

The Private Role in Public Safety

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ABSTRACT

Amid a national debate over the scope of the criminal system and calls to defund police, a growing number of jurisdictions are turning to private actors to mitigate the system's harms. Communities across the country are purchasing body cameras, contracting for implicit bias trainings, and turning to community-based alternatives to police responses.

There is irony in these calls essentially to privatize aspects of public safety. Many proponents of these reforms sharply criticize privatization in related contexts, from prisons to policing. This contrast between demands to privatize in some instances, and to curtail privatization in others, underscores the twin theses of this Article. First, private influences on the criminal system are far more pervasive than the literature recognizes. By canvassing the roles of non-state actors, this Article demonstrates that private influence is inevitable. Second, private influences are neither intrinsically harmful nor beneficial. Although privatization raises serious governance concerns, public aspects of the system suffer many of the same problems, including distorted financial incentives, lack of transparency, and limited accountability. In fact, reliance on private rather than public actors sometimes mitigates these concerns.

In short, the oft-discussed line between public and private is a poor proxy for harm in the criminal system. Instead, policymakers should accept that the public and private spheres will always be intertwined and should regulate them in ways that avoid accountability gaps. The approach detailed in this Article offers important lessons for everything from relying on community-based antiviolence groups to law enforcement's access to the private data market.

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INTRODUCTION

In response to high-profile police killings, many communities are grappling with fundamental questions about the role of law enforcement in achieving public safety. An expanding coalition of Americans agrees that the criminal system incarcerates too many, and that law enforcement responses to social problems—homelessness, substance abuse, and mental illness, to name a few—often result in more harm than good.¹ Calls to “reimagine,” “defund,” or “abolish” aspects of

¹ See, e.g., *American Voters Share Cross-Partisan Consensus on Wide Range of Federal Policies, Polling Shows*, APPEAL (Jan. 8, 2021), <https://theappeal.org/the-lab/polling-memos/american-voters-share-cross-partisan-consensus-federal-policies-polling/> [<https://perma.cc/TS9A-UMJX>] (“66% of likely voters . . . support a proposed federal grant program to provide \$100 million per year in funding for community-based, non-law enforcement emergency and non-emergency response.”); *Widespread Desire for Policing and Criminal Justice Reform*, ASSOCIATED PRESS, <https://apnorc.org/projects/widespread-desire-for-policing-and-criminal-justice-reform/> [<https://perma.cc/7F4R-VHZ6>] (new national polling data); Maggie Astor, *Left and Right*

the criminal system have attracted considerable attention.² These movements seek to deemphasize and direct resources away from police, prosecutors, and prisons, in favor of social service responses to public safety problems.³ Although there is no single blueprint for achieving this kind of transformation, advocates and policymakers are calling for communities to play a bigger role in developing and implementing true public safety.⁴

Agree on Criminal Justice: They Were Both Wrong Before, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/politics/criminal-justice-system.html> [<https://perma.cc/XFF9-42G2>] (“There is a new bipartisan consensus on criminal justice, and it is that the old consensus was wrong.”). *But see* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 265-74 (2018) (complicating the apparent “consensus” about how to address mass incarceration).

This Article uses the term “criminal system” to refer to the institutions and individual conduct that relate to the promulgation and enforcement of criminal laws, while acknowledging these forces are not a unified “system.” *See, e.g.*, Benjamin Levin, *Rethinking the Boundaries of “Criminal Justice,”* 15 OHIO STATE J. CRIM. L. 619, 619 (2018). This definition does not reach the full scope of the carceral state. *See, e.g.*, Sharon Dolovich & Alexandra Natapoff, Introduction: Mapping the New Criminal Justice Thinking (including all “public policies that generate the crime/poverty nexus” (emphasis omitted)), in *THE NEW CRIMINAL JUSTICE THINKING* 1, 4 (Sharon Dolovich & Alexandra Natapoff eds., 2017); Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 818 (2010) (defining carceral state as totality of “spatially concentrated, more punitive, surveillance-and punishment-oriented system of governance”).

² On police defunding, see generally *The Time Has Come to Defund the Police*, MOVEMENT 4 BLACK LIVES, <https://m4bl.org/defund-the-police/> [<https://perma.cc/5XET-RED4>]; *see also* Sarah Holder, Fola Akinnibi & Christopher Cannon, *‘We Have Not Defunded Anything’: Big Cities Boost Police Budgets*, BLOOMBERG CITYLAB (Sept. 22, 2020), <https://www.bloomberg.com/graphics/2020-city-budget-police-defunding/> [<https://perma.cc/YE43-9DUG>] (“While a few major cities like New York and Los Angeles have made large, high profile cuts, more than half actually increased spending or kept it unchanged.”).

On police abolition, see generally Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617 (2019); Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 462 (2018); ALEX S. VITALE, *THE END OF POLICING* (2017).

³ *See, e.g.*, Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/WCH7-BJQC>]; *see also* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1782 (2020) (arguing that we must “take seriously an abolitionist horizon for reform projects”).

⁴ *See, e.g.*, Press Release, White House Briefing Room, Readout of First Meeting of White House Community Violence Intervention Collaborative (July 16, 2001), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/16/readout-of-first-meeting-of-white-house-community-violence-intervention-collaborative/> [<https://perma.cc/MU7D-TJ8E>] [hereinafter White House Community Violence Intervention Press Release]; Editorial, *Reducing Crime in Chicago: Instead of Jail and a Record, a Second Chance*, CHI. TRIB. (Nov. 13, 2020, 5:25 PM), <https://www.chicagotribune.com/opinion/editorials/ct-editorial-restorative-justice-court-north-lawndale-second-chance-20201113-r74ushfv6re6rfgo2oklbslvai-story.html> [<https://perma.cc/C336-A5CW>]; *see also* Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 926 (2021) (suggesting that communities “reimagine public safety from the ground up”); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 Nw. U. L. REV. 1367, 1367

In addition to redirecting resources away from law enforcement, this community-centric vision of public safety elevates the role of privately operated (nongovernmental) alternatives to police. Examples are too numerous to count but include supporting private entities that engage in violence prevention efforts, combat domestic violence, protect vulnerable individuals, and offer community-based alternatives to calling 911.⁵ In championing these programs, advocates often seek a greater role for private, community-based organizations (“CBOs”) and a reduced role for public actors.⁶

There is some irony in these calls—coming largely, though not entirely, from progressive advocates—essentially to privatize aspects of the criminal system. In other contexts, privatization long has been subject to consistent attack. Privately operated prisons and the larger “prison industrial complex” are the most frequent target, but privatization’s critics also discuss private police, private prosecutors, and private surveillance companies.⁷ Critiques vary but often focus on the

(2017) (arguing that “the primary solution is to make criminal justice more community focused and responsive to lay influences”).

⁵ On violence prevention efforts, see *infra* note 56 and accompanying text (discussing violence interrupters); see also Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1217 (2015) (“[A]n abolitionist ethic creates space within which community members may organize themselves to empower vulnerable individuals and to address crime prevention by other means.”).

On domestic violence interventions, see, e.g., McLeod, *supra*, at 1217–18 (discussing “Sistas Liberated Ground” in Bushwick, Brooklyn); API CHAYA, <https://www.apichaya.org/> [<https://perma.cc/V2ZH-T74A>].

There are also groups focusing on youth safety and the LGBTQ community. See, e.g., ABOUT, COLLECTIVE ACTION FOR SAFE SPACES, <https://www.collectiveactiondc.org/about/> [<https://perma.cc/TWW6-RH3U>]; YOUTH DEVELOPMENT, MAN UP! INC., <https://manupinc.org/youth-development/> [<https://perma.cc/88EP-3XGA>]; YOUTH JUST. COAL., <https://www.youthjusticela.org> [<https://perma.cc/F9ZV-MF36>]; see also Ejeris Dixon, Building Community Safety: Practical Steps Toward Liberatory Transformation, in WHO DO YOU SERVE, WHO DO YOU PROTECT? 161, 163–65 (Maya Schenwar et al. eds., 2016) (discussing Safe OUTside the System Collective).

On community-based alternatives and co-response models, particularly for individuals in mental health crisis, see *infra* notes 62–66 and accompanying text.

⁶ See, e.g., CORRECT CRISIS INTERVENTION TODAY-N.Y.C. (CCIT-NYC), PILOTING A PEER-DRIVEN MENTAL HEALTH CRISIS RESPONSE PROGRAM 2, https://f4dce468-6f07-4865-b2e5-1c7341acad2.filesusr.com/ugd/d972a6_890402b83b3247219fbf212550cc2ff6.pdf [<https://perma.cc/ELK6-54EX>] (calling for the New York City Department of Health and Mental Hygiene (DOHMH) to “contract with non-governmental agencies which will deploy the mental health crisis response teams”); cf. Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 913 (2007) (“The public criminal justice system is failing. . . . And as we have seen in other industries, from education to postal services to resolving civil law disputes, a failure of the public system will inevitably lead to the development of a private alternative.”).

⁷ See *infra* notes 110–13, 136 (discussing various aspects of the prison industrial complex); *infra* notes 48–49 and accompanying text (private police); *infra* notes 67, 96–99 and accompany-

difficulties that arise in attempting to govern and hold these private entities accountable.⁸

This contrast between calls to privatize in some contexts and to curtail privatization in others underscores the thesis of this Article: that private actors can play both beneficial and harmful roles in the criminal system. A close look at the criminal system reveals that even public actors suffer from many of the concerns associated with privatization. Moreover, private influences sometimes improve the public system. Rather than seeking to root out or embrace privatization wholesale, each instance must be considered on its merits.

Another key theme of this Article is that private influence on the criminal system is far more pervasive than the literature recognizes. For example, police rely on private individuals to report crimes, a process that neighborhood watch associations and private surveillance tools have made much more systematic.⁹ Investigations and prosecutions depend on a wide range of privately sourced data—from eyewitnesses to massive databases of location data harvested from cell phones.¹⁰ Some neighborhoods bolster police services by hiring private security; others pursue social service-based alternatives to policing.¹¹

These mechanisms are rarely (if ever) thought of as “privatization.” Part of this gap is definitional: traditional privatization, sometimes referred to as “contracting out” or “outsourcing,” refers to arrangements where government finances the private sector to provide specific goods and services.¹² Although some private influences on the criminal system fit this definition, many do not. Government-directed philanthropy, for example, allows the government to bring private sector resources to bear in filling budget shortfalls, buying new surveillance equipment, and implementing new programs with minimal public oversight.¹³

ing text (private prosecutors); *infra* notes 32–35 and accompanying text (surveillance companies).

⁸ See *infra* Part II (discussing governance critiques of privatization).

⁹ See *infra* notes 41–44 and accompanying text.

¹⁰ See *infra* notes 59–77.

¹¹ See *infra* notes 42–58.

¹² See *infra* Section I.A (comparing privatization with private influence); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230 (2003) (“Although the term ‘privatization’ covers a variety of different activities, a useful definition encompasses the range of efforts by governments to move public functions into private hands and to use market-style competition.”).

¹³ See *infra* notes 29–31 and accompanying text. Reliance on private surveillance technology is another example of what this Article calls “government appropriation.” See *id.*

Rather than supporting a particular policy agenda, this Article advocates for a practical policymaking approach to private influence. It is both unrealistic and undesirable to avoid private influences on the criminal system. A better approach is to understand the full breadth of private influence and then to regulate in ways that maximize benefits while minimizing harms.¹⁴

This Article proceeds in three parts.

Part I demonstrates the *extent* to which private individuals and entities pervade the criminal system. Section A provides a taxonomy of private influence. Section B then demonstrates the breadth of private influence at different stages of the criminal process.

Part II then turns to *impact* and makes the case that private influence is intrinsically neither harmful nor beneficial. This discussion begins by identifying four common governance-focused critiques of privatization: (A) lack of democratic accountability, (B) lack of transparency, (C) lack of legal accountability, and (D) misaligned incentives. It then demonstrates not only that these critiques frequently apply to public actors, but that when properly designed, some private influences are preferable to their public alternatives. In short, Part II argues that the “public” or “private” label is not a useful proxy for concern.

Part III turns to regulatory implications. It argues that rather than focusing on “private” or “public” influences, those seeking social change should evaluate benefits and harms, including the governance critiques discussed in Part II. By focusing on outcomes rather than actors, policymakers should be willing to embrace roles for private entities where valuable, while also regulating in ways that avoid the legal and regulatory loopholes that have plagued privatization. Part III concludes with two specific applications of this guidance: community-based antiviolence groups and police reliance on private surveillance.

I. THE PERVASIVENESS OF PRIVATE INFLUENCE

Many commentators decry privatization across the criminal system. Their critiques range from moral objections,¹⁵ to the practical difficulties of governing private actors.¹⁶ Advocates and scholars have

¹⁴ See generally AM. L. INST., PRINCIPLES OF THE LAW: POLICING (forthcoming) (on file with author) (discussing the role of private actors in promoting sound policing, and citing this Article).

¹⁵ See *infra* note 136 (discussing moral arguments against private prisons).

¹⁶ See *infra* Part II (discussing governance critiques).

sustained focus on private prisons and the broader prison industrial complex, including the privatization of bail, probation, immigration detention, and more.¹⁷ More recently, these criticisms have spread beyond the corrections context to the privatization of policing and prosecutorial services,¹⁸ and the role of private technology companies.¹⁹

But the influence of private actors is far broader than most credit. Seeing the full scope of private influence matters, because only after doing so can one level a candid appraisal of impact.²⁰ This Part focuses on the extent of private influence; Part II turns to impact.

A. *Dimensions of Private Influence*

When most people refer to “privatization,” they have a specific meaning: government contracting with a for-profit corporation to provide goods and services.²¹ This type of formal privatization is ubiqui-

¹⁷ See *infra* notes 110–117 and accompanying text (discussing various aspects of the “prison-industrial complex,” from private prisons and immigrant detention, to privatized supervised release).

¹⁸ See *infra* notes 48–49 and accompanying text (discussing private police); *infra* notes 67, 96–99 and accompanying text (discussing private prosecutors). See generally Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2314 (2018) (“Outside of the collateral consequences frame, privatization and the role of private actors in the criminal system increasingly have garnered academic attention over the last few decades. In their treatments of criminal law’s private dimensions, scholars have focused primarily on private prisons, with a lesser emphasis on private policing.” (footnote omitted)).

¹⁹ See, e.g., Elizabeth E. Joh & Thomas Wuil Joo, *The Harms of Police Surveillance Technology Monopolies*, DENV. L. REV. F. (forthcoming), <https://ssrn.com/abstract=3834777> [<https://perma.cc/3WGD-8NMK>]; Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. ONLINE 19, 21 (2017) [Hereinafter Joh, *Undue Influence*].

²⁰ See Dolovich & Natapoff, *supra* note 1, at 4 (“Conceptualizing the criminal system in this multifaceted way is a deliberately expansive move. It is an argument that, in order to understand, judge, and ultimately refashion our system of criminal justice, we need to acknowledge multiple dimensions Omit one of these elements, and you will have missed a vital piece of the puzzle.”); Seth W. Stoughton, *The Blurred Blue Line: Reform in an Era of Public & Private Policing*, 44 AM. J. CRIM. L. 117, 150–51 (2017) (“A similar observation may apply in the context of public and private policing: an incomplete understanding of policing can lead to regulation that is focused exclusively on policing as it is conducted by public officials *not* because the regulatory decision was driven by informed consideration of the options but instead because the blurred blue line was not considered at all.”).

²¹ See Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1508 (2001); Ronald A. Cass, *Privatization: Politics, Law and Theory*, 71 MARQ. L. REV. 449, 450 (1988); see also Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 998 (2005) (“[W]ith much federal governmental action—and most DOD initiatives—privatization simply becomes reliance on nongovernmental actors who are paid under publicly-funded con-

tous across American government,²² but it is hardly the only way that private actors influence the criminal system. To capture the broader scope of “private influence,” this Section offers a rough taxonomy.

1. *Outsourced Goods & Services*

Government outsourcing, or “contracting out,” is a deliberate decision to formally contract with the private sector for production of a good or provision of a service.²³

The umbrella of formal privatization encompasses a wide range of activities. Public actors outsource production of simple goods—e.g., office supplies, Kevlar vests, and firearms—but also incredibly complicated ones—e.g., facial recognition and predictive policing algorithms.²⁴ The more complicated the good, the more discretion

tracts or vouchers.”). *See generally* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377–79 (2003) (discussing various forms of privatization).

²² *See generally* LAUREN-BROOKE EISEN, *INSIDE PRIVATE PRISONS: AN AMERICAN DILEMMA IN THE AGE OF MASS INCARCERATION* 36 (2018) (“The U.S. Government has contracted out or sold its services to private business for more than two centuries.”) (capitalization omitted).

Privatization reaches everything from the administration of social welfare and education programs to military operations and other aspects of what many consider “core” government work. *See, e.g.*, JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* 3 (2017) (“Private contractors now number in the millions. These contractors have taken leading roles in fighting our wars in Afghanistan and Iraq; running prisons and immigration detention facilities; facilitating domestic surveillance and counterterrorism operations; drafting major rules; shaping energy, transportation, health care, and environmental policy; rendering public benefits decisions; collecting taxes; and monitoring and enforcing regulatory compliance across the vast administrative expanse.”); Metzger, *supra* note 21, at 1369 (“Privatization is now virtually a national obsession. Hardly any domestic policy issue remains untouched by disputes over the scope of private participation in government.”); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000) (“Virtually any example of service provision or regulation reveals a deep interdependence among public and private actors in accomplishing the business of governance.”). These days, no institution seems beyond privatization’s grasp. *See, e.g.*, Chris Edwards, *Restructuring the U.S. Postal Service*, 39 CATO J. 667, 667 (2019); *Trump Administration Mulls Privatizing National Park Campgrounds*, AXIOS (Nov. 4, 2019), <https://www.axios.com/trump-administration-privatizing-national-park-campgrounds-a9642a77-46f0-4ac7-8eac-e2b14d63a2cf.html> [<https://perma.cc/ZYS9-YQEB>].

²³ Although traditional privatization relies on contracting, less traditional methods of privatization include tax breaks, voucher programs, and social impact bonds. *See, e.g.*, Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691, 694 (2006); Jon D. Michaels, *Privatization’s Progeny*, 101 GEO. L.J. 1023, 1027 (2013) (calling these arrangements “government by bounty”); E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 889–90 (1987) (“In the United States . . . state and local governments are implementing privatization primarily through contracting and, to a lesser degree, vouchers, franchises, free-market arrangements, and voluntary efforts. Contracting, however, is the primary method governments use to privatize prisons.” (footnote omitted)).

²⁴ *See, e.g.*, Viens Brian, *Privatizing Facial Recognition Systems*, RUTGERS: CIV. LIBERTIES.

government cedes to the private sector.²⁵ When policing agencies purchase facial recognition software, for example, they have little understanding of how the algorithms perform under real-world conditions, whether the algorithm exhibits racial or gender disparities, or how to tailor the algorithm to minimize those disparities.²⁶ They rely almost entirely on the private vendor.²⁷

Service contracts operate much the same way. Governments contract out for everything from janitorial and IT services to wholesale operations of prisons and police patrols.²⁸ The more discretionary the service—like the day-to-day operations of a prison—the more control government cedes to the private sector.

2. Government Appropriation

When contracting out, government spends to acquire a good or service. But there are forms of private influence where government relies on private funding to expand its footprint. I call this “government appropriation,” though it is often done with the knowledge and consent of the private parties.

Government-directed philanthropy is a prime example of government appropriation. Private philanthropic foundations have helped policing agencies purchase a variety of surveillance and investigative tools: persistent aerial surveillance technology in Baltimore, cellphone cracking technology in San Diego, and networked cameras in Atlanta, to name a few.²⁹ Private donations have funded the acquisition of po-

IN TIMES OF EMERGENCY (May 2, 2018), <https://civil-liberties-ite.blogs.rutgers.edu/2018/05/privatizing-facial-recognition-systems/> [<https://perma.cc/S44M-V9CF>].

²⁵ See, e.g., Jon Schuppe, *How Facial Recognition Technology Became a Routine Policing Tool in America*, NBC NEWS (May 11, 2019, 4:19 AM), <https://www.nbcnews.com/news/us-news/how-facial-recognition-became-routine-policing-tool-america-n1004251> [<https://perma.cc/LZ4X-X7W6>].

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *infra* notes 109–14 (discussing various aspects of the “prison-industrial complex,” from prisons to halfway houses and supervised release); *infra* note 61 and accompanying text (discussing private police); *infra* notes 67, 96–99 (discussing private prosecutors).

²⁹ See, e.g., Joseph Cox, *A Police Charity Bought an iPhone Hacking Tool and Gave It to Cops*, VICE (Sept. 28, 2020, 9:00 AM), <https://www.vice.com/en/article/qj4qyp/police-foundation-iphone-graykey-san-diego> [<https://perma.cc/ZP5H-K7RC>]; Emily Opilo, *Privately Funded Surveillance Planes to Begin Patrolling Baltimore Skies*, WASH. POST (Apr. 2, 2020), https://www.washingtonpost.com/local/legal-issues/privately-funded-surveillance-planes-to-begin-patrolling-baltimore-skies/2020/04/02/92cd0daa-752c-11ea-a9bd-9f8b593300d0_story.html [<https://perma.cc/PYY9-L6VD>]; Marcus K. Garner, *12K Cameras to Give Atlanta Police Broader Window to City*, ATLANTA J.-CONST. (Feb. 27, 2014), <https://www.ajc.com/news/12k-cameras-give-atlanta-police-broader-window-city/P9aPd6ApEP4vezte0ZiTCO/> [<https://perma.cc/N7RD->

lice dogs, covered the costs of mental health services for police, and much more.³⁰ At the same time, they have also funded alternatives to police enforcement.³¹

Appropriation is not limited to private funds. Law enforcement routinely expands its surveillance capabilities by relying on private surveillance equipment. When private people and businesses purchase surveillance—cameras, license plate readers, etc.—they often provide police with direct (real-time) access.³² Even short of direct access, new technologies also allow police to obtain information from private devices en masse, rather than installing publicly owned equipment.³³

Law enforcement can also expand its reach by accessing privately held data. Billions of smart devices gather data on every aspect of our lives. Realizing this, law enforcement is increasingly opportunistic, snatching data from smart home devices, smart cars, exercise

DTX8]. See generally Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to Government*, 106 CALIF. L. REV. 1129, 1160 (2018).

³⁰ E.g., *About the Spirit of Blue*, SPIRIT OF BLUE, <https://www.spiritofblue.org/about-the-foundation> [<https://perma.cc/CSF7-4W9Z>] (“Through our fundraising, the foundation is able to provide grants in partnership with law enforcement safety equipment manufacturers ranging from illumination to ballistic protection to firearms.”); *State K9 LEAP Grant Program*, K9 WORKING DOGS INT’L, LLC, <http://k9wdi.com/law-enforcement-k9-police-dogs/police-k9-grants-k9-leap-grant.html> [<https://perma.cc/9BTC-WNM9>]; *Programs*, NAT’L 9-99 POLICE & SHERIFF FOUND., <https://999foundation.org/programs> [<https://perma.cc/F4WM-X3MB>].

³¹ Liz Navratil, *Minneapolis Council Agrees on Alternative Public Safety Approach, but Cuts to Police Undecided*, STAR TRIB. (Dec. 4, 2020, 5:03 AM), <https://www.startribune.com/mps-council-agrees-on-alternative-public-safety-approach-cuts-to-police-undecided/573278561/> [<https://perma.cc/KJ6A-6K5Y>].

³² E.g., John J. Miller, Deputy Comm’r of Intel. and Counterterrorism, N.Y.C. Police Dep’t, Testimony Before the New York City Council Committees on Public Safety and Fire and Criminal Justice Services (Nov. 12, 2014), http://www.nyc.gov/html/nypd/downloads/pdf/pr/terrorism_preparedness_testimony_11122014.pdf [<https://perma.cc/UG67-B8MU>]; *Project Green Light Detroit*, CITY OF DETROIT, <https://detroitmi.gov/departments/police-department/project-green-light-detroit> [<https://perma.cc/64NN-HUTY>]; *SafeCam NOLA*, NEW ORLEANS POLICE & JUST. FOUND., <https://nopjf.org/project/215/> [<https://perma.cc/W6LS-UYT4>]; FLOCK SAFETY, <https://www.flocksafety.com/flock-for-neighborhood-security/> [<https://perma.cc/BR3E-SCT6>].

Video surveillance equipment—a multi-billion-dollar industry—is mounted on private businesses, on private homes, and even atop skyscrapers. See NIALL JENKINS, INFO. HANDLING SERVS., VIDEO SURVEILLANCE: NEW INSTALLED BASE METHODOLOGY YIELDS REVEALING RESULTS, [https://ihsmarkit.com/pdf/IHS-Video-surveillance-installed-base\(2\)_22703811091305213_2.pdf](https://ihsmarkit.com/pdf/IHS-Video-surveillance-installed-base(2)_22703811091305213_2.pdf) [<https://perma.cc/D3G4-P66P>].

³³ See, e.g., POLICING PROJECT, RING NEIGHBORS & NEIGHBORS PUBLIC SAFETY SERVICE: A CIVIL RIGHTS & CIVIL LIBERTIES AUDIT 41, <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/61baab9fcc4c282092bbf7c3/1639623584675/Policing+Project+Ring+Civil+Rights+Audit+%28Full%29.pdf> [<https://perma.cc/ET35-JTNU>] (discussing growth of lateral surveillance). For a discussion of the interaction between new technologies, the police, and civil society, see generally JOSHUA REEVES, *CITIZEN SPIES: THE LONG RISE OF AMERICA’S SURVEILLANCE SOCIETY* (2017); see also *infra* note 52.

monitors, and a variety of other sources.³⁴ Relying on privately collected data gives law enforcement otherwise unattainable capabilities, and at minimal cost.³⁵

3. *Private Volunteerism*

In the preceding categories, public actors initiate or acquiesce to private influences. Government can operate its prisons, decline private donations, and limit its reliance on private surveillance. These decisions might be costly, impractical, or unlikely, but at least public actors largely retain the initiative and authority.

But there is a third category of private influence in which public actors are largely responsive to private actors. In this category, which I call “private volunteerism,” private individuals and entities set priorities and effectively make important decisions on behalf of government.

Consider, for example, a private person’s decision to call the police. Although many call when they genuinely need help, recent years have seen viral episodes of individuals reporting people of color who are going about their daily lives—walking their dogs, shopping in a deli, barbecuing in the park, watching their child play soccer, and generally existing in public spaces.³⁶ The consequences in any individual case can be profound—emotional trauma, arrest, or even death.³⁷

This type of private influence is far removed from formal privatization, but it is a mistake to ignore its effect. We tend to focus on high-profile incidents, but tens of thousands of police interactions occur every day as a result of calls to police.³⁸ At such scale, the impact can be profound. Rather than setting their own agenda, police spend a

³⁴ For a discussion of the ways technology will change the nature of law enforcement surveillance, and resulting privacy issues, see generally Andrew Guthrie Ferguson, *The “Smart” Fourth Amendment*, 102 CORNELL L. REV. 547 (2017) [hereinafter Ferguson, *The “Smart” Fourth Amendment*]; Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CALIF. L. REV. 805 (2016) [hereinafter Ferguson, *The Internet of Things*].

³⁵ See Ferguson, *The “Smart” Fourth Amendment*, *supra* note 34; Ferguson, *The Internet of Things*, *supra* note 34.

³⁶ See Chan Tov McNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 337–41 (2019) (collecting examples).

³⁷ See, *id.* at 341–42.

³⁸ In 2018, for example, of the nearly 61.5 million people who had contact with police, more than 35 million initiated that contact. ERIKA HARRELL & ELIZABETH DAVIS, U.S. DEP’T OF JUST., NCJ 255730, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018 – STATISTICAL TABLES 3 tbl.1 (2020), <https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf> [<https://perma.cc/B9AB-VH4U>].

substantial amount of time answering private calls.³⁹ Private companies like Walmart generate a volume of calls to police that make officers look like private security.⁴⁰ Calls to police in gentrifying neighborhoods generate arrests for offenses like loitering and disorderly conduct and lead to proactive policing for drug and alcohol offenses.⁴¹ This type of enforcement can make longtime residents feel unwelcome, inflame tensions, and exacerbate gentrification.⁴²

Private volunteerism goes well beyond a decision to call 911. The criminal system has many points at which individuals define priorities and choices for public actors. Additional examples, discussed in more detail below, include whether victims and witnesses come forward to the police, whether they cooperate with the prosecution, and whether they embrace a restorative justice-style approach.⁴³

And in many cases, private volunteerism is not just an *individual* decision—private entities and new technologies play key roles. Community bail funds pool private resources to override the decisions of judges and prosecutors.⁴⁴ Some neighborhoods come together to cre-

³⁹ See Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html> [<https://perma.cc/H6NR-FMNS>] (providing data demonstrating that police spend about one-third of their time answering non-criminal calls for service).

⁴⁰ Stoughton, *supra* note 20, at 139 (“According to a review of Walmart stores in the Tampa area, for example, local police agencies ‘logged . . . ‘two calls an hour, every hour, every day.’ One officer described the situation this way: ‘We are, as a department, at the mercy of what they [Walmart] want to do.’” (alteration in original) (footnote omitted) (quoting Zachary T. Sampson, Laura C. Morel & Eli Murray, *Walmart, Thousands of Police Calls. You Paid the Bill*, TAMPA BAY TIMES (May 11, 2016), <https://projects.tampabay.com/projects/2016/public-safety/walmart-police/> [<https://perma.cc/2HS5-SXHD>])).

⁴¹ See, e.g., Brenden Beck, *Policing Gentrification: Stops and Low-Level Arrests During Demographic Change and Real Estate Reinvestment*, 19 CITY & CNTY. 245, 249 (2020); see also Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835, 846 (2019) (“There is some research that has begun to support the accounts of increased 911 calls in gentrifying neighborhoods and the expansion of punitive policing strategies.”); McNamarah, *supra* note 36, at 360 (“[I]n New York City, the highest rate of quality-of-life police reports occurred in communities of color with the largest influx of White residents. Further, such reports were significantly more likely to end in the issuance of a summons or an arrest in communities of color that experienced the highest influx of White new arrivals.” (footnote omitted)).

⁴² See Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1495 (2016) (“The private can mobilize broken windows policing on demand, and the government can proactively supply it at will. This public/private mobilization of broken windows policing makes blacks out of place in, and facilitates their displacement from, areas on route to becoming new white communities.”).

⁴³ See *infra* notes 57, 72, 88 and accompanying text.

⁴⁴ See *infra* notes 92–93 and accompanying text.

ate support networks to avoiding calling the police,⁴⁵ while others form watch associations with a focus on enforcement.⁴⁶

B. *The Breadth of Private Influence*

With this taxonomy in mind, one now can assess the breadth of private influence across the stages of the criminal process. This section makes clear that private influence is pervasive, including in many ways that have escaped notice in the literature on privatization in the criminal system.

1. *Crime Prevention & Emergency Response*

Preventing and responding to crime are seen as core police duties. But in truth, crime prevention and response rest largely in private hands.

We expect and permit private individuals to provide for their own security. People protect their property using a variety of technologies, from vehicle antitheft devices and burglar alarms to cameras and smart doorbells with motion detection, night vision, and other capabilities.⁴⁷ Private entities bolster these efforts—security guards far outnumber public police;⁴⁸ wealthy neighborhoods pay police departments to have officers patrol during their off hours;⁴⁹ neighbor-

⁴⁵ See *infra* notes 63–66 and accompanying text (discussing community-based alternative responder models); see also Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 587 (“Much private policing arises from the private sector to meet private demands. Government agencies are sometimes purchasers of private policing services, but private police often operate wholly outside of direct public management.”).

⁴⁶ See *infra* notes 54–56 and accompanying text.

⁴⁷ See, e.g., TJ McCue, *Home Security Cameras Market to Surpass \$9.7 Billion by 2023*, FORBES (Jan. 31, 2019, 3:33 AM), <https://www.forbes.com/sites/tjmccue/2019/01/31/home-security-cameras-market-to-surpass-9-7-billion-by-2023/> [<https://perma.cc/88R7-X9MQ>].

⁴⁸ Niall McCarthy, *Private Security Outnumbers the Police in Most Countries Worldwide [Infographic]*, FORBES (Aug. 31, 2017, 9:05 AM), <https://www.forbes.com/sites/niallmccarthy/2017/08/31/private-security-outnumbers-the-police-in-most-countries-worldwide-infographic/> [<https://perma.cc/TMV3-G96U>]; see also BRUCE L. BENSON, *TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE* 76–78 (1998); Stoughton, *supra* note 20, at 128–29.

⁴⁹ See, e.g., Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 724 (2020) (discussing “Extended Neighborhood Patrol” (ENP) public-private partnership in Dallas, where “neighborhood associations . . . pay the Dallas Police Department large fees to procure specialized community policing” in the form of “sworn Dallas officers who are off duty spend[ing] overtime hours in specific neighborhoods that pay for the privilege of greater protection and for a relationship with their assigned officer”); Joh, *supra* note 45, at 584 (discussing privately funded patrols); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1177–78 (1999) (“[M]ore commonly, groups of residents or business owners in particular areas have received permission to tax themselves (and their dissenting neighbors) to pay for private patrols.”).

hood watch associations act as the “eyes and ears” of law enforcement,⁵⁰ bringing with them the potential for vigilantism and racial profiling.⁵¹ These efforts have been amplified by modern technology—Nextdoor and Ring, for example, have created digital neighborhood watch associations that include tens of millions of members.⁵² As with a private individual’s decision to call police, these private entities and associations can define what policing looks like in a jurisdiction.⁵³

There are also many examples of private influences that avoid police involvement. Some communities use private sanctions—social pressure and exclusion—to enforce social norms.⁵⁴ Neighbors work together to prevent truancy and confront individuals disturbing the peace without resorting to police.⁵⁵ Community-based antiviolence

⁵⁰ See, e.g., *About Neighborhood Watch*, NAT’L NEIGHBORHOOD WATCH, <https://www.nnw.org/about-neighborhood-watch> [<https://perma.cc/BKC4-2NZP>].

⁵¹ For criticisms of watch associations, see, e.g., Adeoye Johnson, *Neighborhood Watch: Invading the Community, Evading Constitutional Limits*, 18 U. PA. J.L. & SOC. CHANGE 459, 471–79 (2016); Sharon Finegan, *Watching the Watchers: The Growing Privatization of Criminal Law Enforcement and the Need for Limits on Neighborhood Watch Associations*, 8 U. MASS. L. REV. 88, 105–06 (2013).

⁵² See, e.g., POLICING PROJECT, *supra* note 33; *Neighbors by Ring*, Ring, <https://shop.ring.com/pages/neighbors> [<https://perma.cc/6VVP-APC8>]; Christopher Smith, *Neighborhood Watch Goes Rogue: The Trouble with Nextdoor and Citizen*, PCMAG (July 8, 2021), <https://www.pcmag.com/news/neighborhood-watch-goes-rogue-the-trouble-with-nextdoor-and-citizen> [<https://perma.cc/7JE3-VSE6>].

Some platforms like Ring Neighbors and Axon Citizen make it easier to share video with police. See, e.g., POLICING PROJECT, *supra* note 33; *Axon Citizen*, AXON, <https://www.axon.com/products/axon-citizen> [<https://perma.cc/C22P-ECPY>].

⁵³ See, e.g., Johnson, *supra* note 51. Private influences can, for example, heavily influence where police patrol. Most patrol allocation decisions are based on private demands—emergency and non-emergency calls to protect private individuals and private property. There are also a growing number of police using AI-powered proprietary algorithms to determine where to send their officers. See, e.g., Will Douglas Heaven, *Predictive Policing Algorithms Are Racist. They Need to Be Dismantled.*, MIT TECH. REV. (July 17, 2020), <https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/> [<https://perma.cc/29MV-T38M>]. For examples of companies that supply police with such technologies, see, e.g., *Overview*, PREDPOL, <https://www.predpol.com/about> [<https://perma.cc/5LYM-4EAM>]; *Community First Patrol Management Software Improves Crime Deterrence*, SHOTSPOTTER, <https://www.shotspotter.com/law-enforcement/patrol-management> [<https://perma.cc/4LBV-6WQ6>]; see also ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* 67 (2017) (“Today, several dozen cities are using some form of predictive policing technology.”).

⁵⁴ See, e.g., BENSON, *supra* note 48, at 52 (“[T]he availability of alternative private sanctions can reduce the incentives to report crimes to the public sector, if the victim or the witness perceives greater net benefits from private pursuit of justice.”); Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1862, 1866 (1999) (discussing how “the Black church” and “juveniles” are “well positioned to contribute to the control of crime” in inner cities).

⁵⁵ See, e.g., Christopher R. Browning, Seth Feinberg & Robert D. Dietz, *The Paradox of*

groups, such as Cure Violence, attempt to diffuse violence before it occurs.⁵⁶ Many of these groups apply restorative justice principles—bringing offenders and victims together in conversation to look for

Social Organization: Networks, Collective Efficacy, and Violent Crime in Urban Neighborhoods, 83 SOC. FORCES 503, 506–07 (2004); Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918, 918 (1997).

⁵⁶ CURE VIOLENCE GLOBAL, <https://cvg.org> [<https://perma.cc/H22Z-9N2A>]; see also JOHN JAY COLL. RSCH. ADVISORY GRP. ON PREVENTING AND REDUCING CMTY. VIOLENCE, REDUCING VIOLENCE WITHOUT POLICE: A REVIEW OF RESEARCH EVIDENCE 9 (2020) (discussing benefits of anti-violence programs, including Cure Violence, and calling the evidence base for interrupters “promising but mixed”); V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, 1509–11 (2019) (discussing the work of Cure Violence and violence interrupters and noting their “mobilizations of community members” in response to acts of violence).

Cure Violence and other violence interrupter programs have proliferated across the country. See, e.g., ADVANCE PEACE, <https://www.advancepeace.org> [<https://perma.cc/G8GA-857D>]; *Our Programs: Safe Streets, Living Classrooms*, <https://livingclassrooms.org/programs/safe-streets/> [<https://perma.cc/5YNF-BQ7V>]; *Street Outreach* (Nov. 9, 2021), <https://www.chicagocred.org/street-outreach> [<https://perma.cc/X93L-A6U8>]; Deena Zaru, *Lessons from a ‘Violence Interrupter’ as Shootings Continue to Ravage Chicago*, ABC NEWS, <https://abcnews.go.com/Politics/lessons-violence-interrupter-shootings-continue-ravage-chicago/story?id=80462349> [<https://perma.cc/6MD9-25W4>] (describing the violence prevention work of UCAN Chicago); *Communities Partnering 4 Peace*, METRO. FAM. SERVS., <https://www.metrofamily.org/cp4p/cp4p-info/> [<https://perma.cc/JZ7S-482L>]; Maya Rao, *Next Step Goes to the Front Lines of Gun Violence in Minneapolis, Starting with the Shooting Victims*, STAR TRIB. (JAN. 30, 2021, 3:42 PM), <https://www.startribune.com/next-step-goes-to-the-front-lines-of-gun-violence-in-minneapolis-starting-with-the-shooting-victims/600017039/> [<https://perma.cc/8XV5-FCEX>] (discussing work of Next Step in Minneapolis); S. CAL. CROSSROADS, <https://www.socalcrossroads.org> [<https://perma.cc/8558-LJFH>]; Mayor’s Initiative to Reduce Gun Violence, Cure Violence Announcement, CITY OF TOLEDO (Aug. 26, 2021), <https://toledo.oh.gov/news/2021/08/26/mayors-initiative-to-reduce-gun-violence-cure-violence-announcement> [<https://perma.cc/Z83W-ZRSB>] (discussing launch of Toledo’s Cure Violence program); *Urban Peace Academy*, URB. PEACE INST., <https://www.urbanpeaceinstitute.org/our-work-urban-peace-academy> [<https://perma.cc/PP2A-E6XH>]; MIKE McLIVELY & BRITTANY NIETO, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, A CASE STUDY IN HOPE: LESSONS FROM OAKLAND’S REMARKABLE REDUCTION IN GUN VIOLENCE (Apr. 2019); see also *Meeting Bulletin #4: Community Based Responses to Violence*, COUNCIL ON CRIM. JUST. (Oct. 7, 2021), <https://counciloncj.org/meeting-bulletin-4-community-based-responses/> [<https://perma.cc/5FEH-5F6G>] (discussing community-based responses to violent crime).

noncriminal resolutions to disputes.⁵⁷ There is growing evidence of how effective these interventions can be.⁵⁸

When deterrence and prevention fail, next comes crime reporting and response.⁵⁹ Private entities offer specialized ways to contact the police. In addition to the digital watch associations discussed above, security systems and burglar alarms provide an increasing number of direct lines to police.⁶⁰ And when it comes to police response, many places outsource patrols and certain calls to private police.⁶¹

In some cities there are also private entities that offer nonpunitive alternatives to crime reporting and police response.⁶² Los Ange-

⁵⁷ See, e.g., *Our Work*, COMMON JUST., https://www.commonjustice.org/our_work/#common-justice-model [<https://perma.cc/M3AC-X7ZF>] (discussing Common Justice's programs in Brooklyn and the Bronx); M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 140 (2016) (“[R]estorative justice programs usually bear the following hallmarks: a focus on harm rather than on violation of law, consideration of the interests and needs of both victim and offender, support for the offender to meet achievable obligations, and facilitation of dialogue that involves the community affected by the harm.”); Simmons, *supra* note 6; OFF. FOR VICTIMS OF CRIME, U.S. DEP’T OF JUST., NCJ 176350, NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES 5–6, 13, 15 (2000) (cataloging hundreds of victim-offender mediation programs across the country, 67% run through private organizations and 33% run through public agencies); BENSON, *supra* note 48, at 117 (discussing a number of “community dispute resolution projects” and “victim-offender mediation”).

⁵⁸ See PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* (2018) (describing impact of community-based groups on combatting violence).

⁵⁹ 911 services, the core of crime reporting, can be outsourced. See Stoughton, *supra* note 20, at 144 (“Private police support services—such as private companies that provide call-taking and dispatch services . . . —are common.”); Karena Rahall, *The Siren Is Calling: Economic and Ideological Trends Toward Privatization of Public Police Forces*, 68 U. MIAMI L. REV. 633, 648 (2014) (discussing the privatization of “emergency response or 911 dispatching”); see also *About*, SAFERWATCH, <https://www.saferwatchapp.com> [<https://perma.cc/FR2A-QJPY>] (offering an app that provides a connection to 911 and first responders).

⁶⁰ See Rahall, *supra* note 59; SAFERWATCH, *supra* note 59.

⁶¹ See, e.g., Sklansky, *supra* note 49, at 1177 (“Increasingly, though, government agencies are hiring private security personnel to guard and patrol government buildings, housing projects, and public parks and facilities A few municipalities have hired private security companies to provide general patrol services.” (footnote omitted)).

For differing assessments of the role of private police, compare Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177 (2005) (warning of the dangers of the virtually unregulated private security industry), with Joh, *supra* note 45, at 596 (arguing that “traditional legal scholarship has demonstrated too shallow an understanding of private policing in action. By assuming that private policing is a monolithic entity, critical responses often take the form of sweeping denigration.”).

⁶² See, e.g., CMTY. ACTION TEAMS, <https://cat-911.org> [<https://perma.cc/8CVJ-8MPK>] (Los Angeles); *Our Work: Mobile Crisis Team*, BALT. CRISIS RESPONSE INC., <https://bcresponse.org/our-work/mobile-crisis-team.html> [<https://perma.cc/PA7R-SYZK>] (Baltimore); *What We Do: PAD 311 Community Referral Services*, POLICING ALTERNATIVES & DIVERSION INITIATIVE, <https://www.atlantapad.org/311-community-referrals> [<https://perma.cc/9HFR-TEL8>] (Atlanta);

les-based Community Action Teams (“CAT”) 911, for example, is a nonprofit that gives community members an alternative to calling 911 and offers to dispatch private trained responders to assist community members.⁶³ Other programs do not field direct calls from community members but aim to provide holistic care services to address the root causes of low-level criminal behavior.⁶⁴

Other jurisdictions are experimenting with public-private partnerships that create alternative responders operating within the existing public system.⁶⁵ Perhaps the best known of these programs is Crisis Assurances Helping Out on the Streets (“CAHOOTS”) in Eugene, Oregon. A partnership between the local police department and a local nonprofit, CAHOOTS responders bring a social service focused approach to over ten thousand calls a year with little police assistance.⁶⁶

M.H. First Community First Response, ANTI POLICE-TERROR PROJECT, <https://www.antipoliceterrorproject.org/mental-health-first> [<https://perma.cc/YFD8-BB3L>] (Oakland and Sacramento).

⁶³ CMTY. ACTION TEAMS, <https://cat-911.org> [<https://perma.cc/8CVJ-8MPK>].

⁶⁴ See, e.g., *JustCARE*, CoLEAD, <https://coleadteam.org/justcare> [<https://perma.cc/7TXW-VHQQ>] (providing a variety of services to unhoused individuals in Seattle’s downtown).

⁶⁵ Many cities have public programs that rely on private entities or contractors to provide a non-enforcement response. See *Support Team Assisted Response (STAR)*, MENTAL HEALTH CTR. OF DENVER, <https://mhcd.org/star-program> [<https://perma.cc/JK7S-QXMX>] (Denver); BALT. CRISIS RESPONSE INC., *supra* note 62 (Baltimore); S.F. DEP’T PUB. HEALTH, STREET CRISIS RESPONSE TEAM ISSUE BRIEF (2021), https://www.sfdph.org/dph/files/IWG/SCRT_IWG_Issue_Brief_FINAL.pdf [<https://perma.cc/VQR6-NUKQ>] (San Francisco); *Transforming Police Responses to Mental Health Emergencies: Rapid Integrated Group Healthcare Team (RIGHT Care)*, MEADOWS MENTAL HEALTH POL’Y INST., <https://mmhpi.org/project/right-care> [<https://perma.cc/N4W5-VCPK>] (Dallas); *Mobile Crisis Team (MCT)*, HOPEWORKS, <https://www.hopeworksnm.org/mct-2-0> [<https://perma.cc/6AFQ-9VM3>] (Albuquerque); *Crisis Intervention Services*, CITY OF ROCHESTER, <https://www.cityofrochester.gov/crisisintervention> [<https://perma.cc/4G7K-3JEB>] (Rochester); see also Leila Miller, *Reformers Want Police to Step Back from Mental Health Calls. The LAPD Says It’s Been Trying*, L.A. TIMES (June 24, 2020, 6:00 AM), <https://www.latimes.com/california/story/2020-06-24/protests-spur-bid-for-lapd-to-move-back-from-mental-health-calls> [<https://perma.cc/KTY3-78PS>] (describing LAPD plan to divert some 911 suicide calls to a phone line run by Didi Hirsch Mental Health Services, a county-contracted provider). See generally, Katherine Beckett, Forrest Stuart & Monica Bell, *From Crisis to Care*, INQUEST (Sept. 2, 2021), <https://inquest.org/from-crisis-to-care> [<https://perma.cc/ZGM7-FQ5C>] (discussing a variety of alternative responder programs, many operating via private entities or contractors). New York City, for example, has a network of more than two dozen programs called the Crisis Management System. *Interventions*, NYC OFF. TO PREVENT GUN VIOLENCE, <https://www1.nyc.gov/site/peaceny/interventions/crisis-management.page> [<https://perma.cc/TBS8-EA2J>].

⁶⁶ See Rowan Moore Gerety, *An Alternative to Police that Police Can Get Behind*, ATLANTIC (Dec. 28, 2020), <https://www.theatlantic.com/politics/archive/2020/12/cahoots-program-may-reduce-likelihood-of-police-violence/617477/> [<https://perma.cc/L87V-N4LP>].

In response to recent demand, CAHOOTS has begun offering virtual trainings (for a fee). See Tatiana Parafiniuk-Talesnick, *CAHOOTS Launches Mobile Crisis Response 101 Course as*

2. *Criminal Investigations & Arrests*

Private actors play key roles in criminal investigations. Some jurisdictions formally outsource investigations to private contractors,⁶⁷ but more commonly, police are left to respond to investigations conducted by private businesses.⁶⁸ In Chicago, Norfolk Southern Railroad security filled an unmarked tractor trailer with Nike shoes, parked it in multiple spots in a predominantly black and low-income Chicago neighborhood, and then had the Chicago Police Department arrest people caught in the act.⁶⁹ According to the company, the operation was to combat “unacceptable thefts” from freight containers.⁷⁰ From shoplifting to eBay scams to insurance fraud, private investigators conduct a range of investigations, turning over their results to law enforcement.⁷¹

Cities Across the Country Look to Start Similar Programs, KGW8 (Dec. 15, 2021, 4:11 PM), <https://www.kgw.com/article/news/local/cahoots-mobile-crisis-response-101-course/283-5b6564be-2037-4969-94e0-fd8dd882918b> [<https://perma.cc/ZWL9-PUTM>].

⁶⁷ A few jurisdictions contract out general investigative responsibilities, while others contract out specific types of investigations. See Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 275.

⁶⁸ See, e.g., Peter Waldman & Lauren Etter, *Target’s Cozy Police Legacy Leaves Black Americans Wary*, BLOOMBERG L. (Aug. 25, 2021, 5:00 AM), <https://www.bloomberglaw.com/bloomberglawnews/esg/XCNR00JK000000> [<https://perma.cc/9XA2-G37B>] (“Target collected video evidence of shoplifters in the act, interviewed them on tape, and delivered the evidence to law enforcement. ‘What they were doing was essentially the police work that the police didn’t have the time or incentive to do’”).

Rather than turning to the police, some businesses impose private sanctions by, for example, dealing with an employee’s wrongdoing via dismissal, suspension, or other internal sanctions. See BENSON, *supra* note 48, at 124–25 (“Some observers suggest that within business organizations, ‘private justice may exert far greater control on citizens than the criminal justice system itself.’” (quoting WILLIAM CLAY CUNNINGHAM & TODD H. TAYLOR, *THE HALLCREST REPORT: PRIVATE SECURITY AND POLICE IN AMERICA* 12 (1985))).

More recently, some larger retailers have started engaging for-profit corporations to extract payments from (primarily shoplifting) offenders rather than turning the offender over to police. Under this “retail justice” model, “[t]he retailer pays nothing; in fact, in some cases, it reaps a portion of each suspect’s payment.” John Rappaport, *Criminal Justice, Inc.*, 118 COLUM. L. REV. 2251, 2252–53 (2018) (discussing for-profit retail justice corporations like the Corrective Education Company).

⁶⁹ Nadra Nittle, *Video: Railroad Company That Put Nike “Bait Truck” in Chicago Neighborhood Apologizes*, VOX (Aug. 9, 2018, 1:56 PM), <https://www.vox.com/2018/8/7/17661240/video-chicago-police-bait-truck-nike-norfolk-southern-apology-englewood-black-neighborhood> [<https://perma.cc/AT6E-VGJ8>].

⁷⁰ *Id.*

⁷¹ See, e.g., Sean James Beaton, *Counterparts in Modern Policing: The Influence of Corporate Investigators on the Public Police and a Call for the Broadening of the State Action Doctrine*, 26 *TOURO L. REV.* 593, 599–601 (2010) (discussing eBay’s Global Law Enforcement Operations and North America Fraud Investigation teams); *About NICB*, NAT’L INS. CRIME BUREAU, <https://www.nicb.org/about-nicb> [<https://perma.cc/9WMK-YFLD>] (“[T]he nation’s premier not-for-profit organization dedicated exclusively to fighting insurance fraud and crime.”).

Short of an outsourced investigation, there are many other ways that law enforcement relies on private information to power its investigations.

At the simplest level, private actors provide key information to investigators. Many investigations rise and fall on the willingness of private individuals—victims, eyewitnesses, informants, and whistleblowers—to cooperate.⁷² Private entities can play similar roles—Amazon tags packages with GPS devices for use in police operations against package theft,⁷³ the taxi industry helps uncover unli-

Pulling in a different direction, some argue that Amazon has played a role in abetting certain crimes. *See, e.g.*, Rebecca Ballhaus & Shalini Ramachandran, *Ben Dugan Works for CVS. His Job Is Battling a \$45 Billion Crime Spree.*, WALL ST. J. (Sept. 1, 2021, 10:31 AM), <https://www.wsj.com/articles/cvs-home-depot-theft-organized-crime-11630505851> [<https://perma.cc/ATB9-JV46>] (quoting a Colorado police sergeant calling Amazon the “largest unregulated pawnshop on the face of the planet”).

⁷² *See, e.g.*, ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 25–27 (2011) (describing how “snitching is sprinkled throughout the system like salt, flavoring every kind of case from burglary to corporate fraud and political corruption”); BENSON, *supra* note 48, at 4 (“Very few arrests for property or violent crimes result from police-initiated investigations or actions. . . . [W]ithout the . . . cooperation by victims or witnesses in providing testimony, a very substantial portion of the violent and property criminals that are arrested would never be successfully prosecuted.”); *see also* James F. Barger, Jr., *Life, Death, and Medicare Fraud: The Corruption of Hospice and What the Private Public Partnership Under the Federal False Claims Act Is Doing About It*, 53 AM. CRIM. L. REV. 1, 33 (2016) (“Every such case—whether civil or criminal—was initiated by a whistleblower under the public-private partnership of the False Claims Act.”).

If there was any doubt the extent to which law enforcement relies on private individuals coming forward, take a look at the rates at which crimes go unsolved in communities where distrust of the police runs high. *See* C.R. DIV., U.S. DEP’T OF JUST., *INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT* 139 (2016) (“BPD’s persistent failure to hold officers accountable for misconduct contributes to an erosion of the community trust that is central to effective law enforcement.”); C.R. DIV., U.S. DEP’T OF JUST., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 80 (2015) [hereinafter *THE FERGUSON REPORT*] (“[L]oss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.”); Statement of Interest of the United States at 10, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 1:08-cv-01034) (“Officers can only police safely and effectively if they maintain the trust and cooperation of the communities within which they work.”); *see also* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2058–59 (2017) (explaining that “[m]any scholars and policymakers have settled on a ‘legitimacy deficit’ as the core diagnosis of the frayed relationship between police forces and the communities they serve”); TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 7 (2002) (“There is considerable evidence that when people regard the particular agents of the legal system whom they personally encounter as acting in a way they perceive to be fair and guided by motives that they infer to be trustworthy, they are more willing to defer to their directives and decisions.”).

⁷³ *See, e.g.*, Jordan Pearson, *Amazon Is Helping Police Trap Package Thieves in Canada, Too*, VICE (Dec. 16, 2019, 7:49 PM), https://www.vice.com/amp/en_us/article/byggw5/amazon-is-helping-police-trap-package-thieves-in-canada-too [<https://perma.cc/C947-HEP6>] (detailing Am-

censed taxis,⁷⁴ and large corporations operate forensic labs.⁷⁵ Private entities can also bolster investigative efforts by encouraging witnesses to come forward. Crime Stoppers, for example, offers cash rewards for information leading to arrests and claims to have contributed to over 800,000 arrests.⁷⁶ The Crime Stoppers model, which “encourages people to call the cops early and often,” has been criticized for encouraging overincarceration and unnecessary fines.⁷⁷

Then there are the range of investigative tools created by the private sector: body cameras, surveillance planes, and drones capture video evidence while AI-powered algorithms analyze the videos.⁷⁸ When police lack video, they rely on fingerprints, DNA, and other forensic tools.⁷⁹ But many of these tools are so complex that govern-

amazon and Ring’s partnership with Royal Canadian Mounted Police to conduct sting and noting “package stings conducted by police in several U.S. cities including Jersey City, NJ, Hayward, CA, Aurora, CO, and more. In places such as Hayward, GPS-bugged packages from Amazon did the trick. In others, such as Aurora, police got Ring cameras as well.”)

⁷⁴ See Stoughton, *supra* note 20, at 139.

⁷⁵ See Kaveh Waddell, *CSI: Walmart*, ATLANTIC (Apr. 3, 2017), <https://www.theatlantic.com/technology/archive/2017/04/csi-walmart/521565/> [<https://perma.cc/6LQW-X34E>].

⁷⁶ See CRIME STOPPERS USA, <https://www.crimestoppersusa.org> [<https://perma.cc/9WRC-E2YZ>]. Crime Stoppers claims that information provided through their networks have contributed to over 800,000 arrests, including 14,000 homicides, resulting in over \$117 million in rewards to private individuals. *Id.* Motorola’s TipSubmit serves the same purpose. See *TipSubmit*, MOTOROLA SOLS., https://www.motorolasolutions.com/en_us/products/command-center-software/community-engagement/tipsubmit.html [<https://perma.cc/US9G-UPVC>].

⁷⁷ Tana Ganeva, *How Crime Stoppers Hotlines Encourage Sketchy Tips and Hurt Poor Defendants*, NEW REPUBLIC (Oct. 29, 2021), <https://newrepublic.com/article/164156/crime-stoppers-fees-police-reform> [<https://perma.cc/NJ4Z-RJKQ>].

⁷⁸ See JAY STANLEY, AM. C.L. UNION, THE DAWN OF ROBOT SURVEILLANCE: AI, VIDEO ANALYTICS, AND PRIVACY 24–25 (2019).

⁷⁹ See Meghan J. Ryan, *Secret Conviction Programs*, 77 WASH. & LEE L. REV. 269, 294 (2020) (“Similarly, when a forensic scientist tries to use an [Automated Fingerprinting Identification System (“AFIS”)] to match a latent print found at a crime scene to a known print in a law enforcement database, she employs a computer program generally developed by an independent company.”).

On probabilistic genotyping, see *Parabon Snapshot Advanced DNA Analysis*, PARABON NANOLABS, <https://snapshot.parabon-nanolabs.com> [<https://perma.cc/E9HL-VHUR>]; Ryan, *supra*, at 296–97 (“[Private] researchers have developed computer programs to run statistical analyses on these types of low-level and mixed samples so that analysts can determine the probability that any particular individual was a contributor to the DNA sample at issue.”). See generally Michael D. Coble & Jo-Anne Bright, *Probabilistic Genotyping Software: An Overview*, 38 FORENSIC SCI. INT’L: GENETICS 219, 221 (2019).

On cell-site simulators, see, e.g., Joh, *Undue Influence*, *supra* note 19 (discussing law enforcement use of Stingrays and the Harris Corporation); Stephanie K. Pell & Christopher Soghoian, *A Lot More Than a Pen Register, and Less Than a Wiretap: What the StingRay Teaches Us About How Congress Should Approach the Reform of Law Enforcement Surveillance Authorities*, 16 YALE J.L. & TECH. 134, 142 (2013).

ment actors are beholden to the design choices made by private developers, such as how well a face recognition algorithm performs across races and genders.⁸⁰

Police also rely on access to huge reservoirs of privately generated data. As discussed above, private actors share access to privately owned surveillance devices.⁸¹ But police can also purchase data on the private market. Detailed dossiers, geo-tagged license plate readers,⁸² iris scans,⁸³ facial images,⁸⁴ and much more⁸⁵ are available at little cost. If all else fails, police can obtain deeply personal data—our location history, our communications, and our internet search histories—

⁸⁰ See PATRICK GROTH, MEI NGAN & KAYEE HANAOKA, U.S. DEP'T OF COM., NISTIR 8280, FACE RECOGNITION VENDOR TEST (FRVT) PART 3: DEMOGRAPHIC EFFECTS (2019), <https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf> [<https://perma.cc/T2UW-J3X4>]. See generally Andrew Guthrie Ferguson, *Illuminating Black Data Policing*, 15 OHIO ST. J. CRIM. L. 503, 510 (2018) (“Most police administrators and officers are not computer scientists and must remain largely dependent on private companies to provide technical guidance. In practice, this means that police purchase big data technologies without the ability to interrogate them or even understand them.” (footnote omitted)).

⁸¹ See *supra* note 32 (citing New York’s Domain Awareness program, Detroit’s Project Greenlight, Flock Safety’s Automatic License Plate Readers (“ALPRs”), and others).

⁸² Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 180, 182–83 (2012) (“Data aggregators like the [National Vehicle Location Service (“NVLS”)] then amass this type of micro-surveillance from private police all around the country. The result is a thorough, national database of public movements. . . . Aggregative surveillance companies like the NVLS represent the expansion of *private policing into an arena previously occupied exclusively by public police: widespread community surveillance.*” (emphasis added)).

⁸³ BI² TECHS., <https://bi2technologies.com> [<https://perma.cc/Z5JG-92KH>].

⁸⁴ See *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1243 (7th Cir. 2021).

⁸⁵ For example, DNA Solves, created by the private DNA lab Othram, collects genetic profiles. See DNASOLVES.COM, <https://www.dnasolves.com> [<https://perma.cc/D5FJ-RLTT>]. A number of companies sell bulk location data. See Jon Keegan & Alfred Ng, *There’s a Multibillion-Dollar Market for Your Phone’s Location Data*, THE MARKUP (Sept. 30, 2021), <https://themarkup.org/privacy/2021/09/30/theres-a-multibillion-dollar-market-for-your-phones-location-data> [<https://perma.cc/HMK6-4A2E>]. Data brokers develop detailed profiles that include our “addresses, drivers license information, vehicle information . . . telephone numbers, corporations, business affiliations, aircraft, boats, assets, professional licenses, concealed weapons permits, liens, judgments, lawsuits, marriages,” and more. Chris Jay Hoofnagle, *Big Brother’s Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT’L L. & COM. REGUL. 595, 596 (2004) (quoting SOLE SOURCE JUSTIFICATION FOR AUTOTRACK (DATABASE TECHNOLOGIES), <https://epic.org/wp-content/uploads/privacy/choicepoint/cpusms7.30.02j.pdf> [<https://perma.cc/NX6D-8CHB>])). All of this data can be mined and analyzed by a variety of privately developed tools. See, e.g., Ferguson, *supra* note 80, at 503 (“[P]olice administrators have been seeking out new partnerships with sophisticated private data companies and experimenting with new surveillance technologies.”); Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 322–23 (2008); Christopher Slobogin, *Transaction Surveillance by the Government*, 75 MISS. L.J. 139, 167–82 (2005).

through a legal request, leaving it to tech companies to decide whether and when to object to overbroad demands.⁸⁶

3. Prosecution & Defense

After an arrest comes a series of key determinations—whether to divert the individual away from prosecution, whether to hold them on bail, and whether to impose conditions on release (such as electronic monitoring). Each decision, although made by a public actor (usually a prosecutor or judge), is privately influenced in substantial ways.

For example, police may want to divert a person from prosecution, but the options available are constrained by the programs that exist. In many places, diversion programs—be it youth development programs or driving-under-the-influence schools—are operated by private entities.⁸⁷ Where these entities are plentiful, they can divert many away from prosecution and into restorative justice programs that bring victims and offenders together to avoid incarceration.⁸⁸

Similar dynamics exist around bail.⁸⁹ In many places, private companies offer electronic monitoring as an alternative to incarceration—a business that has boomed in response to the COVID-19 pandemic and bail reform.⁹⁰ There also are a growing number of nonprofits that

⁸⁶ See Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99, 102 (2018). For information on data insourcing, see generally Kimberly N. Brown, *Outsourcing, Data Insourcing, and the Irrelevant Constitution*, 49 GA. L. REV. 607, 616–17 (2015); see also Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1311 (2012); Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901, 902 (2008); Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357, 359.

⁸⁷ See, e.g., Sammi Nachtigal, *The Potholes of Offender-Funded Driving Diversion: How Minnesota's Driving Diversion Program Fails the People It Is Supposed to Help*, 37 L. & INEQ. 443, 454 (2019) (discussing Diversion Solutions, LLC); see also Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html> [<https://perma.cc/R8PZ-DDK6>]; Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 154 (2017); Dan M. Kahan, *supra* note 54, at 1868 (1999).

⁸⁸ E.g., *Restorative Justice Partnership*, YOLO COUNTY DISTRICT ATTORNEY, <https://yoloda.org/progressive-programs/restorative-justice-partnership/> [<https://perma.cc/W7SL-BNWW>]; *Manhattan Justice Opportunities*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/programs/manhattan-justice-opportunities> [<https://perma.cc/5CXF-H892>].

⁸⁹ Although judges make final bail determinations, their decisions often mirror the recommendations of privately developed “risk assessment” algorithms. See, e.g., Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265, 1284–86 (2020) (discussing pre-trial risk assessment tools acquired from foundations and the private sector).

⁹⁰ Cyrus Farivar, *Other than Prison, Electronic Monitoring Is ‘the Most Restrictive Form’ of Control, Research Finds*, NBC NEWS (Sept. 23, 2021, 6:03 AM), <https://www.nbcnews.com/tech/tech-news/other-prison-electronic-monitoring-most-restrictive-form-control-research-finds->

supervise individuals on release, giving judges the option to grant release when they otherwise could not. The Center for Court Innovation's Supervised Release Program, for example, has enabled the release of individuals without bail in more than 12,000 cases.⁹¹ Closely related, there are many community bail funds, i.e., nonprofits that use pooled private funds to secure an individual's release.⁹² In a relatively short time, these funds have freed thousands.⁹³ Given the documented impact of pre-trial detention on an individual's ability to mount a defense, likelihood to take a plea, and mental and physical health, one cannot overstate the impact these private entities have on people's lives.⁹⁴ (Of course, there are for-profit entities in the bail business, as well.⁹⁵)

The mechanics of prosecution and defense are also significantly privatized. Although most prosecutors are public actors, some places outsource the role.⁹⁶ There are even jurisdictions that accept private

n1279894 [https://perma.cc/3L7B-Y55Z] (“In the past 18 months, as the judicial system has increasingly used electronic monitoring instead of prisons to monitor inmates through the coronavirus pandemic, newly released data confirm what activists and advocates have long argued: [a]nkle monitors are onerous, and they often subject wearers to vague rules The ankle monitoring business, the research found, is also dominated by four profit-seeking companies, and it ultimately could drive more people back to prison.”); April Glaser, *Incarcerated at Home: The Rise of Ankle Monitors and House Arrest During the Pandemic*, NBC NEWS (July 5, 2021, 11:30 AM), <https://www.nbcnews.com/tech/tech-news/incarcerated-home-rise-ankle-monitors-house-arrest-during-pandemic-n1273008> [https://perma.cc/X8UY-YWLZ].

⁹¹ *Supervised Release Program*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/programs/supervised-release> [https://perma.cc/PU8E-LEAK].

⁹² See Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 587–88 (2017) (“In recent years, community groups in jurisdictions across the United States have increasingly begun to use bail funds to post bail on behalf of strangers, using a revolving pool of money. . . . Each time a community bail fund pays bail for a stranger, the people in control of the fund reject a judge’s determination that a certain amount of the defendant’s personal money was necessary for the defendant’s release.”).

⁹³ See Mary Hooks & Jocelyn Simonson, Opinion, *The Power of Community Bail Funds*, N.Y. TIMES (Aug. 23, 2020), <https://www.nytimes.com/2020/08/23/opinion/bail-funds.html> [https://perma.cc/CQ87-THY6] (“At least 10,000 protesters and ordinary people have been freed from jail and immigrant detention facilities after months of uprisings in which millions of dollars have been donated to nearly 80 community bail funds nationwide.”).

⁹⁴ See Andrea Estes, *Flush with Donations, Massachusetts Bail Fund Pays to Free Defendants Across the State—Many Facing Serious Charges*, BOS. GLOBE (July 19, 2020, 6:49 PM), <https://www.bostonglobe.com/2020/07/19/metro/flush-with-donations-massachusetts-bail-fund-pays-free-defendants-across-state-many-facing-serious-charges/> [https://perma.cc/G8QJ-5X33].

⁹⁵ See generally Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 764 (1996) (discussing the historical and contemporary roles and rights of bail bondsmen and bounty hunters).

⁹⁶ On outsourcing the role of the chief prosecutor, see generally Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161,

financing to support certain types of prosecutions, including for rape kit testing,⁹⁷ workers' compensation fraud,⁹⁸ quality of life issues,⁹⁹ and a host of minor crimes.¹⁰⁰ On the defense side, the accused is permitted to hire private counsel. For people who cannot afford one, counsel is appointed—often a private attorney operating under contract.¹⁰¹ Both the prosecution and the defense can bring additional private resources to the table—investigators, jury consultants, testifying experts, and more.¹⁰²

165–66 (2017) (“For [smaller jurisdictions], hiring a full-time prosecutor or district attorney is often cost-prohibitive Candidates for such outsourced prosecution positions are often required to go through a competitive bidding process in which cost-savings, fine generation, and outbidding competitors are prioritized over other evaluative concerns” (footnote omitted)); Fairfax, *supra* note 67; Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 435 (2009).

Historically, prosecutions were brought by private individuals. See I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1586–87 (2020); Barry Friedman, *What Is Public Safety*, 102 B.U. L. REV. (forthcoming Apr. 2022) (noting relatively recent origins of public prosecutions).

⁹⁷ See, e.g., *The Enough Said Project: A Partnership for Justice*, ENOUGH SAID, <http://enoughsaiddetroit.org/about.html> [<https://perma.cc/W4YX-7T57>]; Ruth McCambridge, *400,000 Untested Rape Kits – Nonprofits Take the Issue On*, NONPROFIT Q. (May 7, 2013), <https://non-profitquarterly.org/400-000-untested-rape-kits-nonprofits-take-the-issue-on/> [<https://perma.cc/UW3H-2GHY>].

⁹⁸ Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665, 668 (1997).

⁹⁹ Jordan C. Harris, Note, *Justice for Sale: The Cost of Private Financing of Prosecution, When Is It Worth It?*, 31 GEO. J. LEGAL ETHICS 635, 635–36, 635 (2018) (listing examples).

¹⁰⁰ See, e.g., Brett Kelman, *They Confessed to Minor Crimes. Then City Hall Billed Them \$122K in ‘Prosecution Fees.’* DESERT SUN (Nov. 15, 3:53 PM), https://www.desertsun.com/story/news/crime_courts/2017/11/15/he-confessed-minor-crime-then-city-hall-billed-him-31-k-his-own-prosecution/846850001/ [<https://perma.cc/A6Q3-CSUX>]; Brett Kelman, *Three New Plaintiffs Join Lawsuit Accusing Indio and Coachella of Prosecuting for Profit*, DESERT SUN (Apr. 26, 2018, 5:29 PM) https://www.desertsun.com/story/news/crime_courts/2018/04/26/new-plaintiffs-accuse-indio-and-coachella-prosecuting-profit/537832002/ [<https://perma.cc/6LB8-J7EX>].

¹⁰¹ See, e.g., N.Y. COUNTY LAW § 722 (McKinney 2019). See generally Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 76 (1993) (“Rather than stressing efforts to strengthen the formal independence—and monopoly position—of established Public Defender agencies, we seek, in a word, to ‘privatize’ the delivery of indigent defense services.”).

¹⁰² On evidence gathering techniques, see, e.g., Bloch-Wehba, *supra* note 89, at 1286 (discussing breathalyzers and DNA testing); Ryan, *supra* note 79, at 270 (discussing breathalyzers, fingerprint analysis, and probabilistic genotyping).

On expert witnesses, see, e.g., *Rape Kit Backlogs: Failing the Test of Providing Justice to Sexual Assault Survivors: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 75 (2010) (statement of Dr. Christian Hassell, Assistant Director, Laboratory Division, FBI); David Armstrong, *The Child-Abuse Contrarian*, NEW YORKER (Sept. 26, 2018), <https://www.newyorker.com/news/news-desk/the->

4. Sentencing & Punishment

Sentencing is at the core of the state's responsibility. Legislatures define a range of possible punishments, commissions set guidelines, and judges have discretion to determine the sentence.¹⁰³ But even sentencing determinations have seen creeping private influence. Most states use risk assessment tools to assist in sentencing decisions; some do so in every case.¹⁰⁴ The private entities that develop these tools determine which factors to include—from prior convictions, incarceration, and drug use to a person's high school grades and socioeconomic factors.¹⁰⁵ It is difficult to know the precise impact of these algorithms, but there is growing evidence of profound racial disparities.¹⁰⁶

Private individuals also play formative roles at sentencing. As a result of the victims' rights movement, many states now afford victims the option to speak at sentencing and parole hearings.¹⁰⁷ On the flip side, the participatory defense movement calls on community groups to join “with families, friends, neighbors, and allies of defendants” and “present biographical videos to prosecutors and judges, and pack courtrooms in support of defendants.”¹⁰⁸ (Of course, court-packing

child-abuse-contrarian [<https://perma.cc/27PV-XQWJ>] (“Michael Holick, a renowned scientist turned expert witness, relies on his own controversial theory to help alleged abusers avoid prison and regain custody of the babies they were accused of harming.”).

¹⁰³ See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 717 (2005) (“For the past three decades, the federal government and roughly one-third of the states have turned to expert commissions to overhaul their criminal sentencing regimes.”).

¹⁰⁴ Maneka Sinha, *Junk Science at Sentencing*, 89 GEO. WASH. L. REV. 52, 70 (2021); Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1121 (2017).

¹⁰⁵ For a discussion of how risk assessments are created, see generally Matt Henry, *Risk Assessment: Explained*, APPEAL (Dec. 14, 2019), <https://theappeal.org/the-lab/explainers/risk-assessment-explained/> [<https://perma.cc/43MK-QSBF>].

¹⁰⁶ See Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 824, 838 (2014); see also Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483, 492 (2019) (“Public and private coalitions began endorsing the use of publicly and privately developed actuarial risk tools in the states as part of a comprehensive agenda to reduce recidivism while saving states correctional costs.”); Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 69 (2017) (“Private companies have developed some of the leading tools used in several jurisdictions.”); Andrea Nishi, Note, *Privatizing Sentencing: A Delegation Framework for Recidivism Risk Assessment*, 119 COLUM. L. REV. 1671, 1673 (2019) (discussing the “largely unexamined role that private actors—risk assessment developers—have come to play in individual sentencing determinations”);.

¹⁰⁷ For background on how these this came to be, see generally OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., NCJ 170600, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY (1997).

¹⁰⁸ Jocelyn Simonson, Essay, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 268 (2019); see also Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281,

techniques also can be used against the accused, and are frequent tactics of police when officers are criminally charged.¹⁰⁹)

Once a person is sentenced, the terms of their sentence are often in private hands. Scholars have written extensively about private prisons, which operate across institutions in at least thirty states and the federal system.¹¹⁰ Privately operated jails and immigrant detention facilities also span the country.¹¹¹ But more widespread are private influences on the 4.5 million Americans living under some form of supervised release, probation, or parole.¹¹² Many halfway houses and drug treatment facilities are outsourced.¹¹³ Other entities administer probation programs—some are nonprofits, but others charge significant fees.¹¹⁴ Private apps promise to lower the cost of parole monitor-

1285–86 (2015) (describing participatory defense movement); *Participatory Defense*, GRASSROOTS LEADERSHIP, <https://grassrootsleadership.org/programs/participatory-defense> [<https://perma.cc/B4R6-XXKK>].

¹⁰⁹ Expert testimony at sentencing can also come on either side of the ledger—a defendant presenting mitigation evidence or a prosecutor arguing likelihood to re-offend. *See, e.g.*, Sinha, *supra* note 104, at 74.

¹¹⁰ *See, e.g.*, *Private Prisons in the United States*, SENT’G PROJECT (Mar. 3, 2021), <https://www.sentencingproject.org/publications/private-prisons-united-states/> [<https://perma.cc/39HW-G73X>]. Regarding private prisons and the prison industrial complex, see generally ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 84–85 (2003); Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 599 (2012); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 449 (2005); Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 144 (2001); Chris Weaver & Will Purcell, Comment, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 HOW. L.J. 349, 353 (1998).

¹¹¹ *See, e.g.*, SENT’G PROJECT, *supra* note 110. Regarding immigrant detention, see generally Mariela Olivares, *Intersectionality at the Intersection of Profiteering and Immigration Detention*, 94 NEB. L. REV. 963, 976–91 (2016); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1507–11 (2015).

¹¹² PEW CHARITABLE TRS., *TO SAFELY CUT INCARCERATION, STATES RETHINK RESPONSES TO SUPERVISION VIOLATIONS 1* (2019), https://www.pewtrusts.org/-/media/assets/2019/07/pspp_states_target_technical_violations_v1.pdf [<https://perma.cc/M3Q7-FD7R>].

¹¹³ *See* Liliana Segura, *How the Coronavirus Became a Death Sentence at a Geo Group Halfway House*, INTERCEPT (July 3, 2020, 7:00 AM), <https://theintercept.com/2020/07/03/halfway-house-pandemic-coronavirus-geo-group> [<https://perma.cc/8CKN-X5ZU>] (discussing coronavirus deaths at federal halfway houses, including those privately run by GEO Group); BENSON, *supra* note 48, at 6.

¹¹⁴ *See* EISEN, *supra* note 22, at 45 (“An increasing number of governments have signed contracts with private, for-profit companies that offer misdemeanor probation services at no cost to the government in exchange for the right to collect fees from the probationers they supervise.”); Andrew Ross, *Probation Profiteering Is the New Debtors’ Prison*, BOS. REV. (Nov. 9, 2021), <https://bostonreview.net/articles/probation-profiteering-is-the-new-debtors-prison/> [<https://perma.cc/HQD9-L6KR>]; Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1496–98, 1507–09 (2016); Vicki L. Gilliam, *The Role of the Defense Attorney in Mitigating the Nonviolent Youthful Offender and Locating the Appropriate Alternative Sentence*, 19 MISS. COLL. L. REV. 361, 372 (1999) (discuss-

ing by tracking and monitoring parolees via remote check-ins, but in so doing make profound choices about the extent to which they invade one's privacy.¹¹⁵

And of course, there are the collateral consequences that come with a criminal conviction. Although some collateral consequences are state imposed—disenfranchisement and loss of access to public housing and public benefits—many are privately imposed. Employer and landlord sanctions are two of the most common.¹¹⁶ The ability of private parties to impose these collateral sanctions is fueled by a private market that aggregates criminal records, performs background checks, and even charges fees to correct erroneous records.¹¹⁷ At the same time, there are also private actors working to minimize collateral consequences—CBOs focus on reentry assistance, and private employers can prioritize hiring people with criminal convictions. Government can incentivize this work through grants or tax credits, but it ultimately relies on private actors.¹¹⁸

5. Systemic Influences

Private influences also operate at a systemic, policymaking level.

The legislative process is an obvious place to start. We expect criminal laws to reflect public will—in some places this means decriminalizing marijuana,¹¹⁹ in others it means stiffening penalties for

ing nonprofit that offers probation, non-adjudication, and house arrest services for a fee); see also HUM. RTS. WATCH, “SET UP TO FAIL”: THE IMPACT OF OFFENDER-FUNDED PRIVATE PROBATION ON THE POOR 55 (2018).

There are also private initiatives working to purchase and forgive probation debt. *E.g.*, Associated Press, *Groups Erase Some Probation Debt in Mississippi, Florida*, U.S. NEWS (Oct. 30, 2021, 8:47 AM), <https://www.usnews.com/news/best-states/florida/articles/2021-10-30/groups-erase-some-probation-debt-in-mississippi-florida> [<https://perma.cc/3UB9-CRLX>] (erasing nearly \$3.3 million in private probation debt in Mississippi and Florida).

¹¹⁵ See, e.g., Molly Osberg & Dhruv Mehrotra, *When Your Freedom Depends on an App*, GIZMODO (Apr. 27, 2020, 1:29 PM), <https://gizmodo.com/when-your-freedom-depends-on-an-app-1843109198> [<https://perma.cc/EVX3-ZRSY>]; Press Release, SCRAM Systems, One in 55 U.S. Adults is Under Community Supervision, (Mar. 11, 2019), <https://www.scramsystems.com/media-room/software-solution-aims-improve-outcomes-adults-community-supervision/> [<https://perma.cc/UD7S-ULAS>]; Jordannah Elizabeth, *JAY-Z Continues to Fight Mass Incarceration with New Investment*, AMSTERDAM NEWS (Apr. 5, 2018), <http://amsterdamnews.com/news/2018/apr/05/jay-z-continues-fight-mass-incarceration-new-inves/> [<https://perma.cc/V5RK-54RY>].

¹¹⁶ See, e.g., Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1411–17 (2018).

¹¹⁷ *Id.*

¹¹⁸ See MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY, AND PRACTICE § 6:14 (2016), Westlaw (database updated Nov. 2021); Michaels, *supra* note 23, at 1052.

¹¹⁹ Daniel Kreps, *Virginia Lawmakers Pass Marijuana Legalization Bills*, ROLLING STONE

package theft.¹²⁰ Private groups have tremendous influence on this process; interest groups lobby, testify, publish research, mobilize supporters, and contribute to campaigns.¹²¹ Business interests, law enforcement associations, and civil liberties groups are the best known, but they are hardly alone in influencing criminal policy.¹²² For decades, tough-on-crime groups have had the upper hand—supporting passage of three strikes laws and mandatory minimums, for example—but the winds have begun to shift of late.¹²³

(Feb. 6, 2021, 1:04 PM), <https://www.rollingstone.com/culture/culture-news/virginia-legalize-marijuana-1124749/> [<https://perma.cc/6PN4-NANM>]. Such efforts can have a substantial effect on reducing over-policing. See Lindsey Kennett, *Marijuana-Related Possession Arrests Drop 90% Across Virginia*, WLS (Sep. 15, 2021, 3:30 PM), <https://www.wsls.com/news/local/2021/09/14/marijuana-related-possession-arrests-drop-90-across-virginia/> [<https://perma.cc/R73P-E3SY>].

¹²⁰ Recent estimates suggest that 1.7 million packages are stolen or lost every day. Katie Schoolov, *With Package Theft at an All-Time High, Amazon and Others Are Fighting Back*, CNBC (Jan. 11, 2020, 9:01 AM), <https://www.cnbc.com/2020/01/10/package-theft-how-amazon-google-others-are-fighting-porch-pirates.html> [<https://perma.cc/W84S-2BUL>]. Some legislatures are addressing this issue with criminal laws: Michigan enacted a new state law making a second such offense a felony. MICH. COMP. LAWS §§ 445.31–33 (2019). Texas has stiffened its package theft law. TEX. PENAL CODE ANN. § 31.20 (West 2019). Other states are considering similar measures. See, e.g., Benjamin Yount, *Wisconsin Lawmaker Looks to Get Tougher on Porch Pirates*, CTR. SQUARE (Dec. 27, 2019), https://www.thecentersquare.com/wisconsin/wisconsin-lawmaker-looks-to-get-tougher-on-porch-pirates/article_60bbf166-280e-11ea-aae7-f32175936a04.html [<https://perma.cc/5DBU-RSHK>]; H. 3071, 123rd Gen. Assemb. (S.C. 2019); Rachel Nunes, *Proposed RI Law Would Crack Down on Porch Pirates*, PATCH (Dec. 20, 2019, 3:01 PM), <https://patch.com/rhode-island/cranston/proposed-ri-law-would-crack-down-porch-pirates> [<https://perma.cc/672N-GA4E>].

¹²¹ See, e.g., PROSECUTORS & POL. PROJECT, UNIV. N.C. SCH. L., STUDY OF CAMPAIGN CONTRIBUTIONS IN PROSECUTORIAL ELECTIONS (2019); *FSA and the Legislative Process*, FLA. SHERIFFS ASS'N, <https://www.flsheriffs.org/law-enforcement-programs/legislative> [<https://perma.cc/U7TA-7C7Y>] (describing lobbying efforts “to support and monitor legislation that ensures public safety in Florida”).

¹²² See, e.g., U.S. CHAMBER OF COM., THE BUSINESS CASE FOR CRIMINAL JUSTICE REFORM: SECOND CHANCE HIRING 1 (2021), https://www.uschamber.com/assets/documents/uscc_business_case_for_cj-second_chance_hiring_report_aug2021.pdf [<https://perma.cc/979G-PX7R>]; Emily Birnbaum, *Tech's Favorite Lobbyists Want to End Qualified Immunity for Cops*, PROTOCOL (June 17, 2020), <https://www.protocol.com/big-tech-police-reform> [<https://perma.cc/Q63D-GZZ7>]; *Criminal Justice Reform News*, AMS. FOR PROSPERITY, <https://americansforprosperity.org/issue/criminal-justice-reform/> [<https://perma.cc/F3VN-6456>]; *About*, INNOCENCE PROJECT, <https://innocenceproject.org/about/> [<https://perma.cc/69VC-GDL8>]; *Criminal Justice*, ARNOLD VENTURES, <https://www.arnoldventures.org/work/criminal-justice/> [<https://perma.cc/Q3HQ-BVR2>].

¹²³ Compare Barbara Ann Stolz, *The Criminal Justice Policy-Making Arena and Privatization: Subgovernment in Flux?*, in *PRIVATIZATION IN CRIMINAL JUSTICE: PAST, PRESENT, AND FUTURE* (David Shichor & Michael J. Gilbert eds., 2001), and Barkow, *supra* note 103, at 726 (“Groups like Families Against Mandatory Minimums, the Western Prison Project, and the Justice Policy Institute aggressively advocate for sentencing reform and alternatives to incarceration, but they do not come close to the lobbying power of traditional targets of regulation.”), with Sarah Figgatt, *Progressive Criminal Justice Ballot Initiatives Won Big in the 2020 Election*,

Systemic private influence is less visible outside of the legislative process. Private companies like Lexipol write policies for police that are designed to be legally adequate but do little to advance meaningful reform.¹²⁴ Some places turn to consultants and think tanks to conduct audits and aid in reform efforts on a range of topics.¹²⁵ There are also private accreditation bodies that, for a fee, will review an agency to ensure it meets certain (proprietary) standards.¹²⁶

The private sector also influences how public actors are trained. Private entities offer police specialized trainings on use of force, social media investigations, warrantless searches, and interrogations.¹²⁷ Some of these trainings are incredibly harmful—the Reid method of interrogation, for example, has contributed to countless coerced statements, false confessions, and wrongful convictions.¹²⁸ But others miti-

CTR. FOR AM. PROGRESS (Nov. 19, 2020, 9:01 AM), <https://www.americanprogress.org/issues/criminal-justice/news/2020/11/19/493026/progressive-criminal-justice-ballot-initiatives-won-big-2020-election/> [<https://perma.cc/D5H2-W2WH>].

¹²⁴ See, e.g., Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891, 892–93, 895–96 (2018); see also *id.* at 894 n.10 (listing other private entities including OSS Law Enforcement Advisors; Daigle Law Group, LLC; the Public Safety Specialist’s Group; Legal and Liability Risk Management Institute; the Thomas and Means Law Firm; and Hillard Heintze).

¹²⁵ Some of these organizations include Policing Project, Justice Collaboratory, Center for Policing Equity, Vera Institute for Justice, National Police Foundation, Police Executive Research Forum, and 21CP Solutions (performing auditing and strategic planning for cities and communities seeking to reform their police system). See, e.g., *Five Days After Two 911 Calls, Her Body Found*, 25 NAT’L BULL. ON DOMESTIC VIOLENCE PREVENTION NO. 11 (2019) (“The Meriden police has a history of botched 911 calls. As a result of prior revelations, a private firm was hired in 2016 to review the police dispatch system. The Mayor at the time promised that improvements were being implemented.”); see also PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 43 (2007) (“The hidden hand metaphor can also be used to describe how consultants work. They operate under vaguely worded contracts to provide advice and analysis. And many government officials, not just the president, rely on consultants for policy advice and counseling on critical issues.”).

¹²⁶ On accreditation, see *About the Commission*, COMM’N ON ACCREDITATION FOR L. ENF’T AGENCIES, <https://www.calea.org/about-commission> [<https://perma.cc/MF6P-X9CP>]; *About Services*, INT’L ASS’N OF DIRS. OF L. ENF’T STANDARDS & TRAINING, <https://www.iadlest.org/our-services/about> [<https://perma.cc/5A2M-ML3P>].

¹²⁷ See, e.g., Pub. Agency Training Council, Seminar Agenda: Investigative Techniques Using Social Networking Sites (Nov. 28–30 2017), <http://www.patc.com/training/brochures/2017/15097.pdf> [<https://perma.cc/2XXS-NZH3>]; BLUE TO GOLD, <https://www.bluetogold.com/> [<https://perma.cc/J8L6-WCHL>] (marketing themselves as “the Nation’s Best Instructors” and offering classes such as “Warrantless Home Entries”); *Training Programs*, JOHN E. REID & ASSOCS., INC., http://archive.reid.com/training_programs/r_training.html [<https://perma.cc/X9KU-K7FR>] (“The Reid Technique(R) is now the most widely used approach to question subjects in the world.”); *About IPTM*, INST. OF POLICE TECH. & MGMT., <https://iptm.unf.edu/About/> [<https://perma.cc/L7SH-UFLK>].

¹²⁸ See Alan Hirsch, *Going to the Source: The “New” Reid Method and False Confessions*,

gate harm, such as trainings on de-escalation techniques, crisis intervention, procedural justice, and implicit bias.¹²⁹

When there are allegations of official misconduct, the private sector again is involved. Law firms defend suits against individuals and municipalities, creating financial incentives to elevate contentiousness over just outcomes.¹³⁰ Many jurisdictions have insurance policies to cover claims, giving insurers substantial authority either to encourage obstinate litigation or to improve policies and fire problematic employees.¹³¹

11 OHIO ST. J. CRIM. L. 803, 805–06 (2014); see also Gene Maddaus, *Netflix and Ava DuVernay Win Dismissal of Defamation Suit*, VARIETY (Mar. 23, 2020, 5:29 PM), <https://variety.com/2020/tv/news/netflix-duvernay-john-reid-assocaites-defamation-1203542947/> [<https://perma.cc/LM9T-E2GL>].

¹²⁹ The leading de-escalation principles were developed by the Police Executive Research Forum. See POLICE EXEC. RSCH. F., GUIDING PRINCIPLES ON USE OF FORCE 33, 121 (2016), <https://www.policeforum.org/assets/30%20guiding%20principles.pdf> [<https://perma.cc/EHV4-XU9D>]. Other companies, building on technology originally developed for the military, offer simulator technology for officers to practice these techniques. See VIRTRA, <https://www.virtra.com/> [<https://perma.cc/E23C-DTQS>]; Caren Chesler, *How Role-Playing Helps Police Do Their Job Without Firing Their Guns*, WASH. POST (Dec. 12, 2021, 8:00 AM), <https://www.washingtonpost.com/national-security/2021/12/12/role-play-police-shootings/> [<https://perma.cc/A7FC-3BDV>] (discussing virtual de-escalation training); Danny Wicentowski, *Searching for the Real Inside a Police Training Simulator*, RIVERFRONT TIMES (Jan. 15, 2020), <https://www.riverfronttimes.com/stlouis/searching-for-the-real-inside-a-police-training-simulator/Content?oid=32911702&showFullText=true&utm> [<https://perma.cc/9CFM-LBG4>]; see also *Firearms Training Systems (FATS®)*, INVERIS TRAINING, <https://www.inveristraining.com/firearms-training-systems-history> [<https://perma.cc/2J2N-T87W>].

On crisis intervention training, see *CIT Is More Than Just Training . . . It's a Community Program*, CIT INT'L, <https://www.citinternational.org/What-is-CIT> [<https://perma.cc/J5A4-LHZH>]. On implicit bias training, see FAIR & IMPARTIAL POLICING, <https://fipolicing.com> [<https://perma.cc/P2P6-6B7W>]; see also Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 296 (2015) (“This Article situates implicit bias training as one small step towards racial equality in law enforcement. But it cautions against overselling implicit bias training.”).

¹³⁰ See Dan Hinkel, *A Hidden Cost of Chicago Police Misconduct: \$213 Million to Private Lawyers Since 2004*, CHI. TRIB. (Sept. 12, 2019, 5:00 AM), <https://www.chicagotribune.com/investigations/ct-met-chicago-legal-spending-20190912-sky5euto4jbcdenjfi4datpnki-story.html> [<https://perma.cc/XN9F-MVX4>].

¹³¹ John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1543, 1574, 1585 (2017); see also Kit Ramgopal & Brenda Breslauer, *The Hidden Hand that Uses Money to Reform Troubled Police Departments*, NBC NEWS (July 19, 2020, 6:15 AM), <https://www.nbcnews.com/news/us-news/hidden-hand-uses-money-reform-troubled-police-departments-n1233495> [<https://perma.cc/E4D3-WEBZ>] (“[T]he insurer gave her a choice: remove the officers or lose coverage. And just like that, although criminal and civil cases against them were dismissed, two-thirds of Niota’s police force had to be replaced.”).

II. THE LIMITED VALUE OF THE PUBLIC/PRIVATE DIVIDE

What should one make of a system so permeated by private influence? Champions of privatization extol its many virtues.¹³² Proponents argue that the private sector improves efficiency and lowers costs,¹³³ results in improved research and technological capabilities, and yields greater flexibility and agility.¹³⁴ But critics of privatization offer strident criticism including moral objections and serious concerns about our ability to govern private actors.¹³⁵ In few contexts is this criticism more sustained and nearly ubiquitous than around the criminal system.

This Part argues that it is a mistake to label all privatization or private influence as “beneficial” or “harmful.” It does so by focusing on the four chief governance critiques of privatization in the criminal system: (A) lack of democratic accountability, (B) lack of transparency, (C) lack of legal accountability, and (D) perverse financial incentives.¹³⁶ With a broader understanding of what private influence

¹³² See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1291–92 (2003) (“In the last two decades, privatization has been championed by conservative policymakers, academics, and public intellectuals as instrumental to reducing the size of government and broadly restructuring society in line with a conservative agenda.” (footnotes omitted)).

¹³³ See, e.g., Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective* (“The sum of all the rules in the traditional procurement system slowed the system down enormously, so that buying products or services took far longer than in the private sector . . .”), in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 153, 165 (Jody Freeman & Martha Minow eds., 2009); VERKUIL, *supra* note 125, at 4; see also Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 98 (2016) (“When the prison privatization movement began in the 1980s, supporters heralded the private sector as capable of demonstrating efficiency that public bureaucracies lacked.”); Freeman, *supra* note 132, at 1287–88 (characterizing claims made by proponents of privatization that performance-based pay in the private sector may improve quality of services provided); Developments in the Law—The Law of Prisons, *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1870 (2002) (“[P]rivate prisons have substantially greater market accountability because they are concerned with winning new contracts and renewing old ones, and with avoiding both adverse publicity and drops in stock price.”).

¹³⁴ See, e.g., Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives It, How to Improve It* (arguing private entities often are better resourced and have superior research capacity compared to government entities), in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY*, *supra* note 133 at 192, 221–22; Savas, *supra* note 23, at 896 (“Interest in prison privatization stems from the perception that private prisons are more cost effective and efficient, constructed more quickly, and operated under more flexible and innovative management.”).

¹³⁵ See, e.g., Stoughton, *supra* note 20.

¹³⁶ Although this Article focuses on the governance critiques of privatization, see *infra* Part II.A–II.D, there are many critiques of privatization unrelated to institutional governance and operation. For example, some argue that transferring aspects of the criminal system into private

entails, this Part argues that on each of these four dimensions, public provision of the criminal system can be as problematic as, or worse than, private influence. And, at times private influence can mitigate the harms of the public system. The four critiques are valid and important, but they do not divide cleanly across the public/private line.

A. *Lack of Democratic Accountability*

A central critique of privatization relates to democratic governance and accountability (or lack thereof).

hands undermines basic moral tenets of a democratic society. *See, e.g.*, Malcolm M. Feeley, *The Unconvincing Case Against Private Prisons*, 89 *IND. L.J.* 1401, 1406 (2014). Most often this argument arises in the context of private prisons, with many arguing that punishment meted out by a private, for-profit actor entails an additional injury: the affront to person dignity that comes with the commodification of incarcerated individuals. *See, e.g.*, Avihay Dorfman & Alon Harel, *The Case Against Privatization*, 41 *PHIL. & PUB. AFFS.* 67, 91, 95 (2013); Dolovich, *supra* note 110, at 542; John J. DiIulio, Jr., *What's Wrong with Private Prisons*, 92 *PUB. INT.* 66, 83 (1988); *see also* HCJ 2605/05 Acad. Ctr. of L. & Bus., Hum. Rts. Div. v. Minister of Fin., *IsrSC*, 27, 73 (2009) (Isr.) (decision of Israeli Supreme Court holding private prisons per se unconstitutional).

A second strain of moral critique—one that reaches both private prisons and private police—begins with the proposition that government maintains a monopoly on all legitimate use of force. *See, e.g.*, Joh, *supra* note 45, at 593; Sklansky, *supra* note 49, at 1188. Absent exigent circumstances, private use of force is illegitimate because it lacks the authority of the state. *See, e.g.*, Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 *HARV. C.R.-C.L. REV.* 1, 33 (2017); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 *CONN. L. REV.* 879, 881 (2004); John J. DiIulio, Jr., *The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails*, in *PRIVATE PRISONS AND THE PUBLIC INTEREST* 155, 173, 175–76 (Douglas C. McDonald ed., 1990).

Although a philosophical debate is beyond the scope of this Article, there are pragmatic reasons not to let these concerns, on their own, drive policy. First, public prisons often involve the same commodification of persons as private prisons. This includes prison gerrymandering, which incentivizes public officials to build and fill prisons to increase their tax base; labor from public prisoners, which is a billion-dollar industry that pays little to no wages; and income from public prisoners and their families who are forced to pay high fees for everyday necessities. *See* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS* 230–249 (2010). Second, the moral distinction between private and public employees is even more tenuous. Contractors and public employees both work to make a living—they show up each day, draw a wage, and do not share in the profits or windfalls of their employers. And both contractors and employees perform well—or engage in misconduct—for personal reasons. *See, e.g.*, Dolovich, *supra* note 110, at 545–46; Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 *U.C. DAVIS L. REV.* 133, 150 (2012). If the true concern is that private entities will make tradeoffs that public entities would not, then the objection is not a moral one, but an empirical one. It can be studied and addressed through regulation that prioritizes quality over low cost, detailed guidance that reins in private discretion, and systems that identify and correct contractor misconduct.

Democratic norms are fundamental to governance.¹³⁷ Key public actors—legislators, sheriffs, and district attorneys—are elected.¹³⁸ When the public sector acts through administrative agencies—like police agencies or bureaus of prisons—the public maintains a degree of indirect control by electing local officials (e.g., mayors) who appoint the agency head and exercise general oversight over the agency.¹³⁹ Although the public’s control over these agencies is indirect, given the visibility of crime and public safety issues, elected officials tend to pay close attention.¹⁴⁰

Private influence is a different matter. Privatization interrupts lines of accountability by insulating decisionmakers from the public’s democratic check.¹⁴¹ Corporations answer to their shareholders and

¹³⁷ Democratic accountability is linked to institutional legitimacy. By limiting democratic control, privatization might undermine public faith in the institutions of the criminal system. See, e.g., Scott M. Sullivan, *Private Force / Public Goods*, 42 CONN. L. REV. 853, 877 (2010) (“Democratic accountability is inextricably tied to legitimacy because its purpose is to keep policy decisions by political officials roughly in line with and responsive to the policy preferences of the public.” (citing Delmer D. Dunn, *Accountability, Democratic Theory, and Higher Education*, 17 EDUC. POL’Y 60, 61 (2003))). This, in turn, might reduce voluntary compliance with the law and engagement with the system generally. See PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT 1 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [<https://perma.cc/DKH8-2CCT>] (“Decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have authority that is perceived as legitimate by those subject to the authority.”). Without discounting this, it is worth noting that public governance is so broken that certain communities are experiencing “legal cynicism” and “LEGAL ESTRANGEMENT” FROM THE CRIMINAL SYSTEM AND GOVERNMENT GENERALLY. See Bell, *supra* note 72, at 2066.

¹³⁸ See, e.g., Cheryl Corley, *Election Results Show Voters Nationwide Ready for Criminal Justice Reform*, NAT’L PUB. RADIO (Nov. 24, 2020, 3:57 PM), <https://www.npr.org/2020/11/24/938593052/election-results-show-voters-nationwide-ready-for-criminal-justice-reform> [<https://perma.cc/67Z8-3ABR>]; Aaron Morrison, *Criminal Justice Reformers Cheer Multiple Election Victories*, ASSOCIATED PRESS (Nov. 21, 2020), <https://apnews.com/article/election-2020-race-and-ethnicity-new-york-voting-rights-elections-1e57c8fb7e737b9aeb6b444019ac98ec> [<https://perma.cc/5PN3-GBWL>]; see also Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 119–20 (2005).

¹³⁹ See Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 818–19 (2000) (“Like agencies, private actors are unelected. Unlike agencies, however, they are not generally expected to serve the public interest. . . . To the extent that they increasingly perform traditionally public functions unfettered by the scrutiny that normally accompanies the exercise of public power, private actors may indeed raise accountability concerns that dwarf the problem of unchecked agency discretion.”).

¹⁴⁰ See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1864 (2015) (“There are few labels in American politics more damning than ‘soft on crime.’”).

¹⁴¹ See, e.g., Fairfax, *supra* note 67, at 283 (“When private actors are contracted to perform the prosecution function, they exercise this power without the democratic check that theoretically applies to public prosecutors.”); see also Minow, *supra* note 12, at 1260 (“Self-government

board of directors, not voters.¹⁴² By splintering decisionmaking among public officials and private actors, privatization also can make it difficult for the public to know who to fault when things go wrong.¹⁴³ In the private prison context, for example, public officials can shift the blame of a scandal onto the private entity administering the program, drawing attention away from the underlying public policy issues.¹⁴⁴

Ironically, contracting out may be the most democratically accountable of the private influences.¹⁴⁵ Whereas government maintains some control of private actors through the contracting process, other forms of private influence operate further beyond democratic reach. Government appropriation is a prime example. When police departments use private foundation funding rather than their own funds, they erode a key “lever for democratic control”—budget oversight.¹⁴⁶

But before skewering private influence on the sword of unaccountability, an honest assessment of the accountability of public ac-

will not retain meaning if major decisions about public resources and the shape of collective experiences occur without the knowledge or participation of the nation’s citizens.”).

¹⁴² CoreCivic, the largest private prison corporation in the country, is just one example. See *Board of Directors*, CORECIVIC, <https://www.corecivic.com/investors/board-of-directors> [<https://perma.cc/44GH-2NA5>].

¹⁴³ See Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1210 (2000) (“When problems arise, government officials and private contractors can point fingers at each other, leaving the public with little means of knowing who is really at fault.”).

¹⁴⁴ See White, *supra* note 110, at 140; Stephen Rahe, *The Business of Punishing: Impediments to Accountability in the Private Corrections Industry*, 13 RICH. J.L. & PUB. INT. 209, 229 (2010).

¹⁴⁵ At the level of individual employees, the way agencies control their employees looks similar to how they control contractors. Bureaucratic controls like setting policy, political appointments, and employee removal, look similar to setting contract terms, monitoring performance, and sanctioning those who do not follow through. See, e.g., Fairfax, *supra* note 67, at 284. Contractor oversight is challenging, but public officials also have encountered tremendous difficulty controlling and removing problematic police, prosecutors, and corrections officers. See, e.g., Zolan Kanno-Youngs & Michael D. Shear, *Trump Loyalists Across Homeland Security Could Vex Biden’s Immigration Policies*, N.Y. TIMES (Feb. 18, 2021), <https://www.nytimes.com/2021/02/03/us/politics/biden-trump-immigration.html> [<https://perma.cc/HGD7-MU8Z>]; Tom Perkins, *‘It Makes it Very Difficult to Fire Them’: Police Union Contracts Protect Bad Officers, Critics Warn*, GUARDIAN (June 30, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/jun/30/police-union-contracts-collective-bargaining-officers> [<https://perma.cc/3PEN-5PWP>]; Matthew Ormseth, *Union Representing Deputy District Attorneys Sues Gascón over Enhancements Policy*, L.A. TIMES (Dec. 30, 2020, 4:05 PM), <https://www.latimes.com/california/story/2020-12-30/union-deputy-district-attorneys-sues-gascon-enhancements-policy> [<https://perma.cc/9ZU3-8WCK>].

¹⁴⁶ See Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 570 (2016). Over time, privatization may erode support for public law enforcement expenditures, not only skewing resources toward those with means, but also undermining legislative checks. See David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89, 91, 104 (2006).

tors is in order. Most prosecutors and sheriffs run unopposed and without term limits, remaining in power for a generation.¹⁴⁷ Their elections hardly function as a check against abuse of power, particularly for the politically powerless.¹⁴⁸ In fact, the electoral process can give outsized influence to the wealthy and powerful.¹⁴⁹

The criminal system also distorts the electoral process in ways that undermine public accountability.¹⁵⁰ Racially disparate law enforcement removes (and incarcerates) voters from communities of color, and felon disenfranchisement strips them of their vote.¹⁵¹ Prison gerrymandering—the practice of counting imprisoned individuals where they are incarcerated, not where they reside—then redistributes that voting power to more conservative (and whiter) communi-

¹⁴⁷ Janet C. Hoeffel & Stephen I. Singer, *Elections, Power, and Local Control: Reining in Chief Prosecutors and Sheriffs*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 319, 319 (2015) (“This toxic combination of narrow focus and disproportionate power skews our political system in the direction that secures and increases the power of chief prosecutors and sheriffs.”).

¹⁴⁸ See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 163–66 (2007); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 583 (2009); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 963 (1997); James Tomberlin, Note, “Don’t Elect Me”: *Sheriffs and the Need for Reform in County Law Enforcement*, 104 VA. L. REV. 113 (2018) (“This Note argues that elections are not functioning as an effective accountability mechanism and that county government must be given power to act as a check on county law enforcement.”).

¹⁴⁹ See, e.g., PROSECUTORS & POL. PROJECT, *supra* note 121, at 30; Radley Balko, Opinion, ‘Woke’ Corporations Are Funding Groups Working to Undermine Criminal Justice Reform, WASH. POST (Sept. 8, 2021, 4:19 PM), <https://www.washingtonpost.com/opinions/2021/09/08/woke-corporations-are-funding-groups-working-undermine-criminal-justice-reform/> [<https://perma.cc/37NL-5KNF>].

¹⁵⁰ See, e.g., Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1611 (2017) (“Relying on deliberation and consensus ignores the ways in which our current criminal justice system relegates African-Americans and other marginalized populations to non-democratic subjects . . .”); STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 130 (2012) (“American criminal justice is much too far out of alignment with outsiders’ needs and views to derive robust legitimacy from the consent of the governed.”).

¹⁵¹ *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUST., (Jan. 1, 2022), <https://www.brennancenter.org/our-work/research-reports/criminal-disenfranchisement-laws-across-united-states> [<https://perma.cc/273P-U98L>]; CHRISTOPHER UGGEN, RYAN LARSON & SARAH SHANNON, SENT’G PROJECT, *6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT*, 2016, (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf> [<https://perma.cc/J8AE-FR8W>]; see also Matt Vasilogambros, *Many in Jail Can Vote, but Exercising that Right Isn’t Easy*, PEW CHARITABLE TRS. (July 16, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/16/many-in-jail-can-vote-but-exercising-that-right-isnt-easy> [<https://perma.cc/WX4R-2YVB>] (describing difficulties of voting from prison).

ties.¹⁵² It is no surprise then, that some see elected officials as the main impediment to criminal reform.¹⁵³

Just as public and private actors can undermine democratic accountability, it is important to remember that private influences can enhance democratic accountability.¹⁵⁴ They do so in two primary ways.

First, as discussed in the next section, private influences can force greater transparency from public actors. Second, decentralizing control of the criminal system from purely government hands into private hands allows for more localized control over criminal justice priorities.¹⁵⁵ For example, rather than ceding all prosecutorial discretion to public prosecutors, community-based restorative justice programs empower crime victims to find nonpunitive solutions. Bail funds allow communities to reassert control over incarceration.¹⁵⁶ Local anti-violence programs can reach at-risk community members on a personal level that police likely never will.¹⁵⁷ All of this creates greater public accountability, not at the municipal or county level, but at the community or neighborhood level. This type of democratic accountability prioritizes localized values and lived experience. It gives a voice to disenfranchised communities most impacted by the criminal system.

152 See John F. Pfaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951, 957 n.23, 978 (2016) (“In all but four states—California (as of 2020), Delaware (as of 2020), Maryland, and New York—inmates are treated as residing in the area where they are housed, not where they come from, for the purposes of redistricting. Since offenders disproportionately come from urban areas, and prisons are disproportionately in nonurban areas, this counting effectively transfers legislative power from cities to more rural areas.” (citation omitted)); see also Natasha Haverty, *By Counting Prisoners Where They’re Incarcerated, Wisconsin Shifts Voter Clout from Cities to Small Towns*, MILWAUKEE J. SENTINEL (Oct. 15, 2021, 5:28 PM), <https://www.jsonline.com/in-depth/news/2021/10/15/when-new-political-districts-drawn-power-skewed-areas-prisons-through-prison-gerrymandering/5950103001/> [https://perma.cc/M98J-8D7G].

153 See RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 110–11 (2019).

154 See Freeman, *supra* note 132, at 1290.

155 See Joshua Kleinfeld et al., White Paper of Democratic Criminal Justice, 111 Nw. U. L. REV. 1693, 1696 (2017); Kleinfeld, *supra* note 4, at 1403.

156 See Alexis Okeowo, *How to Defund the Police*, NEW YORKER (June 26, 2020), <https://www.newyorker.com/news/news-desk/how-the-police-could-be-defunded> [https://perma.cc/C7DP-ZEMC] (“In the past three years, [community anti-violence organizations have] contributed to a fifteen-per-cent decline in shootings in the seventeen precincts with the highest levels of violence in [New York City] . . . Today, more than fifty nonprofits . . . work in twenty-two neighborhoods across New York. Funded by the city, their total budget is \$37.4 million, and they employ a hundred and fifty full-time employees and two hundred seasonal ones.”); see also Hooks & Simonson, *supra* note 93.

157 See Okeowo, *supra* note 156.

B. Lack of Transparency

Closely related to lack of democratic accountability is another common critique—that privatization breeds lack of transparency.

Improved transparency is a central tenet of criminal system reform.¹⁵⁸ It is a bulwark against corruption and the foundation of public accountability.¹⁵⁹ Many even argue that transparency can foster trust and legitimacy in the eyes of those most impacted by the system.¹⁶⁰ To that end, the list of transparency-focused reforms is extensive.¹⁶¹

Privatization can undermine transparency. Traditional mechanisms of government transparency—open records laws,¹⁶² administra-

¹⁵⁸ See Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CALIF. L. REV. 917, 929–30 (2021); Friedman & Ponomarenko, *supra* note 140, at 1848–49; see also David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 115 (2018).

¹⁵⁹ See Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 851 (2019) (“Policing scholars and reform advocates have taken Louis Brandeis’s famous adage that ‘[s]unlight is said to be the best of disinfectants’ as gospel when it comes to police reform.” (quoting Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WKLY., (Dec. 20, 1913))); Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 129 (2012) (“When police are subject to the watchful gaze of courts, the public, and self-surveillance, they behave in better conformity with expectations.”); Bell, *supra* note 72, at 2144–45 (“Transparency measures, including data collection and ‘hot ticket’ reforms such as police officer body cameras, can also contribute to the overall democratization of policing in a way that could begin to root out legal estrangement.”).

¹⁶⁰ See, e.g., Barack Obama, *Commentary, The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 850 (2017).

¹⁶¹ For example, the California Racial & Identity Profiling Act establishes a board composed of various stakeholders to review civilian complaints and to amend police training accordingly. CAL. GOV’T CODE § 12525.5 (West 2015); *AB 953: The Racial and Identity Profiling Act of 2015*, ST. OF CAL. DEP’T OF JUST. OFF. OF ATT’Y GEN., <https://oag.ca.gov/ab953> [<https://perma.cc/ZYD3-WHTF>]. For other transparency efforts, see CTR. FOR POLICING EQUITY & POLICING PROJECT AT N.Y. UNIV. SCH. OF L., *COLLECTING, ANALYZING, AND RESPONDING TO STOP DATA: A GUIDEBOOK FOR LAW ENFORCEMENT AGENCIES, GOVERNMENT, AND COMMUNITIES* (2020), https://policingequity.org/images/pdfs-doc/COPS-Guidebook_Final_Release_Version_2-compressed.pdf [<https://perma.cc/67KH-NHKE>] (promoting among other things, access to body camera footage); Editorial, *Justice and Open Files*, N.Y. TIMES, Feb. 27, 2012, at A18 (advocating for open records on law suit settlements).

¹⁶² See, e.g., VERKUIL, *supra* note 125, at 90 (“[T]his provision applying as it does to government records (or to records held by government) does not reach documents in the hands of private contractors who are doing the work of government. By analogy to the state action requirement, the FOIA ‘agency’ requirement has an exempting force that makes it harder for the public to learn what its private agents are doing.”); David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1461–62 (2010) (“As private corporations, they are typically not subject to open meeting and freedom of information laws that apply to state and local departments of corrections.”); Minow, *supra* note 21, at 999 (“Private companies are free from the disclosure obligations placed on the government by the FOIA, the federal law intended to make democracy work by ensuring access to all of the government’s information compatible with security.”); Beermann, *supra* note 21, at 1554; Nicole B. Cásarez, *Furthering the Accounta-*

tive procedure requirements like notice-and-comment procedures,¹⁶³ and even criminal discovery rules¹⁶⁴—do not apply to private actors in the same ways as public actors. There are also many examples of private entities taking affirmative steps to obscure their operations from public view. Some entities selling DNA testing tools assert trade secret privileges to block access to information about their technology, even when used in criminal prosecutions.¹⁶⁵ Other companies require that government agencies sign nondisclosure agreements, preventing officials from disclosing the existence of the technologies, let alone any details.¹⁶⁶ Contracting out is not the only type of private influence that can create transparency problems. Government-directed philanthropy, for example, often allows agencies to skirt budgetary and procurement processes designed to make government decisionmaking more open to the public.¹⁶⁷

But public actors are hardly immune from transparency concerns. Consider open records requirements. Police routinely invoke a range

bility Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records, 28 U. MICH. J.L. REFORM 249, 264–68 (1995); Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM'NS L.J. 21, 31 (1999).

¹⁶³ 5 U.S.C. § 553.

¹⁶⁴ See Ryan, *supra* note 79, at 307–08; Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1346–48 (2018).

¹⁶⁵ See, e.g., Bloch-Wehba, *supra* note 89, at 1272; Ryan, *supra* note 79, at 319; Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 118–19 (2019); Wexler, *supra* note 164; Joh, *Undue Influence*, *supra* note 19; see also Martha Minow, *supra* note 21, at 999 (“There is some authority that private companies enjoy the ability to enjoin the government from disclosing information they have shared with the government in the course of doing business together.”).

¹⁶⁶ See, e.g., *supra* note 79 (discussing police use of Stingrays); see also Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL'Y REV. 15, 38–39 (2016) (discussing “a number of recent instances [in which] private companies providing surveillance technology have required agreements from police departments that prevent disclosure of information about the technology itself.”); Olivia Solon, *iPhone Spyware Lets Police Log Suspects' Passcodes When Cracking Doesn't Work*, NBC NEWS (May 18, 2020, 3:34 PM), <https://www.nbcnews.com/tech/security/iphone-spyware-lets-cops-log-suspects-passcodes-when-cracking-doesn-n1209296> [<https://perma.cc/EHY3-6UZD>] (discussing NDAs required by Grayshift cell phone cracking malware).

¹⁶⁷ See, e.g., Ali Winston, *Palantir Has Secretly Been Using New Orleans to Test Its Predictive Policing Technology*, VERGE (Feb. 27, 2018, 3:25 PM), <https://www.theverge.com/2018/2/27/17054740/palantir-predictive-policing-tool-new-orleans-nopdf> [<https://perma.cc/2MXK-XR2K>]; Laura Nahmias, *Police Foundation Remains a Blind Spot in NYPD Contracting Process*, CRITICS SAY, POLITICO (July 13, 2017, 5:10 AM), <https://www.politico.com/states/new-york/city-hall/story/2017/07/13/police-foundation-remains-a-blind-spot-in-nypd-contracting-process-critics-say-113361> [<https://perma.cc/4HJK-L378>]; Ali Winston & Darwin Bond Graham, *Private Donors Supply Spy Gear to Cops*, PROPUBLICA (Oct. 13, 2014, 8:00 AM), <https://www.propublica.org/article/private-donors-supply-spy-gear-to-cops> [<https://perma.cc/JT6H-H7DZ>].

of statutory protections to avoid disclosing officer disciplinary records.¹⁶⁸ In too many police killings, body camera footage and other critical evidence is withheld.¹⁶⁹ Prosecutors hide behind grand jury secrecy to avoid explaining why they decline to indict officers who use force.¹⁷⁰ Some agencies have begun filing “reverse FOIA” suits, forcing members of the public to go to court to defend their right to access the records sought.¹⁷¹

Because open-records laws only apply to preexisting documents, public actors can frustrate transparency through poor data collection practices.¹⁷² This is why it is pointless in certain jurisdictions to request comprehensive use of force or stop data—it simply is not collected. A similar dynamic exists with discovery into a police officer’s witness interviews—if there are no notes, there’s nothing to disclose.

¹⁶⁸ See, e.g., *Something Extra Publ’g, Inc. v. Mack*, No. 1190106, 2021 WL 4344346, at *15 (Ala. Sept. 24, 2021) (Parker, C.J., dissenting) (“With one sweeping stroke, today’s decision spells the end of public access to law-enforcement records that are connected in any way to an investigation. Hidden now from the public eye are body-cam videos, dash-cam videos, 9-1-1 recordings, and anything else that is remotely connected to a crime or even potential crime. After today, as to law-enforcement agencies at least, the statute might as well be titled the Closed Records Act.”); Kenny Jacoby & Ryan Gabrielson, *How Cops Who Use Force and Even Kill Can Hide Their Names from the Public*, PROPUBLICA (Oct. 29, 2020, 6:00 AM), <https://www.propublica.org/article/how-cops-who-use-force-and-even-kill-can-hide-their-names-from-the-public> [<https://perma.cc/4M6S-MR42>] (“Marsy’s Law ensures crime victims the right to privacy. But police departments across Florida and the Dakotas have repeatedly used it to hide the names of officers who use force on the job.”); Colleen Slevin, *Transparency Push to Release Police Disciplinary Records*, CHRISTIAN SCI. MONITOR (MAY 2, 2021), <https://www.csmonitor.com/USA/Justice/2021/0502/Transparency-push-to-release-police-disciplinary-records> [<https://perma.cc/T4ZP-8A8N>] (“Lawmakers in more than 20 states have considered bills this year to make the disciplinary records of police officers public or to share them with other agencies About 20 states still largely prohibit their release, however.”).

¹⁶⁹ See, e.g., Jessica Glenza, *Chicago Officials Delayed Release of Laquan McDonald Shooting Video*, GUARDIAN (Jan. 1, 2016, 1:35 PM), <https://www.theguardian.com/us-news/2016/jan/01/chicago-officials-delayed-release-laquan-mcdonald-shooting-video> [<https://perma.cc/R298-YUZE>]; Ryan J. Foley, *Public Regularly Denied Access to Police Officer Videos*, AP NEWS (Mar. 13, 2019), <https://apnews.com/article/wv-state-wire-iowa-city-nd-state-wire-iowa-us-news-67f22d5857f14413a4a9b34642c49ae3> [<https://perma.cc/H9EF-VNDT>].

¹⁷⁰ See, e.g., Bill Hutchinson, *Breonna Taylor Case Sparks Renewed Scrutiny of Grand Juries in Police Misconduct Cases*, ABC NEWS (Oct. 9, 2020, 6:09 AM), <https://abcnews.go.com/US/breonna-taylor-case-sparks-renewed-scrutiny-grand-juries/story?id=73438566> [<https://perma.cc/2YXM-R2U7>].

¹⁷¹ E.g., C.J. Ciaramella, *I Asked for Public Records on a Fatal Police Shooting. Then a Washington Sheriff’s Office Sued Me.*, REASON (Dec. 17, 2020, 10:51 AM), <https://reason.com/2020/12/17/i-asked-for-public-records-on-a-fatal-police-shooting-then-a-washington-sheriffs-office-sued-me/> [<https://perma.cc/H7U7-WU9Z>].

¹⁷² See generally Barry Friedman & Elizabeth G. Jánosky, *Policing’s Information Problem*, 99 TEX. L. REV. 1 (2020).

Public actors also take affirmative steps to conceal information from the public. When police and prosecutors obtain evidence from sources—technologies or informants—that they prefer not to acknowledge publicly, they engage in “parallel construction,” manufacturing an alternative source for the information and hiding the true original source.¹⁷³ There are reports of government officials using encrypted messaging apps so that their communications are not preserved.¹⁷⁴

In contrast, the private sector can, in some cases, help improve government transparency. Take public reporting of crime data. Today, one would be hard pressed to find a police department that does not report crime data. But this became routine only after the federal government called for investment and partnerships with the private sector to make the technology widely available.¹⁷⁵ Body cameras are following a similar course, with initial strong federal support from the Obama Administration.¹⁷⁶ It is hard to imagine these tools being developed or widely adopted without private industry. Some companies also build transparency features into their products, such as public dashboards that document how police use the technology or built-in audit trails that log every time information is accessed.¹⁷⁷

Moreover, the very presence of nonstate actors can bring transparency to government conduct. The filming of George Floyd’s murder, and the resulting national upheaval and criminal prosecution, demonstrates this potential.¹⁷⁸ This type of transparency can be epi-

¹⁷³ On the use of parallel construction by police and prosecutors and secrecy around methods of execution, see Ryan, *supra* note 79, at 324–26. On non-disclosure agreements, see Joh, *Undue Influence*, *supra* note 19, at 23–26. On how federal funding can thwart local control and oversight, see Catherine Crump, *Surveillance Policy Making by Procurement*, 91 WASH. L. REV. 1595, 1601–04 (2016).

¹⁷⁴ Paul Egan, *Top Michigan State Police Officials Using Encryption Messaging Apps that Can Evade FOIA*, DETROIT FREE PRESS (Jan. 23, 2021, 6:00 PM), <https://www.freep.com/story/news/local/michigan/2021/01/22/state-police-phone-apps-keep-text-messages-secret/4236305001/> [<https://perma.cc/G7AL-XEYV>].

¹⁷⁵ See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1164–65, 1170–71 (2000) (discussing crime mapping technology and transparent policing).

¹⁷⁶ Carrie Dann & Andrew Rafferty, *Obama Requests \$263 Million for Police Body Cameras, Training*, NBC NEWS (Dec. 1, 2014, 7:15 PM), <https://www.nbcnews.com/politics/first-read/obama-requests-263-million-police-body-cameras-training-n259161> [<https://perma.cc/3DD4-XACG>].

¹⁷⁷ See, e.g., Holly Beilin, *Flock Safety and Piedmont Police Launch First-Ever ALPR Transparency Portal*, FLOCK SAFETY (June 10, 2021), <https://www.flocksafety.com/blog/transparency-portal/> [<https://perma.cc/LWZ4-PR6B>]; *Taser 7 Device Logs*, MY AXON, https://my.axon.com/s/article/TASER-7-Logs?language=EN_US [<https://perma.cc/M39Z-ENLM>].

¹⁷⁸ Michelle Garcia, *The Monumental Impact of George Floyd’s Death on Black America*,

sodic but can also spark national movements. There are also examples of private groups organizing court-watching or cop-watching efforts to bring greater visibility to how the system operates.¹⁷⁹

If transparency is the goal, one should not assume that the public or private sector is the answer, but rather look to regulatory structures that take the best of both.

C. *Lack of Legal Accountability*

Another pervasive critique of privatization is that private actors operate above the law, beyond the legal rules constraining their public counterparts.¹⁸⁰

The core of this critique hinges on the inapplicability of constitutional protections.¹⁸¹ Courts have developed state action tests to draw a line between conduct that is sufficiently public—and thus subject to constitutional constraints—and conduct that is private—and not subject to constitutional rules.¹⁸² These tests frequently exempt private actors across the criminal system. Private police are a prime example.¹⁸³ Private police typically are not required to demonstrate legal

NBC NEWS (May 25, 2021, 8:52 AM), <https://www.nbcnews.com/news/nbcblk/monumental-impact-george-floyds-death-black-america-rcna1021> [<https://perma.cc/G5HR-GMCQ>].

¹⁷⁹ See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 393 (2016) (defining “organized copwatching” as “groups of local residents who wear uniforms, carry visible recording devices, patrol neighborhoods, and film police-citizen interactions in an effort to hold police departments accountable”); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177–200 (2014) (discussing courtroom audience’s role in keeping judges and prosecutors accountable).

¹⁸⁰ See, e.g., VERKUIL, *supra* note 125, at 84–90; Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY*, *supra* note 133, at 1, 4–5; Dolovich, *supra* note 110, at 480–500.

¹⁸¹ The Fourth Amendment, for example, requires an “invasion[] on the part of the government.” *Boyd v. United States*, 116 U.S. 616, 630 (1886).

¹⁸² The state action doctrine has yielded a body of law that is notoriously confused and confusing, “leaving a dizzying array of outcomes with few common threads.” Kimberly N. Brown, *Outsourcing, Data Insourcing, and the Irrelevant Constitution*, 49 GA. L. REV. 607, 651–52 (2015); see also Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145, 145 (2017) (“In U.S. constitutional law, the state action doctrine—attaching the protections of individual rights to government action—is notoriously confusing, if not incoherent.”); Ohm, *supra* note 86, at 1339 (“In the future, the police request alone will satisfy state action. . . . [T]he ‘action’ of the state will seem thin compared to the cases we think about today.”).

¹⁸³ Stoughton, *supra* note 20, at 127–30 (citing Sklansky, *supra* note 49, at 1270–75); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 91 (2004) (“The law that regulates the public police, however, is largely inapplicable to the private police. An unyielding legal distinction divides the two groups.”); see also *United States v. Day*, 591 F.3d 679, 689 (4th Cir. 2010); Brian R. Johnson & Ruth S. Stevens, *The Regulation and Control of Bail*

cause to perform a stop or search, are not required to administer *Miranda* warnings, and need not provide legal counsel upon request.¹⁸⁴ These constitutional gaps, in turn, can allow *public* police to evade their legal limits by using evidence provided by private police, even if obtained by methods that otherwise would have been unconstitutional.¹⁸⁵

A similar dynamic exists around statutory limits. Because many statutes governing the criminal system do not apply to private parties, law enforcement can rely on private actors to evade statutory restrictions. Examples include data privacy laws and open records laws.¹⁸⁶

But this analysis does not tell the whole story. First, not all constitutional and statutory protections exempt private actors. Under state action tests, for example, private prison employees typically are subject to constitutional restrictions.¹⁸⁷ There also has been statutory movement in this direction, particularly around emerging technologies.¹⁸⁸

Second, the arguments about the legal unaccountability of private actors often do not account for how profoundly unaccountable public actors can be, despite being subject to constitutional restrictions.¹⁸⁹

Recovery Agents: An Exploratory Study, 38 CRIM. JUST. REV. 190, 192 (2013) (stating, in the context of bounty hunters, that private actors “have unique powers that far surpass those of the police in America”).

¹⁸⁴ See Stoughton, *supra* note 20, at 133 (“Because they are private actors, “[p]rivate police have been held exempt from the Fourth Amendment and the *Miranda* rules—as well as from restrictions on entrapment and statutory disclosure requirements.” (quoting Slansky, *supra* note 49, at 1240)); Rushin, *supra* note 82, at 180 (“[T]he law facilitates private police interrogations. While traditional police must read criminal suspects *Miranda* warnings before beginning interrogation, private police have no comparable regulation.” (footnote omitted)); Simmons, *supra* note 6, at 929.

¹⁸⁵ See, e.g., Joh, *supra* note 183, at 114–17 (discussing the “reemergence of the silver platter doctrine,” under which “private police may obtain evidence in ways forbidden to the public police, and then they may turn over contraband, statements, and other kinds of evidence for use at trial”).

¹⁸⁶ See, e.g., Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 719–22 (2010) (Because they are not subject to federal privacy laws, private data brokers “acquire the information more liberally on their own and submit raw data or synthesized intelligence to the government. DHS thus gets the benefit of more sweeping, intrusive searches than would otherwise be permitted of government officials, short of their first obtaining warrants or securing legislative change.” (footnote omitted)); *supra* note 162 (discussing open records laws).

¹⁸⁷ See STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 2:15 (2021) (“Most lower courts have viewed the private operation of prisons under contract with state and local governments as subject[] . . . to § 1983 suits.”).

¹⁸⁸ See *infra* notes 293–97 (discussing Utah ALPR legislation and other statutes that reach privately collected data).

¹⁸⁹ See, e.g., Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763 (2012) (noting that constitutional law cannot fully address problems of police regulation).

Take, for example, the Constitution's failure to address racially disparate law enforcement. Racial disparities permeate every level of the criminal system.¹⁹⁰ The constitutional provisions that one might expect to address these disparities have been imbued with impossibly high legal standards. The Equal Protection Clause, for example, has been interpreted to require discriminatory intent of the officers involved, leaving most widespread racial disparities beyond reach.¹⁹¹ Other constitutional requirements have been interpreted to provide law enforcement with expansive discretion, creating ripe conditions for discrimination. For example, police effectively are given carte blanche to perform pretextual stops and then seek "consent" to search.¹⁹² The results are huge racial disparities with minimal constitutional intervention.¹⁹³

These constitutional failures are compounded by the judiciary's persistent reluctance to provide meaningful redress when it does find constitutional violations.¹⁹⁴ Courts decline to exclude evidence in the face of illegal searches.¹⁹⁵ When civil rights plaintiffs overcome the bevy of court-erected procedural hurdles, officers frequently are protected by qualified immunity, leaving people who experience egregious misconduct with no recourse.¹⁹⁶ In one recent example, a court

¹⁹⁰ See Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 854–59 (2011) (citing evidence of racial profiling in policing). Indeed, although this Article focuses primarily on the critiques (and harms) of privatization, when discussing harms of the criminal system, the place to begin is with racial harms. For more background, see generally PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); ALEXANDER, *supra* note 136; Bell, *supra* note 49; Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1609, 1619 (2012).

¹⁹¹ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (proving that an equal protection violation requires "proving 'the existence of purposeful discrimination.' . . . [plaintiffs] must prove that the decisionmakers in [their] case acted with discriminatory purpose." (footnote omitted) (citations omitted) (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967))); *Brown v. City of Oneonta*, 195 F.3d 111, 118–19 (2d Cir. 1999).

¹⁹² See, e.g., *Whren v. United States*, 517 U.S. 806, 811–16 (1996).

¹⁹³ See Harcourt & Meares, *supra* note 190, at 854–59 (citing evidence of racial profiling in policing).

¹⁹⁴ See, e.g., Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1500–19 (2018) (discussing the narrowing availability of judicial remedies, focusing on policing); Friedman & Ponomarenko, *supra* note 140, at 1865 ("[J]udicial review is completely inadequate for [the regulation of policing].").

¹⁹⁵ Friedman & Ponomarenko, *supra* note 140, at 1866–67.

¹⁹⁶ *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–09 (1983) makes it nearly impossible to obtain injunctive relief, while *Clapper v. Amnesty International USA*, 568 U.S. 398, 408–09 (2013) does the same for aggregate litigation. For a discussion of the barriers on standing, see generally Vicki C. Jackson, Symposium: Standing in the Roberts Court, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 WM. & MARY BILL RTS. J. 127, 149–75 (2014). In addition to the

granted immunity to officers who tased a man soaked in gasoline knowing that it would light him on fire.¹⁹⁷ And when individuals manage to secure damages awards, they have little practical impact.¹⁹⁸

Extraconstitutional mechanisms are similarly ineffective in holding public actors accountable. Consider the ways we punish police and prosecutor misconduct. Policing agencies are notorious for their inability and unwillingness to punish their own officers, even those with long histories of misbehavior.¹⁹⁹ Disciplining officers can be challenging in part because of public sector employee protections—union contracts, law enforcement officer bills of rights (“LEOBRs”), civil service boards, and arbitrators all make it exceedingly difficult to punish and remove misbehaving officers.²⁰⁰ Many cities have created civilian review boards, but these boards rarely have authority to make meaningful change.²⁰¹ And when officers are disciplined by one department, they often simply transfer to another.²⁰² Prosecutor discipline is not much better.²⁰³

dubious legal protection of qualified immunity, see Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2018); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 47 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 17 (2017), municipalities cannot be sued unless one meets the elaborate requirements of *Monell v. Department of Social Services*, 436 U.S. 658, 690–95 (1978), and its progeny.

¹⁹⁷ See *Ramirez v. Guadarrama*, 844 F.App’x 710, 712 (5th Cir. 2021).

¹⁹⁸ See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (finding that police officers found liable are “virtually always indemnified”); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1633 (2012) (noting that money damages are often ineffective in deterring constitutional violations).

¹⁹⁹ See DARREL W. STEPHENS, U.S. DEP’T OF JUST., NCJ 234052, POLICE DISCIPLINE: A CASE FOR CHANGE, 1 (2011) (“Police disciplinary procedures have long been a source of frustration for nearly everyone involved . . .”).

²⁰⁰ See, e.g., Benjamin Levin, *What’s Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1340 (2020) (summarizing dominant critiques of police unions, including that “they operate as impediment to reform by opposing specific policies and shielding officer misconduct”); cf. Ovetta Wiggins & Erin Cox, *Maryland Enacts Landmark Police Overhaul, First State to Repeal Police Bill of Rights*, WASH. POST (April 10, 2021, 10:00 PM), https://www.washingtonpost.com/local/md-politics/hogan-vetoes-police-accountability/2021/04/09/c0ac4096-9967-11eb-962b-78c1d8228819_story.html [<https://perma.cc/EKQ7-CVT4>] (noting that Maryland, the first state to implement a Law Enforcement Bill of Rights (“LEOBR”), repealed the law as part of the State’s efforts to promote justice in policing).

²⁰¹ See Sharon R. Fairley, *Survey Says?: U.S. Cities Double Down on Civilian Oversight of Police Despite Challenges and Controversy*, 2020 CARDOZO L. REV. DE NOVO 1, 32–50.

²⁰² See, e.g., Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676 (2020); AM. L. INST., *supra* note 14 at § 14.13. There have been a range of legislative efforts attempting to address this problem. See, e.g., S. 6489, 2021 S. Assemb. B., Reg. Sess. (N.Y. 2021) <https://www.nysenate.gov/legislation/bills/2021/a7284> [<https://perma.cc/Q973-M67Q>]; Roger L. Goldman, *A Model Decertification Law*, 32 ST. LOUIS U. PUB. L. REV. 147, 149 (2012).

²⁰³ See, e.g., KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A RE-

In light of all this, there are ways in which it can be easier to hold private actors accountable.²⁰⁴ Private sector actors are at-will employees, meaning many public sector hurdles to discipline—like LEOBRs and union contracts—do not apply.²⁰⁵ At a policy level, because the private sector is subject to market pressures, private entities can show greater responsiveness to potential for civil liability and even media scrutiny.²⁰⁶ Compound this with the fact that private sector actors do not enjoy the same immunity protections.²⁰⁷ This is likely why there are examples of private industry implementing their own accountability mechanisms, such as ethics boards, codes of conduct, impact statements, and whistleblowing.²⁰⁸ These mechanisms are particularly prominent around emerging technologies, where government regulation struggles to keep pace.²⁰⁹

PORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 2, 18–38 (2010) (finding that across 707 misconduct cases, 548 cases were upheld, but the misconduct was found harmful in only 157 cases); *see also* Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 887–88 (2015) (describing examples of ineffective prosecutor discipline). *But see* Edward R. Montgomery, *The Facts and Fictions of Prosecutorial Misconduct*, 33 UTAH B.J. 14 (2020).

The same can be said about public corruption more broadly. *See, e.g.*, Lise Olsen, *In Texas, Corrupt Politicians Face Little Accountability*, TEX. OBSERVER (Sept. 20, 2021, 9:00 AM), <https://www.texasobserver.org/corrupt-texas-politicians-face-little-accountability/> [<https://perma.cc/Z9J9-LMAE>].

²⁰⁴ *See, e.g.*, EISEN, *supra* note 22, at 177 (“There are abuses in both public and private correctional facilities, and there is not enough data to say one is better (or worse) than the other.”). *Cf.* Rappaport, *supra* note 68, at 2257 (“[W]hile retail justice may not be ideal, it may still be preferable to criminal justice. Private justice, in fact, is the predictable result of, and a potential palliative for, aggressive policing and harsh criminal penalties.”).

²⁰⁵ At-will employment is the default position in every state but Montana. *At-Will Employment – Overview*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 15, 2008) <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> [<https://perma.cc/8YCY-JUDF>].

²⁰⁶ *See* Freeman, *supra* note 139, at 819 (“Although these forms of accountability may not satisfy the traditional administrative law demand for accountability to an elected body and vulnerability to judicial review, they nonetheless may play an important role in legitimizing, or rendering acceptable, a particular regulatory regime.”); *see also* Volokh, *supra* note 136, at 150 (“One can have significant de facto control over one’s contractor just by having known reasons for failing to renew the contract . . .”).

²⁰⁷ *See, e.g.*, Richardson v. McKnight, 521 U.S. 399, 412–13 (1997).

²⁰⁸ *See* Katyal, *supra* note 165, at 108 (noting these mechanisms in the context of algorithmic accountability).

²⁰⁹ *E.g.*, *Axon AI Ethics Board*, AXON, <https://www.axon.com/company/ai-and-policing-technology-ethics> [<https://perma.cc/S5R4-SVQ3>].

D. *Perverse Financial Incentives*

The most pervasive critique of privatization focuses on the distorting effects of profit motives.²¹⁰ Private actors make decisions to increase revenue, maximize profit, and ensure continuity of their contracts; public actors, the argument goes, act with purer motives, such as the pursuit of justice.²¹¹ With regard to private prisons, for example, scholars argue that corporations maximize efficiency and cost-effectiveness by sacrificing quality of services and living conditions.²¹² Prison companies may also take policy positions that ensure there remain large numbers of people to incarcerate—ignoring rehabilitation programs, imposing discipline to lengthen sentences, and lobbying for stricter sentencing laws.²¹³ Private police are similarly criticized—that

²¹⁰ This critique is closely tied to another: that the perception of financial conflicts can undermine institutional legitimacy. Even absent evidence that profit motives distort behavior, some commentators argue that any role for private entities “may jeopardize the legitimacy of government action because the public may suspect that private profit-making—rather than public purposes—is being served.” Minow, *supra* note 12, at 1234; *see also* Volokh, *supra* note 136, at 189 (discussing Israeli Supreme Court decision striking down private prisons, noting “the absence of actual violations is irrelevant; perceptions of private purposes are enough to ban the practice.”). Loss of legitimacy, in turn, can threaten public safety. *See* Joh, *supra* note 183, at 59 (discussing deficit in trust in police-community relationships, and the resulting impact on police work).

²¹¹ *See* Levin, *supra* note 18, at 2315 (“[T]o the extent that criminal law is meant to embody some sort of collective consciousness or shared moral opprobrium, a system that employs private actors or that implicates private motives may fail to advance the public interest.” (footnote omitted)).

²¹² *See, e.g.,* EISEN, *supra* note 22, at 181 (“[P]rivate prisons have every incentive to cover [their financial data] up. A public prison—no matter how horrible the scandal—will never lose a contract; a private prison will.”); Sharon Dolovich, *How Privatization Thinks: The Case of Prisons* (arguing that operators of private prisons will promote efficiency over other important interests), in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 133, at 128, 134; Robert Craig & André Douglas Pond Cummings, *Abolishing Private Prisons: A Constitutional and Moral Imperative*, 49 U. OF BALT. L. REV. 261, 278 (2020); Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113, 116 (2009) (“[P]rivate prison companies are primarily profit-seeking entities, working to reduce costs wherever possible. Cost-cutting measures promote inferior contract performance, undue safety risks, and poor delivery of inmate services.”); Dolovich, *supra* note 110, at 460–61 (“[A]necdotal evidence suggests that contractors have prioritized economy above all else, with disturbing results for the inmates themselves,” including increased violence).

²¹³ *See* EISEN, *supra* note 22, at 186 (“[P]rivate prison corporations have created a web of perverse incentives around a common financial interest—the steady growth of mass incarceration.”); Geiza Vargas-Vargas, *The Investment Opportunity in Mass Incarceration: A Black (Corrections) or Brown (Immigration) Play?*, 48 CAL. W. L. REV. 351, 360–65 (2012) (discussing how the private prison industry helped draft bills that would expose large number of people to incarceration); Anderson, *supra* note 212, at 116 (“The profit motive also encourages private prison companies to disregard the principles of inmate rehabilitation and criminal deterrence; if advanced, these principles would undermine profits and reduce the demand for these companies’

they act to protect private property at the public's expense.²¹⁴ Scholars also question the incentives of private prosecutors²¹⁵ and technology companies.²¹⁶

Although these critiques are well taken, the picture is incomplete. Public sector policymaking is not immune from distorted financial incentives.²¹⁷

Government addiction to fines, fees, and forfeitures is a clear example. Millions of low-income Americans owe tens of billions of dollars in criminal fines and fees.²¹⁸ These fees stem from everything from traffic violations and court-mandated programs to fees for taking a case to trial.²¹⁹ In some places, fines and fees account for most of the local budget.²²⁰ These windfalls allow lawmakers to plug shortfalls and

services.”) Dolovich, *supra* note 110, at 523, 529 (discussing the dangers of profit motives as they relate to sentencing policies, discipline, and parole). *But see* Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1197 (2008) (“In this Article, I evaluate . . . the argument against prison privatization based on the possibility that the private prison industry will distort the criminal law by advocating for incarceration. I conclude that there is at present no particular reason to credit this argument.”).

²¹⁴ *E.g.*, Rushin, *supra* note 82, at 174–75.

²¹⁵ *E.g.*, Romero, *supra* note 96, at 199; Fairfax, *supra* note 67, at 296–97.

²¹⁶ *E.g.*, Joh, *Undue Influence*, *supra* note 19, at 20.

²¹⁷ *See* Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/8Z5P-GADR>].

²¹⁸ *See* BRIANA HAMMONS, FINES & FEES JUST. CTR., TIP OF THE ICEBERG: HOW MUCH CRIMINAL JUSTICE DEBT DOES THE U.S. REALLY HAVE? 6–9 (2021), https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf [<https://perma.cc/Z4VH-9K2M>]; KARIN D. MARTIN, SANDRA SUSAN SMITH & WENDY STILL, U.S. DEP’T OF JUST., NCJ 249976, SHACKLED TO DEBT: CRIMINAL JUSTICE FINANCIAL OBLIGATIONS AND THE BARRIERS TO RE-ENTRY THEY CREATE 1, 5 (2017), <https://www.ncjrs.gov/pdffiles1/nij/249976.pdf> [<https://perma.cc/NT4H-D5U2>].

Jurisdictions impose fines as punishment for everything from traffic violations to serious misdemeanors, whereas fees are designed to offset costs. *See* MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES (2019); *see also* John D. King, *Privatizing Criminal Procedure*, 107 GEO. L.J. 561, 562, 571 (2019) (fees for indigent defense); Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 57 (2013) (“pay-to-stay” fines). For background on the debt incurred by individuals passing through the criminal justice system, *see generally* Neil L. Sobol, *Charging the Poor: Criminal Justice Debt and Modern-Day Debtors’ Prisons*, 75 MD. L. REV. 486 (2016); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1193.

²¹⁹ *See, e.g.*, Editorial Board, Opinion, *Train the Police to Keep the Peace, Not Turn a Profit*, N.Y. TIMES (Nov. 20, 2021), <https://www.nytimes.com/2021/11/20/opinion/police-traffic-stops-deaths.html> [<https://perma.cc/WJ9D-RTNE>] (“Some police departments across the country have embraced the corrupting and unjust practice of raising revenue for their municipalities by pushing officers to write as many traffic tickets as possible.”).

²²⁰ *See* Mike Maciag, *Addicted to Fines: Small Towns in Much of the Country Are Danger-*

avoid tough budgeting questions.²²¹ Forfeiture laws have allowed law enforcement to seize and retain billions of dollars from people suspected of criminal activity, even without bringing formal charges.²²² Because forfeiture funds are generally spent outside of the budgeting process, they can be used to fund a variety of off-the-books initiatives and splurges.²²³ As a result, fines, fees, and forfeiture opportunities can dictate enforcement priorities.²²⁴ They also create a two-tiered system of justice in which individuals with means can reap a range of benefits—avoiding arrest or incarceration through diversion programs

ously *Dependent on Punitive Fines and Fees*, GOVERNING (Aug. 19, 2019), <https://www.governing.com/archive/gov-addicted-to-fines.html> [<https://perma.cc/XG8C-64U3>].

²²¹ See King, *supra* note 218, at 562 (“As states continue to deal with ever-increasing budget pressures, many have begun to look for nontraditional ways to pay for criminal prosecutions and to shift the costs of the system onto those charged with crimes.”); Brief for the American Civil Liberties Union et al. as Amici Curiae Supporting Petitioners at 7, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091) (“Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.”).

²²² See DICK M. CARPENTER II, LISA KNEPPER, ANGELA C. ERICKSON & GENNIFER MC-DONALD, *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* (2d ed. 2015) (highlighting how local law enforcement uses the federal Equitable Sharing Program to avoid restrictive forfeiture laws); see also *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari) (“This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses.”); *Wayside Church v. Van Buren Cnty.*, 847 F.3d 812, 823 (6th Cir. 2017) (Kethledge, J., dissenting) (“Van Buren County took property worth \$206,000 to satisfy a \$16,750 debt, and then refused to refund any of the difference. In some legal precincts that sort of behavior is called theft.”).

²²³ See CARPENTER II ET AL., *supra* note 222, at 7, 39–41; MARIAN R. WILLIAMS, JEFFERSON E. HOLCOMB, TOMISLAV V. KOVANDZIC & SCOTT BULLOCK, *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 15–20 (1st ed. 2010); see also Shannon Dooling & Christine Willmsen, *Boston Police Bought Spy Tech with a Pot of Money Hidden from the Public*, WBUR (Dec. 17, 2021), <https://www.wbur.org/news/2021/12/17/massachusetts-cell-site-simulator-civil-forfeitures> [<https://perma.cc/K29M-C5UP>]; Tom Schuba & Frank Main, *CPD Launched Secret Drone Program with off-the-Books Cash*, CHI. SUN TIMES (May 12, 2021, 11:02 AM), <https://chicago.suntimes.com/city-hall/2021/5/11/22425299/cpd-chicago-police-drone-secret-emails-hack-lori-lightfoot-dodsecrets-city-hall> [<https://perma.cc/X3PR-UYLN>]; Hannah Morse & Alexandra Clough, *Florida Sheriff Funds \$35,000-a-Month Luxury Office with ‘the Money We Take from the Bad Guys.’* USA TODAY (Aug. 14, 2020, 12:50 PM), <https://www.usatoday.com/story/news/nation/2020/08/13/palm-beach-county-sheriff-ric-bradshaw-rents-luxury-office-space/3366088001/> [<https://perma.cc/VQ5W-CVHQ>].

²²⁴ See David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 31 (2012); see also THE FERGUSON REPORT, *supra* note 72, at 4–5; ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* 113–48 (2018).

or community service²²⁵—and those who cannot pay face a spiral of increasing penalties.²²⁶

Even beyond fines and fees, financial incentives permeate the criminal system in countless ways. Cities seeking to revitalize certain neighborhoods (and their tax bases) often turn to aggressive enforcement to remove “undesirable” elements.²²⁷ Candidates and legislators seek the endorsement of labor organizations and business interests and promise political support in return.²²⁸ Rural communities vie for prisons, and with them the potential for jobs, tax revenue, and local spending.²²⁹ In short, financial motives permeate the public sector much like the private.

Again, there are ways that private influences can guard against these financial motives. The growing role of nonprofit CBOs is one example. By empowering community-focused entities—such as local

²²⁵ See, e.g., Dave Maass, “No Cost” License Plate Readers Are Turning Texas Police into Mobile Debt Collectors and Data Miners, ELEC. FRONTIER FOUND. (Jan. 26, 2016), https://www.eff.org/deeplinks/2016/01/no-cost-license-plate-readers-are-turning-texas-police-mobile-debt-collectors-and#footnoteref1_83a8ezn [<https://perma.cc/KLT5-DD8B>]; Radley Balko, Opinion, *A Louisiana DA Will Let You out of Your Community Service Obligation—If You Donate to His Nonprofit*, WASH. POST (Nov. 1, 2019), <https://www.washingtonpost.com/opinions/2019/11/01/louisiana-da-will-let-you-out-your-community-service-obligation-if-you-donate-his-nonprofit/> [<https://perma.cc/Z6V9-TBG8>]; Dewan & Lehren, *supra* note 87.

²²⁶ See ALEXES HARRIS, BETH HUEBNER, KARIN MARTIN, MARY PATTILLO, BECKY PETTIT, SARAH SHANNON, BRYAN SYKES, CHRIS UGGEN & APRIL FERNANDES, *MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 14* (2017) (discussing “collection charges, interest, non-payment charges, per-payment charges, payment plan set-up charges,” driver’s license suspension, and eventually rearrest); see also MARIO SALAS & ANGELA CIOLFI, *LEGAL AID JUST. CTR., DRIVEN BY DOLLARS: A STATE BY-STATE ANALYSIS OF DRIVER’S LICENSE SUSPENSION LAWS FOR FAILURE TO PAY COURT DEBT 1* (2017); *THE FERGUSON REPORT*, *supra* note 72, at 42–43; King, *supra* note 218, at 598–99; Sobol, *supra* note 218, at 492–93.

²²⁷ See, e.g., Brenden Beck, *The Role of Police in Gentrification*, APPEAL (Aug. 4, 2020), <https://theappeal.org/the-role-of-police-igentrification-breonna-taylor/> [<https://perma.cc/52GT-3Q8W>]; see also *supra* notes 41–42 and accompanying text.

²²⁸ See Joan Petersilia, *California’s Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 224 (2008) (discussing California Correctional Peace Officers Association and its lobbying and political clout); Volokh, *supra* note 213, at 1203 (noting that correctional unions have “contributed massively in support of tough-on-crime positions on voter initiatives and [have] given money to crime victims’ groups, and public corrections officers unions in other states have endorsed candidates for their tough-on-crime positions”).

²²⁹ See Barkow, *supra* note 103, at 729 (“Those with an economic stake in prison growth—such as rural communities, corrections officer unions, and private prison companies—are strong advocates for longer sentences.”); Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration> [<https://perma.cc/K6Y9-2DWM>] (“[F]amilies spend \$2.9 billion a year on commissary accounts and phone calls. Families are also often responsible for paying court fees, restitution and fines when a member goes to prison. . . . [T]he average family paid roughly \$13,000 in fines and fees.”).

violence interrupters or social service groups—policymakers can help ensure that resources are directed toward the communities that are most harmed by the criminal system.²³⁰

If one’s goal is to remove the influence of financial incentives on decisionmakers, one should not assume that the public or private sector is necessarily preferable, but instead focus on guardrails and regulation that curb these influences.

* * * * *

The explosive growth of privatization over the last few decades has brought with it a rich body of scholarship on privatization in the criminal system. Focusing on some of the most conspicuous manifestations of privatization—private prisons in particular—this scholarship has raised a number of valid governance concerns.²³¹ But this Part makes clear that these concerns are not limited to privatization because the public sector is vulnerable to these faults as well. At the same time, private influences sometimes mitigate these harms.

Simply put, the “public” or “private” label is a poor proxy for harm in the criminal system, and undue focus on these labels may cause policymakers to miss opportunities to mitigate harm.²³²

III. POLICYMAKING ACROSS THE PUBLIC/PRIVATE DIVIDE: TOWARD PARITY IN GOVERNANCE

Part I described a criminal system thoroughly riddled with private influences, stretching well beyond the bounds of formal contracting out.

Part II presented a paradox: Yes, private influence can be corrupting and harmful, but public management of the criminal system is hardly rosy, and ironically private influence on occasion can help address some of the worst dysfunction of public actors.

²³⁰ See, e.g., Laura McCrystal & Marina Affo, *Philly Is Pouring Millions into Violence Prevention as Shootings Soar. What Does that Money Buy?*, PHILA. INQUIRER (June 24, 2021), <https://www.inquirer.com/news/philadelphia/philly-is-pouring-millions-into-violence-prevention-shootings-soar-what-does-that-money-buy-20210624.html> [<https://perma.cc/N9CR-54J3>] (\$20 million in funding in Philadelphia to violence prevention groups, including Mothers in Charge); White House Community Intervention Press Release, *supra* note 4.

²³¹ See, e.g., *supra* Part I.

²³² Dolovich, *supra* note 110, at 506–07 (“reject[ing] the ‘either/or’ approach of comparative efficiency” and “aim[ing] not to champion the least bad alternative, but instead to understand how and why existing prisons and jails, public *and* private, fall so far short of the ideal.”).

This Part addresses the question: In light of this more nuanced view of the private influence, how should policymakers think about and regulate the public/private divide?

This Article calls for policymakers to embrace the role of non-state actors in the criminal system, but to do so in a deliberate way. Private influence is a defining characteristic of the criminal system. It cannot be excised. But more than that, public and private frequently operate in a symbiotic relationship—when one ebbs, the other flows to fill the void. This is not necessarily beneficial or harmful—private influence can be used to serve any ideology. What policymakers should do is regulate in ways that embrace the benefits of private influence but also address the most pressing governance concerns (be it lack of transparency or accountability, or another issue).²³³

This Part concludes by applying these lessons in two specific contexts: (1) the role of community-based violence prevention organizations, and (2) law enforcement’s access to private surveillance and the private data market.

A. *The Inseparability & Reciprocity of Public & Private*

A full accounting of the roles of public and private actors in the criminal system makes clear that the two are inextricably intertwined.²³⁴ There can be no purely private or purely public system; the two share a symbiotic relationship.

Government cannot function without private actors. The state cannot efficiently build all the goods it needs, be it vehicles or body cameras. Public prisons rely on a bevy of private goods and services, from flexible pens and paper utensils to healthcare, transportation, and communication.²³⁵ The private sector is especially critical in a world of advancing AI and algorithmic technologies, where companies

²³³ In response to the judiciary’s failure to turn constitutional principles into meaningful limits on public actors in the criminal system, many have called for additional regulation, either legislative or administrative. *E.g.*, Friedman & Ponomarenko, *supra* note 140, at 1850–51 (“Even if the Constitution has nothing to say about this, it seems altogether appropriate for there to be rules—formulated with public input . . .”). For a discussion of different regulatory approaches, and the values behind them, see generally John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205 (2015); Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 537–44 (2013).

²³⁴ See Simmons, *supra* note 6, at 968–69 (“A more appropriate definition might be that a criminal justice system is one that responds to, processes, and resolves criminal activity—and such a system may or may not involve the state.”).

²³⁵ See EISEN, *supra* note 22, at 73–76; see also Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1858 (2020).

have a yawning comparative advantage over government.²³⁶ Even beyond contracting out, the inseparability continues: private individuals decide whether to call the police, law enforcement depends on witness cooperation to build a case, and so on.

But the private sector also relies on public actors. For example, many private entities depend on public spending. This is true of the prison industrial complex, but also for many CBOs that offer nonpunitive and noncarceral approaches.²³⁷

Not only are the public and private spheres inseparable, but they often operate in a reciprocal relationship. There is an ebb and flow between the two: expansion of one can displace the other; and when one withdraws or is inadequate, the other often steps in. Anticipating this ebb-and-flow is crucial to foreseeing the real-world impacts of policy reforms.

Take, for example, ongoing debates about police funding. The defund movement focuses on shrinking police resources to limit policing's reach. Ideology aside, sound policymaking must account for the likely ebb-and-flow of the public and private sectors. If legislators limit police funding, they must be conscious of the ways that the private sector might replace the public sector. For example, police may turn to private funding, private individuals and businesses may install more surveillance, neighborhoods might turn to private security.²³⁸

²³⁶ See, e.g., John J. Lennon, Opinion, *The Cost of Calling My Mom From Prison*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/12/opinion/prison-internet-technology-jpay.html> [<https://perma.cc/N9HZ-JD6N>].

²³⁷ See, e.g., *Funded Programs*, CRIM. JUST. INV. INITIATIVE, <http://cjjii.org/funding/funded-programs/> [<https://perma.cc/N7MM-LUME>] (Manhattan District Attorney's Office listing a wide variety of CBOs and non-profits funded by forfeiture funds); Press Release, N.Y.C. Mayor's Off. of Crim. Just., Shootings Fell Sharply in Neighborhoods Operating NYC-Funded "Cure Violence" Programs, New Study Shows (Oct. 2, 2017), <https://criminaljustice.cityofnewyork.us/press-release/shootings-fell-sharply-in-neighborhoods-operating-nyc-funded-cure-violence-programs-new-study-shows/> [<https://perma.cc/2BT8-4EJG>] (discussing municipal funding of Cure Violence initiative).

²³⁸ See, e.g., Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277, 313 (2020) ("Underfunding may also increase pressure on law enforcement agencies to find alternative revenue streams."); Gregory Pratt, *In Wake of Looting, Chicago to Spend \$1.2 Million on Private Security Firms to Help Protect Businesses*, CHI. TRIB. (June 6, 2020, 1:10 PM), <https://www.chicagotribune.com/news/breaking/ct-chicago-hires-private-security-firms-20200606-6d75fp7srzaz3hiltDNAqrko6u-story.html> [<https://perma.cc/S8JV-DPTH>]; Rebecca Ellis, *Fatal Shooting Exposes Murky Role of Portland's Hired Guards*, PORTLAND TRIB. (July 24, 2021), <https://pamplinmedia.com/pt/9-news/516492-412725-fatal-shooting-exposes-murky-role-of-portlands-hired-guards> [<https://perma.cc/KN79-NMT2>]; Suzanne Phan, *Community Believes Crime Is up in Chinatown-ID, Explores Possibility of Hiring Security*, KOMO NEWS (Sept. 15, 2021), <https://komonews.com/news/operation-crime-justice/community-believes-crime-is-up-in-chinatown-id-explores-possibility-of-hiring-security> [<https://perma.cc/N5WL-QMX5>]; J.D. Capelouto,

The point here is not a normative one, but simply that lawmakers must think through these possibilities in advance and have sensible regulatory responses.

As another example, consider how public and private actors use physical force to ensure public safety. In general, people vest government with authority to use force and violence against members of the community to ensure collective safety. This authority, which is usually exercised by police, is meant to displace vigilantism and private retribution.²³⁹ But when government is unable (or unwilling) to provide for adequate security, private actors step in.

The results can be both troubling and hopeful. Although the affluent can afford to supplement government-sponsored security with private police and surveillance, less affluent neighborhoods do not have the same options. When government fails to provide for security and neighborhoods lack resources and investment, private individuals can resort to self-help. This can sometimes mean high levels of violence and the emergence of criminal organizations, but it can also lead to the rise of community-led antiviolence organizations.²⁴⁰

New Buckhead Security Plan Could Cost \$1.6M; Councilors Donating \$125K, ATLANTA J.-CONST. (Dec. 28, 2020), <https://www.ajc.com/news/atlanta-news/new-buckhead-security-plan-could-cost-16m-councilors-donating-125k/XNQ7FSRJ15CIZDNRZ4C37GFNAY/> [<https://perma.cc/YCR4-VV4B>]; Gordon R. Friedman, *Portland City Council OK's \$10 Million for City Hall Security over Protestors' Shouts and Jeers*, OREGONIAN (May 22, 2019, 12:09 PM), <https://www.oregonlive.com/portland/2019/05/portland-city-council-oks-10-million-for-city-hall-security-over-protesters-shouts-and-jeers.html> [<https://perma.cc/8ML3-G7PJ>]; Lisa Fickenscher, *Retailers Beef up Security as Looting Fears Continue*, N.Y. POST (June 4, 2020, 10:48 PM), <https://nypost.com/2020/06/04/retailers-beef-up-security-as-looting-fears-continue-to-rise/> [<https://perma.cc/RWP2-BCAG>]; Geoff Baker, *More Businesses Fearing Property Damage Hire Private Security Guards in Wake of Protests*, SEATTLE TIMES (June 11, 2020, 11:31 PM), <https://www.seattletimes.com/business/local-business/more-businesses-fearing-property-damage-hire-private-security-guards-in-wake-of-protests/> [<https://perma.cc/4EQE-7KE5>]; Nellie Bowles, *Why Is a Tech Executive Installing Security Cameras Around San Francisco*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/10/business/camera-surveillance-san-francisco.html> [<https://perma.cc/2ZDR-Q9CK>]; see also Candice Bernd, *"Defund Police" Doesn't Mean Hire Private Guns—but Cities Are Doing Just That*, TRUTHOUT (Sept. 1, 2020), <https://truthout.org/articles/defund-police-doesnt-mean-hire-private-guns-but-cities-are-doing-just-that/> [<https://perma.cc/YZ7Y-X8X6>].

²³⁹ Sklansky, *supra* note 146, at 89–91.

²⁴⁰ See, e.g., THOMAS ABT, BLEEDING OUT: THE DEVASTATING CONSEQUENCES OF URBAN VIOLENCE—AND A BOLD NEW PLAN FOR PEACE IN THE STREETS 66 (2019) (“In neighborhoods where cynicism runs high, if somebody beats up your cousin, you don’t call the police; you reach out to friends and family to ‘handle your business.’”); Sklansky, *supra* note 49, at 1170 (“The private security industry forms part of at least two larger phenomena in contemporary criminal justice. . . . The second is the ‘pluralizing of policing’—that is, the partial displacement of public policing not only by private security personnel, but also by community volunteers.” (footnote omitted)).

The point here is to take seriously the lesson of Part II: private influence neither is intrinsically beneficial nor harmful. It can come with both positive and negative effects and can be harnessed to promote any political agenda. While some private actors are used to funnel people into the criminal system (e.g., private police), others divert people from incarceration (e.g., restorative justice programs). Whereas some private actors promote government secrecy, others promote transparency.²⁴¹

Even nonprofits can be turned in service of different carceral approaches. Although there are a growing number of nonprofits embracing antiviolence, restorative justice, and even abolitionist goals, there are plenty of nonprofits pushing in the opposite direction. Victims' rights groups take "tough-on-crime" positions.²⁴² Labor organizations erect obstacles to removing police officers accused of egregious misconduct.²⁴³ Nonprofit police foundations are established for the express purposes of raising discretionary funds for police.²⁴⁴ These foundations often allow police to purchase surveillance equipment, investigative tools, and more while skirting public oversight.²⁴⁵

²⁴¹ Compare *supra* note 79 (discussing Harris Corporation's used on NDAs), with *supra* note 177 and accompanying text (discussing corporate built transparency portals and usage logs).

²⁴² See, e.g., Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 750 (2007) ("The victims' rights movement is and always has been a product of conservative tough-on-crime ideology."); Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 6 (1999) (characterizing the victims' rights movement as "fueled by grassroots campaigns of concerned citizens backed by politicians eager to outdo their opponents in the tough-on-crime competition"). For a vision of a less harmful victims' movement, see Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 334 (2020) ("True victims' rights advocacy focuses on what victims themselves want rather than the embrace of tough-on-crime narratives that serve as little more than ill-kept or empty promises. What victims want may well be what restorative justice has to offer. It is time to give it more serious consideration.").

²⁴³ See, e.g., Levin, *supra* note 200, at 1340 (summarizing dominant critiques of police unions, including that "they operate as impediment to reform by opposing specific policies and shielding officer misconduct").

²⁴⁴ See Zachary Warmbrodt, *New Racial Justice Target: Defund the Police Foundations*, POLITICO (Sept. 18, 2020, 4:30 AM), <https://www.politico.com/news/2020/09/18/new-racial-justice-target-defund-police-foundations-417423> [<https://perma.cc/9ZQX-LH3A>]; Kari Paul, *How Target, Google, Bank of America and Microsoft Quietly Fund Police Through Private Donations*, GUARDIAN (June 18, 2020, 4:12 PM), <https://www.theguardian.com/us-news/2020/jun/18/police-foundations-nonprofits-amazon-target-microsoft> [<https://perma.cc/T9FP-3V3H>] ("Police proponents say the foundations have emerged as police departments face budget cuts and are a means to supplement the force with top-of-the-line technology and weaponry.").

²⁴⁵ See *supra* note 29 and accompanying text. There are also non-profits that themselves operate advanced surveillance systems and provide police with direct access to those systems. See Dave Maass & Matthew Guariglia, *San Francisco Police Accessed Business District Camera Network to Spy on Protestors*, ELEC. FRONTIER FOUND. (July 27, 2020), <https://www.eff.org/>

In short, private actors do not fit a particular ideology—they are a means to many ends.²⁴⁶

B. Parity Across Public & Private

Given that private influences are unavoidable and can be harnessed to serve any end, policymakers ought to regulate their impact in ways that capture benefits and minimize harms. This prescription is simple enough, but rarely occurs today.

Rather than tailoring regulation to the persistent tangle of public and private, many existing legal rules and institutions place undue weight on the public/private line. This approach, in turn, leaves regulatory gaps. Constitutional restrictions, discussed above, are one example—they apply only when the state action test is met and thus largely fall by the wayside when private actors are involved.²⁴⁷ Open records laws are another example.²⁴⁸ Rather than trying to plug these gaps one at a time, a broader shift is needed.

Policymakers should deploy a “parity-focused” approach to regulation—regulation that targets and guards against the harms at stake, whether they result from public or private actors.²⁴⁹ When it comes to constitutional gaps, for example, a parity-focused approach favors revising certain constitutional doctrines that sharply distinguish between public and private actors. The private search doctrine is one such candidate.²⁵⁰

The Supreme Court has already taken a step toward parity around law enforcement access to a person’s location information. In

deeplinks/2020/07/san-francisco-police-accessed-business-district-camera-network-spy-protectors [https://perma.cc/5CZ8-JPSJ].

²⁴⁶ Cf. Freeman, *supra* note 132, at 1295 (“The trouble with ideological positions of this sort, on both sides of the privatization debate, is their intransigence in light of arguments about the empirical consequences of privatization. Empirically grounded claims about how privatization works, or might be made to work, are unlikely to move either side from its core beliefs.”).

²⁴⁷ See *supra* notes 183–85 and accompanying text.

²⁴⁸ See *supra* note 162 (discussing open records laws).

²⁴⁹ See William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 (2016) (“[A] court should ask whether government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform.”).

²⁵⁰ The private search doctrine allows law enforcement to conduct a warrantless search when a warrant would normally be required because a private party has already conducted the search. Compare *United States v. Jacobsen*, 466 U.S. 109, 115 (1984) (permitting warrantless search so long as law enforcement did not exceed the scope of the private search), with *State v. Eisfeldt*, 185 P.3d 580, 585–86 (Wash. 2008) (barring warrantless search under Washington Constitution because the individual’s privacy interest is not extinguished simply because a private actor has searched).

Carpenter v. United States,²⁵¹ the Court established a warrant requirement for location tracking via private cell-site location data, despite the fact that a private entity, not police, originally collected the information.²⁵² This is a step toward parity, and the *Carpenter* Court acknowledged as much: “Whether the Government employs its own surveillance technology . . . or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements”²⁵³ Whether and how courts will extend *Carpenter* remains to be seen.

A parity-focused approach would have a significant impact on private financing of the criminal system. As explained above, policing agencies use private philanthropy to purchase surveillance, upgrade equipment, and fund a variety of specialized units while skirting legislative (budgetary) oversight.²⁵⁴ Regulators could confront this democratic governance problem head on by, for example, requiring the same entity responsible for the agency’s budget to approve all donations and grants of significant value.²⁵⁵ Lawmakers might also require that anticipated donations or grants be accounted for in the budgeting process,²⁵⁶ or that contractors hired with those funds comply with open records laws.

There are a few recent examples of this type of parity-focused approach. A number of municipalities have enacted legislation that brings surveillance technologies under legislative oversight regardless of whether the technology was purchased with public or private funds.²⁵⁷ A group of lawmakers recently proposed a ban on law en-

²⁵¹ 138 S. Ct. 2206 (2018).

²⁵² *Id.* at 2221.

²⁵³ *Id.* at 2217 (“Although such records are generated for commercial purposes, that distinction does not negate *Carpenter*’s anticipation of privacy in his physical location.”).

²⁵⁴ *See supra* notes 30–31, 149, 167.

²⁵⁵ *See* CIVIL RIGHTS AND CIVIL LIBERTIES AUDIT OF BALTIMORE’S AERIAL INVESTIGATION RESEARCH (AIR) PROGRAM pt. IV (2020) <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5fc290577acac6192a142d61/1606586458141/AIR+Program+Audit+ReportFINAL+%28reduced%29.pdf> [https://perma.cc/9S8Z-MUV5]

(recommending ways to improve democratic governance and accountability around Baltimore’s AIR program).

²⁵⁶ *See* Lemos & Charles, *supra* note 29, at 1189 (“[T]he lesson of modern democratic theory is that the democratic process matters. Obsessing over process is not fetishizing, but reflects the conviction that a robust, inclusive political process is the best way of ensuring that decisions about public policy are made in the interest of the public. A well-functioning democratic process is, in this sense, a fundamental aspect of individual liberty.”).

²⁵⁷ *See, e.g.*, N.Y.C., N.Y., Local Law No. 65 (July 15, 2020); Am. C.L. Union, Community Control Over Police Surveillance (CCOPS) Model Bill, (Apr. 2021), <https://www.aclu.org/legal->

forcement access to certain types of data sold by private data brokers.²⁵⁸ But again, these developments remain the exception.

To be clear, a parity-focused approach does not require treating all nonstate actors precisely like state actors. Rather, it encourages legislators to carefully weigh the likely benefits and harms and regulate to mitigate those harms while preserving benefits.

Consider private police. Given the accountability gaps that exist around private police,²⁵⁹ policymakers ought to consider imposing some of the legal obligations that apply to public officers. For example, lawmakers could require private police to follow Fourth Amendment limits on arrest and detention. Or they might impose affirmative *Brady*-like obligations—requiring that private police disclose any exculpatory information in their possession, and even requiring prosecutors turn over impeachment information about private personnel.²⁶⁰ Legislatures might extend the exclusionary rule to reach private police (or at least those who are licensed).²⁶¹ Regulators could also require private police to collect data on stops, searches, and use of force, like their public counterparts.²⁶²

Of course, perfect equivalence between public and private police can be both impractical and undesirable. As government employees, police are given certain civil servant protections that policymakers may not want to grant private police. Although police budgets are subject to legislative oversight, it would be impractical to require every business or neighborhood that employs private security to go through the same public process. We may not want all private security to wear body cameras or even carry firearms. There may even be constitutional restrictions that would be unreasonable to impose of certain types of private security guards.²⁶³

Still, a presumption of parity between public and private as a guiding regulatory principle would do much to address many of the governance issues that exist across the criminal system today.

document/community-control-over-police-surveillance-ccops-model-bill [https://perma.cc/ZHM7-QE3T].

²⁵⁸ Adi Robertson, *Lawmakers Propose Ban on Police Buying Access to Clearview AI and Other Data Brokers*, VERGE (Apr. 21, 2021, 11:52 AM), <https://www.theverge.com/2021/4/21/22395650/wyden-paul-fourth-amendment-is-not-for-sale-act-privacy-data-brokers-clearview-ai> [https://perma.cc/88K6-64F3] (discussing the Fourth Amendment Is Not For Sale Act).

²⁵⁹ See *supra* notes 180–85 and accompanying text.

²⁶⁰ See *Brady v. Maryland*, 373 U.S. 83, (1963).

²⁶¹ See M. Rhead Enion, Note, *Constitutional Limits on Private Policing and the State's Allocation of Force*, 59 DUKE L.J. 519, 519, 548 (2009).

²⁶² See Rushin, *supra* note 82, at 198.

²⁶³ See Joh, *supra* note 45, at 585–97 (discussing broad range of private police work).

C. Applications

The remainder of this Article applies the lessons outlined above to two specific cases: (1) the role of community-based violence prevention organizations, and (2) law enforcement's access to private surveillance and the private data market.

1. Community-Based Violence Prevention Strategies

Understanding the symbiotic relationship between the public and private sectors should inform how communities implement violence prevention strategies, and the role of private actors in those strategies.

In a system where public and private are so intertwined, it is a mistake to think that violence prevention is solely the job of government or the police.²⁶⁴ Private individuals and entities are at the front line of violence and violence prevention. They are the perpetrators, survivors, and witnesses to crime. Community leaders play a key role in fostering cooperation with law enforcement, without which police would be largely powerless.²⁶⁵ More importantly, there is a growing

²⁶⁴ In fact, society might benefit if policymakers considered whether there are greater roles that non-state actors can play in seemingly “core” public areas, such as charging and sentencing decisions.

The traditional view is that making charging decisions is a core function of the public prosecutor. We have seen the consequences of this approach: overly harsh charging and sentencing decisions that fall on the most powerless segments of our society. *See, e.g.*, Simonson, *supra* note 108, at 253. But there is an alternative view beginning to emerge—a community-centered model of prosecution that asks what sort of charging and sentencing decisions are right for the local neighborhood or community. This model sees a decreased role for the public prosecutor and an increased role for hyper-local, non-governmental justice-focused programs. *Cf.* Capers, *supra* note 96, at 1586–87 (discussing the possibility of “using the public fisc . . . to also fund private prosecutions” and allowing victims to initiate prosecutions with judges and grand juries acting as gatekeepers); Simonson, *supra* note 108, at 256 (“This Essay is part of a larger vision of the importance of leaving the sphere of criminal law open to communal resistance and to agonistic participation—forms of direct participation that engage with powerful state institutions in a respectful but adversarial manner.”); Adriaan Lanni, Implementing the Neighborhood Grand Jury (“[P]ermitting local community members to play an active role in prosecutorial charging decisions and policies would help alleviate some of the political pathologies that have led to mass incarceration and the crisis of legitimacy.”), in *GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY* 171, 172 (Roger Anthony Fairfax, Jr. ed., 2011).

²⁶⁵ Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *CRIME & JUST.* 283, 284 (2003) (“The police and courts depend upon public cooperation for their effectiveness. For example, the police need community help in identifying criminals and fighting crime.”); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 *OHIO ST. J. CRIM. L.* 231, 233 (2008) (“To be effective in lowering crime and creating secure communities, the police must be able to elicit cooperation from community residents. Security cannot be produced by either the police or community residents acting alone—it requires cooperation.”); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 *MICH. L. REV.* 567, 604 (2008) (“As the Los Angeles sanc-

body of evidence that violence prevention and alternative responder CBOs can have tremendous violence prevention benefits, without the punitive and carceral approach of law enforcement.²⁶⁶

But the flip side of the inseparability of public and private is that these CBOs cannot succeed on their own. Many of today's most promising interventions are not siloed from the public system. CAHOOTS, for example, still relies on the public emergency dispatch system to receive calls.²⁶⁷ Many violence interrupters are government funded.²⁶⁸ More fundamentally, there will always be situations that require the coercive power of the state—not as a first resort, but as the last. Violent individuals will need to be restrained; mental health interventions will be needed, some of them involuntary. Even summonses and desk appearance tickets eventually need to be enforced. This does not mean that law enforcement is the right *first* response, but it suggests that community-based alternatives must work in tandem with government.

Rather than seeking to excise public actors or private ones, violence prevention should involve a holistic strategy that brings together all of these disparate entities, including privately operated ones and the business community, to work toward a common goal.²⁶⁹

tuary order declares, “[t]he [LAPD] is sensitive to the principle that effective law enforcement depends on a high degree of cooperation between the Department and the public it serves.” (quoting L.A., Cal., Chief of Police Special Order No. 4 (Nov. 27, 1979)); *see also supra* note 72 and accompanying text.

²⁶⁶ *See supra* notes 56, 62–66 and accompanying text (discussing various alternative responder models).

²⁶⁷ *See What Is Cahoots?*, WHITE BIRD CLINIC (Oct. 29, 2020), <https://whitebirdclinic.org/what-is-cahoots/> [<https://perma.cc/4RYM-W482>] (“CAHOOTS calls come to Eugene’s 911 system or the police non-emergency number. Dispatchers are trained to recognize non-violent situations with a behavioral health component and route those calls to CAHOOTS.”); *see also* BRIAN BLICK ET AL., STAR PROGRAM EVALUATION 1 (Jan. 8, 2021), https://wp-denver-ite.s3.amazonaws.com/wp-content/uploads/sites/4/2021/02/STAR_Pilot_6_Month_Evaluation_FINAL-REPORT.pdf [<https://perma.cc/6DQ4-6SVQ>] (discussing Denver’s STAR program, a community response program developed after Eugene, Oregon’s CAHOOTS program).

²⁶⁸ *See*, Press Release, White House Briefing Room, Fact Sheet: President Biden’s Budget Invests in Reducing Gun Crime to Make Our Communities Safer (Mar. 28, 2022), <https://www.whitehouse.gov/omb/briefing-room/2022/03/28/fact-sheet-president-bidens-budget-invests-in-reducing-gun-crime-to-make-our-communities-safer/> [<https://perma.cc/DZE2-YXB2>] (proposing \$500 million for community violence intervention programs); *Governor Hochul Announces State Has Provided \$30 Million in Grants to Fight Gun Violence over Last Three Months*, N.Y. STATE, <https://www.governor.ny.gov/news/governor-hochul-announces-state-has-provided-30-million-grants-fight-gun-violence-over-last> [<https://perma.cc/VT6Y-3JB6>].

²⁶⁹ *See, e.g.*, MAYOR BRANDON M. SCOTT, BALTIMORE CITY COMPREHENSIVE VIOLENCE PREVENTION PLAN 19 (2021) (highlighting, among other things, a “focus on building capacity for

But while doing so, policymakers should be careful to ensure these private entities and CBOs do not operate unchecked and avoid the governance pitfalls discussed in Part II. First, the fact that an entity purports to represent “community” views, should not insulate it from meaningful public accountability. “Community,” after all, includes a multitude of views on crime and public safety and is no guarantee of positive outcomes.²⁷⁰ Second, policymakers and the public should require basic transparency and data collection. Doing so will not only facilitate public governance, but also allow meaningful assessment of the impact and efficacy of these approaches.²⁷¹ Third, there must be regulatory structures in place that provide legal accountability to deter, detect, and discipline misconduct. Regardless of the philosophy or ideology of the entity at issue, it would be naïve not to prepare for this possibility.²⁷² Fourth, even when it comes to com-

community-based organizations”), <https://mayor.baltimorecity.gov/sites/default/files/Mayor-Scott-ComprehensiveViolencePreventionPlan-1.pdf> [<https://perma.cc/5QQ5-YMFC>].

²⁷⁰ See John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 747–48 (2020); Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343, 343; Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 238–239; see generally Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48 (2000) (discussing modern criminal procedure as a response to mob-dominated trials of African Americans in the early 20th century).

²⁷¹ See Editorial, *Are Any of Philly’s Anti-Violence Tactics Working? Without Better Tracking, We’ll Never Know.*, PHILA. INQUIRER (Nov. 30, 2021), <https://www.inquirer.com/opinion/editorials/record-number-of-homicides-in-philadelphia-20211130.html> [<https://perma.cc/TV25-VLVB>] (“An evaluation of the Community Crisis Intervention Program, the city’s violence interruption effort, has never been completed despite the program being in existence for years. Without an analysis of that crucial data, the truth is that city officials are responding to a crisis as if they’re wandering in the dark, hoping that our efforts work and assuming that without them, things would have been worse.”).

²⁷² See Gimbel & Muhammad, *supra* note 56, at 1529–30 (noting there have been allegations of criminal conduct against Cure Violence interrupters); Juliana Kim, *The Many Abuse Accusations Against a Housing Executive*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/2021/02/10/nyregion/rivera-abuse-allegations-new-york.html> [<https://perma.cc/X3K8-7UH4>] (detailing fraud and abuse allegations against housing nonprofit).

The Shomrim, a community patrol of individual from the Heredi Jewish community, have been accused of a range of misconduct—from discrimination to vigilantism. See, e.g., Stephen Averill Sherman, *Many Cities Are Rethinking the Police, but What Are the Alternatives?*, RICE KINDER INST. FOR URB. RSCH.: URB. EDGE (Jul. 22, 2020), <https://kinder.rice.edu/urbanedge/2020/07/22/many-cities-are-rethinking-police-what-are-alternatives> [<https://perma.cc/HD8P-KPR4>]; Adeoye Johnson, Comment, *Neighborhood Watch: Invading the Community, Evading Constitutional Limits*, 18 U. PA. J.L. & SOC. CHANGE 459, 459–61 (2016); Sarah M. Sternlieb, Comment, *When the Eyes and Ears Become an Arm of the State: The Danger of Privatization Through Government Funding of Insular Religious Groups*, 62 EMORY L.J. 1411, 1422–24 (2013).

George Zimmerman, a neighborhood watch volunteer, shot and killed Trayvon Martin, an unarmed black teenager, igniting a national debate about racial profiling. See Yamiche Alcindor, *Trial Turns to Zimmerman’s Neighborhood-Watch Role*, USA TODAY (June 25, 2013, 11:21 PM),

munity-based violence prevention strategies, policymakers should be wary of the distorting role of financial incentives. Requiring disclosure of funding sources, spending, and priorities is a start, but even non-profit social justice organizations can be coopted “to support the status quo and replace accountability to communities with accountability to wealthy donors and institutions.”²⁷³ Even government funding can come with strings that distort the underlying mission.²⁷⁴

In short, it makes sense for jurisdictions to deploy violence prevention strategies that include roles for private, community-based organizations, but before empowering these entities, policymakers should regulate in ways that address the governance difficulties that exist with much of privatization.

2. *Private Surveillance and the Private Data Market*

These same lessons apply to law enforcement’s reliance on private surveillance and privately held data.

Modern technology and big data have transformed the ways that law enforcement conducts criminal investigations.²⁷⁵ This transformation has given private companies an ever-expanding role.²⁷⁶ From the tech giants that transmit and store our communications,²⁷⁷ to data bro-

<https://www.usatoday.com/story/news/2013/06/25/zimmerman-trial-trayvon-neighborhood-watch/2455163/> [<https://perma.cc/AF7W-DEPZ>]; see also *supra* note 51 (discussing criticism of neighborhood watch associations).

²⁷³ Elana Redfield, Pooja Gehi & Gabriel Arkles, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 600 (2010). For a discussion of the relationship between the political process, criminal justice reform, and interest groups, see generally Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 FORDHAM URB. L.J. 295, 307–09 (2016); THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX (INCITE! ed., 2007); Alizabeth Newman, *Reflections on VAWA’s Strange Bedfellows: The Partnership Between the Battered Immigrant Women’s Movement and Law Enforcement*, 42 U. BALT. L. REV. 229, 251 (2013) (citing *id.* at 3).

²⁷⁴ On the possibility of coercion in restorative justice programs, see Hanan, *supra* note 57, at 132 (“This example highlights the problem of coercion in diversionary programs. The accused understands that she will be prosecuted if she cannot reach an agreement that is satisfactory to the complaining witness. The complaining witness may be able to use the threat of prosecution as leverage against the defendant. The accused is put in the position of capitulating with the demands of the complaining witness and, if she does not capitulate, the case will be prosecuted criminally.” (footnote omitted)); cf. Ric Simmons, *Private Plea Bargains*, 89 N.C. L. REV. 1125, 1127–28 (2011) (noting that threats of prosecution can be used to coerce private settlements).

²⁷⁵ See FERGUSON, *supra* note 53.

²⁷⁶ See Rozenshtein, *supra* note 86, at 105.

²⁷⁷ See Aliza Vigderman & Gabe Turner, *The Data Big Tech Companies Have on You*, SECURITY.ORG (Aug. 23, 2021), <https://www.security.org/resources/data-tech-companies-have/> [<https://perma.cc/E7ZZ-SARY>].

kers that aggregate public records into detailed dossiers,²⁷⁸ everyday decisions made by private companies—what data to collect, how frequently to delete data, or whether to oppose a government request for information—make or break criminal investigations and define many aspects of our rights and liberties.

Many scholars and advocates have raised important concerns about the dangers of law enforcement's access to troves of privately held data.²⁷⁹ By tapping into these reservoirs, law enforcement can obtain far more information about us than it could possibly capture directly, and it does so without many traditional constitutional safeguards.²⁸⁰ This expansive access presents grave risks to individual privacy and security against government overreach. History demonstrates that this overreach is likely to be directed toward the same racial and ethnic groups that traditionally bear the brunt of overpolicing.²⁸¹ There is also well-founded concern that these tools will be turned against journalists, political dissidents, and others expressing their First Amendment freedoms.²⁸²

But the solution is not to close off law enforcement from the private data market. First, such an approach is impractical. Law enforcement investigations have always depended on information from private actors. In an analog world, those sources were people (e.g., victims, witnesses, whistleblowers), but in an increasingly digital world, those sources are largely digital.

Second, there are potential benefits to requiring law enforcement to access sensitive data via private actors rather than operating its own

²⁷⁸ See Lauren Sarkesian & Spandana Singh, *How Data Brokers and Phone Apps Are Helping Police Surveil Citizens Without Warrants*, ISSUES IN SCI. & TECH. (Jan. 6, 2021), <https://issues.org/data-brokers-police-surveillance/> [<https://perma.cc/P9LB-25VZ>] (describing how data brokers collect our personal data and noting “government law enforcement agencies are rapidly becoming major buyers.”); Steven Melendez & Alex Pasternack, *Here Are the Data Brokers Quietly Buying and Selling Your Personal Information*, FAST CO. (Mar. 2, 2019), <https://www.fastcompany.com/90310803/here-are-the-data-brokers-quietly-buying-and-selling-your-personal-information> [<https://perma.cc/9KR6-3JZ3>].

²⁷⁹ E.g., BARRY FREIDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION, ch. 10 (2017).

²⁸⁰ See *id.* at 237 (“Under current Supreme Court decisions, virtually any information you provide to anyone is ‘voluntarily’ given and thus fair game for the government to grab.”); *supra* note 33; *infra* notes 291–292.

²⁸¹ See generally KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017); RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE (2019).

²⁸² See, e.g., Complaint for Declaratory Judgment and Injunctive Relief, Farrell-Smith v. Oregon Dep’t of Just., No. 21-cv-47809 (Or. Cir. Ct. Dec. 14, 2021).

databases.²⁸³ When law enforcement maintains its own databases, there are few barriers to accessing the information. Querying a government-maintained warrant database, a DNA database, or a license-plate reader database, for example, does not require judicial authorization.²⁸⁴ When law enforcement has direct access to camera infrastructure, it can monitor the cameras in real time, run advanced analytics like facial recognition, and store the data indefinitely.²⁸⁵ The results of unfettered law enforcement access are well documented: officers access the data for personal purposes; racial, ethnic, and political minorities are disproportionately targeted; and so on.²⁸⁶ But when private entities are the data custodians, they can act in ways that create separation-of-powers protections that other branches of government have largely abdicated.²⁸⁷ Particularly since the Snowden NSA revelations, the largest technology companies have pushed back against law enforcement data requests.²⁸⁸ Apple famously opposed court orders to hack its iPhones in connection with the terrorist shooting in San Bernardino.²⁸⁹ Other companies require warrants rather

²⁸³ This Article focuses on one potential benefit, but there are others. *See, e.g.*, Farhang Heydari, *Understanding Police Reliance on Private Data*, HOOVER INST., Oct. 7, 2021, at 2.

²⁸⁴ *See* United States v. Yang, 958 F.3d 851, 858–9, 861–62 (9th Cir. 2020).

²⁸⁵ *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-105309, FACIAL RECOGNITION TECHNOLOGY: FEDERAL LAW ENFORCEMENT AGENCIES SHOULD HAVE BETTER AWARENESS OF SYSTEMS USED BY EMPLOYEES (2021).

²⁸⁶ *See* Associated Press, *Police Sometimes Misuse Confidential Work Databases for Personal Gain*, CBS NEWS (Sept. 30, 2016, 8:59 AM), <https://www.cbsnews.com/news/police-sometimes-misuse-confidential-work-databases-for-personal-gain-ap/> [<https://perma.cc/T3BB-BURW>].

²⁸⁷ *See* Heydari, *supra* note 283; *see also* Rozenshtein, *supra* note 86, at 105 (“By entrusting our data processing and communications to a handful of giant technology companies, we’ve created a new generation of *surveillance intermediaries*: large, powerful companies that stand between the government and our data and, in the process, help constrain government surveillance.”).

²⁸⁸ Scott Shackford, *5 Years After Snowden, Has Anything Changed?*, REASON (June 6, 2018, 8:30 AM), <https://reason.com/2018/06/06/5-years-after-snowden-has-anything-chang/> [<https://perma.cc/BTB7-BWUB>].

²⁸⁹ Apple Inc.’s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government’s Motion to Compel Assistance, *In re* Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, Cal. License Plate 35KGD203, No. 5:16-CM-00010-SP (C.D. Cal. Feb. 25, 2016), 2016 WL 2771267.

than turning over customer data via subpoena.²⁹⁰ Microsoft challenges secrecy orders attached to search warrants.²⁹¹

Given the impracticability and undesirability of cutting off law enforcement from access to privately held data, policymakers must find ways to regulate law enforcement access so as to capture the potential benefits while addressing the governance difficulties. This means ensuring democratic accountability, transparency, legal accountability, and mitigating perverse financial incentives.

One key will be addressing gaps in existing legal accountability, particularly the Fourth Amendment's inapplicability to police reliance on the private data market.²⁹² Why would law enforcement not tap into ancestry-DNA websites when access is largely unregulated? Why obtain a warrant to attach a GPS to a suspect's vehicle if you can instead purchase location data or obtain access to private surveillance devices like Automatic License Plate Readers ("ALPRs"), neither of which require a warrant?²⁹³

Regulatory approaches are emerging to close these loopholes. Maryland and Montana recently enacted legislation to govern law enforcement use of forensic genetic genealogy searching via companies like Ancestry, 23andMe, GEDMatch, and FamilyTreeDNA.²⁹⁴ Utah

²⁹⁰ Ring, for example, requires formal legal process or certain exigent circumstances before turning over customer videos. See *Ring Law Enforcement Guidelines*, RING, <https://support.ring.com/hc/en-us/articles/360001318523-Ring-Law-Enforcement-Guidelines> [<https://perma.cc/SL2Q-YBXH>].

²⁹¹ See, e.g., First Amended Complaint for Declaratory Judgment, *Microsoft Corp. v. U.S. Dep't of Just.*, 233 F. Supp. 3d 887 (W.D. Wash. 2017) (No. 2:16-cv-00538).

²⁹² Cf. Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 *HASTINGS L.J.* 1303, 1306 (2002) (arguing that courts should focus on "only the result of the search—the type of information that was acquired"). Utah, for example, has moved to legislatively limit aspects of the third-party doctrine. See generally H.B. 57, 2019 Leg., Gen. Sess. (Utah 2019) (requiring law enforcement obtain a warrant for location information, whether obtained directly by law enforcement or indirectly via private third parties).

²⁹³ See Orin S. Kerr, *Buying Data and the Fourth Amendment*, *HOOVER INST.*, Nov. 17, 2021, at 11.

On ALPRs, see generally AXON AI & POLICING TECH. ETHICS BD., *AUTOMATED LICENSE PLATE READERS* (2019).

²⁹⁴ See Jennifer Lynch, *Modern-Day General Warrants and the Challenge of Protecting Third-Party Privacy Rights in Mass, Suspicionless Searches of Consumer Databases*, *HOOVER INST.*, Sept. 23, 2021; Virginia Hughes, *Two New Laws Restrict Police Use of DNA Search Method*, *N.Y. TIMES* (May 31, 2021), <https://www.nytimes.com/2021/05/31/science/dna-police-laws.html> [<https://perma.cc/2QE5-G8VN>]; see also Sonia M. Suter, Erin E. Murphy & Natalie Ram, *Opinion, Maryland Can Be a Model for Regulating Law Enforcement Use of Genetic Databases*, *WASH. POST* (June 18, 2021, 2:00 PM), <https://www.washingtonpost.com/opinions/2021/06/18/maryland-genetic-databases-law-enforcement-regulation-model/> [<https://perma.cc/ZEQ2-RPAA>].

law bars government entities from using privately captured ALPR data without a warrant or court order, unless the private entity meets certain requirements.²⁹⁵ Many jurisdictions have taken a parity-focused approach to eavesdropping.²⁹⁶ A bipartisan group of senators recently proposed the Fourth Amendment is Not for Sale Act to close the data-broker loophole to the warrant requirement.²⁹⁷

Whenever private actors are involved, governance questions should be at the fore. Law enforcement's reliance on private surveillance and access to privately held data is no exception. But just as it is impossible to excise private influence from the criminal system writ large, so too would it be impossible to cut off law enforcement's access to private data. Instead, what is required is a parity-focused approach—one that does not unduly focus on the public/private line, but instead brings accountability and transparency through regulation.

CONCLUSION

The harms of the criminal system require a renewed policymaking focus. But if we are to capitalize on current momentum to transform our criminal system, we need a fuller understanding of the true scope of private influence. Regulators must appreciate how thoroughly intertwined the public and private spheres are, they must embrace it, and they must build regulatory schemes that account for it. These lessons are as relevant for traditional reformers as they are for defunders and abolitionists; they apply with force to the use of new technologies and big data, as well as to reliance on community-based interventions. This approach offers a path to transforming a system that has failed so many for too long.

²⁹⁵ UTAH CODE ANN. § 41-6A-2005(4) (West 2014).

²⁹⁶ See, e.g., JAMES G. CARR, PATRICIA L. BELLIA & EVAN A. CREUTZ, *LAW OF ELECTRONIC SURVEILLANCE* § 3:69 (2021) (discussing Title III's application to private eavesdropping); Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINN. L. REV. 407, 490 (2012) ("Title III reached beyond Section 605 to govern federal and state officials, as well as private actors."); CAL. PENAL CODE §§ 631–32 (West 2011); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (West 2019).

²⁹⁷ Press Release, Sen. Ron Wyden, Wyden, Paul and Bipartisan Members of Congress Introduce the Fourth Amendment Is Not for Sale Act (Apr. 21, 2021), <https://www.wyden.senate.gov/news/press-releases/wyden-paul-and-bipartisan-members-of-congress-introduce-the-fourth-amendment-is-not-for-sale-act-> [<https://perma.cc/E3H4-4ZPZ>] ("This bill closes that legal loophole and ensures that the government can't use its credit card to end-run the Fourth Amendment.").