to successes in the fight against IPV. Mandatory arrest “secures a victim’s immediate safety” and, according to advocates, demonstrates that the state considers IPV a serious issue.⁶⁵

⁵⁹ LISA N. SACCO & EMILY J. HANSON, CONG. RSCH. SERV., R45410, THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION 3, 4 (2019) (CRS report providing an overview of VAWA from initial passage to 2019).

⁶⁰ § 2101, 108 Stat. at 1932 (current version at 34 U.S.C. § 10461).

⁶¹ See 34 U.S.C. § 10461(c)(1) (providing grants to states that “encourage [the] arrest of offenders”).

⁶² Coker, *supra* note 26, at 803.

⁶³ See *id.* at 804–05; Goodmark, *supra* note 53, at 118. In 1994, Ms. Magazine, a leading voice in the feminist movement, published an article by law professor Mari Matsuda questioning the choice to focus on law enforcement intervention given the fact that “for women of color, for feminists of all colors . . . we know that police are a source of violence in our communities, not just a deterrent to it.” Goodmark, *supra* note 53, at 118. The National Women’s Law Center withheld their endorsement of VAWA at the urging of their general counsel Professor Brenda Smith due to their concerns about the impact of increased criminalization on communities of color. See *id.*

⁶⁴ Goodmark, *supra* note 53, at 120.

⁶⁵ Pavlidakis, *supra* note 45, at 1211–12.

VAWA has, according to some studies, led to “higher rates of arrest, prosecution, and conviction; increas[es in] the availability of victim services; the proliferation of specialized units addressing [IPV]; greater collaboration among service providers; and the specialization of bureaucrats focused on gender-based violence.”⁶⁶ Other studies show that no-drop prosecution policies, which limit prosecutorial discretion by encouraging or requiring prosecutors to try all cases involving domestic violence even where the victim is uncooperative, lower recidivism and homicide rates.⁶⁷

It is more difficult to assess the reforms’ effectiveness in decreasing IPV in concrete numbers. Although some have pointed to data showing that domestic violence has fallen 63% since 1994 as evidence of VAWA’s success, it is difficult to determine causality given the concurrent decrease in overall violent crime during that period.⁶⁸ For example, IPV decreased by 48% between 1994 and 2000 and by 25% between 2000 and 2005, while all violent crime decreased by 47% and 33% respectively during the same time periods.⁶⁹

At the same time, the mandatory policies adopted by states and incentivized by VAWA have had unintended consequences. Some activists question whether “efforts to increase state responsiveness resulted in an ‘overcriminalization’ of domestic violence, with an almost automatic initiation of criminal prosecution occurring regardless of the needs and desires of the victim and her family.”⁷⁰ There are concerns that by mandating certain state responses to police calls, the state is replicating the lack of control and harm done by the abuse, in effect “reproduc[ing] the emotional abuse of the battering relationship.”⁷¹ Knowing that their partner will inevitably be arrested as a result, many women do not reach out to police for help.⁷² In jurisdictions with mandatory arrest statutes, murders committed by intimate partners are approximately fifty percent higher than in those without them.⁷³ Moreover, mandatory arrest policies may “cause several adverse social and

⁶⁶ Goodmark, *supra* note 53, at 121.

⁶⁷ See Epstein, *supra* note 29, at 134–35. Epstein discusses a study focused on San Diego, which adopted a no-drop policy in 1985. See *id.* at 135.

⁶⁸ See Goodmark, *supra* note 53, at 122.

⁶⁹ *Id.* Although some have posited that increased reporting rates could be responsible for these disparities, National Crime Victimization Survey data indicates that reporting rates have not increased significantly since 1994, instead fluctuating. See *id.*

⁷⁰ Epstein, *supra* note 29, at 132.

⁷¹ Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 554–55 (1999).

⁷² See Pavlidakis, *supra* note 45, at 1214.

⁷³ Radha Iyengar, Opinion, *The Protection Battered Spouses Don’t Need*, N.Y. TIMES (Aug. 7, 2007), <https://www.nytimes.com/2007/08/07/opinion/07iyengar.html> [https://perma.cc/R7SP-J6GT].

health outcomes for women, such as financial hardship, household disruption, loss of employment, and loss of custody of children.”⁷⁴

C. Increased Arrests of Intimate Partner Violence Victims

Increasing criminalization of IPV, particularly the adoption of mandatory arrest policies, has coincided with an increase in arrests of victims of IPV.⁷⁵ Although women are typically assumed to be the victim in situations with suspected IPV, mandatory arrest jurisdictions have seen a notable rise in arrests of women and in dual arrests.⁷⁶ For example, “[a]fter the passage of mandatory arrest laws in California, men’s arrests rose by 60% percent” while “women’s arrests increased by 400%.”⁷⁷ This occurred despite research suggesting that women’s use of violence is generally responsive to ongoing violence from their partner.⁷⁸ Women who are arrested “often lose the rights and privileges accorded to domestic violence victims, such as transportation to a safe location, temporary housing in a shelter for battered women, issuance of a restraining order, and participation in job training programs.”⁷⁹ This is likely to “disproportionately affect poor and minority women who are more dependent on the police for protection in cases of domestic violence” than more privileged women who often have more resources to handle their abuse privately.⁸⁰

II. SELF-DEFENSE AND ITS LIMITATIONS

Although the right to use force to protect oneself from harm is a long and widely recognized principle of criminal law, self-defense doctrine’s origins and elements make the defense inaccessible for many criminalized survivors in practice.⁸¹ Courts have addressed the issues faced by criminalized survivors primarily through the admission of BWS evidence, which is used to explain the impact that habitual abuse has on victims.⁸²

⁷⁴ Valli Rajah, Victoria Frye & Mary Haviland, “Aren’t I a Victim?”: Notes on Identity Challenges Relating to Police Action in a Mandatory Arrest Jurisdiction, 12 VIOLENCE AGAINST WOMEN 897, 898 (2006).

⁷⁵ See *id.*

⁷⁶ *Id.* Dual arrests are those where both partners are arrested, rather than just one. *Id.* at 897.

⁷⁷ GOODMARK, *supra* note 22, at 10–11; AYA GRUBER, THE FEMINIST WAR ON CRIME 88 (2020).

⁷⁸ See Miller & Meloy, *supra* note 30, at 91.

⁷⁹ Rajah et al., *supra* note 74, at 898.

⁸⁰ See *id.* at 898–99; Miller, *supra* note 20, at 304 (noting that “[w]omen with more income have . . . the ability to afford private physicians and safe shelters, which results in their being able to escape detection from law enforcement, hospital emergency rooms or social service agencies”).

⁸¹ See LIGHT, *supra* note 39, at 1.

⁸² See WALKER, *supra* note 42, at 349–51.

In general, “women’s use of violence within relationships is typically part and parcel of their ongoing victimization, using force to either stop or escape violence.”⁸³ This appears to be particularly true for women convicted of killing their abusers. Although the available dataset on women incarcerated for killing abusive partners is small, it “suggests that [they] may account for a large percentage of women serving sentences for murder or manslaughter.”⁸⁴ For example, a 2005 New York study found that “67% of women . . . convicted of killing someone close to them had been abused by that person.”⁸⁵ The American Civil Liberties Union estimates that “[a]s many as 90% of the women in prison today for killing men had previously been battered by those men.”⁸⁶ An analysis of homicides involving male decedents demonstrated that men were 10% more likely than women to obtain a justifiable homicide ruling.⁸⁷ Another analysis of Florida’s “Stand Your Ground” cases found that in domestic cases, the probability of conviction for accused men was about 40%, but it more than doubled for accused women.⁸⁸

A. *Traditional Self-Defense*

Generally, a person may defend themselves with deadly force only when they reasonably believe such force is necessary to defend against an imminent, unlawful threat of death or serious bodily harm.⁸⁹ Self-defense doctrine first emerged in American law in the seventeenth century as the “castle doctrine,” justifying a man’s use of force in “fighting back against an intrusion into his home.”⁹⁰ Given the doctrine’s connection to property and the fact that originally women and people of color were generally precluded from property ownership—or in some cases considered property themselves—“the right of self-defense

⁸³ Miller & Meloy, *supra* note 30, at 93; *see also* Sue Osthoff, *But, Gertrude, I Beg to Differ, a Hit Is Not a Hit: When Battered Women Are Arrested for Assaulting Their Partners*, 8 VIOLENCE AGAINST WOMEN 1521, 1526–27 (2002) (discussing the distinction between a single act of violence and “battering,” which typically denotes “a systematic pattern of using violence, the threat of violence, and other coercive behaviors and tactics, to exert power, to induce fear, and to control another person”).

⁸⁴ *See* COURTNEY ET AL., *supra* note 34, at 9.

⁸⁵ *Id.*

⁸⁶ *Words from Prison—Did You Know . . . ?*, AM. C.L. UNION (June 12, 2006), https://www.aclu.org/documents/words-prison-did-you-know?redirect=words-prison-did-you-know#_edn-ref43 [<https://perma.cc/BEU4-X6C5>].

⁸⁷ *See* Elizabeth Flock, *How Far Can Abused Women Go to Protect Themselves?*, NEW YORKER (Jan. 13, 2020), https://www.newyorker.com/magazine/2020/01/20/how-far-can-abused-women-go-to-protect-themselves?_sp=08e1114d-c129-46e6-8334-481df72d6132.1711219625502 [<https://perma.cc/S3FF-CU7E>].

⁸⁸ Justin Murphy, *Are “Stand Your Ground” Laws Racist and Sexist? A Statistical Analysis of Cases in Florida, 2005–2013*, 99 Soc. Sci. Q. 439, 451 (2017).

⁸⁹ *See* DRESSLER, *supra* note 41, § 18.01, at 223.

⁹⁰ *See* LIGHT, *supra* note 39, at 12, 20–21.

was essentially a privilege reserved to white, property-owning men.”⁹¹ Self-defense doctrine has evolved, most notably with the expansion of Stand Your Ground laws, but the original formulation of a self-defense scenario—“a *single* violent episode between two *male* individuals who are *strangers* to each other”—still colors the use of self-defense today.⁹²

Although states differ in the specifics, doctrine governing self-defense generally requires those claiming the defense to establish three elements: an imminent threat of serious harm, a reasonable belief that force is necessary to defend against this threat, and the use of proportional force to do so.⁹³ Although each of these elements presents an obstacle for criminalized survivors, and imminence and proportionality will be discussed briefly, this Note will focus on the reasonableness inquiry, as social-frame-work evidence is most relevant to this aspect of self-defense.

A person may only use deadly force if they are faced with an imminent, unlawful threat of death or serious injury.⁹⁴ This has been interpreted to require “strict temporal proximity between the decedent’s threat of harm and the defendant’s response.”⁹⁵ The imminence requirement ensures that the use of force was necessary.⁹⁶ A criminalized survivor’s challenges with the imminence element depend on whether the killing was confrontational, in which the survivor responds to an imminent attack with force, or nonconfrontational, in which the survivor uses deadly force during a break in violence.⁹⁷ In situations in which the accused killed the decedent in response to an imminent attack, as appears to be the case in most prosecutions involving criminalized survivors, imminence is often determined by “a host of nonempirical normative factors, some explicitly irrelevant to the legal inquiry.”⁹⁸ For example, courts often use imminence as a proxy for retreat, even in jurisdictions where retreat is not required, because factfinders assume that if retreat was available, a threat is not sufficiently imminent.⁹⁹ For criminalized survivors who may live or share children with their abusers, however, retreat is much more complex than it would be in a single

⁹¹ Inès Zamouri, *Self-Defense, Responsibility, and Punishment: Rethinking the Criminalization of Women Who Kill Their Abusive Intimate Partners*, 30 UCLA J. GENDER & L. 203, 219 (2023).

⁹² *Id.* at 220.

⁹³ See DRESSLER, *supra* note 41, § 18.01, at 224.

⁹⁴ See *id.* § 18.02, at 225.

⁹⁵ Zamouri, *supra* note 91, at 214.

⁹⁶ See Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 380 (1993).

⁹⁷ See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 391–93 (1991).

⁹⁸ John H. Krause, *Distorted Reflections of Battered Women Who Kill: A Response to Professor Dressler*, 4 OHIO ST. J. CRIM. L. 555, 561 (2007); see also V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1253–54 (2001) (finding that the majority of battered-woman cases raising an imminence question were confrontational situations).

⁹⁹ See Nourse, *supra* note 98, at 1237.

violent incident. Additionally, some criminalized survivors are even questioned as to why they did not leave the relationship prior to the situation becoming deadly.¹⁰⁰

Traditionally, a person defending themselves must only use as much force as is necessary to remove the threat, meaning they ordinarily cannot use deadly force to address a nondeadly threat.¹⁰¹ To those outside the relationship, a threat may not appear to be deadly, but a woman who has been subject to abuse from her partner will perceive the danger posed by her partner differently.¹⁰² As such, “it is not uncommon for the abused woman to use deadly force to respond to what may appear to the outsider like a nondeadly threat.”¹⁰³ Women are also more likely to use a weapon in committing homicide and, therefore, receive weapons enhancements—additional charges or increased penalties when a weapon is allegedly used during the underlying offense—as they are “less able to commit homicide using personal weapons (fists, hands, and feet) compared to men.”¹⁰⁴

1. Reasonableness

A person may use deadly force only if they reasonably believe that such force is necessary to defend themselves against the threat.¹⁰⁵ Traditionally, courts used an objective standard of reasonableness, requiring juries to determine whether a “reasonable” or, in other formulations, “‘just and reasonable,’ ‘ordinary and reasonable,’” or “average” person in the accused’s circumstances would have perceived self-defense as necessary.¹⁰⁶ The goal of this formulation of reasonableness is to ensure that “each member of the community is held equally to one standard of conduct: that of a reasonable person.”¹⁰⁷ The objective reasonableness requirement has posed issues as to who should be the objective “reasonable person” against which the accused is compared: an ordinary

¹⁰⁰ See *id.* at 1238 & n.13.

¹⁰¹ See DRESSLER, *supra* note 41, § 18.01, at 224.

¹⁰² See Zamouri, *supra* note 91, at 218.

¹⁰³ *Id.*

¹⁰⁴ COURTNEY ET AL., *supra* note 34, at 8.

¹⁰⁵ See Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 3 (1998).

¹⁰⁶ *Id.* at 8 (quoting Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 432–33 (1982)). Courts use other phrases or language as a stand-in for “reasonable,” such as “ordinarily prudent,” but each denote the use of an objective standard. *Id.*

¹⁰⁷ Lauren E. Goldman, Note, *Nonconfrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuse*, 45 CASE W. RES. L. REV. 185, 198 (1994).

person, a woman, or a victim of IPV.¹⁰⁸ For those experiencing IPV, their intimate knowledge of the threat they face may mean that their beliefs will not align with that of a “reasonable person”—a legal fiction that, although purportedly representing an “abstract, universal person,” is still “implicitly based on a (white, middle-class, heterosexual) male norm of behavior.”¹⁰⁹ What looks harmless or nonthreatening to those outside an abusive relationship may ring alarm bells for the women who have suffered repeated abuse at their partners’ hands and know to ascribe a wholly different meaning to that behavior.¹¹⁰

Most courts have moved away from a purely objective standard, incorporating varying degrees of subjectivity into the reasonableness inquiry.¹¹¹ The use of a purely subjective standard, which asks only whether the accused “honestly believe[d] it necessary to use force,” is also rare,¹¹² and states have instead mostly adopted a hybrid inquiry with both subjective and objective elements.¹¹³ One such hybrid formulation is encompassed in Model Penal Code section 3.04, which states that the “use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force.”¹¹⁴ Under this approach, the factfinder is asked to assess the “objective reasonableness of the defendant’s act,” but the analysis of the accused’s perceptions is subjective.¹¹⁵ The factfinder assesses whether the person’s use of force is reasonable “under the circumstances as he believes them to be when the force is used,” regardless of the reasonableness of their beliefs.¹¹⁶

¹⁰⁸ See Heller, *supra* note 105, at 80–81.

¹⁰⁹ Zamouri, *supra* note 91, at 216–17.

¹¹⁰ See FERRARO, *supra* note 32, at 160.

¹¹¹ See Heller, *supra* note 105, at 54. Heller analyzes four distinct reasonableness standards used in American courts:

(1) the *objective standard*; (2) a standard that eliminates the reasonableness requirement entirely . . . the *purely subjective standard*; (3) a standard that retains a reasonableness requirement but asks the jury to assess the objective reasonableness of the defendant’s act under the circumstances as he believed them to be . . . the *Model Penal Code or MPC standard*; and (4) a standard that retains a reasonableness requirement, but requires the jury to take into account one or more of the defendant’s personal characteristics when assessing the objective reasonableness of her act . . . the *particularizing standard*.

Id. at 5.

¹¹² See *id.* at 56–57 (quoting *Moor v. Licciardello*, 463 A.2d 268, 272 (1983)). Four states (Delaware, Kentucky, North Dakota, and Ohio) have used a purely subjective standard. *Id.* at 57.

¹¹³ See *id.* at 54; see also, e.g., *State v. Wanrow*, 559 P.2d 548, 555, 559 (Wash. 1977) (requiring a self-defense claim to be “evaluated in light of all the facts and circumstances known to the defendant”).

¹¹⁴ MODEL PENAL CODE § 3.04(1) (AM. L. INST. 1985).

¹¹⁵ See Heller, *supra* note 105, at 5, 66.

¹¹⁶ MODEL PENAL CODE § 3.04(2)(c) (AM. L. INST. 1985).

Washington adopted a similar standard in the seminal case *State v. Wanrow*,¹¹⁷ where the Washington Supreme Court reversed Yvonne Wanrow's second-degree murder conviction because "the jury should have been allowed to consider" Wanrow's knowledge of the victim's reputation for aggressive acts "in making the critical determination of the 'degree of force . . . which . . . a reasonable person in the same situation . . . seeing what [s]he sees and knowing what [s]he knows, then would believe to be necessary.'"¹¹⁸

In their brief, Wanrow's attorneys explicitly argued for consideration of Wanrow's position as a woman, writing that the trial court's jury instruction "established an erroneous, sex-stereotyped and inflexible standard[,] which directed the jury to exclude [Wanrow's] own perspective."¹¹⁹ A plurality of the Washington Supreme Court agreed, holding that imposition of an objective standard of reasonableness was incorrect and the jury instructions did "not make clear that the defendant's actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable."¹²⁰ The "reasonable woman" standard endorsed by *Wanrow* has become an essential tool for criminalized survivors arguing self-defense.¹²¹ Under this standard, reasonableness is frequently assessed through the lens of BWS testimony provided by expert witnesses.¹²²

B. Battered Woman's Syndrome Evidence

Since its advent in the late 1970s, expert testimony on BWS has been the primary way courts have addressed the issues criminalized survivors face with traditional self-defense doctrine.¹²³ BWS testimony is typically used to prove the reasonableness of the accused's actions, though it has been applied to the other elements

¹¹⁷ 559 P.2d 548 (Wash. 1977).

¹¹⁸ *Id.* at 557 (quoting *State v. Dunning*, 506 P.2d 321, 322 (Wash. Ct. App. 1973)) (alterations in original). Yvonne Wanrow was initially convicted of second-degree murder and first-degree assault for killing a friend's neighbor and shooting another man. *Id.* at 550–51. Wanrow shot the decedent, who had previously allegedly been violent toward Wanrow's son and abused his own children, and another man as they attempted to enter her friend's house. *Id.* For an in-depth discussion of the significance of race and gender in *State v. Wanrow*, see generally Donna Coker & Lindsay C. Harrison, *The Story of Wanrow: The Reasonable Woman and the Law of Self-Defense*, in *CRIMINAL LAW STORIES* 213 (Donna Coker & Robert Weisberg eds., 2013).

¹¹⁹ Respondent's Supplemental Brief at 2–3, *Wanrow*, 559 P.2d 548 (No. 43949).

¹²⁰ *Wanrow*, 559 P.2d at 558.

¹²¹ See Coker & Harrison, *supra* note 118, at 245–51 (discussing the legal significance of *Wanrow* for women accused of homicide, specifically IPV victims who defended themselves against abusive partners, even though Wanrow was not defending herself against an intimate partner).

¹²² See *id.* at 249–50.

¹²³ See Zamouri, *supra* note 91, at 221, 225.

of self-defense as well.¹²⁴ BWS is not a defense in itself but rather a type of evidence that can be used to assist juries or judges in their assessment of the accused’s self-defense claim.¹²⁵ Dr. Lenore Walker first formulated the theory underlying BWS in her book, *The Battered Woman*, describing how women become trapped in abusive relationships through a cycle of violence that leads to “learned helplessness.”¹²⁶ This cycle consisted of three stages: (1) a “tension-building” phase, (2) an “acute battering incident,” and (3) a “loving contrition” stage.¹²⁷ Through these stages, there was a slow build-up of abusive behavior, a violent incident, and then a de-escalation.¹²⁸ Walker argued that survivors caught in this repetitive cycle suffer from “learned helplessness,” where “repeated exposure to negative outcomes or stressors eventually causes an individual to stop trying to escape from the aversive situation even when opportunities to escape become available.”¹²⁹ As this cycle repeats, the survivor may, according to Walker, resort to violence to free herself.¹³⁰

BWS theory has been thoroughly criticized for its limited insight and contradictory messaging.¹³¹ Critics say the portrait of a helpless woman painted by the theory has led to a stereotype of what a battered woman looks like, to the detriment of those who do not match the profile, whether for individual reasons or because this conceptualization of a helpless woman conflicts with other stereotypes based on race, class, or culture.¹³² This stereotype also runs contrary to the lived reality of many survivors, who actively “develop strategies to stay alive and minimize their physical and psychological injuries . . . [and] take fierce measures to fight back, get away from their abuser, seek the law’s protection, or terminate the relationship.”¹³³

¹²⁴ See Jessica R. Holliday, Dale E. McNiel, Nathaniel P. Morris, David L. Faigman & Renée L. Binder, *The Use of Battered Woman Syndrome in U.S. Criminal Courts*, 50 J. AM. ACAD. PSYCHIATRY & L. 373, 375–76 (2022).

¹²⁵ See Zamouri, *supra* note 91, at 225.

¹²⁶ See WALKER, *supra* note 42, at 91.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Zamouri, *supra* note 91, at 223.

¹³⁰ See Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 333 (1992).

¹³¹ See, e.g., Zamouri, *supra* note 91, at 223 n.78; Marilyn McMahon, *Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome*, 6 PSYCHIATRY, PSYCH. & L. 23, 37–38 (1999); Mary Ann Dutton, *Critique of the “Battered Woman Syndrome” Model*, AM. ACAD. OF EXPERTS IN TRAUMATIC STRESS, <https://www.aets.org/traumatic-stress-library/critique-of-the-battered-woman-syndrome-model> [<https://perma.cc/RPU6-MBFS>].

¹³² See Dutton, *supra* note 131.

¹³³ Zamouri, *supra* note 91, at 226.

The pathologizing nature of BWS also undercuts those using BWS evidence to demonstrate the reasonableness of their actions.¹³⁴ It is difficult for jurors to square expert testimony explaining BWS with the case in front of them because “learned helplessness is antithetical to the notion that a woman would use lethal force.”¹³⁵ This is counterproductive because “[f]or factfinders, someone who suffers from a syndrome, by definition, cannot be deemed to have acted reasonably; thus, a woman suffering from BWS cannot possibly meet the reasonable person standard required in self-defense claims.”¹³⁶ Therefore, the introduction of BWS testimony “may persuade jurors to interpret the woman’s actions within the context of her ‘psychological (dys)functioning’” rather than as evidence of her reasonableness.¹³⁷ Information gathered via jury simulation studies indicates that BWS may influence jurors’ perception of the accused, viewing them as “having less capacity for responsible choices and as being more distorted in her thinking.”¹³⁸ This indicates that BWS testimony may have the opposite impact than intended, convincing jurors not of the accused’s reasonableness but rather of her diminished capacity.¹³⁹

The acceptance of BWS evidence was an important development in understanding and highlighting the peculiar challenges faced by criminalized survivors, but courts and practitioners should adopt new frameworks more in line with current understanding of IPV when considering the self-defense claims of those accused of killing abusive partners.

III. IMPLEMENTING A SOCIAL ENTRAPMENT MODEL IN THE UNITED STATES

A “social entrapment” paradigm should inform how defense counsel build a criminalized survivor’s case because it is better suited than the BWS approach to explain the circumstances as a criminalized survivor

¹³⁴ See Mary Ann Dutton, *Validity of “Battered Woman Syndrome” in Criminal Cases Involving Battered Women*, in *THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECT IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT* pt. I, at 19 (Malcom Gordon ed., 1996) (“[E]xpert testimony can mistakenly suggest to the factfinder that it is a battered woman’s aberrant psychological condition that explains, for example, her acting in self-defense . . .”).

¹³⁵ Cheryl A. Terrance, Karyn M. Plumm & Katlin J. Rhyner, *Expert Testimony in Cases Involving Battered Women Who Kill: Going Beyond the Battered Woman Syndrome*, 88 N.D. L. REV. 921, 939 (2012).

¹³⁶ Zamouri, *supra* note 91, at 227.

¹³⁷ Terrance et al., *supra* note 135, at 942.

¹³⁸ Norman J. Finkel, Kristen H. Meister & Deirdre M. Lightfoot, *The Self-Defense Defense and Community Sentiment*, 15 L. & HUM. BEHAV. 585, 598 (1991).

¹³⁹ See Terrance et al., *supra* note 135, at 942–43 (discussing how BWS evidence can lead jurors to pathologize accused persons).

understood them to be and, therefore, is better suited to explain the reasonableness of her actions.¹⁴⁰ Victims of IPV suffer from a form of “social entrapment,” where the coercive control of their abusive partner, the insufficient responses of institutions, and the structural inequalities experienced by people with marginalized identities coexist and reinforce each other, limiting victims’ options for help.¹⁴¹ Defense attorneys representing criminalized survivors should use the social entrapment framework to advance their clients’ self-defense claims. Viewing criminalized survivors’ self-defense claims through this framework would require courts to consider not only the violence experienced by a criminalized survivor at the hands of her abuser but also the ways institutional access, apathy, and structural inequalities influence both the abuser’s actions and the criminalized survivor’s options for escape.¹⁴²

This Note approaches the self-defense claims of criminalized survivors from the perspective of survivors and practitioners, not legislators. The framework discussed below argues within the typical current evidentiary rules regarding relevance and reasonableness rather than proposing a new model evidentiary rule for this reason. This approach is meant to be adaptable to different jurisdictions, which have an array of different evidentiary rules and caselaw regarding self-defense and criminalized survivors.

This Note also does not put forward a model rule of evidence out of concern that doing so would be proposing a “reformist reform” that would replicate many of the barriers already faced by marginalized survivors.¹⁴³ An evidentiary rule specific to self-defense claims from criminalized survivors would require the court to act as a gatekeeper, determining who qualifies as a “survivor” such that they are permitted to introduce

¹⁴⁰ The definition of social entrapment was first developed by James Ptacek. See JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM* 9, 10 (Claire Renzetti ed., 1999). Ptacek expands on the idea of “coercive control,” where abusive partners utilize coercive tactics, including but not limited to violence, to dominate their partners, by considering “the inescapably social dimension” of domestic violence, “link[ing] private violence to community responses,” and “connecting poverty, racism, and political disempowerment to women’s abilities to survive violent relationships.” *Id.*

¹⁴¹ See Julia Tolmie, Rachel Smith, Jacqueline Short, Denise Wilson & Julie Sach, *Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence*, 2018 N.Z. L. REV. 181, 183, 185 (arguing that “the appropriate conceptual model to use when investigating, presenting and interpreting facts involving intimate partner violence is an understanding of intimate partner violence as a gendered pattern of harm that operates as a form of social entrapment” and explaining how this conceptual framing applies in the New Zealand context).

¹⁴² See PTACEK, *supra* note 140, at 10.

¹⁴³ Reformist reforms are those that “legitimize the system,” whereas nonreformist reforms are those that aim to “decrease the power of the ‘prison-industrial complex’ through decarceration and decriminalization.” Ben Vagle & Kyle Mullins, *Mariame Kaba Advocates for Transformation of the Criminal Justice System*, NELSON A. ROCKEFELLER CTR., <https://rockefeller.dartmouth.edu/news/2019/11/mariame-kaba-advocates-transformation-criminal-justice-system> [https://perma.cc/5LST-N4AJ].

additional evidence of their victimization. As the criminal legal system's treatment of criminalized survivors thus far has shown, "[s]ome victimization claims are deemed more credible than others," with those who "fail to conform to traditional female gender roles" facing much higher barriers to be considered victims at all.¹⁴⁴ Black women and other women of color, sex workers, immigrants, poor women, lesbians, trans people, and other marginalized people are already often denied "victimhood" by the criminal legal system.¹⁴⁵ This Note does not propose an evidentiary rule carving out self-defense claims of survivors in part out of concern that doing so will simply erect additional barriers for criminalized survivors to clear before their self-defense claims are considered.

Deven Grey's case, discussed in the Introduction, will be used to illustrate the types of evidence that a defense informed by the social entrapment model could introduce.¹⁴⁶ Though Deven's self-defense immunity claim was denied in her Stand Your Ground hearing and she ultimately elected to plead guilty,¹⁴⁷ her story is a helpful example that demonstrates how IPV operates through coercive control and how barriers to accessing institutional help and systematic inequality can keep people trapped in abusive relationships. Evidence of that violence and the context in which it operated could have allowed a hypothetical jury to more comprehensively evaluate the reasonableness of Deven's actions that night—a key issue had she elected to go to trial with her claim of self-defense. This Part uses Deven's case throughout as an example of the different aspects of a possible defense grounded in the social entrapment model.

A. *The Case of Deven Grey*

Deven Grey and John Vance dated for six years prior to John's death.¹⁴⁸ In 2017, when Deven shot John, they lived in rural Calera, Alabama.¹⁴⁹ According to Deven, John had been abusive throughout their relationship, but the abuse escalated when they left New York, where Deven grew up, to live on John's family's land in Alabama.¹⁵⁰ In the early hours of December 12, 2017, the physical abuse escalated to

¹⁴⁴ GOODMARK, *supra* note 22, at 9.

¹⁴⁵ See Sharon Angella Allard, Essay, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 194 (1991); GOODMARK, *supra* note 22, at 9.

¹⁴⁶ See *supra* Introduction. Deven Grey eventually chose to plead guilty. See Blind Plea, *supra* note 14, at 29:40. Use of this case is not intended as a commentary on her defense strategy or counsel but rather to illustrate the additional context and details that could be offered with a defense informed by social entrapment, had she elected to go to trial.

¹⁴⁷ See *supra* text accompanying notes 13–14.

¹⁴⁸ See *Someone Is Lying*, *supra* note 1, at 44:23.

¹⁴⁹ See *id.* at 02:30.

¹⁵⁰ See Blind Plea, *supra* note 7, at 31:20.

the point where Deven says she was so fearful for her life that she saw no option but to kill John.¹⁵¹ She said that night when he woke her up with a slap to the face was “different.”¹⁵² She was sure that she had a choice between her life and his, and she says “I just didn’t want it to be me.”¹⁵³

The state did not believe Deven’s version of events, instead believing John’s other girlfriend, Alexis, who insisted John was never abusive to Deven.¹⁵⁴ When first questioned on December 12, before learning that John was dead, Alexis said she had spoken to John twice early that morning at 12:33 a.m. and 1:23 a.m. Alexis said that on those calls Deven and John were verbally arguing, and John wanted Alexis to pick him up, which she declined to do.¹⁵⁵ When the detective asked Alexis whether Deven and John were “fighting” rather than verbally arguing, she said, “not like that.”¹⁵⁶ Alexis’s story changed abruptly when the detective told her that Deven had shot John earlier that day; she then insisted that she could hear Deven firing John’s gun and threatening to kill him while she was on the phone but that she chose not to pick him up because she did not take the threats seriously.¹⁵⁷

These were the competing stories presented to the judge in Deven’s Stand Your Ground hearing.¹⁵⁸ The judge was charged with deciding whether Deven’s use of force was legal, but he made his decision based on incomplete information, as he barred testimony regarding abuse that occurred prior to December 12 and therefore did not have the complete picture necessary to make that determination.¹⁵⁹ A defense informed by the social entrapment model could better equip factfinders in similar situations, enabling a more comprehensive consideration of a criminalized survivor’s reasonableness.

B. *The Social Entrapment Model*

Social entrapment operates across three overlapping dimensions: “(a) the social isolation, fear and coercion that the predominant

¹⁵¹ See *Someone Is Lying*, *supra* note 1, at 42:30.

¹⁵² See *id.*

¹⁵³ *Blind Plea*, *supra* note 8, at 36:56.

¹⁵⁴ See *Someone Is Lying*, *supra* note 1, at 35:22.

¹⁵⁵ See *id.* at 24:40.

¹⁵⁶ *Id.* at 25:19.

¹⁵⁷ See *id.* at 26:58.

¹⁵⁸ See *Blind Plea*, *supra* note 8.

¹⁵⁹ See *id.* at 21:00. Alabama law instructs:

Prior to the commencement of a trial in a case in which a defense is claimed under this section, the court having jurisdiction over the case, upon motion of the defendant, shall conduct a pretrial hearing to determine whether force, including deadly force, used by the defendant was justified or whether it was unlawful under this section.

ALA. CODE § 13A-3-23(d)(2) (Westlaw through Act 2025-103).

aggressor's coercive and controlling behaviour creates in the victim's life; (b) the indifference of powerful institutions to the victim's suffering; and (c) the exacerbation of coercive control by the structural inequities associated with gender, class, race and disability."¹⁶⁰ Aspects of this model have been partially implemented in jurisdictions with a similar common law tradition as the United States, with some success, which can serve as a model for adoption in the United States.¹⁶¹

When representing a criminalized survivor, it is crucial to introduce expert and fact witness testimony explaining the particularities of her relationship and circumstances in order to inform the factfinder's inquiry into the reasonableness of her actions.¹⁶² Much of the necessary evidence will come from the accused's testimony because an abusive relationship is, in many ways, intentionally rendered invisible to anyone outside the relationship.¹⁶³ However, testifying "will be more difficult for defendants who have brain injury, trauma responses, and are intimidated by the courtroom and cross-examination,"¹⁶⁴ and the accused and their attorney will need to consider the ramifications of waiving her Fifth Amendment rights and opening herself up to cross examination. The accused person's testimony can be bolstered and corroborated by family, friends, and members of the community.¹⁶⁵ Expert witnesses can act as the scaffolding for the fact witness's testimony, further clarifying how the social entrapment dimensions function in practice, and the criminalized survivor's "perception of threat and the impossibility of escape."¹⁶⁶

¹⁶⁰ Tolmie et al., *supra* note 141, at 185.

¹⁶¹ See CTR. FOR WOMEN'S JUST., MAKING SELF-DEFENCE ACCESSIBLE TO VICTIMS OF DOMESTIC ABUSE WHO USE FORCE AGAINST THEIR ABUSER: LEARNING FROM REFORMS IN CANADA, NEW ZEALAND AND AUSTRALIA 9, 13, 15 (Jenny Earle & Katy Swaine Williams eds., 2023); Tolmie et al., *supra* note 141, at 187–88 (discussing New Zealand's and the United Kingdom's approaches to coercive control); Vanessa Bettinson & Nicola Wake, *A New Self-Defence Framework for Domestic Abuse Survivors Who Use Violent Resistance in Response*, 87 MOD. L. REV. 141, 170 (2024).

¹⁶² See Zamouri, *supra* note 91, at 215–16.

¹⁶³ See Elizabeth Sheehy, Julie Stubbs & Julia Tolmie, *Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in R v Falls*, 38 MELB. U. L. REV. 666, 700–01 (2014).

¹⁶⁴ Heather Douglas, Stella Tarrant & Julie Tolmie, *Social Entrapment Evidence: Understanding Its Role in Self-Defence Cases Involving Intimate Partner Violence*, 44 U.N.S.W. L.J. 326, 335 (2021) (footnote omitted) (considering how to build a social-entrapment-informed defense in Australia).

¹⁶⁵ See Sheehy et al., *supra* note 163, at 678–79, 681 (discussing the use of witnesses like the accused person's hairdresser, an employee, a landlord, and a day care director, among others, to provide indirect corroboration of the decedent's violence). Sheehy et al. break down the successful defense of Susan Falls, who was charged with murder after she dosed her husband with sleeping pills and later shot him in the head. *Id.* at 669. She was acquitted on the basis of self-defense. *Id.*

¹⁶⁶ KATHLEEN J. FERRARO & NOËL BRIDGET BUSCH-ARMENDARIZ, THE USE OF EXPERT TESTIMONY ON INTIMATE PARTNER VIOLENCE 4 (2009), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_ExpertTestimony.pdf [<https://perma.cc/8W8C-LKZL>]; see also EVAN STARK,

1. Coercive Control

Academic understanding of the dynamics of IPV has increasingly shifted toward a “coercive control” model, which “emphasizes the batterer’s pattern of coercion and control rather than his violent acts or their effect on victim psychology.”¹⁶⁷ Rather than focusing on discrete violent incidents, this framework considers violent attacks as one tool of many used to destabilize and isolate the victim in an effort to limit their autonomy and liberty.¹⁶⁸ The “critical elements” of coercive control “are the isolation of victims from support systems (e.g., friends, family, workmates, and helping professionals) and the exploitation and micro-regulation of their everyday lives in areas that extend from such survival resources as food or money to everyday routines.”¹⁶⁹ This “microregulation” can be especially intense when it comes to how survivors behave in their gendered roles as homemakers, mothers, and lovers, with the abusive partner policing “how the victim dresses, cooks, cleans, looks after children and performs sexually.”¹⁷⁰

The coercive control framework has gone through numerous iterations, with its application to IPV dating back to the late 1970s after earlier iterations were used as a framework for understanding things like prisoners of war and cult survivors.¹⁷¹ The first states later explicitly incorporated coercive control into their family law doctrines in 2020.¹⁷² According to a survey conducted by the Battered Women’s Justice Project, five U.S. states have explicitly incorporated coercive control in their protective order or family law statutes, and ten states have language in their statute that references coercive control or similar language.¹⁷³ Jurisdictions in the United States can look abroad for further guidance:

COERCIVE CONTROL 381 (2d ed. 2023) (discussing the expert testimony he provided regarding coercive control in Donna Balis’s murder trial in New Jersey); Douglas et al., *supra* note 164, at 336–37.

¹⁶⁷ Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 975–76 (1995).

¹⁶⁸ See Tolmie et al., *supra* note 141, at 186.

¹⁶⁹ Evan Stark, *Commentary on Johnson’s “Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence,”* 12 VIOLENCE AGAINST WOMEN 1019, 1021–22 (2006).

¹⁷⁰ Charlotte Bishop & Vanessa Bettinson, *Evidencing Domestic Violence, Including Behaviour that Falls Under the New Offence of “Controlling or Coercive Behaviour,”* 22 INT’L J. EVIDENCE & PROOF 3, 9 (2018).

¹⁷¹ See STARK, *supra* note 166, at 250 (discussing the precursors to the current coercive control model developed by Stark).

¹⁷² *Coercive Control Bill Tracker*, AMS. CONF. TO END COERCIVE CONTROL, <https://www.theacecc.com/billtracker> [<https://perma.cc/CX73-7WKM>]. There are significant concerns about criminalizing coercive control among anticarceral feminists, who worry that further criminalization will do more harm than good by exacerbating the issues discussed in Part I. See *supra* Part I; see also, e.g., Courtney K. Cross, *Coercive Control and the Limits of Criminal Law*, 56 U.C. DAVIS L. REV. 195, 235–37 (2022). This Note is not advocating for the criminalization of coercive control but arguing for adopting coercive control as a more accurate framing of how IPV functions.

¹⁷³ See BATTERED WOMEN’S JUST. PROJECT, COERCIVE CONTROL CODIFICATION MATRIX 2 (2022).

Several countries, including England, Northern Ireland, Scotland, Australia, Canada, and France, have enacted similar statutes.¹⁷⁴

When presenting a defense based on coercive control, the focus should not be on individual acts of violence but on how the abusive partner has established control over the criminalized survivor, with violence acting as one of those tools. Abuse is personalized, and different forms compound each other, so “tactics will be fact specific and will take effect cumulatively.”¹⁷⁵ The goal should be to demonstrate how the pattern of behavior is tailored to the victim and how the control exercised by the abusive partner affected the criminalized survivor’s belief about what alternatives to force were reasonably available to her.

Evidence demonstrating how the abusive partner isolated the criminalized survivor from friends, family, and support services and deprived the criminalized survivor of access to finances, transportation, sleep, food, medical care, housing, employment, and other resources would all be relevant to establishing the accused person’s reasonable beliefs.¹⁷⁶ Deven’s isolation was a key aspect of John’s control; for example, Deven moved with John to his family’s isolated piece of land in Alabama.¹⁷⁷ She left behind her family and friends in New York, whom John did not allow her to contact.¹⁷⁸ She had no job, license, or car and therefore no ability to leave home without an escort.¹⁷⁹ She was largely reliant on John or, at times, his aunt Sheila who lived on the property, for transportation and access to the outside world.¹⁸⁰ According to Deven, she left John’s land only four times in 2017.¹⁸¹ After John knocked out one of Deven’s front teeth, she had to wait six months for Sheila to take her to the dentist.¹⁸² John’s acts of physical violence were just one of many ways in which he exercised control over Deven.¹⁸³

Examples of “microregulation,” in which the abusive partner sets rules dictating many aspects of the criminalized survivor’s life, are also relevant despite often seeming arbitrary or obscure, because the rules “are about conditioning the primary victim to obey the predominant aggressor’s commands without regard to their substance.”¹⁸⁴ In this formulation, violence, or the threat of it, is another tool used by the abusive partner to “establish the costs of non-compliance and create fear in

¹⁷⁴ See STARK, *supra* note 166, at 2.

¹⁷⁵ Douglas et al., *supra* note 164, at 332.

¹⁷⁶ See *id.* at 334.

¹⁷⁷ See Blind Plea, *supra* note 7, at 05:55.

¹⁷⁸ See *id.* at 13:10, 32:30.

¹⁷⁹ See *id.* at 29:02.

¹⁸⁰ See *id.* at 21:00.

¹⁸¹ See *id.* at 33:30.

¹⁸² See *id.* at 29:20.

¹⁸³ See *id.* at 33:30.

¹⁸⁴ Douglas et al., *supra* note 164, at 334.

the victim.”¹⁸⁵ In between the acts of violence are constant instances of microregulation designed to keep the victim under the abuser’s control. Although people who knew Deven during her relationship with John describe her as shy, she says her behavior was because John kept close tabs on her—she kept to herself because “she was always worried she might say or do the wrong thing or break one of his many rules.”¹⁸⁶ When they were in public, John would frequently accuse Deven of watching or flirting with other men.¹⁸⁷ When questioned by police on December 12, Deven could not provide the last name of the man who had been at their house that day because John did not allow her to know it.¹⁸⁸ When John was drinking, he wanted her to be drinking too.¹⁸⁹ John did not allow her to contact the family and friends she left behind in New York, and he surveilled her calls and texts to ensure compliance.¹⁹⁰ When he learned that she had been in communication, despite his rules, John got her a new phone number.¹⁹¹ When Deven tried to leave during the first year they lived in Alabama, he pushed and slapped her around to scare her out of trying again.¹⁹² Eventually, Deven says, she was not allowed to leave their trailer without John present, and he installed security cameras on the property so he could monitor who was coming and going.¹⁹³ John’s aunt noticed that when the couple did attend family events, John kept Deven within three feet of him at all times.¹⁹⁴

State statutes defining coercive control and recognizing the non- or previolent acts of microregulation, despite often only applying in a family law context,¹⁹⁵ can help guide a defense strategy. Some examples of coercive control provided in Hawaii’s definition, for instance, are “[c]ontrolling how much money is accessible to the individual” and “[m]onitoring the individual’s activities, communications, and movements.”¹⁹⁶ Phone, text, social media, and bank records, including even “who has passwords to which accounts and who does not, can potentially be useful”¹⁹⁷ to demonstrate this type of controlling behavior. Although much of the evidence of John’s coercive control of Deven would need to be introduced via her own testimony, Deven’s

¹⁸⁵ *Id.*

¹⁸⁶ *See Blind Plea*, *supra* note 7, at 24:10.

¹⁸⁷ *See id.* at 32:40.

¹⁸⁸ *See id.* at 14:14.

¹⁸⁹ *See Blind Plea*, *supra* note 7, at 26:26.

¹⁹⁰ *See id.* at 32:30.

¹⁹¹ *See id.* at 33:11.

¹⁹² *See id.* at 28:09.

¹⁹³ *See id.* at 28:25.

¹⁹⁴ *See id.* at 21:32.

¹⁹⁵ *See, e.g.*, CAL. FAM. CODE § 6320 (West, Westlaw through Ch. 1 of 2025 Reg. Sess.); HAW. REV. STAT. § 586-1 (2024).

¹⁹⁶ HAW. REV. STAT. § 586-1 (2024).

¹⁹⁷ Douglas et al., *supra* note 164, at 335.

family and friends in New York, Sheila, and even the dentist Deven visited could provide corroborative testimony.¹⁹⁸ Records from the bank, phone company, the dentist's office, and video security company could bolster Deven's story.¹⁹⁹ Defense attorneys should be creative in offering and interpreting corroborative evidence, thinking outside of the traditional evidence offered to demonstrate the accused and decedent's relationship. Evidence that does not directly show violence can nonetheless provide illustrations of how the control played out in the criminalized survivor's everyday life. Other members of their community could all offer relevant evidence: medical professionals such as dentists and reproductive healthcare providers, mental health practitioners, social workers, domestic violence service providers, and even children's teachers.²⁰⁰

2. Institutional Issues

Understanding a criminalized survivor's history of interaction with, and especially her lack of access to, institutional support is essential to accurately assessing the reasonableness of her actions. Although society and the criminal legal system's understanding and treatment of IPV is significantly different from when the initial anti-violence-against-women movements began gaining ground fifty years ago,²⁰¹ "[t]he unfortunate reality is that the proportion of women exposed to the most serious form of partner abuse remains unchanged."²⁰² Interaction with support agencies often ends up causing harm due to underlying biases against the survivors.²⁰³

Receiving support from formal IPV service agencies—which provide “emergency shelter, transitional housing, advocacy, counseling, economic support . . . children's services” and other vital assistance—reduces the impact of IPV on survivors and “has been linked to reduced

¹⁹⁸ See *supra* text accompanying notes 177–82.

¹⁹⁹ See *supra* text accompanying notes 190–93.

²⁰⁰ See Douglas et al., *supra* note 164, at 335–36; Jodie Valpied & Kelsey Hegarty, *Intimate Partner Abuse: Identifying, Caring for and Helping Women in Healthcare Settings*, 11 WOMEN'S HEALTH 51, 54 (2015) (noting possible IPV indicators a medical professional may observe during patient interactions); Jana Lauren Bregulla, Marcel Hanisch & Bettina Pfeleiderer, *Dentists' Competence and Knowledge on Domestic Violence and How to Improve It—a Review*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH, no. 4361, Apr. 2022, at 2 (noting injuries commonly resulting from IPV that dentists might observe), <https://www.mdpi.com/1660-4601/19/7/4361/pdf?version=1649239584> [<https://perma.cc/87J7-CVZY>].

²⁰¹ See Ake & Arnold, *supra* note 43, at 3–4.

²⁰² STARK, *supra* note 166, at 65.

²⁰³ See Sarah R. Robinson, Kristen Ravi & Rachel J. Voth Schrag, *A Systematic Review of Barriers to Formal Help Seeking for Adult Survivors of IPV in the United States, 2005–2019*, 22 TRAUMA VIOLENCE & ABUSE 1279, 1290 (2020).

negative post-trauma outcomes and increased general well-being.”²⁰⁴ However, significant barriers to accessing this help persist.²⁰⁵ Many survivors are unaware of services available to them or lack services because of their location, language, immigration status, or disability status.²⁰⁶ Others fear the consequences of seeking help or lack the material resources to effectively seek help.²⁰⁷

A criminalized survivor’s testimony about her engagement with and understanding of agency services and her outreach to others in the community can shed light on her perception of her circumstances, which is key to the reasonableness analysis.²⁰⁸ Agency records and testimony from providers both about the individual’s engagement with services and the general services realistically available could also provide valuable context.²⁰⁹

In Deven’s case, John had isolated her in a small trailer on his family’s land in rural Alabama.²¹⁰ Without access to transportation—and with John monitoring her calls, texts, and movement—she had few opportunities to reach out to support services.²¹¹ Deven lacked the material resources that would have made it more likely for her to access help,²¹² as she was unemployed with no independent housing or finances.²¹³ Deven also had her daughter to worry about; she became pregnant in 2013, in what Deven felt was another of John’s attempts to tie her to him more tightly.²¹⁴ Deven did not see any way out, stating, “I can’t leave. I don’t have a license. I don’t have a car. I don’t have friends. I don’t have anything.”²¹⁵

For many survivors, the pathway to accessing these services runs through law enforcement, but there is evidence that “[c]ollaboration between service providers and law enforcement . . . does not necessarily translate to improvements in case outcomes or victim well-being.”²¹⁶ Mandatory arrest and no-drop prosecution policies may impact survivors’ willingness to go to law enforcement because they may be concerned about the lack of control they have over the criminal legal

²⁰⁴ *Id.* at 1279–80.

²⁰⁵ *See id.* at 1291.

²⁰⁶ *See id.* at 1290–91.

²⁰⁷ *Id.*

²⁰⁸ *See Douglas et al.*, *supra* note 164, at 337–38.

²⁰⁹ *See id.* at 339.

²¹⁰ *See Blind Plea*, *supra* note 7, at 6:02.

²¹¹ *See id.* at 29:02, 32:30.

²¹² *See Robinson et al.*, *supra* note 204, at 1289 (discussing multiple studies that showed a lack of independent housing, finances, insurance, transportation, healthcare, and education all pose barriers to seeking help for IPV).

²¹³ *See Blind Plea*, *supra* note 7, at 32:22.

²¹⁴ *See id.* at 28:45.

²¹⁵ *Id.* at 29:02.

²¹⁶ Goodmark, *supra* note 53, at 122.

response or about their own exposure to criminalization.²¹⁷ These policies may have benefited some survivors, but they have also “ushered in a host of consequences for others that range from difficult to devastating including retaliatory violence, financial instability, forced separation, and even survivors’ own incarceration.”²¹⁸

It is impossible to know how the police would have reacted had Deven reported John’s abuse prior to December 12. However, as one Shelby County defense attorney remarked, “people living in [Deven’s] conditions don’t get the same treatment from the police that people living in the nicer neighborhoods might.”²¹⁹ The police investigator responsible for investigating Deven’s case was skeptical of Deven’s claims of abuse.²²⁰ Despite the fact that when police arrived at their trailer on December 12, Deven was bleeding from her ear because of a busted eardrum, covered in cuts and bruises, and suffering from multiple facial fractures,²²¹ the investigator stated, “[Deven] claimed he beat her, but I don’t have any proof of that” because “there was never any evidence that John inflicted that injury on her.”²²² The officer was sure this was not a case of self-defense because “she could’ve walked right out the front door, and he would’ve never been the wiser.”²²³ This attitude from law enforcement officials indicates a troubling misunderstanding of how IPV operates and raises questions regarding how Deven’s efforts would have been received had she reached out for help.

Survivors may struggle to successfully report instances of IPV to law enforcement. For example, when Deven tried to call 911 multiple times, John’s abuse escalated, and he began turning off and hiding her phone when they got into arguments.²²⁴ Even if Deven had been able to report John to law enforcement, it is not clear that she would have been able to access additional support services, which can be scarce in Alabama.²²⁵ Despite “consistently ha[ving] one of the highest rates of domestic violence [and] number of women killed by intimate partners,” only sixteen programs provide domestic violence services to Alabama’s

²¹⁷ See Mills, *supra* note 71, at 612. Mills argues that mandatory interventions, including both arrests and prosecutions, may not serve the best interests of survivors, as they may replicate the “rejection, degradation, terrorization, isolation, missocialization, exploitation, emotional unresponsiveness, and confinement intrinsic to the battering relationship.” *Id.*

²¹⁸ Cross, *supra* note 172, at 200.

²¹⁹ Blind Plea, *supra* note 8, at 11:54.

²²⁰ See *id.* at 26:55.

²²¹ See *Someone Is Lying*, *supra* note 1, at 34:03.

²²² Blind Plea, *supra* note 8, at 26:55.

²²³ *Someone Is Lying*, *supra* note 1, at 45:10.

²²⁴ See Blind Plea, *supra* note 7, at 32:45.

²²⁵ See Maddie McQueen, *More Domestic Violence Shelters Needed in Central Alabama*, CBS 42 (Feb. 16, 2024, 7:09 AM), <https://www.cbs42.com/news/local/more-domestic-violence-shelters-needed-in-central-alabama/> [https://perma.cc/8Z58-ALJA].

sixty-seven counties.²²⁶ This lack of access to services in rural Alabama is consistent in rural areas around the country; survivors living in rural areas “are almost twice as likely to be turned away from services as urban women due to lack of capacity.”²²⁷

Each of these barriers to accessing sustainable support colors Deven’s decision to shoot John that night. Her perceptions of what options were available to her for help and what the consequences of seeking out that help would be informed her beliefs regarding what type of danger she was in that night. Evidence regarding a survivor’s material situation, her prior attempts to reach out for help, and the institutional resources available can help answer the question all too commonly asked of IPV survivors: “Why did she stay?”²²⁸

Testimony regarding the accused person’s interactions with institutions should be brought into the courtroom, as it has an appreciable impact on a survivor’s beliefs regarding their alternatives to using force.²²⁹ Explaining the options available to a survivor can help jurors “realistically examine the safety options available to the defendant in her circumstances” when they might otherwise assume she could have gone to the police or sought other assistance before the situation escalated to the point that she felt responsive force was her only realistic option.²³⁰ Understanding the individual survivor’s interaction, or lack thereof, with these options is key to the reasonableness analysis because the question before jurors is whether the criminalized survivor’s actions were reasonable in light of the circumstances as she believed them to be.²³¹ Evidence of not just the options available but any attempts she made to seek help, any barriers faced, any previous attempts to seek services, and what services were realistically available should all be considered.²³² The community response to help seeking “influence[s] the victim’s decision whether to seek assistance or not.”²³³

3. *The Exacerbating Effect of Structural Inequalities*

The structural inequalities faced by criminalized survivors are relevant to the reasonableness of their responses because they “affect which

²²⁶ Amber Sutton, “*It Was Like a Volcano Erupted*”: *Community-Based Advocates’ Observations of Intimate Partner Violence and Intimate Femicide in Alabama During COVID-19*, 39 *AFFILIA* 320, 321 (2024).

²²⁷ See NAT’L ADVISORY COMM. ON RURAL HEALTH & HUM. SERVS., *INTIMATE PARTNER VIOLENCE IN RURAL AMERICA* 2 (2015), <https://www.hrsa.gov/sites/default/files/hrsa/advisory-committees/rural/2015-partner-violence.pdf> [<https://perma.cc/MF4Z-3WVG>].

²²⁸ See FERRARO & BUSCH-ARMENDARIZ, *supra* note 166, at 4.

²²⁹ See Douglas et al., *supra* note 164, at 337.

²³⁰ *Id.*

²³¹ See *supra* Section II.A.1.

²³² See Douglas et al., *supra* note 164, at 327–28.

²³³ Bettinson & Wake, *supra* note 161, at 146.

coercive and controlling behaviours are adopted by the abuser, how victim/survivors respond to the behaviour and how they engage or otherwise [interact] with the frontline services which become involved.”²³⁴ The “intersecting structural inequities in the IPV victim’s life circumstances” inform how coercive control and institutions function in their lives.²³⁵ Although IPV is often focused on the actions of the individuals in a relationship, “patterns of violence are connected to social systems and social institutions.”²³⁶ A criminalized survivor’s race, ethnicity, immigration status, poverty level, gender identity or sexuality, and a whole host of other identities influence the tactics of the abusive partner and the survivor’s ability to access safety resources.²³⁷

Deven was a Black woman in a relationship with a white man in Alabama,²³⁸ the last state to overturn its ban on interracial marriage.²³⁹ Studies show that Black women are disproportionately affected by IPV, with four in ten experiencing IPV in their lifetime.²⁴⁰ “Compared to White women, Black women are less likely to utilize formal help-seeking (e.g., legal aid services, police, and mental health treatment),” which analysts believe is due to the intersection of historical, structural, community-level, and interpersonal barriers.²⁴¹ This may also be because of the “lack of formal resources available to Black women.”²⁴²

²³⁴ *Id.*

²³⁵ Douglas et al., *supra* note 164, at 328.

²³⁶ Stephanie Rose Montesanti, *The Role of Structural and Interpersonal Violence in the Lives of Women: A Conceptual Shift in Prevention of Gender-Based Violence*, 93 BMC WOMEN’S HEALTH, no. 93, Oct. 2015, at 2, <https://bmcwomenshealth.biomedcentral.com/counter/pdf/10.1186/s12905-015-0247-5.pdf> [<https://perma.cc/9MST-YWWK>].

²³⁷ See Douglas et al., *supra* note 164, at 340.

²³⁸ See Blind Plea, *supra* note 7, at 12:44.

²³⁹ Aaron Blake, *Alabama Was a Final Holdout on Desegregation and Interracial Marriage. It Could Happen Again on Gay Marriage*, WASH. POST (Jan. 9, 2015, 1:00 PM), <https://www.washingtonpost.com/news/the-fix/wp/2015/02/09/alabama-was-a-final-holdout-on-desegregation-and-interracial-marriage-it-could-happen-again-on-gay-marriage/> [<https://perma.cc/4HLA-8W4X>]. Alabama overturned its antimiscegenation statute in 2000, more than three decades after the Supreme Court ruled that such laws were unconstitutional. *Id.* Still, more than forty percent of Alabama voters did not support the change. *Id.*

²⁴⁰ Lorin C. Kelly, Chelsea M. Spencer, Brooke Keilholtz, Paige McAllister & Sandra M. Stith, *Is Separate the New Equal? A Meta-Analytic Review of Correlates of Intimate Partner Violence Victimization for Black and White Women in the United States*, 61 FAM. PROCESS 1473, 1474 (2022). Kelly et al. also noted that 31.5% of all women experience some form of IPV in their lifetime. *Id.*

²⁴¹ *Id.* (citation omitted). Historical barriers include “slavery and its subsequent social and psychological ramifications on race relations in the United States, gender-based stereotypes, and discrimination by the legal and justice systems.” *Id.* Structural barriers include “victim-blaming, minimization, [and] power dynamics from police, such as fear of physical harm or incarceration.” *Id.* Community-level barriers include “mores of not involving outside systems and not wanting to be seen as disloyal.” *Id.* And interpersonal barriers include “fear of [a] partner’s reaction and/or not wanting to make the IPV worse.” *Id.*

²⁴² *Id.*

Deven was aware of how her marginalization may have impacted her interactions with the criminal legal system; she chose to plead guilty in part because of her concerns about going in front of an all-white jury.²⁴³

Deven was also impoverished, living in a small trailer on isolated property.²⁴⁴ Studies demonstrate that women experiencing IPV in rural areas “are more likely to be murdered by a partner than those living in cities.”²⁴⁵ Social factors, such as “traditional gender roles and a high degree of social cohesion in rural communities,” can make it harder for rural women to access help, and rural women are “less likely to seek out help, and perceive the justice system as less helpful than urban women.”²⁴⁶ Rural women experiencing IPV often struggle more than their urban counterparts to become economically independent.²⁴⁷ They typically live further from support services as previously discussed, and like Deven, they often “face the additional barrier of their abuser controlling the family’s transportation and communication channels.”²⁴⁸ Deven’s race and geographic location were tools John could use to enforce his coercive control and limit Deven’s options for escape, making them relevant to the question of reasonableness because they are probative of Deven’s reasonable belief regarding the danger she was facing.

Evidence demonstrating the impact of structural inequality and its impact on the criminalized survivor may be difficult to present through lay testimony. However, the criminalized survivor and other members of her community may be able to testify to how their interactions with the decedent, the larger community, and institutions are colored by their marginalization. This evidence is relevant because it demonstrates the nature of the threat the survivor faced and “provides a jury with a rational basis . . . for determining questions about the particular accused’s conduct and beliefs.”²⁴⁹ Here, expert testimony from those with “specific cultural expertise of relevant communities”²⁵⁰ may play a particularly important contextualizing role.

C. *Admissibility of Social Entrapment Model Evidence*

When a criminalized survivor is on trial, the admission of general and case-specific testimony is crucial to explain the reasonableness of her fear at the time of the charged offense. Testimony from the accused

²⁴³ See *Blind Plea*, *supra* note 7, at 25:24.

²⁴⁴ See text accompanying notes 210–15.

²⁴⁵ NAT’L ADVISORY COMM. ON RURAL HEALTH & HUM. SERVS., *supra* note 227, at 3.

²⁴⁶ *Id.* at 4–5.

²⁴⁷ See *id.* at 5.

²⁴⁸ *Id.* at 6.

²⁴⁹ Douglas et al., *supra* note 164, at 345.

²⁵⁰ *Id.* at 342.

person, friends, family, and community members can help explain the relationship between the survivor and the decedent, which will better equip the factfinder to assess the survivor's state of mind.²⁵¹ There is widespread agreement that evidence pertaining to battering and its effects is relevant to a factfinder's analysis; for over four decades courts have admitted testimony about IPV to help factfinders interpret the facts before them.²⁵² Courts should adopt an approach to this evidence that acknowledges an intersectional, evidence-based understanding of how IPV operates and admit evidence speaking to the three dimensions of social entrapment detailed above.²⁵³ This evidence is highly probative of the criminalized survivor's belief that the survivor was in imminent danger when the charged offense occurred.

1. *Admissibility of Fact Witness Testimony*

When claiming self-defense, evidence pertaining to the survivor's relationship with the decedent is relevant as it is offered to show the reasonableness of her belief that she was in danger of serious bodily injury or death.²⁵⁴ The decedent's prior abusive behavior toward the accused is an important factor for a factfinder to consider when asked to determine whether the survivor was put in fear of serious bodily harm or death.²⁵⁵

Failure to admit this evidence risks unjust outcomes. In Deven's Stand Your Ground hearing, the court sustained the Shelby County District Attorney's objection to Deven's testimony discussing prior abuse suffered at John's hands, ruling that only the violence occurring specifically that night was relevant to her self-defense claim.²⁵⁶ This means that the judge did not hear from Deven nor from John's Aunt Sheila about the years of abuse John inflicted, nor did the judge see the texts from John admitting to and apologizing for his behavior.²⁵⁷ The judge did not hear from John's father, who had told police that his son

²⁵¹ See *id.* at 335.

²⁵² See Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 How. L.J. 297, 312–13 (1995) (discussing *Ibn-Tamas v. United States*, one of the first cases in which an accused person tried to introduce BWS testimony when on trial for shooting her husband (citing *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979))); FERRARO & BUSCH-ARMENDARIZ, *supra* note 166, at 1.

²⁵³ See Tolmie et al., *supra* note 141, at 185; *supra* Section III.B.

²⁵⁴ See *United States v. Saenz*, 179 F.3d 686, 688–89 (9th Cir. 1999) (holding that Federal Rule of Evidence 404(b)'s prohibition on prior-bad-acts evidence does not bar the admissibility of an accused person's knowledge of a decedent's prior bad acts as probative of the accused person's mental state).

²⁵⁵ See Douglas et al., *supra* note 164, at 332.

²⁵⁶ See *Blind Plea*, *supra* note 8, at 22:21.

²⁵⁷ See *id.* at 21:49, 41:34.

frequently fired shots around his trailer²⁵⁸ and that he often had to turn up his TV to drown out the sounds of John and Deven when John “slung her around.”²⁵⁹ In the prosecution’s version of the story, Deven was simply a jealous girlfriend, upset that John was seeing another woman, who killed John in cold blood as revenge.²⁶⁰ The district attorney cast doubt on Deven’s injuries from that night, suggesting that she could have fabricated them herself as part of her premeditation.²⁶¹ Without being able to introduce evidence of John’s prior abuse, Deven’s hands were tied; she was not allowed to introduce crucial evidence that would have tended to prove that her version of the night’s events was true. She was not able to show the judge why something was different that night when John told her that he would kill her if she “tried to lay down next to him, or if he heard me breathing, or if he thought I was using the phone,” nor why she, given her six years of experience with John, believed he meant it.²⁶²

2. Admissibility of Expert Testimony

Both general and case-specific expert testimony likely would have provided important context for Deven’s case as well. Expert testimony is admissible if “scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”²⁶³ The introduction of expert testimony covering how coercive control functions, both generally and in a case-specific manner; institutional responses—or lack thereof—to IPV; and structural inequalities that impact the survivor’s experience of coercive control and ability to access help will help jurors judge the reasonableness of an accused’s beliefs and actions.

For decades, criminalized survivors have been permitted to introduce evidence regarding BWS to inform the factfinder’s assessment of their reasonableness.²⁶⁴ As criticism of BWS testimony mounted, defense counsel and courts have moved toward expert testimony on the totality of “battering and its effects” rather than tailoring evidence into the ill-fitting BWS framework.²⁶⁵ Expert testimony on coercive control has already been found admissible under current evidentiary rules in

²⁵⁸ See *id.* at 29:41.

²⁵⁹ *Someone Is Lying*, *supra* note 1, at 34:44.

²⁶⁰ See *Blind Plea*, *supra* note 8, at 28:43.

²⁶¹ See *id.* at 26:55.

²⁶² *Someone Is Lying*, *supra* note 1, at 42:01.

²⁶³ FED. R. EVID. 702(a).

²⁶⁴ See *supra* note 252 and accompanying text.

²⁶⁵ See Dutton, *supra* note 134, at 19–21 (concluding that BWS was “an inadequate term to represent the scientific and clinical knowledge concerning battering and its effects”).

the United States,²⁶⁶ and others have already advocated for the adoption of “social agency” testimony, which “can highlight the inadequacies that exist within the formal help sources.”²⁶⁷

General testimony regarding institutional issues in addressing IPV and the social inequities that exacerbate it would fall within this “social agency” category.²⁶⁸ This type of testimony can “substantiate the defendant’s claim that she believed she had no other alternative but to kill her abusive spouse without having to excuse her behavior as the actions of a woman suffering from a syndrome.”²⁶⁹ This testimony is relevant to one of the critical elements of a self-defense claim: a person may use deadly force only if they reasonably believe that such force is necessary to defend themselves against the threat.²⁷⁰ What the accused believed at the time of the charged offense and the evidence relevant to the honesty of her stated belief are material to the factfinder’s analysis of objective and subjective reasonableness.²⁷¹ This evidence will enable a jury to better answer the question of whether an “ordinary and reasonable” person in the accused’s circumstances would have perceived self-defense as necessary, as required for an objective reasonableness inquiry,²⁷² and whether force was reasonable “under the circumstances” the person employing protective force “believe[d] them to be when the force [was] used,”²⁷³ as required for a subjective reasonableness inquiry.²⁷⁴

Expert testimony can serve multiple functions for criminalized survivors. It can explain how IPV functions day-to-day and contextualize the lay-witness testimony discussed earlier.²⁷⁵ In this way, it can function similarly to other testimonial “social framework evidence” that courts permit to “provide the factfinder, usually a jury, with information about the social and psychological context in which contested adjudicative facts occurred.”²⁷⁶ It can correct juror misconceptions about IPV and help “bridge the gap between the legal requirements of self-defense and the accused’s evidence.”²⁷⁷ Jurors’ analysis of whether the accused’s

²⁶⁶ See, e.g., STARK, *supra* note 166, at 381 (discussing the expert testimony he provided regarding coercive control in Donna Balis’s murder trial in New Jersey).

²⁶⁷ See Terrance et al., *supra* note 135, at 947–48.

²⁶⁸ See *id.*

²⁶⁹ *Id.* at 950.

²⁷⁰ See Heller, *supra* note 105, at 3.

²⁷¹ See *supra* Section II.A.1.

²⁷² See Heller, *supra* note 105, at 8.

²⁷³ MODEL PENAL CODE § 3.04(2)(c) (AM. L. INST. 1985).

²⁷⁴ See Heller, *supra* note 105, at 66–67.

²⁷⁵ See Sheehy et al., *supra* note 165, at 706; *supra* Section III.C.1.

²⁷⁶ Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133, 133 (1989). Examples include testimony regarding the reliability of eyewitness testimony, predictions of dangerousness, and various psychological conditions. *Id.*

²⁷⁷ Sheehy et al., *supra* note 165, at 691.

behavior was reasonable, in light of her circumstances, will be much better informed by the presentation of evidence regarding how coercive control operates generally and, in the accused person's life, how institutional responses and structural inequalities reinforced the abusive partner's control and limited the criminalized survivor's alternatives.

CONCLUSION

Adopting a social entrapment framework when considering criminalized survivors' self-defense claims would ensure courts better understand the circumstances as the criminalized survivor experienced them, making it possible for the factfinder to answer the question of whether their use of force was necessary and reasonable. Although more extensive changes to self-defense doctrine and a reconsideration of how our society addresses IPV are necessary, adoption of this framework would ensure more accurate and just outcomes for criminalized survivors.

Family In Law.

In 1933, BNA first published *The United States Law Week*. With that first issue, BNA set a new standard for high-quality legal reporting and research. Following *Law Week*'s precedent, BNA has since launched a family of information services for legal professionals.

BNA's notification services cover key areas of the legal field. They include: *Family Law Reporter*; *BNA's Bankruptcy Law Reporter*; *Business Law Adviser*; *Corporate Governance Report*; *Mergers & Acquisitions Law Report*; *BNA's Patent, Trademark & Copyright Journal*; and *Criminal Law Reporter*.

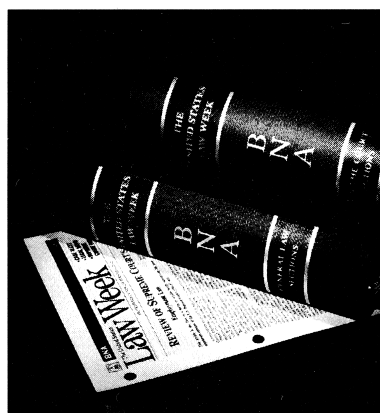
Whichever publication you choose, you'll notice the family resemblance — comprehensive, accurate, in-depth coverage.

Ask your professor for details on low student rates for BNA information services.



BNA

The Bureau of National Affairs, Inc.
1231 25th Street, NW
Washington, DC 20037
Customer Relations: 1-800-372-1033
email: riskfree@bna.com
<http://www.bna.com>



The Benchmark

BNA's Criminal Law Reporter

It's what your opponents read every week. Don't be blind-sided.

The *Criminal Law Reporter* — long regarded as the criminal bar's publication of record. Now, it does even more for you:

- **Summary & analysis** of the week's most important cases and other developments
- **FREE full text** of reported cases on a Web site for subscribers
- **FREE e-mail alerts** of U.S. Supreme Court cases
- **Electronic availability** on the Web or Lotus Notes
- **E-mail** of Highlights with links to full text
- **A new, streamlined format** for faster reading, more depth

FREE TRIALS



**Your Trusted Source for
Criminal Law Developments**

Customer Relations: 1-800-372-1033

email: riskfree@bna.com ♦ www.bna.com

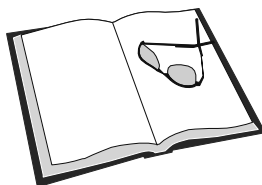
The Bureau of National Affairs ♦ 1231 25th Street, NW Washington, DC 20037

ORDER THROUGH HEIN!

Get your missing back volumes and issues
through Hein!

We have obtained the entire back stock,
electronic, reprint and microform rights to . . .

The George Washington Law Review



Complete sets to date are available now!
We can also furnish single volumes and issues!

BACK ISSUES ALSO AVAILABLE IN *HEIN-ON-LINE!*

<http://heinonline.org>



WILLIAM S. HEIN & CO., INC.

*Law Publisher / Serial & Subscription Agent / Micropublisher
New & Used Law Books / Preservation Printer / Bookbinder
2350 North Forest Road, Getzville, New York 14068
(716) 882-2600 • TOLL FREE (800) 828-7571 • Fax (716) 883-8100
E-Mail mail@wshein.com • Web Site www.wshein.com*

