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ANGLO-AMERICAN CORPORATE TAXATION: TRACING THE COMMON ROOTS OF DIVERGENT APPROACHES*

Steven A. Bank

Over the last century, countries have typically followed either the United States model or the United Kingdom model in taxing corporate income. In the U.S., corporations are subject to tax as separate entities under what is called the classical system. Income is taxed first to the corporation when earned and a second time to the shareholders when distributed as a dividend. This double taxation was mitigated to some extent in the U.S. by a 2003 reduction in the rate applied to the shareholder-level tax on certain dividend payments, but it left the basic double tax system intact. The U.K. system of corporate taxation has traditionally stood in sharp contrast to the U.S. approach by integrating the corporate and individual income taxes through an imputation approach in which shareholders are provided a credit designed to offset at least a portion of the tax paid on that income at the company level. The amount of that credit has declined in recent years, but the U.K. has retained at least a hybrid approach to corporate income taxation.

This sharp divide between the U.S. and U.K. approaches has not always existed. When income taxation was employed during the nineteenth century, both countries taxed corporate income in a system that was integrated with the individual income tax. It was only around World War I that the nations began to diverge as the U.S. moved to a classical system while the U.K. retained a largely integrated approach. Moreover, there have been several instances during the last century when the countries moved closer together, including most notably during the last decade or so. This book seeks to explore the history of British and American corporate income taxation in search of the factors that may help explain why they diverged and converged over the years and what this portends for the future of corporate income taxation in the two countries and around the globe.

The way corporations in the United States and the United Kingdom dealt with retained earnings and set dividend policy reflects an underlying difference in the location of power in corporations in the respective countries. This difference in the

location of corporate power, in turn, contributed to the divergence of corporate income tax schemes. The reason is that the corporation itself was simply perceived differently in the two countries during the first half of the twentieth century when the income tax systems were still developing. Power in the large British public corporation was primarily located at the shareholder level, thus leading to a shareholder-focused corporate tax, while power in the large American public corporation was primarily located at the entity level, thus leading to an entity-focused corporate tax. These differences were then hard-wired into the respective national consciences and continued to influence corporate tax reform in ensuing years.

This difference in the locus of power in British and American corporations not only affected decisions about the appropriate dividend policy, but it may have affected views on the appropriate role of corporate taxation in regulating corporate power and in reaching corporate wealth. To the extent that ownership separated from control much later in the U.K. than in the U.S., U.K. policymakers may have conceived of a family controlled corporation when they contemplated the taxation of the corporation. This necessarily would have suggested a more aggregate conception of the corporation, pointing toward an integrated approach to the taxation of corporate income. Conversely, if in the U.S., the separation of ownership and control occurred much earlier, the rise of the manager-controlled enterprise may have made it easier to conceive of a classical system of corporate taxation in which the corporation was taxed separately on its earnings. Moreover, variations in tax treatment could occur at various points and on individual provisions in response to specific contingencies or because of shifts in the nature of corporate ownership and governance. Nevertheless, the justifications for such variations were often framed in the historical rhetoric. Thus, the adoption of an American-style classical corporate income tax in the U.K. between 1965 and 1973 was justified as an aid to stemming the tide of excessive dividends paid to wealthy shareholders, while the adoption of an undistributed profits tax in the U.S. between 1936 and 1939 was justified as a means of constraining abusive managers.

I. THE DIVERGENCE IN THE NATURE OF THE CORPORATION

The differing contemporary descriptions of the corporation and the differences that developed in the fundamental nature of the respective corporate tax systems during the early twentieth century are connected. Given this, it is valuable to examine the divergence in the development of the corporation itself that occurred between the turn-of-the-century and the onset of World War II. This includes legal and practical differences in the position of shareholders and the locus of power as a result of the varying degree to which ownership separated from control in the two countries over this period.

A. Familial Capitalism and the Presence of Blockholders

Although the U.S. and the U.K. were more or less on parallel tracks in the growth and dispersion of their shareholder populations in the early twentieth century, the

countries diverged as to the extent of blockholder control. This had two dimensions. First, families maintained controlling stakes in British public corporations, at least in the industrial and manufacturing sectors, at a relatively high rate. Second, American corporations more quickly developed a management structure that ceded control to individuals who were not directly associated with or controlled by the shareholders. The combination meant that even amidst the growth in public corporations and the expansion of stock ownership in both countries, different patterns emerged. While the U.S. was moving closer to the outsider/arm's-length structure of corporate governance, the U.K. continued to adhere to the insider/control-oriented model.

In both the U.K. and the U.S., the founding families of newly-public corporations often maintained control of their early twentieth century corporations by retaining ownership of a block of stock sufficient to affect voting. In the U.K., for instance, Imperial Tobacco continued to be dominated by the Wills family even after a 1901 merger of seventeen U.K. tobacco companies and an ensuing public offering in 1902 designed to finance the merger. At the time, the Wills family owned sixty-eight percent of the resulting company's ordinary shares and it still held fifty-five percent in 1911 after the death of William Henry Wills, the founding chairman of Imperial.¹ One commentator later described Imperial as a "glorified family firm."² This phenomenon was true even for very large firms with widely-dispersed shareholders. Lever Brothers, a British soap manufacturer and the forerunner of the modern conglomerate Unilever, had 187,000 shareholders but "remained firmly under the thumb" of its founder, William Lever, until his death in 1925, through the family's control over the voting stock and the management structure.³ To avoid diluting family control, the company only issued debentures and non-voting preferred stock and other stock with limited or no voting rights in connection with their aggressive acquisition campaigns.⁴

I. Blockholders

The British companies were not unique in this regard in the early twentieth century. In the U.S., large companies such as Ford Motor Company, the Mellon family's Gulf Petroleum and Aluminum Company of America, and the Duke family's American Tobacco Company were all heavily dominated by family ownership and control.⁵ According to studies of corporations in the first several decades of the twentieth century, a similar percentage of families, or other shareholder groups, maintained control in the U.S. as in the U.K. In Berle and Means' study, fifty-five percent of the largest 200 American corporations were controlled by minority blockholders such as families as of 1929.⁶ Likewise, Leslie Hannah found that fifty-five percent of the largest 200 British corporations had family members on the board of directors in 1919, with that percentage rising to seventy by 1930.⁷

The difference between the U.S. and the U.K. was not in the presence of family control in the early 1900s, but rather in the extent to which it continued through

the twentieth century. The development of a true outsider/arm's-length form of corporate governance in the U.K. was delayed in large part by the persistence of family control.⁸ According to Brian Cheffins, "[o]nly after World War II would the transformation to outsider/arm's-length corporate governance become complete."⁹ Even considering the 1950s and 1960s as the demarcation point, there was still substantial evidence as late as the 1970s of the type of familial capitalism and blockholder control in the U.K. characteristic of an early generation.¹⁰ Mary Rose distinguishes this from the experience in America, noting that "in contrast to the experience in the United States, where from the 1880s onwards ownership and control became increasingly divorced, in Britain personal capitalism persisted well into the twentieth century."¹¹

Part of the reason family insiders were able to maintain control in many U.K. companies at such a high rate is because they frequently retained some or all of the voting equity after listing the company's other securities. As P.L. Cottrell observed, "[a]lthough the number of public companies grew, this development did not lead to 'outside' shareholders gaining control of their assets. The equity, which carried voting rights, remained generally in the hands of their vendors whereas extra funds were raised at the time of conversions, or subsequently, by the issues of either preference shares or debentures."¹² According to Cottrell, "[i]n the years before 1914 domestic public joint-stock companies issued more than seventy-five percent of their new capital in fixed-charge securities Ordinary shares remained generally with the original proprietors, who took them in payment for fixed assets and goodwill that they made over to the new limited concerns."¹³ A.R. Hall confirms this, stating that "a large number of the 'disposals', probably the majority, did not involve the sale of ordinary shares but only preference shares and debentures."¹⁴

This does not mean that separation of ownership and control had not spread to any British industries. An early example of where such separation occurred was in the railroads. In 1872, a Joint Select Parliamentary Committee noted that "[o]n railways there is a powerful bureaucracy of directors and officials. The real managers are far removed from the influence of the shareholders and the latter are to a great extent a fluctuating and helpless body. The history of railway enterprise shows how frequently their interests have been sacrificed to the policy, the speculations, and the passions of the real managers."¹⁵ As Cheffins explained, "[o]wnership was divorced from control in large UK railway companies as far back as the mid-19th century and the situation remained unchanged up to World War I."¹⁶ Nevertheless, in the British industrial sector, where firms were often local and may have had a disproportionate influence on popular thinking about the nature of the firm, familial and personal capitalism continued to be dominant.¹⁷

Between 1880 and 1930, the small, privately held, family-controlled U.S. business appeared to gradually give way to the large, publicly traded, manager-controlled corporation.¹⁸ According to Alfred Chandler, such a transformation primarily occurred before World War I, with U.S. companies developing independent and sophisticated management structures quite distinct from their shareholders.¹⁹ This phenomenon was repeatedly emphasized by contemporary observers. F. Edson White, the president of a meatpacking firm Armour and Company, reported in a 1924 interview that “[b]ig business is rapidly becoming decentralized in ownership – and it desires to be.”²⁰ *The New York Times* noted the following year that “a widespread diffusion of corporate ownership is unquestionably now in full swing.”²¹ By 1927, economist William Ripley noted that “[t]he prime fact confronting us as a nation is the progressive diffusion of ownership on the one hand and of the ever-increasing concentration of managerial power on the other.”²²

Adolf Berle and Gardiner Means offered empirical data to buttress these contemporary observations of the transformation to a manager-led corporation. In their famous 1932 study,²³ Berle and Means documented that a substantial majority of the 200 largest corporations in 1930 were controlled by management rather than by an individual or family.²⁴ They wrote “[w]e have reached a condition in which the individual interest of the shareholder is definitely subservient to the will of a controlling group of managers even though the capital is made up of the aggregated contributions of perhaps many thousands of individuals.”²⁵ Although their conclusion was not as clearly supported by their data as they asserted,²⁶ other studies soon followed to confirm that many of the largest corporations in the U.S. were indeed controlled by managers.

In the U.K., this transformation to a manager-controlled corporation appeared to take place much later than in the U.S. John Micklethwait and Adrian Wooldridge, in their history of the company, described this divergence:

British entrepreneurs clung to the personal approach to management long after their American cousins had embraced professionalism. As late as the Second World War, a remarkable number of British firms were managed by members of the founding families. These founders kept the big decisions firmly within the company, only calling on the help of professional managers *in extremis*. Family-run firms had no need for the detailed organizational charts and manuals that had become commonplace in large American companies. They relied instead on personal relations and family traditions.²⁷

For example, a study by Phillip Sargant Florence of eighty-two of the largest industrial and commercial firms in Britain as of 1936 found that the vast majority had a dominant owner.²⁸ Similarly, in a recent study of fifty-five listed U.K. firms as

of 1950 by Julian Franks, Colin Mayer, and Stefano Rossi, the authors reported that the largest ten shareholders held an average of almost forty-nine percent of the shares.²⁹ The real transition appeared to occur during the 1960s. In 1961, Anthony Sampson analyzed twenty-three of the largest U.K. companies by asset value and concluded that among these firms “there is still often a family or an individual with a dominating influence on the board.”³⁰ A decade later, in 1971, Sampson concluded that “the big corporations are left, like perpetual clocks, to run themselves; and the effective power resides not with the shareholders but with the boards of directors.”³¹

B. Corporate Governance

Even if the formal separation of ownership and control had occurred at roughly the same time in the two countries, shareholders maintained a degree of influence over corporate governance in British companies that did not exist in the U.S. This may have had long-standing roots. Lorraine Talbot attributes the British conception of shareholders to the survival of legal protections that emerged during the dominance of quasi-partnership companies in the post-Bubble Act era, noting that even after shares in widely-dispersed companies were reconceptualized as personal property rather than taking on the character of the firm’s assets, “[s]hareholders were still conceived as owners with the entitlement of owners, which seems to be more extensive than mere ownership of shares.”³² Talbot even suggests that this persists to the modern day, although this may be an overstatement: “In the United Kingdom, shareholders continue to be considered the owners of companies and the proper recipients of corporate activity, regardless of the level of share dispersal.”³³

One area where the difference in shareholder rights was particularly stark, at least on the face of it, was in dividend policy. From the middle of the nineteenth century, British shareholders of most companies were accorded the right to vote on the Board’s recommendation to declare a dividend. This right was incorporated in Table A of the U.K.’s Company Acts, which set forth a number of default rules that companies could adopt in constructing their charters.³⁴ According to paragraph 72 of Table A, “[t]he Directors may, with the Sanction of the Company in General Meeting, declare a Dividend to be paid to the Members in proportion to their shares.”³⁵ For many companies, the articles of association borrowed liberally from Table A, including the provision for shareholder vote on dividends.³⁶ According to Professor Colleen Dunlavy’s forthcoming database on corporate charters, which describes dividend and other provisions in a series of U.K. charters adopted between 1845 and 1865, two-thirds of the charters included provisions requiring shareholder approval for declaration of a dividend.³⁷ Although shareholders generally could not vote to change the amount of a Board’s recommended dividend and they could not initiate a dividend,³⁸ they could veto a dividend recommendation.

By contrast, U.S. shareholders have never held any power, even in the form of a veto right, over the dividend decision. The board of directors had the sole discretion to determine dividend policy. There were early instances in which the dividend

decision was delegated to stockholders under the corporation's by-laws,³⁹ but by the end of the century the rule was firmly established that "[t]he directors, being the agents of the corporation, alone have the power to determine the amount and to declare a dividend from earnings – a power resting in their honest discretion, uncontrollable by the courts."⁴⁰ Stockholders had a mere "inchoate right" in the profits of the corporation until a dividend was declared by the directors.⁴¹ Thomas Cooley elaborated, writing in an opinion for the Michigan Supreme Court that "until the dividend is declared . . . the dividend is only something that may possibly come into existence."⁴²

The established norm of shared or at least quasi-shared responsibility for the dividend decision in British companies may have perpetuated their high dividend payout ratios, especially since the depressed profits for British firms during the 1920s made maintaining level dividend payments more difficult.⁴³ For example, Charles H. Grinling, writing in 1903, attributed this liberal dividend practice to the shareholder-oriented corporate governance structure in British railroads:

[O]wing to the predominance of shareholders' influence upon British railway policy, it has been the custom to divide the profits of each half year "up to the hilt," subject only to a more or less liberal current expenditure for the maintenance of the property. Then the net profits are divided up amongst the shareholders as far as they will go, an amount being 'carried forward' to next half-year, usually because it was not possible to squeeze out another 1/4 percent.⁴⁴

This shareholder influence over dividend policy continued at least up until World War II. Economist Norman Buchanan wrote in 1938 that "[t]he tendency to distribute a larger share of the total annual earnings as dividends in Great Britain may, however, be partially explained by the rather common practice of having the shareholders vote upon the question in meeting, rather than leaving the dividends to be determined by the directors as in American corporations."⁴⁵ Notwithstanding that shareholder power over dividends was limited to the right to vote on a proposal by directors, the requirement that directors submit a proposal to a shareholder vote was a reflection of shareholder power and influence. As Benjamin Graham and David Dodd observed, "the mere fact that the dividend policy is submitted to the stockholders for their specific approval or criticism carries an exceedingly valuable reminder to the management of its responsibilities, and to the owners of their rights, on this important question."⁴⁶

In addition to dividend policy, the differential influence of U.S. and U.K. shareholders over corporate governance is also reflected in the location and nature of the corporate annual meeting. While British managers often moved their annual meetings to facilitate shareholder attendance, U.S. managers did the exact opposite,

“preferring to hold annual general meetings far from where shareholders lived or worked.”⁴⁷ In 1947, the Investors’ League cited the examples of a paper company that held its annual meeting at an abandoned paper mill that could only be reached by a special train and a meeting of the American Can Company in an upstate New York town that was not accessible by rail at all.⁴⁸ Even where meetings were held in cities accessible to most shareholders, they were held on the same day as meetings of other corporations in different cities, effectively preventing shareholders from attending meetings of more than one of the corporations in which it held shares.⁴⁹

Part of the explanation for this difference in approach to annual and special meetings was structural differences in the corporate law governing U.K. and U.S. companies. As Janette Rutterford has explained, the federal system in the U.S. permitted businesses to be headquartered in one state, but incorporated in an entirely different and often far-off state. Because the choice to incorporate in a state was often a product of a competition among states to offer the most favorable laws for business and its managers, this meant that the protections for shareholders and the disclosure requirements were often quite minimal. The U.S. did not provide uniform disclosure requirements until the 1930s with the creation of the Securities Exchange Commission. The difference between the business home and legal home of a corporation also meant that annual meetings held near the registered office were more ceremonial than substantive, since they could be located quite a distance from any natural shareholding population surrounding the actual business operation of the company.⁵⁰ By contrast, in the U.K., with all English and Welsh companies filing documents and information to the Registrar of Companies in London starting in 1900, there was no advantage to locate far from a company’s base of operations and its natural shareholder and employee constituency.⁵¹ Disclosure was also more complete in the early twentieth century U.K. firm, with the Companies Act of 1900 even requiring the publication of shareholder lists.⁵² In a legal environment in which disclosure was required more broadly, the annual meeting might have the chance of actually being informative rather than merely ceremonial.

Even apart from the logistical obstacles to attending annual meetings in the U.S., the average shareholder had little incentive to attend. Frequently, their questions were ignored if there was even time reserved for questions at all.⁵³ Corporate management was highly suspicious of shareholder motives in this context. One railroad chief executive officer, James J. Hill of the Great Northern Railroad, reportedly testified before the Pujo Committee in 1913 that in thirty years “no stockholder so far as he could remember had attended the meetings . . . unless he wanted to make trouble.”⁵⁴ John Broderick, in his book, *A Small Stockholder*, offered a colorful explanation for why the lack of any chance to influence the corporation led people to ignore annual meetings:

What I am trying to calculate at the moment is the measure of interest that there is for me in any meeting of corporation stockholders which I am entitled to attend. In fact, while I am usually at ease in the presence of death in any form, if I were obligated to choose between hying to one of these corporate powwows, with its arid ceremonial, and going to a funeral, with its moving solemnity, there is no doubt that I would pick the funeral. At a friend's obsequies one may at least speak a consoling word to the widow, if he knows how, and possibly serve as a pallbearer.⁵⁵

As a result, John Sears of the Corporation Trust Company noted that “[i]t has become . . . customary for stockholders’ meetings to be . . . devoid of personal attendance or participation in discussions.”⁵⁶

There was reportedly a very different scene at annual meetings of British corporations, where annual meeting attendance had a long tradition. Indeed, while there were some instances of non-attendance and proxy voting, it “should not be assumed that it was very widespread.”⁵⁷ A Royal Commission in 1886 found that “the directors are as a rule well looked after, meetings are frequent: generally they are held quarterly.”⁵⁸ This general practice continued in the twentieth century, although by then proxy voting had gained a foothold, leading to dire predictions of the decline of the importance of the meeting.⁵⁹ Such predictions did not prove true. Sears noted that “[i]n contrast with our American experience we hear frequent reference to the large attendance, real discussions, and results secured at stockholders’ meetings in England.”⁶⁰ The *Wall Street Journal* marveled that:

Stockholders’ meetings are held in London in a hall that accommodates two thousand people and it is frequently crowded. There is always a good attendance. The directors sit on the platform, with their chairman, and answer questions after the report has been read. The questions are usually shrewd and searching, and woe betide the director who tries to evade them. Such meetings are well reported in the newspapers, especially if the company is a prominent one. The result of this publicity is that the will of the stockholder tends to prevail.⁶¹

This does not mean, of course, that shareholders in the U.K. agreed with their American counterparts in concluding that British shareholder meetings were productive and useful or that shareholders in the U.S. were ineffective in imposing their will on directors. The popularity and significance of the shareholder meeting does suggest why a British shareholder might feel more involved in the governance of the corporation than a comparable American shareholder.

Company law provided further encouragement to the annual meeting function of British corporations. Shareholders in the U.K. were afforded some legal

entitlements that were absent under most state corporate law statutes in the U.S. In the U.K., for example, starting in 1900 shareholders collectively holding ten percent or more of the stock had the right to call a meeting of the company.⁶² The situation before 1900 was only somewhat less favorable. The default rule under Table A of the Companies Act of 1862 was that a general meeting could be called by twenty percent of the shareholders.⁶³ As Richard Nolan has explained, these rules reflected the basic assumption “that shareholders would make decisions at face-to-face meetings.”⁶⁴ Even if the discussions at such meetings did not result in real changes,⁶⁵ they afforded the shareholders fairly significant power. According to Nolan, “the shareholders could require a meeting whether or not they had the power to do so under the company’s articles, and whether or not the company’s directors were willing to use their powers to call a meeting.”⁶⁶ Given these background rules and the actual custom of participation, it therefore would not be surprising if the public conceived of the U.K. company as an aggregation of individual shareholders.

II. THE EFFECT ON CORPORATE TAX DESIGN

The real differences in the nature of at least the large public industrial corporation in the U.S. and the U.K. during the first third of the twentieth century appeared to have an effect upon the development of the respective corporate tax systems. In the U.K., for instance, where large corporations were often controlled by families or individual shareholders, tax measures often favored shareholders. During periods of concern about excessive distributions, though, tax measures were targeted at the wealthy shareholders who were suspected of draining the corporate coffers at the expense of both labor and the economic community at large. For example, after World War II, the U.K. enacted a Differential Profits Tax that subjected distributed profits to a higher rate than undistributed profits.⁶⁷ This was designed to force companies to reinvest in their businesses as part of the post-war recovery rather than paying out high dividends to shareholders.⁶⁸

By contrast, in the U.S., where large corporations were often controlled by managers, tax measures often served to protect the corporation from the high graduated marginal rates applicable to individuals. During periods of concern about excessive retentions, though, tax measures were targeted at the entity level to limit the ability of managers to drain the corporate coffers at the expense of shareholders and the economic community at large. For example, in 1936 Congress enacted an Undistributed Profits Tax designed to penalize corporations for higher amounts of retaining earnings.⁶⁹ This responded to a deep-seated concern about the overexpansion of corporations during the 1920s and the effect this had in deepening the Great Depression.⁷⁰

In other words, although both countries were worried about the problem of governmental expropriation or a tax burden that was too excessive for business

to continue to thrive, in the U.K. they were also worried about shareholder expropriation while in the U.S. they were worried about managerial expropriation. Since laws and attitudes linger long after the facts supporting them have dissipated, tax policy continued to be animated by these concerns at least through the post-World War II period, and in some cases through to the current day.

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FROM PRIVATE VIOLENCE TO MASS INCARCERATION: THINKING INTERSECTIONALLY ABOUT WOMEN, RACE, AND SOCIAL CONTROL*

Kimberlé Williams Crenshaw

This Article, which originally appeared in *UCLA Law Review's* 2012 Symposium issue, entitled "Overpoliced and Underprotected: Women, Race and Criminalization," is a contribution to the ongoing efforts to think critically about the intersectional features that contribute to the surveillance, punishment, and mass incarceration of women of color. In the context of mass incarceration, race-centered and gender-centered frames are largely silent about the hyper-presence of women of color in the system. The failure to be sensitive to the overlapping vulnerabilities of race and gender—as evidenced by select examples discussed *infra*—is a failure to fully investigate the unique structural and institutional intersections that contribute to the risk and consequence of punishment for women of color.

Focusing on the experiences of women and girls of color *qua* incarceration and policing reveals how the dynamics that constitute mass incarceration are not exclusively underwritten by criminal justice processes. Instead, they are produced by a wider template of disciplinary practices produced both by state institutions as well as by private social power. The vulnerability of women of color to these institutional forces is reinforced by certain discursive failures within antiracism and feminist politics. These deficits have reproduced dynamics that have historically surfaced in both feminist and antiracist discourses around violence and inequality. Below I offer a brief snapshot of the intersectional dynamics contributing to the surveillance and social control of women of color. I then sketch out some linkages between the intersectional failures within antiracism and feminism that contribute to the weakened capacity of social justice discourses—to resist the ideological juggernaut that underwrites the expansion of social punishment and mass incarceration.

Despite the fact that women and girls are the fastest growing populations under criminal supervision, much of the contemporary discourse that elevates the racial dimensions of mass incarceration fails to interrogate its effects on women. The fact that Black men are more likely to be incarcerated than any other cohort has reinforced the inference that Black men are uniquely subject to racial discrimination and control in a way that women are not. However, within

THE
INTERSECTIONAL
DIMENSIONS
OF MASS
INCARCERATION
IN THE CONTEXT
OF WOMEN AND
GIRLS

their respective gender groups, men and women of color face racialized risks of incarceration that are similar.¹ In other words, the increased risk of incarceration relative to race is virtually the same for Black men as it is for Black women. To the extent that the system of mass incarceration might be framed as a system of racial control, the fact that Black women are 6.9 times more likely than white women to be brought under the system and that Latinas are 2.5 times more likely than white women tells us that the social surveillance and control of women can also be framed as a racialized enterprise.²

Many factors have contributed to the explosive rate of women's incarceration, most prominently among them being the war on drugs.³ For example, incarceration for drug-related offenses accounted for an eightfold rise in African American women and Latina supervision between 1986 and 1991.⁴ The racial dimensions of the war on drugs—particularly the crack-powder cocaine distinctions and the draconian mandatory minimums—have been well documented.⁵ Efforts to understand the particular ways that women are caught up in the war on drugs highlight the intersectional dimensions of a racialized social policy set against the backdrop of gendered relations between men and women.

HOUSING AND SURVEILLANCE

While attending to the gendered dimensions of the prevailing discourses on mass incarceration can bring much needed attention to some of the causes and consequences of the disproportionate incarceration of women of color, centering their broader vulnerability to surveillance and control expands the field of inquiry to the structural and ideological dimensions of social control. This broader template reveals the multiple ways that institutional and political dynamics intersect to create the vexed social environment that renders women of color vulnerable to social surveillance and that simultaneously marginalizes these risks within social justice discourses.

Priscilla Ocen brings these dimensions to the fore in her analysis of a case involving the surveillance and control of subsidy-reliant single Black mothers in Antioch, California.⁶ Ocen recounts the troubling story of how Black female recipients of Section 8 housing vouchers were subjected to public and private policing in predominantly white communities when economically distressed homeowners began accepting the vouchers, thereby opening up middle-class neighborhoods that had previously been inaccessible to single Black mothers. In response, the police department put together a special unit to meet this perceived threat.⁷ Black women were singled out for constant monitoring and intrusive house searches by this special unit, and neighbors were invited to participate in the surveillance through flyers that the unit distributed throughout the community. In an episode that tragically captures the theme of this symposium—overpoliced and underprotected—one of the plaintiffs recounted how a police visit to intervene in a domestic assault

turned into a compliance investigation and search of her home.⁸ No investigation into the domestic violence complaint was ever pursued. Evidence suggests that this pattern of manufacturing suspicion is widely experienced by Black women in other communities as well,⁹ drawing a complicated picture not only of the interface between public and private power but also of the institutional interface between subsidy programs and policing.¹⁰

Ocen's analysis widens the lens through which the intersectional dimensions of social control are legible. As she illustrates, intersectional vulnerability to social control extends beyond the formal carceral regime.¹¹ Her analysis of the Antioch case reveals how the converging vulnerabilities that render some populations particularly amenable to control can be premised on the intersection of formal status (beneficiaries of social support services) and ascriptive identities (African American). Entrapped as such, the plaintiffs were available targets of both public (police) and private (neighborhood watch) mechanisms of surveillance and social control.

The current crisis that we call mass incarceration or punishment comprises multiple intersections—not just of identity and power but of systemic dynamics that themselves do the work of subordination. Dorothy Roberts and Sunita Patel examine the nexus between child welfare and mass incarceration, and immigration and foster care respectively, revealing how the convergence of criminal and civil surveillance regimes creates and maintains the dominant racial, class, and gender hierarchy.

**CONVERGING
VULNERABILITIES:
CHILD WELFARE,
IMMIGRATION
AND MASS
INCARCERATION**

In Dorothy Roberts' sobering account of the parallel and overlapping systems of mass incarceration and child welfare, Roberts shows how these systems work in tandem to create and justify conditions that render women vulnerable and subsequently punish them for their vulnerability.¹² Roberts' cogent critique emphasizes the extent to which the ideological permission to punish is generated by widely available stereotypes of Black mothers. By heaping punishment on those who have been primed to deserve it, the discourse not only "obscures the need for social change"¹³ but also undermines solidarity and the recognition of common cause. So long as these conditions prevail, "there is little incentive for privileged parents to advocate alongside black mothers for more public support for caregiving for everyone."¹⁴

Sunita Patel's discussion of the convergence between child welfare systems and immigration in the context of the Department of Homeland Security's Secure Communities program illustrates similar ways that immigrant women are subject to intersectional dynamics of social control.¹⁵ Social expectations that are gendered, and that reflect circumstances of economic marginality, shape the challenges faced

by women defending themselves against the Department of Homeland Security's efforts to remove them. According to Patel, "[t]he mothers have to personify the judges' image of a good mother in order to win: self sacrificing, humble, law abiding and English speaking. Poor migrant women and their attorneys often struggle to create a particular narrative of the woman's life to compare with gender and rational ideas of motherhood."¹⁶ Yet in doing so, they frequently face gendered double standards in that the sacrifices they sometimes make for their children—leaving them with relatives, working long hours to send money home, and saving money so that they can be reunited with their children—are perceived negatively in women when the same behaviors in men would be considered heroic. "Migrant men making the same decisions aren't blamed or punished for their choices as fathers."¹⁷ The interface between immigration and child protective services is further vexed by the structural and economic backdrop in which immigrant women are situated. Because detained mothers are often in networks in which those whom the mother might designate as acceptable caretakers are unable to come forward because of their own status, or agencies will not accept them if they do, their ability to negotiate alternatives to foster care is limited.

These brief examples illustrate the ways that race, gender and class function along with other factors to render certain women particularly vulnerable to systems of surveillance and social control. But intersectional analysis draws attention not only to these converging patterns of social marginality, but also to the absence of collective support and social justice advocacy on their behalf. Taken together, these examples thus may serve to not only amplify an earlier set of debates about the relative marginality of women of color in a variety of feminist and antiracist discourses pertaining to violence and inequality.¹⁸ It also primes an important consideration of how these earlier deficits have contributed to the growth of neo-liberal ideologies that underwrite the shift from social welfare to social punishment.¹⁹

**FROM THE
SHELTER TO
THE JAIL: THE
INDUSTRIAL-
IZATION OF
DOMESTIC
VIOLENCE
INTERVENTION**

Various observations made by symposium participants reveal how intersectional failures in responding to the underprotection of women of color are linked to the current regime of overpolicing. In the case of domestic violence, for example, the increasingly punitive approaches to a variety of social problems in the last decades of the twentieth century opened up opportunities for domestic violence advocacy to ride the tide associated with crime control and local accountability. As the "Get Tough" approach to drug dependency, poverty, juvenile delinquency, and single-family formation shifted the landscape away from legal reform to social control, domestic violence advocacy gained new traction as a criminal justice issue.²⁰ A key dimension of the Violence Against Women Act (VAWA),²¹ for example, was its embrace of mandatory arrest policies along with federal support to encourage local police departments to process domestic assault complaints aggressively. The promise of expanding resources to support

mandatory arrest policies seemed to present a win-win situation for some domestic violence advocates who understood the problem primarily in terms of the state's underprotection of women who were subject to battery.²² This understanding of domestic abuse as a criminal justice issue allowed some advocates to join forces with national and local governments to receive support for certain draconian reforms.²³ Mandatory arrest policies and other pro-policing remedies were seen as important victories by many advocates despite the serious reservations of many women of color and other advocates.²⁴

Other domestic violence advocates were far less sanguine about the supposed opportunities that such collaborations with law enforcement would engender for the overall movement.²⁵ For those who understood domestic violence as part of a broader system of gender subordination rather than an exclusively criminal problem, the shifts to federally supported police involvement presented a serious threat to the grassroots origins of domestic violence advocacy.²⁶ Some were particularly critical of this shifting emphasis as many warned that any strategy predicated on criminalization would likely result in higher fatalities and an increase in arrests for women of color.²⁷ But several factors seemed to pave the way toward the increasing influence of law enforcement as a primary goal of domestic violence advocacy. The availability of resources associated with the get-tough turn in public policy, the ongoing debate among various camps about whether violence should be understood as a systemic embodiment of patriarchy or a matter of discriminatory protection within law enforcement,²⁸ the unresolved tensions about the importance of incorporating racial differences into gender-based advocacy, and the eclipse of the radical feminism that had grounded the shelter movement in the first place, all contributed to an environment in which the marriage between domestic violence advocacy and state-oriented approaches was readily consummated.²⁹ The concerns of women of color were fairly consistently overlooked in the process.

While the alliance between domestic violence advocates and law enforcement might be readily understood as the maturation of a grassroots insurgency into a powerful national lobby, others have regarded the alliance as evidence of the shifting of the antiviolence movement into a pro-state, professionalized cohort that has depoliticized the original movement.³⁰ The alliance did work to secure a national profile for domestic violence advocacy along with funds to support mandatory arrest policies.³¹ Yet, as many women of color predicted, mandatory arrest policies appear to have done little to protect women of color against domestic violence.³² Indeed, some studies seem to suggest that the policies have inadvertently increased the risks of serious injury or death for some victims of domestic violence, including a heightened risk of mortality for Black women in particular.³³ Beyond the heightened risk of death, research suggests that women of color are more likely to be arrested themselves for behavior that may be consistent with self-defense, but interpreted through the lens of stereotypes as overly aggressive.³⁴

The blowback from these criminal justice solutions has also ensnared girls of color.³⁵ For example, both Francine Sherman and Jyoti Nanda discuss how the increasing system involvement of girls is tied less to increases in offending and more to shifting policies such as mandatory arrest in the context of intrafamily violence.³⁶ In cases of domestic assaults, girls who have been violent at home and who may have, in an earlier era, been processed outside the juvenile justice system are now apprehended and processed through the juvenile system. Black girls appear to be disproportionately apprehended under such policies, reflecting perhaps the stereotypes that they are more likely to engage in physical confrontation.³⁷

Advocates who were sensitive to the dual systems of private violence and public surveillance were attuned to the need to think critically about alternative means of protection that did not overinvest in approaches that put women of color at greater risk.³⁸ Unfortunately these intersectional sensibilities were embraced neither by legislative advocates nor by their allies, and thus domestic violence intervention became another social issue swept into the criminal justice juggernaut. Hindsight may indeed provide a clearer view of the risks associated with an overly punitive approach to domestic violence,³⁹ but it is not entirely speculative to suggest that had there been greater receptivity to the reservations that women of color were raising about mandatory arrests, domestic violence advocacy may well have been better positioned to sustain a political agenda that was more firmly rooted in social justice rather than criminal enforcement.⁴⁰ Had more domestic violence advocates taken up the intersectional challenges faced by women who were subject to both private violence and public control, reliance on an apparatus that was long associated with racial management might have been more carefully scrutinized. Not only might women of color have been better situated, but the entire movement might have been better positioned to address the causes and consequences of domestic abuse rather than to succumb to the more troubling logics of criminal enforcement.⁴¹

**ENDANGERMENT
DISCOURSE AND
THE TAMING OF
RACIAL JUSTICE**

This blowback is only one consequence of the intersectional failures from the 1990s that influences contemporary discourse about mass incarceration. A parallel and overlapping connection between the intersectional failures in the 1990s and the current discourses around mass incarceration can be found in a cluster of ideas contained within the “Black male endangerment” discourse.⁴² Beginning in earnest with the Reagan Administration, two key dimensions of post-reformist social policy were packaged around images of criminality, crime, and pathology: the war on drugs and welfare dependency.⁴³ As President Clinton extended the war on drugs and campaigned to “end welfare as we know it” by shredding the economic safety net for millions of women and children,⁴⁴ images of Black crime, drug dealing, and welfare dependency saturated the political debate.⁴⁵ Although both initiatives bore Black faces and contributed to the discursive shift

away from social justice to social control, only the targeting of Black men was taken up as a crisis within antiracist politics.⁴⁶ While stereotypes of both Black men and women punctuated the growing embrace of penal approaches to drug addiction, poverty, and their many social consequences, Black politics converged around Black men as the focal point of responsibility and uplift. The shifting rhetorical stance from a more inclusive, community-centered ethos to a male-centric notion of responsibility and endangerment was captured most memorably by Minister Louis Farrakhan's Million Man March.⁴⁷

While the exclusion of women is perhaps one of the most memorable ways that the March marked its almost exclusive focus on men, deeper still was the way the March authorized a central ideological pillar that underwrote the attack on welfare, single-headed households, and Black single mothers. The thesis that Black inequality was grounded in dysfunctional family relationships had been introduced decades earlier by a controversial report that cast doubt on the possibility that structural reforms would significantly improve the lives of poor Black people. Daniel Patrick Moynihan infamously described the Black family as pathologically out of sorts, illustrated by the dominance of the so-called Black matriarch⁴⁸ and the relative absence of traditional gender relations in the family. Among other concerns, Moynihan worried about the consequences of generations of Black boys being raised by single or dominant mothers and encouraged military training to remove them from this matriarchal influence.⁴⁹

The Million Man March was in many ways an extension of and response to the Moynihan critique. Unlike the March on Washington in 1963, this March sought no structural interventions, no changes in economic policy, and no specific demands with respect to legal enforcement, opportunity creation, or family support. Accountability was squarely placed on Black men whose agency or lack thereof was the focal point of critique and uplift. Although a massive retrenchment in the social support that was vital to countless women and children was being debated at the time, little effort was made to support single mothers and their families other than a promise that a man in the house was on the way. The Million Man March was so in concert with the prevailing ideology that underwrote the ongoing efforts to restructure Aid to Dependent Families that the President and other opinion leaders supported the gathering despite the widespread criticism of Minister Farrakhan.⁵⁰

Thus, as the earlier social justice demands of the 1960s became rearticulated as a call for male leadership in the family and in the community, the particular risks that Black women faced as a consequence of their intersectional encounter with racialized, gendered, and class-based hierarchies bore little traction within antiracist political discourses. As dynamics such as violence, economic marginality, and vulnerability to the war on drugs continued to unfold, Black women found themselves discursively

vulnerable by historical stereotype and politically vulnerable by an intracommunity investment in addressing Black male endangerment.⁵¹ It is in this opportune space that legislative initiatives that extended and rationalized the web of punishment were anchored. These included, for example, welfare reform,⁵² the Adoption and Safe Families Act (ASFA),⁵³ and draconian public housing policies,⁵⁴ all of which were largely conceded without the vocal community opposition such measures deserved.⁵⁵

Indeed, not only have these conditions failed to muster significant attention within antiracist advocacy; very little within that discourse challenges the way that single Black motherhood remains ideologically salient as one of the key factors that contributes to the Black community's vulnerability to a host of social ills, including poverty, underachievement, violence, and incarceration.⁵⁶ By embracing the notion that a fundamental source of Black inequality was a family structure at odds with patriarchal norms, those Black community discourses that have been shaped around the endangered male narrative have come to regard the needs of single Black mothers with a sideways glance.⁵⁷ This ideology, along with the failure of antiracist discourse to significantly contest it, has contributed to making poor Black mothers the legitimate objects of punishment that Dorothy Roberts has consistently shown.⁵⁸

The conditions under which Black women struggle for survival are not only marginal to Black politics. Their exclusion from prevailing discourses that address the endangerment of men supports the mistaken impression that Black women are socioeconomically secure, or alternatively, that their socioeconomic insecurity is secondary to the interests of Black men in the communities in which they live. These impressions remain, even though many of the conditions facing Black women are directly related to the particular risks of surveillance and incarceration they face. For example, women who have survived domestic violence face a higher risk of incarceration as one of its many consequences, however domestic violence is often excluded from discussions on Black-on-Black crime even though most gender crime is intraracial.⁵⁹ The same intraracial solidarity that underwrites beliefs that Black men are the primary victims of racism and violence also entraps many Black women into a forced silence about their own experiences.⁶⁰ Black women are also marginal in antiracist critiques of the war on drugs—even though the hyperprosecution of Black communities presents particular risks for Black women given their gendered relationships to men and their various enterprises.⁶¹ Moreover, women's experiences are trivialized in discourses about economic insecurity even though they make less than Black men and typically, as heads of households, have to make their meager dollars stretch farther.⁶²

Black male endangerment relegates all these issues to the background even though many women—like men—face personal and economic insecurity on a daily basis. Unlike most men, however, many Black women grapple with the challenge of raising

children alone on subsistence wages and struggle mightily to keep a roof over their heads.⁶³ They, along with their daughters, often navigate public spaces that are profoundly underresourced, which in turn heightens the risk of abuse and assault and lowers the likelihood of meaningful protection.⁶⁴ Those who become caught up in the drug trade face long prison terms often for marginal involvement in drug enterprises, and are more likely to lose their children than men because of the hard-nosed provisions of the ASFA.⁶⁵ Those who manage to avoid parental termination face enormous challenges in reunifying their family when they are released.⁶⁶ Despite the risks they share with Black men, as well as other risks that are unique to them, Black women remain subject to the twin dimensions of hypervisibility and substantive erasure: They are present in the stereotypical images of Black families at risk, and they are virtually absent as a focal point of the millions of dollars strategically distributed by foundations and local governments under the promise of rescuing Black boys and saving Black families.⁶⁷

Lurking behind this sacrifice of Black mothers has been a troubling rationale that permits an alliance between those who endorse an endangerment narrative and those who are in fact agents of the very policies that contribute to the social surveillance and mass incarceration of Black men. The capaciousness of this frame to include those whose policies actually contribute to the purported crisis is apparent in the actions of Mayor Michael Bloomberg in New York City. To great fanfare and media attention, Mayor Bloomberg announced a multimillion-dollar joint strategy to address the crisis of Black and Latino boys.⁶⁸ This initiative, predicated on averting the school-to-prison pipeline, seeks to create opportunities for better achievement in school and to develop the appropriate attachments to work.⁶⁹ At the same time, however, Mayor Bloomberg oversees the most aggressive surveillance and arrest policies in the country,⁷⁰ and he has campaigned against the demands to enjoin the policies on behalf of the millions of Black and Latino men who have been stopped and frisked since 2002.⁷¹ Bloomberg has also vowed to stand firm against another lawsuit seeking to open up the city's disproportionately white fire department.⁷² Of course, attachment to work requires real work opportunities, a structural feature of the status quo that Mayor Bloomberg could directly impact by cooperating with efforts to open up industries that have been largely closed to Blacks and Latinos. Yet in standing firm against these lawsuits, Mayor Bloomberg undermines the very outcomes he promises under the rubric of "youth at risk" by reproducing the conditions that constitute the risk.⁷³

UNLIKELY
ALLIES

The subtle erasure of the structural and institutional dimensions of social justice politics has been facilitated in part through the widespread adoption of the "at risk" frames.⁷⁴ In singling out Black boys as a uniquely vulnerable population, the frame inadvertently suggests that the structural dimensions of social life in which they and everyone else in their communities are situated are themselves

relatively uncontroversial and transparent. Under this frame, the journey from underachievement to jail is preventable not through active lobbying against the carceral state and its many tributaries, but through the embrace of behavioral modifications designed to bring “at risk” individuals into compliance.

The work that such crisis narratives do to normalize retrenchment and deflect attention from the neoliberal project of underprotection and overpolicing is facilitated by intersectional failures within antiracism itself. The exclusion of women and girls from discourses pertaining to the social welfare of the community narrows the field of vision upon which the wider patterns of punishment and social control might be seen and understood.⁷⁵ Longstanding rhetorics that framed men as uniquely damaged by racism have primed Black communities to endorse neoliberal accounts of social life that subtly shift the focus from historically constituted relations of power to the failures of family formation and gender conformity. As Dorothy Roberts argues:

It’s not just [that] the framework doesn’t work but in fact the frame that we have is not a structural frame, and one of the reasons it’s not a structural frame is that it is wrapped around the identity of the black male patriarch, and as long as we frame some of the consequences in a way they need help or in the ways [that] they have not been able to step up [to] their roles and responsibilities, we are engaged [in] individualistic discourse that fails to deal with the structural reasons for some of these problems.⁷⁶

These failures to address the intersectional particulars of Black women’s experience have contributed to the failure to challenge the essentialized relationship between female-headed households and social dysfunction. These intersectional failures have, in turn, primed antiracist discourses to relinquish their broader social justice demands in exchange for crisis-based diversions that are integral to the “pipeline to prison.” Rather than foregrounding a demand for deconstructing the pipeline itself, the crisis frame tends to regard Black (and Brown) males as the targets of reform writ large. While this targeted frame appears to embrace the many challenges that they face, the exclusions of women and girls presents male problems as *sui generis*, effectively obscuring the structural dimensions of racial power that shape the circumstances of both boys and girls, and men and women. As such, crisis discourses represent a fundamental shift away from social justice perspectives and a move toward rationalizing the basic structures of social life.⁷⁷ Under the crisis logics, men and boys may have to overcome disadvantages, but the source of these disadvantages rests almost entirely within the families and communities in which they exist, not within the broader societal processes that have historically structured these relations and that continue to underwrite social surveillance and mass incarceration.⁷⁸

The turn from structural to cultural understandings of inequality leaves the endangerment of women and girls unrecognized and underresearched. More broadly, these absences have fueled unsupported assumptions that racial inequality has either bypassed women and girls or that their inequalities are wholly dependent on and collateral to the racial inequalities facing men and boys.

Similar to the disappointing contestation within feminism over mandatory arrest, the surrender to the logic of neoliberalism represented by the crisis frame has been facilitated by longstanding failures in intersectional thinking that were apparent in intracommunal discourses about violence against women.⁷⁹ The male-centric approaches that traditionally informed the responses to domestic violence and sexual abuse have continued to shape these and other intraracial issues within Black community discourse.⁸⁰ Efforts to broaden the scope of antiracism to include how Black women's lives are impacted by issues such as violence and economic marginality have frequently been reined in by an antiracist politic that prioritized Black men's vulnerability as representative of the community as a whole.

The "crisis" discourses that have replaced structural and institutional understandings of racial inequality are not only compatible with ideological justifications for surveillance and punishment; they have also facilitated an important shift in the grammar of racial justice.⁸¹ Indicative of the marginalization of women in contemporary policy discourses is the fact that to speak about Blackness in the context of racial power is virtually coextensive with speaking about Black men. "Endangered species" has come to replace racialized communities, while the term "racism" has been nudged out by the softer sounding indictment of "lack of achievement."⁸² The problem of segregated and underresourced schools of the *Brown* era has been replaced by "the soft bigotry of low expectations."⁸³ Institutions that were once the target of widespread critique and reformist energy, such as unresponsive representatives, overvigilant police, and inaccessible employment markets, have been pushed aside as benchmarks of oppression, replaced by the family not only as the site of reform but as ground zero of racial disparity. Under the crisis rationale, Black men and boys are endangered not by a society that has resisted the full demands of racial equity over the course of centuries, but by mothers and families left undisciplined by would-be husbands and absent fathers. The pathologies attributed to Black family formation in the Moynihan controversy have resurfaced in the narratives of jail or death for African American men.⁸⁴ Central to the mainstream discourses on endangerment is the home—where women rule, boys flounder, and responsibility is crushed. Efforts to address economic inequality, housing segregation, and crumbling urban infrastructures that entrap both men and women have given way to unitary efforts to resuscitate the nuclear family.⁸⁵ This exclusive focus on the personal development of young men and boys, replete with its promise of building healthy communities, addresses the crisis of mass incarceration

and social insecurity with the hope that, with a man in every household, the native sons will straighten up and fly right.⁸⁶

The crisis-based focus on the family brings antiracist advocacy into the neoliberal agenda in the same way that domestic violence advocates became role players in the wider criminalization agenda that helped deradicalize antiviolence mobilization. Intersectional failures to incorporate the specific interests of women into antiracism undermined the development of a feminist articulation of antiracism and set the stage for a resurgence of agendas rooted in a defense of patriarchy. A greater degree of intersectional literacy among advocates and stakeholders would certainly have grounded a more inclusive political vision that addresses the plight of women and girls and resists the ideological frames that underwrite punitive social policies. Social justice politics that focus on equitable life chances for racially marginalized men as well as women would better equip advocates to challenge punitive logics that justify inequality on the basis of characteristics such as gender or marital status. A broader politics worthy of the legacy of social justice movements that we inherit is one that remains vigilant in the face of efforts to peel apart similarly situated members of distressed communities on the basis of greater desert or moral worth.

Healthy lives and equitable outcomes are objectives that should not be subject to trickle-down politics; nor should the heavy weight of social surveillance and incarceration be engaged primarily through ideological submission to inequitable social relations. Struggles against social control and mass incarceration should be animated by both antiracist and feminist sensibilities that ensure that peace and economic security need not be limited to those who adopt heteronormative family formations. Premised on the fundamental recognition that historical disparities exacerbated by the retraction of resources cannot be managed by the state's nightstick, feminist and antiracist advocacy should highlight and contest the logics of neoliberalism that naturalize punishment and that reserve the good life for the right kind of people.

CONCLUSION

The various gendered dimensions of racial retrenchment have continued to exact tragic consequences for racially marginalized women and their families. The articles in *UCLA Law Review's* Symposium issue "Overpoliced and Underprotected: Women, Race and Criminalization" repeat and expand the dynamics that underscore the dramatic growth of punishment in women's lives. From their encounters within systems ranging from housing to employment, from juvenile justice to foster care, and from criminal justice to immigration, gender and class correspond with a host of vulnerabilities that fuel this explosion and that authorize some of its most debilitating consequences. As these narratives reveal, despite the dominant frames through which mass incarceration is understood and contested, the social construction of deviant publics is not exclusively gendered as male. To the

contrary, the many permissions to incarcerate and punish large populations of men, women, and children are generated through broad constructions of deviance that gain traction through the representation of stigmatized women of color.⁸⁷

In tracing the genealogy of a few ideological contestations within the corpus of antiracist and feminist discourse, it is evident that the dynamics that are at play in constructing the underprotection and overpolicing of women of color are far from static. Attending to the connections between earlier mobilizations against violence and the contemporary rhetoric around mass incarceration reveals that intersectional failures from an earlier era become the beachheads upon which retrenchment politics play out in the next. The retrenchment politics underwritten by neoliberal ideology are powerful, yet they are sometimes inadvertently facilitated by feminist and antiracist advocates who concede to apologetic explanations for existing inequalities or who underestimate the consequences of policies that subvert the thrust of the originating demands.

Thus, the relationship between underprotection and overpolicing is not solely a matter of state power but also the consequence of political elisions that have undermined the development of a more robust critique of social control and a more expansive vision of social justice. While these matters belie simple solutions, the efforts to attend to the paradoxes of overpolicing and underprotection are fruitfully grounded in and informed by the experiences of women of color.

The current milieu that, in George Lipsitz's words, renders large numbers of people "arrestable, incarcerable, displaceable, and deportable" rests not only on the retraction of resources and notions of broad social responsibility.⁸⁸ It also is made possible by the presence of certain legitimizing beliefs, many of which pertain to the presumed dysfunction of women in need of discipline. The structural and discursive abandonment of women of color—the normalization of their socioeconomic marginality alongside the renewed fantasies of gender normativity—are key elements sustaining the beliefs that "people with problems are problems."⁸⁹

As Dorothy Roberts notes, until we recognize the centrality of the intersectional entrapment of racially marginalized women and girls with regard to contestations over mass incarceration and social welfare more broadly, the possibilities for building more coherent politics that link constituencies with shared interests will remain unrealized.

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1. The data show that while women are at less of a risk than men for incarceration, the odds ratios indicate that the between-race comparisons (Black-White, Black-Latino, Latino-White) are relatively consistent regardless of gender. The relative risk of incarceration for Blacks relative to other groups is the same, controlling for gender.

Table 1. Odds of Incarceration

	Black	Latino	White
Male	1:3	1:6	1:17
Female	1:17	1:45	1:111

Table 2. Proportional Odds of Incarceration by Race

	Black-White	Black-Latino	Latino-White
Male	5.7:1	2:1	2.8:1
Female	6.5:1	2.6:1	2.5:1

The data in Table 1 indicate that one out of three Black men is likely to be incarcerated at least once in his lifetime, meaning that their chance of incarceration is 33 percent. Because one out of seventeen white males will be incarcerated at some point in their lives, their chance of incarceration is 5.88 percent. This means that a Black man is approximately 5.7 times more likely to be incarcerated in his lifetime than a white man, as shown *supra* Table 2. A Black woman, on the other hand, is approximately 6.5 times more likely to be incarcerated than a white woman. Thus the Black-White racial disparity is similar for men and women. The Black-Latino and Latino-White disparities are also similar between men and women, as illustrated *supra* Table 2. See CHILDREN'S DEF. FUND, CRADLE TO PRISON PIPELINE® CAMPAIGN (2009), available at <http://www.childrensdefense.org/child-research-data-publications/data/cradle-prison-pipeline-summary-report.pdf>; see also THOMAS BONCZAR, BUREAU OF JUSTICE STATISTICS, NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1, 8 (2003) (providing similar estimates, showing one in nineteen Black women being incarcerated in their lifetimes, as against one in 118 white women). I thank Joseph Doherty and Scott Dewey for assistance in calculating these odds.

2. See Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012) (discussing the overrepresentation of Black women and girls under criminal supervision). I refer here to the traditional civil rights and women's rights discourses that shape the agendas of advocacy organizations, foundation portfolios, research institutions, and state and federal governments. Women of color-led organizations, activists, and critical scholars are among those who have challenged these frames, drawing attention to many of the counterproductive strategies that these dominant sensibilities have underwritten. See, e.g., INCITE! WOMEN OF COLOR AGAINST VIOLENCE & CRITICAL RESISTANCE, STATEMENT ON GENDER VIOLENCE AND THE PRISON INDUSTRIAL COMPLEX (2001) [hereinafter "INCITE!"].

3. See STEPHANIE R. BUSH-BASKETTE, *MISGUIDED JUSTICE: THE WAR ON DRUGS AND THE INCARCERATION OF BLACK WOMEN* 23 (2010).
4. See Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 85 n.67 (2000); see also George Lipsitz, “*In an Avalanche Every Snowflake Pleads Not Guilty*”: *The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights*, 59 UCLA L. REV. 1746, 1770, 1776 (2012) (“Drug convictions account for 23 percent of incarcerated white women but for 39 percent of incarcerated Black women and 44 percent of incarcerated Latinas.”).
5. See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995); see also Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 JUDICATURE 6 (2010).
6. The Black women discussed by Ocen were part of a certified class of plaintiffs in a suit against the city of Antioch that has since settled. See Order Granting Plaintiffs’ Motion for Class Certification, *Williams v. City of Antioch*, No. C-08-02301, 2010 WL 3632197 (N.D. Cal. Sept. 2, 2010); Report and Recommendation Regarding Final Approval of Class Action Settlement, *Williams v. City of Antioch*, No. C-08-02301, 2012 WL 6865477 (N.D. Cal. Mar. 8, 2012); Order of Dismissal, *Williams v. City of Antioch*, No. C 08-02301 (Apr. 6, 2012).
7. Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1544 (2012) (discussing the City of Antioch’s Community Action Team [CAT]). A key feature of the CAT strategy was to gather information that might be used to terminate the women’s participation in the Section 8 program. African Americans were both more likely to have cases referred to housing authorities and most likely to have their cases determined to be unfounded. See Expert Report of Barry Krisberg at 16, 19, *Williams v. City of Antioch*, No. C-08-2301 (N.D. Cal. Sept. 4, 2009), available at <http://www.impactfund.org/downloads/Antioch.B.Krisberg.ExpertReport.pdf>.
8. Ocen, *supra* note 9, at 1578. A similar disregard for potential victims of domestic violence in the context of policing suspected undocumented immigrants was reported by Sunita Patel, who observed, “[Y]ou can see, when people come into your home to investigate a violence complaint, or if they are doing a traffic stop, they then become more interested in the woman’s status than they are in actually the perpetrator of the violence.” Sunita Patel, Presentation at UCLA Law Review Volume 59 Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality* 104 (Jan. 27, 2012) (transcript on file with author).
9. See Ann M. Simmons, *Palmdale Settles Suit Alleging Section 8 Housing Discrimination*, L.A. TIMES, 10 Feb. 3, 2012, <http://articles.latimes.com/2012/feb/03/local/la-me-harassment-settle-20120203> (describing a similar scenario occurring in Palmdale and Lancaster, California); Landon Cassman, *Future of Danville’s Public Housing Remains Uncertain*, WILL AM 580 (June 11, 2012), <http://will.illinois.edu/news/story/future-of-danvilles-public-housing-remains-uncertain> (discussing the complaint filed by four women against the city of Danville, Illinois, alleging racial discrimination in the acceptance and use of Section 8 vouchers); see also Victoria Schlesinger, *Section 8 Tenants Unwelcome*, CAL. LAW., July 2012, <http://www.callawyer.com/clstory.cfm?eid=923321> (discussing recent moves by the City of Lancaster to “crack down” on public housing tenants in the city and a suit filed

- by the Public Counsel Law Center of Los Angeles and the NAACP alleging race discrimination).
10. See Ocen, *supra* note 9, at 1581–82 (“The examination of the harassment of subsidy-reliant Black women also reveals the myriad ways Black women are increasingly vulnerable to sanction by the criminal justice system as a result of societal marginalization. Thus, the interaction between the welfare and criminal justice systems forcefully contributes to preserving racial stratification through exclusion.”).
 11. *Id.*
 12. Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012).
 13. *Id.* at 1476.
 14. *Id.* at 1490.
 15. Patel, *supra* note 10.
 16. *Id.* at 100.
 17. *Id.* at 98.
 18. Beth Richie, Presentation at UCLA Law Review Volume 59 Symposium, Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality (Jan. 27, 2012) (transcript on file with author).
 19. *Id.*
 20. As Karen Rosenberg explains, “the Reagan administration, while drastically cutting funding for social service programs, expanded funding for criminal legal institutions. This formed part of the larger ideological project to cast social problems as criminal concerns. Thus the Reagan administration launched campaigns and concomitant policies declaring ‘war’ on a host of social ills, from homelessness to drugs to domestic violence. In this policy environment, casting battering as a law and order issue had the best chance of winning government support.” KAREN E. ROSENBERG, FROM MODERATE CHASTISEMENT TO MANDATORY ARREST: RESPONSES TO VIOLENCE AGAINST WOMEN IN CANADA AND THE UNITED STATES 65 (2011).
 21. Pub. L. No. 103-322, 108 Stat. 1796 (1994).
 22. Radha Iyengar & Lindsay Sabik, *A Dangerous Shortage of Domestic Violence Services*, 28 HEALTH AFF. w1052 (2009).
 23. See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 294 (2005). As some critics note, the relationship between VAWA and the ongoing industrialization of social punishments was not incidental. Richie points out that “VAWA was part of a larger, more controversial Violent Crime Control and Law Enforcement Act of 1994, one of the most comprehensive, far-reaching crime bills in the history of the United States.” BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION 86 (2012).
 24. See generally LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 108 (2012) (discussing the mixed reception of mandatory arrest regimes by advocates); Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, 36 AM. BEHAV. SCIENTIST 651 (1993).
 25. As Richie explained, “One group remained committed to a broader analysis of the systemic causes of violence against women, arguing as strongly as ever for the need for radical social change work based on an understanding of the role that systems advocacy and coalition politics could play in that. For this group, the problem of persistent gender inequality, as a structural problem, remained at the center of the analytical paradigm that activists remained committed to. Another group coalesced

- around a different formation. Compelled to respond to conservative state tendencies regarding families, gender, and sexuality, they pursued a safer, less antagonistic strategy that they expected would be more acceptable to the new conservative national, legislative, and local leadership. This group distanced itself from the former activist-oriented.” Richie, *supra* note 25, at 75; *see also* Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities*, 11 VIOLENCE AGAINST WOMEN 38 (2005).
26. *See, e.g.*, DONALD G. DUTTON, *The Failure of Criminal Justice Intervention Policy*, in RETHINKING DOMESTIC VIOLENCE 249 (2006).
 27. *See, e.g.*, INCITE!, *supra* note 4; Goodmark, *supra* note 26, at 109.
 28. As G. Kristian Miccio described the tension,

In analyzing the Protagonist position . . . one sees how it presumes that the state qua state is hospitable to women. This contrasts starkly with the early advocates who understood that the state was the cause of women’s subordination and that male intimate violence and the system of laws that condoned such violence were emblematic of such subordination. Abolition of male intimate violence would require more than a criminal justice response; it would require a reordering of power relations in both public and private life. Arrest alone or in tandem with mandatory prosecution was not the antidote.

Miccio, supra note 25, at 294 (footnote omitted).
 29. Pub. L. No. 103-322, 108 Stat. 1796 (1994). The section of the Violence Against Women Act entitled Grants to Encourage Arrest Policies, *id.* § 40231, 108 Stat. at 1932 (codified as amended at 42 U.S.C. § 3796hh (2006)), received an initial funding of \$28 million in 1996, of which funding for mandatory arrest initiatives was a large part. The funding geared toward mandatory arrests has since been suspended. NAT’L COAL. AGAINST DOMESTIC VIOLENCE, COMPARISON OF VAWA 1994, VAWA 2000 AND VAWA 2005 REAUTHORIZATION BILL (2006), *available at* http://www.ncadv.org/files/VAWA_94_00_05.pdf; *see also* GARRINE P. LANEY, CONG. RESEARCH SERV., RL30871, VIOLENCE AGAINST WOMEN ACT: HISTORY AND FEDERAL FUNDING, at 8 (2003).
 30. *See, e.g.*, Elizabeth Ben-Ishai, *The Autonomy-Fostering State: “Coordinated Fragmentation” and Domestic Violence Services*, 17 J. POL. PHIL. 307 (2009).
 31. *See* sources cited *supra* note 31.
 32. Miccio, *supra* note 25.
 33. *See* STOP ABUSIVE & VIOLENT ENV’TS, ARREST POLICIES FOR DOMESTIC VIOLENCE 4 (2010), *available at* <http://www.saveservices.org/downloads/Justice-Denied-DV-Arrest-Policies> (citing to a Milwaukee study that concluded that “mandatory arrest prevents 2,504 acts of violence against primarily white women at the price of 5,409 acts of violence against primarily Black women,” and to a Harvard study that concluded “[i]ntimate partner homicides increased by about 60% in states with mandatory arrest laws” (citing Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137; Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence From Mandatory and Recommended Arrest Laws* (Nat’l Bureau of Econ. Research Working Paper No. 13186, 2007), *available at* <http://www.nber.org/papers/w13186> (internal quotation marks omitted)); Meda Chesney-Lind, *Criminalizing Victimization: The Unintended Consequences of Pro-*

arrest Policies for Girls and Women, 2 *CRIMINOLOGY & PUB. POL'Y* 81, 82 (2002). The critique of the way the antiviolence movement embraced criminalization as the principle intervention against domestic violence should not be interpreted as a call for do-nothing strategies or romanticized notions of community accountability. See, e.g., INCITE!, *supra* note 4 (critiquing the antiprison movement for failing to take violence against women seriously and calling for interventions that do not overrely on criminalization and also provide safety and accountability).

34. Michael P. Johnson & Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 *J. MARRIAGE & FAMILY* 948, 953-54 (2000) (citing relevant literature, broken down here by race: Native American: RONET BACHMAN, *DEATH AND VIOLENCE ON THE RESERVATION: HOMICIDE, FAMILY VIOLENCE, AND SUICIDE IN AMERICAN INDIAN POPULATIONS* (1992); David G. Fairchild et al., *Prevalence of Adult Domestic Violence Among Women Seeking Routine Care in a Native American Health Care Facility*, 88 *AM. J. PUB. HEALTH* 1515 (1998); Diane McEachern et al., *Domestic Violence Among the Navajo: A Legacy of Colonization*, in *PRESSING ISSUES OF INEQUALITY AND AMERICAN INDIAN COMMUNITIES* 31 (Elizabeth Segal & Keith Kilty eds., 1998); Ilena M. Norton & Spero M. Manson, *A Silent Minority: Battered American Indian Women*, 10 *J. FAMILY VIOLENCE* 307 (1995); Lillian Tom-Orme, *Native American Women's Health Concerns*, in *HEALTH ISSUES FOR WOMEN OF COLOR: A CULTURAL DIVERSITY PERSPECTIVE* 27 (Diane L. Adams ed., 1995); Asian and Pacific Islander: YOUNG I. SONG, *BATTERED WOMEN IN KOREAN IMMIGRANT FAMILIES: THE SILENT SCREAM* (1996); Margaret Abraham, *Ethnicity, Gender, and Marital Violence: South Asian Women's Organizations in the United States*, 9 *GENDER & SOC'Y* 450 (1995); Christine K. Ho, *An Analysis of Domestic Violence in Asian American Communities: A Multicultural Approach to Counseling*, 9 *WOMEN & THERAPY* 129 (1990); Alice G. Yick & Pauline Agbayani-Siewert, *Perceptions of Domestic Violence in a Chinese-American Community*, 12 *J. INTERPERSONAL VIOLENCE* 832 (1997); Latina: Julia L. Perilla et al., *Cultural and Domestic Violence: The Ecology of Abused Latinas*, 9 *VIOLENCE & VICTIMS* 325 (1994); African American: BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* (1996); Ruth E. Dennis et al., *Addressing Domestic Violence in the African American Community*, 6 *J. HEALTH CARE POOR & UNDERSERVED* 284 (1995); Clifton E. Marsh et al., *Sexual Assault and Domestic Violence in the African American Community*, 17 *W.J. BLACK STUD.* 149 (1993).
35. Sara Goodkind et al., *Are Girls Really Becoming More Delinquent? Testing the Gender Convergence Hypothesis by Race and Ethnicity, 1976-2005*, 31 *CHILD. & YOUTH SERVICES REV.* 885 (2009).
36. Francine T. Sherman, *Justice for Girls: Are We Making Progress*, 59 *UCLA L. REV.* 1586, 1603 (2012); Nanda, *supra* note 4.
37. Chesney-Lind, *supra* note 35, at 82 (attributing the prevalence of Black women and girls arrested under mandatory arrest policies around the United States in part to the greater likelihood of Black women and girls to report domestic violence to authorities).
38. The conflict among domestic violence advocates presented yet another moment where Black feminists were locked into a two-fronted struggle. As Richie noted,

[I]t occurs to me that it may be paradoxical that in fact most of my work and most of the work of other women of color, some of who are here today . . . to end violence against women has become work about overpolicing:

overpolicing of women who experience violence when in some parts of the antiviolence movement, the answer has been to call the police. So in some ways I stand in the mix still of that paradox, working primarily in low income African American communities and other communities of color for thirty years to try to say to primarily men who claim spaces of leadership . . . for racial justice to demand that attention be paid to gender inequality, while at the same time, spinning around and making sure that [the] white-domina[ted] antiviolence movement pays particular concerns to women of color.

Richie, *supra* note 20, at 11.

39. Funding for mandatory arrest has been suspended. Critics of the alliance point out that few if any federal dollars were ever directed to support shelter and other services for battered women. “[A] leading activist in New York City remarked that over a ten-year period approximately \$258 million has been allocated through the federal VAWA for criminal justice programs in New York City—yet not one dollar has been allocated for shelters, long-term housing, or job training. And because VAWA is the largest federal funding source and financial conduit for programmatic support, the narrow scope of its mission severely impacts distribution of resources to programs and women survivors.” Miccio, *supra* note 25, at 290 (footnote omitted).
40. Kavitha Sreeharsha notes another tension between mainstream feminism and grassroots activism playing out in the context of trafficking that is also partly related to the collaborations between law enforcement and feminist advocacy. Kavitha Sreeharsha, Presentation at UCLA Law Review Volume 59 Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality* 166 (Jan. 28, 2012) (transcript on file with author). In the context of human trafficking, the primary focus—both in terms of media attention and resourcing—has been on sex trafficking, although far more immigrant women have been caught up in labor trafficking. *Id.* Noting that virtually all labor-trafficked women are undocumented, the consequence of “applying the criminal justice framework to labor-trafficked worker women leads to heightened immigration arrest, detention, and removal.” *Id.* The discourse’s marginalization of immigrant women “is not something we can continue to ignore.” *Id.*
41. This is not to suggest that there is always a clear strategy to resist such consequences. The risk that an insurgent movement might be co-opted always accompanies efforts to engage state power in addressing specific demands. The scope of a movement’s primary arguments will not necessarily determine how the state responds. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1352-54 (1988) (arguing that in the context of antiracist struggles, civil rights advocacy was necessary to engage the state and that other rhetorics were unlikely to have generated any useful interventions). That said, in the context of domestic violence, demands around how state coercion should be deployed to force matters into the criminal justice system were far more contested within the movement itself.
42. See, e.g., Luke Charles Harris, *My Two Mothers, America, and the Million Man March*, in *BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER* 54, 57 (Devon W. Carbado ed., 1999).
43. See JULIA S. JORDAN-ZACHERY, *BLACK WOMEN, CULTURAL IMAGES, AND SOCIAL POLICY* 56-62 (2008) (discussing their origins in the Reagan era).

44. See ANDREW B. WHITFORD & JEFF YATES, PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS 66-69 (2009) (discussing President Clinton's policy emphasis on drug enforcement over treatment, such as by issuing three executive orders to extend the power of the Office of National Drug Control Policy and to create the President's Drug Policy Council); Sheila R. Zedlewski, *Welfare Reform: What Have We Learned in Fifteen Years?* 8-9 (Urban Institute Brief 24, 2012) (discussing the impact of Temporary Assistance for Needy Families (TANF), instituted as part of President Clinton's Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, on the economic safety net of poor parents and children); see also LEGAL MOMENTUM, WELFARE REFORM AT AGE 15: A VANISHING SAFETY NET FOR WOMEN AND CHILDREN 1 (2011) ("The shredding of the safety net has had an especially harsh impact on single mother families, as at any given time between one-quarter and one-third of single mothers are jobless and potentially in need of assistance.").
45. See, e.g., David A. Sklansky, *supra*, note 7 (noting public associations of the "ghetto" drug trade targeted by the war on drugs primarily with Black men); ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN (2004) (arguing that much of the foundation of the welfare reform debate of the 1996 turned on stereotypes and maligned misperceptions of poor Black mothers).
46. NIKOL G. ALEXANDER-FLOYD, GENDER, RACE, AND NATIONALISM IN CONTEMPORARY BLACK POLITICS 68 (2007).
47. See Harris, *supra* note 44, at 58-65.
48. DANIEL PATRICK MOYNIHAN, U.S. DEP'T LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 17-28 (1965), available at <http://www.dol.gov/oasam/programs/history/webid-meynihn.htm> ("Because the father is either not present, is unemployed, or makes such a low wage, the Negro woman goes to work. Fifty-six percent of Negro women, age 25 to 64, are in the work force, against 42 percent of white women. This dependence on the mother's income undermines the position of the father and deprives the children of the kind of attention, particularly in school matters, which is now a standard feature of middle-class upbringing."); *id.* at 34 (quoting Thomas Pettigrew as noting, "[t]he Negro wife in this situation can easily become disgusted with her financially dependent husband, and her rejection of him further alienates the male from family life. Embittered by their experiences with men, many Negro mothers often act to perpetuate the mother-centered pattern by taking a greater interest in their daughters than their sons.").
49. *Id.* at 42 ("There is another special quality about military service for Negro men: It is an utterly masculine world. Given the strains of the disorganized and matrifocal family life in which so many Negro youth come of age, the Armed Forces are a dramatic and desperately needed change: a world away from women, a world run by strong men of unquestioned authority, where discipline, if harsh, is nonetheless orderly and predictable, and where rewards, if limited, are granted on the basis of performance.").
50. The *New York Amsterdam News* quoted President Clinton as saying of the Million Man March ("the March"):

"They were basically standing up for the dignity of family and asking African American men and fathers to be more responsible," Clinton said. "It was totally non-violent and got a big participation and it also showed frankly, a face to a part of America that is not as sympathetic

to the problems that African Americans in the cities and the poor rural areas have . . . that hey, there's all these people and they are advocating a responsible agenda and not just asking for something, and they're saying, 'This is our responsibility; this is what we're suppose to do.' I personally thought it was quite positive.”

Jamal E. Watson, *A Clinton Conversation, Part I: Former President Talks About Cosby's Controversial Comments and Millions More March*, N.Y. AMSTERDAM NEWS, May 5, 2005, at 1, 29; see also Paul Richter, *Million Man March: Clinton Calls for End to Racism: Speech: Racial Gulf Exposed by Simpson Trial Demands Individual Remedy, He Says*, L.A. TIMES, Oct. 17, 1995, <http://articles.latimes.com/1995-10-17/news/mn-579531simpson-trial>. Supporters of the March included Ralph Johns, reported to be the first white person to join a local NAACP chapter and the first white vice president of the NAACP. Lilly Dizon, *Million Man March: Supporters in O.C. Stage Local Rally*, L.A. TIMES, Oct. 17, 1995, <http://articles.latimes.com/1995-10-17/news/mn-579841million-man-march>. Additionally, politicians such as Baltimore Mayor Kurt L. Schmoke, Philadelphia Mayor Edward G. Rendell, rap musicians Public Enemy and Brand Nubian, and the National Council of Negro Women supported the March. Michael A. Fletcher & Hamil A. Harris, *'Million Man March' Gains Supporters*, OSCALA STAR-BANNER, Sept. 11, 1995, at 3A.

51. See Harris, *supra* note 44.
52. President Clinton vowed to “end welfare as far as we know it” throughout his campaign for the presidency and attempted to eventually fulfill this goal by signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, on August 22, 1996. See Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC, Mar. 1997, <http://www.theatlantic.com/past/docs/issues/97mar/edelman/edelman.htm>.
53. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a)(3), 111 Stat. 2115, 2118 (expediting parental termination when parents have lost contact with their children in fifteen of the preceding twenty-two months); see also Tina Reynolds, Presentation at UCLA Law Review Volume 59 Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization—Race, Gender, and Conditions of Confinement* (Jan. 28, 2012) (transcript on file with author).
54. See Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (codifying the procedure for evicting residents from public housing who otherwise qualified if one of them was charged with a drug offense—commonly known as the “One Strike” law); see also Stacy L. Mallicoat, *The Incarceration of Women*, in *WOMEN AND CRIME: A TEXT/READER* 461, 471 (Stacy L. Mallicoat ed., 2012) (describing how the Welfare Reform Bill of 1996 has resulted in significant challenges to family reunification, visitation, and lifestyle improvement to individuals convicted of a drug offense). On August 12, 2009, the American Civil Liberties Union’s Women’s Rights Project filed suit against the Housing Authority of the City of Annapolis (HACA) challenging an HACA policy that bans approximately five hundred individuals from being on or near public housing property, effectively preventing these individuals from visiting family. Complaint, *Sharps v. Hous. Auth. of the City of Annapolis* (Md. Cir. Ct. Aug. 12, 2009.), available at <http://www.aclu.org/womens-rights/sharps-v-housing-authority-city-annapolis-complaint>. Under

the policy, individuals that were labeled a “danger” to the community were placed on the “do not enter” list for a variety of reasons, including mere involvement in minor offenses five or more years ago and, in many instances, premised upon alleged criminal conduct for which they were never charged with a crime. For more information on the case, see *Sharps v. Housing Authority of the City of Annapolis*, ACLU.org (Nov. 17, 2010), <http://www.aclu.org/womens-rights/sharps-v-housing-authority-city-annapolis>.

55. Traditional civil rights organizations have failed to prioritize the special challenges faced by imprisoned mothers despite the growing numbers of Black children who wind up in long-term foster care. For example, the NAACP devoted an entire convention to the crisis facing Black men and boys, yet the president’s comments on mass incarceration failed to mention Black women or the devastating effects of ASFA on their families. Advocates in New York have successfully lobbied the legislature to ameliorate some of the more draconian dimensions of the law. See Deseriee A. Kennedy, “*The Good Mother*”: *Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 195-96 (2012). The coalition that brought the plight of incarcerated mothers to light did not include traditional civil rights groups. See Abigail Kramer, *A Fight to Extend Parents’ Rights*, CITY LIMITS, Feb 25, 2010, <http://www.citylimits.org/news/articles/3895/a-fight-to-extend> (noting supporters of the bill included, *inter alia*, the Children’s Defense Fund, Big Brothers and Big Sisters of NYC, and the Federation of Protestant Welfare Agencies; notably, the NAACP, Urban League, and other African American lobbying groups did not come out in support of the bill).
56. See Julia S. Jordan-Zachery, *Let Men Be Men: A Gendered Analysis of Black Ideological Response to Familial Policies*, in THE EXPANDING BOUNDARIES OF BLACK POLITICS 177, 183 (Georgia Anna Persons ed., 2007) (“Fatherhood and marriage initiatives are designed to eliminate the Black Matriarch and ‘liberate’ the emasculated black man by reinstating him in his rightful place. If policy can ensure the reinstatement of these men as leaders of the family, supporters argue everything will be all right in these communities.”); see also Dorothy Roberts, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 8 (1998) (noting that neoliberals point to failed family formation as the primary cause of poverty in the United States and ultimately demonize Black motherhood: “[I]t is believed that Black mothers transfer a deviant lifestyle to their children that dooms each succeeding generation to a life of poverty, delinquency, and despair. A persistent objective of American social policy has been to monitor and restrain this corrupting tendency of Black motherhood.”).
57. Watson, *supra* note 52.
58. See Roberts, *supra* note 14, at 1476, 1483-84, 1488-91.
59. “Seventy percent of women who are detained in any correctional facility in this country have experienced violence.” Richie, *supra* note 20, at 13.
60. See Richie, *supra* note 36, at 62.
61. See KEMBA SMITH WITH MONIQUE W. MORRIS, POSTER CHILD: THE KEMBA SMITH STORY (2011). More broadly, despite the male-centric discourses about the consequences of the war on drugs, women have suffered a greater increase in the resulting incarceration rates than men.
62. Brenda Smith, *Uncomfortable Places, Close Spaces: Female Correctional Workers’ Sexual Interactions with Men and Boys in Custody*, 59 UCLA L. REV. 1690 (2012);

see also AM. ASS'N OF UNIV. WOMEN, *THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP* 6-7 (2012) (additionally noting that Black women earn 91 percent of what a Black male earns and 70 percent of what a white male earns).

63. See Lipsitz, *supra* note 6, at 1752.
64. Jody Miller argues that “though violence against women is systematic throughout the United States, . . . it is particularly acute for adolescent girls in neighborhoods characterized by intense disadvantage. Young women do their best to navigate these dangerous terrains, but they encounter vastly inadequate social and institutional supports. Moreover, these are structural and ecological problems.” JODY MILLER, *GETTING PLAYED: AFRICAN AMERICAN GIRLS, URBAN INEQUALITY, AND GENDERED VIOLENCE* 3 (2008).
65. See Reynolds, *supra* note 55, at 108 (recounting how ASFA’s policies, combined with the difficulty of female prisoners to receive visits from their children because of the long distances between the few female prisons and the community in which her family resided, resulted in the termination of her rights over one of her children). As Emily Nicholson notes, “[o]ver sixty percent of parents in state prisons and over eighty percent of parents in federal prisons are located in facilities greater than one hundred miles from their homes.” Emily K. Nicholson, Comment, *Racing Against the ASFA Clock: How Incarcerated Parents Lose More Than Freedom*, 45 DUQ. L. REV. 83, 89 (2006) (citing CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, NCJ 182335, *INCARCERATED PARENTS AND THEIR CHILDREN 1* (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/iptc.pdf>). “Mothers are particularly likely to be placed at a substantial distance from their families due to the limited number of female correctional facilities across the nation.” *Id.* (citing Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1673 (2003)). Women are additionally disadvantaged by this gender-neutral law “[b]ecause incarcerated mothers are more likely to have children in foster care than incarcerated fathers[. W]omen have become more vulnerable to ASFA’s 15/22 provision and thus more susceptible to losing their parental rights.” *Id.* at 92. Between 70 and 90 percent of incarcerated mothers are the custodial parents of their children whereas the reverse is true for men. *Id.* (citing Mariely Downey, *Losing More than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 BUFF. WOMEN’S L.J. 41, 45 (2001)).
66. Barriers to family reunification include laws that impose lifetime bans prohibiting those convicted of drug offenses from accessing government aid and housing support; barriers to entering professions that require licensing include, for example, nursing, hairdressing, and childcare. The intersectional dimension of race, gender, class, and status as a formerly incarcerated woman likely presents barriers that vary by race. For example, one study found that women with a criminal record are significantly more likely to receive a negative response from a potential employer than those without a criminal record. Black women were the only group more likely to receive a negative response from an employer whether or not she had a criminal record. See MONIQUE W. MORRIS ET AL., THELTON E. HENDERSON CTR. FOR SOC. JUSTICE, *A HIGHER HURDLE: BARRIERS TO EMPLOYMENT FOR FORMERLY INCARCERATED WOMEN* (2008).
67. Organizations focused on promoting the development of young black males include the Open Society Foundation’s Campaign for Black Male Achievement and the Knight Foundation’s Black Male Engagement Campaign. See also Kimberly N. Alleyne, *Foundations Help to Reshape Plight and Images of Black Males*, LA.

WKLY., Jun. 4, 2012, <http://www.louisianaweekly.com/foundations-help-to-reshape- plight-and-images-of-black-males>. The federal government also supports such male-centered intervention through its fatherhood initiative designed to “help[] fathers improve their economic status by providing activities, such as Work First services, job search, job training, subsidized employment, job retention, and job enhancement; and encouraging education, including career-advancing education.” *Promoting Responsible Fatherhood Home Page*, U.S. DEP’T HEALTH & HUM. SERVICES, <http://fatherhood.hhs.gov> (last visited Aug. 3, 2012). A search of the Department of Health and Human Services (DHHS) website found no comparable motherhood initiatives to address the economic marginality of poor women. Although children of color are disproportionately dependent on their mothers’ income, which is, in turn, lower than their male counterparts across racial groups, the economic plight of poor women of color is all but ignored in these interventions. The alleged gender discrimination in the DHHS fatherhood initiatives drew a complaint from Legal Momentum, arguing that thirteen programs discriminated against women in a matter prohibited by the Fifth Amendment and by Title 9. *See* Legal Momentum & Nat’l Org. for Women, Class Complaint of Sex Discrimination in Responsible Fatherhood Program in Violation of Title IX, Submitted to United States Department of Health and Human Services (Mar. 28, 2007), *available at* <http://www.legalmomentum.org/assets/pdfs/regvicomplaint.pdf>.

68. *See* Adriane Quinlan, *Among Those It Would Help, Doubts That a Plan Can Tame Inequality in New York*, N.Y. TIMES, Aug. 4, 2011, <http://www.nytimes.com/2011/08/05/nyregion/black-and-latino-men-in-new-york-question-bloomberg-program.html>. Interestingly, the frame has been expanded to include now “Black and Brown boys,” although the rationale remains firmly fixed within the discourse of Black male crisis. Adding Latino boys to the frame highlights the fact that these initiatives are more ideologically than materially based. The crisis frame has become so wildly rehearsed that in 2007, presidential candidates John Edwards and Hillary Clinton signaled their commitment to eliminating poverty by focusing their comments on boys of color. In fact, on virtually all fronts, research suggests that young Latino men were economically better situated than their female counterparts, and Black young men were better situated than Black young women on seven out of ten comparative factors. LEGAL MOMENTUM, *YOUNG MEN ARE STILL ECONOMICALLY BETTER OFF THAN YOUNG WOMEN* 4, 6 (2008), *available at* <http://www.legalmomentum.org/assets/pdfs/youngwomenbetterthanmen.pdf> (“[A]lthough fewer are high school dropouts and more have college degrees, young women still earn less than young men. The earnings increase associated with their superior educational attainment is more than offset by the earnings decrease associated with their gender . . . [A]t each level of educational attainment young Hispanic men earn more than young Hispanic women, and young Black men earn more than young Black women.”).
69. *See* DAVID BANKS & ANA OLIVEIRA, *YOUNG MEN’S INITIATIVE: REPORT TO THE MAYOR FROM THE CHAIRS* 10 (2011), *available at* http://www.nyc.gov/html/om/pdf/2011/young_mens_initiative_report.pdf (noting that economic recovery in New York City will be incomplete without bringing jobs to Black and Latino boys and giving them a place in the workforce of tomorrow); Quinlan, *supra* note 70; Press Release, City of New York, Mayor Bloomberg Launches Nation’s Most Comprehensive Effort to Tackle Disparities Between Young Black and Latino Males and Their Peers (Aug. 4, 2011) <http://www.nyc.gov/html/om/html/2011b/pr282-11.html>; *see also* Press

Release, Open Soc’y Funds., Soros Pledges \$30 Million to Transform the Lives of the Most Vulnerable Black and Latino Boys (Aug. 4, 2011), <http://www.soros.org/press-releases/soros-pledges-30-million-transform-lives-nyc-s-most-vulnerable-black-and-latino-boys> (emphasizing import of targeting school-to-prison pipeline as impediment to success for Black and Latino boys).

70. *See, e.g.*, *Floyd v. City of New York*, 283 F.R.D. 153, 159, 178 (S.D.N.Y. May 16, 2012) (holding that safeguarding the right to physical liberty is “quintessentially the role of the judicial branch,” and that imposing an injunction on Mayor Bloomberg’s stop-and-frisk policy would not be outside of the courts’ power); Editorial, *Surveillance, Security and Civil Liberties*, N.Y. TIMES, Mar. 3, 2012, <http://www.nytimes.com/2012/03/04/opinion/sunday/surveillance-security-and-civil-liberties.html>; Al Baker, *Judge Grants Class-Action Status to Stop-and-Frisk Suit*, N.Y. TIMES BLOGS-CITY ROOM (May 16, 2012, 11:23 AM), <http://cityroom.blogs.nytimes.com/2012/05/16/judge-allows-class-action-status-in-stop-and-frisk-lawsuit>; *see also Stop and Frisk Data*, NYCLU.org, <http://www.nyclu.org/issues/racial-justice/stop-and-frisk-data> (last visited Mar. 20, 2013) (indicating that in 2011, NYPD stopped people 685,724 times, 88 percent of whom were not arrested or ticketed, and 87 percent of whom were Black or Latino).
71. Kate Taylor, *Stop-and-Frisk Policy ‘Saves Lives,’ Mayor Tells Black Congregation*, N.Y. TIMES, June 10, 2012, <http://www.nytimes.com/2012/06/11/nyregion/at-black-church-in-brooklyn-bloomberg-defends-stop-and-frisk-policy.html> (discussing Mayor Bloomberg’s campaign to win support for the policy from Black churches).
72. *See United States v. City of New York*, No. 07-CV-2067, 2011 WL 4639832 (E.D.N.Y. Oct. 5, 2011) (major reforms were ordered to be taken by the city in order to address the discriminatory practices the Fire Department of New York had employing). Mayor Bloomberg responded to the order by stating that “the judge was not elected to run the city, and you can rest assured that we’ll be in court for a long time.” Alan Feuer, *Monitor Must Oversee N.Y. Fire Dept. Hiring, Judge Rules*, N.Y. TIMES, Oct. 5, 2011, <http://www.nytimes.com/2011/10/06/nyregion/monitor-must-oversee-ny-fire-dept-hiring-judge-rules.html> (internal quotation marks omitted). The case has since been heard by the U.S. Second Circuit Court of Appeals on appeal by the city. *See id.*; David R. Jones, *Is the U.S. Justice Department Supporting Discrimination by the New York Fire Department?*, HUFFINGTON POST (July 9, 2012, 4:31 PM), http://www.huffingtonpost.com/david-jones/is-the-us-justice-departm_b_1647089.html.
73. The connection between race and neoliberalism is explored in DAVID WILSON, CITIES AND RACE: AMERICA’S NEW BLACK GHETTO (2007). As David Roberts and Minelle Mahtani describe, Wilson “introduces readers to a cast of characters, such as ‘Welfare Queens’, ‘welfare-hustling men’, and ‘black youth gangbangers’ that Ronald Reagan used to capitalize upon the fears of the country and direct them at the ghetto. In each of these terms, race, specifically blackness, coupled with anti-market behaviors become [sic] intertwined in the construction of the antithesis of the ideal neoliberal citizen in the black ghetto resident. In his analysis, race is mobilized to show that racialized subjectivities are essential in justifying certain impacts of neoliberalization that are experienced disproportionately within racialized communities.” David J. Roberts & Minelle Mahtani, *Neoliberalizing Race, Racing Neoliberalism: Placing “Race” in Neoliberal Discourses*, 42 ANTIPODE 248, 249 (2010).
74. As Janine Brodie acknowledges, neoliberalism works through numerous ideological frames, including the frame of at-risk populations:

Other strategies of subordination include: narrowing or downsizing and targeting social programs to specific groups that are identified as being at risk; functionalizing or redesigning social programs so that they primarily address the needs of neoliberal labour markets rather than personal wellbeing; and fiscalizing or transforming social policies that required program planning and service providers into tax credits and deductions, which purportedly allows citizens ‘choice’ in meeting their social needs.

Janine Brodie, *Reforming Social Justice in Neoliberal Times*, 1 *STUD. SOC. JUST.* 93, 101 (2007) (citing John Clarke, *Subordinating the Social? Neo-liberalism and the Remaking of Welfare Capitalism*, 21 *CULTURAL STUD.* 974 (2007)).

75. See Lipsitz, *supra* note 6, at 1751 (“Women of color play a central role in this process because punitive policies directed against impoverished people of color almost always rely on fantasies of gender normativity that locate virtue in heterosexual companionate marriage and intact male-headed nuclear families and see other forms of desire, sexuality, affiliation, and affection as causes of criminality. These fantasies function as explanations and excuses for the intersectional vulnerabilities that are actually created by multiple forms of raced and gendered exploitation inscribed inside the routine practices of contemporary capitalism.”).
76. Dorothy Roberts, Presentation at UCLA Law Review Volume 59 Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization—Establishing the Framework* 40 (Jan. 27, 2012) (transcript on file with author).
77. Keita Takayama, *A Nation at Risk Crosses the Pacific: Transnational Borrowing of the U.S. Crisis Discourse in the Debate on Education Reform in Japan*, 51 *COMP. EDUC. REV.* 423, 427-28 (2007) (discussing the initial emergence of the crisis discourse in the United States and asserting that “[e]very crisis story line has common characteristics that legitimize a particular way of making sense of a given social condition”).
78. *Id.*
79. See Roberts, *supra* note 14, at 1488-89. As recognized by feminist and antiracist political scientists, neoliberal doctrine has had profound effects on women and persons of color. For example, as noted by David Goldberg, neoliberalism’s elevation of the privatization of “property, revenue generation, utilities, services, and social support systems, . . . shifting the traditional caretaking functions of the modern state . . . [has] bifurcated experiences of social goods”—in many crucial instances along the lines of gender, race, or both. DAVID THEO GOLDBERG, *THE THREAT OF RACE: REFLECTIONS ON RACIAL NEOLIBERALISM* 332 (2009); see also ANNA MARIE SMITH, *WELFARE REFORM AND SEXUAL REGULATION* 33 n.64 (2007).
80. This is particularly notable in the context of violence and sexualized racism. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1256 (1991) (describing how Black women’s experience of domestic violence and sexual assault is frequently suppressed out of concerns that such acknowledgment constitutes dirty laundry that will reinforce racist stereotypes of African American men). Particularly resonant here, for example, are traditional critiques of sexual violence and racism that focus almost exclusively on the disproportionate conviction of Black defendants in interracial cases. Falling far outside this focus has been Black women’s experience, namely, the fact that Black women are least likely to see their assailants prosecuted and convicted. Some have gone so far as to argue that violence against Black women

is justified as a disciplinary measure to keep them in check. *Id.* at 1254 (discussing controversial author Shahrazad Ali arguing that Black women have been damaged by racism’s undermining of traditional male authority, and thus physical punishment is an acceptable option for men seeking to reestablish control).

81. As Dorothy Roberts notes, the critique of the dominant frame is not to deny that there is indeed a crisis with respect to mass incarceration. Instead, “the idea is, to the extent that we do understand mass incarceration being a crisis in our community (and I think we all do), it is important that we understand it has gender dimensions, and those gender dimensions are not only not being addressed, but the failure to address them actually exacerbates those gender dimensions. So, basically, just a straightforward plea to just say [that] this is what our interest is and it should be and we need to be far more inclusive and critical [of s]ome of the frames that make it more difficult to do the work.” Roberts, *supra* note 78, at 40-41.
82. See Jaekyung Lee, *Racial and Ethnic Achievement Gap Trends: Reversing the Progress Toward Equity?*, 31 EDUC. RESEARCHER 3 (2002) (discussing the reasons that may have contributed to the widening of the achievement gap since the 1980s, but not referencing once the potential impact of declining resources and increasingly segregated education); Robert Rothman, *Closing the Achievement Gap: How Schools Are Making It Happen*, 5 J. ANNENBERG CHALLENGE, Winter 2001/02, at 1, 6 (discussing the achievement gap and the “soft bigotry of low expectations” language used by President Bush in regards to education).
83. See *supra* note 84 and accompanying text.
84. MOYNIHAN, *supra* note 50; see, e.g., Marc Mauer, *The Crisis of the Young African American Male and the Criminal Justice System*, in IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY 199 (Othello Harris & R. Robin Miller eds., 2003) (discussing the reemergence of Moynihan-esque narratives). For a searing critique of the reemergence of the Moynihan-esque thesis in public policy, see NIKOL G. ALEXANDER-FLOYD, *The Black Cultural Pathology Paradigm and George Bush’s Faith-Based and Fatherhood Initiatives*, in ALEXANDER-FLOYD, *supra* note 48, at 75.
85. See, e.g., Frank F. Furstenberg, *If Moynihan Had Only Known: Race, Class, and Family Change in the Late Twentieth Century*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 94 (2009) (discussing pseudo-revivalist attempts at pushing for the return to the nuclear family akin to those proffered by Moynihan).
86. See Steven L. Nock, *Marriage and Fatherhood in the Lives of African American Men*, in BLACK FATHERS IN CONTEMPORARY AMERICAN SOCIETY: STRENGTHS, WEAKNESSES, AND STRATEGIES FOR CHANGE 30 (Obie Clayton, Ronald B. Mincy & David Blankenhorn eds., 2006).
87. See generally Ron Haskins, *Moynihan Was Right: Now What*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 281 (2009).
88. Lipsitz, *supra* note 6, at 1806.
89. *Id.* at 1761.



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Professor Gardbaum's scholarship focuses on comparative constitutional law, constitutional theory and federalism. His book *The New Commonwealth Model of Constitutionalism* (Cambridge University Press, 2013) develops the theory and explores the practice of a novel form of human rights protection in Canada, New Zealand and the United Kingdom. He was the keynote speaker at the 2009 Protecting Human Rights Conference in Australia, part of the debate in that country about adopting this new model. A book-length collection of his work on the comparative structure of constitutional rights was recently published by the European Research Center of Comparative Law. Professor Gardbaum's articles have appeared in the *Harvard Law Review*, *Stanford Law Review*, *Michigan Law Review*, *University of Chicago Law Review* and the *American Journal of Comparative Law*, among other places. His scholarship has been cited by the U.S. and Canadian Supreme Courts, and widely translated.

THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE*

Stephen Gardbaum

As a recent and ongoing experiment in constitutional design, the new Commonwealth model of constitutionalism may be something new under the sun. It represents a third approach to structuring and institutionalizing basic constitutional arrangements that occupies the intermediate ground in between the two traditional and previously mutually exclusive options of legislative and judicial supremacy. It also provides novel, and arguably more optimal, techniques for protecting rights within a democracy through a reallocation of powers between courts and legislatures that brings them into greater balance than under either of these two lopsided existing models. In this way, the new Commonwealth model promises to be to forms of constitutionalism what the mixed economy is to forms of economic organization: a distinct and appealing third way in between two purer but flawed extremes. Or, it may be, as some have claimed, more like a comet that shone brightly and beguilingly in the constitutional firmament for a brief moment but quickly burned up, a victim of the inexorable law of the excluded middle. In exploring the theory and practice of the new Commonwealth model, the book from which this article is excerpted assesses whether ink or eraser is the better response to its current penciled-in status on the short list of alternatives from which constitutional drafters everywhere make their momentous decisions.

“The new Commonwealth model of constitutionalism” (“the new model” for short) refers to a common general structure or approach underlying the bills of rights introduced in recent years in Canada (1982), New Zealand (1990), the United Kingdom (1998), the Australian Capital Territory (ACT) (2004) and the state of Victoria (2006). This approach self-consciously departs from the *old* or traditional Commonwealth model of legislative supremacy, in which there is no general, codified bill of rights; rather, particular rights are created and changed by the legislature through ordinary statutes on an *ad hoc* basis. Under this traditional model, courts have no power to review legislation for infringing rights, as rights are not limits on legislation but its product, and are changeable by it. In this way, legislatures are supreme because they ultimately determine what legal rights there are and how rights issues are resolved. The judicial function is limited to faithfully interpreting and applying whatever laws the legislature enacts.

At the same time, however, the new model also contrasts with the alternative standard option for institutionalizing basic constitutional arrangements: namely, judicial or constitutional supremacy. Here, there is a general, codified bill of rights, which imposes constitutional limits on legislative power. These limits are enforced by authorizing courts to review legislation for consistency with the bill of rights and to invalidate statutes that, in their final view, infringe its provisions. As a result, courts are supreme because they have the last word on the validity of legislation and the resolution of rights issues, at least within the existing bill of rights.

The new model carves out a distinct third answer to the general question of how constitutionalism's core limits on governmental power should be institutionalized in a democracy. Its novel approach calls for the enactment of a bill of rights—although not necessarily one that imposes constitutional limits on the legislature—and its enforcement through the twin mechanisms of judicial *and* political rights review of legislation, but with the legal power of the final word going to the politically-accountable branch of government rather than the courts. In this way, the new model treats legislatures and courts as joint or supplementary rather than alternative exclusive protectors and promoters of rights, as under the two traditional models, and decouples the power of judicial review of legislation from judicial supremacy or finality.

I. WHAT IS NEW ABOUT THE NEW MODEL?

In essence, the new Commonwealth model of constitutionalism consists of the combination of two novel techniques for protecting rights. These are mandatory pre-enactment political rights review and weak-form judicial review.

The first technique requires both of the elective branches of government to engage in rights review of a proposed statute before and during the bill's legislative process. The formalized, mandatory and deliberate nature of political rights review under the new model distinguishes it from characteristic practices under both other forms of constitutionalism, where if any such review occurs it tends to be *ad hoc*, voluntary and unsystematic.¹ Political rights review is a direct and alternative response to the standard concerns about legislative/majoritarian rights sensibilities that underlie the traditional argument for judicial review of legislation. It is designed to take this concern seriously and to address it directly, at the horse's mouth as it were, by ensuring that the general rights consciousness of the executive that proposes bills and the legislature that considers and enacts them is raised and that specific rights concerns are identified and aired during the legislative process.² In other words, political rights review provides an internal solution to this potential problem that transfers some of the responsibility for rights protection from the external and more indirect mechanism of judicial review to the legislature itself. As such, it also

supplements a purely *ex post* technique of rights protection with an *ex ante* one, with many of the associated general advantages of this type of regulation. In this context, *ex ante* regulation provides the only protection against those outputs of the legislative process that are never litigated for one reason or another,³ and a second layer in addition to *ex post* review for those that are.

The second technique of rights protection that is constitutive of the new model is weak-form judicial review. It is this technique that decouples judicial review from judicial supremacy, meaning that although courts have powers of constitutional review they do not necessarily or automatically have final authority on what the law of the land is. Unlike the case under judicial supremacy, their decisions are not unreviewable by ordinary legislative majority. This is because one of the defining features of the technique (and so of the new model) is that it grants the legal power—but not the duty—of the final word to the legislature. That is, in giving political discretion to the legislature on whether or not to use it in any particular case, the new model creates a gap between this legal power and its exercise that distinguishes it from the other two models. Whereas under both strong-form judicial review and legislative supremacy, the institution with the power of the final word is essentially bound to exercise it and does so routinely, almost automatically—courts in the context of deciding a case or abstract review and legislatures because the act of passing a law *is* the final word—this is not so under the new model. In deciding whether (rather than how) to use their power, legislatures may be heavily influenced by the prior exercise of weak-form judicial review.

Here it is necessary to clarify both the relevant sense of judicial supremacy that the new model rejects and what is novel about the technique. The term judicial supremacy has become a little clouded as a result of the rise of “dialogue theory,” which originated and has its strongest hold in Canada. Its proponents argue that the frequency of “legislative sequels” following the judicial invalidation of statutes means there is judicial-legislative dialogue and often *de facto* legislative supremacy, especially where such sequels are upheld by the courts.⁴ Even in the United States, it has been noted that a similar practice of legislative sequels and inter-institutional dialogue sometimes occurs, as exemplified by Congress’ continuing to create hundreds of legislative vetoes of executive action after the practice was declared unconstitutional by the Supreme Court in *I.N.S. v. Chadha*.⁵ This, it has been argued, means that in reality the meaning of the Constitution depends on interpretations put forward by legislators in opposition to those proposed by the judiciary and that no single institution, judiciary included, has the final word on constitutional questions.⁶

Putting aside the fact that this *Chadha* episode is unrepresentative of U.S. constitutional law as a whole because on separation of powers (as distinct from rights) issues it is well-known that legal resolutions generally play a lesser role than political ones,⁷ this train of thought misses the specific and relevant finality issue. This is who has the final legal word on the validity and continuing operation of the particular existing law at issue in the litigation, not whether the judicial decision binds *future* legislative or executive acts—an issue about which there has long been divided opinion in the United States.⁸ But on this relevant issue for our purposes, there is no doubt or controversy: short of constitutional amendment, the judiciary has the final word on whether the specific law (or part of it) challenged in *Chadha* is the law of the land—and indeed, on the validity of any of the subsequently enacted legislative vetoes that may come before them. This is what, in context, strong-form judicial review refers to.⁹ By contrast, weak-form judicial review under the new model means that the legislature and not the judiciary has *de jure* finality, the legal power of the final word with respect to the specific law at issue, unlike in the United States or other regimes of judicial supremacy.

On the novelty of the technique, the concept of weak-form judicial review *per se* may not be original to the new model. This is because there are arguably other pre-existing constitutional theories that have a similar basic structure of judicial review without judicial finality and so can perhaps properly be called such. These include certain versions of departmentalism (each branch of government is the final interpreter of its own powers)¹⁰ and popular constitutionalism (the people are the final interpreters of constitutional meaning).¹¹ Nonetheless, weak-form judicial review as institutionalized within the new model is innovative in at least three ways. First, it is the general mode of judicial review under the new model, whereas it is only a partial or supplementary mode under these other theories, employed in certain areas but not others (*e.g.*, separation of powers type issues under departmentalism) or triggered exceptionally or only periodically (*e.g.*, popular constitutionalism). Secondly, the new model's general mechanism of "penultimate judicial review"¹² followed by possible exercise of the legislative override power is not one that is present in the other theories, because either courts defer to the relevant other branch in the first place or it is the people themselves who have the final say. Indeed, the new model's distinctive allocation of powers provides a far more tangible and concrete institutional mechanism of judicial non-finality than is present in most versions of popular constitutionalism and departmentalism.¹³ Thirdly, two of the new model's specific mechanisms of weak-form review were entirely novel when introduced: namely, the "notwithstanding mechanism" contained in section 33 of the Canadian Charter of Rights and Freedoms 1982 (the Charter) and also section 2 of its predecessor, the Canadian Bill of Rights 1960 (CBOR),¹⁴ and the power of the higher United Kingdom courts to issue declarations of incompatibility under section 4 of the Human Rights Act 1998 (HRA).¹⁵

These two techniques of political rights review and weak-form judicial review, which in combination define and distinguish the new model, can be further broken down into the following four essential institutional features, or jointly necessary and sufficient conditions. The first is a legalized and codified charter or bill of rights—as distinct from purely moral and political rights, residual common law liberties or a piecemeal collection of specific, stand-alone statutory rights. This bill of rights forms the subject-matter or focus of both political and weak-form judicial review and may have either constitutional or statutory status.

The second feature is mandatory rights review of legislation by the political branches before enactment. This is typically institutionalized by a requirement that a government minister provide a formal statement where he or she is of the opinion that a bill is incompatible with protected rights on its introduction in the legislature, which triggers both prior executive vetting and subsequent legislative scrutiny.

The third is some form of constitutional review of legislation by the courts. That is, a form of judicial power to protect and enforce these rights going beyond an interpretive presumption that the legislature does not intend to violate them or ordinary modes of statutory interpretation. From the perspective of traditional legislative supremacy, these are *enhanced* or greater judicial powers to protect rights than previously existed. As we shall see momentarily, the required form of constitutional review may range from a duty to interpret legislation consistently with protected rights where reasonably possible to a judicial power of invalidation.

The fourth feature, notwithstanding this judicial role, is a formal legislative power to have the final word on what the law of the land is by ordinary majority vote. The specific form of this legislative power will vary according to the version of the constitutional review power granted to the courts, ranging from the power to amend legislation as interpreted by the courts under their rights-respecting duty to the power to override the judicial invalidation of legislation, with others in between.¹⁶

In combination, the first and third features distinguish the new model from traditional legislative supremacy and the fourth from judicial or constitutional supremacy. These essential features of the new model are quite general and permit a range of different specific instantiations, particularly with respect to the second and third features, some of which have in fact been adopted in various countries. So, on a spectrum in which traditional judicial and legislative supremacy mark the two poles, the new model has at least five different possible variations, thereby occupying five slightly different intermediate positions.

Starting from the judicial supremacy pole, the first of these is exemplified by the Charter: (1) a constitutional bill of rights (2) granting the judiciary power to

invalidate conflicting statutes but (3) with a formal legislative final word in the form of the section 33 power exercisable by ordinary majority vote.¹⁷ The second is a statutory bill of rights granting the judiciary the same power to invalidate conflicting statutes, with a similar legislative override power. This position is most closely, although not exactly, illustrated by the still operative CBOR.¹⁸ The third version is exemplified by the HRA, the ACT Human Rights Act 2004 (ACTHRA) and the Victorian Charter of Human Rights and Responsibilities Act 2006 (VCHRR): a statutory bill of rights without the power of judicial invalidation of legislation but instead one new judicial power to declare statutes incompatible with protected rights that does not affect their continuing validity, and a second new judicial power (and obligation) to give statutes a rights-consistent interpretation wherever possible. Both types of judicial decision—declaratory and interpretive—are subject to the ordinary legal power of the legislature to have the final word, a default power in the case of the former and requiring affirmative action in the case of the latter. The fourth variation is a similar statutory bill of rights containing the second judicial power, the interpretive power/duty, but lacking the first or declaratory power. This was exemplified by the New Zealand Bill of Rights Act 1990 (NZBORA), at least until 2000 when the latter power was seemingly implied by the courts.¹⁹ A fifth variation would be granting the courts the declaratory power but only ordinary and traditional powers of statutory interpretation.²⁰

A statutory bill of rights alone without either the interpretive duty or the declaratory power would not satisfy the third necessary feature of the new model and thus, whatever its independent merits, does not depart from traditional parliamentary sovereignty. Similarly, pre-enactment political rights review alone, with or without a bill of rights.²¹ Weak-form judicial review by itself is also insufficient, which is why certain stand-alone legislative override mechanisms in non-Commonwealth jurisdictions amount to no more than a “partial” adoption of the new model.²²

We have already seen that what is new about the new model is the following: (1) it transcends the standard dichotomy in institutional forms of constitutionalism, providing a third choice; (2) it does so by combining two novel techniques of rights protection; and (3) as part of this second feature, it provides a clear institutional mechanism for decoupling judicial review from judicial supremacy. Also as part and parcel of these characteristics, the new model establishes a distinctive and more balanced allocation of powers between courts and legislatures than under the two lopsided existing models. Thus, with their authority to engage in constitutional review, courts have greater powers than under political constitutionalism but their lack of *de jure* finality means less power than under any form of legal constitutionalism. And conversely, legislatures are faced with greater legal and judicial constraints on their actions than under political constitutionalism, but fewer than under legal constitutionalism.

This allocation of powers demonstrates that the new third option is specifically an intermediate one in between the two standard and traditional choices. Its intermediate nature can be further elaborated and explained in the following ways. First, it takes certain key ideas from each of the other two models and combines them into a distinct third option. By borrowing from *both*, the new model creates something in between. From the “big-C” version of legal constitutionalism, the new model first takes the importance of a comprehensive set of affirmative legal rights,²³ as distinct from the (a) mostly moral and political, (b) *ad hoc* statutory and/or (c) default, or negative, conception of rights and liberties as whatever is left unregulated by government that characterizes the traditional model of parliamentary sovereignty. It also accepts the importance of judicial protection and enforcement of rights, as compared with exclusively political. And from legislative supremacy, the new model takes the importance of the notion that there is no form of law set above and wholly immunized from legislative action.

Secondly, the new model can be said to create a distinct blending of legal and political constitutionalism across the board. Although the discourse of political versus legal constitutionalism tends to suggest that the choice is an either-or one, in reality most legal systems have elements of both even where one or the other is predominant.²⁴ Thus, a paradigmatically legal constitutionalist regime such as the United States still has swathes of putatively constitutional law that are typically politically rather than judicially enforced, such as separation of powers between Congress and the President.²⁵ Australia is perhaps the best example of a formally “mixed regime” at the national level, with a legal constitutionalist treatment of structural issues—federalism and separation of powers—and a mostly political constitutionalist treatment of rights.²⁶

By contrast with such formally or informally mixed regimes that apply one or other model to different substantive areas, the new model blends political and legal constitutionalism across the board. It provides a sequenced role for both legal and political modes of accountability as its general mode of operation. In its various instantiations the new model begins with political rights review at the legislative stage, whereby the government is required to consider whether proposed legislation is compatible with protected rights and make its conclusion known to parliament.²⁷ The second stage involves judicial rights review, whereby in the context of a litigated case courts may exercise one or more of their enhanced powers to protect and enforce the rights. The third and final stage involves post-legislative political rights review, whereby the legislature may exercise its power of the final word and enforce any disagreement with the courts. Indeed, the new model not only combines legal and political modes of accountability, but also (1) legal and moral/political conceptions of rights and (2) judicial and legislative rights reasoning,²⁸ rather than a general systemic choice of one rather than the other.

Thirdly, and most formally, the new model offers a set of intermediate legal positions to the essential and conflicting postulates of constitutional and legislative supremacy. Despite interesting differences in the institutionalization of legal constitutionalism since the end of World War II, most notably between centralized and decentralized judicial review, contemporary systems of constitutional supremacy around the world uniformly adhere to the basic principles first established by the United States in its legal revolution against Great Britain that closely followed the political one. These are that the written—or, rather codified—constitution, including its rights provisions, is (1) the supreme law of the land, (2) entrenched against ordinary majoritarian amendment or repeal and (3) enforced by the judicial power to invalidate or disapply conflicting statutes and other government actions, against whose decisions the legislature is powerless to act by ordinary majority vote. The contrary principles of traditional parliamentary sovereignty, which the U.S. Constitution was deliberately designed to reject, are that statutes are (1) the supreme law of the land, (2) not entrenched against ordinary majoritarian amendment or repeal and (3) not subject to a judicial power of review and invalidation on substantive grounds.²⁹

The new model provides intermediate positions on each of these three basic issues. In a legally significant sense, the protected rights have some form of higher law status compared to ordinary statutes but not one that wholly immunizes them from legislative action. This may, for example, be conventional constitutional status but subject to a legislative override, as in Canada, or “constitutional statute” status as has been argued for under the HRA³⁰ and occasionally applied in practice in New Zealand, whereby the earlier statutory right prevails over a conflicting later ordinary statute unless expressly amended or repealed.³¹ Such non-application of the normal doctrine of implied repeal also provides a mode of partial entrenchment that straddles the full and no entrenchment of the other two models.³² And, as discussed, the new model grants courts greater powers to protect rights than under traditional parliamentary sovereignty, powers that amount to forms of constitutional review, but not powers against which legislatures are wholly powerless to act by ordinary majority, as under constitutional supremacy. These include the power of Canadian courts to disapply conflicting statutes subject to the legislative power in section 33, the power of higher U.K. courts to issue declarations of incompatibility under section 4 of the HRA, and the power/duty of U.K. and New Zealand courts to interpret statutes consistently with rights provisions whenever possible.³³ These new, “weak-form” powers occupy the space in between strong-form judicial review against which there is no legislative recourse by ordinary majority vote *vis-à-vis* the particular statute at issue and no constitutional review at all.

The Commonwealth model does not only, however, provide a new form of judicial review; it also provides a new justification of judicial review. For once shorn of

judicial supremacy, the task of defending a judicial role in rights protection is a different—and easier—one. A model of constitutionalism that provides for judicial rights review of legislation but gives the legal power of the final word to ordinary majority vote in the legislature is normatively, and not only practically, different from one that does not.

From a systemic perspective, the new model suggests the novel possibility that the universe of constitutionalism, rather than a bifurcated one clustered around one or other of two mutually incompatible poles, is more of a continuum based on the scope and role of legal/judicial versus political/legislative decision-making in resolving rights issues and enforcing other limits on political power. The continuum stretches from what can be thought of as pure political constitutionalism or strong legislative supremacy at one end to pure legal constitutionalism, or what has been termed “the total constitution,”³⁴ at the other. On this continuum, unlike on the bipolar model, many constitutionalist systems will occupy positions somewhere between the two ends.

II. THE FULLER SPECTRUM

For pure political constitutionalism, the answer to the general question of what type or number of rights-relevant issues and conflicts in a society should be resolved by judicially enforceable higher law is zero. All such issues/conflicts should be resolved politically, through ordinary, non-constitutional laws made and executed by political actors who remain fully accountable for them to the electorate. The judicial role is limited to fairly interpreting and applying this law. The opposite answer is given by pure legal constitutionalism. Its instrument is the “total constitution,” a constitution that decides or strongly influences virtually all rights-relevant issues and conflicts in a society. It does this by broadly defining the rights it contains, imposing affirmative duties on government and/or by creating greater horizontal effect on private law and private individuals.³⁵ In this way, the total constitution effectively constitutionalizes all law by requiring it to be not merely consistent with, but effectively superseded by, the comprehensive higher law of the constitution. Here there is relatively little room for discretionary, autonomous political decision-making or lawmaking as the total constitution provides mandatory answers to almost all issues, leaving ordinary law in effect as a form of administrative law. What defines this polar position, then, is the scope or reach of legal constitutionalism.

Moving along the continuum from total constitutionalism, we come to more standard or limited versions of legal constitutionalism, in which the written or unwritten higher law as construed and applied by the constitutional judiciary resolves some but not all of the rights-relevant issues and conflicts in a society. Again, as compared with the polar version, this will typically be because of its fewer

and more narrowly defined rights, lesser reach into the private sphere and/or fewer affirmative duties on government. Here, legal constitutionalism still leaves significant space for discretionary and autonomous political decision-making in that it removes some but not all topics from the political sphere and, within those remaining, some but not all approaches to those topics. In other words, within conventional legal constitutionalism, higher law (as interpreted and applied by the courts) provides answers to certain issues and narrows the range of permissible political options on others, but its lesser scope compared to the pure or polar version maintains greater space for politically accountable decision-making. Just as important as its better-known function of taking some issues off the political agenda³⁶ is that ordinary legal constitutionalism *leaves others on it*—and this has been central to its appeal in an era that has seen the rise of world constitutionalism alongside, and as part and parcel of, the rise of world democracy.³⁷

The new Commonwealth model occupies that part of the continuum in between this more limited and common form of legal constitutionalism on the one side and pure political constitutionalism on the other. With its blending and sequencing of legal and political accountability and modes of reasoning, its form of judicially enforced higher law influences but does not automatically or necessarily resolve any rights-related issues, distinguishing it from the neighboring positions on either side. Within the space occupied by the new model and on the basis of the introductory discussion of the range of different specific instantiations above, it might be suggested that Canada is slightly closer to the limited legal constitutionalism part of the continuum than the other new model jurisdictions, with the original version of the NZBORA slightly closer to the political constitutionalism pole than the HRA, ACTHRA and VCHRR.

To give a concrete example of how these various positions on the continuum affect how and by whom rights issues are decided, let us consider the case of abortion. On this issue at least, Germany approximates pure legal or total constitutionalism.³⁸ As interpreted by the Federal Constitutional Court, the Basic Law largely determines how this most controversial issue is resolved, leaving relatively little space for discretionary political decision-making. As is well-known, because the fetus' right to life is protected by Article 2(2)³⁹ and the state has a constitutional duty to protect this life even against its mother, the state must treat all abortions as unlawful with the exception of the few judicially defined "unexactable" situations, such as rape, incest or severe birth defects.⁴⁰ Discretionary political decision-making is limited to the narrow window of selecting constitutionally permissible means, apart from the criminal law, for effectively fulfilling the state's duty while still maintaining the required general unlawfulness of abortion. Even here, however, the Federal Constitutional Court has prescribed much of the content of mandatory counseling as a permissible alternative.⁴¹

The United States exemplifies the second position on the continuum, the more conventional or limited version of legal constitutionalism, in its written or enacted form. Here, judicially enforced higher law determines what legislatures *cannot* do—namely, as currently interpreted by the Supreme Court, prohibit or place “undue burdens” on pre-viability abortions or post-viability ones necessary to protect the life or health of the mother—but leaves a greater amount of space for discretionary political decision-making within the parameters of the constitutionally permissible.⁴² Thus, the scope of legislative choice runs from no regulation of abortion at all to twenty-four hour waiting periods, prohibiting so-called partial birth abortions, and perhaps mandatory viewing of fetal ultrasounds.⁴³

In the U.K., the HRA as interpreted and applied by the judiciary may influence the abortion issue but does not definitively decide any aspect of it—either what legislatures must or cannot do. So, even if a higher court were to interpret Convention rights as bestowing a right to life on the fetus and declare the current U.K. abortion statute inconsistent with it—or, conversely, declare a future statute criminalizing abortion inconsistent with a woman’s right to privacy—Parliament would be free to exercise its power to disregard the declaration.⁴⁴ Indeed, this first was the specific scenario cited by the Home Secretary during legislative debate on the HRA as the type of situation where Parliament might reject a declaration.⁴⁵ Similarly, if a court were to interpret the current abortion statute narrowly to render it consistent with its finding of a right to life, Parliament would be free to amend the statute to make its intention and disagreement with the judicial decision clear.

At the federal level in Australia, one of the last surviving bastions of a fairly pure form of political constitutionalism in the rights context, the abortion issue is fully and exclusively decided by politically accountable lawmaking, with no substantive role for the judiciary—apart, of course, from interpreting it according to traditional principles of statutory interpretation and applying it in litigated cases.

To be sure, other factors than the four defining the new model and differentiating it from both conventional legal and pure political constitutionalism may also help to locate the relative position of any particular system on this continuum. These are factors that might be said to affect the depth or strength of legal/judicial decision-making, as distinct from its breadth or scope, such as the ease or difficulty of constitutional amendment,⁴⁶ the independence and tenure of the judiciary, and access to (individual standing) and systemic consequences of judicial review. Thus, on these issues, the U.S. system, with its very high bar for constitutional amendment, life tenure for federal judges without a mandatory retirement age, relatively easy access to judicial review due to individual standing and decentralization, and system-wide effects of judicial decisions is closer to the polar position than most

other systems of conventional legal constitutionalism or constitutional supremacy. At the margin, this may even result in some blurring of the boundary between pure and ordinary legal constitutionalism, especially if or where a total constitution bestows lesser depth to legal/judicial decision-making through its position on these issues. Ultimately, however, depth issues of this sort are subordinated to the prime criterion of the scope of such decision-making within the political system.

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1. Under their pre-new model systems of legislative supremacy, there were essentially no such mechanisms or institutions in these countries so that, for the most part, new bodies and practices have been established at both executive and legislative levels. Within systems of judicial supremacy, where it is undertaken at all, political rights review tends to occur in a less formal and more partisan way. Where there is abstract judicial review, for strategic reasons legislators sometimes express their policy differences in the language of constitutional law with an eye towards the final, judicial stage of the legislative process. See ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 61-90 (2000); Janet Hiebert, *Constitutional Experimentation: Rethinking How a Bill of Rights Functions*, in *COMPARATIVE CONSTITUTIONAL LAW* 307 (Tom Ginsburg & Rosalind Dixon eds., 2011).
 2. See Janet Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?*, 82 *TEX. L. REV.* 1963 (2004); Janet Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 *MOD. L. REV.* 7 (2006); James B. Kelly, *The Commonwealth Model and Bills of Rights: Comparing Legislative Activism in Canada and New Zealand* (Jul. 20-22, 2006) (paper presented at conference on Parliamentary Protection of Human Rights, University of Melbourne).
 3. Brian Slattery, *A Theory of the Charter*, 25 *OSGOODE HALL L. J.* 703, 714 (1987); JANET HIEBERT, *CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE?* 14 (2002).
 4. Peter W. Hogg and Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All)*, 35 *OSGOODE HALL L. J.* 75 (1997).
 5. 462 U.S. 919 (1983). See NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 94 (2004).
 6. DEVINS & FISHER, *supra* at 238-39.
 7. See, e.g., JEROME BARRON & C. THOMAS DIENES, *CONSTITUTIONAL LAW* 132 (1999) (“the courts have tended to avoid judicial review of executive actions, especially in the area of foreign affairs and national security”). Indeed, Jesse Choper influentially argued that separation of powers questions should generally be treated as political questions inappropriate for judicial resolution. JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).
 8. Compare the U.S. Supreme Court's statement in *Cooper v. Aaron*, 358 U.S. 1 (1958), that its interpretations of the Constitution are the supreme law of the land and bind all legislative and executive officials, with the statements to the contrary by Presidents Jefferson, Jackson, Lincoln, and Franklin Roosevelt, see KATHLEEN SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 22-25 (2010), as well as then-incumbent Attorney General Edwin Meese, Edwin Meese III, *The Law of the Constitution*, 61 *TUL. L. REV.* 979 (1987). It is uncontroversial that, under the doctrine of precedent, decisions of the Supreme Court bind all other courts in subsequent cases.
 9. See *Dickerson v. United States*, 530 U.S. 428 (2000) (then-Chief Justice Rehnquist noting that “Congress may not legislatively supersede our decisions interpreting and

- applying the Constitution”). There is, however, some controversy over the existence and scope of Congress’s ability under its Article III, section 2 power to make “Exceptions” to the Supreme Court’s appellate jurisdiction to respond to judicial decisions by stripping the Supreme Court (and other federal courts) of jurisdiction over specific subject matters. Cf. Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981) with Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984).
10. See Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217 (1994).
 11. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). By contrast, where it exists, the judicial practice of deferring to the elective branches in particular areas or generally is not an instance of weak-form review because the judiciary still has the legal power of the final word, it simply chooses to exercise it in a way that tends to uphold the challenged governmental measure.
 12. This helpful term was coined by Michael J. Perry in *Protecting Human Rights in a Democracy: What Role for Courts?*, 38 WAKE FOREST L. REV. 635 (2003).
 13. See Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 INT’L J. OF CONST. LAW 950 (2012).
 14. The notwithstanding mechanism is a Canadian invention that first appeared in the prototype new model bill of rights, the statutory CBOR, which under section 2 permits the federal Parliament to exempt a statute from its operation. “Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe . . . any of the rights and freedoms herein recognized and declared . . .” Canadian Bill of Rights, S.C 1960, c. 44, § 2. Versions of this mechanism were also included in the pre-Charter provincial human rights codes of Quebec, Charter of Human Rights and Freedoms, S.Q. 1975 c. 6, § 52, Saskatchewan, Saskatchewan Human Rights Code, S.S.1979, § 44, and Alberta, Human Rights, Citizenship and Multiculturalism Act, 1980, § 2. The version of the mechanism contained in section 33 of the Charter permits legislative override of a judicial decision as well as such pre-emptive use. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11, § 33 (1982).
 15. At the time of the HRA’s enactment, no other system of constitutional review of legislation in the world, domestic or international, past or present, contained the same or a similar judicial power. It was subsequently adopted in New Zealand (by judicial implication), Ireland as part of the European Convention on Human Rights Act (2003), and as part of both the ACT Human Rights Act and the Victorian Charter of Human Rights and Responsibilities Act 2006. The Supreme Court of Canada’s suspended declaration of invalidity is quite different in that the legislature acts in the shadow of a legally authoritative reversion to a judicial order invalidating the relevant statute.

16. Practically speaking, a legislative power to amend the constitution by ordinary majority vote without any special procedures (such as a referendum or successive majorities) is a fully equivalent power to override a judicial decision and have the final word, which is why it is such a rarity among codified constitutions where courts have the invalidation power. Indeed, I am not aware of any written constitutions that have such flexible general amendment procedures. The Indian Constitution contains three specific exceptions to its general requirement under Article 368 of a two-thirds parliamentary majority for constitutional amendments. INDIA CONST. art. 368. These exceptions, permitting amendment by simple majority, are citizenship matters (INDIA CONST. art. 11), abolition or creation of Legislative Councils of a State (INDIA CONST. art. 169) and the creation of local legislatures or councils of ministers for certain union territories (INDIA CONST. art. 239A). Although there is a conceptual difference between applying a constitution which empowers the legislature to trump the judicial view and amending a constitution which does not (even if by ordinary majority vote), this seems too fine and formal a distinction for denying that such a flexible amendment procedure would satisfy this necessary fourth feature. I am grateful to Vicki Jackson for persuading me of the need to include discussion of amendment procedures.
17. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11, § 33 (1982). Under sections 33 (3) and (4), a declaration made under section 33 ceases to have effect after five years but may be renewed any number of times. *Id.*
18. Under the CBOR, the judicial power to invalidate is not expressly granted but implied by the Supreme Court of Canada in the case of *R v. Drybones*, [1970] S.C.R. 285, analogously to *Marbury v. Madison*, 5 U.S. 137 (1803) in the United States. It is not an exact example because the legislative override power granted was pre-emptive only, insulating legislation against subsequent judicial review. But there is no reason why a section 33-style power, or even a reactive only power, could not be included in a statutory bill of rights.
19. Although note that the current status of the unused implied power is questionable. See Claudia Geiringer, “*On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act*,” 40 VICTORIA UNIVERSITY WELLINGTON L. REV. 612 (2009).
20. Arguably, this reflects the current position in both the ACT and Victoria.
21. This is the current situation at the federal level in Australia, but without a bill of rights, following enactment of the Human Rights (Parliamentary Scrutiny) Act 2011.
22. In Israel, the Basic Law: Freedom of Occupation, one of eleven Basic Laws, was re-enacted in 1994 with a “notwithstanding” provision (in section 8) permitting the Knesset to immunize a statute from the Basic Law by a vote of a majority of its members if expressly so stated when enacted. Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 8 (Isr.) (Basic Law: Freedom of Occupation originally enacted in 1992, replaced in 1994). Between 1991 and 2003, Article 145(1) of the Romanian Constitution permitted the legislature to override a constitutional court decision on abstract review before promulgation of a statute by re-enacting the statute with a two-thirds majority vote in each of the two chambers. ROMANIA CONST. art. 145(1). Finally, in enacting the European Convention on Human Rights Act 2003, Ireland borrowed much of the structure of the U.K.’s Human Rights Act 1998, including the judicial declaration of incompatibility mechanism. However,

within the Irish legal system this amounts to a supplementary set of statutory rights (incorporating those under the European Convention on Human Rights (ECHR)) to the ones already contained in its supreme law constitution, and so reflects only partial rather than general adoption of the new model.

23. Affirmative in the sense of contrasting with a residual conception of rights, not in the sense of positive versus negative constitutional rights, *i.e.*, constitutional entitlements.
24. See RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007); Tom Hickman, *In Defence of the Legal Constitution*, 55 U. TORONTO L. J. 981, 1016 (2005); Graham Gee & Gregoire C.N. Webber, *What Is a Political Constitution?*, 30 OXFORD J. LEGAL STUD. 273 (2010).
25. Again, this is why the example of the post-*Chadha* episode as calling into question judicial supremacy in the U.S. is hardly characteristic of the system as a whole. On the role of law in limiting presidential power, see Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381 (2012) (reviewing ERIC A. POSNER, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)).
26. The one major exception is the judicially implied federal right of political speech.
27. In some jurisdictions the government is required to make a formal statement only when it is of the opinion that a statute is inconsistent with rights; in others, either way.
28. On the difference between the two, see Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT'L J. OF CONST. LAW 2 (2009).
29. Obviously, these general principles of parliamentary sovereignty do not require the absence of an uncodified constitution as traditionally in the Commonwealth. The first four French republics, for example, all had written constitutions but adhered to the model of parliamentary sovereignty.
30. *Thoburn v. Sunderland City Council*, [2003] Q.B. 151 at 60 (Eng.).
31. *R v. Pora* [2001] 2 NZLR 37 (CA).
32. There is some controversy as to whether this suspension of the normal rule of implied repeal applies under the HRA.
33. Human Rights Act, 1998, c. 48 (U.K.); New Zealand Bill of Rights Act § 6 (1990).
34. Matthias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law—Part I/II*, 7 GERMAN L. J. 341 (2006).
35. *Id.*
36. Stephen Holmes, *Gag Rules, or the Politics of Omission*, in *CONSTITUTIONALISM AND DEMOCRACY* 19-58 (John Elster & Rune Slagstad eds., 1988).
37. See Stephen Gardbaum, *The Place of Constitutional Law in the Legal System*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* (Michele Rosenfeld & Andras Sajó eds., 2012).
38. Kumm argues it does more generally. See Kumm, *supra* note 34.
39. GRUNDESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I art. 2(2) (Ger.) (“Everyone has the right to life and physical integrity”).
40. First Abortion Case, 39 BVERFGE 1 (1975).
41. As affirmed and applied in the Second Abortion Case, 88 BVERFGE 203 (1993).
42. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

43. See *Casey*, *supra* note 42; *Gonzales v. Carhart*, 550 U.S. 124 (2007).
44. This would be true especially if the European Court on Human Rights continues its longstanding practice of staying out of the abortion issue.
45. 317 PARL. DEB., H.C. (6th ser.) (1998) 1301 (U.K.):

Although I hope that it does not happen, it is possible to conceive that, some time in the future, a particularly composed Judicial Committee of the House of Lords reaches the view that provision for abortion in . . . the United Kingdom . . . is incompatible with one or another article of the convention. . . . My guess—it can be no more than that—is that whichever party was in power would have to say that it was sorry, that it did not and would not accept that, and that it was going to continue with the existing abortion legislation.
46. Although, as noted above, at the extreme of ease, constitutional amendment by ordinary majority vote of the legislature satisfies the final element of the new model as a form of legislative override of judicial decisions.



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NEW TECHNOLOGY, NEW LAW: STEM CELL PRODUCTS*

Stephen R. Munzer

New technologies do not always require new legal arrangements. But new stem cell products pose different risks, and may offer different rewards, from other drugs, biologics, and combination products.¹ This new technology does require new law.

I. INTRODUCTION

In fact, it requires new law in two separate but related areas. One is product liability law, which is part of the law of torts. The other is administrative law, which would enable the Food and Drug Administration (“FDA”) to offer new regulations to deal with the special features of stem cell products.

In 2012 I published two articles that had started out as a single obscenely long draft.² I had to split the draft into different articles. One article offered a proposal for tort law applicable to stem cell products. The other suggested a proposal for the administrative law that should govern the FDA’s oversight of stem cell products. Splitting a lengthy draft in two was easy. The hard part was showing how the two proposals fit together in the right way.

This essay spends no time carping about the deficiencies of existing law or the suggestions of other scholars. It spills just enough ink on the two proposals to make their content and justification clear. The chief contribution of this essay is to show how these proposals are integrated in the most useful way, and it is that contribution that receives the most attention here. In my view, the interlocking tort and regulatory elements must satisfy three criteria: complementarity, well-suitedness, and mutual reinforcement. These are semi-technical terms, and I will explain them in due course. The bulk of this essay, then, concerns how these proposals meet the criteria just mentioned.

Broadly, a stem cell is any cell that has the capacity to self-renew and to differentiate into a more committed cell. The most basic stem cell is a zygote—the product of fertilization of an egg by a sperm cell. As the cells

II. STEM CELL PRODUCTS

of the organism divide, the zygote becomes a blastocyst, then an embryo, and eventually a fetus. Nonhuman animals have stem cells too, but here I am concerned only with human stem cells. These fall into two main categories.

The first are tissue-specific stem cells. Of these the most conspicuous examples are hematopoietic (blood forming) stem cells, which can be obtained from bone marrow, umbilical cord blood, and with much more difficulty from circulating adult blood. Tissue-specific stem cells have been in use for some while to treat blood cancers and some anemias. In fact, the only stem cell products specifically approved by the FDA are tissue-specific stem cells and stem cell lines.³

The other category of stem cells consists of human embryonic stem cells (“hESCs”) and human induced pluripotent stem cells (“hiPSCs”). Cells in this second category hold great promise in treating disease and in regenerative medicine generally because in principle they can be coaxed to differentiate into any other kind of cell in the human body. Unfortunately, cells in this category pose much more in the way of risks, both known and unknown. For instance, some such cells may cause cancers.

There is much hoopla about stem cell research. At this point, I doubt that all the hype is justified. But I am not a naysayer either. I am a realist who seeks to have adequate safeguards, in both tort and administrative law, for the responsible development and exploitation of stem cell products to be used in regenerative medicine. Articulating these legal safeguards is a job for today, not for a decade later when legal and policy analysts can do little more than play catch-up.

III. LITIGATION OVER STEM CELL PRODUCTS

Although the FDA has asserted jurisdiction over stem cell products and what some authors call stem cell treatments for two decades,⁴ the matter is in litigation pending a possible appeal, and later cases may raise similar issues. Regenerative Sciences, LLC (“Regenerative Sciences”) sued the FDA to prevent the federal agency from interfering with its activities.⁵ Regenerative Sciences is a Colorado firm that isolates mesenchymal stem cells (“MSCs”) from bone marrow. It then cultures the cells, adds some materials, and uses the mix for injection into patients. Its main treatment is called “Regenexx-C”; the “C” stands for “Cultured.”⁶ In 2008, the FDA sent a warning “letter to Regenerative Sciences stating that, based on the way the use of MSCs was being promoted on the Regenexx website, it considered those cells to be drugs and biological products” over which the FDA had authority.⁷

The company’s position was that its MSCs were not drugs or biologics and that the

FDA was interfering with the practice of medicine. Eventually the company sued the FDA for injunctive and declaratory relief. A federal district court granted the FDA's motion to dismiss on ripeness grounds because the FDA had not yet attempted to regulate Regenerative Sciences.⁸ In June 2010, Regenerative Sciences "applied for an order 'to prompt the FDA to take "final agency action" or leave its medical practice alone'."⁹ Later, the FDA sought an injunction and ultimately, in January 2011, moved for summary judgment and dismissal of the defendants' counterclaims.¹⁰

In the newly captioned *United States v. Regenerative Sciences, LLC*,¹¹ the court ruled in favor of the United States and granted its request for a permanent injunction against the defendants. The court said that "the cell product used in the Regenexx™ Procedure meets the statutory definition for both a 'drug' under the FFDC [Federal Food, Drug, and Cosmetics Act] and a 'biological product' under the PHSA [Public Health Service Act]."¹² The court then concluded that Regenerative Sciences' cultured mesenchymal stem cell products amount to a "drug" under federal law.¹³ One might cavil whether Regenerative Sciences' MSCs are better classified as a biological product, or as both a drug and a biological product. In any event, the thrust of the decision is sound because of the amount of manipulation the MSCs received and because of the need to control inadequately vetted stem cell products.

This case is interesting partly because of its political valence. The protests of Regenerative Sciences prior to the injunction had become a rallying cry against FDA regulation. Two articles addressed this litigation while it was in progress. One acknowledged that Regenerative Sciences was likely to lose but contended that "the FDA should recognize that it makes little sense to impose a regulatory framework developed for mass manufacturers on small physician practices."¹⁴ The majority shareholders of Regenerative Sciences are two physicians who operate a clinic in Broomfield, Colorado, where, prior to the injunction, they injected Regenexx-C into patients.¹⁵

But the crucial point is not the size of the laboratory or manufacturer. What's crucial is the nature and degree of the manipulation of the components of Regenexx-C. To create this product, MSCs are harvested from the patient's hip. The patient's blood is then drawn to isolate growth factors. Finally, using the MSCs, growth factors, reagents, and culture media, Regenerative Sciences increases the number of MSCs that go into Regenexx-C.¹⁶ The manipulation of these ingredients is sufficiently intensive to warrant FDA oversight. This is not a case of regulation run wild.

Barbara von Tigerstrom, a well-known writer on stem cell technology and tissue engineering, was the author of the other article on this litigation while it was in progress. She makes a strong case that the FDA's regulation in this situation is

“eminently reasonable.”¹⁷ It would be even more reasonable in cases involving allogeneic, rather than autologous,¹⁸ stem cell products and treatments, and in cases using autologous human induced pluripotent stem cells, or “hiPSCs.”¹⁹ Regulation is also needed to thwart stem cell tourism, whether within or outside the United States, because insufficiently vetted stem cell products pose health risks no matter where the products are administered.²⁰

IV. A PROPOSED TORT LIABILITY REGIME FOR STEM CELL PRODUCTS

The tort structure I propose mandates strict liability for products with inadequate warnings or defects, yet adopts measures to safeguard product development and thus encourage innovation. Thus, my product liability proposal contains significant qualifications. These secure a balance among innovation, safety, effectiveness, and patient preferences. This balance is informed by the ethics of imposing risks²¹ on others as well as by economic theory. My proposal is mindful of the difficulty in determining the causes of harm in the design, development, manufacture, and use of stem cell products.

A. Why Strict Liability Needs to be Qualified

To begin, a strict liability scheme should include a socialized insurance function to hold down the financial burden on pioneers in the field. Money for a socialized insurance fund would come from patients, designers, and manufacturers. The government would act as an insurer of last resort.

One could arrange contributions to the fund in various ways. Perhaps the most straightforward arrangement would have patients pay into the fund for each treatment and firms pay into the fund for each stem cell product. In this scheme, for every stem cell product a firm manufactures, it would pay a fixed amount into the insurance fund. These payments from various sources would defray the costs of caring for those patients who have adverse reactions to stem cell products.

The point of my socialized insurance scheme is to spread the cost of liability, but my product liability proposal has additional rules to suppress some of the undesirable effects of an unqualified strict liability regime. These include an unavoidably unsafe rule, a learned intermediary rule, FDA approval as a rebuttable presumption in defective design suits, a state-of-the-art defense, a collateral-source rule, and assorted limitations on damages, especially on punitive damages.

My tort proposal also includes an exception for compassionate use of stem cell products to encourage a balance between patient safety and patient preferences. Patients who are diagnosed with serious or terminal conditions that lack suitable non-stem cell treatments might want to be treated with cutting edge stem cell

products. In such cases, firms should not be held liable for the harms these products cause, even though the stem cell products at issue may be insufficiently tested to warrant putting them on the market generally.

Because informed consent is vital to the ethics of imposing risk on patients, I would allow the compassionate use of insufficiently tested stem cell products only when patients were informed of the risks of such use and discouraged from taking inordinate risks.²² Even then, I would permit use of these products only in serious cases.

The FDA, the patient, and the treating physician should have the main voices in deciding whether a condition is serious enough to warrant a compassionate-use exception. They should also have the main voices in deciding whether safer treatments are insufficiently effective to merit the use of a less well-tested stem cell product.

Still, one must be wary of a slippery slope in such decisions. Suppose that an existing treatment is safe and effective—but also very expensive. I doubt that an insufficiently tested but cheaper stem cell alternative treatment should be allowed on grounds of compassionate use. We should avoid the risk of a secondary market developing for stem cell products in which manufacturers both avoid product liability and market these products to patients who are less well off financially and less well informed than most patients.

If a stem cell product causes harm, pinpointing the exact cause of that harm can be a serious challenge. First, a stem cell product may become defective at various points in its development. The design may be faulty, the stem cell line may be corrupted, or the manufacture may be shoddy. Next, the product might cause harm when administered to the patient. For instance, medical personnel may improperly dispense or store the product, and thereby create or even compound the harm. Further, these scenarios, and many more besides, could combine to produce the harm that results. Unearthing the likely cause of any particular harm may be especially difficult with stem cell products because the use, design, manufacture, and development of these products will be novel. Interplay among these possibilities might aggravate the task of identifying the causes of the harm a patient suffers.

For these reasons, my qualified strict liability scheme explores collective and proportional liability theories.²³ Under these theories, plaintiffs would be allowed to recover damages against multiple members of the supply chain in situations where

**B. Apportioning
Liability in the
Supply Chain
Under a Strict
Liability Scheme**

fault cannot be satisfactorily shown as to any one party. Proportional liability would parcel out the cost of liability based on the degree of harm each of the defendants caused. Members of the supply chain would be free to allocate the costs of liability among themselves, such as through indemnification arrangements. They could also reduce their collective risk through self-regulation.

In at least three cases, the party responsible for the harm may be uniquely identifiable. For instance, if a design is faulty, the plaintiff may bring suit against the design firm. Likewise, depending on the harm, a lawsuit may be brought for a manufacturing defect against the manufacturer or for an inadequate warning against either the manufacturer or designer. Each type of lawsuit presents distinct challenges.²⁴

As to the first case, a defect in design may create liability if there were safer design alternatives available at the time the product was conceived. If no such design existed, designers ought to be able to avoid liability with the state-of-the-art defense.

The second case—suing the manufacturer—would be potentially more lucrative for plaintiffs since manufacturers would rarely have a state-of-the-art defense.

In regard to the third case, a lawsuit for inadequate warnings should fail in most cases if the warnings were transparent, but such warnings could increase the potential liability for designers and manufacturers, and thus reduce their incentive to unearth adverse information. To avoid this result, courts could create protections for early warnings, but afford no such protections for delayed warnings.

**V. A NEW
REGULATORY
PROPOSAL**

**A. The Core of
the Proposal**

Because so much uncertainty surrounds the risks associated with stem cell products, the FDA should play a more aggressive role than usual in deciding which of these products should be allowed on the market and what instructions, warnings, and restrictions on use should be applied.

The FDA should concentrate above all on safety risks and risks of ineffectiveness. As to safety, the FDA ought to refuse to allow the marketing of any stem cell products whose risks are deemed unacceptable for virtually all patients. In regard to effectiveness, it should not allow ineffective products at all and should permit marginally effective stem cell products only if no other treatments are available and the products pose little in the way of safety risks.

The FDA center that should take the lead in evaluating stem cell products, as well as their risks and effectiveness, is the Center for Biologic Evaluation and Research

("CBER"). It has the best track record in dealing with biologically active materials. If a stem cell product is harnessed to a delivery device, the Office of Combination Products ("OCP") should step in. Even here CBER, not the OCP, should have the dominant role.

1. Strengthening Pre-Approval Requirements and Pre-Clinical Administrative Review

B. Some Details
of the Regulatory
Proposal

The best antidotes for inadequate information are more and better information. In light of better information, the FDA should consider strengthening its pre-approval requirements and pre-clinical regulatory review. It can do so by tamping down on accelerated or fast-track review, and developing standards for testing and approving stem cell products.

2. Post-Market Regulation

Few lapses are as well documented as problems with the FDA's post-market drug-safety program. One has only to utter the name Vioxx. In the case of stem cell products, the FDA should require physicians and manufacturers to report adverse events promptly. It should also articulate clear, effective, and objective criteria and processes for which actions to take when adverse events become known. Once again, CBER is likely to be the best FDA center to carry out these actions.

3. Risk-Management and Risk-Reduction System

CBER should consider designing and managing a database that includes information on adverse events and protocols for managing the risks. The data should be accessible by physicians, patients, research scientists, designers and manufacturers of stem cell products, and health insurers. These groups have different informational needs, and the material in the database will not be equally usable by everyone.

Voluntary organizations, such as the American Cancer Society, may be able to enrich CBER's database. Their help ought not to be refused.

Any system of this sort will have cons and pros. Among the disadvantages are the costs of setting up and maintaining the database. Also, scientists and manufacturers have legitimate concerns about their patents, patent applications in progress, and proprietary information generally. The principal advantages, which I think outweigh the cons, lie in fostering the safety and effectiveness of stem cell products and the decisions to use or avoid them. Physicians and patients can work together on the

best treatment options. Health insurers can make informed decisions on which products merit coverage.

4. Relation to Product Liability

If the regulatory proposal is put in place, that should have some impact on manufacturers' liability for defective stem cell products if only because manufacturers have to jump through more hoops. If the level and degree of regulation of a stem cell product are fairly and accurately adjusted to match its safety risks and its relative effectiveness, that might reduce manufacturers' liability in products suits. Sometimes increased protection should be received by manufacturers, but only if they meet all reporting requirements for post-market evidence of adverse events or ineffectiveness.

VI. INTEGRATING ADMINISTRATIVE AND PRODUCT LIABILITY LAW

Accepting my administrative proposal does not require acceptance of my product liability proposal, nor does accepting my product liability proposal require acceptance of my administrative proposal. However, the two proposals are consistent with each other. Moreover, they are complementary, well-suited to each other, and mutually reinforcing. As to integration, the nub of the matter is to clearly specify *how* they interact on these criteria.

A. How the Two Proposals Mesh with Each Other

Stem cell products have risks that are largely unknown and potential rewards that are highly touted. The tort and administrative proposals summarized in this essay share some aims and means for reducing the risks of stem cell products while permitting their relatively unencumbered development. To explain how the commonalities between these proposals enable them to mesh well together, it is necessary to clarify three key terms, which I use in a semi-technical way.

Two proposals are *complementary* if they work together to promote common aims.

Two proposals are *well-suited* if they use the same or similar means to achieve their shared aims with as little waste as possible of resources expended on extraneous means and aims.

Finally, two proposals are *mutually reinforcing* if each encourages compliance with the other.

Take note that writing of aims, means, incentives, and avoiding waste does not make either proposal, or both of them together, a wholly consequentialist affair. The best analyses of risk reduction, risk management, and risk imposition have an important

non-consequentialist cog in that they take seriously the ethics of imposing risks on other people.²⁵

The proposals advanced here share the following aims: mitigating disincentives to enter the stem cell market; increasing the safety of stem cell products and thereby lowering the risks they pose to consumers; and promoting the effectiveness of stem cell products and thereby increasing their usefulness to consumers.

1. *Entry*

The product liability proposal mitigates disincentives to enter the stem cell market. It thereby advances safety in two ways. First, it immunizes firms that disclose post-market test results from liability in inadequate warning lawsuits. The disclosure must be timely, but such prompt notice enables designers and manufacturers to limit liability, which offers the prospect of increased profits. Second, the proposal limits punitive damages for firms that have fully complied with all FDA requirements. This limitation reduces the monetary risks of designing and making stem cell products. Lowering the exposure to one category of damages should draw more firms into the market. It should also increase the quality and variety of stem cell products, which might help control prices for consumers. Thus, limiting liability and in turn reducing barriers to entry increase the incentive to disclose post-market test results and to comply fully with all FDA requirements that advance safety.

The administrative proposal also mitigates disincentives to enter the stem cell market in various ways and thereby promotes safety. To begin, it eliminates the lobbying that would otherwise be needed to slot a proposed stem cell product into a particular FDA center. Under current law, firms often hire lawyers or professional lobbyists to persuade the FDA to place their products into a center that tests, or at least is believed to test, less rigorously and less expensively than another center. The proposal eliminates this lobbying expense by having a single department within CBER evaluate all proposed stem cell products.

Some might contend that the mandatory insurance provision in the product liability proposal will greatly increase barriers to entry and thereby raise prices to consumers. However, this assertion is easily rebutted. All insurance costs something. If it did not, there would be no reason for the insurer to provide any coverage. For designers and manufacturers of stem cell products, buying insurance is a way to hedge against risk. Hence, a required insurance premium, while possibly representing a minor barrier to entry, provides an even greater demonstrable benefit that reinforces the complementary nature of the product liability and administrative proposals. The mandatory insurance provision thus serves to mitigate disincentives to enter the stem cell market.

Further, the mandatory insurance premium is based partly on market share. Thus, a firm hoping to break into the field will face relatively small insurance costs. In return for a modest premium, the firm cabins the risk of debilitating judgments and settlements. Thereafter, efforts to improve safety and effectiveness, the eventual success of those efforts, compliance with post-market regulations, and the securing of FDA approval will all play a role in decreasing firms' payments into the mandatory insurance fund. As with all insurance, the premium paid hedges against risk, and that hedge should appeal to almost all firms, large and small. Consequently, the mandatory insurance provision does not prevent the two proposals from mitigating disincentives to enter this market. As a result, any effect on costs to consumers stemming from the mandatory insurance provision is likely to be modest.

2. *Safety*

The two proposals are also complementary because they work together to increase the safety of stem cell products and thereby decrease the risks to consumers. The product liability proposal advances this end by incentivizing firms to follow FDA procedures that will likely make their products safer by limiting liability and punitive damages in exchange for compliance. Further, FDA approval of products results in a rebuttable presumption of safety so far as design flaws are concerned. The availability of this presumption should encourage firms to comply with FDA regulations. As a corollary, compliance with FDA regulations might lead to a reduction in the insurance premiums paid by firms.

The administrative proposal seeks to increase the safety of stem cell products through its risk-reduction and risk-management system. This system provides for the rapid dissemination of information among firms, doctors, patients, consumers, and the FDA. The heightened level and quality of information should enable all concerned to make better choices about the design, manufacture, and use of stem cell products. In this situation, better choices include safer choices.

Two primary objections exist to the argument for complementarity. The first is that various parts of the product liability proposal actually increase risk to consumers. Limits on punitive damages might lead to carelessness on the part of designers and manufacturers. Immunizing defendants in failure-to-warn suits because of timely disclosure of post-market test results lowers the deterrent value of product liability suits. This lower value in turn decreases consumers' prospects of financial recovery. The objection, if sound, might suggest that the product liability proposal is not complementary to the administrative proposal, as the former undermines the aim of decreasing risk to consumers.

However, analysis of this objection reveals that it has less weight than it initially appears. For a start, the objection relies on a suppressed premise—namely, that many, if not most, parts of the product liability proposal increase consumer risk. Without this premise as a base, to be convincing the objection requires extrapolation from the few parts mentioned in the preceding paragraph to all or most parts of this proposal. Such an extrapolation is patently unwarranted, for it is evident that the proposal contains many provisions that increase consumer safety. Among them are tort liability for defective products and inadequate warnings and the fact that the regime suggested is a modified strict liability regime for stem cell products. Precisely because the extrapolation is unwarranted and the suppressed premise is false, many, if not most, parts of the proposal advance consumer safety.

A further point has to do with the part-to-whole relationship contemplated by the first objection. One way of putting the objection is that some elements of the product liability proposal undermine safety, or at least seem to do so. This is the “part.” From this point, the objector reasons that the proposal overall undermines safety. This is the “whole.” This reasoning is fallacious. What is true of a part, or even of several parts, need not be true of the whole. It could well be that the proposal overall advances safety. So it is not simply that the suppressed premise is false and the extrapolation is unwarranted that the proposal advances safety; it is *because* the suppressed premise is false and the extrapolation is fallacious that the overall proposal could advance safety.

Moreover, both proposals seek to take competing considerations into account. On the one hand, were safety standards raised to an unattainable level, fewer firms would place even a toe in the icy waters of the market. On the other hand, were regulations decreased or loosened and tort actions curtailed, the prospect would arise of a free-for-all market in which firms cut costs and put out substandard products. Although some balancing is in order, it is ham-handed to turn the entire conversation into “weighing” things on “scales.” A virtue of much sophisticated work in moral and political theory is the move away from sole reliance on crude balancing metaphors to a wider awareness of the ways in which reasons and normative considerations on one side can variously exclude, undercut, override, neutralize, or otherwise affect reasons and normative considerations on the other.²⁶

At the intersection of the two proposals, then, we must be wary certainly of tipping the scale too far in either direction. But we must be equally wary of allowing one proposal to exclude, or otherwise undercut the other to an indefensible extent. Once these points are taken to heart, we see that the liability proposal must not be pushed so far as to throw the administrative proposal out of balance or to derail it. The parts of the liability proposal that the objection invokes fall well short of an

exhaustive list of its parts. Other parts provide a good many incentives to safety. Consequently, once a judicious merger of Parts IV and V is reached, the fact that some aspects of the product liability proposal might result in less than sharply reduced consumer risk does not defeat the complementarity of the proposals with respect to safety.

So much for the first objection. The second objection is that the various incentives to follow FDA procedures, in the hope of avoiding product liability or at least punitive damages, might not increase consumer safety. The claim that it increases safety, the objection goes, depends on the idea that the FDA has special knowledge about stem cell products. Only with this special knowledge can the FDA assess accurately the safety of products submitted for its approval. Yet, the objection concludes, right now the FDA has no such expertise or special knowledge.

This objection raises a problem that the administrative proposal is designed to overcome or at least to limit. It will take some time for the new department within CBER to gain great knowledge of stem cell products. But it will likely not take long, for in the past two decades graduate schools in the life sciences have been minting new scientists with doctorates in stem cell biology. Hence, there should be a good labor supply of qualified scientists.

Moreover, the proposal deals with the timing issue by instituting various requirements that must be met before the limit on punitive damages takes effect. One such requirement is that the FDA have a more accurate picture of the risks of stem cell products. So before the limits on product liability damages come into effect, stem cell technology must be well enough studied for the FDA, designers, manufacturers, physicians, and consumers to have a decent grasp of the risks. In consequence, the objective of consumer safety has priority over mitigating the disincentives to enter the market.

Hence, when the incentives to follow FDA procedures do take effect, the specialized knowledge of the FDA will enable compliance with the FDA procedures to increase consumer safety. Granted, this point does not entail that safety will increase immediately. Still, the modest limits on liability, preclusion of punitive damages, and significant barriers to entry are likely to have two further effects. One is to encourage independent safety protocols by manufacturers and regulators. The other is to give the FDA time to come up with well-vetted procedures for increasing safety.

3. *Effectiveness*

Here the product liability proposal plays a minor role, for consumers can hardly sue in tort just because a particular stem cell product failed to help them. Still, consumers might be able to sue manufacturers for false or misleading advertising. Also, the regime of modified strict liability encourages designers and manufacturers to avoid unnecessary risks and to produce products that work well. In these ways, the tort proposal thus furthers effectiveness to some extent.

The administrative proposal pulls the laboring oar for effectiveness. Under it, the FDA will approve only products that clinical trials have shown to be effective for a given injury, disease, or condition. Additionally, if post-market testing indicates that certain products are ineffective, or are less effective than alternatives that have better-known risk profiles, then ineffective products will be withdrawn from the market, and less effective products with decent alternatives will decline in market share. Thus, the two proposals are complementary not only with respect to safety and mitigating disincentives to enter the stem cell market but also with respect to effectiveness.

Complementarity has to do with ends; well-suitedness concerns means. Recall that two proposals are well-suited if they use the same or similar means to achieve their shared ends with as little waste as possible of resources expended on extraneous means and ends. Two features of my proposals illustrate how well-suited they are to each other. The risk-management system created for the FDA is used in product liability cases. And the prompt disclosure of post-market test results both brings stem cell products into compliance with suggested FDA regulations and shields against some sorts of product liability lawsuits.

C. Well-Suitedness
and Common
Means

1. *Risk-Management System*

The system advocated in the administrative proposal includes a database of stem cell products that contains, among other things, information on their safety and effectiveness. The contents of the database include information secured by post-market testing. By having this information readily accessible, the database makes it easier to determine the insurance premiums to be paid for various stem cell products in light of their claims histories. From the database, the entity overseeing the product liability insurance fund has an easier road to determine the market share of various firms.

Thus, both proposals employ the same or similar means to further the aims of safety and effectiveness. These means might also advance the aim of mitigating disincentives to enter the stem cell market by calibrating mitigation. The two

proposals are well suited to each other, for the database included in the risk-management system aids both the administrative and product liability schemes in achieving their similar objectives.

2. *Disclosing Post-Market Test Results*

The product liability proposal uses incentives for firms to disclose post-market test results even when, and especially when, they are unfavorable to the firms' products. The administrative proposal compels such disclosure. Here, similar means advance the ends of having safe and effective stem cell products.

Precisely how the two proposals interlock here is slightly complicated. Insofar as the FDA has the legal authority to compel the disclosure of post-market test results, backfiring can occur. To combat the possibility of backfire—having less information rather than more as a result of regulation—the qualified strict liability regime limits the information that plaintiffs can use in inadequate-warning suits. The product liability proposal would also limit punitive damages. Hence this proposal has ways to encourage speedy disclosure by firms of post-market test results. The two proposals are well suited in that both use similar means to advance the ends of safety and effectiveness.

Let no one contend that a combination of carrot, via the product liability proposal, and stick, via the administrative proposal, is unnecessary. The idea behind such a contention seems to be that incentivizing something while also compelling it is exactly what makes the two proposals ill suited, or, at least, redundant.

I reply that here we need both carrot and stick. With only the stick, firms might well cease, or curtail, post-market testing for fear of product liability. With only the carrot, some firms might choose not to comply with the FDA. Noncompliance might be the result of calculating either that the costs of disclosure outweigh the benefits or that the unfavorable information is unlikely to be discovered by anyone else. Either way, the consumer is left at a higher risk of using an unsafe or ineffective product. What may seem superfluous is in fact necessary. The two proposals should use the common means of disclosure to pursue ends of safety and effectiveness.

D. Mutual Reinforcement

Two proposals are mutually reinforcing if each encourages compliance with the other. We have already seen one instance of mutual reinforcement: disclosure of post-market testing as mandated by the FDA reinforces—and is reinforced by—the corresponding immunity given in product liability litigation. Here are three more examples.

1. *Rebuttable Presumption of Safety*

Under the administrative proposal, FDA approval gives designers a rebuttable presumption of safety in product liability suits. The product liability proposal, by giving designers some protection against strict liability, spurs them to comply with FDA regulations for approving a stem cell product. Further, the rebuttable presumption of safety is bolstered by, and partly justified on the basis of, stricter FDA approval standards that increase consumer safety. Thus the added difficulty in securing FDA approval should erase doubts that the presumption might compromise consumer safety.

2. *Limits on Punitive Damages*

The punitive damages limit and compliance with the suggested FDA regulatory scheme mutually reinforce each other. The product liability regime, by limiting firm exposure to punitive damages, offers an incentive for firms to adhere to FDA regulations. In turn, strict FDA regulations are warranted partly because compliance with them limits the damages that injured plaintiffs can recover.

3. *Risk Management and Socialized Insurance*

The administrative proposal includes a risk-management system. This system, with its database, facilitates the exchange of information among the FDA, designers, manufacturers, physicians, and patients. The transparency of the system gives firms an incentive to participate honestly. The product liability proposal includes a socialized insurance scheme. Firms' premiums are partly a function of information about the safety and effectiveness of their products. Honest participation in the risk-management system is likely to hold down the amount of their insurance premiums. Consequently, the socialized insurance scheme provides incentives to participate honestly in the risk-management system and to comply with FDA regulations pertaining to safety and effectiveness.

Only Pollyanna, some might say, would have such an optimistic view of the honesty of designers and manufacturers.²⁷ They are likely, some would say, to provide *false* information. To a significant extent, I disagree. By no means am I blessed with the constant sincerity and sunny disposition of the title character in Porter's novel. Yet I think that the penalties for false statements by designers and manufacturers, aided by the transparency of the system in which they work, are apt to induce honest participation and significant, if grudging, compliance with FDA regulations.

The whole of the mutual reinforcement argument can be seen by looking at the above examples in the aggregate. The prospect of having to pay large judgments

or settlements in a stem cell product liability suit may lead even the most safety-conscious firms to think twice about entering the stem cell market. By encouraging compliance with strict FDA regulations, the two proposals work together to increase safety and lower the chance that firms will be hit by an enormous verdict despite meticulous research and development. The rebuttable presumption of safety that arises from FDA approval further lowers the chances that firms will be exposed to substantial liability. The limit on punitive damages resulting from compliance with FDA procedures protects firms against debilitating damage awards even if a verdict is returned against it. Conversely, the socialized insurance premiums reflect, in their amounts, regulatory compliance. Should all firms comply with FDA regulations, it becomes even more appropriate that socialized insurance ought to exist to prevent any one firm from financial ruin.

To sum up: these examples, as components of proposals for two different areas of the law, show that the proposals mutually reinforce each other in encouraging increased safety and effectiveness pursuant to FDA regulations by way of limiting potential liability and mitigating disincentives to market entry.

CONCLUSION

The possibilities of stem cell products in treating disease and in regenerative medicine are vast. These possibilities, though, come with significant risks. It would be regrettable to delay the needed reformation of administrative law until hundreds, if not thousands, of stem cell products are on the market. The administrative regulation of eventual stem cell products by the FDA will require exacting attention to safety and effectiveness without imposing an undue burden on manufacturers. The same is true for product liability claims regarding stem cell products.

Alas, no existing category—whether vaccines or blood products or combination products—offers a perfect legal model for stem cell products. However, one can tease out pertinent features of these categories to show what might work well for stem cell products. These features can then be considered and molded into more definitive recommendations as these products appear on the market and their risks and rewards become better understood over the coming decades. The proposals advanced here therefore have a dynamic quality that allows for adaptations as superior information becomes available.

- * Stephen Munzer is Distinguished Professor of Law at UCLA School of Law. I am most grateful for the help of Karen Y. Lam, Robert Lawner, Mark Metzke, Jamie L. Summers, Jenifer Wiseman, and Douglas Wolfe. This article is an abridged version of Stephen R. Munzer, *How to Integrate Administrative Law and Tort Law: The Regulation of Stem Cell Products*, 64 ADMIN. L. REV. 743 (2012); Stephen R. Munzer, *Risk and Reward in Stem Cell Products: A New Model for Stem Cell Product Liability*, 18 B.U. J. SCI. & TECH. L. 102 (2012).
1. Some authors speak of “treatments” and others of “products.” The Food and Drug Administration has asserted jurisdiction over both. Throughout I use the term stem cell “products.”
 2. Stephen R. Munzer, *How to Integrate Administrative Law and Tort Law: The Regulation of Stem Cell Products*, 64 ADMIN. L. REV. 743 (2012); Stephen R. Munzer, *Risk and Reward in Stem Cell Products: A New Model for Stem Cell Product Liability*, 18 B.U. J. SCI. & TECH. L. 102 (2012) [hereinafter Munzer, *Risk and Reward*].
 3. The FDA approved a stem cell product known as Hemacord on November 10, 2011. *November 10, 2011 Approval Letter—Hemacord*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/BiologicsBloodVaccines/CellularGeneTherapyProducts/ApprovedProducts/ucm279613.htm> (last updated Nov. 10, 2011). Anyone who clicks on the Package Insert for Hemacord on the FDA website above will see that the warnings are substantial. Less than a year later, the FDA approved another stem cell product. *See May 24, 2012 Approval Letter—HPC, Cord Blood*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/BiologicsBloodVaccines/CellularGeneTherapyProducts/ApprovedProducts/ucm305620.htm?utm> (last updated May 25, 2012) (approving HPC, cord blood). Canada has approved Prochymal, a mesenchymal stem cell product used to treat children with graft-versus-host disease and perhaps other ailments. *See also* Andrew Pollack, *A Stem-Cell-Based Drug Gets Approval in Canada*, N.Y. TIMES, May 17, 2012, <http://www.nytimes.com/2012/05/18/health/a-stem-cell-based-drug-gets-approval-in-canada.html>.
 4. Application of Current Statutory Authorities to Human Somatic Cell Therapy Products and Gene Therapy Products, 58 Fed. Reg. 53,248–51 (1993). *See also* United States v. Loran Med. Sys., Inc., 25 F. Supp. 2d 1082 (C.D. Cal. 1997) (issuing a permanent injunction on the importation of neonatal cells); CTR. FOR BIOLOGICS EVALUATION & RESEARCH, U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: GUIDANCE FOR HUMAN SOMATIC CELL THERAPY AND GENE THERAPY 3 (Mar. 1998), available at <http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/CellularandGeneTherapy/ucm081670.pdf>; Donald W. Fink et al., *FDA Regulation of Stem Cell-Based Products*, 324 SCIENCE 1662 (2009). For use of the term “stem cell treatments,” see RUSSELL KOROBKIN, *STEM CELL CENTURY: LAW AND POLICY FOR A BREAKTHROUGH TECHNOLOGY* 232–57 (2007). Korobkin believes that the FDA has “the authority to regulate premarket approval of stem cell treatments,” but adds, correctly, that “[w]hether and when the FDA should exercise this authority is a different question.” *Id.* at 243.

5. Regenerative Sciences, Inc. v. U.S. Food & Drug Admin., No. 09-CV-00411-WYD-BNB, 2010 WL 1258010 (D. Colo. Mar. 26, 2010). The company sometimes drops “LLC” and calls itself Regenerative Sciences, Inc.
6. *Regenexx Procedures Family—Stem Cell and Platelet Procedures*, REGENEXX, <http://www.regenexx.com/regenexx-procedures-family/> (last visited Nov. 9, 2012).
7. Barbara von Tigerstrom, *The Food and Drug Administration, Regenerative Sciences, and the Regulation of Autologous Stem Cell Therapies*, 66 FOOD & DRUG L.J. 479, 482 (2011).
8. Regenerative Sciences, Inc. v. U.S. Food & Drug Admin., No. 09-CV-00411-WYD-BNB, 2010 WL 1258010, at *7 (D. Colo. Mar. 26, 2010).
9. von Tigerstrom, *supra* note 7, at 483.
10. *Id.*
11. 878 F. Supp. 2d 248 (D.D.C. 2012).
12. *Id.* at 257.
13. See Jocelyn Kaiser, *U.S. Federal Court Says Stem Cell Treatments Are Drugs*, SCIENCEINSIDER, July 26, 2012, available at <http://news.sciencemag.org/scienceinsider/2012/07/us-federal-court-says-stem-cell.html> (last visited Aug. 21, 2012).
14. Mary Ann Chirba & Stephanie M. Garfield, *FDA Oversight of Autologous Stem Cell Therapies: Legitimate Regulation of Drugs and Devices or Groundless Interference with the Practice of Medicine?*, 7 J. HEALTH & BIOMED. L. 233, 272 (2011). There is a good deal of space between the dichotomous terms in the title of their article.
15. The physicians have ceased doing so until the lawsuit is finally decided. However, von Tigerstrom, *supra* note 7, at 481–82, reports that the company “has licensed the technology to clinics offering it in China and Argentina, and is opening a stem cell culture lab in the Cayman Islands.” Stem cell tourism, anyone?
16. *See id.* at 480.
17. *Id.* at 506. For a brief commentary on the case, see Tamra Lysaght & Alastair V. Campbell, *Regulating Autologous Adult Stem Cells: The FDA Steps Up*, 9 CELL STEM CELL 393 (2011).
18. In this context, an allogeneic stem cell product is created from the genetic constitution of a different individual from the same species, whereas an autologous stem cell product is created from the same individual who will be using the product.
19. Paul S. Knoepfler, *Key Anticipated Regulatory Issues for Clinical Use of Human Induced Pluripotent Stem Cells*, 7 REGENERATIVE MED. 713 (2012).
20. Alex Philippidis, *Stem Cell Tourism Hardly a Vacation*, GENETIC ENGINEERING & BIOTECH. NEWS, (Aug. 16, 2012), <http://www.genengnews.com/insight-and-intelligenceand153/stem-cell-tourism-hardly-a-vacation/77899669>.
21. My account of the ethics of risk imposition lends itself to no quick summary. See Munzer, *Risk and Reward*, *supra* note 2, at 143-45. My basic approach is roughly Scanlonian—that is, ethical principles of risk imposition must be justifiable to each reasonable individual put at risk by, in this case, a stem cell product. See, e.g., THOMAS M. SCANLON, WHAT WE OWE TO EACH OTHER (1998); James Lenman, *Contractualism and Risk Imposition*, 7 POLITICS, PHILOSOPHY & ECON. 99 (2008).

22. See, e.g., Zubin Master & David B. Resnik, *Opinion: Reforming Stem Cell Tourism*, THE SCIENTIST, Sept. 14, 2011, <http://the-scientist.com/2011/09/14/opinion-reforming-stem-cell-tourism> (offering suggestions for thwarting the use of unproved and possibly harmful stem cell therapies). Compare the discussion of Regenexx-C, *supra* at text accompanying notes 5–20.
23. E.g., Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L. REV. 151 (2004).
24. Tomas J. Philipson & Eric Sun, *Is the Food and Drug Administration Safe and Effective?*, 22 J. ECON. PERSPECTIVES 85, 90–91 (2008).
25. See generally Munzer, *Risk and Reward*, *supra* note 2, at 135–45.
26. See generally 1 DEREK PARFIT, ON WHAT MATTERS 31–174 (2011); JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 6–8, 143–47, 186–87, 205–08, 214–19, 367–69 (2009); JOSEPH RAZ, PRACTICAL REASONS AND NORMS 35–48 (3d ed. 1999); Robert Nozick, *Moral Complications and Moral Structures*, 13 NAT. L. FORUM 1 (1968).
27. See generally ELEANOR H. PORTER, POLLYANNA (1913).



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INDIANS AND GUNS*

Angela R. Riley

INTRODUCTION

The Supreme Court's recent Second Amendment¹ opinions establish a bulwark of individual gun rights against the state. *District of Columbia v. Heller* confirmed that the Second Amendment guarantees an individual right to bear arms for self-defense,² and the Court applied this analysis to the states two years later in *McDonald v. City of Chicago*.³ As a result of these cases, it is often assumed that individual gun rights now extend across the United States. But this conclusion fails to take account of a critical exception: Indian tribal nations remain the only governments within the United States that can restrict or fully prohibit the right to keep and bear arms or even ignore the Second Amendment altogether.⁴ Indian tribes were never formally brought within the U.S. Constitution; accordingly, the Second Amendment does not bind them.⁵ In 1968, Congress extended select, tailored provisions of the Bill of Rights to tribal governments through the Indian Civil Rights Act but included no Second Amendment corollary.⁶ As a result, there are over 67 million acres of Indian trust land in the United States,⁷ comprising conspicuous islands within which individuals' gun rights are not constitutionally protected as against tribal governments.⁸

The relationship between Indians and guns holds particular salience for reservation residents, where crime is high, jurisdictional limitations cabin the ability of tribal governments to police Indian country, and political and fiscal barriers inhibit adequate complementary law enforcement by other sovereigns.⁹ The scenario so often proposed as a historical justification for the individual right to arms—the presence of vast, rural landscapes where Americans are unable to rely on the protection of the state against threatening forces¹⁰—is actually still at work on some of the most rural Indian reservations in the United States, albeit with roles radically redefined.¹¹ Yet these are the very places where gun rights may be most severely curtailed, and by tribal governments themselves.

The present position of Indians in relation to guns is a reflection of a long-standing perception of Indians and Indian nations as the un-“we,” as peoples existing consistently outside the American polity. The pressing question remaining for Indian nations is how to situate themselves within the broader American legal landscape of gun rights—at its heart a work not only about gun policy but also about tribal sovereignty and peoplehood.

In the full article upon which this essay is based, I detail the untold story of Indians and guns and examine the legislative history and contemporary ramifications of Congress' decision to omit any reference to the Second Amendment (or a corollary) into the Indian Civil Rights Act of 1968, leaving tribal governments free to make tribally distinct gun laws and regulations. I will not go into such depth here. Instead, this essay focuses on Indian tribes' vast and unique freedom to engage in lawmaking around gun laws and policies, unconstrained by Second Amendment jurisprudence. Accordingly, with this background, this essay proceeds as follows. In Section I, I briefly describe the intricate nature of tribal criminal and civil jurisdiction in Indian country as defined by federal law. Section II examines Indian nations' own constitutional protections for the right to bear arms, tribal criminal law regarding guns, and, finally, tribal civil regulation of guns in Indian country. In Section III, I explore some of the potential governance possibilities created by American Indian nations' unique, extra-constitutional status.

I. TRIBAL CRIMINAL AND CIVIL JURISDICTION IN INDIAN COUNTRY

The labyrinth of tribal jurisdiction in Indian country is well-documented.¹² The baseline presumption is that Indian tribes maintain jurisdictional control and authority over their own territory as a matter of their inherent sovereignty. More specifically, Indian reservations are—with some important exceptions¹³—free from state criminal jurisdiction when an Indian is involved in the crime as either the victim or the perpetrator.¹⁴ By contrast, the federal government has a large role in criminal justice in Indian country. The federal government has jurisdiction over crimes committed in Indian country by a non-Indian against an Indian¹⁵ and over major crimes committed by an Indian, whether the victim is Indian or non-Indian.¹⁶ Nonmajor crimes committed by Indians—whether they are members of the prosecuting tribe or not—remain within the exclusive jurisdiction of tribal governments.¹⁷

Perhaps most significantly, in 1978 the Supreme Court held in *Oliphant v. Suquamish Indian Tribe* that Indian tribes do not have criminal jurisdiction over non-Indians.¹⁸ Thus, if a non-Indian commits a crime against an Indian or Indian property in Indian country, the crime must be prosecuted by the federal government,¹⁹ negating the localized community control that characterizes virtually all law enforcement in the United States.²⁰ (Notably, publication of the article upon which this essay is based pre-dated the Reauthorization of the Violence Against Women Act, which contained provisions providing for tribal jurisdiction over the investigation, prosecution and sentencing of non-Indian perpetrators of domestic violence against an Indian partner or spouse in Indian Country.)²¹

Tribal civil jurisdiction over members has been repeatedly acknowledged as Indian tribes' inherent sovereign right,²² and tribes also routinely exercise jurisdiction over non-Indians on tribal lands.²³ But *Montana v. United States*²⁴ created a presumption

against tribal civil regulatory jurisdiction over nonmembers on nonmember fee land within the reservation unless that jurisdiction meets one of two exceptions: there exists a consensual relationship between the defendant and the tribe, or the regulation at issue goes to the health, safety, and welfare of the tribe.²⁵ Though seemingly capacious, these two exceptions to the so-called *Montana* rule have been construed exceedingly narrowly by subsequent Supreme Court decisions.²⁶

The practical implications of these jurisdictional limitations are central to contemplating gun rights in Indian country and set the backdrop for understanding the scope of tribal authority to enact laws related to the right to bear arms and gun control.

The anomalous position of Indian tribes within the federal system affords them the opportunity to self-govern in a localized manner in relation to guns. Much like the states and federal governments, Indian nations have begun to consider and fashion gun rights and protections tailored to their own tribal communities. In the following subsections, I examine two areas where tribes have addressed the right to bear arms and guns more generally—in tribal constitutions and in tribal codes, respectively.²⁷

II. INDIAN NATIONS AND GUNS

Numerous tribes operate under written constitutions, which embody a wide range of tribal governance systems. They commonly—but certainly not universally—set forth, much like the U.S. Constitution, separation of powers and protection of individual rights.²⁸ Today, a rather small but growing number of tribal constitutions expressly provide that the Indian nation may not infringe on the individual right to bear arms.²⁹ Such provisions limit the tribe’s ability to infringe the right, whether the suit is brought by an Indian or a non-Indian.³⁰

A. Tribal Constitutional Law and the Right to Bear Arms

Of those tribes identified that have provisions securing the right to bear arms, some variation can be seen, as tribal constitutions reflect tribes’ particular circumstances, history, and tradition. Of particular note is that none included an analog to the Second Amendment’s prefatory clause regarding the formation of a militia. In contrast, in each tribal constitution dealing with the right to bear arms, the individual right is paramount.³¹ As such, these tribes convey a common respect for the individual right to bear arms as a limit on the actions of tribal governments.³²

Beyond constitutional guarantees, as seen in the following subsections, tribes may—and often do—regulate the ownership, possession, and use of guns in Indian country through both civil and criminal codes.

B. Tribal Gun Laws in Indian Country

1. *Criminal Codes* Perhaps not surprisingly, virtually every tribe researched that has a criminal code has enacted some type of gun law. Laws banning or governing the carrying of concealed weapons are quite prevalent.³³ Several tribes allow

concealed carry where a permit has been issued by the tribe.³⁴ Some tribes more tightly constrain gun ownership in general, limiting the places where weapons may be lawfully carried, with no permit exceptions.³⁵

References to guns or weapons are most common in code provisions related to violent crimes like assault, robbery, intimidation, and stalking.³⁶ Some tribes allow tribal police to take guns from the home in a domestic violence situation even if the gun was not used in the incident at issue.³⁷ Others condition release of a defendant guilty of domestic violence on a guarantee of no future possession of firearms.³⁸ Numerous tribes have comprehensive criminal gun laws.³⁹

Tribes also employ carve outs to general gun regulations or prohibitions for activities that may be tribally distinct or connected to their particular cultural and ceremonial practices. The Navajo Nation Code, for example, includes an express exception to its general gun laws where the firearm is used in “any traditional Navajo religious practice, ceremony, or service.”⁴⁰ The San Ildefonso Pueblo Code similarly states an exception to its criminal gun code when the gun use is related to “any ceremony where traditions and customs are called for.”⁴¹ And the Shoshone and Arapaho of the Wind River Indian Reservation set forth requirements regarding the hunting of “big game” on the reservation.⁴² The code includes pre-ceremony permitting requirements relevant to those dancing in the tribes’ Sundance Ceremony and using male elk or male deer in the ceremonies themselves.⁴³

2. Civil Regulatory Codes Numerous tribes have enacted comprehensive civil codes regarding guns. Unsurprisingly—given the rural nature of many reservations and the deep cultural links to a subsistence lifestyle—many pertain to hunting.⁴⁴ These codes typically set parameters for the taking of game in ways similar to non-Indian country regulations, including regulations regarding the types of guns that can be used in hunting.⁴⁵ In some instances, they set forth exceptions to general criminal gun laws or articulate time, place, and manner restrictions. Such restrictions also address the use of firearms in demonstrations and regulations regarding the sale of guns on the reservation.⁴⁶

Other civil codes regulate guns with regard to particular reservation locales, including casinos⁴⁷ and schools,⁴⁸ debtor–creditor law,⁴⁹ and transportation.⁵⁰ There are also tribally specific rules embodied in the codes, with the use of bows and arrows commonly addressed along with guns.⁵¹

III. ENGAGING “INDIANS AND GUNS”: WHAT LIES AHEAD?

In the following section, I provide background on governance within Indian country and then lay out three broad, potential categories of options for tribes to consider in regard to gun regulation: criminal gun bans, civil laws banning guns, and other forms of gun regulation.

Tribal governments are positioned to reclaim some of the local control over gun regulation that has historically marked this body of law. Though states may have lost some of their traditional freedom to regulate after *McDonald*, tribes continue to enjoy full flexibility. Tailoring of gun laws may be particularly appealing for tribal governments,⁵² as each tribe's unique culture, geography, history, demographics, and treaty-rights considerations can inform the particular panoply of gun rules and regulations a tribal government may choose to enact and enforce. It is also likely that, in structuring gun laws, tribal governments—like other sovereigns—will take into account the particular criminal statistics of their community.

Such an analysis may be particularly critical for tribal governments. Reservations are notoriously difficult to police, with the safety and security of reservation residents oftentimes suffering as a consequence of the complexities of existing jurisdictional arrangements.⁵³ The vast majority of reservations are home to both Indians and non-Indians, with many being majority non-Indian.⁵⁴ As a general matter, residents are free to move on and off the reservation freely and without impediment.⁵⁵ There is little tracking by any government (tribal, state, federal) as to who is residing on the reservation at any given time.⁵⁶ And reservations have received far less than their fair share of attention in regard to criminal justice resources.⁵⁷ All of these factors make reservation governance all the more difficult, particularly given that one's racial and political status bear on the question of which sovereign may exercise jurisdiction in a given instance.

On the other hand, tribes' freedom to tailor gun laws to meet the needs of local communities empowers Indian nations to define their own relationship to guns and enact laws that are a good cultural, institutional, and fiscal match.⁵⁸ In this sense, tribes may seek coherence and consistency in the face of an otherwise muddled body of federal Indian law—one that has proven faulty, in part, because the wide diversity in language, culture, religion, governance, and history among Indian nations is seldom taken into account.⁵⁹

Because sovereignty and property are so inextricably linked for Indian nations, some brief discussion of differences among tribal land bases is apposite. For example, tribes that were subject to allotment⁶⁰ now must govern territory that is characterized by "checkerboarding," with individual Indian trust allotments, Indian-owned fee land, non-Indian-owned fee land, and tribal trust lands situated side by side, creating convoluted jurisdictional arrangements. As a result, tribal, state, and federal law enforcement officials must work together through a process of on-the-ground arrangements, such as cross-deputization.⁶¹

By contrast, other tribes maintain enormous, largely contiguous swaths of rather remote territory, sometimes spanning several state lines and time zones.⁶² The role of the federal government in investigating and prosecuting crime greatly

impacts governance here, where the closest prosecutor's office and federal court may, literally, be hundreds of miles away.⁶³ On the other hand, in Public Law 280 states, tribes must coordinate with sometimes reluctant state law enforcement officials to address crime on the reservation.⁶⁴ Tribes' specific internal governmental arrangements may further impede streamlined, efficient law enforcement efforts⁶⁵ and may also be negatively impacted by social problems, such as high rates of unemployment and poverty.⁶⁶

Scholars and policymakers have also long complained that too little is known about crime in Indian country.⁶⁷ Despite the recent studies discussed *infra*—as well as evidence suggesting high crime rates in Indian country and a great deal of crime committed by non-Indians in Indian country—the data required to draw concrete conclusions about gun crime in Indian country and who commits it is largely unavailable.⁶⁸ Gaps in the data—long pointed out by tribal members, policymakers, and scholars in the area⁶⁹—have contributed to the problem of inadequate jurisdictional governmental infrastructure.⁷⁰

The collection of data regarding crime involving American Indians is particularly worthwhile in regard to Indian women, who are grossly over-represented in crime-victim statistics.⁷¹ According to Amnesty International, jurisdictional and institutional barriers have made Indian women particularly vulnerable to sexually violent crimes with little access to adequate justice systems.⁷² Anecdotally, there also appears to be an increase in crime across Indian country by non-Indians, particularly as non-Indian gangs and drug cartels increasingly infiltrate Indian reservations.⁷³ But these statistics fail to paint a complete picture of the criminal justice challenges faced by tribes. Notably, many conclusions about crime involving Indians are drawn from nationwide crime data by race but are not Indian-country specific.⁷⁴ Undoubtedly, more empirical studies are needed to draw concrete conclusions about Indian country criminal activity.

At the same time, on a tribe-by-tribe basis, Indian nations do typically have an understanding of the criminal justice issues they face and what the greatest obstacles are to solving those problems.⁷⁵ Tribal leaders, including tribal prosecutors, police officers, and judges are uniquely positioned to gather information—formally or informally—about barriers to public safety in Indian country. This particularized analysis is likely to be more useful to tribes than generalized Indian-country data anyway, as each tribe is free to establish its own laws regarding arms that fit its particular history, culture, and contemporary circumstances.

B. Contemplating Gun Rights in Indian Country

With wide-ranging diversity between tribes, it is neither feasible nor desirable to create a one-size-fits-all paradigm for gun control in Indian country.⁷⁶ Tribes can and do take into account a multiplicity of factors in determining the best gun control laws for their tribal nation, including subsistence hunting, recreational gun use, and ceremonial activities.

In this excerpted essay, however, I place a particular emphasis on the potential for gun laws to speak to reservation crime. In no way do I mean to suggest, of course, that gun laws can ever be an appropriate stand-in for an infusion of adequate resources into Indian country to address public safety concerns. Moreover, I emphasize the critical caveat that the connection between gun control and crime reduction is heavily contested.⁷⁷ But gun ownership and use is heavily regulated all across the United States—more in some places than in others—and it is, thus, correspondingly important to think about how such laws and regulations may work on reservations. Here I discuss three potential models of gun laws tribes may consider implementing.

1. Criminal Laws Banning Guns One way for tribes to deal with the question of gun regulation in Indian country is to enact universal disarmament and criminally ban all firearms and handguns on the reservation. This was essentially the tack taken by Washington, D.C. and Chicago before the Supreme Court determined such bans were constitutionally impermissible. But tribes could enact such bans without federal or state constitutional restraints. Of course, those tribes whose own constitutions contain a right to bear arms would have to overcome their own legal barriers to such a law.⁷⁸ But, absent that potential restriction, tribes have relative freedom to enact such laws.

And complete bans may, for some tribes, constitute a good cultural, governmental, and institutional fit. If the tribe faces a large amount of gun crime committed by tribal members or even other Indians, a criminal prohibition on guns may result in reduced reservation gun crime, since—up to the limits proscribed by the Indian Civil Rights Act—the tribe may criminally prosecute all Indians who violate the ban. Thus, a tribe that either has few non-Indian residents or few non-Indian reservation visitors may find a criminal gun ban an appealing option; tribes would not have to strain their already limited resources by enacting gun laws that discern between authorized and unauthorized uses of guns.

On the other hand, the potential disadvantages to this approach are evident. As an initial matter, a criminal gun ban may not be a good cultural or institutional fit for some tribes. If one considers the importance of hunting and fishing—for subsistence, ceremonial, and even religious purposes—within tribal communities, a criminal gun ban would be highly undesirable for some tribes. Moreover, depending on the tribe, such a ban might even be construed to be violative of treaty rights, protecting, in particular, the traditional hunting of big game.

But there is even a more potent objection to the suggestion of a universal, criminal gun ban in Indian country. Given that tribes do not have criminal jurisdiction over non-Indians, a criminal gun ban could only be applied to Indians. This would result in a disparate system, one in which Indians—including Indians who are not tribal

members—would be criminally prohibited from having guns, but non-Indians could not be criminally prosecuted by the tribe for gun ownership. Consequently, a tribal criminal gun ban would leave non-Indians uniquely free to arm themselves. If a tribe has particular concerns about crime by non-Indians against Indians, this type of ban could essentially be construed as empowering non-Indians against an unarmed Indian population.

Relatedly, one argument against individual gun ownership is that citizens should rely on our collective sources of state protection rather than private weaponry for security from harm.⁷⁹ But the power of this argument depends on ensuring the state is providing adequate protection to its citizens. It is not clear such protections are readily available in Indian country; on many rural Indian reservations there is grossly inadequate law enforcement,⁸⁰ and jurisdictional, legal, cultural, and institutional barriers make criminal justice difficult. A recent press release from the Fort Hall Reservation in Idaho pointed out, for example, that the reservation traverses four separate counties.⁸¹ When 911 calls come in, they are routed to the county dispatcher who then reroutes the calls to the Fort Hall Police Dispatch Center. Pat Teton, Fort Hall Police Chief reports, “The time lost in having to reroute emergency calls can mean the difference between life and death.”⁸² Moreover, until recently, many rural residents had no physical addresses whatsoever, and conveyed their location through rural route numbers or by giving verbal directions to emergency personnel.⁸³ Accordingly, the rural nature of many Indian reservations may motivate some tribes toward robust gun rights.

Moreover, though *Heller* does not constitutionally limit the actions of Indian nations, its admonitions regarding the right of self-defense may be morally instructive to tribal governments considering such a ban. In particular, if we think of reservations as places where residents are not provided adequate protection by the nation-state,⁸⁴ gun rights and gun control could be viewed in light of existing racial hierarchies and social injustice.⁸⁵ Ultimately, the reservation Indian may find herself in a situation where she cannot count on governmental police power for protection, raising the question of whether such circumstances increase the desire and need for robust rights to arms for the purpose of self-defense.⁸⁶

2. Civil Gun Bans Another option is for tribes to enact a universal gun ban in the form of civil regulation, which would make Indians and non-Indians alike subject to tribal civil liability. The appeal might be fewer strains on the tribal criminal justice system, while still securing the same kind of objectives as would be sought by a criminal ban. Moreover, the ban would be applicable to all those on the reservation and would not—as a criminal ban might do—actually put non-Indians in a stronger position vis-à-vis Indians on the reservation, because a civil gun ban within Indian country arguably would apply to everyone. Nonmembers on non-Indian fee land within the reservation likely would be subject to tribal jurisdiction, as gun regulations clearly fit within *Montana’s* “health or welfare” exception.⁸⁷

Although one potential drawback to a civil ban might be that civil laws do not provide the same panoply of punishment options as criminal law, it is here that innovative tribal solutions come into play. To achieve greater control over nonmembers' on-reservation activity, some tribes have begun to exercise civil regulatory jurisdiction over non-Indians, even in cases where the civil regulation blurs the murky edges of criminal law.⁸⁸ As Matthew Fletcher notes, numerous tribes are now enforcing civil offense ordinances against non-Indians to keep the charges in line with Supreme Court precedent.⁸⁹ In the two cases cited by Fletcher in advocating for greater tribal control over reservations, guns were involved.⁹⁰ In both cases, the tribe charged the perpetrator with a civil offense and imposed civil, rather than criminal, penalties.⁹¹

Anecdotal evidence indicates this practice is increasingly common, particularly as tribes with gaming and entertainment facilities see many more non-Indians coming onto their reservations.⁹² The Nottawaseppi Huron Band of the Potawatomi, for example, imposes civil penalties for actions that typically might be in the purview of a criminal misdemeanor code,⁹³ defining civil wrongs such as public intoxication and possession of drug paraphernalia as "Conduct Deemed Detrimental to Public Health, Safety and Welfare," with a seeming intent to fall within the second *Montana* exception.⁹⁴ And some of these codes relate directly to the regulation of guns, such as the code of the Confederated Tribes of Siletz Indians in Oregon, which includes the offense of purposefully pointing a firearm at another.⁹⁵

Without the power to physically constrain non-Indians, some tribes have turned to their power to exclude as a way to maintain law and order on the reservation.⁹⁶ Tribes use exclusion to remove offenders from the reservation through civil means, without invoking a criminal prosecution or criminal penalties.⁹⁷ The Navajo Nation Code, for example, has a provision for the "[e]xclusion from all lands subject to the territorial jurisdiction of the Navajo Nation courts."⁹⁸ Numerous other tribes have done the same.⁹⁹ A judge for the Tulalip Tribal Court has also discussed using this process to rid the reservation of non-Indian wrongdoers. After a civil exclusion order is issued, she explained, the subject of the order "gets a ride to the reservation border" by tribal police and is instructed not to return.¹⁰⁰ Exclusion of non-Indians, in fact, is an increasingly common practice among tribal governments.

Of course, a civil gun ban also has drawbacks. One potential objection is that, in the absence of adequate criminal penalties, such a ban lacks the enforcement mechanism necessary to act as a deterrent. Moreover, when attempting to exercise civil regulatory jurisdiction over non-Indians in regard to gun ownership and use, tribes would have to prepare for potential state or even federal backlash. Wholesale gun bans are likely to be challenged through litigation, putting questions of the scope of Indian tribal jurisdiction over non-Indians in regard to the highly politicized issue of gun control into the hands of the federal courts, where tribes have—at least in the last two-plus decades—not fared well.¹⁰¹

3. *Other Regulatory Options* Most gun control laws in the United States don't focus on gun bans but contemplate more mediated measures. Tribes' civil regulatory authority presents an opportunity to devise gun control laws that could employ some of these more modest regulation schemes without resorting to wholesale bans.¹⁰² This may come in the form of regulation on types of guns, on uses, or in permitting.

Given the well-documented distinction between the use of shotguns and handguns in committing violent crime, for example, limiting the types of guns that may be lawfully possessed in Indian country could serve as one way for tribes to advance public safety.¹⁰³ A tribe might also require that gun owners stipulate that acquiring a gun permit in Indian country necessarily subjects that person to tribal jurisdiction. Or if a tribe considers tribal members' rights to armed self-defense as central to individual rights, and is equally cognizant of the severity of crime committed on reservations by non-Indians, presumably a tribe could create a civil gun control statute that would ensure the gun rights of tribal members, even if it abridged those of non-members. Though such schemes may potentially raise equal protection issues, such disputes will be resolved in tribal courts, in accordance with tribal interpretations of tribal law.¹⁰⁴ This leaves tribal autonomy and the right of self-determination intact.

Alternately, tribes might also consider amending their constitutions to include a right to bear arms, if one is not already present. Many tribes currently are in a period of constitutional revitalization, and several have recently undergone or are now undergoing changes in their constitutional structure. Given that many tribal constitutions were drafted either with the heavy influence of the Indian Reorganization Act or the Indian Civil Rights Act—neither of which suggested the inclusion of a Second Amendment counterpart—the omission of a right to bear arms may, for many tribes, merely be an oversight that is ripe for readjustment.

A final option may be for tribes to actually mandate gun ownership for reservation security. The model for such mandatory gun laws lies in the history of the United States itself. In early America, laws mandating gun ownership and maintenance were frequently employed to ensure public safety.¹⁰⁵ Contemporary Indian tribes may determine, based on available data, that laws requiring gun ownership, maintenance, and even carry may be appropriate for Indian nations. Of course, it is critically important to understand those laws in historical context and promulgated in conjunction with provisions regarding the formation of a militia, which is not, it seems, an avenue tribes have taken or likely will take.

To be clear, I am in no way making an argument for more expansive tribal constitutional protections for gun rights, advocating more lenient gun laws within Indian country, or even suggesting that more liberal access to guns will reduce crime on reservations or protect reservation residents. The exact opposite may, in fact, be true. Nor am I suggesting that any criminal law or civil regulatory scheme

stands as a substitute for adequate law enforcement in Indian country. To the contrary, what I have attempted to do here is present a set of workable scenarios that touch on the spectrum of plausible legal responses that tribes could employ in the exercise of their sovereignty and toward the goal of addressing reservation security. The outsider status afforded to Indians and to Indian nations that made the current legal lacuna possible, even if accidentally, provides provocative options for tribes attempting to address reservation crime and safety in light of exceedingly constrained jurisdictional limits, and in the absence of a full complement of governance options.

The convergence of the gun and the Indian (nation) is a story of the racially tinted American dream, the un-“we,” and the hundreds of nations within this nation that remain, for better or worse, outside the polity. But Indian otherness has, perhaps unwittingly, created a legal chasm within which tribes may engage in innovative governance to address reservation security. Their extraconstitutional status affords them the freedom to tailor their gun laws and engage community-based solutions to reservation ills that have not been fully explored to date. As sovereign nations unconstrained by the federal Constitution and, concomitantly, the Supreme Court’s interpretation of the Second Amendment, tribal governments can exercise local control over guns and devise systems and codes in line with their tribally distinct needs. The freedom from restraint means each tribe’s own culture, history, current legal status, and contemporary governance challenges will set the standard for which courses of action to take to address governance issues.

CONCLUSION

Ultimately, then, this excerpted essay is as much about tribal sovereignty as it is about gun policy.¹⁰⁶ And Indian nations’ sovereignty is expressed by each tribal nation individually. Proposing one solution would not only be legally impossible but would also be unwise. However, the convergence of the unique legal status of Indians, Indian nations, and guns with the availability of innovative governance solutions in Indian country allows tribes to address issues of crime, violence, racial inequities, and social justice in ways that would be impermissible if undertaken by federal or state governments.¹⁰⁷ Suggesting one solution for all tribes—other than a uniquely shared freedom to define their own path forward—would undermine tribal sovereignty and ultimately derail the purpose of the project: to emphasize the sovereign nature of tribal governments and their concomitant freedom to devise gun policy that works for their own nation.

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1. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.
 2. 554 U.S. 570, 636 (2008). One scholarly article describes *Heller*’s holding as follows:

Heller actually decided little about the Second Amendment’s scope or implementing doctrine. The majority opinion establishes that a certain class of trustworthy citizens has a judicially enforceable right to an operable handgun in the home for the purpose of self-defense—perhaps only at the time of self-defense—as against a flat federal ban on handgun possession.

Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1043 (2009).
 3. 130 S. Ct. 3020, 3050 (2010).
 4. The Supreme Court has only heard five Second Amendment cases in its history, none of them pertaining to Indian tribal governments. See *McDonald*, 130 S. Ct. 3020; *Heller*, 554 U.S. 570; *United States v. Miller*, 307 U.S. 174 (1939); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875).
 5. See *Talton v. Mayes*, 163 U.S. 376, 384 (1896).
 6. See Pub. L. No. 90-284, §§ 201–03, 82 Stat. 73, 77–78 (1968) (codified as amended at 25 U.S.C. §§ 1301–03 (2006)).
 7. AREA OF INDIAN RESERVATION AND TRUST LANDS IN STATES AND COUNTIES: BASED ON DATA EXTRACTED FROM THE TRUST ASSET AND ACCOUNTING MANAGEMENT SYSTEM (TAAMS) ON MARCH 30, 2009 (2009) (on file with the Bureau of Indian Affairs Division of Land Titles and Records). Though this article focuses on land as a geographic homeland wherein tribes face a panoply of governance issues, as has been well-documented, land and indigenous peoples’ connection to it forms the basis of virtually every aspect of indigenous culture, from religion to language to ceremony. See, e.g., Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1112–13 (2009) (explaining the basis of all things sacred in native communities as attached to land); Kristen A. Carpenter, *Recovering Homelands, Governance, and Lifeways: A Book Review of Blood Struggle: The Rise of Modern Indian Nations*, 41 TULSA L. REV. 79, 79–80 (2005) (“Tribal land ownership is a key factor in community revitalization, allowing tribes to foster tribal jurisdiction, economic development, housing, environmental health, subsistence patterns, and spirituality. Thus, the recovery of Indian property represents a dramatic turn of events, given both the overwhelming history of land loss and importance of a growing land base to contemporary survival.” (footnote omitted)).

8. The scope of tribal jurisdiction over reservation residents—whether member Indian, nonmember Indian, or non-Indian—is discussed fully herein at Section III.A.
9. With over 560 Indian tribes in the United States, enormous diversity between tribes makes generalizations regarding crime difficult to compare across reservations. Nevertheless, much of the crime data collected points to extremely high rates of crime, particularly violent crime, in Indian country. See STEWART WAKELING ET AL., U.S. DEP'T OF JUSTICE, NCJ NO. 188095 POLICING ON AMERICAN INDIAN RESERVATIONS 2, 13–22 (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.
10. See, e.g., Transcript of Oral Argument at 8, *Heller*, 554 U.S. 570 (No. 07-290) (quoting Justice Kennedy as wondering whether the Second Amendment had anything to do with “the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that.”).
11. For Indian people today, threats to security are often not due to an Indian presence, but a non-Indian one. STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 8 (2004), available at http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf.
12. See Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976) (calling tribal criminal justice a “jurisdictional maze”); Elizabeth Ann Kronk & Heather Dawn Thompson, *Modern Realities of the “Jurisdictional Maze” in Indian Country: Case Studies on Methamphetamines Use and the Pressures To Ensure Homeland Security*, FED. LAW., Mar.–Apr. 2007, at 48, 48.
13. See, e.g., Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2006 & Supp. IV 2010) and 28 U.S.C. § 1360 (2006)). As a Public Law 280 state, California long took the position that Public Law 280 barred tribal criminal jurisdiction. See *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1195, 1197–98 (C.D. Cal. 1998).
14. See General Crimes Act, 18 U.S.C. § 1152 (2006); *United States v. McBratney*, 104 U.S. 621 (1881) (holding that state has jurisdiction over crimes committed by a non-Indian against a non-Indian in Indian country); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561–62 (1832) (holding that state criminal laws had no role in Indian country).
15. See 18 U.S.C. § 1152.
16. See 18 U.S.C. § 1153 (covering fifteen “major” crimes).
17. See 25 U.S.C. § 1301(2).
18. See 435 U.S. 191, 212 (1978), *superseded by statute in part*, Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077(b)–(c), 104 Stat. 1856, 1892–93 (1990) (codified at 25 U.S.C. § 1301(2), (4)) (clarifying that Indian tribes may assert jurisdiction over nonmember Indians).
19. There are exceptions for Public Law 280 jurisdictions, where the state will prosecute crimes committed in Indian country, though tribes retain concurrent jurisdiction over crimes committed by Indians. *But see* Carole Goldberg & Heather Valdez Singleton, Research Priorities: Law Enforcement in Public Law 280 States 3 (unpublished manuscript), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/209926.pdf> (“Yet the U.S. Supreme Court has yet to resolve the matter, and the Attorney General of California, as recently as 1995, took the position that Public Law 280 divested tribes of criminal jurisdiction.”).

20. See Assimilative Crimes Act, 18 U.S.C. § 13; General Crimes Act, 18 U.S.C. § 1152; see also Kevin K. Washburn, *American Indians Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1014–16 (2008) (describing law enforcement in the United States generally as a “community endeavor” and explaining how this differs in Indian country).
21. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4 (2013).
22. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 4 (1831) (“Cherokee nation, and the other nations have been recognized as sovereign and independent states; possessing both the exclusive right to their territory, and the exclusive right of self government within that territory.”).
23. See *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 805 (9th Cir. 2011) (per curiam).
24. 450 U.S. 544 (1981).
25. *Id.* at 565–66.
26. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (holding that the tribal court had no jurisdiction over a land dispute arising on the reservation with an off-reservation bank); *Nevada v. Hicks*, 533 U.S. 353, 364–66 (2001) (holding that the tribal court lacked jurisdiction over a case involving a search warrant by state officials executed on Indian trust land within the reservation). As a general matter, states cannot exercise civil jurisdiction in Indian country where state law has been preempted by a federal and tribal statutory scheme, as, I would argue, is the case with gun control. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 343–44 (1983).
27. This section is meant to give an anecdotal flavor to the issue of gun laws in Indian country but does not reflect a comprehensive, empirical examination.
28. See Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 895–98 (2003) (discussing the general process by which tribes adopted individual rights provisions); Joseph Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, in *AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS* 184, 195–96 (Eric D. Lemont ed., 2006) (“Today, establishment of separation of powers is a common theme of many tribes’ constitutional reform efforts.”). This is not to say that a tribe is without a quasi-constitutional structure, even in the absence of a written constitution. See Kalt, *supra*, at 188 (explaining how, for centuries, the “Cochiti Pueblo has sustained continuity of collective organization for collective decision- and rule-making, although this organization was never written down as a ‘constitution.’”).
29. See, e.g., ZUNI TRIBE CONST. art. III, § 1.
30. But see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (suggesting that tribal sovereign immunity may be a barrier to such lawsuits); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1108 (2007) (same).
31. The Navajo Nation functions under a code rather than a constitution and also has a “[r]ight to keep and bear arms,” which reads: “The right of the people to keep and bear arms for peaceful purposes, and in a manner which does not breach or threaten the peace or unlawfully damage or destroy or otherwise infringe upon the property rights of others, shall not be infringed.” NAVAJO NATION CODE ANN. tit. 1, § 6.
32. See MILLE LACS BAND OF OJIBWE CONST. art. V, § 1(f) (Draft, July 10, 2010); ZUNI TRIBE CONST. art. III, § 1; LITTLE RIVER BAND OF OTTAWA CONST. art. III, § 1(k); SAINT REGIS MOHAWK CONST. art. IV, § 1; see also CHEYENNE & ARAPAHO CONST. art. I, § 1(p)

(“The government of the Tribes shall not make or enforce any law which . . . denies to any Person the right to own and use firearms subject to regulation by the Tribes by law.”); POKAGON BAND OF POTAWATOMI INDIANS CONST. art. XVI(m) (“The Pokagon Band, in exercising the powers of self-government, shall not . . . [m]ake or enforce any law unreasonably infringing the right of a person to keep and bear arms.”). Because these constitutional protections have not been the subject of reported tribal court opinions, it is difficult to determine how they might be interpreted under each tribe’s respective tribal law, but it is plausible that different tribal courts would interpret these constitutional protections in varying and differing ways.

33. *See, e.g.*, POARCH BAND OF CREEK INDIANS TRIBAL CODE § 8-6-17 (defining carrying a concealed weapon as a crime if committed by any person, “other than an authorized law enforcement officer”); Fort Peck Assiniboine & Sioux Tribes v. Stiffarm, No. AP-019, 1987 Mont. Fort Peck Tribe LEXIS 6, *5 (Fort Peck Ct. App. Aug 12, 1987) (citing the tribe’s concealed weapon statute).
34. *See, e.g.*, BAY MILLS LAW & ORDER CODE § 610 (concealed weapons code); BLACKFEET TRIBAL LAW & ORDER CODE ch. 5, pt. IV, § 3 (same); HOPI INDIAN TRIBE, LAW & ORDER CODE § 3.3.12 (same).
35. *See, e.g.*, CONFEDERATED SALISH AND KOOTENAI TRIBES LAWS § 2-1-1204 (criminalizing carrying a concealed weapon in a prohibited place); ELY SHOSHONE CRIM. CODE § 202.265 (restricting carrying a firearm on school property).
36. *See, e.g.*, BAY MILLS LAW & ORDER CODE § 609(5) (defining “Criminal Sexual Conduct” as an offense where the offender may be “armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon”); BLACKFEET TRIBAL LAW & ORDER CODE ch. 5, pt. II, § 5(E)(2) (defining “Domestic Abuse” as an offense that may involve “the use or threatened use of a weapon”); CHITIMACHA COMPREHENSIVE CODES OF JUSTICE tit. III, § 213(b) (defining “Simple Assault” as an act by an offender who “recklessly or negligently causes bodily injury to another with a dangerous weapon”); SWINOMISH TRIBAL CODE § 4-02.100(E)(4) (defining “Stalking” as a “Class B offense” if “the stalker was armed with a dangerous weapon, while stalking the person”).
37. *See, e.g.*, COUSHATTA TRIBE OF LA. CODES § 3A.02.010(a)(2) (allowing officers to seize weapons when responding to a domestic violence crime); WHITE MOUNTAIN APACHE CRIM. CODE § 6.3(D)(2) (allowing police officers to remove weapons discovered during a domestic violence investigation); *see also* ELY SHOSHONE TRIBAL CODE § 171.146 (permitting officers to seize weapons when responding to any arrest).
38. *See, e.g.*, CHEROKEE CODE §§ 14-34.15(a), 14-40.1(p)(2)(e); NEZ PERCE CODE § 7-2-18(b)(5); *see also* COUSHATTA TRIBE OF LA. CODES § 3A.04.010(b)(4) (conditioning pretrial release on prohibition of firearm possession); ELY SHOSHONE TRIBAL CODE § 176.337 (providing for court notification of convicted domestic-abuse defendant concerning future restrictions on gun possession).
39. *See, e.g.*, ASSINIBONE & SIOUX COMPREHENSIVE CODE OF JUSTICE tit. VII, § 401; CHEROKEE CODE § 14-10.30; CHICKASAW NATION CODE § 5-1506.8(A) (“It shall be unlawful to carry a Dangerous Weapon concealed on the person”); *id.* § 5-1506.7; HOPI INDIAN TRIBE, LAW & ORDER CODE § 3.3.12; NAVAJO NATION CODE ANN. tit. XVII, § 320; OGLALA SIOUX TRIBE CRIM. OFFENSES CODE §§ 510–11; WHITE MOUNTAIN APACHE CRIM. CODE § 2.71.
40. NAVAJO NATION CODE ANN. tit. XVII, § 320(B)(4).

41. SAN ILDEFONSO PUEBLO CODE tit . VI, § 13.55(b).
42. SHOSHONE & ARAPAHO FISH & GAME CODE ch. 4.
43. *See id.* § 16-4-1(1).
44. *See, e.g.*, CHEROKEE CODE § 113-10 (outlining the restrictions on weaponry used to hunt); MILLE LACS BAND STAT. ANN. tit. XI, § 4038 (prohibiting hunting with a firearm while under the influence of alcohol); SHOSHONE & ARAPAHO FISH & GAME CODE § 16-8-12 (“Firearms Restrictions”); SILETZ TRIBAL CODE § 7.022 (applying state regulations to the weapons used in hunting); WHITE MOUNTAIN APACHE, GAME & FISH CODE § 4.14 (“Prohibited Activities: Occupation and Use”); *id.* § 5.16 (“Prohibited Devices”); *id.* § 5.19 (“Prohibited Activities: Hunting”).
45. *See, e.g.*, WHITE MOUNTAIN APACHE, GAME & FISH CODE §§ 2.2, 5.16(A), 5.19(A)(3).
46. *See, e.g.*, CHEROKEE CODE §§ 144-1 to -2 (regulating firearm and handgun sales); *id.* § 167-2(d) (“It shall be unlawful for any person participating in, affiliated with, or present as a spectator at any parade, demonstration, picket line or exhibition to willfully possess or have immediate access to any dangerous weapon.”).
47. *See, e.g.*, ABSENTEE SHAWNEE GAMING ORDINANCE § 323 (disallowing firearms on gaming premises except by permission of Gaming Commission); NEZ PERCE CODE § 6-2-13(n)(1) (regulating employees’ possession of firearms and weapons on gaming premises).
48. GRAND TRAVERSE BAND CODE tit. XVI, § 213(d)(5) (allowing an adult affiliated with a school to exert physical force against a student in order to seize a dangerous weapon).
49. *See* CHICKASAW NATION CODE § 5-215.19(A)(14) (exempting one handgun or rifle from being seized from a debtor); CHITIMACHA COMPREHENSIVE CODES OF JUSTICE tit. IV, § 310(a)(15) (same); CONFEDERATED SALISH AND KOOTENAI TRIBES LAWS § 4-3-317(9) (exempting personal property, including firearms, up to \$5000 aggregate value from execution of a judgment).
50. BAY MILLS SNOWMOBILE CODE § 1614 (providing that firearms must be unloaded, locked, and stored if being transported by snowmobile); SILETZ TRIBAL CODE § 12.124 (criminalizing the discharge of a weapon on or across a highway); YANKTON SIOUX TRIBAL CODE § 11-8-080 (defining shooting from or across a public highway as a civil violation).
51. *E.g.*, BAY MILLS SNOWMOBILE CODE § 1614.
52. *Cf.* Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009) (describing the variance in gun control laws amongst different states); Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights To Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 221–22 (2009) (detailing state and local regulation of concealed guns despite right to bear arms).
53. *See supra* note 9 and accompanying text.
54. L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 134 tbl.4 (1994) (detailing that in eight of the ten most populated reservations, the majority of residents were non-Indian).
55. Riley, *supra* note 29, at 1066, 1068.
56. *But see* Sex Offender Registration and Notification Act (SORNA) § 127, 42 U.S.C. § 16917(a)(1); National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,049–50 (July 2, 2008) (detailing tribal authority to monitor sexual offenders residing in Indian territory). In addition, the community and family-

based nature of Indian tribes makes it likely that tribes are most aware of the presence of tribal members, who also participate in ceremonial and community life, as well as seek goods and services from their tribal governments.

57. See CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 24–26 (2007), available at <http://cdn.law.ucla.edu/SiteCollectionDocuments/centers%20and%20programs/native%20nations/pl280%20study.pdf>; Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 721–40 (2006) (detailing how the lack of resources in Indian country bears on criminal justice at the tribal and federal levels).
58. See Stephan Cornell & Joseph P. Kalt, *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't* 16 (Joint Occasional Papers on Native Affairs, Paper No. 2005-02, 2005).
59. There are over 560 federally recognized Indian nations in the United States and many more that are unrecognized.
60. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, *repealed by* Indian Land Consolidation Amendments of 2000, Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 1991, 2007. The statute opened reservation lands to white settlement, with “allotments” set aside for tribal members.
61. See, e.g., Intergovernmental Co-operative Agreement, Citizen Band Potawatomi Indian Tribe of Okla.–Pottawatomie County, Okla., Jan. 4, 1995 (detailing a crossdeputization agreement between the Citizen Band Potawatomi Tribe and Pottawatomie County of Oklahoma to coordinate the authority of commissioned officers of both parties for better law enforcement).
62. Washburn, *supra* note 57, at 711. See generally Dave Smith, *Spring Forward, Fall Back: Time Zone Differences Can Wreak Havoc with Police Reports and More*, POLICE, Dec. 2010, <http://www.policemag.com/Channel/Patrol/Articles/Print/Story/2010/12/Spring-Forward-Fall-Back.aspx> (“All Tribal paperwork including citations had to be on daylight time and all Arizona paperwork had to be on MST, which also made for interesting moments of confusion. . . . [W]hen I patrolled the Four Corners Monument I drove through four states in 10 seconds!”).
63. See *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 49 (2008) [hereinafter *Declination Hearing*] (statement of Janelle F. Doughty, Director, Dep’t of Justice and Regulatory Affairs, S. Ute Indian Tribe), available at http://www.indian.senate.gov/public/_files/September182008.pdf (noting that the nearest federal courthouse to the Southern Ute Indian reservation is 350 miles away); Washburn, *supra* note 20, at 1022 (detailing expansive distances that separate tribal communities and federal court houses, and the challenges this creates for federal prosecutors and reservation residents).
64. See Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1425–26 (1997).
65. The Hopi, for example, live on a reservation entirely surrounded by the Navajo Nation and have a governance system based on kin and clan relationships that are decentralized, with power largely situated at the village level. See, e.g., CONST. & BY-LAWS OF THE HOPI TRIBE art. III, § 2 (describing powers reserved to Hopi villages); Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL’Y 761, 768–73 (2000) (explaining the process by which the Hopi courts enforce village decisions and police enforce court orders); Charles F. Wilkinson, *Home Dance, the*

Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest, 1996 BYU L. REV. 449, 458 (describing Hopi societal structure as defined by largely individual, decentralized Hopi villages, each with its own unique decision-making processes).

66. See generally Washburn, *supra* note 57, at 766–72 (discussing obstacles to access for defendants in Indian country).
67. See, e.g., *id.*, at 775–76.
68. See generally DIANE J. HUMETEWA, 2009 ARIZONA INDIAN COUNTRY REPORT 28–68 (2009), available at http://www.justice.gov/usao/az/reports/2009_Report.pdf (providing a sample of Indian country cases prosecuted by the Office of the U.S. Attorney for the District of Arizona from July 1, 2008, to July 1, 2009, but without capturing the incidence of gun crime or the race of victims); PERRY, *supra* note 11, at v (compiling data from 1992 to 2002 and positing that “[a]pproximately 60% of American Indian victims of violence, about the same percentage as of all victims of violence, described the offender as white”). However, Steven Perry’s report does not provide statistics specific to Indian country crime. See PERRY, *supra* note 11, at 6.
69. See, e.g., GOLDBERG & CHAMPAGNE, *supra* note 57, at 250, 274 (discussing the severe lack of reliable data surrounding Indian country criminal justice, which renders scholars ill-equipped to effectively compare Public Law 280 and non-Public Law 280 jurisdictional frameworks); Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL’Y 121, 122 (2004) (highlighting the gap in Indian country criminal justice scholarship related to issues of sexual violence); Washburn, *supra* note 57, at 776 (advocating for a comprehensive analysis of the challenges facing Indian country criminal justice to develop potential solutions).
70. See, e.g., Judith V. Royster, *Oliphant and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL’Y 59 (2003) (addressing the negative impact of the *Oliphant* decision on Indian country); Washburn, *supra* note 57, at 775–76 (explaining the ineffective execution of federal jurisdiction in Indian country). See generally Goldberg-Ambrose, *supra* note 64 (exploring the challenges facing Indian communities impacted by the Public Law 280 jurisdictional framework).
71. PERRY, *supra* note 11, at v (“[T]he rate of violent victimization among American Indian women was more than double that among all women.”).
72. AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 27–39 (2007) (exploring the jurisdictional challenges hindering Native women’s access to effective justice following sexual assault and other related crimes).
73. See, e.g., Eric Eckholm, *In Drug War, Tribe Feels Invaded by Both Sides*, N.Y. TIMES, Jan. 24, 2010, <http://www.nytimes.com/2010/01/25/us/25border.html>; Ken Ellingwood, *Tribes Are Caught on the Border*, L.A. TIMES, May 8, 2000, <http://articles.latimes.com/2000/may/08/news/mn-27815>.
74. See Carole Goldberg & Kevin Washburn, *Lies, Damn Lies, and Crime Statistics*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 25, 2008), <http://indiancountrytodaymedianetwork.com/ictarchives/2008/07/25/goldberg-and-washburn-lies-damn-lies-and-crime-statistics-93310> (pointing out that the Bureau of Justice Statistics’ statistics do not take account of whether the crime occurred within Indian country). Given the percentage of Indians in the general population (around 1–2%), off-reservation crime data provides an insufficient basis upon which to assess Indian country criminal justice issues.

75. See Troy A. Eid & Carrie Covington Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1110–16 (2010) (arguing for greater tribal, localized control over criminal justice in Indian country).
76. As empirical studies have shown, tribes are more successful in the long run when there is a good match between “formal governing institutions and contemporary indigenous ideas.” See Cornell & Kalt, *supra* note 58, at 7, 16.
77. COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, NAT’L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 2 (Charles F. Wellford et al. eds., 2005).
78. See *supra* notes 30–31.
79. See generally RAMSEY CLARK, CRIME IN AMERICA 107 (1970) (arguing against individual gun ownership for the purposes of self-defense, calling such tactics “anarchy, not order under law—a jungle where each relies on himself for survival,” which goes against the idea of government fulfilling its obligation to protect citizens).
80. See Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 788–89 (2006) (detailing the extremely rural nature of many Indian reservations and the concomitant problems of crime and insufficient law enforcement).
81. Press Release, Shoshone-Bannock Tribes, Tribes Eye Dedicated 911 System (June 24, 2011), available at <http://www.shoshonebannocktribes.com/documents/pressreleases/addressing.pdf>.
82. *Id.*
83. See *id.*
84. See Goldberg-Ambrose, *supra* note 64, at 1410–11; Washburn, *supra* note 80, at 710–13; Michael Riley, *Justice: Inaction’s Fatal Price*, DENVER POST, Nov. 13, 2007, http://www.denverpost.com/ci_7437278 (noting that an attempted murderer’s identity and address—an Indian on a reservation—were known but “the FBI failed to make an arrest for seven months” and also noting the enormous caseload carried by FBI agents assigned to the Blackfeet reservation).
85. Cf. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 318 (1991) (“With the exception of Native Americans, no people in American history have been more influenced by violence than blacks.”).
86. See *id.* at 359.
87. *Montana v. United States*, 450 U.S. 544, 566 (1981). As discussed, *infra*, there would likely be heavy opposition by non-Indians to such an assertion of tribal authority.
88. See Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 1002–14 (2010) (advocating Indian resistance to federally defined civil jurisdiction over non-Indians); Hallie Bongar White, Kelly Gaines Stoner & James G. White, *Creative Civil Remedies Against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427, 431 (2008) (discussing the possibility of exercising civil jurisdiction over non-Indians in domestic violence, sexual assault, and stalking cases in the absence of criminal jurisdiction).
89. Fletcher, *supra* note 88, at 1015.
90. *Id.* at 1015 & nn. 227–28.
91. *Id.* at 1015–16.

92. *See, e.g., Bill Would Give Tribal Police Jurisdiction over Non-tribe Members*, KOMO NEWS (Jan. 30, 2008, 5:22 PM PST), <http://www.komonews.com/news/local/15044786.html> (addressing the Tulalip Reservation’s new influx of non-Indian customers of tribal enterprises, and the authority of the Tulalip Police Department to maintain public-safety efforts); *see also* Jeff Barnard, *Oregon’s Biggest Casino is a Major Philanthropist*, KATU.COM (May 24, 2004, 5:19 AM PST), <http://www.katu.com/news/business/3615016.html> (explaining the positive impact of the Confederated Tribes of Grand Ronde’s successful casino on the State of Oregon’s economy); Nicholas K. Geranios, *Ten Years Later, Tribe’s Casino Venture Paying Off*, LAS VEGAS SUN, Dec. 16, 2003, <http://www.lasvegassun.com/news/2003/dec/16/ten-years-later-tribes-casino-venture-paying-off/> (addressing the success of Coeur d’Alene Tribe of Indians’ successful casino operations).
93. NOTTAWASEPPI HURON BAND OF THE POTAWATOMI INDIANS LAW & ORDER CODE tit. VIII, ch. 9, §§ 306, 308.
94. *Id.* §§ 301–16; *see also* BLUE LAKE RANCHERIA ORDINANCES no. 04-2000 (“Nuisance Ordinance”); CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, PUBLIC SAFETY ORDINANCE (c)(1) (“No person shall cause or permit a nuisance on Tribal Lands.”); PAWNEE TRIBE OF OKLA., LAW & ORDER CODE §§ 537, 539–40, 552. The four provisions of the Pawnee Tribe’s code—Possession of an Alcoholic Beverage, Abuse of Psychotoxic Chemical Solvents, Dangerous Drug Offense, and Livestock Offense—authorize a civil proceeding as an appropriate response to a violation. PAWNEE TRIBE OF OKLA., LAW & ORDER CODE §§ 537, 539–40, 552; *see also* NOTTAWASEPPI HURON BAND OF THE POTAWATOMI INDIANS LAW & ORDER CODE tit. XIII, ch. 9, §§ 303, 309 (applying civil penalties to public intoxication and drug paraphernalia possession).
95. SILETZ TRIBAL CODE § 12.103(s).
96. These are codes intended to provide for the exclusion and expulsion of nonmembers from tribal territory. *See, e.g.,* CHEROKEE CODE ch. 2; COLVILLE CONFEDERATED TRIBES CODE ch. 3-2; FORT McDOWELL YAVAPAI NATION, LAW & ORDER CODE ch. 15; HOOPA VALLEY TRIBAL CODE tit. V; *see also* White, Stoner & White, *supra* note 88, at 443 (discussing tribes’ right to exclude or banish non-Indians).
97. *See* White, Stoner & White, *supra* note 88, at 443.
98. NAVAJO NATION CODE ANN. tit. XVII, § 204(D)(4). The Nation is also clear about the circumstances under which an order of exclusion may be entered against a nonmember. *See id.* § 204(A), (D).
99. *See, e.g.,* GRAND TRAVERSE BAND CODE tit. XIV, ch. 9; MILLE LACS BAND STAT. ANN. tit. II, § 3004 (defining exclusion as a possible penalty for violating a civil offense); SILETZ TRIBAL CODE § 9.028 (defining exclusion as a possible civil penalty for violating offenses outlined in the tribes’ Cultural Resource Lands and Sacred Sites Ordinance).
100. Teresa Pouley, Judge, Tulalip Tribal Court, Public Address at the Federal Bar Association 36th Annual Indian Law Conference (Apr. 7, 2011) (quotation based on author’s notes).
101. *See generally* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005) (discussing racist undercurrents in federal Indian jurisprudence).
102. Of course, civil gun codes may also create a panoply of options for tribes to regulate hunting, use of firearms in ceremonies, recreational gun use, and the rest. The focus

- here on gun laws as pertaining specifically to crime is intentional and in no way is meant to imply a limitation on tribes' governance over gun usage more generally.
103. See Carl T. Bogus, *Gun Control and America's Cities: Public Policy and Politics*, 1 ALB. GOV'T L. REV. 440, 446 (2008).
 104. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978). There is an equal protection provision in the Indian Civil Rights Act, but equal protection claims against tribal governments would have to be brought in tribal court. See *id.* at 58–59.
 105. See ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 113 (2011). Of course, in the colonial period, these laws were designed to protect whites and the burgeoning Union against potential uprisings by slaves or against attack from hostile Indian tribes or competing colonial powers. See *id.* at 115–16.
 106. To be clear, I am not advocating for any particular outcome, protection, or laws in regard to guns, nor am I making any claim about the relationship between guns and safety. The empirical evidence regarding whether legal protection for gun rights contributes to or lessens the crime rate is politically charged, hotly contested, and ultimately inconclusive.
 107. This is, of course, assuming that there is any connection between gun control and crime, which is an open question.